

(2005) 11 DEL CK 0150
In the Delhi High Court
Case No : Ex. P. 73 of 2000

Mashreq Bank

APPELLANT

Vs

Navin Khilnani

RESPONDENT

Date of Decision : 09-11-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, 13, 47
Constitution of India, 1950 — Article 226, 32
Foreign Judgments (Reciprocal Enforcements) Act, 1933 — Section 10

Citation : (2005) 125 DLT 172

Hon'ble Judges : Om Prakash Dwivedi, J

Bench : Single Bench

Advocate : R.S. Endlaw and Bharti Ali, for the Appellant; S.C. Dhanda, for the Respondent

Judgement

O.P. Dwivedi, J.—Decree Holder Mashreq Bank psc has filed this execution along with an application under Order XXI Rule 22 CPC seeking permission to execute the judgment dated 13.11.98 and decree order dated 23.11.98 passed by the Queen's Bench Division of High Court of United Kingdom in case No. 1997 M. No. 1548.

2. Briefly narrated, the facts leading to this execution application are that Decree Holder Bank had filed a suit for recovery of a sum of pound 5470212 along with interest thereon against the Judgment Debtor. The amount claimed was due to the Bank from Munradtech Industrial Generators Limited (for short "MIG") of which the Judgment Debtor/ objector was a Director and had executed a guarantee dated 4.2.1993 ensuring the payment of the Bank dues. The suit was filed under the provisions of O. 14 RSC which prescribed a summary procedure in such matters. It appears from the judgment dated 13.11.98 of which a duly authenticated copy has been placed on the record that the defendant had engaged some attorneys and had also filed an application for leave to defend setting out his defense therein but did not file any affidavit in support thereof nor anybody participated in the proceedings on behalf of the defendant after initial

stage. It may be pointed out here that in the defendant did not dispute the amounts due as claimed by the Bank nor denied the execution of guarantee deed. The only defense raised was that he along with his brother Deepak Khilnani were running a group of companies. The business of the company in the UK and other European countries was being run and managed by his brother Deepak Khilnani whereas other group of companies in the Middle East Countries were being run by the defendant himself. According to the defendant, his brother Deepak Khilnani did not disclose the true position regarding financial conditions of European companies to him and persuaded him to execute the guarantee deed by misrepresenting that it was only a formality to obtain further facilities from the Bank. Thus according to the defendant he has been a victim of undue influence and fraud practiced upon him by his brother of which the Decree Holder Bank had constructive notice and as such surety is entitled to wriggle out of the liability under the guarantee deed. Although there was no appearance on behalf of the Judgment Objector yet the Hon''ble Judge minutely examined this plea in the light of material on record and held that defendant's plea of having been defrauded by his brother Deepak Khilnani or exercising undue influence by misusing ostensible trust and confidence holds no water. While coming to this conclusion learned Judge took note of various factors namely that defendant himself was an experienced businessman holding MBA degree and had been representing group of companies in the Bank. Eventually the Bank's claim for the amount due along with interest thereon was upheld and the decree passed accordingly. Admittedly no appeal/ revision has been preferred against the said decision which has Therefore become final. The Decree holder has filed the certificate dated 29.3.1999 from the superior court being Supreme Court of England and Wales u/s 10 of the Foreign Judgment (Reciprocal Enforcement) Act 1933 and also the original certificate dated 26.4.99 from the Supreme Court of England and Wales certifying that the judgment and decree remains wholly unsatisfied. Along with the execution, an application under Order XXI Rule 22 CPC being EA No. 177/2000 has also been filed seeking permission to execute the decree. On notice of the application being served the Judgment Debtor Navin Khilnani has filed objections u/s 47 read with Order 21 Rule 22 CPC. Main objection raised by the Judgment Debtor is that the judgment in question has not been given on merits of the case and Therefore the same is not conclusive and un-executable in view of Section 13(b) CPC. The other objection is that the decree can not be executed for want of permission of RBI under FERA. The Decree Holder has contested these objections by filing a detailed reply.

3. I have heard learned counsel for the parties and perused the record.

4. Learned counsel for the respondent-JD has referred to various decisions viz., R.E. Mahomed Kassim & Co. v. Seenii Pakirbin Ahmed and Ors AIR 1927 Madras 265. (FB); Algemene Bank Nederland NV Vs. Satish Dayalal Choksi, K.M. Abdul Jabbar Vs. Indo Singapore Traders P. Ltd., and O.P. Verma Vs. Lala Gehrilal and Another, to support his contention that if the judgment has been rendered without trial without recording evidence it cannot be said to be a judgment on

merits. In the case of R.E. Mahomed Kassim and Co. Vs. Seeni Pakir Bin Ahmed and Others, , the facts were that the plaintiff had earlier filed a suit against the defendant and obtained a judgment from Supreme Court of Penang in default of appearance of the defendant because procedural law of that Court permitted a judgment being rendered on the basis of plaint and without any trial if the defendant does not appear. Subsequently the plaintiff filed a suit in Madras court on the basis of foreign decree obtained from Penang. Suit was dismissed by the subordinate Judge. The matter went to the Madras High Court and the Full Bench took the view that such a judgment/ decree of the foreign court which has been rendered in default of appearance of the defendant cannot be said to be one on merits. In Algemene Bank Nederland NV Vs. Satish Dayalal Choksi, , the foreign judgment was an ex parte judgment given by a Hong Kong Court on the basis of pleadings and documents without going into the controversy between the parties as the defendant did not appear at the time of hearing. In these circumstances it was held that it was not a judgment on merits. In the case of K.M. Abdul Jabbar Vs. Indo Singapore Traders P. Ltd., , it appears from the report that a foreign judgment was passed by Singapore Court on the basis of allegations made in the plaint after refusing the leave to defend. The Court took the view that such a judgment is not a judgment on merits of the case. From the reported portion of the judgment it is not clear as to what exactly the foreign judgment dealt with. It is also not clear what defense was raised by the defendant and whether same was considered by the Court in the light of material on record or not. In para 3 of the reported judgment it has been observed that "... the appellant and the second respondent therein, appeared by counsel and affidavits were filed on behalf of the defendants for leave to defend. But as the leave to defend sought for by the defendant was not given and the Court passed a decree straightway, it was contended by the appellant before the Court that the decision rendered in the case by the Singapore High Court was not on merits and, Therefore, the judgment cannot be taken to be conclusive u/s 13(b) of the Civil Procedure Code...." It thus appears that in that case there was no discussion on the merits of the case set up by the defendant in his leave to defend application. Obviously such a judgment could not have been held to be a judgment on merits. There is a decision of Rajasthan High Court (DB) in the case of O.P. Verma Vs. Lala Gehrilal and Another, which deals with the question quite elaborately and exhaustively. In that case plaintiff had obtained a decree under Order 37 CPC from the Delhi Courts on the basis of a dishonoured cheque. The defendant filed leave to defend application but on the date fixed for the disposal of the said application neither the defendant nor his counsel was present. The defendant sought adjournment through a telegram which was ignored by the Court. The Court dismissed the application and passed a decree under Order 37 CPC on 27.7.43. On the basis of the said judgment, plaintiff filed another suit in the Court of District Judge of Kota where defendant was living. In that case question arose as to whether decree passed by the Delhi Courts which was a foreign court at that time qua the state of Kota, was on merits? Division Bench considered numerous decisions on the point in depth & detail and in para 28 of the judgment

recorded its conclusions in the following words :-

"28. From a review of the case-law made above, we are clearly of opinion that in order that a judgment of a foreign court may successfully pass the test of having been given on the merits, such a judgment must not have been given either as a matter of penalty or as a matter of mere form based on special or summary procedure inasmuch as such a trial does not offer any real or substantial opportunity to the defendant to contest the suit as a matter of right as he receives it under a regular procedure. This is, however, not to say that an ex parte judgment per se may not be a judgment on the merits. It may very well be. 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 has been decreed requires the court to determine the truth or falsity of the contentions raised or which may be raised. It seems to us that where it so requires and the court applies its mind to the contentions raised on either side, there cannot but be a judgment on merits. Where the procedure, however, does not so require and a decree can be entered in favor 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 leave to defend and such leave is refused, then ...are disposed to hold the view that such a judgment cannot be held to have been given on the merits within the meaning of S. 13(b), CPC. We say nothing here about that class of suits where leave to defend having been given under a summary procedure the court applies its mind to the truth or falsity of the case and then decides the suit. We hold accordingly.

5. Learned counsel for the decree holder has also referred to the following decisions on this point viz Govindan Asari Kesavan Asari Vs. Sankaran Asari Balakrishnan Asari, and Trilochan Choudhury Vs. Dayanidhi Patra, to contend that even an ex parte judgment can be considered to be on merits provided the merits of the case has been considered. The sum and substance of discussions in these decisions has been succinctly reproduced by Division Bench of Rajasthan High Court in para 28 reproduced above. In order to ascertain whether a particular foreign judgment is on merits of the case or not, one has to look to the contents of the judgment. If a judgment is delivered merely because of some default on the part of the defendant it will be more by way of punishment than on merits. But where merits of the case set up by both parties have been examined in the light of the material on record and Court has arrived at a definite conclusion on that basis it cannot be said to be a judgment in default. In the present case although neither the defendant nor his counsel appeared at the time of hearing of the application for leave to defend yet Hon"ble Judge examined the probability of the defense being truthful and then negated it. As already observed, the Judgment Debtor/ objector did not dispute the Bank's claim regarding the dues nor did he dispute the execution of the guarantee deed dated 4.2.93. Thus on merits of the claim, there was no defense. His only plea

was that he was misguided by his younger brother Deepak Khilnani regarding the financial conditions of the company and was persuaded to furnish the guarantee under the belief that the company was doing very well and the guarantee was merely a formality to seek more facilities from the Bank. Thus according to the defendant bank guarantee has been obtained by exercising undue influence of which fact the Bank was aware and had constructive notice and Therefore, Bank cannot enforce the same against the defendant. Hon"ble Judge examined the plausibility of his defense and found it to be untenable. Leave to defend was eventually declined. Judgment was rendered after a very detailed analysis and after bestowing considerate thought to the defense version. Had the court dismissed the application straightway because of the absence of the defendant and passed a decree, it could have been said to be a judgment in default but that is not the case here. As already noticed, the defense version has been duly taken note of, thoroughly scrutinized and then rejected being unworthy of trial. Such a judgment, in my view, cannot but be said to be on merits of the case. Commenting on the necessity of holding full fledged trial by examination and cross examination of the witnesses in recovery cases instituted by the Banks, the Supreme Court in para 23 of the case of Union of India v. Delhi High Court Bar Association and Ors, 2002 2 AD (SC) 613, has observed as under:-

"... When the High Courts and the Supreme Court in exercise of their jurisdiction under Article 226 and Article 32 can decide questions of fact as well as law merely on the basis of documents and affidavits filed before it ordinarily, there should be no reason as to why a Tribunal likewise, should not be able to decide the case merely on the basis of documents and affidavits before it. It is common knowledge that hardly any transaction with the Bank would be oral and without proper documentation, whether in the form of letters or formal agreements. In such an event the bona fide need for the oral examination of a witness should rarely arise. There has to be a very good reason to hold that affidavits, in such a case would not be sufficient."

6. In view of above, I hold that the impugned judgment dated 13.11 1998 (Annexure-A) rendered by Division Bench of High Court of U.K. is a judgment on merits which has not been appealed against. The said judgment has attained finality, is conclusive within the meaning of Section 13(b) of CPC and is, Therefore, executable. Judgment Debtor's objections in this regard is hereby rejected.

7. Regarding the question of applicability of FERA or requirement of permission of the RBI, I think, RBI should be heard in the matter.

8. Let a Court notice be issued to RBI, New Delhi, returnable on 12.12.2005 before "roster bench".