
(1999) 05 BOM CK 0007

In the Bombay High Court

Case No : Execution to Application Lodging No. 167 of 1999

Bank of Baroda

APPELLANT

Vs

Manubhai Jethabhai Patel and Others

RESPONDENT

Date of Decision : 05-05-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 3, Order 21 Rule 1, Order 21 Rule 11(1), Order 21 Rule 2, Order 21 Rule 22
Evidence Act, 1872 — Section 114, 86

Citation : (2000) 1 BomCR 325

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : P. Samdani instructed by Little and Co, for the Appellant; Salil M. Shah, for the Respondent

Judgement

F.I. Rebello, J,

1. The plaintiffs-decree holders have moved this Court by way of Judges' Order. On 19th March 1999 it was agreed between the parties that this should be treated as Notice of Motion under Order XXI, Rule 22 of the CPC and order was passed accordingly.

2. The plaintiffs had filed a suit in the High Court of Justice, Queens' Bench Division bearing No. 1995-B. No. 2588. In the said suit judgment came to be pronounced on 3rd July 1996, against defendant No. 1. The plaintiffs, being unable to get the decree satisfied by execution in U.K., have applied for execution of the said decree before this Court. The plaintiffs have annexed a certified copy of the judgment along with a certificate issued by the High Court of Justice Queen's Bench Division dated 16th June 1997 that the decree remains wholly unsatisfied. It is contended that the judgment/decreed is of a reciprocating country and consequently can be executed in this Court. Reliance for that purpose is placed on sections 13 and 44A of the CPC 1908.

To execute a foreign decree a decree holder must move this Court in Court in

terms of Order XXI, Rule 10. Section 44A of C.P.C., requires that the Court executing the decree must issue notice to the judgment debtor in terms of Order XXI, Rule 22 of the Code of Civil Procedure. In terms of Order XXI, Rule 2(2) the judgment debtor can also inform the Court if any payment or adjustment has been made and apply to the Court to issue notice to the decree holder to show cause why such payment or adjustment should not be recorded as certified. Order XXI, Rule 2 also provides that no payment or adjustment shall be recorded at the instance of the judgment debtor unless the payment is made in terms of Order XXI, Rule 1 or the payment or adjustment is proved by documentary evidence or the payment or adjustment is admitted by or on behalf of the decree holder. Payment or adjustment which has not been certified or recorded as aforesaid cannot be recognized by any Court executing the decree. In the back ground of the aforesaid provisions the present notice can be considered.

3. In the application for execution, the decree holder has set out that a writ of summons dated 1st December 1995 was duly served by personal service on the defendant (judgment debtor) on 4th January 1996. The first defendant acknowledged service on 24th January 1996. The 1st defendant who is the judgment debtor herein gave notice of his intention to defend the suit. The High Court of Justice, Queen's Bench Division thereafter under Order 14, Rule 3 ordered that judgment as provided be entered against judgment debtor (defendant No. 1) in a sum of Pounds 1, 278,153.91 plus costs to be taxed if not agreed. On 16th June 1997 certificate was issued by the Master of the Queen's Bench Division inter alia certifying that a writ of summons was duly served upon the defendant and that no objection was raised to the jurisdiction of the Court and the judgment was obtained for the amount as set out above plus costs. It is then averred that the Master of the Queen's Bench Division of the Supreme Court of England and Wales has issued certificate on 16th June 1997 certifying that the judgment dated 3rd July 1996 for the amount set out hereinabove remained wholly unsatisfied. It is pointed out in para 10 that the said judgment has remained wholly unsatisfied till date. It is then explained that a fresh certificate confirming that the judgment is wholly unsatisfied till date has not been applied for as the costs for the same would have to be borne again in precious foreign exchange. It is then pointed out that in the event this Court so directs, the plaintiff will request their solicitors in England to obtain the same. In these circumstances it is pointed out that this Court be pleased to take on file the certified copy of the judgment dated 3rd July 1996 along with copies of the certificates and other papers annexed thereto and issue the execution processes as prayed for in the execution application under Order XXI, Rule 11(2) of the Code of Civil Procedure.

4. The judgment debtor (defendant No. 1) has filed an affidavit in reply. It is pointed out therein that the proceeding in execution taken out by the plaintiff in so far as it seeks execution of the foreign judgment against his wife and other defendants is contrary to law as the foreign judgment is passed only against defendant No. 1 i.e. Manubhai Jethabhai Patel. It is then pointed out that the

judgment is violative of the provisions of section 13(b) of the CPC and is not conclusive within the meaning of section 13 of the Code of Civil Procedure. It is contended that the said foreign judgment is not given on merits but is given *ex parte* under the summary procedure of Rule 14 of the Rules of Supreme Court of England without consideration of the plaintiff's evidence. It is submitted that the writ in the proceedings instituted by the plaintiff in the Court of Queen's Bench England was served on defendant No. 1. In para 8 it is pointed out that the primary responsibility for payment of the amounts claimed by the plaintiff in the writ filed before the Court of Queen's Bench England on which foreign judgment is passed is that of Chandrakant Jathabhai and Pioneer Whole Sale Ltd.

A rejoinder has been filed on behalf the decree holder-bank. It is contended that the decree is not violative of section 13(b) of the Code of Civil Procedure. It is denied that the judgment passed under Order 14 of the Rules of the Supreme Court of England is *ex parte* and not a judgment given on merits. It has been pointed out that the first defendant admits having been duly served with the writ of summons. The 1st defendant filed defence through M/s. Chatrath Ariya, Solicitors. The plaintiffs thereafter applied for judgment under summary procedure. The solicitors of defendant No. 1 were given notice and an *inter parte* hearing took place and judgment was pronounced on 3rd July 1996. Along with the affidavit in rejoinder the decree holder sought to rely on a compilation of documents. The same is objected to on behalf of the judgment debtors on the ground that they are xerox copies which are not certified to be true copies and consequently cannot be looked into by this Court.

5. Considering the above, the contention raised on behalf of the judgment debtors that a decree was not on merits must now be considered. When a decree passed by a Court of any reciprocating country has been satisfied in this Court, this Court can execute the decree as if it had been passed by this Court. Together with the certified copy of the decree has to be filed a certificate from such superior courts stating the extent if any to which decree has been satisfied or adjusted and such certificate shall for the purposes of proceedings under the section be conclusive proof of the extent of such satisfaction or adjustment. The provisions of section 47 apply to such proceedings from the filing of the certified copy. The Executing Court can refuse to execute the decree if it falls within any of the exceptions specified in Clauses (a) to (f) of section 13. Definition of decree by Explanation II means any decree or judgment.

We are concerned herein with the objection raised by the judgment debtor which falls u/s 13(b). The said objection is that the judgment has not been given on the merits of the case. As pointed out earlier I have referred to the averments which are on record before this Court both on behalf of the decree holder and the judgment debtor. The question is whether the judgment passed by the foreign Court is a judgment on merits. As pointed out, in execution considering the language of section 44A this Court may refuse to execute the decree if the judgment debtor points out that a decree cannot be executed being contrary to

any of the provisions of section 13(a) to (f). It will be important to find out whether the contention of judgment debtor can be upheld. In so far as the decree holder is concerned he has to comply with the procedural requirements as set out in section 44A viz., to produce the certified copy of the judgment along with a certificate showing that the decree has not been satisfied. This in the present case the decree holder has complied with. He has applied for execution accompanied by these documents. In these circumstances it is the judgment debtor who will have to establish that the decree obtained is not a decree on merits. u/s 114 of the Indian Evidence Act the Court may presume the existence of any fact which it thinks to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. One of illustrations sets out that the Court may presume that judicial and official acts have been regularly performed. u/s 86 of the Evidence Act there is a presumption in so far as foreign judgments are concerned. In other words on production of certified copy of the judgment it may be presumed unless the contrary is proved that a decree has been passed in conformity with the laws of England.

In the instant case the suit was filed under Order 14 of the Rules of Supreme Court, 1965. In terms of the said rules when the plaintiff applies for summary judgment, the plaintiff can apply for judgment against the defendant under Order 14, Rule 1. The plaintiff then has to comply with the requirements of Order 14, Rule 2. That requires that the application must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed. The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than 10 clear days before the return day. Order 14, Rule 3 then provides that on the hearing of an application under Rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim in which event the Court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed. The defendant may show cause against an application under Rule 1 by affidavit or otherwise to the satisfaction of the Court. In such event the Court may give a judgment against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.

This procedure as contained under Order 14 is more or less akin to the procedure as contained in Order XXXVII of the Code of Civil Procedure. Order XXXVII is the provision pertaining to summary procedure in the matter of institution of summary suits. For that purpose Order XXXVII, Rules 2, 3, and 4 as amended would be applicable. In this background we may now examine whether the

judgment which is sought to be executed is a judgment not given on merits as is contended on behalf of the judgment debtor.

6. For that purpose I must firstly deal and refer to judgments referred by both the parties. The judgment debtor has relied on a judgment of a Single Judge of this Court in the case of *Algemene Bank Nederland NV Vs. Satish Dayalal Choksi*, . In that case a foreign judgment passed by the Supreme Court of Hong Kong was sought to be executed before this Court. It was inter alia contended on behalf of the judgment debtor that the judgment was not a judgment on merits and consequently could not be executed. It was his contention that a decree had been obtained against him based on a guarantee purported to have been given on 7th April, 1985. It was the case of the judgment debtor that the company in respect of which guarantee was given was incorporated in 1975 and that he was never a director of the company. It is then his contention that earlier it was a proprietary concern. He was in Hong Kong prior 1975. However since 1971-72 he resided in Bombay and carried on independent business. It was his contention that he may have given blank form of personal guarantee in favour of the plaintiff. After the suit was instituted, notice had been issued to the judgment debtor. The judgment debtor was granted unconditional leave. Matter was adjourned from time to time. The matter was ultimately fixed for hearing on 7th July 1987. On that date the defendant was absent and an ex parte decree was granted to the plaintiff. This Court examined section 44A(3) and section 13(f) of the Code of Civil Procedure. Reference has been made to a large number of judgments including the leading judgment in the case of *D.T. Keymer v. P. Visvanathan Reddi*, AIR 1961 P.C. 121. In that case the defendant refused to answer interrogatories which had been submitted to him. On his refusal, the defence was struck out. The merits of the case were not investigated and the defendant was treated as though he had not defended the suit. The Privy Council held that such a decision cannot be regarded as a decision given on the merits of the case within the meaning of section 13(b) of the Code of Civil Procedure. The learned Judge then considered the judgment of the Full Bench of the Madras High Court in the case of *R.E. Mahomed Kasim and Co. v. Seni Pakir* AIR 1927 Mad. 265. In that case judgment was passed on default of appearance of the defendant without trial on evidence. The Full Bench of the Madras High Court followed the decision of the Privy Council in *Keymer's* case (supra). The Full Bench of the Madras High Court held that in principle no distinction could be made between a case where the defence of the defendant was struck out for not answering the interrogatories and the case such as the one before them where the defendant did not appear at all. The said foreign judgment was held to be not a judgment on merits. Various other judgments were referred which I may not advert to. After considering all these judgments the learned Judge on the facts of the case in *Algemene Bank's* case accepted the contention on behalf of the judgment debtors that the judgment of the foreign Court was not a judgment on merits.

Next reliance is placed on the judgment of the Single Judge of the Calcutta High

Court in the case of Middle East Bank Ltd. Vs. Rajendra Singh Sethia, . In that case the decree holder had obtained a judgment under the summary procedure from the Queen's Bench in the High Court of Justice in London. The writ of summons was served on the respondent/judgment debtor and the other defendants in the suit. The writ of summons was accepted by the solicitors of the third defendant (the judgment-debtor by the name of Messrs Iringhans). A certificate of such service was issued by the Master of Queens Bench Division of the Supreme Court of England and Wales. On 8th February, 1985 the plaintiff/decree-holder obtained a judgment against the five defendants including the respondent. Based on that decree, the decree was sought to be executed before the Calcutta High Court. One of the defences taken was that the judgment was not on merits in terms of section 13(b) of the Code of Civil Procedure. It may be mentioned that it was contended that the judgment was obtained against a judgment debtor who was not residing in England. The learned Single Judge referred to various judgments including the judgment of this Court in *Algemene Bank's case* (supra). On the facts of that case the learned Judge held that the judgment before him was not a judgment on merits within the meaning of section 13(b) of the Code. The learned Judge formulated the propositions of law in paragraphs 51, 52 and 53 of the said judgment. The learned Judge was pleased to hold that the judgment or decree passed by a Court under summary procedure where Court had no occasion to determine the truth or falsity of contentions raised or which may be raised and a judgment entered in favour of the plaintiff merely because the defendant failed to appear or to apply for leave to defend or if applied the leave was refused is a decree or judgment which cannot be held to have been given on merits. Thereafter the learned Judge proceeded to hold that in a procedure similar to the procedure under Order 14 of Rules of Supreme Court of England, the Court has only to be satisfied before entering a judgment in favour of the plaintiff that the defendant must have entered an appearance, the statement of claim must have been served on the defendant, and on affidavit in support of the application by summons verifying the facts on which the claim to which the application relates is based and stating that in the deponent's belief there is no defence to that claim. The learned Judge proceeded to hold that in such circumstances it cannot be said that such a judgment and decree is not executable, but such judgment has not been given on the merits of the case and as such is not conclusive foreign judgment within the meaning of section 13 of the Code of Civil Procedure. The learned Judge then proceeded to hold that an ex parte decree may be on merits but nevertheless the judgment showed that the Court had gone through the case made out by the plaintiff and had duly considered the same or had taken evidence of the witnesses put up by the plaintiff. Again ex parte decree may be passed in a summary manner under certain special procedure without going into the merits of the case and without taking any evidence. Both types of ex parte decree are executable in domestic forum in which it has been passed. But if such decree is a foreign decree passed in a reciprocating territory, then such decree is executable in this Court, if it is conclusive u/s 13 of the Code.

7. On the other hand on behalf of the decree holder firstly reliance is placed on a judgment of a Division Bench of the Calcutta High Court in the case of Sheikh Abdul Rahim alias S.A. Rahim Vs. Mohamed Din and Another, . In that case a decree obtained by the plaintiff in the High Court in London was sought to be executed in Alipore Court. In that case the plaintiff issued a writ against the defendants claiming certain amounts. The writ was served on the defendants and the defendants duly appeared to the writ. Parties were represented by solicitors. The writ was specifically endorsed under Order 3, Rule 6 of the Rules of the Supreme Court. There were negotiations which failed. Ultimately the matter was ordered to be tried by a special referee in the Court in London. No pleadings were delivered in the action other than the statement of claim endorsed in the writ. On 17th February 1939 the matter came before one of the official referees who issued a certificate. Pursuant to that certificate and order the formal judgment which in this country would be described as a decree was drawn up. When the application was made for execution the judgment debtors contended that the judgment given in England was not given upon the merits of the case, in that the defendants were not present in Court when the matter was heard and adjudicated upon. The Division Bench considered the question whether non appearance of the defendants would result in the judgment being not based on merits. The District Judge had held that the judgment was not on merits, which was appealed before the Calcutta High Court. In that context Derbyshire, C.J., observed as under:

"If the mere absence of the defendant could prevent a judgment given in his absence from being one on the merits of the case, there would be every incentive for the defendant to be absent when the matter came on for disposal, and, in such an event, he would always say that the judgment was not on the merits of the case, even though the absence was due to his own fault".

The learned Division Bench of the Calcutta High Court relied on the propositions contained in the judgment of the Privy Council in D.T. Keymer's case (supra). In that case there were various denials by the defendant. None of those defences was considered nor was it the subject of adjudication at all. As earlier set out, that was a case where as the defendants failed to answer the interrogatories the merits of the case were never investigated and his defence was struck out. It is in these circumstances that the Privy Council was pleased to hold that such a judgment was not a judgment on merits. Considering the test laid down by the Privy Council and the facts before it, the Division Bench of the Calcutta High Court held that the controversy raised in the action was the subject of direct adjudication by the Court. If the defendants were absent through some inadvertence or accident they could have applied to have that judgment set aside. They did not do so. If they had any grounds for impugning the validity of judgment they would have appealed to the Court of appeal. They did not do so. In that context the Division Bench held that the defendants had failed to show to the satisfaction of the Court, as was the burden on them, that the decree falls within exception (b) of section 13 viz., that it was not a judgment on merits.

Next was the judgment of the learned Single Judge of this Court in (Ephrayim H. Ephrayim v. Turner Morrison & Co.) AIR 1930 Bom. 511. There also the question was whether the judgment passed therein could be said to be on merits. In that case appearance was put on behalf of the defendants by the attorneys. No instructions had been received to defend the case on merits. The learned Single Judge held that this could not be said to be a judgment not on merits. The learned Judge observed that when the defence has been raised and for some reason or another has not been adjudicated upon then only can it be said that the decision was not a decision on merits.

Reliance was then placed on a Division Bench decision of this Court in the case of D. Shanlal and Vs. Bank of Maharashtra, . The Division Bench presided over by the then learned C.J., Mookerjee, was considering a group of appeal against an ex parte decree under Order XXXVII, Rule (3). After considering the procedure contained in Order XXXVII the Division Bench observed:

"After leave to defend is refused or is not obtained, the plaintiff is entitled to judgment. By reason of the defendant not appearing, the facts stated in the plaint must be admitted by the defendant. Undoubtedly, there are some similarities between the procedure of the suit which becomes ex parte by reason of the default on the part of the defendant and that of a summary suit under Order XXXVII of the Code in which the defendant either did not apply for leave or leave to defend was refused to him or having obtained leave did not furnish the security, and therefore, was precluded from contesting the suit".

The Court held that the decree passed in such suits ex parte decided would be on merits. The Division thereafter observed:

".....when leave is not obtained or leave is refused or where the defendant fails to comply with a conditional order, the defendant is precluded from further contesting the plaintiff's claim. By reason of the wordings of Order XXXVII, Rr. 2 and 3 of the Code, there is further disability upon the defendant. The facts stated in the plaint must be considered to have been admitted by the defendant and the plaintiff becomes entitled to judgment".

In Silver Shield Construction & Trading Ltd. v. Recondo Ltd., Corporate Law Adviser, 92, a learned Single Judge of this Court was considering a winding up petition based on a foreign judgment. One of the contentions was that the judgment was not on merits as the judgment was passed ex parte. Reliance was placed in the case of Alegemene Bank (supra). The learned Judge held that the judgment delivered by the London Court referred to the pleas taken in the written statement and the documents produced by the company. The judgment was held to be on merits. The contention that the petition had to be dismissed as the decree could not be executed was rejected.

8. From all these judgments what appears is that if the judgment is not pronounced on merits, in that event the decree cannot be executed in terms of section 44A of the Code of Civil Procedure. Can be it said on the facts of the

present case that the judgment is not on merits. The procedure as required under Rule 14 of the Supreme Court of England Rules was complied with. In other words the writ of summons was issued against the 1st defendant i.e. the judgment debtor herein. It was served on 4th January 1996 by personal service. The 1st defendant acknowledged the service on 24th January 1996. The 1st defendant gave notice of intention to defend. The defendant in his affidavit in reply has admitted that it was served upon him. In para 7 of his reply he has stated the judgment was passed under the summary procedure contained in Order 14 of the Rules of the Supreme Court of England. It is then averred that the said judgment was passed ex parte and as such is not a judgment on merits. In the affidavit in reply nowhere has it been pointed out that the judgment debtor took any steps after the judgment was ex parte delivered to set aside the ex parte judgment by preferring an appeal. As pointed earlier, the decree holders have complied with the requirements under Order 14, Rule 2. The judgment debtor applied for leave to defend. Leave was, however, refused and decree passed against the judgment debtor in terms of the Rules of the reciprocating country. In other words this was a decree following the procedure of Order 14 of the Rules of the Supreme Court. Nowhere in his affidavit in reply has the judgment debtor contended that there was any procedural violation of Order 14. On the contrary in the affidavit in rejoinder in paragraph 7 the decree holder has pointed that the first defendant filed defence through M/s. Chatrath Ariya, Solicitors. After this the decree holders applied for judgment under summary procedure. The solicitors were given notice and inter parte hearing took place and judgment was pronounced on merits on 3rd July 1996. No surrejoinder contesting the said averments has been filed on behalf the judgment debtor herein. It is thus clear that the judgment was pronounced after following the procedure of the Court of the reciprocating country. Once the judgment has been passed after compliance with the procedure of the reciprocating country, it will be difficult for this Court to hold that the said judgment is not on merits. If the mere absence of the defendant could prevent a judgment given in his absence from being one on the merits of the case, then as observed in the case of Sheikh Abdul Rahim (supra), there would be every incentive for the defendant to be absent when the matter came up for disposal in the country where the suit is filed and then contend before the Court where the decree is transferred for execution that the decree is not on merits. I am, therefore, clearly of the opinion that the contention of the judgment debtor relying on the judgment of the Privy Council or for that matter the judgment of the Single Judge of this Court in *Algemene Bank's* case that the judgment in the present case is not a judgment on merits has to be rejected.

9. At the hearing on behalf of the decree holders certain documents were sought to be relied. Some of them are xerox copies of the documents filed before the High Court of Justice, Queen's Bench Division. As there has been objection on behalf of the judgment debtors that xerox copies are not certified copies as required by section 86 of the Indian Evidence Act, I have not considered the said

documents.

10. It was then contended by learned Counsel for the judgment debtors that they would rely upon a xerox copy of a document purportedly issued by the decree holders which would show that there is no amount due and payable as the decree has been satisfied or adjusted. Adjournment was sought on the ground that judgment debtors require time to get the original. Adjournment was refused and matter was heard as, in my opinion, the judgment debtors could in terms of Order XXI, Rule 2 apply to this Court and point out that the decree had been satisfied. As no prejudice would be caused to the judgment debtors adjournment was refused and matter proceeded with.

11. Having said so, I am clearly of the opinion that the foreign judgment can be executed. The objections u/s 13(b) have no merits and consequently, deserve to be dismissed. In that light of the matter, leave is granted to the decree holder to execute the judgment dated 3rd July 1996 passed by the Supreme Court of Justice, Queen's Bench Division.

On the application of the judgment debtors, order is stayed for a period of eight weeks from today.