

(1998) 10 DEL CK 0018

In the Delhi High Court

Case No : E.A. No. 206 of 1998 in Ex. No. 38 of 1998

Formosa Plastic Corporation Ltd.

APPELLANT

Vs

Ashok Chauhan and Others

RESPONDENT

Date of Decision : 08-10-1998

Acts Referred:

Citation : (1999) 1 AD 392 : (1998) 76 DLT 817

Hon'ble Judges : J.B. Goel, J

Bench : Single Bench

Advocate : Mr. R.K. Anand and Mr. Arun Birbal, for the Appellant; Mr. Shanti Bhushan and Mr. Prashant Bhushan, for the Respondent

Judgement

J.B. Goel, J.—M/s. Formosa Plastic Corporation of U.S.A. (for short "Formosa") had filed a suit for recovery of US \$ 19,935,539.38 on account of price of goods sold and delivered against M/s. Kunstoplast of America Inc. (for short "KOA") as principal debtor and Ashok Kumar Chauhan (for short "Chauhan") as guarantor/surety in the District Court at Texas, USA. Chauhan had executed guarantee for the liability of KOA on 19th October, 1993. Subsequently, on March 25, 1994 the parties have further entered into a letter agreement which further defined their relationship whereby Formosa was to supply certain quantities of Resin on the terms and conditions mentioned therein. Chauhan had again executed personal guarantee dated 18th March, 1994. Dues remained unpaid. On February 20, 1995 Formosa filed a suit against KOA and Chauhan. Both were duly served but they failed to file response and a default judgment was given. Both filed joint motion for new trial. Motion of KOA was disallowed and Chauhan's was allowed. Chauhan disputed the claim and also filed a counter-claim. Counter-claim of Chauhan was separated and his objections were dismissed and a decree was passed. Appeal filed before the Appellate Court of Texas has been dismissed on 11th June, 1998.

2. In the meantime, Formosa sought execution of the decree before the High Court of Justice Chancery Division, London against Chauhan. Chauhan filed

objections which were dismissed and a judgment/decreed was passed on 24th October, 1997 by the High Court. Appeal filed was subsequently dismissed by the Appellate Court on 6.4.98.

3. In the meantime, the High Court of Justice, London vide order dated 30.1.1998 gave leave to Formosa to enforce the decree passed on 24.10.1997 in India to the extent of seeking relief in the nature of Mareva relief.

4. On the basis of judgment dated 24.10.1997 Formosa filed an application before this Court impleading Chauhan, his wife, son and brother as respondents No. 1 to 4 and sought injunction for restraining the latter from transferring by sale or otherwise certain properties including Bank accounts, trust properties and some immovable properties alleging that those properties/ assets belonged to Chauhan and had been acquired fraudulently in the names of respondents 2 to 4 or other trusts.

5. On this application vide orders dated February 17, 1998 and February 19, 1998 passed by this Court, respondents were restrained from alienating, disposing of or otherwise encumbering any of those properties. Chauhan has filed objections against these orders, and has challenged the enforceability of the judgment passed by the High Court of Justice, London inter alia on the grounds, (i) that the judgment was not given on merits; (ii) judgment had been obtained by fraud; (iii) it was in violation of natural justice; and (iv) there is no judgment/ decree passed against respondent No. 2, 3 and 4 and as such no injunction could be passed against them restraining them from transferring their properties; and (v) remedy of Mareva injunction could be obtained by filing a suit and not in execution proceedings.

6. I have heard learned Senior Counsel for the parties who have addressed arguments at length.

7. First contention of the learned Senior Counsel for the objector is that there is no reciprocity arrangement with the American Courts and as such the decree passed by Texas" Court is not executable in India; also that the judgment of that Court was not given on merit, and for these reasons the judgment of the English Court is also not executable in India. He has relied on D.T. Keymer Vs. D. Visvanathan Reddi AIR 1916 PC 121.

8. This is disputed by learned Senior Counsel for the applicant who has contended that the judgment of the Texas and also of the English Court has been given on merit and the judgment of the English Court is enforceable in India u/s 44-A of the CPC (for short "Code") read with Section 13 of the Code.

9. He has cited certain case law in support of his contention that it is a judgment given on merits. Sub-Section (1) of Section 44-A of the Code reads as under:

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

10. USA has not been declared as a "Reciprocating Territory" by the Central Government. As such its decree/judgment is not executable in India.

11. However, England has been so declared and its judgment/decreed is executable under this provisions.

12. Section 13 of the Code provides as under :

13. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except -

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

(b) where it has not been given on 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.

13. Facts and material which gave rise to passing of the decree by the Texas Court are available on record. These facts have also been noticed in the judgment dated June 11, 1988 of the Fourteenth Court of Appeals, of the State of Texas, as under:

"In the early 1990s, Formosa and KOA entered into an agreement for the sale of Chemical resins. Pursuant to the agreement, Formosa began delivering resins, but KOA failed to tender payment. Formosa sought security to cover KOA's ... Chauhan signed an individual guarantee ("the guarantee") in 1993 in which he personally vouched for the "existing and future qualified claims of Formosa".

14. In addition, on March 25, 1994, both parties entered into a letter agreement ("the letter agreement") which further defined their relation-ship. Under the terms of the letter agreement, Formosa and KOA were to enter into a supply agreement specifying the amount of resin Formosa was to provide. The letter agreement also set forth various financing terms, i.e., KOA agreed to execute an irrevocable letter of credit in favor of Formosa; a term loan agreement acknowledging its indebtedness for \$ 19,885,795.63; and a security agreement giving Formosa a senior perfected security interest in all of its property. Moreover, Chauhan was obligated under the letter agreement to execute personal guarantees to Formosa to ensure the performance of these obligation.

15. The record also contains a document entitled "Direct Suretyship" which Chauhan signed in his individual capacity one week before the letter agreement. The purpose of the suretyship was "to secure the claims arising out of [KOA's]

debt". The "Direct Suretyship" also expressly provides," Any payments under the separate guarantee issued by the curator in favor of the creditor shall be deemed to be a payment to the obligations under this suretyship as well".

16. On February 20, 1995, Formosa sued KOA for breach of contract and Chauhan for breach of the guarantee agreement. KOA and Chauhan were properly served through the Secretary of State. However, they failed to file an answer and the Court entered a default judgment against both KOA and Chauhan. Upon receiving notice of the default, KOA and Chauhan filed original answers and a joint motion for new trial. Although the Trial Court granted Chauhan's request for a new trial, it denied KOA's motion. Formosa then filed a motion for partial summary judgment against Chauhan contending it had established all of the elements necessary to prove its cause of action against Chauhan as guarantor. The Trial Court agreed and granted Formosa's motion. KOA and Chauhan each filed a second motion for new trial, and the trial judge overruled both motions. Final judgment was entered against both defendants, joint and severally, for damages in excess of \$ 20 million."

17. There was relevant material including documentary evidence and also affidavit evidence in support of the petitioner's claim before the Trial Court of Texas. KOA did not appear to contest the suit and default judgment was given against it and its motion for retrial was rejected.

18. Before the Appellant Court two contentions were raised on behalf of KOA:

- (1) It had a meritorious defense to Formosa's cause of action and its failure to answer was not the result of conscious indifference; and
- (2) The doctrine of res judicata barred Formosa's claims.

The Appellate Court did not find any merit in the first contention.

19. The second contention was not pleaded and raised before the Trial Court. The Appellate Court held that it could not be allowed to be raised in appeal on the ground of waiver. On merit also, it did not find any merit in this plea.

20. KOA thus did not raise any triable issue before the Trial Court of Texas. In the circumstances, it cannot be said that judgment against KOA was not on merits.

21. Chauhan also did not raise any substantial triable issue before the Texas Trial Court. The Appellate Court has noticed the defense/plea taken by Chauhan, which is as under:

"In the affidavit attached to his response to Formosa's notice for summary judgment, Chauhan states Formosa represented to him that, (1) Formosa's rights under the guarantee were waived, superseded terminated and were the subject of an accord and satisfaction; (2) Formosa was waiving its rights to sue him on the guarantee; and (3) the guarantee was no longer valid and was to be replaced by the direct suretyship."

22. The Trial Court had obviously considered these plea before passing the judgment. The Appellate Court has held that this affidavit of Chauhan was not proper and competent summary judgment proof. The contentions raised before the Appellate Court were considered but found without any substance.

23. Before the judgment in appeal was delivered by the Appellate Court of Texas on 11.6.1998, Formosa had sought execution of the decree passed by the District Court of Texas in the High Court of Justice, London. Objections were filed against its enforceability but Chauhan did not appear at the time of hearing and the same was dismissed on 24th of October, 1997 by a reasoned judgment. It appears that the only contention raised and which was considered by that Court but rejected was "the Texas judgment was given on the consideration of written briefs without there being any oral hearing." Apparently no objection had been taken before that Court that the judgment passed by the District Court of Texas was not on merits. Chauhan had also gone in appeal against the judgment dated 24th October, 1997 of the High Court of Justice, London. There also he had not taken this plea. Even the plea that the judgment had been entered without an oral hearing which had been rejected by the Trial Court was not pressed before the Appellate Court of England.

24. It is thus clear that Chauhan had not taken the plea that the judgment was not given on merits before the Trial Court or the Court of Appeal in England.

25. In the case of D.T. Keymer (supra) relied on behalf of Chauhan, a suit for money was brought in the English Court against the defendant as partner of a certain firm wherein the latter denied that he was a partner and also that any money was due. The defendant was served with certain interrogatories to be answered; on his omission to answer them his defense was struck off and judgment entered for the plaintiff. plaintiff then filed another suit against defendant in Madras on the basis of this judgment. The defendant again took the same pleas denying his liability. The question that arose was whether the judgment on which suit was based was given on merits of the case within the meaning of Clause (b) of Section 13 of the Code. It was held that this clause refers to those cases where for one reason or another, the controversy raised in the action has not, in fact, been the subject of direct adjudication by the Court and in that case because the defendant refused to answer the interrogatories his defense was struck off and the merits of the case were not investigated. And it was held that as the decision was not given on merits, it was not enforceable under Clause (b) of Section 13 of the Code. Obviously that judgment was given without going into merits of the case but by way of a penalty on mere default.

26. Learned Senior Counsel for the decree holder on the other hand has contended that this judgment in the circumstances, is a judgment given on merits, both by Texas Court as well as by the English Courts.

27. It is well settled that it is not open to the Court trying the suit on a foreign judgment to decide whether the decision of the foreign Court on the materials

put before it is right or not. The duty of the Court is merely to see that the foreign Court has applied its mind to the facts of the case and the law on the point. In *Dr. Kulwant Vs. Dhan Raj Dutt* AIR 1935 Lah 396, it was held that the expression "judgment on the merits" is used in contradistinction to a decision on a matter of form or by way of penalty and where procedure is strictly followed and defendant though is given full opportunity to appear and raise a defense voluntarily refrains from doing so, a decision of foreign Court passed ex parte must be taken to have been decided on the merits. In *Shaligram Vs. Daulat Ram*, wherein a summary suit instituted in the Bombay High Court, the defendant, resident of the former Hyderabad State, appeared in obedience to the process of the Court and applied for leave to defend the suit without any objection to the jurisdiction of that Court and the same was granted to him on condition of his depositing certain amount in Court within the prescribed time but on his default an ex parte decree was passed against him. The decree was transferred to a Court in Hyderabad a foreign Court at the time of decision by the Bombay Court. Objection taken by the defendant that the decree was not executable was dismissed and it was held that the defendant had submitted to the jurisdiction of a foreign Court and Therefore, the ex parte foreign decree passed against him was valid. A judgment given after considering the merits of the matter, even if it is ex parte, is a judgment "given on merits" (See *Trilochan Choudhury Vs. Dayanidhi Patra*, and the judgments relied therein).

28. In the present case, as already noticed, the suit of Formosa disclosed facts, supported by documentary and affidavit evidence and KOA and Chauhan had not raised and triable and bona fide defense before the Texas' Courts. He also did not raise such a plea before the English Courts. The Trial Court as well as Appellate Court later on had considered the merits of the controversy raised before them. In the circumstances, it cannot be said that the judgment passed by the Texas Court or by the English Court has not been given on merits of the case. This plea has obviously been taken for the first time in this Court. Section 13 of the Code provides that foreign judgment is conclusive between the parties. This means that foreign judgment is res judicata between the parties. This plea is barred by rule of res judicata u/s 11 of the Code also.

29. The second contention raised is that the judgment in question is opposed to natural justice. This ground falls under Clause (d) of Section 13 of the Code. Though this point was raised during oral arguments here, however, thereafter the written submissions have been filed but this plea has not been raised in those submissions. Chauhan has not raised this plea before the Appellate Court of Texas. Chauhan had filed objections against the enforceability of the judgment of Texas Court before the High Court of Justice, London. Initially he had not taken the objection that the judgment of the Texas Court was in breach of natural justice. However, subsequently he sought to take the plea that he was not given an opportunity to appear and make "oral submissions" in the Texas Court. Chauhan did not appear at the time of hearing before the High Court of Justice on 24.10.97 but this objection that the Texas judgment was obtained in breach

of natural justice was considered and it was found without any substance and it was held that judgment was given on consideration of written briefs and oral hearing was not claimed. The legal position in regard to oral hearing in England and also as applicable in Texas Court was gone into by the High Court and it has been observed as under:

"I have been taken through the evidence about Texas procedure on matters of this kind. I would be unwilling to state, as a matter of general principle, that the absence of an oral hearing is, without more, a breach of natural justice according to what our concept of natural justice requires. The maxim *audi alteram partem* is, to my mind, capable of being satisfied by hearing the parties' submissions on paper and does not necessarily require that they be heard orally."

30. As regards the legal position applicable in Texas Court, it was observed".. It appears that the procedure in Texas is that an oral hearing will be granted on an application of the kind made by the plaintiff if either side requests an oral hearing. The plaintiff did not request an oral hearing because it did not consider that the issues raised made an oral hearing necessary.

The first defendant was represented by Texas attorneys who lodged a written brief and they too did not request an oral hearing. I would take a great deal of convincing that the reason why they did not request an oral hearing was anything other than that they did not consider an oral hearing necessary....". The High Court of London accordingly rejected this objection that the Texas judgment was obtained in breach of natural justice. No objection was also taken before the High Court of London that the Texas judgment was not given on merits. Learned senior Counsel for the objector has not contended or cited any authority to show that this principle of natural justice in India is different from that is applied in England where it was held that right of oral hearing is not necessarily a part of the rule of natural justice. This objection also has no merit and is also barred by rule of *res judicata*.

31. The third contention is that it was obtained by fraud. This ground falls under Clause (e) of Section 13 of the Code. The plea of Chauhan in this respect is that the claim made by Formosa before the Texas District Courts pertains to the supplies made to, (i) Formosa Plastics Corporation Louisiana (FPC - Louisiana) amounting to US \$ 6,747,071.94; (ii) Formosa Plastics Corporation Texas (FPC - Texas) amounting to US \$ 13,139,323.99 plus an additional entry of US \$ 49,743.75 of FPC -Texas; that these two companies are separate entities and independent of KOA and the defendant Chauhan had never undertaken their liability as guarantor. This fact was concealed and the decree is obtained by fraud; that he had no document when the case was pending in Texas Court and that "it was only after Texas judgment that first defendant could arrange part of the document from Germany by which he came to know of the fraud played by the plaintiff". It is not specifically mentioned when the alleged fraud was actually discovered. In reply, this plea is refuted and *inter alia* it is contended that: (i) on these allegations, no fraud is disclosed; (ii) this plea was considered by the

American Courts but was not found proper and rejected; (iii) this plea was also considered and rejected by the English Courts; (iv) this Court is not sitting in appeal over those Courts and cannot go into this plea; (v) this plea is belated and the facts in support are not correctly given.

32. Plea to this effect had not been taken before the American Courts though appeal was dismissed there on 11.6.1998. This plea was also not taken before the High Court of England. It was sought to be raised by amendment before the English Appellate Court but was not entertained being belated, not bona fide and was also found not making out a case of fraud.

33. In these proceedings for enforcement of the foreign judgment, Chauhan cannot be allowed to ask for a re-trial of the issue of fraud as between him and the plaintiff on facts known to him at the time the judgment was rendered by the Courts, both American and English. The merit of this plea has been considered by the Appellate Court of England but was found without substance. This ground is also barred by rule of res judicata u/s 11 of the Code. This contention thus also has no force and is rejected.

34. Learned Senior Counsel for the objection has also contended that the relief in the form of Mareva injunction is an interim relief which can be granted only when a suit is pending and as no suit is pending before this Court, this relief could not be granted.

35. Learned Counsel for the decree-holder has refuted it and has contended that the foreign judgment has been made enforceable to the extent of obtaining Mareva relief and in view of this limited enforceability available when the application was filed, the properties of the judgment-debtor could not be sold in execution but the same can be attached or otherwise an order of injunction can be passed against alienating the same. The intention of the English Court was to secure the interest of the applicant during the pendency of appeal before American Court.

36. The High Court of London while passing the decree on 24.10.97 has ordered that the decree shall not be enforced without the leave of the Court unless and until the appeal of Chauhan to the Court of Appeals of Texas shall have been dismissed. And by the subsequent order dated 30th January, 1998 it granted leave to the petitioner-decree holder limited to the extent of Mareva relief.

37. The name "Mareva injunction" came from the case of *Mareva a Compania Naviera SA Vs. International Bulk Carriers SA* 1980 (1) All. E.R. 213, wherein the Court of Appeal in England had approved of the making of an injunction restraining the defendants from removing or disposing out of the jurisdiction monies standing to the credit of the defendants at a London Bank until trial of the action or further order. The plaintiffs were shipowners and the defendants voyage charterers; they had received payment for the freight into that account but had not paid the hire due to the plaintiffs. The scope of this remedy has since been widened and this remedy by way of injunction may be granted to a plaintiff

with a proper claim in any case where there are grounds for fearing that the defendant may defeat justice by transferring assets abroad or by concealing them in that country.

38. This principle has now received the recognition and approval of Parliament and has been enacted in Section 37 (3) S.C.A. 1981.

39. The Mareva injunction is now an established feather of English Law which could be granted where it appears likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum and there are reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, wholly or in part, but may deal with them, whether by removal out of the jurisdiction or disposing of them within the jurisdiction so that they are not available or traceable when the judgment is given against him.

40. The purpose obviously is for preventing a defendant from dissipating or concealing his assets so as to make a judgment against him worthless or difficult to enforce.

41. The purpose and object of limiting the enforceability of the judgment by the English High Court in India is to preserve the properties of the judgment-debtor from being alienated or dissipated. This remedy is analogous to the remedy of attachment before judgment as provided under Order 38, Rule 5 and injunction under Order 39, Rules 1 & 2 of the Code before a decree is passed. However, after a decree is passed a decree could be executed under Order 21, Rule 30, inter alia, by the attachment and sale of the property of the judgment-debtor, if in his possession or under Order 21, Rule 46 if not in his possession in case of movable property and under Order 21, Rule 54 in case of immovable properties.

42. There seems to be no legal impediment if in such a case a judgment-debtor is restrained from alienating, disposing of or in any manner encumbering or dissipating his property which may be sold in execution of the decree when the bar against execution of the decree is lifted. Assuming that Order 21, Rules 30, 46 and 54 and Order 39, Rules 1 & 2 and Order 38, Rule 5 are not available in the present case, such an order could be made under the inherent power of the Court u/Sec. 151 of the Code which provides that "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

43. By now the appeal has since been dismissed by the Texas Appellate Court on 11.6.1998. Appeal against the judgment of the High Court of London has also since been dismissed on 6.4.1998. The judgment/decreed of the English Court has thus become final. It is now executable in India. This objection has thus lost its significance now.

44. `Objection has also been taken that the properties in question do not belong to Chauhan and there is no decree against respondents No.2,3 and 4 or the

independent trusts, foundations and companies with which the defendants are associated and as such these properties could not be attached and sold in this decree and for that matter no injunction restraining their transfer could also be passed.

45. The question whether the assets and the properties in question are owned and/or possessed by Chauhan and/or the names in which they may have been acquired are fictitious or fraudulent or merely cloaks can be decided after parties have led evidence. The Court has always the power of lifting the corporate veil or mere cloaks where device is employed and the properties have been acquired fictitiously in others names for the purpose of committing illegalities or for defrauding others so as to enable it to pass appropriate orders to do justice between the parties concerned. (See Delhi Development Authority Vs. Skipper Construction Company (P) Ltd. and another, .

46. In view of this discussion, the objection petition of respondents being EA No. 206/98 has no merit and the same is hereby dismissed and interim orders dated February 17, 1998 (in EA No. 78/98) and February 19, 1998 (in EA No. 80/98) are hereby confirmed.

47. EAs No. 78/98, 80/98 and 206/98 stand disposed of accordingly.

This case may now be listed before the appropriate Bench for directions on 16th October, 1998.