

(2014) 03 BOM CK 0134
In the Bombay High Court
Case No : Company Petition No. 69 of 2013

Marine Geotechnics LLC

APPELLANT

Vs

Coastal Marine Construction and Engineering Ltd.

RESPONDENT

Date of Decision : 05-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22 13 13(c) 44A 47
Companies Act, 1956 — Section 433 433(e) 434 434(1)(a) 434(1)(b)

Citation : (2014) 3 ABR 193 : (2015) 6 ALLMR 259 : (2014) 2 BomCR 769 :
(2014) 120 CLA 349 : (2014) 183 CompCas 438

Hon'ble Judges : G.S. Patel, J

Bench : Single Bench

Advocate : Rajiv Narula, Mr. Aurup Dasgupta, instructed by M/s. Jhangiani, Narula and Associates, for the Appellant; Vishal Sheth, instructed by Mr. Ashwin Shankar, for the Respondent

Final Decision : Dismissed

Judgement

G.S. Patel, J.—Is an ex-parte default summary judgment obtained in a non-reciprocating foreign country against an Indian company a "debt" due and payable by it within the meaning of Section 433(e) of the Companies Act, 1956? This is the issue in this winding up petition. The petitioner, Marine Geotechnics LLC ("Marine Geotechnics") is an American company. It has its headquarters in Houston, Texas. It brought suit against the respondent-Company, Coastal Marine Construction & Engineering Ltd. ("Coastal Marine") in the United State District Court, Southern District of Texas, Houston Division. Marine Geotechnics filed a Motion for Entry of Default Judgment against Coastal Marine and three others. On 18 January 2011, the US District Court granted Marine Geotechnics' motion and entered default judgment against Coastal Marine and one of the other defendants. A copy of that opinion/judgment is annexed to the affidavit in rejoinder. The order is composite. Against two other defendants it obtained a summary default judgment. Against Coastal Marine and one other defendant it obtained a default judgment. The total amount decreed is in the aggregate sum

of US\$ 432,731.28.

2. Marine Geotechnics' lawyers issued a statutory notice to Coastal Marine on 15 September 2012. Coastal Marine's advocates replied on 8 October 2012 denying liability, saying that Coastal Marine was unaware of any such decree. Marine Geotechnics' advocates responded on 20 October 2012.

3. Mr. Narula for the petitioner, Marine Geotechnics, submits that there is no defence to the petition. There is, he says, a valid decree against Coastal Marine, and it has not been satisfied despite service of a statutory notice. Coastal Marine must be deemed to be unable to pay its debts within the meaning of Section 434(1)(a) of the Companies Act, 1956. In any case, he says, Coastal Marine has liabilities in excess of Rs. 26 crores and is commercially insolvent.

4. Mr. Sheth, appearing for Coastal Marine, disputes its liability altogether. Coastal Marine was, he says, never served with a writ of summons (or its equivalent). There is no evidence of service. The default judgment of the US District Court is just that: an ex-parte default summary decree against Coastal Marine since it did not appear. Mr. Narula's attempt at this stage to produce proof of service is not something that I can or am willing to examine; certainly there is nothing on affidavit to demonstrate service. The document Mr. Narula produces is also not one that I can accept like this at its face.

5. Even if there was any such evidence, I doubt it would assist Mr. Narula much. Mr. Sheth's submission is that this is ostensibly a decree or a judgment of a foreign court in a non-reciprocating territory. u/s 13 of the Code of Civil Procedure, 1908 ("CPC"), the judgment on which this decree is based is conclusive, but only if it satisfies the tests of that section. That means that the decree is no debt till it is made a rule of a court in India, and that, he says, can only be done once the Marine Geotechnics files a suit on that judgment and brings it within the parameters of Section 13. Until that time, Mr. Sheth submits, the judgment of the US District Court is not a "debt" within the meaning of Section 433(e) of the Companies Act, 1956 sufficient to provide a foundation for a winding up action.

6. Mr. Narula relies, first, on the decision of a single Judge of this Court in China Shipping Development Co. Ltd. Vs. Lanyard Foods Ltd., There, in a case of Affreightment, four letters of indemnity were said to have been issued by the respondent-company jointly and severally with the State Bank of Saurashtra. The petitioner having delivered the cargo at the respondent-company's request, the petitioner incurred liabilities to third parties who claimed they were lawful holders of one or more of the bills of lading in question. Legal proceedings were initiated against the petitioner by these third parties, and judgment obtained. The petitioner invoked the indemnities. After its action in England against the Bank of Saurashtra failed, it brought suit there against the respondent-company. Despite being duly served, the respondent-company did not enter appearance or file a defence. The petitioner moved the English court for a summary judgment under

the English Civil Procedure Rules. The respondent-company received intimation of this. It did not appear. Summary judgment was entered against the respondent. The respondent was served with the decree and a certificate of the Master of the English Court that no appeal had been filed.

7. The petitioner then issued a statutory notice to the company in India, calling upon it to pay the decretal sum. There was no reply. The petitioner filed for winding up. The company's defence was, inter alia, that the English judgment did not meet the requirements of Section 13 of the CPC. This court held that the petition was maintainable. The defence taken before the China Shipping court was that the English courts lacked jurisdiction and that the decision was not on merits. Chandrachud, J. (as he then was) held that the provisions of Section 13 must be borne in mind. That section makes a foreign judgment conclusive on any manner directly adjudicated in it. This is subject to the exceptions listed in clauses (a) to (f). Two of these were canvassed before the learned single Judge: that the English court was not one of competent jurisdiction; and that the decision was not on merits. Both arguments were rejected on the facts before the court. Chandrachud, J. said:

A defendant to the proceedings before a foreign Court who chooses not to appear despite being served runs the risk of an ex parte judgment in favour of the plaintiff and it is a well-settled principle of law that even such a judgment would be a judgment given on merits if evidence is adduced on behalf of the plaintiff and judgment is based on a consideration of the evidence.

8. The company petition was admitted and directed to be advertised. The company appealed. The judgment of the Division Bench, Lanyard Foods Limited Vs. China Shipping Development Co. Ltd. and The Official Liquidator appointed as Provisional Liquidator on the Lanyard Foods Limited, notes the submission of the appellants that the case fell u/s 434(1)(b) and not Section 434(1)(a) of the Companies Act, 1956. It also noted the submission on behalf of the respondent to the appeal, the original petitioner, that an amount due under a decree is as much a debt as any other, and that a petitioning-creditor who is also a decree-holder is not invariably driven to Section 434(1)(b) alone. The issue of whether a foreign decree from a non-reciprocating territory can ever constitute a debt was not considered by the appeal court. What remained was the learned single Judge's finding of fact that the judgment of the UK Court was a decision on merits by a competent court, and hence did not fall afoul of the parameters of Section 13 of the CPC. Neither of these decisions is, therefore, of assistance to Mr. Narula.

9. The decision of a Division Bench of the Gauhati High Court in Kitply Industries Ltd. Vs. California Pacific Trading Corporation, is, however, one where there was a decree of a court in a non-reciprocating foreign territory. It was contended by the appellant-company (the original respondent to the winding up petition) that the decree, of a District Court in North Carolina, USA, was not executable and was no debt at all. It required adjudication, and the petitioning-creditor would

have to file a suit on it to make it a rule of the Court. In that civil proceeding, the petitioner-creditor, as plaintiff, would have to show that the requirements of Section 13 of the CPC were satisfied. It was, however, pointed out that the judgment of the District Court in America was one on merits. The appellant had been served. It entered appearance, but later withdrew. It was in those circumstances that the learned single Judge admitted the winding up petition. The appeal court did not, in fact, decide the question of the "bar" u/s 13 of the CPC:1

So far as the other point raised by learned Counsel at the bar is concerned, we find that since the matter is yet to be finally decided after delivering defence by the appellant and the matter is still in its initial stage before the learned company court, any finding of ours may pre-judge the issue which we do not intend to do for the interest of either of the parties, and learned Counsel concur on this view. In that view of the matter, we do not find any merit in this appeal and, accordingly, the same is dismissed.

(emphasis supplied)

10. Mr. Sheth is quick to point out that Mr. Narula's reliance on the 2008 decision in Kitply is misdirected as that case had a particularly chequered history. The Division Bench remanded the matter to the Company Court for a decision on merits. The Company Court made a conditional order on the petition requiring Kitply Industries to pay its debt to California Pacific in three months, failing which, it would be wound up. Kitply Industries appealed. The Division Bench in this second round held that the petition was maintainable. Kitply Industries filed a Special Leave Petition. The Supreme Court directed that the matter be heard on merits and expressly kept open the issue of maintainability. The Division Bench therefore remitted the case to the learned single Judge who, on a close examination of the North Carolina court decree, found that it was by a court not of competent jurisdiction, and therefore not conclusive or enforceable in India. It is this later decision, Mr. Sheth points out, and in my view rightly, that should be taken into account, and it does not support Mr. Narula. 2

11. The issue at hand was, however, squarely before a learned single Judge of the Madras High Court in Yehuda Silberberg Ltd. V. Premier Polyweaves P. Ltd. 3 There, the decree was of a court in Israel, a non-reciprocating state u/s 44A of the CPC. The facts are peculiar, in that it was the respondent-company that initiated proceedings before the magistrate's court in Tel Aviv-Jaffa. The petitioning-creditor filed a counter-claim, inter alia for loss of profit. This counter-claim was decreed, and the claim of the respondent-company (the Indian entity) for recovery of the price of goods sold and delivered was rejected. The decision was on merits. Since the Indian party, the respondent-company, had initiated proceedings, it could hardly contend that the decision was not of a competent court. The proceedings thus resulted in a decree in favour of the petitioning-creditor, a foreign entity, against the Indian respondent-company. The petitioning-creditor relied inter alia on the decision of the learned single Judge of this Court

in China Shipping to contend that the respondent-company could no longer contend that the judgment of the magistrate in Tel Aviv was not binding and not an enforceable debt. That judgment, the petitioning-creditor said, created a liability and a debt. Since that had remained unpaid, winding up should be ordered.

12. Learned senior counsel for the respondent-company disputed this formulation of the law. He relied on Section 13(c) of the CPC read with Section 44A. Israel was not, he argued, a reciprocating state. A decision of its court could not be binding until it was made a rule of a court in India. To do that, the petitioner would have to bring an action on that judgment or decree in an Indian court of competent jurisdiction. Till that was done, and a domestic judgment or decree obtained, the decision of the court in Israel did not constitute a debt. Further, since that action was now time-barred, there was no outstanding debt. The learned single Judge accepted the submissions made on behalf of the respondent-company, and held that the defence based on Sections 13(c) and 44A of the CPC was sufficiently substantial that no order of admission could be made on the winding up petition. The Court did not, however, finally decide whether the foreign judgment of the magistrate in Israel was or was not binding.

13. *Intesa Sanpaolo SPA v. Videocon Industries Ltd.* 4 is a recent decision of a learned single Judge of this Court, one of which Mr. Narula places much reliance. The petitioning-creditor ("Intesa") was an Italian bank. It sought winding up of an Indian company, Videocon Industries Ltd. ("Videocon"). Intesa's claim was brought under a letter of guarantee, called a "patronage letter". In 2011, Intesa brought an action against Videocon in a court in Turin, Italy. It produced documents. A mandatory injunction was sought and granted against Videocon for payment of over ₹ 36 million. In 2012, one of Videocon's shareholders filed a suit in a civil court in Kolkata inter alia for a declaration that the letter of guarantee or patronage letter was null and void and contrary to the Foreign Exchange Management Act (FEMA). Videocon was a party to the suit. Intesa intervened. It also filed an independent suit in this court to enforce the Turin court's decree. A motion, too, was filed. Both are pending. Intesa then issued a statutory notice to Videocon claiming an amount of about ₹ 38 million.. Videocon replied, inter alia contending that till the Turin court's order was made a decree of a competent court in India, Videocon was not liable to make any payment. Intesa then filed a winding up petition. At the admission stage, it was argued that the winding up petition was not based on the Turin decree at all but on the patronage letter. This was disputed by Videocon. Till such time as the Turin decree was made one of an Indian court, Intesa could not be said to be Videocon's creditor u/s 439 of the Companies Act, 1956. The Turin decree was not on merits and was opposed to natural justice and did not, therefore, satisfy the tests of Section 13 of the CPC.

14. On a close examination of the facts, the Court found that the petition was not, in fact, based on the Turin decree but on the patronage letter and

subsequent admissions made by Videocon. It also repelled the submissions that the cause of action, if any, on the patronage letter had merged with the decree of the Turin court; that the Turin court had exclusive jurisdiction; and that the claim based on the Turin decree was beyond limitation. Of the many decisions cited before the Intesa court, two are immediately germane. The first, of course, is that of the learned single Judge in China Shipping. The second is of a learned single Judge of the Gujarat High Court in Vanguard Textiles Ltd. v. GHCL Ltd. 5 As in China Shipping, Vanguard Textiles too was a decision that arose out of a decree obtained in the United Kingdom. That being a reciprocating State, the decree could be put in execution u/s 44A (read with O. XXI, R. 22) of the CPC. The question of non-enforceability in that case would arise, the Gujarat High Court said, in execution of that foreign decree. That could not be a reason to deny the winding up action. Jamdar, J. in Intesa then considered the different considerations that obtain in a civil action and in an action for winding up. The fact that a creditor holds a decree does not make him any less a creditor. He said:

47. If a creditor with or without a decree of an Indian Court can file a petition for winding up based upon a original cause of action, pending the suit and after decree, there is no warrant to deprive a creditor with a decree of foreign Court to present a petition for winding up, independently of the decree, in the Company court having jurisdiction. The Companies Act does not contemplate such exclusion. To deprive a creditor with a decree of foreign court of this statutory right, will also not be in larger public interest. If a foreign creditor with decree of foreign Court is barred from presenting a petition for winding up on the original course of action and till the decree by Indian Court is passed in it's favour, it will make a distinction between two classes of creditors. This will lead to the Indian companies adopting unhealthy practices of borrowing capital abroad and then refuse to repay admitted debts and resist winding up. This will have negative effect on the cross border flow of capital and international commerce. Thus there is no warrant to read such an exclusion of the statutory right by way of interpretation.

48. Therefore there is no impediment in the way of the Petitioner to proceed on the basis of the Patronage Letter as a creditor of the Company for presenting this petition for winding-up. There is no question of merger of the Patronage Letter into the decree. The admissions as regards the liability given in the correspondence is sufficient to form basis of the petition for winding-up. Even assuming that there is a suit filed for enforcement of a foreign decree it cannot be said that the Petitioner has ceased to become a creditor of the Company.

(emphasis supplied)

15. I am unable to accept Mr. Narula's invitation to expand this carefully limned delineation to something that could never have been intended. Clearly, Jamdar, J. found that the Intesa petition was based on the original cause of action. He therefore said that merely because a decree had been obtained overseas, that could not prevent a creditor from presenting a petition independently of the

decree on the original or underlying cause of action. The argument was that such a petitioner need not wait till the foreign decree was made a decree of an Indian court; he could file on the original cause of action straightaway. What Mr. Narula asks of me is something else altogether: to do away with the requirement of filing a suit on the foreign decree or on the original cause of action or both, and to grant him relief in a winding up petition based only on the foreign decree, with no regard at all to Section 13 of the CPC. That can only mean this: that Section 13 must be confined to civil proceedings, and for the purposes of a winding up petition it is permissible to ignore it altogether. I do not see how this can possibly be done.

16. There are, as I see it, some material points of distinction between Intesa and the present case. In Intesa, a suit had already been filed on the foreign (Turin) decree. It was pending. That suit could only have been u/s 13 of the CPC. The winding up action, however, was not based on the Turin decree at all; it was found to be based on the underlying Patronage Letter or guarantee. It was that guarantee/Patronage Letter, read with Videocon's admissions, that showed its liability to pay the debt claimed to be due. In the present case, the winding up action is based on, and only on, the foreign decree of the Houston court. No suit has yet been filed on it in India, or even on the underlying transaction, whatever that might be. There is not, in the petition, a single mention of that underlying transaction. Marine Geotechnics' only case is that since it has in its hands a decree of a foreign court against Coastal Marine, therefore, Marine Geotechnics is a creditor of Coastal Marine and can sustain this petition.

17. I do not believe this to be either the correct position in law or the Intesa's ratio. Indeed, this is a wholly incorrect and entirely unwarranted misreading of Intesa. That decision said that even if a creditor has a decree in his hands against the debtor-company, and even if that decree be of a foreign court, the petitioning-creditor is not prevented, merely for his having obtained such a decree, from maintaining a winding up petition on the underlying transaction or cause of action. That is quite different from saying that the minute a person obtains a decree, even if it be a default ex-parte summary judgment not on merits, and even if it be of non-reciprocating state, that decree-holder is instantly a creditor of the company against whom that decree has been obtained. The question, more correctly, should be this: does a foreign decree of a non-reciprocating state invariably create a "debt" that can be said to be "payable now" by the respondent-company against whom it is obtained, sufficient to maintain a winding up petition under Sections 433 and 434 of the Companies Act, 1956, even if, albeit on a prima-facie assessment, it does not conform to the requirements of CPC Section 13?

18. The relevant provisions of the CPC are these:

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 recognise the law of India in cases in which such law is applicable;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud;
- (f) where it sustains a claim founded on a breach of any law in force in India.

44A. 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 2.--"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.

19. Section 13 enunciates the well-established principle of private international law that a court will not enforce a foreign judgment that is not of a competent court. What that section provides is, therefore, substantive law, not mere procedure.⁶ Now Section 13 makes no distinction between judgments of a court in a reciprocating territory and those of courts in non-reciprocating territories. That distinction comes only in Section 44A, an independent provision that says

that a decree of a court in a reciprocating state may be put into execution in India. 7 A decree from a non-reciprocating state cannot be so executed. Decrees of both reciprocating and non-reciprocating territories must, however, satisfy the tests of Section 13. The difference is at what stage, and on whom lies the burden. Where a foreign judgment is not on merits, or violates any of the provisions of sub-clauses (a) to (f) of Section 13, it is not conclusive, even though it may accord with the domestic procedure of the country in which it was passed and is valid and enforceable in that country. An ex-parte decree is not necessarily one that is always, and ipso facto, not on merits. If a court has considered and weighed the plaintiffs' case and assessed his evidence, it will be on merits, notwithstanding that it is ex-parte. Where however, there is a summary disposal of the case under some special statutory provision that obviates an examination of the merits and the taking of evidence, such a decree is not executable in India. Thus, for instance, if there is an immediate default summary judgment only on account of the defendants' failure to appear and without any examination of the material or the evidence, that judgment is not enforceable in India. 8 In short, if a foreign judgment falls under any of the Clauses (a) to (f) of Section 13, it is not conclusive as to any matter thereby adjudicated upon. The judgment is open to collateral attack on the grounds mentioned in the clauses of Section 13. 9 The elaborate discussion by the Supreme Court in *International Woollen Mills v. Standard Wool (UK) Ltd.* 10 ultimately leads to one pithy conclusion: a decree that follows a judgment that is not on merits cannot be enforced in India:

...Even where the defendant chooses to remain ex parte and to keep out, it is possible for the plaintiff to adduce evidence in support of his claim (and such evidence is generally insisted on by the Courts in India), so that the Court may give a decision on the merits of his case after a due consideration of such evidence instead of dispensing with such consideration and giving a decree merely on account of the default of appearance of the defendant.

In the former case the judgment will be one on the merits of the case, while in the latter the judgment will be one not on the merits of the case. Thus it is obvious that the non-appearance of the defendant will not by itself determine the nature of the judgment one way or the other. That appears to be the reason why Section 13 does not refer to ex parte judgments falling under a separate category by themselves ...

(emphasis supplied)

20. Armed with a decree of a court in a non-reciprocating foreign territory, what must a party do in India? His option is to file, in a domestic Indian court of competent jurisdiction, a suit on that foreign decree, or on the original, underlying cause of action, or both. 11 He cannot simply execute such a foreign decree. He can only execute the resultant domestic decree. To obtain that decree, he must show that the foreign decree, if he sues on it, satisfies the tests of Section 13. If the decree is, on the other hand, of a court in a reciprocating

territory, then he can straightaway put it into execution, following the procedure u/s 44A and Order XXI, Rule 22 of the CPC. At that time, the judgment-debtor can resist the decree-holder by raising any of the grounds u/s 13. If he does not, or fails in his attempt, the decree will be executed as if it were a decree passed by a competent court in India.

21. A winding up petition is not to a legitimate means of enforcing recovery of a debt disputed bona fide. Not every decree of a foreign court is a "debt" per se. In *Silver Shield Construction v. Recondo Ltd.*,¹² a learned single Judge of this Court found that a decree of a UK court was passed on merits, and therefore held that a winding up petition based on that decree was maintainable. The debt in a winding up proceeding must be one that is due eo instanti, both debitum in praesenti and solvendum in praesenti.¹³ It must be due at the date of the petition. It is not every debt that can form the foundation of a winding up petition: a petition will not, for instance, be admitted or allowed on a time-barred debt. It is for the petitioning-creditor to show that the debt on which the petition is brought is due and payable on the date of the petition.¹⁴ A "debt due" is a sum now payable, in praesenti.¹⁵ Clearly, that must mean a sum payable now in India, according to Indian law. If a foreign decree of a non-reciprocating territory needs to be made a rule of an Indian court to become an enforceable debt, I cannot see how, without passing through the filter of Section 13 of the CPC at least on a minimal, prima-facie enquiry, it can possibly form the foundation of a winding up petition.

22. For the purposes of a winding up petition, therefore:

(a) It is not every foreign decree, irrespective of whether or not it is on merits, that can, therefore, be said to be a "debt" for the purposes of Section 433(e) of the Companies Act, 1956. Any foreign decree, whether of a reciprocating or non-reciprocating territory, that is not on merits, or does not otherwise satisfy the requirements of Section 13 of the CPC, cannot be the basis of a winding up petition. It is not a debt due.

(b) A foreign decree of a reciprocating territory, if found to be on merits and otherwise not afoul of CPC Section 13, is a debt due, and a winding up petition can be maintained on it even without it being put in execution.

(c) The only manner in which a decree of a non-reciprocating territory can be recovered is if it is made to pass the test of Section 13 of the CPC. Usually, that is done by filing a suit on it (or on the original cause of action, or both). Once the parameters of CPC Section 13 are met, it is not possible to examine the sufficiency of evidence before the foreign court, or to test the correctness of the decision.¹⁶

(d) The winding up process cannot be used as a substitute for a necessary and required civil proceeding. A winding up petition based only on a foreign decree of a non-reciprocating territory cannot, absent even a minimal prima-facie assessment under CPC section 13, be maintainable. Where such a petition is

based only on the foreign decree of a non-reciprocating territory, it is for the petitioning-creditor to show that the tests of Section 13 CPC are met. At this stage, where the company court finds that a fuller enquiry is needed, for instance, requiring evidence as to service, no order of winding up can be made.

(e) A party who has a foreign decree from a non-reciprocating territory may nonetheless maintain a winding up petition on the original or underlying cause of action. The fact that there is also a foreign decree does not bar the filing of such a petition. This is the Intesa rule.

23. In the present case, the decree against Coastal Marine is clearly not on merits. It is a default summary judgment for non-appearance. There is no indication of evidence against Coastal Marine. There were four defendants to the suit in Houston. The only reference to Coastal Marine in the Houston court's order is at internal page 6 (of Exhibit "1" to the affidavit in rejoinder):

Defendants Rai and COMACOE [Coastal Marine] are in default. (See Doc. 54.) Rai is not a minor or an incompetent person. Neither Rai nor COMACOE have appeared in this action. MGLLC [Marine Geotechnics] is therefore entitled to a default judgment against Rai and COMACOE. Defendants Rai, COMACOE, QVC and Mumford are jointly and severally liable for MGLLC's damages.

24. The entire petition is based on, and only on, the Houston decree. There is no mention in the petition of the original cause of action. Mr. Narula's submission that the Houston decree was on merits is not one that I am prepared to accept. There is no reference to Coastal Marine in any part of the preceding discussion. The only discussion on "summary judgment evidence" is at internal page 5, and none of it is in relation to Coastal Marine, which is not mentioned even once. Section 13 uses the words "any matter thereby directly adjudicated upon". The word "matter" means the right claimed, not the subject-matter.¹⁷ As between Marine Geotechnics and Coastal Marine, there was no matter at all that received any adjudication in Houston: the latter did not appear, and the former moved for, and obtained, summary judgment in default of Coastal Marine's appearance. I cannot begin to see how this is possibly a judgment on merits. There is therefore no doubt whatever that the Houston decree against Coastal Marine is a summary default judgment on account of Coastal Marine's non-appearance before that court. Now whether or not Coastal Marine was served is a matter that can only be established by evidence. The Houston court decree has not been made a rule of an Indian court. It has not been subjected to the discipline of Section 13 of the CPC. It is not possible to hold that there is any debt due within the meaning of Section 433 and Section 434 of the Companies Act, 1956. The petition is, therefore, not maintainable. It is dismissed. There will be no order as to costs.

¹Kitply Industries, id., p. 289, pi. 9

²California Pacific Trading Corporation v. Kitply Industries Ltd., [2011] 165Comp Cas 247 (Gauhati)

3 Yehuda Silberberg Ltd. Vs. Premier Polyweaves P. Ltd., ; per Chitra Venkatraman, J.

4Company Petition No.528 of 2012; decision dated 5 December 2013, per N.M. Jamdar, J.

5Company petition 20 of 2009, decided on 26th August 2009.

6 Raj Rajendra Sardar Maloji Marsingh Rao Shitole Vs. Sri Shankar Saran and Others,

7M.V. Al Quamar v. Tsavliris Salvage (International) Ltd. & Ors., AIR 2000SC 2826

8International Woollen Mills, supra

9 Smt. Satya Vs. Shri Teja Singh,

10 M/s. International Woollen Mills Vs. M/s. Standard Wool (U.K.) Ltd., ; M/s. International Woollen Mills Vs. M/s. Standard Wool (U.K.) Ltd., .

11 Badat and Co. Vs. East India Trading Co.,

12[1994] 15 CLA 92, at pp. 94-95, per N.D. Vyas, J cited in China Shipping, supra, and in Bank of Baroda Vs. Manubhai Jethabhai Patel and Others, .

13 Tower Vision India Pvt. Ltd. Vs. Procall Private Limited,

14 Vijayalakshmi Art Productions Vs. Vijaya Productions Pvt. Ltd.,

15 Union of India (UOI) Vs. Raman Iron Foundry, ; Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta,

16 R. Viswanathan Vs. Rukn-UI-Mulk Syed Abdul Wajid,

17 R. Viswanathan Vs. Rukn-UI-Mulk Syed Abdul Wajid,