
(2009) 12 GAU CK 0061
In the Gauhati High Court
Case No : Company Appeal No. 1 of 2009

Kitply Industries Ltd.

APPELLANT

Vs

California Pacific Trading Corporation

RESPONDENT

Date of Decision : 23-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 13, 14, 44A
Evidence Act, 1872 — Section 86

Citation : (2010) 153 CompCas 345 : (2011) 2 GLR 427

Hon'ble Judges : J. Chelameswar, C.J.; B.K. Sharma, J

Bench : Division Bench

Advocate : J.L. Gupta, M. Hazarika, Sanjay Bhatt, A. Ajitsaria and Sumanta Biswas, for the Appellant; A.K. Bhattacharyya, P.J. Saikia, A.N. Choudhury, K.K. Bhattacharyya, A.K. Choudhury and S. Dutta, for the Respondent

Judgement

1. Chelameswar, C.J.—Pursuant to the order dated July 29, 2009 Kitply Industries Ltd. Vs. California Pacific Trading Corporation, by which the preliminary issue was decided against the appellant herein, the appeal is listed for hearing on merits.

2. The basic facts of the appeal are stated in paragraphs 4, 5 and 6 of the abovementioned order which reads as follows (page 21 of 151 Comp Cas):

4. Pursuant to an agreement between the parties, the appellant herein supplied one of its products known as marine teak plywood to the respondent. On the ground that the materials supplied by the appellant were defective the respondent herein instituted a suit in the United States District Court, Middle District of North Carolina. The further details of the suit are not necessary for the present except to state that eventually the said suit came to be decreed on April 12, 2001, for a sum of US \$ 22,57,147.58.

5. On June 29, 2002, the appellant received a notice dated June 24, 2002, from the respondent demanding payment of the abovementioned decretal amount equivalent to Rs. 11,06,00,227 along with interest at the rate of 8 per cent, per

annum. The appellant disputed its liability. Consequently, the Company Petition No. 10 of 2002 California Pacific Trading Corporation Vs. Kitply Industries Ltd., came to be filed.

6. By the judgment dated November 19, 2008 California Pacific Trading Corporation Vs. Kitply Industries Ltd., the learned company judge allowed the company petition directing the appellant-company to be wound up. The present appeal was admitted on January 7, 2009, an interim stay of the operation of the judgment under appeal was ordered and the matter was directed to be heard finally at an early date. Consequently, the appeal was taken up for hearing on February 1, 2009.

3. Mr. J.L. Gupta, learned senior counsel for the appellant argued that though the appellant raised various questions of law under Sections 13 and 14 of the CPC, none of the objections were specifically decided by the learned judge by the judgment under appeal. According to learned Counsel the decree of the foreign court dated April 12, 2001, passed by the District Court of Middle District of North Carolina in the United States of America cannot be recognised by the Indian courts as (1) the said court has no jurisdiction to deal with the subject-matter of the dispute purportedly adjudicated therein, (2) that, such a decree was obtained in violation of the principles of natural justice, and (3) that, the said decree was obtained by fraud and, therefore, in view of the specific embargo contained u/s 13 of the CPC the abovementioned decree cannot be recognised by the Indian courts and consequentially no relief whatsoever on the basis of the abovementioned decree can be given.

4. At the initial stage of the proceedings, when the company petition came up for admission the appellant raised various objections including objections u/s 13 of the CPC but the same was never finally adjudicated upon. Learned Counsel pointed out in this regard to paragraph 2 of the judgment under appeal wherein the learned judge recorded the various objections based on Section 13 of the CPC raised by the appellant herein at the initial stage of the company petition. Against the order dated November 18, 2003 California Pacific Trading Corporation Vs. Kitply Industries Ltd., of admission of the company petition and directing advertisement thereof the appellant herein had earlier carried the matter in appeal being Company Appeal No. 4 of 2004 and the same came to be disposed of by a Division Bench of this Court on August 23, 2006 Kitply Industries Ltd. Vs. California Pacific Trading Corporation,

5. The Division Bench in the said appeal while specifically rejecting one of the objections raised by the appellant held as follows (page 289 of 142 Comp Cas):

10. Referring to the apprehension expressed by Mrs. Hazarika that the observation of the learned company judge in deciding the maintainability of the appeal might affect the appellant at later stage of the proceeding, we make it clear that those findings/observations have been made only for the purpose of deciding the limited prayer relating to the maintainability raised by the appellant

and the learned company judge will independently assess the matter at the final stage of hearing on the basis of defence that may be delivered by the appellant in support of its case.

6. Coming to the judgment under appeal, the learned judge did not adjudicate upon the objections raised by the appellant on the ground that an enquiry into the issues such as the one raised by the appellant would tantamount to going beyond the decree passed by the company court. At paragraphs 9 and 10 of the judgment the learned judge held as follows (351 of 148 Comp Cas):

10. Where the debt claimed to be due arises under a decree objections to the legality of the decree cannot be considered by the company court by going behind the decree as such a course of action may have the effect of converting the company court as an appellate forum against the decree. Such objections, therefore, must appear on the face of the decree and the same must go to the root of the matter and vitiate the decree. In the present case a reading of the order of the U.S. court amply discloses that facts have been recorded which according to the U.S. court clothed it with necessary jurisdiction to entertain the matter. The respondent-company in the additional affidavit dated February 5, 2008, has placed contrary materials to show that the contract was concluded in Kolkota and no part of the cause of action arose within the jurisdiction of the U.S. court/Furthermore, it is contended in the said additional affidavit that the primary facts on the basis of which jurisdiction was assumed by the U.S. court, i.e., visit of Sri Banka and Sri Gupta to U.S.A., were in connection with some other business and not with regard to the business giving rise to the claim and the decree. The facts pointed out in the additional affidavit of the respondent-company would necessarily require a determination which exercise will neither be feasible nor permissible to the company court to undertake. The plea taken up by the respondent-company in the affidavit, ideally, are matters which can be resolved either in an appeal against the decree or even in the course of the proceedings in execution of the decree by virtue of the provisions contained in Section 13 of the Code of Civil Procedure, 1908. In a situation where the U.S. court had recorded existence of certain facts conferring jurisdiction on it and the contrary facts cannot be tested in the present proceedings, this Court cannot hold that the objection of the respondent-company as to the lack of jurisdiction of the U.S. court should be sustained.

11. In so far as the objection of the respondent-company that the decree was not on the merits of the case, it will be suffice to say that a reading of the order of the U.S. court clearly shows that the claim of the petitioner/plaintiff was not decreed merely on the failure of the defendant (respondent-company) to offer its defence. The evidence and materials adduced by the petitioner, as the plaintiff, were duly considered and it is only thereafter that the decree was passed. A decree passed in the aforesaid manner cannot be said to be unconnected with the merits of the case.

7. One more submission made by learned Counsel for the appellant is that the

respondent never produced a certified copy of the foreign decree before the company judge, therefore, even on this count the conclusion of the learned judge that there was a debt due to the respondent herein from the appellant-company is not legally tenable.

8. In so far as the first submission of learned Counsel for the appellant, that the objections of the appellant based on Section 13 of the CPC, are concerned the learned judge did not examine the same on the ground that such an examination tantamount to going beyond the decree and is not permissible for the company court. We are of the view that the learned judge erred in reaching such a conclusion. We have already held in the order dated July 29, 2009, that the question of either recognition or enforcement of a foreign decree is subject to the principles of conflict of law of this country. Sections 13, 14 and 44A of the CPC are some of the provisions dealing with the rules of the conflict of laws in this country. While Sections 13 and 14 embody a rule of evidence whenever a foreign decree is sought to be relied upon for the recognition of any right based on such a foreign decree Section 44A deals with enforcement of specified class of foreign decrees by way of execution of the decrees.

9. Section 14 of the CPC mandates that a court shall presume on the production of any document purporting to be certified copy of a foreign judgment that such judgment was pronounced by a court of competent jurisdiction. Section 14 itself declares that the presumption is a rebuttable presumption. In other words any person seeking recognition or enforcement of a foreign decree can call in aid the presumption created u/s 14 to the limited extent of saying that the decree was passed by a court of competent jurisdiction but before such a presumption is pressed into service Section 14 requires that a certified copy of the foreign judgment must be produced before the court which is called upon to draw the presumption. However, even after the production of a certified copy of the foreign judgment the party resisting recognition or the enforcement of such a foreign judgment can always prove that the judgment was passed by a court which was not competent to adjudicate the dispute. The expression "certified copy" occurring u/s 14 though not defined under the CPC Section 86 of the Indian Evidence Act deals with the matter. We shall deal with the content of Section 86 later.

10. On the other hand Section 13 of the CPC embodies a rule of evidence that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated. In other words once a foreign judgment is produced seeking either the recognition or enforcement of the judgment, the judgment is declared to be conclusive with regard to any matter directly adjudicated by the judgment. In other words it shall not be open to the party resisting the recognition or enforcement of such a foreign judgment to plead that the judgment is erroneous either in fact or law. In other words the rule of res judicata contained u/s 11 is incorporated into Section 13. However, the conclusive nature of the judgment is subject to the various exceptions specified under Clauses (a) to (f) of Section 13,

that means that the party resisting the foreign judgment may not be able to resist it on the ground that either the judgment is erroneous but can still be resisted on grounds, such as lack of jurisdiction on the part of the court which pronounced the judgment or that there was a failure to comply with the principle of natural justice in the process of the judgment, etc.

11. We have already noticed in our order dated July 29, 2009 Kitply Industries Ltd. Vs. California Pacific Trading Corporation, that even in those cases where foreign decrees are executable by virtue of the operation of Section 44A of the CPC it is open to the judgment debtor to resist the enforcement of such a decree on the ground that the decree is unenforceable for one or some of the reasons mentioned u/s 13 Clauses (a) to (f). Section 44A(3), clearly recognises such a right.

12. In fact learned senior counsel for the respondent Mr. A.K. Bhattacharyya very fairly conceded that the various objections raised u/s 13 by the appellant herein are required to be considered.

13. Coming to the second submission made by learned Counsel for the appellant that in the absence of a certified copy of the foreign judgment the company petition could not have been adjudicated upon as there was no legal material before the court to establish the fact that the appellant herein owed any debt to the respondent. Learned Counsel for the respondent argued that such an objection having not had been made before the learned judge the appellant is debarred from raising the objection at this stage.

14. Section 86 of the Evidence Act embodies a presumption regarding the judicial records of any country not forming part of India. If a certified copy of any such judicial record is produced before any court of this country the court is required to presume that the record is genuine and accurate if such a document is further certified by the representative (such as the Ambassador, etc.) of the Central Government "in or for" the country of whose judicial records are sought to be relied upon. Such further certification (of the representative of the Central Government) is required to declare that the Tribunal certification of the judicial record is in the manner commonly used in that country for certification of the judicial records. In our opinion Section 86 of the Evidence Act must necessarily be read in conjunction with Section 14 of the CPC.

15. What is the interface between both the abovementioned sections is a matter which requires an examination. We only make it clear that Section 86 of the Evidence Act does not rule out other modes of proof in the context of a judicial record of a foreign country. It only provides for a presumption when a particular mode of proof is sought to be adopted.

16. For all the abovementioned reasons we are of the opinion that these various questions pointed out are required to be examined after an appropriate opportunity to both the parties and accordingly we deem it appropriate to remit the matter to the learned company judge for an appropriate adjudication of the

issues in accordance with law. Accordingly the matter is remitted back to the learned company judge.

17. In view of the fact that the litigation is pending in this Court for considerable length of time, we deem it appropriate to place on record that the matter requires an early consideration.

18. The appeal is accordingly disposed of.