
(2009) 11 DEL CK 0380

In the Delhi High Court

Case No : Regular First Appeal (OS) 59 of 2008

Emirates Bank International PJSC

APPELLANT

Vs

Sh. Vijay Talwar

RESPONDENT

Date of Decision : 06-11-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 13

Citation : (2009) 11 DEL CK 0380

Hon'ble Judges : Vikramajit Sen, J; Sunil Gaur, J

Bench : Division Bench

Advocate : Rajiv Nayyar and Rishi Agrawala, for the Appellant; Chetan Sharma Ramni Taneja and Aashish Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Sunil Gaur, J.—Refusal to enforce foreign decree and judgment is under challenge in this Appeal. Appellant's suit for recovery of UAE DHS 1,813,801.74 has been held to be not maintainable by the learned Single Judge, who has invoked Order VII Rule 11 of the CPC at the instance of Respondent herein.

2. Impugned Order of May 14, 2008, takes note of the factual matrix of this case, in the following words:

3. On 30th November, 1998, Dubai Court of First Instance passed a judgment and decreed the suit of the plaintiff against Marmo Company LLC and the defendant jointly, to pay to the plaintiff Bank a sum of UAE DHS 16,44,365.34 along with interest of 10.25% p.a. from the due date upto the date of full payment. The Court also confirmed the validity of the mortgage made over the company's assets dated 25th May, 1997 and the attachment No. 1950/98. It is submitted that the decree was passed by the Dubai Court of First Instance on the merits of the case after considering the documents and the pleadings. It is also stated that the defendant's attorney was notified of the case but the defendant's attorney did not attend the Court. After passing of the judgment and

decree, the plaintiff Bank initiated execution proceedings and realized an amount of AED 305,830.57 on 3rd July, 2000 by the sale of the assets of Marmo Company LLC. However, a sum of UAE DHS 1,813,801.74 was still outstanding as on 27th November, 2001.

4. The plaintiff contended that it filed present suit on the basis of judgment and decree passed by the Dubai Court of First Instance for the recovery of remaining amount which could not be recovered despite sale of the mortgaged assets of the Marmo Company LLC and because the decree remained unsatisfied on account of absconding of the defendant from Dubai without payment of the dues, invoking the personal guarantee dated 7th March, 1995 executed by the defendant in favour of the plaintiff Bank. It is stated that the plaintiff representative in India Mr. Sunil Gulati had during September/ October 2001 spoken to the defendant on telephone. The defendant had offered to pay and settle the claim of the plaintiff at a ridiculously low amount, which was not agreeable to the plaintiff. Hence, this suit.

3. The suit of the Appellant was resisted by the Respondent by filing an application under Order VII Rule 11(d) of the CPC, being barred by law i.e. by the provision of Section 13 of the Code of Civil Procedure, 1908, which spells out six eventualities when foreign judgment is not conclusive. Out of these six, i.e. (a) to (f) of Section 13 of the CPC, the two which have been invoked are (b) and (d) of Section 13 of the CPC. The second and fourth eventualities are (b) where it (Foreign Judgment) has not been given on merits of the case and (d) where the proceedings, in which the Foreign Judgment was obtained, are opposed to natural justice.

4. Respondent succeeded in persuading the learned Single Judge in holding that the judgment and decree of Dubai Court of First Instance of 30th November, 1998, (hereinafter referred to as the "foreign judgment and decree.") was not on merits and was opposed to natural justice, as the Respondent was never served but was proceeded ex parte.

5. The operative part of the impugned order is as under:

In the present case, the proceedings before UAE Court make it apparent that no effort was made to serve the defendant. The plaintiff had not given the known address of the defendant. The plaintiff had specifically pleaded in the present case that the defendant was not available in UAE and had fled to India. The address of the defendant in India was available to the plaintiff since even at the time of opening the account the plaintiff had obtained a copy of the passport of the defendant in verification of the New Delhi address of the defendant. Despite this, the plaintiff did not given the current address of the defendant and failed to disclose to the Court at Dubai that the defendant was not available in Dubai. The plaintiff obtained a decree against the defendant in absentia. Dubai Court presumed that the defendant was duly served through its Attorney and did not appear. It is not stated who was the attorney, who appointed him, at what

address he was served, when he was served. I consider that such a decree obtained by the plaintiff is not a decree on merits and contravenes the principles of natural justice. Such a decree is not executable in India. The judgment given by the Dubai Court also shows that it was an ex parte judgment wherein no evidence was led by the plaintiff. The Court at Dubai in a formal manner enumerated the documents filed by the plaintiff along with suit considered them as sufficient to pass the decree. The judgment and the decree passed by the Dubai Court of First Instance is therefore contrary to the principles of natural justice and contrary to the provisions of Section 13 CPC.

6. Learned Senior Counsel for the parties have been heard in this Appeal and record of this case has been perused by us.

7. The substratum of the submissions advanced is that Order VII Rule 11 of the CPC does not entitle the Court to hold a mini trial and the averments in the plaint alone are to be seen. To support this proposition, reliance has been placed upon Ramesh B. Desai and Others Vs. Bipin Vadilal Mehta and Others, . There can be no dispute about it. However, merely because the learned Single Judge has referred to the written statement of the Defendant/ Respondent and the replication of the plaintiff/ Appellant and the copy of the pass-port of the Defendant/ Respondent, it would not per se mean that he has relied upon them.

8. In the impugned order, learned Single Judge has found that the foreign judgment and decree is not on merits and the same is opposed to natural justice, as the Defendant/ Respondent was not properly served by the Dubai Court of First Instance. It has been also noted in the impugned order that the Dubai Court had presumed that the Defendant/ Respondent was duly served through his Attorney and did not appear. The pertinent fact noticed in the impugned order is that it was not stated who was the Attorney, who appointed him, at what address he was served and when he was served. This fact has not been assailed before us. What has been asserted is that the Defendant/ Respondent had left Dubai without informing the plaintiff/ Appellant and the averment in the plaint of Appellant knowing about Respondent residing in Delhi in September/ October 2001, has to be taken to be correct. Even if it is so, still the Appellant is obliged to explain as to who was the Attorney and at what address he was served and in what manner. This, the Appellant has failed to do. This clearly violates the principles of natural justice, as we understand. What is least required is that the fair opportunity of hearing is to be afforded to a party, which has not been done by the Dubai Court before rendering the "foreign judgment and decree. in question.

9. The dicta of the Apex Court in *Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others*, is that while adjudicating upon an application under Order VII Rule 11 of the CPC, the plaint cannot be dissected. There can be no quarrel with this proposition. The plaint has to be read as it is. Upon doing so, we find that a decree for UAE DHS 18,13,801.74 with interest is sought on the basis of "Statement of Claims", being Annexure- A to the plaint. The averments

made in Para- 19 of the plaint in this respect are as under:

The plaintiff Bank claims UAE DHS 1,813,801.74 as per the statement of claim being Annexure-A along with interest at 10.25% per annum from the date of filing of the present suit till the date of payment. The amount payable to the plaintiff Bank as stated in the statement of claim is as per the Decree dated 30.11.1998 passed by the Dubai Court of First Instance.

10. It would be worthwhile to reproduce Annexure- A of the plaint, which is as under:

IN THE HIGH COURT OF DELHI AT NEW DELHI ORIGINAL CIVIL JURISDICTION
CIVIL SUIT No. -----2001 IN THE MATTER OF Annexure-A EMIRATES BANK
INTERNATIONAL PJSCplaintiff VERSUS SHRI VIJAY
TALWARDEFENDANT STATEMENT OF CLAIMS

i) Amount decreed by the Dubai UAE DHS 1,644,356.34 Court of First Instance on 30th November, 1998.

ii) Interest on UAE DHS UAE DHS 280,910.87 1,644,356.34 From 31st August, 1998 to 3rd July, 2000 @ 10.25% III) Received on 3rd July, 2000 UAE DHS 305,830.57 iv) Principal amount outstanding on UAE DHS 1,338,525.77 4.7.2000 v) Interest on UAE DHS UAE DHS 194,365.10 1,338,525.77 from 4th July, 2000 Till 27th November, 2001 @ 10.25% vi) Total outstanding as on UAE DHS 1,813,801.74 27.11.2001 Note:

a) The aforesaid amount of UAE DHS 1,813,801.74 is payable along with interest @ 10.25% from 28.11.2001 till payment b) the Rupee equivalent on the date of suit is Rs.2,35,79,422/- (for the purpose of jurisdiction). NEW DELHI AGARWAL LAW ASSOCIATES DATED: 27.11.2001 ADVOCATES FOR THE plaintiff 34, BABAR LANE, 1ST FLOOR BENGALI MARKET, NEW DELHI (PHONES: 3354330; 3738122)"

11. Although there is an averment in the plaint that the suit amount is due and payable under personal guarantee of 7th March, 1995, executed by M/S Marmo Company of the Defendant/ Respondent but it is evident from the "Statement of Claims", Annexure-A, which is the basis of the plaint that the suit amount is exclusively based upon the outstanding amount of the "foreign judgment.. Therefore, Appellant cannot be heard to say that its suit is based upon a personal guarantee of the Respondent and the same is continuing one. Therefore, reliance placed upon decision of the Apex Court in Syndicate Bank v. Channaverrappa Beleri (2006) 11 SCC 406 is unwarranted.

12. Now, what is required to be seen is as to whether the "foreign judgment. is on merits or not. For this, its authenticated translation (Annexure- R-1) is required to be seen.

13. Upon perusing the "foreign judgment. (Annexure- R-1), it is found that the Dubai Court has relied upon photocopies of documents produced by the

Appellant/ plaintiff and has not taken on record evidence of any witness to prove the photocopy of the documents produced and has noted as under:

The matter was heard in Court as evidenced by the papers. The plaintiff was represented by the Counsel. No one had appeared for the two Defendant who were summoned. The Court decided to announce the judgment today.

14. All that has been said in "foreign judgment. (Annexure R-1) is that the Defendant (Respondent) were summoned but not appeared. It has not been elucidated as to in what manner the Defendant/ Respondent were served and it is nowhere stated that the Attorney of the Defendant / Respondent was served. The finding returned by the Dubai Court, as is evident from "foreign judgment. (Annexure- R-1), is as follows:

Accordingly, since it is established in the papers that the plaintiff Bank had granted the First Defendant the facilities through the account opened at the plaintiff, and that it is established before the Court upon perusal of the Statement of Account that the total indebtedness is DHS 1,644,365.34 and since the Defendants did not attend and had not filed any defense, therefore, the Court enters judgment against the First Defendant to pay of the said amount to the plaintiff.

15. It is pertinent to note that the personal guarantee of 7th March, 1985, was also subject matter of the foreign judgment and decree rendered by the Dubai Court. We are conscious that in a given case, it is possible that even though the defendant has not entered appearance, the plaintiff may prove its case through oral and documentary evidence. If after consideration of oral and documentary evidence an ex parte decree is passed, it would be a decree on merits.

16. What the Apex Court has said in M/s. International Woolen Mills Vs. M/s. Standard Wool (U.K.) Ltd., deserves attention. It reads as under:

Where, however, no evidence is adduced on the plaintiff's side and his suit is decreed merely because of the absence of the defendant either by way of penalty or in a formal manner, the judgment may not be one based on the merits of the case.

17. Thus, it needs no emphasis that in a case where no evidence is led, decision rendered in the absence of the opposite party would not be on merits. The documents referred to by the Dubai Court in the foreign judgment (Annexure-R-1) are photocopies and have not been proved by any witness by deposing in support of those documents. The proposition that the foreign judgment (Annexure- R-1) was on merits as all documents and particulars had been endorsed with the "Statement of Claim" stands negatived by the Apex Court in "Standard Wool. (Supra), wherein it has been declared in unequivocal terms that if an ex parte decree was passed in a summary manner under a special procedure, without going into the merits and without taking the evidence, then those decrees would not be executable in India. Though, it is noticed by the

Dubai Court in the "foreign judgment. (Annexure R-1) that the rule is that the plaintiff has to establish his right and the Defendant is to rebut the same, but there is no worthwhile appreciation of documents of the plaintiff/ appellant in the "foreign judgment. (Annexure- R-1) to even prima facie show that the plaintiff/ Appellant had succeeded in its right to the suit amount claimed. Therefore, viewed from any angle, foreign judgment (Annexure- R-1), cannot possibly be said to be a judgment on merits.

18. In our considered opinion, learned Single Judge has rightly applied the ratio of "Standard Wool. (Supra) to conclude that the "foreign judgment and decree. (Annexure- R-1) obtained by the plaintiff/ Appellant, is not a decree on merits and it contravenes Section 13(b) of the CPC and is as such not executable in India. As already noticed above, it also violates the principles of natural justice i.e. Section 13(d) of the CPC, which provides that where the proceedings in which the foreign judgment is obtained, are opposed to natural justice. The foreign judgment (Annexure- R-1) rendered by the Dubai Court does not satisfactorily deal with the vital aspect of service of summons/ notice upon the Respondent/ Defendant or its Attorney.

19. It was vehemently argued by the learned Senior Counsel for the Appellant that plea of limitation was not taken by the Respondent in his application under Order VII Rule 11 of the CPC, but the learned Single Judge has non-suited the plaintiff/ Appellant by holding that the suit of the plaintiff / Appellant is time barred. All that has been said in the impugned order on the limitation aspect is as under:

Thus, the period of limitation shall start from 5th September, 1998 and not from the date of attachment order delivered by the Dubai Court. If the cause of action is based on the letter of guarantee dated 7th March, 1995, or from denial of dues, the suit filed in November, 2001 would be beyond the period of limitation

20. The operative part of the impugned order makes it clear that the Appellant's/ plaintiff's suit has been rejected being not maintainable and not on the ground of being time barred. We are of considered view that learned Single Judge has correctly arrived at a conclusion that Appellant's suit is for the rest of the amount of the foreign judgment and decree, which is not on merits and therefore, not enforceable in India. Rejection of Appellant's suit is also justified because it is solely based upon the foreign judgment and decree, which includes the claim based on personal guarantee. For this very reason, Appellant could not have maintained this suit solely on the basis of personal guarantee of 7th March, 1995, by asserting that it was continuing one.

21. For the aforesaid reasons, we do not find any merit in this Appeal and the same is dismissed, while leaving the parties to bear their own costs.