

(2009) 07 GAU CK 0021
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 : 29-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 1(3), 10, 11, 12, 13
Companies Act, 1956 — Section 233A, 235, 237, 424G, 433
Evidence Act, 1872 — Section 40, 41, 42, 43
Foreign Judgments (Reciprocal Enforcements) Act, 1933 — Section 2

Citation : (2009) 151 CompCas 19 : (2010) 1 GLR 401 : (2009) 5 GLT 54 :
(2010) 103 SCL 250

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.—This company appeal arises out of an order dated November 19, 2008 in Company Petition No. 10 of 2002(California Pacific Trading Corporation Vs. Kitply Industries Ltd.,).

2. For the purpose of the present the full factual details of the company petition may not be necessary and we shall state only those facts which are relevant.

3. The respondent herein, a company incorporated in America, filed the abovementioned company petition under Sections 439, 433(e) and 434(1)(b) of the Companies Act, 1956, praying that the appellant, a company registered in India under the Companies Act, 1956, be wound up on the ground that the appellant-company is unable to pay its debts.

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.

7. On June 17, 2009, when the matter was taken up for hearing learned senior counsel for the appellant, Sri Jawaharlal Gupta, argued that since the petition u/s 439 of the Companies Act seeking winding up of the appellant-company on the ground that the appellant is unable to pay its debts is in the nature of an execution petition of a decree passed by the American court for realisation of the decretal amount and, therefore, the company court erred in allowing the company petition as the executing court can only execute those decrees passed by "superior courts" in "reciprocating territories" as defined u/s 44A of the Code of Civil Procedure, 1908; whereas the court from which the respondent obtained the decree is neither a "superior court" nor the United States of America or any part thereof is a "reciprocating territory" within the meaning of those expressions occurring u/s 44A of the Code of Civil Procedure, 1908. Learned Counsel has also submitted that such an objection was, in fact, raised before the learned company judge in the additional affidavit filed by the appellant before the company judge on February 5, 2008, but the learned company judge failed to examine the said question.

8. Though various other grounds are raised in the appeal regarding the correctness of the judgment under appeal learned Counsel appearing on behalf of either side in the appeal, agreed that if the abovementioned objection based on the noncompliance with Section 44A of the CPC is accepted, it goes to the root of the matter and the company petition, itself, is liable to be rejected on that ground and the other questions raised in appeal need not be gone into.

9. Hence, we heard submissions of learned Counsel for both the sides on the abovementioned question and by an order dated June 17, 2009, adjourned the appeal for a decision on the abovementioned preliminary issue.

10. For deciding the correctness of the objections raised by the appellant we are required to examine the following questions:

(1) What is the legal efficacy of a decree/judgment of a foreign court, such as the one relied upon by the respondent herein, in this country ?

(2) u/s 439 of the Companies Act, whether a petition (such as the one herein) is a petition for execution of a decree within the meaning of Section 44A of the CPC ?

11. The adjudicatory process in any civilised system is a mechanism established by the State for the peaceful resolution of the disputes arising between (i) its subjects inter se, or (ii) between the States and its subjects, or (iii) between either the State or its subjects on one hand and a foreigner on the other. To create the mechanism for the adjudication of disputes of the first two of the abovementioned three categories is, undoubtedly, within the powers of the State. Because the State has the necessary sovereignty to establish the legal system not only for the adjudication of such disputes but also for the enforcement of the legal rights and obligations determined by the process of adjudication. Coming to the third category mentioned above the State would, undoubtedly, have the authority to set up a mechanism for the adjudication of the rights of a foreigner against either the subjects of the State or the State itself. But when it comes to the question of the obligations of a foreigner the difficulty arises because the enforcement of such obligations would not be possible unless such foreigner is physically amenable to the coercive power of the State or has properties which are within the territory over which the State exercises its sovereign authority. The only other way such an obligation can be enforced against a foreigner is by consent of the State of which he is a subject. Such consent must be formed in the body of the law of such a country.

12. The Code of Civil Procedure, 1908, is the law which regulates the adjudicatory process of civil disputes in this country. Any person, who is otherwise not prohibited by law, seeking the determination and enforcement of his legal rights or legal obligations owed to him can do so by resorting to the procedure prescribed under the Code.

13. The CPC deals with adjudication (determination) of the existence of rights and obligations and also the enforcement of such rights and obligations duly adjudicated upon. The adjudicatory process commences with the initiation of a suit u/s 9 of the CPC and culminates in the pronouncement of a judgment followed by a decree u/s 33. Section 9 of the Code of Civil Procedure, which occurs in Part I, declares that "the courts shall have jurisdiction to try all suits of civil nature excepting suits of which their cognisance is either expressly or impliedly barred". Part I of the CPC contains various provisions generally dealing with the suit and the jurisdiction of the courts to entertain the various kinds of suits and incidental matters.

14. Part II of the CPC deals with execution of the decrees (sections 36 - 42).

None of the sections commencing from Sections 36 - 42 makes any reference to the territorial jurisdiction of the courts which passed the decree in the context of the execution of such decrees. By necessary implication Sections 36 - 42 deal with only the decrees passed by the courts to which the CPC applies. Such implication arises in view of the language and scheme of the later sections, more particularly, the expressions "judgment" and "foreign judgment" are respectively, defined u/s 2(9) and (6), respectively.

15. Sections 43, 44 and 44A deal with execution of decrees passed by specified categories of courts with reference to the territory in which they are located and to which the provisions of the CPC do not apply. Section 43 deals with the execution of decrees passed by the civil courts established in any part of India but to which the CPC does not apply. It may be mentioned here that by virtue of the declaration of Section 1, Sub-section (3) of the CPC does not apply to the State of Jammu & Kashmir and various other areas specified therein. Section 44 deals with decrees passed by the revenue courts. It may be worthwhile to mention here that neither the expression civil court nor a revenue court is defined under the Code of Civil Procedure. It is beyond the scope of our present discussion to examine that aspect of the matter.

16. Section 44A deals with the execution of decrees passed by "superior courts" of "reciprocating territories". Section 44A reads as follows:

Section 44A. Execution of decrees passed by courts in reciprocating territory.-(1) Where a certified copy of 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 had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of Section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court, shall refuse execution of any such decree, if it is shown to the satisfaction of the court that the decree falls within any of the exceptions specified in Clauses (a) to (f) of Section 13.

Explanation I.-"Reciprocating territory" means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and "superior courts", with reference to any such territory, means such courts as may be specified in the said notification.

Explanation II.-"Decree" with reference to a superior court, means any decree or judgment of such court under which a sum of money is payable, not being a sum

payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.

17. Under Explanation I, a "reciprocating territory" is defined to be any country or territory outside India which the Government of India by notification in the Official Gazette declares as reciprocating territory for the purpose of Section 44A. Similarly, the expression "superior court" occurring therein is also defined to mean such of those courts in a reciprocating territory which are notified by the Government of India to be superior courts.

18. While Section 44A(1) declares that the decrees of superior courts of the reciprocating territories may be executed in India, the expression "decree" itself is explained to mean, under Explanation 2, an adjudication of the liability of the judgment debtor to pay a sum of money. In other words, what is popularly understood as a decree for payment of money. Obviously, decrees other than the money decrees, even though passed by superior courts of reciprocating territories, are not executable u/s 44A. Even decrees for payment of money are not executable if such an amount represents the liability of payment of some tax or fine or penalty or of money payable pursuant to an arbitration award. Such exception is obviously in recognition of a principle of private international law that the municipal courts of a country do not recognise or enforce the revenue law of the other countries. It is clear from the scheme of Section 44A that only a limited class of decrees passed by the courts established outside the territory of India are made executable in accordance with the provisions of the Code of Civil Procedure. The limitations, as already noticed, are threefold based on (i) the status of the court, (ii) the territory to which the court is located, and (iii) the nature of the decree.

19. The scheme of Part-II of the Code of Civil Procedure, more specifically with reference to Sections 38, 39 and 44A of the Code of Civil Procedure, fell for consideration of the hon"ble Supreme Court in M.V. Al Quamar Vs. Tsavloris Salvage (International) Ltd. and Others, .In paragraph 8 of the said judgment the hon"ble Supreme Court has held as follows (page 318):

63. When we turn to Section 38, we find that a decree may be executed either by the court which passed it, or by the court to which it is sent for execution. This section by itself refers to decrees passed by Indian courts against the defendants who may be within the territorial jurisdiction of the competent civil court in the light of the correct place for suing in such courts as laid down by Sections 15 - 20 of the CPC. If the nature of suit against the defendant falls within any of these provisions then, admittedly, such a decree can be executed by the same court which passed the decree being a competent court but it can be sent by that competent court to any other court for execution if the defendant has properties within the territorial jurisdiction of any other competent court in India and that is what Section 39(1) provides. The said section reads as under:

39. Transfer of decree.-(1) . . ."

Sub-section (3) of Section 39 provides that such a transferee court, admittedly, situated in India, shall be deemed to be a court competent to execute such a transferred decree if, at the time of making the application for transfer of decrees, it is shown to have jurisdiction to try the suit in which such decree was passed. It must at once be noted that Section 38 refers to the executing courts in India which have themselves passed the decrees in suits which were within their jurisdiction and were admittedly, therefore, competent courts. Such decrees passed by competent courts in India can also be executed by getting the decrees transferred to other competent courts in India provided the requirements of Section 39(1) read with Sub-section (3) are satisfied. Therefore, the transferee court in India must be a competent court, which at the time of making an application for transfer of decree by the decree-holder, should be shown to have jurisdiction to pass such a decree even originally. It is easy to visualise that, this requirement of a transferee court in India which gets jurisdiction qua such execution proceedings only on transfer from competent executing court which has passed the decree in India is conspicuously absent, when we turn to Section 44A. It nowhere lays down that the District Court in which decree of any superior court of a foreign territory is submitted for execution by a foreign decree-holder must be a court which could have been competent to pass such a decree if in the first instance such a suit was filed by a foreign national against another foreign national in India. The second distinguishing feature is that Section 44A permits the foreign judgment debtor to challenge the foreign decree even before the executing court being the District Court in India on any of the grounds mentioned in Clauses (a) to (f) of Section 13. A transferee court u/s 39 which is called upon to execute an Indian decree passed by a competent Indian Court against the judgment-debtor cannot permit the judgment-debtor to go beyond the decree sought to be executed by such transferee court.

20. It is also required to be noticed while dealing with Section 44A that under Sub-section (3) the execution of such decree which otherwise satisfies requirements of Section 44A shall be refused "if it is shown to the satisfaction of the court that the decree falls within any of the exceptions specified in Clauses (a) to (f) of Section 13".

21. The history and background of Section 13 and Section 44A of the CPC and their purpose is required to be examined to arrive at the correct conclusion and the questions framed by us earlier.

22. The authority/jurisdiction of every court is confined to the territory over which the court is empowered by the sovereign to exercise jurisdiction. The legal principles on the basis of which the recognition and enforcement of judgment and decrees passed by the foreign courts the contours of which varied from time to time and country to country. The principles are stated in a text book titled "The Conflict of Laws" by Dicey. In the fourteenth edition of the aforesaid text book edited by Sir Lawrence Collins, at page 567, it is stated as follows:

A foreign judgment has no direct operation in England. It cannot, thus, be immediately enforced by execution. This follows from the circumstance that the operation of legal systems is, in general, territorially circumscribed. Nevertheless, a foreign judgment may be recognised or enforced in England. It is plain that, while a court must recognise every foreign judgment which it enforces, it need not enforce every foreign judgment which it recognises.

23. At page 568 of the said book the development of the legal principles in this regard are stated as follows:

English courts have recognised and enforced foreign judgments from the seventeenth century onwards. It was at one time supposed that the basis of this enforcement was to be found in the doctrine of comity. English judges believed that the law of nations required the courts of one country to assist those of any other, and they feared that if foreign judgments were not enforced in England, English judgments would not be enforced abroad. But later this theory was superseded by what is called the doctrine of obligation, which was stated by Parke B. in *Russel v. Smyth* [1842] 9 M. & W. 810 and *Williams v. Jones* [1845] 13 M. & W. 628 and approved by Blackburn J. a generation later in *Godard v. Gray* ILR[1870] 6 Q. B. 139 and *Schibsby v. Westenholz* [1870] L.R. 6 Q.B. 155 in the following words : "We think that...the true principle on which the judgments of foreign tribunals are enforced in England is...that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts of this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action". It followed that provided the foreign court had jurisdiction to give the judgment according to the English rules of the conflict of laws, the judgment is conclusive in England (unless it is impeachable for reasons for fraud, public policy or the like) and not merely prima facie evidence of the defendant's liability as had at one time been supposed.

In *Adams v. Cape Industries plc* Scott J. accepted Blackburn J.'s restatement of the obligation doctrine as being the basis on which English courts would recognise and enforce foreign judgments in personam. The Court of Appeal, however, accepted that the obligation doctrine was purely theoretical, since it has no practical value in identifying the foreign judgments which give rise to the obligation. The Court of Appeal accepted that at common law foreign judgments were enforced, not through considerations of comity, but on the basis of the principle that a legal obligation arises to satisfy a judgment of a court of competent jurisdiction, but in a later passage it also expressed the view that some notion of comity lay behind the recognition of judgments, but "this cannot be comity on an individual nation-to-nation basis, for our courts have never thought it necessary to investigate what reciprocal rights of enforcement are conceded by the foreign country, or to limit their exercise of jurisdiction to that which they would recognise in others. The most one can say is that the duty of

positive law first identified in *Schibsby v. Westenholz* [1870] L.R. 6 Q.B. 155 must stem from an acknowledgment that the society of nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action, and which may be directly enforced in countries where the defendant or his assets are to be found.

In *Adams v. Cape Industries plc* the basis for the recognition of judgments was considered to be relevant by the Court of Appeal in deciding the issue whether the federal court in Texas had jurisdiction under Rule 36(1) by virtue of the alleged presence of the judgment debtor in another State of the American Union, Illinois : was the relevant "country", for the purposes of the enforcement of the Texas court, the United States (in which event presence in Illinois would be regarded as giving the court jurisdiction) or Texas (in which event it would not be so regarded) ? Scott J. took as the starting point the suggestion in *Schibsby v. Westenholz* [1870] L.R. 6 Q.B. 155 that the basis of the jurisdiction of a foreign court over resident aliens was that they had the benefit of the protection of the laws of that country or owed temporary allegiance to it. Scott J. concluded that the relevant "country" was the United States because the source of authority of the Federal Court was in the sovereign power which established it, namely, the United States. The Court of Appeal was sceptical about the application of the idea of "allegiance" as being the basis of the obligation, and saw the judgment debtor's duty to abide by the foreign judgment as deriving from the fact that "by going to a foreign place he invests himself by tacit consent with the rights and obligations stemming from the local laws as administered by the local court". In the event, it was not necessary to decide this issue, because (like Scott J.) the Court of Appeal held that the judgment debtor had not been present or resident in Illinois; but the Court of Appeal indicated that if it had been necessary to decide the question, it would have agreed with Scott J. that the relevant "country" was the United States rather than Texas.

24. These principles were discussed by the Privy Council in (1895) ILR 22 222 (Privy Council) .Their Lordships held as follows:

Under these circumstances there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the court to which the defendant is subject at the time of suit ("actor sequitur forum rei"); which is rightly stated by Sir Robert Phillimore (International Law, volume 4, Section 891) to "lie at the root of all international, and of most domestic, jurisprudence on this matter". All jurisdiction is properly territorial, and "extra territorium jus dicenti, impune non paretur". Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living

were domiciled, within the territory. As between different provinces under one sovereignty (e.g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign court ought to recognise against foreigners, who owe allegiance or obedience to the power which so legislates.

25. This statement was quoted with approval, by the Supreme Court in *Raj Rajendra Sardar Maloji Marsingh Rao Shitole Vs. Sri Shankar Saran and Others*, of the judgment of justice J. L. Kapur.

26. As pointed out by Dicey there is a distinction between recognition and enforcement. While a court may recognise foreign judgment, which it enforces, it need not enforce every foreign judgment which it recognises.

27. Coming to the question of enforcement of a foreign judgment, Dicey, at page 570 of the *Conflict of Laws* stated "...A judgment creditor seeking to enforce a foreign judgment in England at common law cannot do so by direct execution of the judgment. He must bring an action on the foreign judgment". This principle is also accepted in India. The Supreme Court in *Roshanlal Kuthalia and Others Vs. R.B. Mohan Singh Oberoi*, has held as follows (page 637):

Ordinarily, a suit on foot of a foreign decree is sustainable and Section 13 of the CPC sets out the limitations on the amplitude of the right. This proposition is not disputed....

28. Again in paragraph 20 it was held that (page 637) "A foreign judgment is enforceable by a suit upon the judgment which creates an obligation between the parties."

29. Section 13 of the CPC sets out the limitations on the recognition of a foreign judgment. "Foreign judgment" is defined u/s 2, Sub-section (6) of the CPC to mean the judgment of a foreign court. Whereas the expression "foreign court" is defined u/s 2, Sub-section (5) as follows:

"foreign court" means a court situate outside India and not established or continued by the authority of the Central Government.

30. Therefore, Section 13 of the CPC provides for the "recognition" of foreign judgment subject to the various limitations in the Sub-sections (a) to (f) thereof by the Indian courts and makes it conclusive between the parties. In other words, when a holder of a foreign decree approaches the appropriate court in this country to which the provisions of the CPC apply, unless the defendant succeeds in establishing any one or some of the objections enumerated under Clauses (a) to (f) of Section 13, the judgment of the foreign court is declared to be conclusive as to any matter that is directly adjudicated between the same parties and the decree is required to be passed in terms of the said foreign judgment by the Indian court. Thereafter, the decree can be executed in the manner provided by the Code of Civil Procedure.

31. On the other hand, Section 44A came to be introduced in the CPC by Act VIII of 1937. The Division Bench of the Madras High Court in *N.P.A.K. Muthiah Chettiar (died) and Others Vs. K.S. Rm. Firm Shwebo, Burma and Others*, traced out the history of Section 44A as follows (page 27):

The history of Section 44A of the CPC may be considered. This section was introduced into the Civil Procedure Code, for the first time by Section 2 of the Act 8 of 1937, and therefore, till then there was no provision in the CPC by which decrees passed outside India and Burma could be executed in British-Indian courts. By Section 2 of Foreign Judgments (Reciprocal Enforcement) Act, 1933 (23 Geo. V. Ch. 13) a foreign judgment has been defined as a judgment or order, given or made by a court in any civil proceedings or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party . . . There are other provisions in the Act by which foreign judgments could be enforced in the United Kingdom. An order applying that Act to British India and Burma came into force on November 18, 1938 and was repealed by the Reciprocal Enforcements of Judgments (India) Order, 1953, which came into force on March 1, 1953. This latter order extended Part-I of the Act to those territories of the Republic of India which are named in the schedule to the order. It was after the passing of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, that a similar provision was enacted in the CPC by which Section 44A was introduced.

32. Before the introduction of Section 44A of the CPC, i.e., in 1937 the question of direct enforcement of a foreign decree in India did not arise. The only possibility was seeking the recognition of a foreign decree by filing a suit for a decree by the Indian courts in terms of the foreign decree.

33. Under the scheme of the Indian Evidence Act, 1872, Sections 40 - 43, the evidentiary value of a judgment is limited.

34. u/s 40 of the Evidence Act the existence of any judgment, order or decree is a relevant fact when the question is whether the court ought to take cognisance of a suit if taking of the cognisance of a suit is prohibited by law in view of the pendency of an earlier suit between the same parties on the same subject-matter or in view of determination by a competent court of the issues between the same parties if sought to be raised in a subsequent suit, etc. In other words Section 40 declares the existence of a prior judgment relevant in the situations covered by Sections 10, 11 and 12 of the CPC.

35. Section 41 of the Evidence Act declares the existence of a final judgment or decree of a competent court to be relevant if such previous judgment confers upon or takes away from any person any legal character, etc. Such judgments are classified jurisprudentially as "judgments in rem".

36. Section 42 stipulates that judgment, order or decrees other than those mentioned in Section 41 are relevant only if they are related to matters of public nature relevant to the enquiry.

37. Section 43 declares that judgment, order or decrees other than those mentioned in Sections 40, 41 and 42 are irrelevant except in such a situation where prior judgment is a fact in issue. Obviously, the judgments referred to in Sections 40 - 43 of the Evidence Act are judgments of the competent courts established within the territory of India by the authority of law made either by Parliament or a State Legislature.

38. The CPC which is a later enactment than the Evidence Act made a provision u/s 13 which makes the judgment of a foreign court conclusive between the parties on the issue decided by the foreign court subject to the condition that such a judgment is not otherwise hit by any of the shortcomings pointed out in Clauses (a) to (f). Section 13 in our view incorporated the rules of the conflict of laws as evolved and applied in the courts of England and is an exception to the rule contained in Sections 40 - 43 of the Evidence Act.

39. Clauses (a) to (f) of Section 13 of the CPC, stipulates the conditions, the existence of any of them, makes the foreign decree incapable of affording the basis for an Indian decree. However, the section shifts the burden to the defendant to establish the existence of such conditions.

40. Even u/s 44A, though certain foreign decrees are made directly enforceable by execution, in this country, a judgment debtor under such a foreign decree is still entitled to plead u/s 44A(3) the existence of any one of the "exceptions" enumerated under Clauses (a) to (f) of Section 13 to resist the execution of such decree.

41. Section 14 of the CPC provides for a presumption in favour of the competence of a foreign court when a certified copy of the foreign judgment is produced. But such a presumption is made rebuttable obviously at the instance of the person against whom it is sought to be established.

42. In our view Sections 13 and 44A of the CPC embody the well recognised principles of private international law recognised in England. It does not, however, necessarily mean that the Indian Legislatures cannot prescribe other modes of recognition or enforcement of foreign decrees other than the ones provided under the CPC, as discussed above. Therefore, the question is whether Sections 433, 434 and 439 prescribe a different mode of enforcement of a foreign decree.

43. Section 433 of the Companies Act stipulates the various contingencies under which a company may be wound up by the court. One of the contingencies is that "the company is unable to pay its debts".

44. Section 434 of the Act creates a fiction that a company shall be deemed to be unable to pay its debts in the two contingencies specified under Sub-section 1(a) and (b) which reads as follows:

434. Company when deemed unable to pay its debts.-(1) A company shall be deemed to be unable to pay its debts:

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor ;

(b) if execution or other process issued on a decree or order of any court or tribunal in favour of a creditor of the company is returned unsatisfied in whole or in part;

45. Section 439 of the Act prescribes the procedure by which a company is to be wound up by the court. We must necessarily enquire whether Sections 433, 434 and 439 create any right in favour of a creditor, either Indian or foreigner, and if such a right is created what is the nature of the right?

46. While Section 433 of the Act authorises the court to wind up a company in the various contingencies specified therein the right to file an application for such winding up is conferred on various bodies enumerated u/s 439(1)(a) to (g) including the company itself and also by the Central Government or the State Government. Therefore, it follows that any one of the persons specified u/s 439(1) can seek winding up of a company by the court on the ground that one of the contingencies specified u/s 433 occur subject, of course, to the limitations further prescribed under the various sub-sections of Section 439, for example, a petition to wind up a company on the ground that it is unable to pay its debts need not necessarily be filed only by a creditor or creditors, it can be filed by the company itself or by the Registrar of Companies or by any contributory of the company.

47. The limitations on the right of a contributory are specified in Sub-section (4) of Section 439. Similarly, the right of the Registrar to present a petition for winding up of the company is limited by the conditions specified under Sub-section (5) of Section 439.

48. Under Sub-section (5) even the Registrar can file a petition for winding up a company on the ground that the company is unable to pay its debts. However, under the first proviso to Sub-section (5) such a ground is available to the Registrar only if the Registrar is of the opinion that the balance-sheet of the company disclose such a possibility, or a special auditor appointed u/s 233A or an inspector appointed under Sections 235 and 237 of the Companies Act reports that the company is unable to pay its debts.

49. Notwithstanding the limitations on the ability of the Registrar to move an application to wind up a company on the ground that it is unable to pay its debts the very fact that even the Registrar is also in certain circumstances enabled to invoke the ground that the company is unable to pay its debts for seeking the winding up of the company, in our view, indicates that the proceedings u/s 439 are not in the nature of execution of a decree within the meaning of the Code of

Civil Procedure. Under the scheme of the CPC a decree creates rights in favour of the person holding the decrees which conclusively determine the rights of the parties with regard to all or any of the matters in controversy in the suit. Necessarily, the matters in controversy are to be adjudicated in the suit on the basis of the rights of the parties to the suit and such rights can inhere only in the party exclusively whereas the right to seek winding up of a company on the ground that the company is unable to pay its debts is not a right that exclusively inheres in the creditors. There are other classes of persons specified u/s 439 who can also seek such winding up of the company subject of course to the limitations imposed u/s 439, some of which are already noticed above. Apart from that the power u/s 439 is discretionary and the court is not bound to wind up the company only on the ground that the petitioner is entitled for a sum from the company. Various other factors are required to be examined before passing an order for winding up of the company, even in a case where the liability is admitted. Such factors include the interests of the employees, revenue, etc. On the other hand in the matter of execution of a decree the executing court has no such discretion under the provisions of the CPC.

50. Therefore, we are of the opinion that a proceeding u/s 439 of the Companies Act is not a proceeding for execution of a decree. Consequently, the objections raised by the appellant that in the absence of a notification contemplated u/s 44A of the CPC the decree of the American court, which creates the debt in favour of the respondents herein, cannot form the basis of a petition u/s 439 of the Companies Act, is rejected.

51. In our opinion, the respondent is seeking the recognition of a debt arising out of a judgment passed by a foreign court but not its enforcement, as understood under the private international law.

52. Whether such a recognition, such as the one sought by the respondent, can be accorded by the company court and if so what are the principles of law on the basis of which such a recognition is required to be accorded ? Whether Sections 13 and 14 of the CPC apply to the proceedings u/s 439 of the Companies Act are questions which require a separate examination on which the arguments have not been heard yet.

53. In the circumstances we are of the opinion that the appeal shall be listed for further hearing.