(2011) 05 GAU CK 0063

In the Gauhati High Court

Case No : Company Petition No. 10 of 2002

California Pacific Trading Corporation APPELLANT

Vs

Kitply Industries Ltd. RESPONDENT

Date of Decision : 02-05-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 113, 13, 19, 2(5), 2(6)
Companies Act, 1956 — Section 433, 434(1), 439
Contract Act, 1872 — Section 17, 73
Limitation Act, 1963 — Article 55

Citation : (2011) 3 CompLJ 518 : (2011) 3 GLT 485

Hon'ble Judges : Hrishikesh Roy, J

Bench : Single Bench

Advocate : N. Dutta., A.C. Buragohain, P.K. Sharma and H. Buragohain, for the Appellant; S. Talukdar and M. Hazarika, S. Dutta, A. Ajitsaria, S. Biswas and S. Laha, for the Respondent

Final Decision : Dismissed

Judgement

1. This is an application u/s 433(e) and Section 434(1)(a) of the Companies Act, 1956 (hereinafter referred to as "the Act"), whereby winding up of the Respondent company the Kitply Industries Ltd. (hereinafter referred to "Kitply") is sought by the Petitioner California Pacific Trading Corporation (hereinafter referred as "California") on the alleged failure of Kitply to pay its debt. The debt is claimed to be due under a decree dated 12.4.2001 passed by a foreign court i.e. the District Court for the Middle District of North Carolina in the United States of America. By the said decree, the claim of California, against Kitply as the Defendant has been decreed for a sum of $22,57,147.58 and interest thereon. It may be recorded herein that the judgment debtor Kitply has not filed any appeal against the decree and the decree holder California too has not taken any steps for execution of the decree, but have chosen to file this winding up petition against Kitply in a court in India.

LITIGATION HISTORY

2.1. The admission of the winding up petition was resisted by the Respondent who contended that the petition is not maintainable and the remedy of the Petitioner lies in execution of the decree. The Respondent also contended that assumption of jurisdiction by the Court of Middle District North Carolina was erroneous and the decree of the U.S. Court is hit by Section 13 of the Code of CPC as the Plaintiff seeks to enforce the decree in Indian Court. But on a prima facie examination of the objection, the Company Judge on 18.11.2003 ordered advertisement of the winding up petition. Then Kitply challenged the order by filing Company Appeal 4/2004. The Division Bench in its order dated 22.8.2006 held that the amount due under the decree of the District Court of the USA is a debt for the purpose of Section 433(e) of the Act. The Court also held that the decree holder could either execute the decree or seek winding up of the judgment debtor company. Accordingly the proceeding initiated under the Companies Act was held to be maintainable and the matter was remitted back to the Company Judge, for final adjudication of the winding up petition on merit.

2.2. Thereafter the matter was finally heard and the Company Judge on 19.11.2008 held that Court can''t go behind decree of the U.S. Court and examine the legality of the foreign decree. Other objections on enforceability of the decree in India raised by the Respondent Kitply, was rejected and accordingly the winding up petition was allowed through order dated 19.11.2008. But considering the stand taken that the Respondent company is a going concern, the Court granted 3 months time to Kitply to pay off its debt due to the Petitioner, California and in defaulting to pay within the said period, the Respondent company was ordered to be wound up.

2.3. Being aggrieved with the winding up order, the Respondent Kitply filed Company Appeal No. 1/2009. The learned Division Bench considered the Appellant''s contentions and noted, inter alia, in its preliminary order that proceeding u/s 439 is not a proceeding for execution of a decree and rejected Italy''s objection that a petition u/s 439 of the Company''s Act is not maintainable. The Appellate Court opined that California is seeking recognition of a decree passed by a foreign court and not its execution and since winding up is not an execution proceeding, even in the absence of an appropriate notification by the Central Government u/s 44A of Code of CPC , the company proceeding is maintainable and accordingly the appeal was posted for hearing.

2.4. Kitply being aggrieved with the preliminary order in the Company Appeal No. 1/2009 filed an SLP against the order dated 29.7.2009. The Supreme Court while disposing of the SLP on 23.10.2009 ordered the High Court to decide all the points urged by the parties. Future protection was also granted to Kitply by the Apex Court by giving 8 weeks breathing time to the Company, if they feel aggrieved by the High Court''s decision. More importantly, the maintainability issue of the winding up petition was expressly kept open by the Supreme Court while disposing of the SLP of Kitply on 23.10.2009.

2.5. The Company Appeal No. 1/2009 was finally ordered on 23.12.2009 wherein the Division Bench held that it is open to the judgment debtor to resist the enforcement of a foreign Court''s decree for any of the 6 exceptions in Section 113 of the Code of CPC and the matter was remitted back to this Court for a fresh adjudication on all the issues raised by the judgment debtor.

CONTENTION OF PETITIONER

3.1. The Petitioner contends that the Respondent company supplied defective marine teak plywood to the Petitioner which were rejected by its customers i.e. McEwen Lumber Company ("McEwen") and Weber Plywood and Lumber Company ("Weber") and since the defective goods were not replaced, the Petitioner suffered loss of current and future business. Accordingly a civil lawsuit was initiated for recovery of loss and damage in the United States District Court for the Middle District of North Carolina and the said suit was decreed on 12.4.2000 for U.S. $22,57,147.58 with interest and no appeal being filed against the said decree, it became final. Accordingly the decreed amount became payable by the Respondent to the Petitioner and since a demand made upon the Respondent to pay the equivalent Indian sum of Rs. 11,66,00,227/- (Rupees eleven crores sixty six lakhs two twenty seven) was not satisfied, the said sum became a "debt" within the meaning of Companies Act, 1956, payable to the Petitioner by the Respondent. Accordingly it is the submission of Mr. Dutta that since the Respondent failed to pay the "debt" despite receipt of a statutory notice, it is liable to be wound up by this Court u/s 433(a) of the Act.

3.2. Mr. N. Dutta, learned Senior Counsel argues that the Plaintiff had adduced evidence in the North Carolina Court and the Court considered the case set up by the Plaintiff on the basis of available materials and evidence brought on record by the Plaintiff. As the damages have been quantified on the basis of projections contained in the pleadings and the conclusions are supported by reasoning given by the learned Trial Court and the Defendant didn''t adduce any evidence and permitted the decree to be passed ex parte without contest, the Counsel submits that the decree of the foreign Court was given on merit and is conclusive and can be acted upon for the present proceeding in India.

3.3. The Senior Counsel contends that the District Court of North Carolina was aware of the basis on which the claim for damage was set up by the Plaintiff. Since it was also clearly projected in the plaint that the Defendant would manufacture marine teak ply wood, in accordance with the standards propagated by the International Hardwood Products Association ("IHPA") and there was a representation by the Defendant that it would manufacture the goods according to the IHPA standards. It was further reflected in the plaint that purchase orders were placed with the Defendant to fulfill the requirement of the Plaintiff''s customers McEwen and Weber. Therefore Mr. Dutta submits that the decree passed by the U.S. Court is on reasonable basis on full understanding of all the material particulars and the same is conclusive amongst the litigating parties.

3.4. Referring to the prayer made in the plaint, Mr. Dutta submits that a claim for recovery of quantified loss and unspecified damage were made by the Plaintiff and the damage payable was subsequently quantified by the Court on appropriate material and evidence on account of loss of future profit as well as the damages suffered for breach of contract and false representation on warranty of the goods as well as cost and action of the litigation. He submits that in a business contract, margin of profit is always a subject of assumption and the extent of future profit on the basis of an on going business relationship, is a matter to be determined through evidence and since the Court took into account the evidence adduced by the Plaintiff, the damage awarded was reasonable and on proper assumption. The Counsel submits further that even u/s 73 of the Indian Contract Act, 1872 compensation claim for loss or damage caused by breach of contract is maintainable and the U.S. Court has appropriately quantified the loss and damage from natural and proximate consequence of the breach made by the Respondent and therefore the decree of the U.S. Court should be recognized for this winding up proceeding.

3.5. The Petitioner contends that unliquidated damage once assessed and upon adjudication by a competent adjudicatory authority do give rise to a debt against a judgment debtor and since the Respondent failed to repay the dues upon demand, it must be deemed unable to pay its debt and a proceeding for winding up against such defaulting company is maintainable.

3.6. Defending the jurisdictional competence of the North Carolina Court to pass a decree against an India based company, Mr. Dutta submits that a suit for damage can also be filed where the impact of the breach was felt i.e. U.S.A., by a contracting party. He cites 1991 (1) GLR 389 - State of Meghalaya v. Jyotsna Das in support of his submissions.

3.7. The Senior Counsel submits that Title 28 of the U.S. Code is a positive law governing procedure and jurisdiction of U.S. District Courts. He refers to the "Venue" given in Chapter 87 of Title 28 to show that under Sub-clause (d) of Clause 1391 an "alien" of U.S.A. may be sued in any district and therefore the North Carolina District Court was competent to exercise jurisdiction. Mr. Dutta points out that under Clause 1332 of Chapter 85 of Title 28 of U.S. Code, a U.S. District Court is competent to adjudicate civil action where the claim exceeds U.S. $75,000/- in a case between U.S. citizen and a subject of a foreign State and accordingly he contends that the decree was given by a competent Court in U.S.A. and it must receive due recognition in Indian Court.

3.8. Alternately Mr. Dutta contends that since the Respondent submitted to the jurisdiction of the U.S. Court by filing pro se, it waived its right to contest the jurisdiction of the said Court. He points out that in the response filed on 22.7.1999 in U.S. Court by the Respondent, defences on merit of the claim was advanced and prayer was made before the North Carolina Court, inter alia, for dismissing the suit and pronouncement of judgment. In such circumstances, the Counsel submits that the U.S Court had rightly held that Court had personal jurisdiction over the Defendant.

CONTENTION OF RESPONDENT

4.1. Mr. S. Talukdar, the learned Senior Counsel at the very outset submits that since this winding up petition is being considered on remand by the Division Bench, the earlier judgment rendered by the Company Judge on 19.11.2008 (whereby the winding up was allowed), should not inhibit this Court from taking a fresh view in the matter. In support of his contention, the learned Counsel relies upon a decision of the Kaluram and Another Vs. Mehtab Bai and Another, in the case of Kaluram v. Mehtab Bai to show that an order of remand implies reversal of the earlier decision and the whole case is open for retrial by the original court, except in matters expressly or impliedly decided by the order of remand. Referring to the recording in the remand order dated 23.12.2009 of the Division Bench, Mr. Talukdar points out that this Court is free to consider all the objections(s) raised under 13 Code of CPC as this has also been conceded by the learned Counsel who appeared for the Petitioner California.

4.2. The learned Senior Counsel questions the enforceability of the decree passed by the District Court of North Carolina, USA, by contending that the judgment is not conclusive in as much as, it was not passed by a Court of competent jurisdiction. The Counsel points out that no part of the cause of action amongst the parties arose within the jurisdiction of the foreign court and therefore the decree passed by the foreign Court is not conclusive and is hit by Clause (a) of Section 13 Code of CPC .

4.3. The Respondent refers to the plaint filed by California to project that the Plaintiff hasn''t indicated how the Court at USA has territorial jurisdiction over a contractual dispute, where the contract was concluded and executed in Indian territory. He submits that the U.S. Court might have jurisdiction over a foreign Defendant on the basis of the Municipal Laws of that country. But when the decree is sought to be enforced in an Indian Court, the decree to be recognized, mustn''t be inconsistent with the statutory laws in India. The Respondent refers to the plaint filed by California to show that the Defendant Kitply is conceded to be an Indian Company with its principal place of business at Calcutta and only at the principal place of business i.e., Calcutta, the purchase orders were placed, goods were approved for shipment, letters of credit and bills of lading were issued, showing the Plaintiff to be the consignee. The Respondent contends that in the plaint, places at U.S.A were projected as the place, where pre-contract discussion with officers of the Defendant Kitply had taken place but since Situs of the contract was Calcutta, the foreign decree can''t be enforced in India as it is hit by Section 20(c) of Code of CPC since the proceeding in the U.S.A., is in contravention of the applicable Indian laws for Court''s jurisdiction.

4.4. The enforceability of the foreign decree is also challenged on the ground that the same has not been given on the merit of the case since the decreed amount goes way beyond the claim of the Plaintiff. The Respondent contends that the Petitioner has not proved its claim nor has quantified the damage before the foreign court and Court''s conclusion is perverse as it was reached without any evidence on the damage suffered for alleged loss of potential business and the same can''t be utilized in support of a winding up proceeding in India. The learned Counsel submits that the alleged loss of future business suffered by the Plaintiff was never proved in the Trial Court as the ultimate 3rd party purchasers were never brought on record either as party or as witness in the District Court and therefore the foreign decree is hit by the exception Clause (b) of Section 13 Code of CPC and such inconclusive foreign judgment can''t be used to sustain an unpaid debt claim against Kitply. In any event it is contended that, quantification of damage was based entirely on surmises of the Trial Judge and in the absence of any evidence, no debt can be said to be due from Kitply to the Petitioner and the winding up petition is accordingly not maintainable. The learned senior counsel relies upon the Supreme Court decision in Union of India (UOI) Vs. Raman Iron Foundry, to submit that a party complaining of breach of contract can recover only reasonable compensation proximate to the damage sustained and a claim for unliquidated damage does not give rise to a debt, until the liability is adjudicated and damage assessed on evidence, by an adjudicating authority. When there is a beach of contract, the party who commits the breach does not eo instant incur any pecuniary obligation nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the aggrieved party secures is the right to sue for damage. By referring to this judgment, the learned Counsel contends that the alleged damage suffered by the Plaintiff California has not been assessed through evidence by the North Carolina Court and the damage is quantified on the basis of conjecture only and therefore recognition of such a decree of damage is impermissible and on that basis a debt can''t be enforced against the Respondent in an Indian Court.

4.5. The Senior Counsel submits that since the suit was filed beyond 3 years of cause of action for claim arising out of alleged supply of defective goods, the Law of Limitation prevalent in India is disregarded and the foreign decree is hit by Clause (f) of Section 13 Code of CPC .

4.6. Referring to the certificate(s) of inspection given by the President of California at Calcutta, approving the goods for shipment to the consignee, the learned Counsel contends that these certificates were deliberately withheld by the Plaintiff from the trial Court and therefore the decree secured by California by alleging supply of sub-standard goods was obtained by concealment which amounts to fraud under the Indian Contract Act and on this score alone, the foreign Court''s decree is inconclusive and can''t be enforced in India. The learned Counsel points out that the goods were examined by the consignee before its transshipment and requisite Inspection Certificates were given to the consignor to dispatch the goods. But the Certificates of Inspection was not produced by the Plaintiff in the trial Court although the certification certainly had material bearing on the claim for damages. By suppression of these material document(s) the Trial Court according to the Counsel, was tricked into awarding a claim for damages against the Defendant Kitply. The learned Counsel relies upon the decision of the Apex Court in Sankaran Govindan Vs. Lakshmi Bharathi and Others, where the Court accepted that if a foreign judgment was obtained by fraud, it will be covered by the exceptions in Section 13 of the Code of CPC and such judgment can''t be held to be conclusive for use in Indian Courts.

4.7. Mr. Talukdar points out that Plaintiff being a domicile of North Carolina may be good enough under the Municipal Laws of U.S.A., to confer jurisdiction on the U.S. Court to award damages against a foreign based Defendant. But since recognition of the foreign decree is sought for a Court proceeding in India, the residence of the Defendant or the place where the cause of action arose becomes relevant and since the Defendant does not reside or carries on business within the territorial limits of the US Court, a decree for damages awarded by a US Court by placing reliance on the municipal laws of that country, can''t be enforced automatically in India. The learned Counsel submits that Section 13 of the Code of CPC sets out the limits on application of decree passed by a foreign Court and no proceeding to recover a debt on the basis of a foreign decree can be initiated, without fulfilling the conditions laid down in Clauses (a) to (f) of Section 13 of the Code of CPC . In support of this contention, he relies upon the decision of the Supreme Court in Roshanlal Kuthalia and Others Vs. R.B. Mohan Singh Oberoi, and Smt. Satya Vs. Shri Teja Singh,

4.8. The decision of the Apex Court in Raj Rajendra Sardar Maloji Marsingh Rao Shitole Vs. Sri Shankar Saran and Others, is also relied on by the learned Counsel to show that the provisions of Section 13 of the Code of CPC are not merely Rules of procedure but are Rules of substantive law and the decree of the U.S. court must be valid in the international sense and can''t be enforced ipso facto in Indian Courts only because, the proceeding in the North Carolina Court conforms to the municipal laws applicable in USA.

4.9. Assailing the finding recorded by the District Court at USA that the Defendant waived their right to contest the Court''s jurisdiction as it filed its response to that Court, the learned Counsel points out that the Defendant immediately on receipt of summons from the U.S. Court, at the very first opportunity in February, 1999 had objected to the territorial competence of the District Court at USA and the said response of the Defendant was erroneously construed as submission of the Defendant to the jurisdiction of the U.S. Court. The learned Counsel relies upon the decision in the case of Narhari Shivram Shet Narvekar Vs. Pannalal Umediram, to contend that an incompetent Court cannot exercise jurisdiction over a foreign subject merely because, the foreign subject responded to the summons of the Court particularly when, response was to the effect that the U.S. Court lacked territorial jurisdiction, to examine the claim of damages against the foreign Defendant.

4.10. Mr. Talukdar refers to the provisions of Section 73 of the Indian Contract Act, 1972 to contend that compensation can''t be awarded under Indian Law for remote and indirect loss or damage. He cites the decision of the Apex Court in Karsandas H. Thacker v. M/s The Saran Engineering Co. Ltd. reported in AIR

1965 SCC 1981 to project that on a breach of contract claim, the affected party is entitled to receive compensation only for such loss suffered in the usual course of business and remote and indirect loss sustained by the breach, will not entitle the party to any compensation. Furthermore, the offending party can''t be made to pay compensation for the loss suffered because of commitment made to a third party, unless it is so stipulated in the contract transactions. The learned Counsel submits that no evidence has been recorded by the District Court to show the quantum of damage suffered by the Plaintiff, because of loss of business with McEwen and Weber and in the absence of any evidence, payment of damage could not have been ordered against the Defendant on this count.

4.11. Pointing out the summary nature of a winding up proceeding, the learned Counsel finally submits that a company Court is not expected to hold trial when dispute as to the liability for payment of debt is bona fide, substantial and where the claim requires detail investigation of facts and evidence and considering the objection raised by Kitply against recognition of the foreign decree and the necessity for a detailed examination of the facts and evidence to consider the objections raised under Clauses (a) to (f) of Section 13 of Code of CPC , the winding up proceeding is not maintainable. Relying on the decision of the Apex Court in IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd., Mr. Talukdar submits that Kitply has raised a bona fide dispute based on substantial grounds and the debt is hotly contested and accordingly he contends that the Company Court is not expected to hold a full trial into the matter and considering the substantial nature of objection(s), the winding up petition should be dismissed.

DISCUSSION ON ARGUMENTS

5. The arguments advanced by the rival Counsels requires me to adjudicate as to (i) whether the winding up petition is maintainable; (ii) whether the judgment of the North Carolina Court is conclusive in the context of Section 13 of Code of CPC and (iii) whether the foreign judgment should be recognized for enforcing a debt claim against the judgment debtor, in an Indian court.

WINDING UP OBJECTION

6. For considering an winding up petition for enforcing a payment of debt, it is the duty of the Company Court to examine whether the Respondent company has raised genuine dispute to the claimed debt. A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court has to scrutinize whether the objection is substantial or is a ruse invented, to deprive a creditor of a just and honest entitlement. Of course, it is settled law that if the creditor''s debt is bona fide disputed on substantial grounds, the Court has the discretion to dismiss. A party to a dispute should not be allowed to use the threat of winding up petition as a means of enforcing the company to pay a bona fide disputed debt because if it is bona fide disputed, there can''t be neglect to pay within the meaning of Section 433 of Companies Act, 1956 and the deeming provision does not come into play.

For this proposition, see IBA Health (I) Pvt. Ltd. Vs. Info-Drive Systems Sdn. Bhd.,

7. Having regard to the above enunciation of law on an winding up proceeding given in IBA Health (India) Private Limited (supra), the Court will now have to examine as to whether the dispute raised by the Respondent is substantial and genuine. Since the Respondent resist the winding up petition under different heads of Section 13 Code of CPC , it would be convenient to deal with each of the objections with the cited decisions, which throw light on enforcing foreign judgment for a court proceeding in India.

APPLICABILITY OF FOREIGN JUDGMENT

8. In R. Viswanathan Vs. Rukn-Ul-Mulk Syed Abdul Wajid, the Apex Court held that for a foreign judgment to be conclusive, it must be rendered by a competent court both by the law of the State which has constituted it and in an international sense, ... and the foreign court must be a court of competent jurisdiction. The Supreme Court in Roshanlal Kuthalia and Others Vs. R.B. Mohan Singh Oberoi, declared that foreign judgment is enforceable and conclusive subject to the exceptions enumerated in Section 13, Code of CPC .

9. Keeping the above principles in mind, it should now be tested as to whether the objection on the jurisdictional competence of the North Carolina Court raised by the Respondent is a sustainable plea.

JURISDICTION OBJECTION

10.1. In A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, it has been held that the jurisdiction of the Court in the matter of a contract will depend on the situs of the contract and the cause of action arising through connecting factors. It is further held that in a suit for damage for breach of contract, the cause of action consists of making of the contract, and its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred. But it has been held in this case that "making of an offer on a particular place doesn''t form the cause of action in a suit for damage for breach of contract".

10.2. it may also be useful to take note of the decision of the Kerala High court in V. Sreedharan Vs. T.T. Nanu and Another, where the Division Bench has held that the place of preliminary negotiation, do not determine the jurisdiction of the Court to try a suit.

11.1. In the plaint filed, the Petitioner has conceded the Respondent (Defendant) to be a company registered in India with its principal place of business at Calcutta. The Situs of the contract and the delivery of goods and breach if any, too had occurred at Calcutta. Under Clause (c) (1) of Section 1332 of Title 28 of the U.S. Code, it is provided that a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. Therefore, under the relevant U.S. Code, the place of incorporation and the principal place of business of a Defendant company is relevant. Similarly u/s 1391 of Title 28 of U.S. Code, a corporation shall be deemed to reside in any judicial district of USA in which it is subject to personal jurisdiction at the time, the action is commenced. It is not the case of the Petitioner (Plaintiff) that the Defendant company should be considered as a resident of the North Carolina District as it is conceded to be incorporated in India with its principal place of business at Calcutta. The Defendant is not in the category of an individual alien, who was a resident of the North Carolina district at the time of commencement of the suit. In such circumstances, it is difficult to understand how the North Carolina Court derived jurisdiction to try a suit for damage against an Indian company, which is not subject to territorial jurisdiction of that Court.

12.1. Another aspect, relating to the jurisdiction question, i.e. whether the Defendant, acquiesced to the jurisdiction of the North Carolina Court has to be considered as it filed pro se answer, by responding to the summons of that Court. In their pro se answer dated 10th February, 1999, the Defendant categorically stated that the suit has been filed under wrong jurisdiction and it should be out rightly dismissed. When response of the Defendant is merely to question the jurisdictional competence of the Trial Court, it can''t be said in my view that the Defendant acquiesced and waived their right to contest the issue of jurisdiction of the U.S. Court.

12.2. Since the Respondent herein after their pro-se response allowed the suit to proceed ex parte, the applicability of the decision of the Supreme Court in Narhari Shivram Shet Narvekar Vs. Pannalal Umediram, cited by the Petitioner should now be examined. In that case, the Defendant applied for leave to defend in the foreign court and thereafter absented himself. The Supreme Court held that the ex parte decree passed thereafter against a person who appears in obedience to the process of a foreign court and applies for leave to defend the suit without objecting to the jurisdiction of the Court when he is not compelled by law to do so, must be held to have voluntarily submitted to the jurisdiction of the Court. Accordingly it was declared that the foreign decree doesn''t suffer from the defect which a foreign ex parte decree, without such submission may suffer. But the facts in Narhari Shivram Shet Narvekar (supra) is distinguishable since the Respondent herein, categorically objected to the jurisdiction of the North Carolina Court and accordingly can''t be said to have acquiesced to the jurisdiction which would disentitle him to raise the jurisdictional question of the foreign court. Accordingly the contrary conclusion of waiver reached by North Carolina Court is declared to be erroneous.

12.3. Furthermore the Plaintiff''s pleadings if one reads them as it is, do not disclose any cause of action against, what is averred to be an Indian Company with its principal place of business at Calcutta. Therefore on consideration of the ratio of Mayar (H.K.) Ltd. v. Owners and Parties, Vessel M.V. Fortune Express; Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others, respectively, I am of the opinion that territorial jurisdiction of the U.S. Court is not attracted against the Defendant Company.

SUPPRESSION AND FRAUD

13.1. The next objection of the Respondent against enforcing the foreign court''s decree is pleaded on the ground that the decree was secured from the US Court by suppression of relevant materials which is defined to be fraud under the Indian Contract Act. For examining this issue, it may be appropriate to look into the decisions relied upon by the rival Counsels.

13.2. In Sankaran Govindan Vs. Lakshmi Bharathi and Others, it has been held that a foreign judgment can be impeached for fraud of the party, in whose favor the judgment is obtained. Court also declared that it is an established proposition in Private International Law that unless a foreign court has jurisdiction in the international sense, a judgment delivered by that Court would not be recognized or enforceable in India.

13.3. Similarly in Smt. Satya Vs. Shri Teja Singh, the Apex Court has held that a foreign divorce decree is subject to collateral attack for lack of jurisdiction even where the decree contains the findings or recitals of jurisdictional facts. The Apex Court in this case has laid down that the principles of the American and English conflict of laws are not to be adopted blindly by Indian Courts and our public policy must determine the Rules of our Private International Law. The Supreme Court accordingly endorsed thus -

We are sovereign within our territory but it is no derogation of sovereignty to take account of foreign law and as said by Cardozo J. "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home", and we shall not brush aside foreign judicial processes unless doing so "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal

14. In the present case the Certificates of Inspection given by the president of the Plaintiff on the goods quality at pre-shipment stage was not disclosed. Section 17 of the Indian Contract Act defines concealment as fraud. That apart the trial court might have reached a different conclusion if the Court was aware that the Plaintiff, certified the goods to be of contracted standard and dispatch-worthy. In the context of the Petitioner''s non disclosure, it has to be declared that the decree of the North Carolina Court is hit by the exception Clause (e) of Section 13 of Code of CPC . Withholding of the certificates will have a bearing also on the specification of the contracted goods and this is being considered in the next paragraphs.

SPECIFICATION OF THE CONTRACTED GOODS

15. In this case 2 specifications are mentioned by the Plaintiff for the contracted goods and it is necessary to understand goods of which quality was contracted

for, the breach of which is alleged in the case. In the Certificates of Inspections, the Plaintiff had projected that the ordered material should meet the "Carolina Pacific Trading Standards" and it was accordingly "approved for shipment". But in the plaint mention of the 2 customers of the Plaintiff was made and it was stated that the Defendant would manufacture "teak marine plywood with the standards propagated by the International Hardwood Products Association" (IHPA Standards). Therefore if the Plaintiff approved shipment of Marine Teak Plywood conforming to Carolina Pacific Trading Standards, it is difficult to understand as to how, the rejection by McEwen and Weber who were not Defendant''s customers, can give rise to an action of breach of contract against the Defendant, who were naturally not obliged to supply one type of goods to Plaintiff as approved and another type of materials, conforming to IHPA standard to the customers of the Plaintiff. It is quite possible that the Plaintiff had contracted to supply materials of International quality to its customers and in the absence of any evidence on record to show that the Respondent was obliged to supply IHPA Standard materials, the Defendant in my view, couldn''t be fastened with liability for breach of contract.

DAMAGE QUANTIFICATION

16.1. Furthermore, the assessment of future loss of business allegedly suffered by the Plaintiff is not based on any evidence. There is nothing on record to show that the Plaintiff was committed to supply Marine Teak Plywood to its two customers for "X" years at "Y" rate out of which, it expected to make "Z" profit and the Defendant had any obligation in the said transaction. Unless these figures are proved, the Court could not have quantified any alleged loss of future profit. To put it another way, when there is nothing by way of evidence to show that the Defendant was aware of any such future contract of the Plaintiff with its customers McEwen and Weber, it would be unreasonable to burden the Defendant, for alleged loss of future business suffered by the Plaintiff. Such claim in my view is remote and indirect and is covered by Section 73 of the Contract Act. The Apex Court''s decision in Karsandas H. Thacker Vs. The Saran Engineering Co. Ltd., supports this conclusion.

16.2. The relevance of the evidence of the 2 so called marine experts is also required to be considered. The statement of the experts did not relate to the business transaction or the contract terms of the Plaintiff with McEwen and Weber and even otherwise, no oral statement on damage could have been made the basis for quantification of a damage claim against the Defendant. Such finding without material evidence has been held to be perverse by this Court in 1996 (3) GLT 352 (National Diary Development Board, Bhavanagar v. M/s Gograj Agarwalla and Company) and I feel that on this aspect, the ratio of the cited case is applicable here.

17. In the above context, the decision in McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, relied upon by Mr. Dutta, the learned Senior Counsel is distinguishable in as much as, the Court in that case was considering

computation of damages by application of the Emden Formula. The claim in that case was proved by application of the formula, which is widely accepted as a method for computation of damage under different heads such as overheads, loss of profit, overtime, productivity and so on. Seeing the basis for damage quantification, the Court held that Emden Formula in assessing the damage was a correct act of the Arbitrator. But in the present case, not to talk of any such well recognized formula, there is nothing by way of evidence to show how the Court computed the loss of future business, allegedly suffered by the Plaintiff. Therefore I declare that the ratio of Mcdermott International Inc.(Supra) relied upon by the Petitioner, has no application in the facts of the present case.

18. As we are on damage quantification, it may be apposite now to note of the observation of the Apex Court in Union of India (UOI) Vs. Raman Iron Foundry, where the Court permitted recovery of only reasonable compensation -

Under Indian law there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Section 74 of the Contract Act eliminates the somewhat elaborate reinstatements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. The Indian Legislature has sought to cut across the web to rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore, makes no difference that the claim is for liquidated damages. It stands on the same footing as a claim for unliquidated damages.

RECOGNITION OF FOREIGN DECREE

19.1. The Court will now consider the ratio of the decision in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., as arguments are advanced by the Defendant for not accepting the foreign Court''s decree on the ground that, it is opposed to Public Policy of India . Explaining the expression, the Supreme Court declared that the concept of Public Policy connotes public good and public interest. Expanding the narrower definition of Public Policy of India given in the Renusagar Power Co. Ltd. Vs. General Electric Co., , in the context of an award given by an Arbitrator, the Supreme Court declared that the phrase Public Policy of India would cover: -

(a) Fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

19.2. When the Supreme Court has held that a foreign decree can be challenged on the ground that it is contrary to the fundamental policy of Indian law or is patently illegal, the limitation aspect urged by the Respondents should now be considered since the suit was filed 3 years after the alleged breach of contract. In the U.S.A. a suit filed within 4 years under the applicable American Law of Limitation is maintainable. But under Article 55 of the Schedule to the Indian Limitation Act, 1963, time limit of 3 years is prescribed for claiming compensation for breach of contract. Therefore it is apparent that the North Carolina Court''s decree is opposed to the Indian Limitation Act which must be construed as fundamental policy of Indian Law. If recognition of the U.S. Court''s decision is sought for any proceeding in that country, it can''t obviously be resisted by citing the Indian Law of limitation. But for the foreign decree to be recognized in an Indian Court, it must be in conformity with fundamental policy of Indian Law.

20. On reading of the last decision relied upon by the Petitioner i.e. State of Meghalaya v. Jyotsna Das reported in 1991 (1) GLT 389, I feel that the ratio therein can have no application here since that was a claim under Tort default, made u/s 19 of the Code of CPC (against the State of Meghalaya for wrongful confinement of the purchased cement during transit) and was not a claim against the seller of cement. The facts and the nature of the claim in that case are different from the present case. Accordingly the ratio of Jyotsna Das (Supra) is declared to be inapplicable in deciding the present case.

APPLICABLE LEGAL PRINCIPLES

21. It is well settled that jurisdiction of a Court or its authority can''t travel beyond the territory over which the Court is empowered by the sovereign to exercise jurisdiction. A decree passed by a competent Court under one sovereign can have no automatic application within the territory of another sovereign and the legal principles on the basis of which the recognition and enforcement of a foreign Court''s decree differs in one country from another. In the celebrated text took "The Conflict of Laws" it is pointed out by Prof. Dicey that there is distinction between recognition and enforcement. While a Court may recognize a foreign judgment, which it enforces, it needn''t enforce every foreign judgment it recognizes. The Division Bench judgment given earlier in this case on 29.7.2009 in Company Appeal No. 1/2009 may be usefully extracted, to understand the scope of applicability of foreign judgment.

Coming to the question of enforcement of a foreign judgment Dicey, at page 570 of the Conflict of Laws stated "... A judgment creditor seeking to enforce a foreign judgment in England at common law cannot do so by direct execution of the judgment. He must bring an action on the foreign judgment." This principle is also accepted in India. The Supreme Court in Roshanlal Kuthalia and Others Vs. R.B. Mohan Singh Oberoi, at paragraph 19, has held as follows:

Ordinarily, a suit on foot of a foreign decree is sustainable and Section 13, Code of CPC sets out the limitation on the amplitude of the right. This proposition is not disputed....

Again in paragraph 20 it was held that " A foreign judgment is enforceable by a suit upon the judgment which creates an obligation between the parties."

Section 13 of the Code of CPC sets out the limitations on the recognition of a foreign judgment. "Foreign judgment'' is defined u/s 2, Sub-section (6) of the Code of CPC to mean the judgment of a foreign Court. Whereas the expression "foreign court'' is defined u/s 2 Sub-section (5) as follows:

"Foreign Court" means a Court situate outside India and not established or continued by the authority of the Central Government.

Therefore, Section 13 of the Code of CPC provides for the "recognition" of foreign judgment subject to the various limitations in the Sub-sections (a) to (f) thereof by the Indian Courts and makes it conclusive between the parties. In other words, when a holder of a foreign decree approaches the appropriate Court in this country to which the provisions of the Code of CPC apply, unless the Defendant succeeds in establishing any one or some of the objections enumerated under Clauses (a) to (f) of Section 13 the judgment of the foreign court is declared to be conclusive as to any matter that is directly adjudicated between the same parties and the decree is required to be passed in terms of the said foreign judgment by the Indian court. Thereafter, the decree can be executed in the manner provided by the Code of Civil Procedure.

22. Answering the question on conclusiveness of foreign judgment, the Supreme Court in R. Viswarathan (Supra) has declared that provisions of Section 13 of the Code of CPC are "condition precedent to the conclusiveness of foreign judgments ....and.... both judgments in rem and judgments in personam are contemplated by Section 13 of the code". It therefore follows that the judgment of the North Carolina Court for its recognition and enforcement in India will have to satisfy the rigor of Section 13 and the question is whether the Respondent has successfully established one or more of the exceptions enumerated in the Section.

23. The decision of the Supreme Court in Raj Rajendra Sardar Maloji Marsingh Rao Shitole Vs. Sri Shankar Saran and Others, may also referred herein since the Court in this case held that, the right of the judgment debtor to plead that the decree is a nullity u/s 13 of Code of CPC , is not a procedural matter but is a vested right.

CONCLUSION

24. On the plea that the foreign decree was not by a Court of competent jurisdiction, from the reasoning given earlier, it is hereby held that the North Carolina Court neither had jurisdiction to try a claim for damage nor does the said Court acquire jurisdictional competence, through the pro-se response filed by the Defendant in that Court. Thus the Respondent, according to my opinion, has succeeded in demonstrating that the exception in Clause (a) of Section 13 of

the Code of CPC is satisfied for the foreign decree, in this case.

25. The Foreign Court''s decree is also declared to be inconclusive and hit by Clause (b) of Section 13 of the Code of CPC . This is because the damage quantification was made by the Court without any acceptable evidence on record and the claimed loss suffered by the Plaintiff was given on conjecture and surmise and accordingly it is declared that the North Carolina Court has not given its judgment on the merit of the case.

26. Furthermore it could not be established that the Defendant had any obligation to supply IHPA Standard marine teak plywood as there is lack of certainty on the specification of material, the Defendant was obliged to supply under the contract since the Plaintiff approved shipment of Carolina Pacific Trading Standard marine teak plywood. It is probable that the Plaintiff was committed to supply superior grade material to its customers than what it contracted from the Defendant. Therefore there cannot be any claim against the Defendant arising out of rejection of the materials by McEwen and Weber - the two customers of the Plaintiff, as the Defendant had no contract with those two buyers.

27. There is also reasonable basis for concluding that the judgment of the North Carolina Court has been obtained by playing fraud on Court. The necessary discussion on this aspect is already made in the earlier part of this judgment and all that should now be said is that the relevant certificates showing that the materials were of contracted standards and dispatch worthy were withheld and the probability of the Court giving a different verdict if the withheld materials were available, is a distinct possibility. Accordingly I am of the opinion that the exception under Clause (e) of Section 13 of the Code of CPC has been successfully projected in this case by the Respondent.

28. It is further seen that the suit for damage was filed by the Petitioner in the North Carolina Court 3 years after the alleged breach which is beyond the prescribed period of limitation in India. Since the foreign judgment to be conclusive, is required to be in conformity with the law in India, I hold that the North Carolina Court''s decree is inconclusive, as it is covered by exception Clause (c) of Section 13 of the Code.

29. The objection of the Respondent on enforceability of the decree of the North Carolina Court are based on issues, inter alia, like the U.S. Court''s lack of jurisdictional competence; judgment not rendered on merit; decision obtained by playing fraud on Court and the Petitioner''s claim being founded on breach of applicable Indian Law. Although these challenges are based on Section 13 Code of CPC , having regard to the decision of the Apex Court in Raj Rajendra Sardar Moloji Nar Singh Rao Shitole (supra), it must be declared that the objections are substantive and not procedural and the U.S. Court''s decree is not valid in the International Sense since it is hit by one or the other exception(s), stipulated in Section 13 of the Code.

30. Another special aspect of this proceeding is that the merit of this case is being examined on remand on the order of the Supreme Court recorded on 23.10.2009 and the consequential Division Bench''s order dated 23.12.2009. As can be seen from the orders, no finality is attached to any of the earlier order(s) passed in this winding up proceeding. Accordingly, since the matter is remitted back by the appellate Courts without reservation, it must be held that the maintainability issue of this case is still open, notwithstanding the earlier decision of the Company Judge recorded on 18.11.2003.

31. Finally it can hardly be ignored that this Court is considering a prayer for winding up of the Respondent Company. The determination of the multifold objection(s) of the Respondent, as is already evident, entail a detail examination of the facts and the evidence recorded by the Foreign Court and such an exercise is not contemplated before a Company Court. As has been held by the Supreme Court in IBA Health (Supra), a Company Court is required to act with circumspection, care and caution and examine as to whether an attempt is made to pressurize the Company to pay a debt which is substantially disputed. What is seen here is that the Petitioner after obtaining the decree from the North Carolina Court, has neither resorted to execution proceeding in the USA nor in India but has chosen to file a winding up petition in India, against the judgment debtor. Bearing in mind the deficiencies earlier noticed, choice of this option appears to be an attempt, for enforcing a debt which is bona fide disputed by the Respondent Company. Accordingly, having regard to the ratio of the decision in IBA Health (Supra), I declare that this proceeding is not maintainable.

32. For the foregoing reasons, the petition is dismissed without any order of cost.