

(2007) 05 DEL CK 0065

In the Delhi High Court

Case No : EFA (OS) No. 16 of 2005 and CM No. 18137 of 2005

Mr. Navin Khilnani

APPELLANT

Vs

Mashreq Bank psc.

RESPONDENT

Date of Decision : 25-05-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 8 Rule 10, 13, 44A, 44A(3)
Evidence Act, 1872 — Section 114

Citation : (2008) 146 DLT 134 : (2007) 98 DRJ 656 : (2007) 2 ILR Delhi 1382

Hon'ble Judges : Hima Kohli, J;A.K. Sikri, J

Bench : Division Bench

Advocate : S.C. Dhanda, for the Appellant; Bharti, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—The respondent herein (hereinafter referred to as the decree holder) has obtained a decree against the appellant herein (hereinafter referred to as the judgment debtor) from the Queens Bench Division of the High Court of United Kingdom in case No. 1997 M. No. 1548. The judgment is dated 13.11.1998 and decree is dated 23.11.1998. The decree holder which is a bank had filed a suit for recovery of a sum of ₹5,470,212 along with interest thereon against the judgment debtor before the Queens Bench Division of High Court of United Kingdom. It was pleaded that this amount was due to the bank from Munradtech Industrial Generators Limited (hereinafter referred to as the company) of which judgment debtor was one of the Directors. Judgment debtor was also impleaded as one of the defendants in the said suit on the ground that he had executed a guarantee dated 4.2.1993 ensuring the payment of the bank dues. The suit was filed under the provisions of Order 14 RSC. This is akin to Order 37 of the Indian CPC and provides for summary procedure in such matters. After receiving the summons, the judgment debtor had engaged some attorneys and had also filed application for leave to defend setting out his defense. However, no affidavit in support thereof was filed nor anybody appeared on

behalf of the defendant before the Queens Bench Division of High Court, after the participation in the proceedings at the initial stage. In the application for leave to defend, the judgment debtor had not disputed the amounts due from the company. He also did not deny that he had executed guarantee deed. His defense, however, was that he along with his brother Deepak Khilnani were running a group of companies. In the UK and other European countries business was being run and controlled by Deepak Khilnani, whereas the other companies of this group which were in the Middle East countries were managed by the defendant. He pleaded that Deepak Khilnani did not disclose the true position regarding financial conditions of the group of companies in Europe and persuaded him to execute the guarantee deed by misrepresenting that it was only a formality to obtain further facilities from the bank. He, Therefore, became victim of undue influence and fraud practiced upon him by his brother of which the decree holder had constructive notice and as surety he wanted to wriggle out of the guarantee deed on the basis of such a plea.

2. Perusal of the judgment passed by the QDB of the High Court in London would reveal that the learned Judge examined this plea extensively in the light of material placed on record but rejected the same holding that such a plea that the judgment debtor was defrauded by his brother or there was undue influence exercised upon him by using ostensible trust and confidence did not hold any water. This conclusion is supported by the reasons. As no appeal/revision was preferred against this judgment and decree, the same became final.

3. Armed with this judgment and decree, the decree holder filed the execution petition in this Court under Order XXI Rule 22 CPC of the CPC seeking permission to execute the same. Judgment debtor filed application u/s 47 read with Order XXI Rule 22 CPC raising objections to the maintainability of the execution petition. It is not in dispute that the main thrust of the objection was that since the judgment in question had not been given "on merits of the case", the same was not conclusive and, thus, unexecutable in view of provisions of Section 13(b) CPC. Though one more objection was raised before the learned Single Judge namely decree could not be executed for want of permission of RBI under FERA, it is not necessary to go into such objection inasmuch as learned Single Judge has not decided the question of applicability of FERA in the impugned judgment dated 9.11.2005 passed by him and has issued notice to RBI for determining this question. The first plea taken by judgment debtor is rejected by the learned Single Judge vide the impugned order holding that the judgment rendered by the Queens Division Bench of High Court of United Kingdom is a judgment on merits. Challenging this order, the present appeal is preferred.

4. Section 44A of CPC now provides for execution of decrees passed by the foreign courts in reciprocating territories. It, inter alia, stipulates that 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. Together with the certified copy of

the decree, a certificate from such superior courts is to be filed stating the extent, if any, to which the decree has been satisfied or adjusted. Such a certificate is as the conclusive proof of the extent of such satisfaction or adjustment. Sub-section 3 of Section 44A further lays down that provisions of Section 47 of the CPC shall apply to such execution proceedings and the Court can 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) in Section 13 CPC.

5. It is not in dispute that the decree passed by the Court in UK is of a Court in reciprocating territory. It is also not in dispute that the decree is of a superior court of that country. Therefore, it is executable by Indian Courts. The decree holder has also filed, along with certified copy of the decree, a certificate to the effect that no payment under this decree has been made so far and the decree has not been satisfied.

6. Section 13 of the CPC makes a foreign judgment as conclusive with respect 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. This principle, however, is not applicable in six circumstances which are provided as exceptions in the same section. We are concerned with exception provided in clause (b) which reads as under:

Where it has not been given on the merits of the case.

The question, Therefore, which fell for consideration, in view of the objections of the judgment debtor was as to whether the judgment in question given by the foreign court is a judgment "on the merits of the case".

7. The objection flowed from the submission that since the judgment had been rendered without trial and without recording the evidence in a suit tried under summary procedure whereby leave to defend to the judgment debtor was refused, such a judgment cannot be said to be a judgment on merits. The judgment debtor had supported this submission by referring to the following judgments:

1. R.E. Mahomed Kassim & Co. v. Seeni Pakir-bin Ahmed and Ors. AIR 1927 Mad 265.
2. Algemene Bank Nederland NV Vs. Satish Dayalal Choksi,
3. K.M. Abdul Jabbar Vs. Indo Singapore Traders P. Ltd.,
4. O.P. Verma Vs. Lala Gehrilal and Another,

8. The learned Single Judge, however, was not persuaded by the submission of the judgment debtor. After analysing the aforesaid judgments and discussing the ratio thereof, the learned Single Judge opined that a judgment given in a particular case would not be a judgment on merits if it is a judgment "in default". A judgment in default would be the one which is rendered due to the fault on the

part of the defendant like non appearance and the judgment given ex-parte without discussing the merits of the case or without going into the controversy between the parties in the absence of the defendant or where the leave to defend application is dismissed in default and decree followed without discussing the merits. The learned Single Judge held that in the instant case, even when the judgment debtor had not appeared, the Court had examined the probability of defense being truthful and then negated it. It, Therefore, held on merits of the claim that there was no defense. Following extract from this judgment would depict the thought process of the learned Single Judge:

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 II 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.

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.

9. We are, Therefore, required to examine as to whether the learned Single Judge was right in his approach and correctly held that the judgment, on the basis of which execution was filed, was the one rendered "on the merits of the case".

10. Learned Counsel for the appellant questioned the approach of the learned Single Judge on the ground that simply because the Court had passed the detailed order rejecting the application for leave to defend filed by the defendant, it would not be branded a judgment on the merits of the case. His submission was that such a judgment was still under summary procedure and without recording the evidence. He argued that the judgment cited by the appellant were not properly appreciated and discussed in right perspective by the learned Single Judge. He also cited the judgments of the Supreme Court in the case of M/s. International Woollen Mills Vs. M/s. Standard Wool (U.K.) Ltd., . Learned Counsel for the decree holder maintained that since the defense of the judgment debtor as contained in application for leave to defend was duly considered; the Court also took in consideration various documents filed by the decree holder as well as the affidavits; the evidence on record was taken into consideration and analyzed, such a judgment would be a judgment on the merits of the case.

11. The impugned judgment is dated 9.11.2005. The judgment of the Supreme Court in the case of International Woollen Mills v. Standard Wool (U.K.) Ltd. (supra) which was pronounced in April 2001 was available. However, this judgment was not brought to the notice of the learned Single Judge and, Therefore, is not discussed in the impugned judgment. It would be apposite to discuss the ratio of this case in the first instance to find out as to whether any answer to the case at hand is provided by this judgment.

12. In International Woollen Mills v. Standard Wool (U.K.) Ltd. (supra), the appellant had placed an order with this respondent for purchase of greasy fleece wool. These goods were delivered by the respondent to the appellant but the appellant did not pay the price of the goods on the ground that after taking delivery it was found that the goods were of an inferior quality. The respondent filed a case in Central London County Court in United Kingdom. An ex-parte decree was passed by the said Court in the following terms:

IT IS ORDERED THAT:

There be judgment for the plaintiff in the sum of US \$49, 178.50 plus interest of US \$ 17.00 ANF court costs. A total of US \$49,895.50 plus ? 243.75.

13. Execution application in the Court of Civil Judge (Senior Division), Ludhiana, was filed by the respondent on the strength of the said decree. The appellant filed objections taking the same plea as taken here namely the decree was not

on merits and, Therefore, not executable in India. This application was dismissed by the Civil Judge along with other application of the appellant taking certain other objections with which we are not concerned in the instant case. The appellant filed civil revision which was dismissed by the High Court. The High Court though concluded that the decree was not "on merits of the case" but dismissed the revision on the ground that the second application was barred by the principles of constructive resjudicata as this objection was not taken in the first application. The appellant preferred SLP. The respondent also filed SLP against that portion of the judgment which held that the decree was not on merits. The Supreme Court discussed the law on this point in great detail taking note of its earlier judgment and also various judgments of different High Courts. The Court held that judgment of the Calcutta High Court in Sheikh Abdul Rahim alias S.A. Rahim Vs. Mohamed Din and Another, which held that a person asserting that the judgment was not on merits because no evidence was given, must prove the same as there is a presumption in Section 114 of the Evidence Act that judicial acts have been regularly performed, did not lay down the correct law. The Court held that no such presumption u/s 114 of the Evidence Act can be drawn, inasmuch as even if it is presumed that all the formalities were complied with and decree was passed regularly, it still would not lead to the conclusion that it was passed on merits.

14. The Court further held that if an ex-parte decree is passed in a summary manner under a special procedure without going into the merits and without taking evidence then such a decree would not be executable in India. However, on the other hand, if the decree is ex-parte, it can still be judgment on merits in case the Court had gone through the case made out by the plaintiff and considered the same and taken evidence of the witnesses to be put by the plaintiff. The Court specifically approved the principle laid down in the case of *Algemene Bank Nederland NV Vs. Satish Dayalal Choksi*, . That was a case where summary suit was filed in Hong Kong. Unconditional leave to defend was granted to the defendant to contest the suit. Thereafter, the defendant filed written statement. However, the defendant could not appear at the trial as he had applied to the RBI for foreign exchange in order to engage a lawyer in Hong Kong which was not granted by the RBI, an ex-parte decree came to be passed against the defendant. It was noted that Hong Kong Court had proceeded to pronounce the judgment in view of the defendant's failure to appear at the hearing to defend the case on merits. The Court held that it was not a judgment on merits of the case as it merely set out that "on the defendant's failure to appear and upon proof of plaintiff's claim" the judgment was entered for the plaintiff. At the same time, the Court disapproved the ratio in the case of *Chintamani Padhan and Others Vs. Paika Samal and Others*, wherein it has been held that a judgment on merits is one which is entered after a full trial of the issues through pleadings, presentation of evidence, and arguments by both sides. The Court held that the expression "judgment on the merits" implied that it must have been passed after contest and after evidence had been led by both the sides. The Supreme Court

did not approve this extreme definition of the expression "judgment on the merits" which is rendered only after a full trial of the issues through pleadings, observing that in a given case, it is possible that even though the defendant has not entered evidence the plaintiff may prove its case through oral and documentary evidence. If after consideration of oral and/or documentary evidence an ex-parte decree is passed, it would still be a decree on merits. It noted that in later judgment of the Orissa High Court in the case of Trilochan Choudhury Vs. Dayanidhi Patra, , earlier judgment was overruled holding that even an ex-parte judgment in favor of the plaintiff may be deemed to be a judgment on merits if some evidence is adduced on behalf of the plaintiff and a judgment, however brief, is based on a consideration of that evidence.

15. In International Woollen Mills v. Standard Wool (U.K.) Ltd. (supra) the decree was passed ex-parte without any discussion on the merits of the case and only because the defendant failed to appear and in view of the law laid down there was no problem to hold that such a judgment was not on merits of the case. However, in the process, the discussion contained in the Supreme Court judgment gives some clue to get an answer to the question with which we are faced with. Further reading of the judgment would show that the Supreme Court also approved a view of Kerala High Court in Govindan Asari Kesavan Asari Vs. Sankaran Asari Balakrishnan Asari, on which interestingly both the counsel have also relied. Following passage from this judgment is quoted with approval by the Supreme Court:

In construing Section 13 of the Indian CPC we have to be guided by the plain meaning of the words and expressions used in the section itself, and not by other extraneous considerations. There is nothing in the section to suggest that the expression "judgment on the merits" has been used in contradistinction to a decision on a matter of form or by way of penalty.

The section prescribes the conditions to be satisfied by a foreign judgment in order that it may be accepted by an Indian court as conclusive between the parties thereto or between parties under whom they or any of them litigate under the same title. One such condition is that the judgment must have been given on the merits of the case. Whether the judgment is one on the merits, must be apparent from the judgment itself. It is not enough if there is a decree or a decision by the foreign court. In fact, the word "decree" does not find a place anywhere in the section. What is required is that there must have been a judgment. What the nature of that judgment should be is also indicated by the opening portion of the section where it is stated that the judgment must have directly adjudicated upon questions arising between the parties.

The Court must have applied its mind to that matter and must have considered the evidence made available to it in order that it may be said that there has been an adjudication upon the merits of the case. It cannot be said that such a decision on the merits is possible only in cases where the defendant enters appearance and contests the plaintiff's claim. 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. A foreign court may have its own special procedure enabling it to give a decision against the defendant who has failed to appear in spite of the summons served on him and in favor of the plaintiff, even without insisting on any evidence in support of his claim in the suit.

Such a judgment may be conclusive between the parties so far as that jurisdiction is concerned, but for the purpose of Section 13 of the Indian CPC such a judgment cannot be accepted as one given on the merits of the case, and to that extent the law in India is different from the law in other jurisdictions where foreign judgments given for default of appearance of defendants are also accepted as final and conclusive between the parties thereto. This position was noticed and recognized in *R.E. Mohd. Kassim and Co. v. Seeni Pakir-bin Ahmed* AIR 1927 Mad. 265. The contention that the defendant who had chosen to remain *ex parte*, must be taken to have admitted the plaintiff's claim was also repelled in that case as unsound and untenable. His non-appearance can only mean that he is not inclined to come forward and contest the claim or even to admit it.

His attitude may be one of indifference in that matter, leaving the responsibility on the plaintiff to prove his claim if he wants to get a decree in his favor. Such indifference on the part of the defendant cannot necessarily lead to the inference that he has admitted the plaintiff's claim. Admission of the claim is a positive act and it cannot be inferred from any negative or indifferent attitude of the person concerned. To decree the plaintiff's claim solely on account of the default of the defendant and without considering the question whether the claim is well founded or not and whether there is any evidence to sustain it, can only mean that such a decree is passed against the defendant by way of penalty.

It will not satisfy even the minimum requirements of a judgment on the merits of the claim. What such requirements are, have been explained in *Abdul Rahman v. Mohd. Ali Rowther* AIR 1928 Rang 319 in the following terms:

A decision on the merits involves the application of the mind of the Court to the truth or falsity of the plaintiff's case and Therefore though a judgment passed after a judicial consideration of the matter by taking evidence may be a decision

on the merits even though passed ex parte, a decision passed without evidence of any kind but passed only on his pleadings cannot be held to be a decision on the merits.

The same view was taken by the Patna High Court also in *Wazir Sahu and Another Vs. Munshi Das*, where the question when an ex parte decision can be said to be on the merits, was answered as follows:

An ex parte decision may or may not be on the merits. The mere fact of its being ex parte will not in itself justify a finding that the decision was not on the merits. That is not the real test. The real test is not whether the decision was or was not ex parte, but whether it was merely formally passed as a matter of course or by way of penalty or it was based on the consideration of the truth or otherwise of the plaintiff's claim.

We are in respectful agreement with the view taken in these two cases.

16. What follows from the discussion of this judgment of the Supreme Court is that an ex-parte judgment or a judgment by way of penalty is passed without discussing the merits of the case, it would not be a judgment on merits. On the other hand, even an ex-parte judgment, if based on the consideration of the evidence produced by the plaintiff, would be a judgment on the merits of the case. We may state at the outset that there was no dispute that if a judgment, given by a foreign court, is by way of penalty namely is the result of the default, then the said judgment would not be a judgment on merits. The clear examples of such situations would be the following:

- a) In a summary suit, the defendant does not appear and treating the averments made in the suit as correct, the judgment and decree is passed.
- b) Again in a summary suit, if the application for leave to contest the suit is not filed and due to this default, the judgment is pronounced and decree passed treating the averments made in the plaint as correct.
- c) In an ordinary suit, the defendant does not appear and an ex-parte decree is passed without recording the evidence and only on the basis of averments made in the plaint supported by the affidavits filed in support of the plaint.
- d) In a situation akin to Order 8 Rule 10 CPC of the Indian Code of Civil Procedure. This would arise when in spite of repeated opportunities given to the defendant, he defaults by not filing the written statement and the decree is passed under Order 8 Rule 10 CPC without directing the plaintiff to prove the case by leading evidence.

17. At the same time, even when the defendant is proceeded ex-parte or the defendant has failed to file the written statement but the Court directs the plaintiff to prove his claim and the plaintiff produces documentary and oral evidence and after perusal thereof claim of the plaintiff is accepted and the decree passed, such a judgment would be on the merits of the case

notwithstanding the default on the part of the defendant in not appearing or in not filing the written statement. As aforesaid, counsel for the parties conceded this to be correct position in law. Thus, when in a summary suit, judgment is given by default, it is not a judgment on merits. However, if the application for leave to defend the suit is filed i.e. dismissed by detailed speaking order holding that no triable issue was raised and, Therefore, the plaintiff was entitled to judgment and decree straightaway and it was not a case where evidence was required in the absence of any triable issue, can it still be said that it is not a judgment on the merits of the case? We are of the opinion that the Supreme Court in the case of *International Woollen Mills v. Standard Wool (U.K.) Ltd.* (supra) has not gone to the extent of holding that even such a judgment shall not be on the merits of the case. The judgments of the High Courts which are approved by the Supreme Court in the aforesaid case relate to those cases which were rendered ex-parte and the ratio which is laid down is that if the ex-parte judgment is given by default and when evidence of any kind, it would not be a decision on the merits. On the other hand, even an ex-parte case if the evidence is led, it would be a judgment on merits. Of course *Ram Chand v. John Bartlett* (1909) 3 IC 523, was one case where judgment was given following summary procedure. However, the facts of that case would show that the defendant remained ex-parte and the defendant did not appear, judgment was pronounced. That was not a case where appearance was entered and application for leave to contest was filed and the Court refused to grant the leave after discussing the merits of the case.

18. We are, Therefore, of the opinion that in those cases where suits are tried under summary procedure, leave to defend application is filed but by passing speaking orders the Court has refused to grant the leave to defend and that would be a decision on the merits of the case. Even in *International Woollen Mills v. Standard Wool (U.K.) Ltd.* (supra), the Court has observed that when the decision is given after due application of mind of the Court to the truth or falsity of the plaintiff's case and after judicial consideration that would be a judgment on merit. The test laid down is as to whether "it was merely formally passed as a matter of course or by way of penalty or it was based on the consideration of the truth or otherwise of the plaintiff's claim". Whereas it would not be a judgment on merit if it is merely formally passed as a matter of course or by way of penalty, it would be a judgment on the merits if it is passed on the consideration of the truth or otherwise on the plaintiff's claim.

19. At this stage, let us deal with the manner in which case at hand was decided by the court in England. Leave to defend application was filed by the judgment debtor. However, he did not appear thereafter. Nevertheless, the Court has not dismissed the application leave to defend of the judgment debtor in default and proceeded with the passing of the decree. It has discussed the various submissions made by the judgment debtor in his application but has not found favor with them and, Therefore, the decree is passed. Situation is like the one where the Court has opined that there are no triable issues and the plaintiff is

entitled to the decree. At the same time, the decree is passed in a summary manner. The decree holder was not required to lead any evidence. Thus, on the one hand, while the decree is not passed without discussing the merits of the defense, on the other hand, the decree holder was not required to produce any evidence. The foreign judgment runs into 15 odd pages and

- i) sets out the facts i.e. the nature of the claim.
- ii) nature of the defense put in, though not pursued.
- iii) notices that in the defense no formal or substantive flaw in the documentation or the claim under the documentation was found.
- iv) finds that only defense was that the defendant in the foreign Court and the appellant before this Court was induced to enter into the guarantee, on the basis whereof the claim was made against him in the foreign Court.
- v) finds the said defense of having been induced to enter into guarantee by misrepresentation and undue influence to be not good for the reason of the defendant before the foreign court and the appellant herein, being as much as interested in the business of the company for financial assistance, he stood as guarantor, as his brother under whose undue influence he claimed to have given the guarantee.
- vi) considers the affidavits, evidence given by the plaintiff before the foreign court and the respondent herein.
- vii) summarizes the position emerging from the various facts and from the conduct of the parties.
- viii) notices that the defendant before the Foreign Court and the appellant herein is an MBA and is a business man and well understanding of facets of business.
- ix) analyzes its law as to trust and confidence.
- x) further notices the evidence summarized but which is stated to be voluminous.
- xi) in the circumstances, holds the defendant liable to pay the monies claimed.

Therefore, such a judgment should be treated as judgment given on merits. It was, Therefore, not a case where the judgment was on "default judgment" i.e. pronounced only because of non appearance of the judgment debtor. If the contention of the appellant is accepted then in a case decided under the summary procedure, even after due consideration of the defense put forth by the defendant and finding it to be sham and moonshine, it would not be a judgment on merits. That would be travesty of justice. How the plaintiff is expected to lead evidence when the defendant has not been able to show any triable issue. Therefore we are of the opinion that in the case of *International Woollen Mills v. Standard Wool (U.K.) Ltd.* (supra), wherever the reference has come that the decision passed "without evidence" would not be a decision on the merits, that would not include cases under summary procedure when leave to defend

application is dismissed and Court comes to the conclusion, after detailed analysis of the respective contentions, that it is not a case which even requires any evidence. Of course even those cases under summary procedure where the judgment is by default namely because of non appearance and it was merely formally passed or by way of penalty namely where the defendant does not move application for leave to defend, the judgment would be not be on the merits of the case.

20. In the instant case, the learned Single Judge has also remarked that the appellant had in fact no defense on the merits of the claim. His only plea was that he was misguided by his younger brother 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. This plea of the appellant was discussed by the English Court, which passed the decree, in detail and leave to defend was eventually declined. The judgment was rendered after a very detailed discussion and bestowing considerate thought to the defendant's version.

21. We, Therefore, agree with the aforesaid view of the learned Single Judge holding that such a judgment was on the merits of the case. The appeal is accordingly dismissed. The judgment of the learned Single Judge is upheld. The execution would proceed on merits.