

(2020) 11 BOM CK 0032

In the Bombay High Court

Case No : Appeal No. 14 Of 2020, Chamber Summons No. 710 Of 2010,
Execution Application No. 37 Of 2005

Arvind Jeram Kotecha

APPELLANT

Vs

Prabhudas Damodar Kotecha

RESPONDENT

Date of Decision : 09-11-2020

Acts Referred:

Foreign Judgment (Reciprocal Enforcement) Act, 1993 — Section 10
Code Of Civil Procedure, 1908 — Section 2(2), 2(9), 2(14), 13, 13(a), 13(b), 13(c),
13(d), 13(e), 13(f), 44(A), Order 21 Rule 22

Citation : (2020) 11 BOM CK 0032

Hon'ble Judges : S. C. Gupte, J; Madhav J. Jamdar, J

Bench : Division Bench

Advocate : Nikhil Sakhardande, Shubhra Swami, Kapil Moye, Pratik Amin, Zal
Andhyarujina, Hursh Meghani

Final Decision : Dismissed

Judgement

S.C. Gupte, J

1. This appeal arises from an order passed by a learned Single Judge of this court on a chamber summons taken out in an execution application. The chamber summons was for leave to the decree holder (Respondent herein) for prosecution of execution proceedings against the judgment debtor (Appellant herein). The execution was sought of a decree passed by the High Court of Justice of U.K., Queen's Bench Division, in Case No.1990-K-528, read with (i) final costs certificate dated 11 November 2004 and (ii) additional certificate dated 17 January 2005. The decree holder also holds a certificate under Section 10 of the Foreign Judgment (Reciprocal Enforcement) Act.

2. The original plaintiff had filed Case No.1990-K-528 against the defendant in the Queen's Bench Division of the High Court of Justice (U.K.) for an order for release of a fund held in the joint names of the plaintiff and the defendant and for damages. On 25 February 1993, a consent order was passed in the case,

under which a judgment was entered against the defendant on the ground that no defence had been served by the defendant pursuant to the order of Deputy Master Rose dated 3 August 1992 and adjudging that the defendant shall pay the original plaintiff damages as assessed. The original plaintiff accordingly proceeded to apply for damages. The case for assessment of damages was tried and a decree was passed by the Queen's Bench Division (Judge Reach QC) on 22 January 1999. The decree assessed the damages at nil, and was in the following terms :

"PURSUANT to the Consent Order of Master Foster Under Order 37 of the Rules of the Supreme Court the assessment of damages in this action was tried before His Honour Judge Rich QC (sitting as a Judge of the High Court) without a jury at the Royal Courts of Justice in London on the 20th, 21st and 22nd days of January, 1999.

AND THE JUDGE having assessed the award of damages at nil.

THE JUDGE DIRECTED that judgment should be entered for the Defendant with costs to be taxed if not agreed.

IT IS THIS DAY ADJUDGED that judgment be entered for the Defendant and the Plaintiff do pay the Defendant his costs of the assessment of damages in this action to be taxed if not agreed.

AND THE JUDGE DIRECTED that the Plaintiff's application for leave to appeal be refused."

3. Pursuant to this judgment, on 23 March 2000, the decree holder filed a bill of costs. A detailed hearing regarding assessment of costs took place wherein points of dispute were served and replies filed. On 11 November 2004, pursuant to the judgment dated 22 January 1999, a final costs certificate was issued by the Costs officer of the court directing the original plaintiff to pay to the defendant costs of 57,175.25 GBP within 14 days. The final costs certificate reads as under :

"In accordance with the Judgment dated 22nd January, 1999.

Upon the Defendant filing a completed bill of costs in this claim Costs Officer O-Riordan has assessed the total costs as £57,175.25 (being as to £39,272.63 in respect of the said bill of costs, £1,728.75 court fee for the detailed assessment, £12,648.87 for the costs of the detailed assessment and £3,525 as costs of the costs of the detailed assessment).

You the Claimant must pay the sum of £57,175.25 to the Defendant within 14 days of the date of this order.

The date from which entitlement to interest under this certificate commences under the Judgments Act 1838 at the rate of 8% per annum is as follows:-

1. On the sum of £39,272.63 from 22nd January, 1999 except interest shall not

run for 1184 days.

2. On the sum of £1,728.75 from 29th April, 2004.

3. On the sum of £12,648.87 from 29th April 2004.

4. On the sum of £3,525 from 26th October, 2004."

4. On 17 January 2005, an additional costs certificate was issued levying 9,159 GBP as interest from 31 December 2004 and thereafter at the rate of 12.53 GBP per day until payment.

5. The original foreign judgment dated 22 January 1999, the final costs certificate dated 11 November 2004 and the additional costs certificate dated 17 January 2005 are all subject matters of the present execution application. The decree holder filed a chamber summons in the execution application for leave to execute the decree and dispensation of notice under Order 21 Rule 22 of the Code of Civil Procedure. That chamber summons was made absolute and notice under Order 21 Rule 22 was dispensed with. The judgment debtor filed an appeal challenging that order. In appeal, the chamber summons was allowed to be withdrawn with liberty to file a fresh chamber summons. Accordingly, the present chamber summons (Chamber Summons No.710/2010) has been filed in the execution application for leave to execute the foreign judgment together with two costs certificates and the certificate under Section 10 of the Foreign Judgments (Reciprocal Enforcement) Act.

6. A learned Single Judge heard the parties on the chamber summons, and by his impugned order dated 28 November 2019, made the chamber summons absolute, granting leave to execute the judgment dated 22 January 1999 of the High Court of Justice, Queen's Bench Division (U.K.), the final costs certificate dated 11 November 2004 and the additional costs certificate dated 17 January 2005, both issued by that court. This order has been challenged in the present appeal.

7. The principal submission of Mr.Sakhardande, learned Senior Counsel appearing for the Appellant/judgment debtor, is that the foreign judgment dated 22 January 1999 including the two certificates of costs is not a judgment given on merits as contemplated by the provisions of Section 13(b) of the CPC. It is submitted that whether a foreign judgment is a judgment on merits or otherwise must be assessed from the judgment itself; it must be, in other words, apparent from the text of the judgment. It is submitted that to the extent that the present foreign judgment does not contain reasons, the same does not, on its face, reveal or disclose application of mind of the court to the truth or falsity of the case including evidence placed and submissions made before the court. Mr.Sakhardande submits that absent any reasons in the judgment, it would be impossible for a contesting party to raise any effective defence under Section 13 of the CPC. In other words, learned Counsel submits, reasons are essential to enable a party to raise a permissible defence under Section 13, particularly under

Clauses (b), (c) and (f) of Section 13. It is submitted that but for such construction, these clauses would be rendered otiose and nugatory, and therefore, the rival contention that there need not be reasons in a foreign judgment ought to be eschewed. Without prejudice to these submissions, Mr.Sakhardande submits that the foreign judgment must at least indicate that the court has considered rival pleadings, evidence - oral and documentary - and submissions; only when the judgment gives such indication that it could be considered as having satisfied the test of a judgment on merits as laid down by Courts in India.

8. Mr.Andhyarujina, learned Senior Counsel appearing for the Respondent / decree holder, counters these submissions. Learned Counsel submits that the judgments relied upon by Mr.Sakhardande in support of his proposition that a foreign judgment must contain reasons so as to make it a judgment on merits are all cases of ex parte foreign judgments. Learned Counsel submits that there is no requirement in law of reasons to be contained in a foreign judgment so as to make it a conclusive judgment within the meaning of Section 13 of CPC. Learned Counsel submits that a judgment can be considered as having been passed on merits, when the court deciding the case gives opportunity to the parties to put forth their respective cases and after considering rival submissions, renders its decision in a formal order or judgment. Learned Counsel submits that in this case, proper judicial process has been followed as per applicable procedural laws of U.K.; the parties were given adequate opportunity to present their respective cases; the case was tried for three days; and thereafter the judgment was delivered. As for assessment of costs, the parties filed bills of costs, points of disputes and replies on disputes as to costs and were heard and only thereafter certificates of costs were issued. It is submitted that this judgment/decreed (including the costs certificates) is conclusive, having been passed on merits of the case.

9. The relevant provisions of the CPC for execution of a foreign judgment are to be found in Sections 44A and 13 of the CPC. The sections are quoted below:

"44A. Execution of decrees passed by Courts in reciprocating territory.- (1) Where a certified copy of a decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it

is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

Explanation 1- "Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and "superior Courts", with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 2.- "Decree" with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment."

"13. When foreign judgment not conclusive.- A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in India."

10. The above provisions make it clear that execution in India of a decree (defined in Section 44A to include a judgment) of any superior court (defined in Section 44A) of any reciprocating territory (also defined in Section 44A), upon filing of a certified copy of such decree in a district court, the decree itself being conclusive as to matters adjudicated thereby, is a rule; Clauses (a) to (f) of Section 13 of the CPC contain the only exceptions to this rule. If it is shown to the satisfaction of the court that the decree, i.e. the foreign decree or decree of a reciprocating territory, falls within any of the exceptions specified in Clauses (a) to (f) of Section 13, the district court is obliged to refuse execution of such decree. None of these clauses, i.e. Clauses (a) to (f) of Section 13, advert to the requirement of giving of reasons. It is, however, the case of the judgment debtor that to the extent the judgment contains no reasons, it falls within Clause (b), which excepts judgments not given on the merits of the case from conclusive foreign judgments. It is also alternatively argued that to assess the existence or otherwise of matters referred to in Clauses (a) to (f) of Section 13 and

particularly, Clauses (b), (c) and (f) thereof, the decree or order must contain reasons. Learned Counsel for the judgment debtor relies on the definition of "judgment" in Section 2(9) of the Code and case law explaining that definition.

11. Section 2(9) defines a "judgment" to mean "the statement given by the Judge of the grounds of a decree or order". A "decree", on the other hand, under Section 2(2), means "the formal expression of an adjudication" which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. An order, on the other hand, defined in Section 2(14), means "the formal expression of any decision of a Civil Court which is not a decree". The CPC consolidates and amends laws relating to the procedure of courts of civil judicature in India. So far as our civil courts are concerned, the code makes a clear distinction between a judgment, on the one hand, and a decree or order, on the other. The latter two are formal expressions of adjudication or decision of civil courts, whereas the former, a judgment, is a statement of the grounds of such decree or order given by the Judge. In so far, however, as judgments of reciprocating territories or foreign judgments are concerned, the expression "decree" is defined under Section 44A to mean "any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of fine or other penalty". What is executed under Section 44A is a "decree" of any superior court of a reciprocating territory and such decree means a decree or judgment of such court as explained in Explanation II of Section 44A. In other words, so far as execution of foreign decrees is concerned, the Code does not make any distinction between a "decree" and a "judgment". Any adjudication by a foreign court upon a matter before it, including a formal expression of such adjudication, is executable under Section 44A. This much appears from a plain reading of the relevant provisions of the CPC.

12. Privy Council in the case of *Brijlal Ramjidas vs. Govindram G. Seksaria*¹ held that a "judgment" within the meaning of Section 13 of the CPC meant "an adjudication by a foreign court upon the matter before it" and not a statement of reasons for the order. Authorities cited by Mr.Sakhardande for the proposition that in order to constitute a judgment, the order must contain reasons (*Balraj Taneja vs. Sunil Madan*² and *Assistant Commissioner vs. Shukla and Bros.*³) are quite beside the point, since they do not deal with foreign judgments, but with judgments rendered by civil courts in India.

13. Mr.Sakhardande contends that reasons would be necessary to determine whether any of the exceptions given in Section 13 would apply to a foreign judgment and therefore, reasons are necessary to constitute a conclusive foreign judgment within the meaning of Section 13. This is a circuitous argument. What Section 13 provides is circumstances where a foreign judgment shall not be treated as conclusive. From this, Mr.Sakhardande deduces that in every case, the court must be in a position to assess whether any of the enumerated

circumstances exists in the context of a foreign judgment. He then follows it up by submitting that such assessment is possible only if there are reasons stated in the foreign judgment; the scheme of the CPC for executing foreign decrees (which include judgments), as noticed above, requires the district court to refuse execution "if it is shown to the satisfaction of the court that decree falls within any of the exceptions specified in Clauses (a) to (f) of Section 13." He then sums up by insisting on the requirement of reasons as flowing from this scheme. A perfect roundabout for inventing an altogether new exception - "absence of reasons". A simple answer to Mr.Sakhardande's so-called dilemma may be expressed thus :Clauses (a) to (f) are the only exceptions to a conclusive and executable foreign judgment. The onus to show to the satisfaction of the court that a decree falls within any of these exceptions is upon the objector to execution. The very first and central fallacy is in insisting on deducibility of these exceptions solely from the text of the decree. There is no warrant for such insistence in Section 13 itself. If anything, the language of Section 13 suggests otherwise.

14. The first exception in Section 13, contained in clause (a), is want of pronouncement by a court of competent jurisdiction. The decree could never reflect, on the face of it, competence or otherwise of the court pronouncing it; that would have to be gathered from the circumstances surrounding a case and the adjudication called for by it. Even clause (b) does not suggest the mere text of a foreign decree or judgment as the basis of assessment. A decree or judgment, for example, may contain reasons and yet these may have absolutely nothing to do with the merits of the case; if at all, these merits can only be noticed from the pleadings of the parties, and not from the mere text of the decree or judgment. Clause (c) of Section 13, on its very face, makes it clear that one must have regard to the proceedings before the foreign court to assess whether, on the face of such proceedings, the decree appears to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable. One cannot simply have recourse to a decree to consider whether circumstances provided under clause (c) are satisfied; one must necessarily have regard to the proceedings. Ditto for clause (d) of Section 13. By its very nature, it requires the executing court to have regard to the proceedings in which the judgment was obtained to see whether such proceedings were opposed to natural justice. Clause (e), which is invoked in a case of fraud, almost by definition, could not imply exclusive reference to the text of a decree or judgment for its assessment. Even for assessing a case under clause (f), one must have regard to the claim and the defence to come to any conclusion on founding of the claim on breach of any law in force in India. Circumstances provided in Clauses (a) to (f) of Section 13 are, thus, deducible from pleadings, circumstances or proceedings of a case and there is nothing intrinsic in the text of a decree so as to treat it as the sole basis for assessing existence or otherwise of the exceptions provided therein. The text of the decree, indicating inter alia whether or not it contains reasons, is but one circumstance;

the court must have regard to all circumstances to assess whether any of the exceptions provided in Clauses (a) to (f) of Section 13 is made out. The court cannot refuse to execute a foreign decree or judgment merely because it is not apparent from such decree or judgment whether or not it falls within any of the exceptions contained in Clauses (a) to (f) of Section 13.

15. Clauses (a) to (f) of Section 13, being exceptions to the rule, the onus to show that the foreign judgment falls within any of these exceptions is on the objector to the execution applied for. The objector must positively show existence of the circumstances referred to in either of these clauses. In the present case, the judgment debtor, who objects to the execution, invokes clause (b), submitting that the judgment has not been given on the merits of the case. As explained by the Supreme Court in *Alcon Electronics Pvt.Ltd. vs. Celem S.A.*⁴, "when the court deciding the case gives opportunity to the parties to the case to put forth their case and after considering the rival submissions, gives its decision in the form of an order or judgment, it is certainly an order on merits of the case". In the case of *Alcon Electronics* the appellant, after submitting itself to the jurisdiction of the court, had agreed to go for a summary adjudication of costs. The order of costs did not have reasons. The appellant contended before the court that the order of costs was not a judgment on merits. The Supreme Court negated the contention. This is what the Supreme Court held was the purport of Section 13 generally with its exceptions to conclusiveness of a foreign judgment :

"A plain reading of Section 13 CPC would show that to be conclusive an order or decree must have been obtained after following the due judicial process by giving reasonable notice and opportunity to all the proper and necessary parties to put forth their case. When once these requirements are fulfilled, the executing Court cannot enquire into the validity, legality or otherwise of the judgment."

16. The cases relied upon by Mr.Sakhardande in support of his argument that want of reasons is suggestive of want of adjudication on merits, particularly the cases of *International Woollen Mills vs. Standard Wool (U.K.) Ltd.*⁵ and *Atit Omprakash Agarwal vs. BNP Paribas*⁶, deal with judgments given for default of appearance of the defendant. That was why they were treated as judgments not given on the merits of the case. Whenever a defendant fails to enter appearance in response to a summons to answer a claim, two scenarios may follow. The court may hear the plaintiff in the absence of the defendant and pass a judgment on merits. In some jurisdictions, the courts may instead pass a judgment in such case simply on the footing that the defendant has failed to enter appearance. A judgment delivered in the former case would be a judgment on merits in spite of the defendant's absence; whilst the latter would be a judgment not on merits, but simply because of the defendant's absence. The former is a case of a conclusive judgment within the meaning of Section 13, the latter is not since it is hit by clause (b) of Section 13.

17. Let us now consider how the subject foreign decree or judgment fares in the

face of this law. The genesis of the decree in our case is a consent order passed in an action initiated by the Appellant (plaintiff) against the Respondent (defendant). By consent, a judgment was entered against the defendant and it was ordered that he pay such damages as may be assessed by the court. In the proceedings for assessment of damages, a total of eleven affidavits of evidence as well as written arguments of Counsel were filed by the respective parties. The case was heard without a jury at the Royal Court of Justice in London for three days, whereafter the presiding judge held against the plaintiff, assessing award of damages at nil, and ordering that judgment be entered for the defendant and the plaintiff do pay the defendant costs of the assessment of damages in the action, such costs having to be taxed if not agreed. The plaintiff's application for leave to appeal from that order was refused by the judge. These facts, collectively, negate any case that the main judgment on assessment of damages was entered otherwise than on merits.

18. Let us now come to the order of costs which is the real bone of contentions between the parties. Under English Law, costs follow the event; the party who loses in court pays the other party's legal costs (Rule 44.3 of CPR). The court awarding costs usually, as was indeed done in our case, orders such "costs to be assessed, if not agreed". Assessment of costs is a technical procedure under which the successful party submits its detailed bill of costs to a court official or a costs judge (Rule 47.6 read with practice direction 47) who then assesses how much of it the losing party should pay. In case the paying party disputes any item in the bill of costs, it has to serve on the receiving party points of dispute (Rule 47.9). The receiving party may then serve replies to these points of dispute (Rule 47.13). There is a detailed assessment hearing if the receiving party so requires. (Rule 47.14). The costs are usually summarily assessed at the conclusion of assessment proceedings (Rule 47.20). After the detailed assessment hearing, a "completed bill" is filed, based on which a "final costs certificate" is issued (Rule 47.17). As the English Court of Appeals held in *Flannery vs. Halifax Estate Agencies Ltd.*⁷, where court makes a summary exercise of discretion, particularly in an order of costs, there is no duty to give reasons. A party seeking reasons for a decision in detailed costs assessment proceedings must do so by filing an appropriate request (Rule 47.23).

19. In our case, in keeping with these rules, a bill of costs was filed by the defendant who was a successful party. The plaintiff filed points of dispute. The defendant filed replies. A detailed hearing regarding assessment of costs took place between 29 March 2004 and October 2004. The costs officer issued a final costs certificate assessing costs together with interest on such costs. By an additional costs certificate dated 17 January 2005, that interest was quantified. All of this was purely an assessment of costs on merits and not by default or any other mode, and the plaintiff, against whom costs were ordered, admittedly, did not apply for statement of reasons for such costs. There is no reason for us to hold, on these facts, that the decree or judgment on costs was not an order on merits.

20. The Appellant/judgment debtor has accordingly failed to discharge his onus to show that the decree or judgment comes within the exception contained in clause (b) of Section 13 or any of the other exceptions in clauses (a) to (f) of Section 13. The learned Single Judge, in any event, has taken a perfectly possible, and even a probable view, and there is no reason for us to take another view and unsettle it.

21. The appeal is, in the premises, dismissed. The costs of the appeal, quantified at Rs.2 lacs, shall be included in the costs of execution and recovered from the Appellant/judgment debtor.

22. Learned Counsel for the Appellant applies for stay. Stay is refused.