
(2012) 07 DEL CK 0005
In the Delhi High Court
Case No : EX. P. 203 of 2010

Lawrence Graham

APPELLANT

Vs

Kaleidoscope Entertainment Pvt. Ltd.

RESPONDENT

Date of Decision : 16-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13, 13(b), 44A, 47
Companies Act, 1956 — Section 54

Citation : (2013) 198 DLT 674

Hon'ble Judges : Reva Khetrapal, J

Bench : Single Bench

Advocate : Akhil Sibal with Mr. Salim Inamdar and Mr. Jaspreet Singh Kapur, for the Appellant; Sudhir Nandrajog with Mr. Nakul Sachdeva and Mr. Shantanu Agarwal, for the Respondent

Judgement

Reva Khetrapal, J.—The aforesaid execution petition has been filed by the Decree Holder above-named (hereinafter referred to as "the petitioner") praying, inter alia, for the execution of the judgment and decree dated 07.12.2009 passed by the High Court of Justice, Queen's Bench Division in Claim No. HQ09X 02705 for GBP 75,631.95 along with pendente lite and future interest @ 8% per annum; and to order the Judgment Debtor (hereinafter referred to as "the respondent company") to disclose on oath all their assets both movable and immovable, and upon such disclosure being made to order immediate attachment and sale of the said assets. In the alternative to the prayer above, to direct the sale of the respondent Company as a going concern and appropriate the sale proceeds towards the repayment of the decretal amount. Further, to appoint a Receiver for preserving the assets of the respondent Company to secure the decretal amount. The facts leading to the filing of the present petition are that on 25.06.2009, the petitioner filed a suit before the High Court of Justice, Queen's Bench Division, being Claim No. HQ09X 02705, copy whereof is placed on record. The said suit along with the documents was served upon the respondent Company on 11.07.2009 as evidenced from the receipt of summons. The respondent

Company acknowledged receipt of the same through its Company Secretary and the claim was admitted in the form itself, which is dated 31st July, 2009, to the extent of GBP 30,000 by stating: "I admit the amount of pounds sterling 30,000." Further, in Column 11 titled "Offer of Payment", the respondent Company stated that it "can pay monthly instalments of Rs. 5,000" as "the Company has incurred huge losses and proposed IPO was shelved because of economic downturn so we do not have adequate funds." A copy of the said acknowledgment of service containing the offer to pay the sum of Pounds Sterling 30,000 in monthly instalments of Pounds Sterling 5,000 is placed on record.

2. On 07.10.2009, the petitioner filed an application before the High Court of Justice, Queen's Bench Division for summary judgment on the basis that the respondent had admitted a sum of GBP 30,000 as due to the petitioner. On the same day, i.e. on 07.10.2009, the petitioner filed a written statement before the High Court of Justice Queen's Bench Division. A certified copy of the entire High Court of Justice, Queen's Bench Division record in claim No. HQ09X 02705 is part of the Court Record lodged with the Court.

3. On 12.10.2009, the High Court of Justice ordered hearing in the matter filed by the petitioner against the respondent Company on 07.12.2009 at 10.30 a.m. for 30 minutes.

4. On 07.12.2009, the High Court of Justice after recording that no one had appeared on behalf of the respondent Company decreed the suit in terms of the prayer of the petitioner.

5. Since the respondent Company is a Company registered in India, the petitioner applied for a certificate from the High Court of Justice Queen's Bench Division u/s 10 of the Foreign Reciprocal Enforcement Act, 1933. The said certificate was issued on 01.02.2010 in favour of the petitioner stating that the petitioner is entitled to recover GBP 75,631.95 from the respondent Company. A copy of the said certificate is part of the Court Record lodged with the Court.

6. In the aforesaid backdrop, the petitioner submits that the respondent Company is liable to pay the amount already decreed to the petitioner in GBP 75,631.95 along with future interest @ 8% per annum. The petitioner further submits that the procedure established by law was complied with. Summons were admittedly received by the respondent Company. The claim of the petitioner was admitted by the respondent Company to the extent of GBP 30,000 without any other defence on merits. The principles of natural justice were met with at the time of the passing of the judgment and decree by the High Court of Justice Queen's Bench Division. The judgment and decree of the Queen's Bench Division is on merits of the case after seeing the evidence produced by the petitioner to substantiate its claim. The judgment is, therefore, liable to be enforced and executed as against the respondent Company and the respondent Company liable to pay the decretal amount. In case the respondent Company

does not pay the said amount, its assets movable and immovable, are liable to be sold off for the purpose of payment to the petitioner till the petitioner gets its payment. The decree in the hand of the petitioner, it is submitted, cannot be defeated by the respondent Company in any circumstances. It is also submitted that this Court has the territorial jurisdiction to deal with the present execution since the respondent is a Company incorporated and having its registered office within the territory of this Court.

7. Objections to the execution petition were filed on behalf of the respondent Company along with affidavit on 27th October, 2010. At the outset, it may be stated that the jurisdiction of this Court to entertain the present execution petition has not been questioned nor any objection raised to the same. The respondent Company in the objections filed by it has submitted that in view of the legal provisions contained in Section 44A read with Section 13(b) of the Code of Civil Procedure, read with the judicial interpretations accorded to these specific legal provisions, the decree sought to be executed by the petitioner is not executable as it does not fulfill the criteria laid down in the said Sections. Before elaborating upon the said objection raised by the respondent Company, it is, however, proposed to set out briefly the version of the respondent Company, as set out by it in the Objections/ Reply filed by it, which is as follows.

8. The respondent Company M/s. Kaleidoscope Entertainment Pvt. Ltd. is a Private Limited Company, limited by shares, duly incorporated under the Indian Companies Act, 1956, having its registered office at 204, Golf Apartments, Maharishi Ramanna Marg, New Delhi-110003. It is a production house engaged in the business of production and distribution of films and other allied entertainment services. In 2007, the respondent Company was desirous of raising capital, in order to diversify and expand its business. In August, 2007, the respondent Company was advised by Grant Thornton, India that they could raise investment/capital by floating an Alternative Investment Market (hereinafter referred to as "AIM") listing. AIM is the London Stock Exchange's junior international market and provides one of the best platforms for expanding companies seeking international investment. The process of overseeing suitability for admission of companies to AIM has been entrusted to a "nominated advisor" (hereinafter referred to as "NOMAD"). All companies looking to list on the AIM need a NOMAD from an approved register who is responsible to the London Stock Exchange. The role of NOMAD is critical to the Initial Public Offer ("IPO") process as it is for the NOMAD to determine the company's suitability for an AIM admission. The respondent Company in order to float an AIM admission as per the requirements of the AIM Rules, for the purpose of carrying out the due diligence entered into an agreement with the petitioner on 24.06.2008. The respondent Company's NOMAD Grant Thornton, UK introduced the parties and on its recommendation the respondent Company entered into the aforementioned agreement with the petitioner. On 03.09.2008, the petitioner raised an invoice for a two month period ending on 28.08.2008 for Rs. 20,000 (Twenty Thousand), copy whereof is placed on record.

9. On 23.10.2008, the NOMAD appointed by the respondent Company suddenly stated by e-mail that in the light of the prevailing market conditions, the IPO was being put on hold. Till this date, Grant Thornton, UK had maintained and represented to the respondent Company that the AIM market had not been hit by recession and that the fears expressed by the brokers with regard to the prevailing market condition were without any basis. On 10.11.2008, Grant Thornton, UK informed the respondent Company that investor's reaction was slow and finally on 23.12.2008, Grant Thornton, UK informed the respondent Company that they "did not know, when they would restart the process of floating KEPL AIM listing." On 28.01.2009, after the petitioner was aware that the Floatation was not going to take place, the petitioner raised an invoice of Pounds Sterling 35,743. The grievance of the respondent is that the petitioner raised an invoice knowing as early as October, 2008 that the respondent Company's Floatation was not going to proceed.

10. The respondent Company further submits that on 25.06.2009, the petitioner filed a suit before the High Court of Justice Queen's Bench Division, being Claim No. HQ09X 02705, which was served on the respondent Company on 11.07.2009 on behalf of the petitioner by Naik & Company. It was the Company Secretary of the respondent Company who acknowledged receipt of the same and "admitted the amount of pounds sterling 30,000", stating that the respondent Company "can pay monthly instalments of pounds sterling 5,000 as the Company has incurred huge losses and proposed IPO was shelved because of economic downturn so we do not have adequate funds." It is submitted that the Company Secretary was not authorized to either acknowledge receipt of the claim filed by the petitioner or acknowledge the debt of Pounds Sterling 30,000. The respondent Company had not designated the Company Secretary as an authorized signatory, as required by law, therefore the Company Secretary was not competent to either acknowledge receipt or to state a proposed course of legal action by or on behalf of the Company. Hence, the respondent Company is not bound by the admission or acknowledgment of debt by its Company Secretary.

11. Without prejudice to the aforesaid, it is submitted by the respondent Company that the acknowledgment of service by its Company Secretary was returned on 10.08.2009 by a letter from Her Majesty's Court Service (for short "HMCS") stating that the respondent Company's acknowledgment of service was being returned as they had no address for service of documents within England and Wales Jurisdiction. The respondent Company claims to have again written a letter dated 26.08.2009 to HMCS stating that the Company does not have a local branch or contact point in England and Wales Jurisdiction and the same was returned on 03.09.2009 by HMCS. Copies of the said letters are placed on record by the respondent Company.

12. It is asserted by the respondent Company that finally on 22.09.2009, it wrote to Naik & Company, who served Lawrence Graham notice stating that their

replies had been returned by Court and they were sending a copy of the papers to them. A copy of the said letter is also placed on record by the respondent.

13. On 22.09.2009, the petitioner wrote to the respondent Company and stated:

We also note that you allege you have had no information to justify the amount of the final invoice for pounds sterling 33,000. Whilst we are of the view that the information as to the work to be carried out was clearly set out in the letter of engagement and also to you subsequently. We set out details of the work carried out below and confirm that the final invoice has been calculated as set out in the letter of engagement on the basis of time spent.

? Drafting the back end of the Admission document and commenting substantially on the front end of the Admission document.

? Negotiating the company's engagement letter with Kaupthing and Elara (its brokers).

? Organizing the incorporation of a new company in Jersey and in Singapore including providing drafting for a new Jersey company article of association (this was made a more lengthy procedure by us having to chase for instructions).

? Providing ancillary documents normal for any AIM admission e.g. memorandum of directors' responsibilities, responsibility statement, committee terms of reference, share dealing code etc. These documents were commented on by Olswang - the NOMAD's lawyer which created further work as we needed to incorporate the comments.

? Reviewing a business transfer agreement in relation to the proposed transfer.....

As we are sure you realize a substantial amount of work was carried out and time spent on this." The said letter is annexed hereto and marked as ANNEXURE-K.

14. It is submitted by the respondent Company that the petitioner did not give a breakup of the number of hours spent on the work as the fees was to be calculated on an hourly rate, either in the invoices raised or in the letter dated 22.09.2009. The rate was further dependent primarily on the experience of the person carrying out the work. Neither the invoices raised nor the letter dated 22.09.2009 gave a breakup as to the experience of the person carrying on the work and the hours put in by the said Advocate. Even the said letter was not filed before the HMCS.

15. Adverting now to the objection of the respondent Company premised on the provisions of Section 44A read with Clause (b) of Section 13, it is proposed to first reproduce the aforesaid provisions for the facility of reference.

Section 44-A of the CPC "44-A Execution of decrees passed by Courts in reciprocating territory.

(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 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 1 - "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.

Section 13 of the Code of Civil Procedure

13. When foreign judgment not conclusive.

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 the 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 recognize 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.

16. Referring to the provisions of Section 13(b), it is submitted by Mr. Nandrajog on behalf of the respondent Company that the decree in the instant case not

having been given on the merits of the case, the foreign judgment is not conclusive between the parties and the same cannot be executed in India. It is further submitted that the expression "on the merits" though has not been defined by the Code of Civil Procedure, 1908, the Courts have interpreted the term "merits of the case" in a catena of judgments, and the foreign judgment in the present case falls foul of the said decisions. No oral or documentary evidence was produced before the suit was decreed. Even the invoices forming the substratum of the claim of the petitioner and giving a breakup as to the experience of the person carrying on the work and the number of hours put in by the said Advocate were not filed by way of documentary evidence in the suit. An adjudication without evidence of any kind being led, based only on pleadings, cannot be held to be a decision "on the merits."

17. It is also submitted that apart from the fact that the petitioner had suppressed material facts and relevant documents and did not file before the Court copies of the invoices on the basis of which it had based its claim, the petitioner while filing its application for summary judgment suppressed and withheld its letter dated 22.09.2009 sent to the respondent Company, trying to justify the amount raised by it as due under the letter of engagement.

18. Without prejudice to the aforesaid, it is submitted by the respondent Company that even if the Court passed the decree based on the alleged admission of liability of GBP 30,000 by the Company Secretary of the respondent Company, it does not absolve the Court from considering if the remaining amount claimed as allegedly due to the petitioner was, on the basis of documentary evidence, actually due to the petitioner.

19. This Court has heard Mr. Akhil Sibal, the learned counsel for the petitioner and Mr. Sudhir Nandrajog, the learned senior counsel for the respondent Company at length and scrutinized the entire record of the High Court of Justice, Queen's Bench Division in Claim No. HQ09X 02705. The Court has also gone through the precedents relied upon by the learned senior counsel for the respondent Company to substantiate his principal contention that the decree sought to be executed, by the petitioner cannot be executed in that it falls within the exception culled out by Clause (b) of Section 13 of the Code of Civil Procedure, 1908, which provides that if it has not been given on the merits of the case then the foreign judgment is not conclusive between the parties and the same cannot be executed in India. The said decisions may be catalogued as under:-

(i) M/s. International Woolen Mills Vs. M/s. Standard Wool (U.K.) Ltd.,

(ii) Shri Raj Kumar Gupta vs. Barnes Investments Limited and Ors., 2007 (99) DRJ 629.

(iii) Middle East Bank Ltd. Vs. Rajendra Singh Sethia,

(iv) O.P. Verma Vs. Lala Gehrilal and Another,

(v) Gurdas Mann and Others vs. Mohinder Singh Brar, AIR 1993 Punjab and Haryana 92.

(vi) R.E. Mahomed Kassim and Co. Vs. Seeni Pakir Bin Ahmed and Others,

20. The question which arises for the consideration of this Court thus is: Whether the decree passed by the High Court of Justice, Queen's Bench Division in the Claim Petition filed by the petitioner could be said to be a decree on merits" Before proceeding to consider the aforesaid question, however, it deserves to be noted that Courts in England have been treated as Courts in reciprocating territory within the meaning of Explanation 1 to Section 44A of the Code of Civil Procedure. Now a look at the decree which has been passed in the following terms:-

An Application was made on the 7 December 2009 by the solicitors for the Claimant under Part 24 for judgment and was attended by the Claimant's solicitors and there was no appearance by the Defendant. The Master read the written evidence filed. AND THE COURT having found that the Defendant has no real prospect of successfully defending the claim and that there is no other reason why the claim should be disposed of at a trial. IT IS ORDERED that

1. There be summary judgment for the Claimant in the sum of Rs. 65,743.08 together with interest to the date hereof (at the Judgment rate of 8%) of Rs. 4,888.87 making a total of Rs. 70,631.95.

2. The Claimant's costs of the claim and this application be summarily assessed at Rs. 5,000.

3. The Claimant shall have permission to serve this Order on the Defendant outside the jurisdiction at the address shown on the Defence and Counterclaim 204 Golf Apartment, Maharishi Ramanna Marg, New Delhi 110003 India or elsewhere in India.

Dated this 7th day of December 2009

21. As already noted, the petitioner along with the aforesaid decree has filed before this Court the complete record of the High Court of Justice, Queen's Bench Division, which, inter alia, contains the Claim Form dated 25th June, 2009; Particulars of Claim dated 25th June, 2009; Acknowledgment of Service dated 31.07.2009, Admission and Defence dated 31st July, 2009; Application Notice for Summary Judgment dated 7th October, 2009; Second Witness Statement of Andrew Charles Dobson dated 7th October, 2009; Exhibit ACD2 dated 7th October, 2009 and Order dated 7th December, 2009.

22. From the aforesaid documents on record, it clearly emerges that the respondent Company did in fact enter appearance before the English Court and in its Defence before the English Court dated 31st July, 2009 stated as follows:-

We, (Kaleidoscope Entertainment Private Limited) engaged the claimant (Lawrence Graham LLP) for the proposed floatation on AIM. As per clause 3 of

the main engagement letter, dated 24 June, 2008, the fee for the services of claimant were to be based on the time spent by their partners/associates which was to be calculated on hourly basis rate. For convenience it was suggested that the billing be done at a flat of Rs. 10,000 per month as an advance. On the basis of above clauses, two invoices totaling Rs. 30,000 were raised till end of September 2008. By early October 2008 it was clear that the market was taking a downturn and the Floatation would need to be suspended. There is enough correspondence from the Nominated Advisors to support that and a formal mail on 23rd August for suspension was sent to everyone including claimant. For some time there was no billing and then suddenly an invoice for over Rs. 33,000 was sent. It is important to note there is absolutely no correspondence or detail that either supports the calculation of these amounts and or the work done. We have dealt with law firms for years and it is the first time that we have received unsupported and unsubstantiated invoices. If the expenses were not in line with the billing we should have been informed. Had we received any indication of this we would have changed our agreement. The last bill was disproportionately high and still unsupported and unsubstantiated. We also expressed our concerns and Claimant offered to reduce the bills but by very small amounts. We believe that the final billing should be well within the advance amounts billed as work had slowed down and consequently feel that the Rs. 30,000 figure we have offered is fair. Therefore we hereby refuse to pay the last invoice amounting to Rs. 35,743.08. Finally, as the impact of the suspended AIM floatation, and overall economic scenario and the consequences thereof on our cash revenues have made it impossible to make a onetime payment. We have had to cut back expenses, lay off people and reduce salaries to tide over this difficult time. Our cash flows have been transparently shared with the claimant as part of the process and they are fully aware of this situation. As professionals who would like to honor fair commitments we have offered to pay the Rs. 30,000 in instalments of Rs. 5,000 per month and agree to pay interest thereon as proposed by claimant. We are surprised that the Claimant has gone to court as they have offered to reduce the amounts invoiced in the past."

23. It is the contention of the petitioner's counsel that the respondent Company having entered appearance before the English Court and having made the aforesaid defence, which in fact amounts to an admission of its liability, cannot now retract from the same by invoking the provisions of Section 13(b) of the Code of Civil Procedure. In the reply filed by the respondent Company before this Court, it has sought to resile from its admission of liability on the basis that its Company Secretary had not been authorised to admit the claim. The petitioner's counsel contends, and in the opinion of the Court rightly so, that it is not open to the respondent Company to resile from its admission of liability for the reason that u/s 54 of the Companies Act, 1956, the Company Secretary is the statutory representative of the Company and is entitled to make statements on behalf of the Company. Further, no grievance was raised before the English Courts as regards the authority of the Company Secretary of the respondent Company to

sign the Defence Form before the English Courts. What is even more surprising is that the respondent Company relies upon the minutes of its Board of Directors filed along with the objections before this Court, which are executed by the same Company Secretary who had signed and executed the Defence Form on 31.07.2009.

24. It is also crystal clear that the respondent Company was duly served on its India office and provided an opportunity to defend the proceedings before the English Court, which opportunity was not availed of by it for reasons best known to it. It is also clear from the record that the respondent Company at no point of time requested the petitioner to supply a break-up of the number of hours spent on the work or details of the professionals involved and the fees billed by them. Had the respondent Company requested the petitioner for the same, there is no reason to pre-suppose why the petitioner would not have provided the details of the number of hours spent and the professional fees involved, for, a detailed chart thereof has been furnished by the petitioner along with its rejoinder filed in this Court as Ex.A. Even otherwise, it is clear from the record that the English Courts like all other Courts of Justice and Equity considered the evidence placed before it and the documents filed along with the said evidence, which clearly showed that invoices had been tendered by the petitioner to the respondent Company. In this situation and in view of the fact that the respondent Company had not disputed the tendering of any of those invoices, there was no occasion for the English Courts or need to see the copies of the invoices as regards which there was no dispute between the parties. The grievance of the respondent Company that the letter dated 22.09.2009 was not filed by the petitioner Company before the English Courts is also misplaced in view of the fact that the original of the said letter was with the respondent Company and it could have placed the same on the record along with its defence and/or at the time of adducing its evidence.

25. It may be noted at this juncture that it is clear from the record of the High Court of Justice, Queen's Bench Division that the English Court had seen the contract between the respondent Company and the petitioner whereunder the respondent Company had agreed to pay the petitioner's fees. The Court had also seen the evidence that the fees was outstanding (including the admission made in the defence of the respondent Company), and as no evidence had been put in to dispute the tendering of invoices or the fees claimed by the petitioner, the Court awarded the judgment. To put it differently, the Court determined on the evidence before it that there was a valid claim to which there was no valid defence. In these circumstances, for the respondent Company to contend that the judgment is a penalty and not based on the merits of the matter would, in the opinion of this Court, be wholly unjustified.

26. It may also be noted at this juncture that the Second Witness Statement of Andrew Charles Dobson before the English Court, certified copy whereof is placed on the record of this Court, wholly substantiates the claim of the petitioner. The

said witness proved on record the contract between the parties in the form of "the Letter of Engagement dated 24th June, 2008", and categorically stated on oath that the petitioner had rendered services as detailed in the said Letter of Engagement and continued to do so until 23rd October, 2008 when the petitioner was instructed by the office of Grant Thornton UK LLP, the nominated advisors, "to cease work in light of current market conditions". A copy of the said communication is also proved on record by the witness. The witness further stated that under Paragraph 3 of the Letter of Engagement the petitioner was entitled to calculate its fee on the basis of the time spent dealing with the matters on which they were engaged. He stated that in accordance with Paragraph 6 of the Engagement, interim invoices, on account, were issued on 29th August, 2008 and 30th September, 2008 and the balance outstanding was invoiced on 27th January, 2009. The witness further stated in his statement that the respondent Company had admitted Rs. 30,000 of the debt in its Defence dated 31st July, 2009 and offered to pay this sum by instalments of Rs. 5,000 per month, but till date no payment had been made. A copy of the defence was also enclosed by the witness with his statement. Thus, the evidence of the witness was accompanied by (i) particulars of the claim, (ii) acknowledgment of service, admission and defence dated 31st July, 2009, (iii) terms of engagement, and (iv) the letter dated 23rd October, 2008 whereunder the petitioner was advised to cease work on account of the prevailing market conditions. All the aforesaid documents were exhibited collectively as Ex.ACD2 dated 7th October, 2009 and are not in dispute, except insofar as it is the contention of the respondent Company that its Company Secretary was not authorised to file the defence before the English Court, who, as noted above, is the same Company Secretary who has signed the minutes of Board of Directors filed by the respondent company in the present case.

27. As regards the controversy sought to be raised at this stage by the respondent Company with regard to the invoices raised by the petitioner, there is no substance in the aforesaid contention as well, for the reason that apart from the fact that the receipt of the said invoices has been admitted in the defence filed by the respondent Company before the English Courts, each of the invoices raised by the petitioner at the bottom clearly mentions that it may be challenged/ disputed under the Solicitors (Non-Contentious Business) Remuneration Order 1994 within one month of the receipt of the invoices or got independently reviewed by an Officer of the Court under the Solicitors Act, 1974, and no such challenge has ever been raised by the respondent Company. The endorsement at the bottom of each of the invoices reads as follows:-

This constitutes notice in writing of your right under the Solicitors (Non-Contentious Business) Remuneration Order 1994 to require us within one month of the receipt of this bill to obtain a certificate from the Law Society stating either that our bill is fair and reasonable or that a lower amount should be paid. To exercise this right you must first (unless you have already done) now pay us an amount sufficient to cover half the fee and all other disbursements and VAT as

shown above, or if applicable the difference between what you have already paid us and this amount. This requirement may be waived if you can satisfy the Law Society at 8 Dormer Place, Royal Leamington Spa, Warwickshire CV32 5AE that exceptional circumstances exist. Alternatively, you have the right under Sections 70 to 72 of the Solicitors Act 1974 to have our bill independently reviewed by an Officer of the Court. We are entitled to claim statutory interest (currently 8% per annum) on the unpaid bill or the amount certified, whichever is the lower running from one month after delivery.

28. It is clear from the aforesaid that the judgment and decree returned against the respondent Company cannot be said to be returned on the sole ground of the respondent Company not having entered appearance. The learned senior counsel for the respondent Company in the course of his submissions was not able to point out as to what further documentary or oral evidence could be expected to be produced by the petitioner Company to enable it to claim that the judgment was a judgment on merits. He was also unable to dispute that service had been effected properly on the respondent Company at its India office. This being so, if the respondent Company chose not to appear, is it now open to it to term the judgment of the English Court as "not conclusive", not in accordance with the mandate laid down in Clause (b) of Section 13 of the Code and therefore "not executable".

29. The decisions relied upon by Mr. Sudhir Nandrajog, the learned senior counsel for the respondent Company are also wholly distinguishable on facts. Thus, in the case of M/s. International Woollen Mills (supra), it was clearly noted by the Hon'ble Supreme Court that all that was read by the English Court before recording its order was the affidavit filed in the English Court by the Solicitor for the respondent at the time of effecting service upon the petitioner, to which affidavit had been annexed copies of the invoice and other relevant documents. Thereafter, no documents were tendered nor any evidence led. The English Court then pronounced the judgment and decree, in which it did not even say that it had read the second affidavit filed by an employee of the appellant upon whom the solicitor of the respondent had effected service. Thus, clearly no evidence was led by the petitioner/respondent in the said case. The judgment and decree of the English Court in the said case, which is reproduced in the judgment of the Supreme Court, also does not indicate whether any documents were looked into and/or whether the merits of the case were at all considered.

30. The decision rendered in the case of Shri Raj Kumar Gupta (supra) by this Court is also clearly distinguishable on facts. As noted in the said case, a bare perusal of the foreign decree showed that the judgment had been returned against the plaintiff/Judgment Debtor on the sole ground of his not having entered appearance before the High Court of Justice, Queens Bench Division. It was in these circumstances that a learned Single Judge of this Court (Hon'ble Mr. Justice Sanjay Kishan Kaul) held that the execution petition for enforcement of the decree was liable to be dismissed on account of the decree not meeting the

parameters as set out in Clause (b) of Section 13 of the Code.

31. Likewise, the decision in the case of Middle East Bank Ltd. (supra) is of no avail to the respondent Company. In the said case also, a bare look at the foreign decree reproduced in the judgment was sufficient for the Court to hold that in the context of Section 13 the judgment and decree given by default under a summary procedure in the absence of appearance by the defendant and filing of any defence by him, and without any consideration of the plaintiff's evidence is not a judgment given on the merits of the case.

32. The Division Bench judgment in the case of O.P. Verma (supra) also does not further the case of the respondent Company in any manner. On the contrary, it is clearly laid down in the said case that it is not the presence or the absence of the defendant which can really condition the quality of a judgment as to its having been given on the merits or not. What really matters is whether the procedure according to which the suit had been decreed requires the Court to determine the truth or falsity of the contentions raised or which may be raised. Thus, an ex parte judgment per se may very well be a judgment on the merits. Where, however, a decree can be entered in favour of the plaintiff merely because the defendant has failed to appear and the judgment is given in default, or where he has failed to apply for leave to defend, or where he has applied for leave to defend and such leave is refused, then such a judgment cannot be held to have been given on the merits within the meaning of Section 13(b) of the CPC. Significantly, in the said case it was noted that the application for leave to defend the case had been dismissed as the defendant had not appeared and the decree passed without entering into the merits of the case. The ratio laid down in the aforesaid case, therefore, has no application to the present case, where cogent evidence has been adduced by the petitioner and the same has been scrutinized by the English Court.

33. The decision of the Punjab and Haryana High Court in the case of Gurdas Mann (supra) relied upon by the respondent Company is on similar lines in that the decree in the said case was passed by the foreign Court, being the Supreme Court of Ontario, ex parte merely on the pleadings of the plaintiff and because the defendant chose not to appear. While considering the aspect of whether the decree was not on merits, the Court specifically noted that "on persistent asking, the learned counsel for the respondent was unable to point out any evidence, oral or documentary, which was produced before the Supreme Court of Ontario, before the said Court passed the decree." In the penultimate paragraph of the judgment, it was recorded that the judgment of the English Court did not show that any evidence oral or documentary was produced before the suit was decreed.

34. In the Full Bench decision of the Madras High Court in the case of R.E. Mahomed Kassim and Co. (supra), the question which was referred to the Full Bench was:-

Does a suit lie in this country on a foreign judgment given on default of

appearance of the defendant on the plaint allegations without any trial on evidence?

35. The Court ruled relying upon the judgment of the Privy Council in *Keymer vs. Visvanathan*, AIR 1916 PC 121 that where the decision is given without any evidence at all, but under the rules governing the foreign Court under which, where the defendant does not appear, a decree is given as a matter of course without any trial or evidence, it must be held not to have been given on the merits of the case. Thus, the facts before the Full Bench were entirely different from the present case where the petitioner has admittedly filed evidence by way of an affidavit supported by documents which clearly prove the case of the petitioner.

36. In view of the aforesaid discussion, the inevitable conclusion is that though the law is well settled that by virtue of Sub-Section (3) to Section 44A of the Code, the Court shall refuse execution of a decree if it is satisfied that the decree falls within the exception culled out by Clause (b) of Section 13, merely because a decree is ex parte may not in itself be sufficient to arrive at a conclusion that it is not "on merits". Indubitably, an ex parte decree may be passed in a summary manner without going into the merits of the case and without taking any evidence. Where however a decree is passed in the absence of the defendant but the Court nevertheless has gone through the case and taken the evidence of the witnesses put up by the plaintiff, it cannot be said that the decree is not on merits merely because the defendant has chosen not to appear before the Court. Had that been the intention of the legislature, there was no difficulty in the legislature spelling out the fact that an ex parte foreign judgment shall not be conclusive as to any matter thereby adjudicated upon between the parties. In that event, Clause (b) of Section 13 would have been drafted by the legislature to read as "where it has been given ex parte" instead of "where it has not been given on the merits of the case". The Legislature having chosen not to do so, the only inference which can be drawn is that where a judgment is rendered ex parte by a Foreign Court, it is for this Court to satisfy itself before executing the judgment whether the said judgment is "on merits" or whether under the procedure of the Foreign Court it has been rendered merely on account of the absence of the defendant. The ultimate test would be for the Court to examine whether upon the evidence led by the plaintiff, oral and documentary, it could reasonably be said that the plaintiff was entitled to a decree in his favour and against the defendant.

37. Applying the aforesaid test to the facts of the present case, this Court is of the opinion that it cannot be said in the instant case that the judgment and decree of the foreign Court was entered into in favour of the plaintiff merely on account of the absence of the defendant and without any evidence on the record. The English Court being a Court covered by the provisions of Section 44A of the Code of Civil Procedure, the decree passed by it must be executed. It is, therefore, ordered that the respondent Company/Judgment Debtor shall

immediately disclose on affidavit all their assets both movable and immovable, including tangible and intangible assets within a period of four weeks. List on 03.09.2012 for further proceedings.