

(2011) 06 BOM CK 0123

In the Bombay High Court

Case No : Notice of Motion No. 726 of 2011 in Suit No. 536 of 2011

Dhirajlal alias Dhirubhai Babaria and Ashwin alias Ashwinbhai Babaria APPELLANT

Vs

Navinbhai C. Dave and Swan Mills Limited RESPONDENT

Date of Decision : 14-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 4, 13

Citation : (2011) 4 ALLMR 714 : (2011) 5 BomCR 519 : (2011) 4 MhLj 681

Hon'ble Judges : S.J. Vazifdar, J

Bench : Single Bench

Advocate : Fredun De'Vitre, Rajnish Agarwal, Nishit Dhruva, Prakash Shinde and Swati Deshpande, instructed by M. Dhruva and Partners, for the Appellant; Virag Tulzapurkar, Zubin Behram-Kamdin, Vivek Vashi and Anush Rajan, instructed by Bharucha and Partners, for the Respondent

Judgement

S.J. Vazifdar, J.—The Plaintiffs have filed the suit for an order that a foreign judgment dated 21st September, 2010, passed by the District Court, 14th Judicial District, Dallas County, Texas, United States of America, be deemed to be a decree of this Court and for a direction to enforce and execute the said judgment as a decree in favour of the Plaintiffs and against the Defendants. The Plaintiffs have taken out the above Notice of Motion seeking interim reliefs in respect of the Defendants properties to safeguard their rights under the said judgment.

2. The Plaintiffs filed proceedings before the District Court to recover a sum of US \$5,500,000/-together with interest thereon at 10% from April, 2009 till payment and for costs. The case in the petition is this.

The parties entered into a series of transactions commencing from 1989 in Dallas County, Texas. The transactions were referred to as the "Oil Rig of Peerless Drive Limited". Defendant No. 1, acting individually and as the Chairman of the Board of Defendant No. 2, Swan Mills Limited, requested the Plaintiffs to secure a loan

of approximately US \$ 1 million for which the Plaintiffs furnished personal guarantees. Further transactions of this nature were also entered into. The Plaintiffs agreed to furnish guarantees in Dallas County. The Plaintiffs made various payments under the said guarantee.

Pursuant to negotiations between the parties, a settlement agreement dated 9th May, 2005, was executed by Defendant No. 1 in his personal capacity and as Chairman on behalf of Defendant No. 2. The document reads as under:

This has reference to the last discussion we have had jointly in the presence of Shri Dineshbhai Gandhi and Shri Dhirubhai Shah, in connection with the dealing in respect of the Oil Rig of Peerless Drive Ltd.

It has been mutually and finally settled that an area of approximately 10,000 sq. ft. (built-up) will be handed over to you, as compensation and in full settlement for the above purpose by us along with the others, as and when the premises is available for possession, from the property being developed by us adjoining Bandra-Kurla Complex.

It was also mutually agreed that the above arrangement would supersede all the previous discussions, or writings, understandings etc. and the matter sets closed.

The Plaintiffs endorsed their acceptance at the foot of the document. The document has been witnessed by two witnesses. Indeed, the execution of the document is not denied.

It is also averred in the petition that the Defendants can be served pursuant to Section 17.044 of the Texas Practice & Remedies Code and Rule 108 of the Texas Rules of Civil Procedure, and that the Secretary of the State of Texas is an agent for service of the process on the Defendants because they "engage in business in this State, but do not maintain a regular place of business in this State or a designated agent for service of process in this State in a matter that arises out of business done in the State of Texas and to which the Defendants are a party. It is also averred that the cause of action arose in whole or in part in Dallas County, Texas.

3. Under cover of a letter dated 18th December, 2009, Defendant No. 1 forwarded to the clerk of the said Court, a written answer. Defendant No. 1 contended that the Court had no jurisdiction, inter-alia, as no part of the cause of action had arisen in the United States. It is averred that the Plaintiffs had not exhibited any documents with regard to business dealings of the Plaintiffs in Dallas, Texas. It is pertinent to note, however, that it is not averred as a matter of fact that there were no business dealings with the Plaintiffs in Dallas, Texas. It is averred that Defendant No. 1 "does not carry on any business activity in Texas or anywhere in the United States and that the Plaintiff had not submitted any evidence to show that the Defendants "engage" in business in Texas". This averment is in respect of the Plaintiffs assertion in the petition that the Secretary of the State of Texas is an agent for service of process on the Defendants

because they engage in business in the State of Texas, but do not maintain a regular place of business therein. The averment, therefore, does not pertain to the Plaintiffs assertion regarding the transactions between themselves and the Defendants. The first Defendant also denied the Plaintiffs' case on merits.

4. Defendant No. 2, under cover of a letter dated 22nd February, 2010, addressed to the clerk of the District Court, forwarded its written answer to the Plaintiffs original petition. Defendant No. 2 contended that the District Court at Dallas County, Texas had no jurisdiction to entertain the petition, inter-alia, on the ground that the settlement agreement dated 9th May, 2005, was entered into in India and that no part of the cause of action had arisen in Texas. Defendant No. 2 denied all the allegations made by the Plaintiffs. It contended that the settlement agreement was not signed by Defendant No. 1 in his capacity as Chairman of the second Defendant and that the second Defendant has no connection therewith. Defendant No. 2 adopted the written answer filed by Defendant No. 1.

5 (A) The Plaintiffs filed a "Motion to abate and to strike defective answer of Swan Mills Limited" (Defendant No. 2). This Motion was, therefore, directed only against Defendant No. 2 and not Defendant No. 1. The Plaintiffs contended that if Defendant No. 2 failed to obtain counsel authorized to practice law in the State of Texas within the time provided by the Court, its answer should be stricken and a default judgment entered. The Plaintiffs contention was that under the Rules of CPC of Texas, parties are allowed to appear either in person or by an attorney, but that this had been held to apply only to individuals and not to corporations.

(B) By an order dated 23rd April, 2010, the District Court ordered as under:

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that this case be and is hereby ABATED for a period of Sixty (60) days from the date of this Order for the purpose of allowing Defendant Swan Mills Ltd. to obtain counsel for representation in this action.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that should Defendant Swan Mills Ltd. not obtain counsel within sixty (60) days from the date of this Order, the Answer filed herein by said Defendant may be stricken and a post judgment default entered pending evidence of the Plaintiffs' damages.

6. Defendant No. 2 failed to appoint an attorney or counsel to represent it in the action.

7 (A) The Plaintiffs thereafter filed a motion for summary judgment. The Motion reiterated some of the averments in the petition, including that the settlement agreement dated 9th May, 2005, was executed by Defendant No. 1 individually and not in his capacity as Chairman of Defendant No. 2; that under the settlement agreement, Defendant No. 1 agreed to transfer the said property and that the agreement was executed by all the parties in full satisfaction of the moneys owed by the Defendants as a result of the business dealings conducted

in the United States and specifically in Texas. The Plaintiffs stated that neither of the answers filed by the Defendants denied the execution or validity of the document. The Plaintiffs contended that the value of the property was US \$750 per square foot i.e. an aggregate of US \$ 7,500,000/-for the ten thousand square feet agreed to be transferred. The Plaintiffs averred that in the light of the summary judgment proof attached to the Motion through the affidavit of the Plaintiff No. 1 as well as the failure of the Defendants to deny the validity of the settlement agreement, they were entitled to move for a summary judgment for an award of the value of the property or, in the alternative, for an order of specific performance to order the Defendants to convey the property plus attorney's fees.

(B) It is pertinent to note the affidavit of Defendant No. 1 in support of the Motion for summary judgment. The affidavit was stated to be proof attached to the Motion. Plaintiff No. 1 reiterated the averments in the original petition. It was specifically averred that Defendant No. 1 executed the document in his capacity as Chairman of the Board of Defendant No. 2 as Defendant No. 2 was to be the owner of the property agreed to be transferred and that Defendant No. 1 had refused to honour the agreement. Plaintiff also stated that he had personal knowledge that the fair market value of the property was US \$7,500,000/-. It is in the above Motion for summary judgment that the said judgment dated 21st September, 2010, was passed and which the Plaintiffs seek enforcement of.

8. The Motion for summary judgment was, admittedly, served upon the Defendants. It is also admitted that no reply was filed in this Motion and that the Defendants did not appear when the same was heard by the Court.

9. Before referring to the judgment, it will be convenient to refer to Mr. Tulzapurkar's submissions. The defence was based almost entirely on Section 13 of the Code of Civil Procedure, 1908, which reads as under:

13. When foreign judgments 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 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. Mr. Tulzapurkar relied upon the judgment of the Supreme Court in M/s. International Woolen Mills Vs. M/s. Standard Wool (U.K.) Ltd., . Relying on this judgment he made the following submissions.

A foreign judgment is not conclusive between the parties and the same cannot be executed in India if it has not been given on the merits of the case. Even if a foreign judgment has been passed in accordance with the rules and procedure of the country in which it was passed and it is valid and enforceable in that country, it would not be enforceable in India if it has not been passed on merits. An ex parte decree may still be on merits provided that it could be shown that the Court had gone through the case made out by the Plaintiff and considered the same and taken evidence of the witnesses put up by the Plaintiff. If, however, an ex-parte decree is passed in a summary manner under a special procedure, without going into the merits and without taking evidence, then those decrees would not be executable in India. A decree would not be on merits if the Court has not gone through and considered the case of the Plaintiff and taken evidence of witnesses of the Plaintiff. If, by the law of a foreign country, a Plaintiff is entitled to judgment simply on the non-appearance of a Defendant and without adducing any evidence whatever in support of his claim or if the wrong-headedness of a foreign Judge should induce him to so decide, the Plaintiff would not be entitled to sue upon the judgment so obtained. If a judgment is delivered merely because of the Defendant's failure to appear at the hearing of the case and without considering the merits of the case, it is not enforceable in India.

11. The submissions are well founded and are entirely supported by the judgment of the Supreme Court in M/s. International Woolen Mills. It is sufficient to refer to paragraphs 18 and 22 in this regard, which read as under:

18. In the case of Middle East Bank Ltd. Vs. Rajendra Singh Sethia, a decree had been passed ex parte and without service of notice on the judgment-debtor. A number of authorities were cited before the Court including the case of Sheikh Abdul Rahim alias S.A. Rahim Vs. Mohamed Din and Another, . The Court held that even though a decree may be ex parte it may still be on merits provided it could be shown that the Court had gone through the case made out by the Plaintiff and considered the same and taken evidence of the witnesses put up by the Plaintiff. It was held that if an ex parte decree was passed in a summary manner under a special procedure without going into the merits and without taking evidence then those decrees would not be executable in India. Based on this authority it was submitted that a decree could be said to be not on merits only if it is passed in a summary manner in any special or summary procedure. It was submitted that such a decree i.e. a decree which has not been passed in a summary manner in a summary proceeding would be a decree on merits. The authority itself makes it clear that the decree would not be on merits if Court has not gone through and considered the case of the Plaintiff and taken evidence of witnesses of the Plaintiff. It must also be noted that in this case the Court ultimately held that the concerned decree was not a decree on merits.

....

22. Reliance was also placed upon the case of *Ram Chand v. John Barlett* reported in (1909) 3 Ind Cas 523. In this case it has been held as follows:

The next contention that has been raised for the Appellant to show that the Respondent's suit on the foreign judgment did not lie, is that the said judgment was not passed on the merits, and that, therefore, it cannot be enforced by the Indian Courts. In my opinion, this contention has no force. The writ of summons issued by the High Court in England was, it is admitted, duly served on the Appellant in this country, but the latter did not, within the time allowed for that purpose enter an appearance and deliver a defence. The Respondent had (under the rules of procedure that govern the Supreme Court) the right, at the expiration of the prescribed period, to enter final judgment for the amount claimed, with costs.. The writ aforesaid was especially endorsed with the statement of claim, containing all the necessary particulars, and there is nothing to show that the application for leave to serve the writ was not supported by affidavit or other evidence stating the several particulars required by Order XI, Rule 4. In short, the proceedings held in the High Court of England appear to have been strictly in accordance with the existing rules of procedure, which are not shown to be in any way contrary to the fundamental principles of justice and fair play; and the judgment passed against the Defendant on the facts of the case must be considered as one passed on the merits. It does not proceed on any preliminary point, i.e., a point collateral to the merits of the case, but is based on the merits as disclosed by the pleadings before the Court. If the Defendant did not, in spite of notice of action, choose to appear and defend it, the judgment passed by the Court in Plaintiffs favour was not the less a judgment on the merits, because it was not founded upon detailed evidence which the Plaintiff might have produced had the Defendant entered an appearance and contested the claim. The position to my mind is the same as if the Defendant had appeared and confessed judgment. In support of his contention that the judgment in question cannot be considered as one passed on the merits, the Appellant's counsel has relied on the following passage in Sir William Rattigan's *Private International Law* (1895) at pages 234-235:

It would seem to be equally plain that, if, for instance, it should happen that by the law of a foreign country, a Plaintiff was entitled to judgment simply on the non-appearance of a Defendant who had been duly served, and without adducing any evidence whatever in support of his claim, or if the wrong-headedness of a foreign Judge should induce him to so decide, the Plaintiff would not be entitled in an English Court to sue upon a judgment so obtained. If on no other ground, such a judgment of a foreign Court would, at all events, be so contrary to the fundamental principles of the Law of England as, for this reason alone, to be incapable of receiving any effect in a Britain Court." The above passage does not, however, as I read it, support the present Appellant's position, as it cannot, in my opinion, be affirmed in this case that the Plaintiff has obtained judgment from

the High Court in England simply on the non-appearance of the Defendant without adducing any evidence whatever in support of his claim." Under Order XI, Rule 4, the Plaintiff's application for leave to serve the writ of summons out of the jurisdiction must be supported by a affidavit or other evidence stating that the Plaintiff has a good cause of action and the grounds upon which the application is made, and leave can only be granted if the Court of Judge is satisfied that the case is a proper one for the service prayed for. The necessary procedure must be presumed to have been followed in this case, and it has not been shown by the Appellant that it was not so followed. The affidavit filed by the present Plaintiffs-Respondents in pursuance of the above rules, would, in my opinion, constitute "evidence in support of the claim" within the purview of the principle laid down in the passage quoted above, and the judgment obtained after service of the writ on the Defendant as required by the rules of the Supreme Court would, I think, be a judgment on the merits. If however, the passage relied upon does not bear the construction I have placed upon it, if, that it so say, it mans that there can be no judgment on the merits, unless, after the service of the writ on the Defendant in the regular way the Plaintiff has adduced some evidence, oral or documentary, in support of his claim, such as he would have produced if the Defendant had appeared and contested the claim, then, with all possible respect for the learned author of that passage, I venture to think that the rule laid down by him is expressed in too wide language, and I would be reluctant to follow it unless it were supported by clear authority. I can discover no such authority either in Dicey's "Conflict of Laws" (p.411), or in any other standard text-book on the subject; and I do not think that the maxim enunciated by Sir William Rattigan himself as the one applicable in such cases, viz. that the judgment passed must not contravene the fundamental principles of a rational system of law, supports the wide proposition, which it has been urged, is laid down in the passage quoted above.

In our view the passage in Sir William Rattigan's Private International Law (1895) at pages 234-235, reproduced above, states the correct law. With great respect to the learned Judges concerned the restricted interpretation sought to be given cannot be accepted. With greatest of respect to the learned Judge we are unable to accept the broad proposition that any decree passed in absence of Defendant, is a decree on merits as it would be the same if Defendant had appeared and confessed judgment. We also cannot accept the proposition that the decree was on merits as all documents and particulars had been endorsed with the statement of claim. With the greatest of respect to the learned Judges they seem to have forgotten at stage of issuance of writ of summons the Court only forms, if it all does, a prima facie opinion. Thereafter Court has to be consider the case of merits by looking into evidence led and documents proved before it as per its rules. It is only if this is done that the decree can be said to be on merits.

12. Before proceeding to consider the judgment in the present case, it is necessary to note that the Supreme Court also held that the burden of proving

that the decree is not on merits would be on the party alleging it, in this case the Defendants. It was also held that even though the Defendant has not entered evidence, the Plaintiff may prove its case through oral and documentary evidence and that if, after consideration of oral and/or documentary evidence an ex-parte decree is passed it would be a decree on merits. The Court must be found to have applied its mind to the matter and considered the evidence made available to it in order that it may be said that there has been an adjudication upon the merits of the case. Paragraphs 23, 27 and 29 read as under:

23. It was also submitted that the burden of proving that a decree was not on merits is entirely on the Appellants. It was submitted that no evidence had been led by the Appellant to show that the decree was not on merits and for that reason it must be presumed that the decree is on merits. In support of this submission reliance was placed upon the authority in the cases of R.M.V. Vellachi Achi Vs. R.M.A. Ramanathan Chettiar, ; R. Viswanathan Vs. Rukn-UI-Mulk Syed Abdul Wajid, . Undoubtedly the burden of proving that the decree is not on merits would be on the party alleging it. However Courts never expect impossible proofs. It would never be possible for a party to lead evidence about the state of mind of the Judge who passed the decree. Of course, amongst other things, the party must show that the decree does not show that it is on merits, if necessary, the rules of that Court, the existence or lack of existence of material before the Court when the decree was passed and the manner in which the decree is passed. All this has been done in this case.

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27. Reliance was also placed upon the case of Chintamani Padhan v. Palka Samal reported in AIR 1856 Ori 136. In this case it has been held that a judgment on the merits is one which is entered after a full trial of the issues through pleadings, presentation of evidence, and arguments by both sides. It is held that the expression `judgment on merits' implied that it must have been passed after contest and after evidence had been let in by both sides. In our view the authority also cannot be said to be laying down the correct law. In a given case, it is possible that even though Defendant has not entered evidence the Plaintiff may prove its case through oral and documentary evidence. If after consideration of oral and/or documentary evidence an ex parte decree is passed, it would be a decree on merits.

....

29. In the case of Govindan Asari Kesavan Asari Vs. Sankaran Asari Balakrishnan Asari, it is held as follows:

In construing S. 13 of the Indian CPC we have to be guided by the plain meaning of the words and expressions used in the section itself, and not by other extraneous considerations. There is nothing in the section to suggest that the expression judgment on the merits has been used in contradiction to a decision on a matter of form or by way of penalty.

The section prescribes the conditions to be satisfied by a foreign judgment in order that it may be accepted by an Indian Court as conclusive between the parties thereto or between parties under whom they or any of them litigate under the same title. One such condition is that the judgment must have been given on the merits of the case. Whether the judgment is one on the merits, must be apparent from the judgment itself. It is not enough if there is a decree or a decision by the foreign Court. In fact, the word "decree" does not find a place anywhere in the section. What is required is that there must have been a judgment. What the nature of that judgment should be is also indicated by the opening portion of the section where it is stated that the judgment must have directly adjudicated upon questions arising between the parties.

The Court must have applied its mind to that matter and must have considered the evidence made available to it in order that it may be said that there has been an adjudication upon the merits of the case. It cannot be said that such a decision on the merits is possible only in cases where the Defendant enters appearance and contests the Plaintiff's claim. Even where the Defendant chooses to remain *ex parte* and to keep out, it is possible for the Plaintiff to adduce evidence in support of his claim (and such evidence is generally insisted on by the Courts in India), so that the Court may give a decision on the merits of his case after a due consideration of such evidence instead of dispensing with such consideration and giving a decree merely on account of the default of appearance of the Defendant.

In the former case the judgment will be one on the merits of the case, while in the latter the judgment will be one not on the merits of the case. Thus it is obvious that the non-appearance of the Defendant will not by itself determine the nature of the judgment one way or the other. That appears to be the reason why S. 13 does not refer to *ex parte* judgments falling under a separate category by themselves. A foreign Court may have its own special procedure enabling it to give a decision against the Defendant who has failed to appear in spite of the summons served on him and in favour of the Plaintiff, even without insisting on any evidence in support of his claim in the suit.

Such a judgment may be conclusive between the parties so far as that jurisdiction is concerned, but for the purpose of S. 13 of the Indian CPC such a judgment cannot be accepted as one given on the merits of the case and to that extent the law in India is different from the law in other jurisdictions where foreign judgments given for default of appearance of Defendants are also accepted as final and conclusive between the parties thereto. This position was noticed and recognised in AIR 1927 Mad 365 (FB). The contention that the Defendant who had chosen to remain *ex parte*, must be taken to have admitted the plaintiff claim was also repelled in that case as unsound and untenable. His non-appearance can only mean that he is not inclined to come forward and contest the claim or even to admit it.

His attitude may be one of indifference in that matter, leaving the responsibility

on the Plaintiff to prove his claim if he wants to get a decree in his favour. Such indifference on the part of the Defendant cannot necessarily lead to the inference that he has admitted the Plaintiff's claim. Admission of the claim is a positive act and it cannot be inferred from any negative or indifferent attitude of the person concerned. To decree the plaintiff claim solely on account of the default of the Defendant and without considering the question whether the claim is well-founded or not and whether there is any evidence to sustain it, can only mean that such a decree is passed against the Defendant by way of penalty.

It will not satisfy even the minimum requirements of a judgment on the merits of the claim. What such requirements are, have been explained in *Abdul Rehman v. Md. Ali Rowhter* AIR 1938 Ran 319, in the following terms:

A decision on the merits involves the application of the mind of the Court to the truth or falsity of the Plaintiff's case and therefore though a judgment passed after a judicial consideration of the matter by taking evidence may be a decision on the merits even though passed ex parte a decision passed without evidence of any kind but passed only on his pleadings cannot be held to be a decision on the merits.

The same view was taken by the Patna High Court also in *Wazir Sahu and Another Vs. Munshi Das*, , where the question when an ex parte decision can be said to be on the merits, was answered as follows:

An ex parte decision may or may not be on the merits. The mere fact of its being ex parte will not in itself justify a finding that the decision was not on the merits. That is not the real test. The real test is not whether the decision was or was not ex parte, but whether it was merely formally passed as a matter of course or by way of penalty or it was based on the consideration of the truth or otherwise of the Plaintiff's claim.

We are in respectful agreement with the view taken in these two cases.

13. As rightly submitted by Mr. Tulzapurkar, there were three

14. The first question was whether the Court had jurisdiction or not.

15. In this regard, the learned Judge held that the Defendant No. 1 and Defendant No. 2 had entered an appearance in the action and accepted the jurisdiction of the Court for all purposes by filing an answer with their transmittal letters dated 17th December, 2009 and 2nd February, 2010, respectively. The question of jurisdiction was thus considered. Whether the extent of consideration was adequate to meet the test of Section 13 or not is undoubtedly an important point. would, however, leave the issue to be decided at the final hearing of the suit. I am not inclined, at this stage, to brush aside the judgment on the ground of non-application of mind or even non-consideration of the issues. It is a moot point whether a judgment fails the test u/s 13 merely because it is passed on one ground and does not deal with every contention even in a case where it is sufficient to uphold a plea on that ground alone. In other words, even if the other

contentions are answered in favour of the Defendants, if the issue must on another ground in any event be answered in favour of the Plaintiff it is doubtful it can be said that the judgment based on that ground is not on merits.

16. The matter is certainly not free from doubt. The provisions of the laws of the State of Texas may well require to be considered in greater detail at the hearing of the suit to ascertain whether jurisdiction could have been founded on the basis that the Defendant had not complied with the procedure prescribed by the laws of that State. For instance, reliance was placed on Rule 120a which reads as under:

Rule 120a. Special Appearance.

1. Notwithstanding the provisions of Rules 121, 122 and 123, a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the Defendant on the ground that such party or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearance shall be made by sworn motion filed prior to motion to transfer venue or any other plea, pleading or motion; provided however, that a motion to transfer venue and any other plea, pleading or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance; and may be amended to cure defects. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery process, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

2. Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.

3. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on the personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of such affidavits are presented in violation of Rule 13, the court shall impose sanctions in accordance with that rule.

4. If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State.

17. Mr. Tulzapurkar submitted that the answers filed by the Defendants must be deemed to be the special appearances entered by them in accordance with Rule 120a. He submitted that the provision should be considered as one of substance and not merely of form. Mr. Agarwal, however, submitted that a special appearance was not filed in accordance with the rules.

18. The learned Judge, however, held that the Defendants had not complied with the rules and obviously, therefore, held that they had filed a general appearance. Whether his construction of the order is correct or not is another matter. Even if I am entitled to question the correctness of the decision, I am not inclined at this stage to, in effect, set it aside.

19. The next question that fell for consideration was the liability of the Defendants under the said settlement agreement dated 9th May, 2005.

20. It is true that the judgment records that the action should proceed to summary judgment. However, from what follows, prima facie, it does not appear that the judgment was passed as a matter of course, as a mere formality only on account of the Defendant's absence and failure to respond to the motion. The learned Judge has stated that he found that the motion for summary judgment was well taken and should be granted. There is a specific finding that Defendant No. 1 signed the settlement agreement individually and as the Chairman of the Board of Defendant No. 2 in which he obligated himself and Defendant No. 2 to convey the property to the Plaintiff. The learned Judge further found that in the respective answers filed by the Defendants neither of them had denied the execution of the validity of the settlement agreement. This statement indicates that the Court considered the respective answers filed by the Defendants. In other words, the answers filed by the Defendants were not disregarded while considering the Plaintiff's motion for a summary judgment.

21. Mr. Tulzapurkar submitted that the above observations do not indicate the basis on which the learned Judge came to the said conclusion. The fact is that the learned Judge considered not merely the Plaintiff's case, including the said settlement agreement, but also the answers filed by the Defendants. I would leave for consideration at the final hearing of the suit, the question as to the adequacy of reasons furnished by a foreign Court to meet the test u/s 13 of the Code of Civil Procedure. It is true that the judgment itself is not elaborate on this

point.

22. As noted earlier, the Court had before it not merely the motion for summary judgment, but also an affidavit in support thereof. That affidavit appears to be the evidence of Plaintiff No. 1 in support of the petition and the motion for summary judgment. The Defendants did not file a reply thereto. There was, therefore, evidence before the Court. Whether it was rightly accepted or not, is another matter. It is doubtful whether, while considering a suit of this nature, this Court is entitled to substitute its interpretation of a document or the evidence for that of the foreign Court. I would hesitate at the interlocutory stage to hold that the evidence was such that it could not form the basis of a rational conclusion.

23. The criticism against the finding that neither Defendant had denied the execution or validity of the settlement agreement dated 9th May, 2005, *prima facie*, does not appear to be justified. What was obviously meant was that neither of the Defendants had denied the execution of the agreement or validity of its existence as such. In other words, the observation is not contrary to the answers filed by the Defendants to the effect that Defendant No. 2 was not a party to the settlement agreement.

24. The third question that arose for consideration was the market value of the property. Mr. Tulzapurkar submitted that there was absolutely no evidence in support thereof.

25. Here again, the learned Judge recorded the findings "based on the summary judgment evidence". This obviously refers to the affidavit in support of the motion for summary judgment. In the affidavit, Defendant No. 1 has expressly furnished the value of the property to his personal knowledge. Whether the deposition of the Defendant No. 1 was validly accepted or not is another matter. Whether his evidence ought to have been accepted or not, without anything more, is another matter. It is again a moot point whether a foreign judgment is invalid merely because it is based on an incorrect appreciation of the evidence. The learned Judge has obviously accepted the evidence furnished by the Plaintiff. The judgment does not indicate that the evidence was accepted merely because or only on the ground that the Defendants had not produced any contrary evidence.

26. I must clarify that I do not for a moment suggest that the matter is free from doubt. Indeed, there is much to be said in favour of the Defendants. The matter certainly requires deeper consideration at the final hearing. I am, however, unable at this stage of the proceedings to come to the conclusion that the judgment is absurd and does not satisfy the test of Section 13. That being so, the Plaintiff would be entitled to protect their interests under the foreign judgment and decree subject to any other consideration.

27. In the plaint, a decree was sought for a sum of US \$5,500,000/-. However, the judgment has awarded an amount of US \$7,500,000/-. Mr. Tulzapurkar submitted that the same constituted a breach of natural justice. The submission,

however, was founded on the erroneous basis that the Defendants had no knowledge of this increased claim. It is admitted now that the motion and the affidavit in support thereof were served upon the Defendants. Whether under the laws of the State of Texas, an amount in excess of that claimed in the plaint can be granted in this manner can be decided at the final hearing of the suit. There is insufficient material to decide the same at this stage.

28. Mr. Tulzapurkar relied upon a letter dated 29th April, 2011, addressed by the Defendant" advocates to the Plaintiffs advocates seeking inspection of various documents and particulars. They are, however, relevant to the merits of the disputes between the parties. In a suit of this nature it is doubtful whether the Defendants can re-argue the merits of the rival contentions.

29. Mr. Tulzapurkar submitted that in any event no case has been made out warranting an order of attachment before judgment.

30. I do not intend passing an order of attachment before judgment. In the facts of this case, an injunction of the nature I intend passing would meet the ends of justice. A case for the same has been made out. The Defendants remained absent before the foreign Court. It is not their case that they were unable to remain present or to have themselves duly represented for any reason. The affidavit in support establishes that Defendant No. 2 has entered into various agreements whereunder it has disposed of a large part of the property being developed by it. The property which is the subject mater of the settlement agreement dated 9th May, 2005, is also encumbered. Proceedings are pending between the Defendants and third parties. The Defendants have even refused the offer fairly made by the Plaintiffs to have the foreign judgment set aside and to have the proceedings heard de-novo. They have shown a complete reluctance to have the disputes adjudicated in any manner before any forum even in this country. In these circumstances, the Plaintiffs are entitled to some protection.

31. I am unable to limit the operation of the order to specific properties as I do not have before me any particulars which would indicate even an approximate valuation thereof. The order, therefore, enables the Defendants to apply, if they so desire, to restrict it to properties sufficient only to meet the Plaintiff's claim.

32. The Notice of Motion is, therefore, made absolute in terms of prayer (a). The order shall operate from today and shall not apply to any transactions that may have been entered into upto today. The Defendants are at liberty to complete such transactions. The Defendants shall file an affidavit disclosing their assets on or before 31st July, 2011. Liberty to the Defendants to apply for limiting this order to specified assets after the affidavit is filed. Costs shall be costs in the cause.

33. The application for stay of this order is refused as a stay would for obvious reasons enable the Defendants to render this order infructuous.