
(1999) 12 P&H CK 0117

In the Punjab And Haryana At Chandigarh

Case No : Civil Revision No. 2703 of 1999 and Civil Miscellaneous No. 12083-CII of 1999

International Woolen Mills

APPELLANT

Vs

Standard Wool (U.K.) Ltd.

RESPONDENT

Date of Decision : 09-12-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 13, 38, 39, 40

Citation : AIR 2000 P&H 182 : (2000) 124 PLR 541 : (2000) 2 RCR(Civil) 249

Hon'ble Judges : N.K. Agrawal, J

Bench : Single Bench

Advocate : A.K. Chopra and Puja Malhotra, for the Appellant; Aman Hingorani and Reema Bhandari, for the Respondent

Final Decision : Dismissed

Judgement

N.K. Agrawal, J.—This is a revision petition by the Judgment-debtor against two orders, both dated March 15, 1999, passed by the Civil Judge (Junior Division), Ludhiana, whereby judgment-debtor's applications challenging the execution proceeding have been dismissed.

2. The plaintiff/decreed-holder is a Company incorporated and registered in England. It is engaged in the business of selling wool. The defendant Company is engaged in the business of buying wool and manufacturing woolen knitwears at Ludhiana in India. The plaintiff and the defendant entered into an agreement on August 21, 1996 and the plaintiff agreed to sell to the defendant 45 bales of wool described as greasy fleece wool of good colour. The goods were shipped to Bombay on C.I.F. terms on September 14, 1996. Invoice dated September 17, 1996 for U.S. \$ 44,206.50 was received by the defendant Company at Ludhiana. Full contract price was to be paid by the buyer by December 16, 1996, The buyer Company of Ludhiana did not make the payment on the ground that the U.K. Company had supplied the goods of much inferior quality. The wool supplied was suitable for only carpet industries and not for manufacturing high class

knitwears. However, delivery of goods was taken by the buyer Company on an assurance from the U. K. Company that the material was the same as ordered. It is alleged by the buyer Company that the U.K. Company played fraud with it by supplying goods of inferior quality. A legal notice dated October 18, 1997 was sent by the U.K. Company to the Ludhiana Company. A claim for the recovery of price with interest was filed by the U.K. Company before the Central London County Court (for short, the "London Court"). It was decreed on April 20, 1998. The U.K. Company filed an execution application in the Court of Civil Judge at Ludhiana.

3. The judgment-debtor, i.e. the Ludhiana Company, raised the objection that the execution application could not be directly filed by the U.K. Company in the Court of Civil Judge at Ludhiana and that the Civil Judge at Ludhiana was not competent to entertain the execution application. It was also stated in the objection petition by the judgment-debtor that the execution application had been filed without following the procedure laid down in Sections 38, 39 and 40 of the Code of Civil Procedure.

4. A second objection petition was also filed by the judgment-debtor raising an objection that the decree of the London Court was not executable in view of Section 13(b). Civil Procedure Code, as the decree was not passed on merits of the case. It was alleged that the foreign judgment sought to be executed at Ludhiana had not been given by the London Court on the merits of the case. Since the judgment was not conclusive as to the matter between the parties, it could not be executed.

5. The Executing Court at Ludhiana, namely, the Civil Judge (Junior division), has dismissed both the applications filed by the judgment-debtor by two different orders, both passed on March 15, 1999. The present revision petition has been filed challenging both the orders. Learned counsel for the judgment-debtor has not explained as to how one revision petition was maintainable for challenging the two different orders. It would not matter that both the orders have been passed by the Executing Court on the same day. Two orders have been passed on two different applications filed by the judgment-debtor. Be that as it may, the matter may also be examined on merits. First objection petition dated October 25, 1998 filed by the judgment-debtor raised only one objection that the execution application had been wrongly filed by the decree-holder, namely, the U.K. Company, without following the procedure of Sections 38, 39 and 40, Civil Procedure Code, and that the execution application could not be filed directly in the Executing Court. The second application was subsequently filed raising the question under Sections 13 and 44-A of the Code of Civil Procedure. It was stated that the judgment of the London Court was in the nature of an ex-parte decree and was not on the merits of the case. The judgment could not, therefore, be executed in India. Another question was raised that the decree-holder could not proceed with the execution without permission from the Reserve Bank of India and the Central Government.

6. Learned counsel for the decree-holder has opposed the revision petition with the plea that the second objection petition filed by the judgment-debtor in the Executing Court was barred by constructive res judicata. As regards the first objection petition, it has been argued that the decree-holder had two options. He could either get the decree transferred from the Court which had passed the decree to the Executing Court in compliance of Section 39, Civil Procedure Code, or he could directly file an application for execution of the decree u/s 44-A, Civil Procedure Code.

7. Learned counsel for the judgment-debtor has contended that the Executing Court disposed of both the objection petitions filed by the judgment-debtor on the same day and, therefore, the principle of constructive res judicata was not attracted. The first application objecting to the maintainability of the execution petition was pending. Since the procedure as laid down in Sections 38 to 40, Civil Procedure Code, had not been followed by the decree-holder, the execution petition was not maintainable. Since the first application was pending and had not been disposed of, the second objection petition filed by the judgment-debtor was not barred by the principle of constructive res judicata.

8. Learned counsel for the decree-holder has, on the other hand, placed reliance on a decision of the Calcutta High Court in *Sri Madan Mohon Jew Vs. Sm. Bejoyabati Dassi and Others*, . It has been held that where previous application under Order 21, Rule 80, Civil Procedure Code, had been dismissed for failure to make necessary deposit, subsequent application under Order 21, Rule 90, was barred inasmuch as the ground of attack now raised had not been taken up in the previous application. Similar view has been taken by the Patna High Court (Full Bench) in *Baijnath Prasad Sah Vs. Ramphal Sahni and Another*, . It has been held that the principle of constructive res judicata was applicable to the execution proceedings also. The Andhra Pradesh High Court has also taken the same view in *K. Santha Kumari Vs. Suseela Devi*, and *K. Venkata Subrahmanyam and Another Vs. Premier Bank of India, Nellore and Others*, .

9. The applicability of the principle of res judicata has been considered by the Rajasthan High Court in *Janki Vallabh Vs. Moolchand and Others*, , and the Delhi High Court in *Matu Ram and Sons and Another Vs. Elgin Mills Co., Ltd. and Others*, . It has been held that the principle of constructive res judicata can be attracted to different stages of the same execution proceedings. If the judgment-debtor filed objections to the execution but did not take a plea, he was barred to take up that plea in the subsequent application by the principle of constructive res judicata.

10. This Court had also an occasion to examine a similar matter in *Rocky Tyres and Others Vs. Ajit Jain and Another*, . In that case, two rounds of litigation had taken place and parties had gone upto the Supreme Court. It was held that all pleas raised now could be raised in the earlier petition. They shall be deemed to have been raised and rejected.

11. Supreme Court in Prem Lata Agarwal Vs. Lakshman Prasad Gupta and Others, , has held that principle of res judicata applied to the execution proceedings also.

12. In P.K. Vijayan Vs. Kamalakshi Amma and Others, , it has been held that if a party omits to raise all available and relevant pleas which he might and ought to have raised in that proceeding, the omission constituted res judicata.

13. In Sharadchandra Ganesh Muley Vs. State of Maharashtra and others, , it has been observed that where a plea as to the bar of limitation had not been raised in the petition challenging the acquisition of land, the appellant was precluded to raise the controversy once over in view of the doctrine of constructive res judicata.

14. The judgment-debtor had un-disputedly filed his first objection petition challenging the execution on specific grounds. He did not there take up the plea which he subsequently raised in his second application. Though the first objection was pending, that would not help the judgment-debtor nor will it permit him to raise more objections in the second petition. The principle of constructive res judicata would apply. The second petition is, therefore, held to be barred and not maintainable on the principle of constructive res judicata.

15. It would be now appropriate to examine the argument raised by the learned counsel for the judgment-debtor. He has contended that the judgment and decree dated April 20, 1998 passed by the London Court was not a judgment on merits in terms of Section 13(b), Civil Procedure Code. The order passed by the learned Judge of the London Court on January 20, 1998 summoning the defendant, namely, the Ludhiana Company, for appearance in the Court reads as under :--

"BEFORE His Honour Judge Diamond QC sitting at 26 Park Crescent, London, W1 on the 20 January 1998.

UPON reading the Affidavit of Kaashif Basit sworn 20 January 1998.

IT IS ORDERED that the Plaintiff be at liberty to serve the Summons in this action on the Defendant at 131, Industrial Area-A, Ludhiana-141003. Punjab, India, or elsewhere in India, and that the time for acknowledging service shall be 23 days after service of the Summons on the Defendant."

16. The London Court passed the following final order on April 20, 1998 :-

"BEFORE His Honour Judge Hallgarten QC sitting at 26 Park Crescent, W1 on the 20 April 1998.

IT IS ORDERED that

1. There be Judgment for the Plaintiff in the sum, of US \$ 49,178.50 plus interest of US 717.00 ANF court costs. A total of US \$ 49,895.50 plus 243.75."

17. A perusal of the above order does not give an impression that the judgment

was rendered by the learned Judge of the London Court after discussing the evidence adduced by the plaintiff before him.

18. Learned counsel for the judgment-debtor has argued that there was no valid service of summons upon the judgment-debtor. Mr. Yash Paul, upon whom summons of the English Court is said to have been served, was not an employee of the judgment-debtor Company. Further, the learned Judge of the London Court did not discuss the merits of the case brought before him by the plaintiff.

19. Learned counsel for the decree-holder has, on the other hand, placed on the record of this case the copies of the affidavits and the documents which are stated to have been produced before the London Court. It has been contended by the learned counsel that the documentary evidence produced and exhibited in the London Court consisted of the agreement between the parties dated August 21, 1996, the test certificate dated September 6, 1996, Veterinary Health Certificate dated September 19, 1996, European Community Certificate of Origin, International Bill of Lading, Insurance Certificate and Invoice No. 4003 dated September 17, 1996, etc. Besides, two affidavits of Mr. Kaashif Basit, the Solicitor of the U.K. Company were also filed. The London Court proceeded ex parte after the summons of that Court had been served on the Ludhiana Company through Civil Judge (Senior Division), Ludhiana. Since the Ludhiana Company failed to put in appearance, the London Court proceeded to examine the matter and passed order on April 20, 1998. The judgment and decree are based on the documents filed in the Court. The learned counsel has argued that the mere absence of the defendant would not preclude the Court from giving judgment on merits. No effort was made by the judgment-debtor to file an application for setting aside the ex parte judgment dated April 20, 1998. The judgment-debtor has also not filed an appeal before the Court of Appeal in England. Since the U.K. Company produced all necessary documents in support of its claim, an ex parte judgment was given by the London Court on merits. A judgment can be said to be not on merits only if no oral or documentary evidence is produced in the Court. The judgment was not passed by the London Court under summary procedure. It was a regular trial after service of summons on the defendant. The judgment was not automatically passed as a penalty for non appearance or without investigating the merits of the case. The decree-holder thereafter filed a certified copy of the judgment dated April 20, 1998 before the Executing Court at Ludhiana and also filed the Non-satisfaction Certificate as is required by Section 44-A, Civil Procedure Code. The judgment, though ex parte, was passed on the merits after taking documentary evidence.

20. In *R.M.V. Vellachi Achi Vs. R.M.A. Ramanathan Chettiar*, , a similar matter came up for consideration before a Division Bench of the Madras High Court. It has been held that a foreign decree passed solely due to the default of appearance without taking any evidence in proof of the claim will not be considered as passed on merit.

21. Gujarat High Court in *Maganbhan Chhotubhai Patel v. Maniben* AIR 1985 Guj

187, has also taken the view, in a similar matter, that the decree passed without recording any evidence was not a decree on merits.

22. Orissa High Court had also an occasion to examine a similar foreign judgment In Chintamoni Padhan and Others Vs. Paika Samal and Others, . It has been held that the expression judgment on merits" implies that it must have been passed after contest and after evidence has been led in by both sides. Where the judgment of the foreign Court is not a judgment passed on the merits, it is not conclusive on the point decided therein.

23. Bombay High Court in Algemene Bank Nederland NV Vs. Satish Dayalal Choksi, , has also considered a similar matter with regard to the conclusiveness of a foreign judgment. It has been held that where foreign judgment has not been given on the merits, it could not be executed in India. Judgment given ex parte on the basis of plaintiffs pleadings and documents tendered by him without going into the controversy between the parties was not a judgment on merits.

24. Calcutta High Court in Middle East Bank Ltd. Vs. Rajendra Singh Sethia, , has also taken a similar view on the executability of a foreign judgment. It has been held that where an ex parte decree is given under summary procedure without consideration of the plaintiffs evidence, it is not conclusive foreign judgment in the context of Section 13, Civil Procedure Code, and is not executable in India.

25. A similar question was examined by this Court in Gurdas Mann and others Vs. Mohinder Singh Brar, . It has been held that where a decree was passed ex parte merely on pleadings of the plaintiff and because the defendant chose not to appear, it was not a decree on merits and it could not be executed.

26. The argument raised by the learned counsel for the judgment-debtor is found to have substance inasmuch as the judgment of the London Court given on April 20, 1998 is not a judgment on the merits of the case. Though the learned counsel for the decree-holder has filed copies of various documents, which are said to have been produced before the London Court, there is nothing on record to show that these were examined by the London Court. The judgment dated April 20, 1998 does not contain any reference to these documents. There is no discussion of any document which is said to have been filed in the Court by the U.K. Company as a plaintiff. Though it is stated that two affidavits had also been filed by the Solicitor of the plaintiff before the London Court, there is no discussion on the same in the judgment. The London Court has referred to an affidavit in its order dated January 20, 1998 directing the plaintiff to serve the summons on the defendant. A bare perusal of the judgment shows that evidence of the plaintiff has not been considered and examined at all. The argument put forward by the learned counsel for the judgment-debtor, therefore, succeeds.

27. Since the plea that the judgment of the London Court is not a judgment on the merits was taken up by the judgment-debtor in the second objection petition, the finding arrived at hereinabove in favour of the judgment-debtor would not help him inasmuch as the second objection petition was not maintainable on the

principle of constructive res judicata. No reasons have been given as to why the plea raised in the second objection petition was not taken up in the first objection petition filed by the judgment-debtor. Since the second objection petition is barred by constructive res judicata, the order of the executing Court does not call for any interference.

28. The objections raised in the first objection petition are also found to be without any merit. There was no requirement to follow the procedure laid down in Sections 38, 39 and 40, Civil Procedure Code. Once the decree-holder opted to proceed u/s 44-A, Civil Procedure Code, it could directly file the execution petition in the Executing Court at Ludhiana.

29. In *Lakhpat Rai Sharm Vs. Atama Singh*, , it has been held that Section 44-A is an independent section. It is not controlled by the provisions of any other section. The moment a certified copy of a decree of any of the superior Courts of any reciprocating territory and a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted, are produced in a District Court in India, the decree may be executed in India as if it had been passed by the District Court. It is not necessary that the decree should have been transferred to the Court for execution by the Court which passed the decree.

30. On a consideration of the controversy, it is found that the objections raised in the first objection petition filed by the judgment-debtor did not have any merit. Nothing has been brought on record to show that the decree-holder, after having obtained a decree from the London Court, could not directly file the execution petition before the Court at Ludhiana, Section 13 read with Section 44-A, Civil Procedure Code, permit the decree-holder to file the execution petition.

31. The objections raised by the judgment-debtor in his first objection petition would, therefore, also not help him.

32. In the result, the revision petition is found to have no merit. It is dismissed. No costs.