

(2015) 03 BOM CK 0119

In the Bombay High Court

Case No : Notice No. 663 of 2011 in Execution Application No. 265 of 2011 in
Suit No. 238/2009/D

Masterbaker Marketing Ltd.

APPELLANT

Vs

Noshir Mohsin Chinwalla

RESPONDENT

Date of Decision : 13-03-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 21 Rule 22(b), 11, 13, 13(b)

Citation : (2015) 3 ABR 228 : (2015) 4 ALLMR 686 : (2015) 3 BomCR 604 :
(2015) 5 MhLj 727

Hon'ble Judges : R.S. Dalvi, J.

Bench : Single Bench

Advocate : Daniyar Madon, Senior Advocate a/w. Cyrus Andeshir, Advocate i/b. Sagar Vasant Divekar, for the Appellant; Karl Tamboly, Advocate instructed by Law Offices Divya Bahl, Advocates for the Respondent

Judgement

R.S. Dalvi, J.—This notice has been taken out under Order 21 Rule 22(b) of the CPC by the plaintiff/judgment creditor (JC) for execution of a decree of the High Court of the Republic of Singapore (the Court) as the reciprocating territory filed under Section 44-A of the CPC. The notice having been issued upon the defendant/judgment debtor (JD) three contentions in law have been taken up as to why the decree of the foreign Court cannot be enforced as a foreign judgment under Section 13 of the CPC.

2. The defendant was the Chief Financial Officer of the plaintiff. He retired in 2008. Certain irregularities in his work were noticed. The accounts of the plaintiff were got audited through KPMG who submitted initially a preliminary and then final audit report of the funds having been siphoned off by the defendant over a period of 10 years and deposited in various companies incorporated by the defendant and his wife.

3. Hence the plaintiff sued in the Court upon fraud having been committed by the

defendants by misappropriation and siphoned off the funds of the plaintiff under the specified transactions for which plaintiff claimed damages under prayer (e) against the defendant.

4. The Court passed its judgment on 2nd September, 2010 in the absence of the defendant/JD herein.

5. The defendant claims that the judgment is not on merits. That it is obtained by fraud and that this Court cannot execute that decree. The plaintiff/JC herein would claim that these grounds have been taken by the JD in the Court in the USA where the aforesaid judgment was sought to be executed. It is, therefore, claimed that it would be barred by principles of res-judicata on the question of fraud.

6. The pleas having been raised, they require to be considered on those aspects.

1. Merits of the plaintiff's claim:-

7. The statement of claim of the plaintiffs mentioned about the employment of the defendant as the CFO, the fact that he owed the duties to the plaintiff and had to act honestly and in good faith, that he was the trustee of the plaintiff's property, he acted in breach thereof and transferred funds from the bank account of the plaintiff's to certain companies. The plaintiff appointed KPMG, an accounting firm to conduct investigation and specified amounts were noted as against the defendants/JD herein (as also other parties with whom we are not concerned.). The cause of action of the plaintiff is that the defendant is liable to account for and make restitution to the plaintiff for all the unauthorised transfers by which the amounts are misappropriated whilst he was the fiduciary of the plaintiff and acted as its trustee. The only prayer clause against the defendant/JD herein is prayer "e" for the damages for the breach of fiduciary duty and a breach of trust in relation to the misappropriation in a sum of USD 1.5 million and EUR 1 million.

8. The defendant failed to appear despite service. The judgment records that the plaintiff had obtained an interlocutory judgment against the defendant/JD herein for damages to be assessed before the Assistant Registrar of the Court and on that day in the presence of the counsel of the plaintiff, the plaintiff filed affidavits of examination in chief of three witnesses mentioned therein who personally appeared before the Assistant Registrar and that the plaintiff's counsel was heard. The judgment records that the first defendant would pay the plaintiff specified amounts of damages granted therein as also interest and costs.

9. The judgment, therefore, considered the fact of the assessment of damages claimed by the plaintiff before the Assistant Registrar of the Court on that day. The judgment received in evidence three affidavits of examination in chief. Upon such evidence and having heard the counsel for the plaintiff the judgment in damages, interest and cost came to be passed. The claim against the defendant/JD herein was only in damages. It was only for a specified transaction. The

assessment of damages was done before Assistant Registrar. This would be in accordance with law and must be accepted to be in accordance with the rules of the Court. That was accepted by the Court in addition to the receiving of evidence of three witnesses on behalf of the plaintiff. The evidence of the witnesses remained completely uncontroverted for want of appearance of the defendant. It is in these circumstances that it would have to be seen whether the judgment is given on merits of the case of the plaintiff.

10. Mr. Tamboly on behalf of the defendant drew the Court's attention to the case of *Algemene Bank Nederland Nv Vs. Satish Dayalal Choksi*, which was a summary suit in which the writ of summons was served and an application for summary judgment was made. Upon an affidavit in reply filed by the defendant unconditional leave was granted by the Supreme Court of Hong Kong to defend the suit. The defendant filed his defence. In a summons for directions taken out by the plaintiff, the defendant disclosed guarantee executed by the defendant in favour of the plaintiff bank and relied upon an entry in the register of guarantees. The suit was set down for trial. The defendant did not appear but produced a medical certificate. The suit came to be adjourned. The defendant, who was an Indian, thereafter sought leave of the RBI to sanction funds to prosecute his defence in the suit. That was rejected. The defendant did not take steps to make any application in Court against the refusal of the RBI to release foreign exchange to him. The defendant failed to appear. It was observed to be due to his own lapse. A decree came to be passed and whether or not it was passed on the merits of the case came to be considered.

The learned Single Judge of this Court considered inter-alia number of judgments including the judgment in the case of *D.T. Keymer vs. P. Viswanath Reddi*²¹ CWN 358 (Privy Council) . In that case the defendant had refused to answer the interrogatories of the plaintiff. His defence was struck out. A judgment was given on that footing. The Privy Council has held that the decision could not be taken to be on merits under Section 13(b) of the CPC since the controversy raised in the action was not the subject of direct adjudication of the Court. Upon such a ruling the Single Judge of this Court observed that in that case the defence filed by the defendant questioned the execution of the guarantee and the entry in the register of guarantees. No evidence was led. The judgment set out that "on the defendant's failure to appear and upon the proof of the plaintiff's claim" the judgment was given. The plaintiff bank did not properly prove its documents. Certain alterations and erasures and a corner sticker which was on the documents came to be observed. The learned Single Judge observed that there was no material to show that those aspects were examined by the Supreme Court of Hong Kong. The Court observed:

The court seems to have proceeded to pronounce judgment in view of the defendant's failure to appear at the hearing of the case to defend the claim on merits."

The Court held that such was not a decree on merits.

11. In appeal therefrom the Division Bench of this Court under an unreported judgment in the case of ABN AMRO Bank NV Vs. Satish Dayalal Choksi dated 3rd August, 1992 disagreed with and overruled the learned Single Judge on this aspect. On Page 31 and 32 of the judgment it is observed that:

In our judgment, an ex parte order can be held to be not on merits only in cases where a judgment is delivered on the ground of limitation or want of jurisdiction or where the defence is struck off as in the case before the Privy Council. In such cases, the Court declines to examine the merits because the suit is barred by limitation or the Court lacks jurisdiction to entertain the suit or the defendant is prevented from defending the suit. It is only in these kind of exceptional cases that it is possible to suggest that the decree is not passed on merits. Even when the Court passes an ex parte decree, the Court examines the merits of the plaintiff's claim and the defendant cannot be permitted to claim that the decree is not on merits and take advantage of his own wrong in not defending the suit. In our judgment, on the facts and circumstances of the present case, the conclusion is inescapable that the judgment delivered by the Hong Kong Court is on merits of the case and consequently such judgment is enforceable and the bar of Section 13(b) of the Code of Civil Procedure is not attracted.

12. The judgment of the Supreme Court of India in the case of M/s. International Woolen Mills Vs. M/s. Standard Wool (U.K.) Ltd., is the authority on what the merits of the case would be. In paragraph 30 of the judgment the Supreme Court has held that whether or not a judgment is on merits would be apparent from the judgment itself. It is not enough if there is decree or decision of the Court. It has to be a judgment. The judgment must have directly adjudicated the question arising between the parties. The Court should have applied its mind and considered the evidence in which case there would be an adjudication on merits. The plaintiff should have adduced evidence in support of the claim so that the Court duly considered such evidence instead of passing a decree merely on default of appearance of the defendant. The Supreme Court has held that in the former case there is judgment on the merits of the case; in the latter case when the decree is upon default of appearance the judgment is not on merits. Hence whether or not it is ex parte it can be a judgment on merits upon the aforesaid tests. The two diametrically different situations have also been set out in the latter part of paragraph 30 thus:

a) If the judgment is solely on account of the default of the defendant without considering whether the claim is well founded or not and whether there is evidence to sustain it, it could be a decree passed by way of penalty.

b) If there is an application of mind by the Court it would be a judgment on merits. If it is without any evidence of any kind but passed only on the pleadings it cannot be a decision on merits.

c) If the judgment is passed as matter of course or by way of penalty it would not be a judgment on merits. If it is passed on consideration of the truth or

otherwise of the plaintiff's claim it is on merits.

The Supreme Court considered in that judgment and the decree in that case was passed as matter of course on account of the default of the appearance without any evidence and without consideration of the tenability or justness of the plaintiff claim and hence was not a judgment on merits.

13. It is to be seen whether the judgment in the above suit would fall within the parameters laid down by the Supreme Court in the case of International Woolen Mills Ltd. (Supra). The judgment is passed upon considering the assessment of damages before the Assistant Registrar. The Court has received in evidence three affidavits of examination in chief. The judgment shows that the counsel of the plaintiff was heard. Thereafter the claim is decreed for specified amount of damages, interests and costs.

This judgment considered the assessment of damages and took on record the evidence of the plaintiff. The judgment was not merely on account of the default of the appearance of the defendant. Consequently it was not by way of penalty. It was not without evidence of any kind and not passed only on pleadings. It was not passed as matter of course by way of penalty. It considered the truth of the plaintiff's claim upon its evidence and upon the assessment of damages. It, therefore, considered the question of damages raised by the plaintiff. It would, therefore, show application of mind to an action for damages. It would have to be seen whether there was due consideration of the evidence. The plaintiff led evidence of three witnesses. Aside from having its claim being assessed before the Assistant Registrar, there was nothing that the plaintiff could do. Since there was no controversy raised by the defendant, what was stated by the plaintiff would have to be accepted. The decree for damages, interests and costs would be the only corollary.

Upon the aforesaid test led down by the Supreme Court, the judgment would fall within the parameters of the case decided on merits and not simply upon the default of the defendant, pleadings of the plaintiff's, documents of the plaintiff or as matter of course by way of penalty. Similarly upon the test led down by the Division Bench of this Court it is not a judgment in which the Court declined to examine the merits because of any bar of limitation, lack of jurisdiction or striking out of defence etc. Hence even when the Court passed an ex parte decree or judgment it would be that it would examine the plaintiff's case on merits. On what material it had examined the case on merits and how and where that is done is also evident from the judgment and hence, as observed by the Division Bench of this Court, the defendant cannot be permitted to claim that the decree is not on merits and take advantage of his own wrong in not defending the suit.

14. The judgment sought to be executed is, therefore, given on merits on the plaintiff's claim and cannot be challenged under Section 13(b) of the CPC as the judgment which is not conclusive between the parties.

15. Mr. Tamboly relied upon the judgment passed by Division Bench of Madras High Court in the case of RMV Vellachi Achi Vs. RMA Ramanathan Chettiar on 10th April, 1972, laying down various principles upon which a foreign decree cannot be permitted to be executed. Paragraph 16 of the judgment shows that those principles are well established. The judgment however, does not refer to earlier judgments establishing those principles. The principles set out are that the foreign judgment would be binding upon the defendant who is subject of foreign country in which a judgment has been obtained against him on prior occasions or where he is a resident or where that person selects the foreign court or where he voluntarily appears or where he contracts to submit himself as in those cases he would be amenable to the jurisdiction of the foreign Court. There would be other cases also where foreign Court would have jurisdiction based upon the cause of action in the suit and it would have to be seen from the law of the country (Lex Loci) as to whether that was the Court of proper law of contract where also a foreign judgment could be passed and which would be enforceable under Section 13 of the CPC in India. These are not established principles under precedents.

Mr. Tamboly relied upon the above judgment where no evidence was taken in proof of the claim of the plaintiff but was passed solely due to the non appearance of the defendant. The judgment was not on merits but was on default of appearance. That has been held in the aforesaid Supreme Court judgment. It is also observed that if it is solely on account of the default of the defendant's appearance and without judicial consideration of the tenability of the justness of the claim it would not be the judgment on the merits.

Indeed that would be so. That has also been held in the aforesaid judgment. If the judgment is based upon some evidence which the Court has received, it would be upon the consideration of such evidence and not merely upon the default of the defendant as in this case.

16. Reading all the established parameters the judgment in this case is seen to have been passed on merits of the plaintiff's claim by the Court.

2. Judgment obtained by fraud:

17. The defendant/JD would claim that the defendant had paid off the amounts claimed by the plaintiff to have been misappropriated by the defendant prior to the filing of the civil action by the plaintiff in the High Court of the Republic of Singapore. The plaintiff suppressed that fact. Hence the judgment was obtained by playing a fraud. The defendant sought to rely upon a number of documents to prove such claim. Mr. Madon on behalf of the plaintiff/JC/DH herein urged that the Court should not take these documents on record as it would tantamount to going behind the decree which is not permitted to be done by the executing Court. Mr. Tamboly on behalf of the plaintiff contended that the fraud alleged by the defendant could be shown by the defendant only upon those documents.

18. It would, therefore, be a fraud which was perpetrated at the time of the filing

of the action and before the judgment was delivered. It was a fraud which could have been brought to the notice of the Court by way of defendant's defence in the suit. The defendant failed to appear. His case on merits could not be brought in the notice of the Court. The fraud, if any, which was sought to be perpetrated by the plaintiff was in the suit itself. It was a fraud perpetrated prior to obtaining the judgment.

19. It would have to be seen from settled law whether such fraud is permitted to be brought to the notice of an executing Court to prevent a decree or a foreign judgment from being executed. In the case of *Sankaran Govindan Vs. Lakshmi Bharathi and Others*, relied upon by the defendant himself the Court considered the foundational case of principles of fraud for impeaching foreign judgment in paragraph 24 being the case of *Abouloff (Sic) Vs. Oppenheimer*, 1882, 10 QBD 295. That was an action of delivering of goods unlawfully detained by the defendant brought in a Russian Court. The case of fraud was that the plaintiff falsely represented to the Court that the defendant was in possession of the goods whereas the plaintiff himself continued in possession of the goods throughout. It was observed that examining such a plea would mean a new trial on merits. Whether or not to do so was on the footing that the Court would have to decide whether the foreign Court was misled by the fraud and it was observed that such question could not have been submitted to the Court, could not have been an issue between the parties and could never have been decided by the foreign court and hence to decide that the English Court would not be re-trying any issue which was submitted to the determination of the Russian Court.

Hence two principles that were laid down is to see whether in determining a fraud played by the plaintiff to obtain a judgment the executing Court would have to re-try the issue which had been tried by the Court which passed the foreign judgment.

20. In the latter case of *Vadala V. Lawes* (1890) 25 QBD 310 this aspect was again considered. That was a suit filed in Italy upon non payment of certain bills of exchange. The judgment was entered for the plaintiff. The plaintiff brought an action in England on the judgment. No new evidence was adduced. It was held that if the plaintiff induced the foreign Court to come to a wrong conclusion by fraud and misled the Court by evidence which was known to the plaintiff to be false, the whole case can be reopened. The Court held that as general rule a party can impeach the judgment on the ground of fraud but it is well settled that when an action was brought on a foreign judgment the Court cannot go into merits which is tried in the foreign Court and "one has to combine these two rules and apply them in the case". Hence it was laid down that if the fraud that was practised misled the Court by evidence known by the plaintiff to be false and if the foreign judgment was obtained thereupon, the Court would re-try the merits.

21. In a later judgment relied upon in paragraph 26 the Supreme Court considered the case of *Syal Vs. Heyward* (1948) 2 All ER 576. It was a suit filed

in India for recovery of a loan of Rs. 20,000/- advanced to the defendant. The plaintiff obtained the judgment. The defendant claimed that the plaintiff deceived the Court in India, in that the amount lend to them was Rs. 10,800/- and not Rs. 20,000/- and thereby the plaintiff concealed from the Indian Court the possibility that the defendants would have the defence under the Indian usury laws. It was held by the Court that the fraud alleged to set aside a foreign judgment must be the fraud which must have been discovered by the applicant since the date of the foreign judgment.

22. Hence the parameters of fraud to prevent execution of a foreign judgment are extracted from the case of *Abouloff* (Supra) in which the Court held that a new trial on merits would be held if the Court was misled, the case of *Vadala* (Supra) in which it was held that the fraud and the misleading of the Court would have to be seen upon the merits of the case tried in the foreign Court and in the case of *Syal* (Supra) in which it was held that such fraud would have to be discovered by the applicant only since the date of the foreign judgment (and therefore, not before).

The Supreme Court also, therefore, summarised the aforesaid judgment to conclude later in paragraph 26 that the defendants cannot ask for re-trial of the issue of fraud as between him and the plaintiff on facts known to them at the date of the earlier judgment. Hence to successfully prevent the foreign judgment from being executed it has to be a case of a fraud not on the defendants but a fraud upon the Court and to see that the Court was deceived in which case alone the issue could be re-tried.

23. The Supreme Court also considered the case of *Jacobs V. Beaver*, 17 Ont LR 496, where it was held that fraud relied upon must be extrinsic or collateral and not merely fraud which is imputed from alleged false statements made at the trial. Consequently the defendant would be estoppel by the principle of estoppel from contending that the plaintiff's statement was false when he did not show them to be so in the trial but such estoppel could not be upon new and material facts which were not before the former court and from which it could be deduced that the judgment was obtained by fraud. This also would show that the fraud intrinsic in plaintiff's case which would be known to the defendant and which could be shown to Court by the defence of the defendant cannot be gone into after the decree is passed and by the executing Court. It is only if there were new and material facts which were not before the Court during the trial but which could be shown to the executing Court of how the decree was obtained fraudulently. Only that can be gone into by the executing Court to hold that the foreign judgment was obtained by fraud and hence could not be conclusive under Section 13(e) of the CPC.

After considering the judgments of the Courts of Canada and America, the Supreme Court considered the commentary of Cheshire to see the effect of the aforesaid judgments.

The Supreme Court thereafter held in paragraph 30 the kind of fraud which is sufficient to vitiate the foreign judgment. To answer the question raised by itself and considering again the aforesaid cases the Supreme Court observed that the vitiating effect of fraud as laid down in the aforesaid cases would be to the utter disregard of the res judicata doctrine. In laying down the ambit of what must be considered it observed that misleading the Court by false testimony was to be determined by the tribunal in the very trial and a judgment on merits, therefore, necessarily involves the res judicata of the credibility of witnesses. Thus if the Court was fraudulently misled by perjury, there would be re-trial on merits to consider that issue. The Court considered that in any of the aforesaid cases the Court could not have contemplated that a foreign judgment was only prima facie evidence of the debt and may be re-examined on merits and that the customary adherence to doctrine of res judicata had to be observed. Consequently the Court held that the conclusion upon the examination of the aforesaid authorities is that if a fraud was alleged by the perjury it would tantamount to re-trial of the issue which would be res judicata and which could not be opened under the guise of impugning the judgment as procured by fraud and hence the perjury constituting fraud must be established by evidence not known to the parties at the time of the former trial.

24. This then is the ultimate parameter of seeing and considering the judgment obtained by fraud which would fall within the mischief of Section 13(e) of the CPC. It should be a fraud by perjury or otherwise which could be shown to the Court by evidence which was not known to the parties during the former trial. This stands to reason. If it was known to the parties at the time of the trial it would constitute the defence of the defendant. The defendant is obliged to bring forth that defence to the Court since it was known to the defendant. The Court would then not be misled. The defendant cannot allow the Court to be misled by its absence. That is the main characteristic of an adversarial trial. The plaintiff files his action in law. It may be truthful or perjurious or even fraudulent. The defendant is given notice of the action. He is served the summons. He is called upon to answer the plaintiff's claim. The Court is prepared to hear the defendant and to dismiss the plaintiff's claim if it is fraudulent or perjurious. It is, therefore, not only the defendant's right to get the action of the plaintiff dismissed if perjurious or fraudulent, but also its duty to bring perjurious act constituting fraud to the notice of the Court if it is known to the defendant at the time of the trial. If that is not done then and sought to be done later after the judgment is passed, it would constitute a re-trial of that issue. That re-trial is forbidden by the salutary principle of res judicata. If permitted it would allow all defendants not to defend the claim and allow any decree to be passed which can be challenged whilst being executed. That would be an abuse of the Court process. It would be a bigger abuse if the action lies in foreign Court which has jurisdiction over the subject matter and passes a decree which otherwise would be conclusive under Section 13 of the CPC. The defendant would succeed in not allowing the decree to be executed even without submitting to the jurisdiction of the competent

Court in a foreign country. The defendant would raise up his hands after the plaintiff has gone through the process of trial and undertaken the execution and then apply to the executing Court to re-try the issue which it cannot do.

The ultimate principle laid down by the Supreme Court in the aforesaid case of Sankaran (Supra) is, therefore, that the fraud which is stated to have been perpetrated, is the fraud not known to the defendant when the decree was passed. It is only when the defendant is taken by surprise of the fraud played by the plaintiff when the defendant is served the notice of execution that he can challenge the decree or foreign judgment on the ground of fraud. That would be fraud not in suing but in obtaining the decree. The defendant had well known the cause of action in the suit. The defendant would not know how the decree came to be passed. Defendant would show the fraud perpetrated upon the defendant under the decree and successfully resist its execution.

25. In the case of Smt. Satya Vs. Shri Teja Singh, , the Supreme Court further considered what would be fraud that would vitiate a foreign judgment. That was the case of grant of decree of divorce by the Court in Nevada, USA. The plaintiff's husband alleged that the defendant was within the jurisdiction of the Court. He also alleged that the defendant lived separate and apart for more than three consecutive years and without cohabitation and that there is no possibility of reconciliation. The plaintiff has obtained an ex-parte decree. The Court had to consider the challenge to it on the ground of fraud. In paragraph 50 of the judgment the Court considered that fraud as to the merits of the respondent's case may be ignored. The fraud as to the jurisdiction of Nevada, Court was a vital consideration in the recognition of a decree passed by that Court.

Hence the Court contrasted the fraud to claim the jurisdiction of the Court, without which the decree would be nullity, and the fraud merely on the merits of the case which would be by perjury. Whereas the former was vital, the latter may be ignored. It could be ignored because being on the merits of the case it would be known to the defendant and could have been resisted. Not having done so it could not be resisted before executing Court. But a fraud on the jurisdiction of the Court being more vital, it was seen that the plaintiff in the suit successfully invoked the jurisdiction of the Nevada Court upon making a false statement. The statement relating to jurisdiction being false, the defendant would not be able to defend the suit. The plaintiff having lied to the Court on jurisdictional facts, the judgment could be impeached as observed by De Grey CJ in the case of Duchess of Kingston's Vs. Smith's Leading Cases; (13th Edn.) ii 644 at pg. 651. The Supreme Court, therefore, concluded thus:

In other words, though it was not permissible to allege that the Court was "mistaken" it was permissible to allege that the Court was "misled". The essential distinction thus was between mistake and trickery.

26. Hence it is seen that if the Court was mistaken in passing the judgment, the executing Court cannot look into it. (The Court would be mistaken if the defence

is not shown on merits by a defendant who is served summons but fails to appear and answer the plaintiff's claim). If the Court was misled it could be resisted in execution. (The Court would be misled if a perjurious statement is made which the defendant has no means to rebut by defending the plaintiff's action.)

27. In this case the defendant/JD herein would claim that he had made payments earlier which was known to the plaintiff and yet the decree was obtained. Hence the decree was obtained by perjury. That perjury could have been prevented. The Court would have been mistaken in passing the decree but was not misled. Hence the judgment was not imposed upon the defendant. The judgment had to be passed. The fraud, if any, was prior to the action. The fraud was known at the time of trial. The defendant had noticed it and could have defended it. To allow the defendant to defend it now would cause re-trial, which is forbidden. It is rightly argued by Mr. Madon that otherwise every Court would have to go into the merits of the defendant's defence. That cannot be permitted.

28. The reliance by the defendant upon the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, is wholly misconceived. It is the judgment oft cited in cases of alleged fraud laying down the salutary principle that the Court must dismiss the suit at the first hearing itself, if it is seen to be a frivolous claim based upon the fraud but it would have little application in an execution application challenging the foreign judgment.

29. Mr. Madon on behalf of the plaintiff/JC/DH submitted that the execution of the decree in this case was sought even in the USA where defendant lives and owns property. It was sought to be challenged even in the USA on the ground of the lack jurisdiction of the Court in Singapore, lack of due process in the judicial system of Singapore, the notice to defendant as also the question of the judgment being obtained by fraud. He would, therefore, submit that the case of the defendant that the judgment was obtained by fraud is res judicata it having been finally decided in the matter directly and substantially in issue between the same parties litigating under the same title under Section 11 of the CPC. Indeed the American Court has considered and held that fraud of the defendant relates to intrinsic fraud which does not warrant non recognition as opposed to extrinsic fraud which would warrant non recognition of the judgment. It has been held in that judgment that the claim of fraud in obtaining the judgment for non recognition is limited to extrinsic fraud which is a fraudulent conduct by the party that deprived the losing party of adequate opportunity to present its case to the Court, intrinsic fraud being cases in which the judgment was passed upon false oral testimony or false documents.

Intrinsic fraud would be a fraud within the trial. It would be a fraud at the time of cause of action and the filing of the suit. It would be known to the defendant. It could be defended by the defendant. The perjured testimony or the falsified documents could be shown to the defendant who summoned to appear and answer the plaintiff's claim. Such intrinsic fraud does not lend itself to non

recognition and consequently denial of execution but if there was extrinsic fraud which was played upon the Court to obtain a decree not on the merits of the claim but at the time of the decree itself by any fraudulent conduct not known to the defendant the defendant would not be able to defend it in the trial and can get justice and relief by seeking to resist the execution of a decree obtained by such extrinsic fraud which would alone warrant non recognition of the judgment and thus prevent execution.

The judgment of the American Court has extensively considered the case law relating to misrepresentation by concealment of the facts which prevents a real trial and intrinsic fraud which cannot prevent execution. The Court also considered the facts of the case of the plaintiff, the admission of the service of the summons upon defendant who received notice of the suit. Thus fraud if played by the plaintiff could have been suppressed by the defence of the defendant which the defendant failed to show. Thus intrinsic fraud not based upon new facts but based upon the evidence known to be false and the facts known to the parties at the time of the trial must rest at that.

3. Non executability of the judgment:-

30. Mr. Tamboly would take up this ground under Section 13 of the CPC which alone would have to be considered in an execution application for execution of a foreign judgment. He would contend that in the case of Lalji Raja and Sons Vs. Firm Hansraj Nathuram, the Supreme Court held that a judgment passed in foreign court was not executable within India. That was a decree passed by Sub-Judge, Bankura (West Bengal). The decree was transferred to Morena in Madhya Bharat State. The defendant resisted the execution on the ground that the Court had no jurisdiction to execute the decree which was of a foreign Court. The judgment was passed on 3rd December, 1949 before the various foreign states came to be merged into the Union of India. It was in those circumstances that it was observed that the Court at Morena was the Court to which the Civil Procedure Code did not apply and hence decree could not be transferred to it under Section 38 and 39 of the Code.

The judgment would have no application to this case.

31. Consequently the notice issued by the plaintiff under Order 21 Rule 22 is made absolute. The objections to the notice are rejected. The execution shall proceed. The additional affidavit of the defendants/JD in reply dated 17th February, 2015 setting out the documents showing how the plaintiff's case was false is, therefore, not considered upon the correct objection of counsel on behalf of the plaintiff/JC/DH.

32. The Sheriff shall act on the copy of the order uploaded on the Internet.