

(2007) 11 DEL CK 0166

In the Delhi High Court

Case No : CS (OS) 138 of 1995, EX.P. 135 of 1992 and EA (OS) 278/94

Shri Raj Kumar Gupta

APPELLANT

Vs

Barnes Investments Limited and Others

RESPONDENT

Date of Decision : 14-11-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 21 Rule 58, 13, 14, 2(5)

Citation : (2007) 99 DRJ 629

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : M.R. Chawla, in CSOS 138/95 and J.D. in Ex. P. 135/9, for the Appellant; Devinder Singh and Shakur Ali and Saurab Tewari for Defendants 1 to 3 in CS (OS) 138/95 and D.H. in Ex.P. 135/92 and Rajiv Kapur, for SBI, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The execution petition has been filed by the three decree holders in Ex. P. No. 135/1992 [defendants in CS(OS) 138/1995] seeking enforcement of the decree dated 29.11.1990 against judgment debtor No. 1 [plaintiff in CS(OS) 138/1995] for U.S. Dollars 1,248,415.49, equivalent to Rs. 3,609,821.01 along with interest @15% P.A. from the date of the decree. The decree has been passed by the High Court of Justice, Queen's Division Bench, Commercial Court, in England 1988 Folio No. 1090. The plaintiff filed objections to the execution of the decree. The plaintiff also filed a suit, bearing CS(OS) 138/1995 for declaration and permanent injunction against the enforcement of the said decree.

2. The brief facts relating to the controversy are being set out hereinunder. The plaintiff is the founding chairman of the United Group of Companies. Defendants Nos. 1 and 3 are the foreign companies stated to be managed by defendant No. 2 or his family members. It is in the year 1982 that defendant No. 2 is stated to have expressed a desire to invest monies on behalf of his family members and himself to the plaintiff by purchase of shares of M/s United Watches Limited and

M/s M.P. United Polypropylene Limited of the United Group. The defendants were to become co-promoters in both the projects and the investments were to be made by the defendants providing for full repatriation facilities of capital and dividend. This proposal was agreed to by the plaintiff but the same was subject to permission and sanctions from various statutory authorities including Reserve Bank of India. It is the case of the plaintiff that the investment was not to carry any interest. It is in pursuance to this oral agreement that defendant No. 2 is stated to have sent monies to the United Towers India Private Limited, R.K. Towers India Private Limited, United Builders Constructions (India) Private Limited and International Industrial Development Consultants Private Limited of the plaintiff as these companies were to transfer their shareholdings to the defendants in M/s United Watches Limited and M/s M.P. United Polypropylene Limited.

3. It is the case of the plaintiff that despite his best efforts, the Reserve Bank of India rejected the request of the companies of the plaintiff for transfer of shareholdings to the defendants on a repatriation basis though the Reserve Bank of India was willing to permit investment on non-repatriation basis. On 21.8.1984 the defendants are stated to have informed the plaintiff that they were not interested in acquiring the shares on non-repatriation basis and, thus, requested the plaintiff to refund back the money forthwith. The plaintiff claims that in pursuance to this understanding, the amount was so remitted back, thus, putting the transactions to an end.

4. The dispute arose out of the claim of the defendants that further amounts which were to be paid, were not paid by the plaintiff and in view thereof, a suit for recovery of money was filed in the High Court of Justice Queen's Bench Division, Commercial Court in England 1988 Folio No. 1090. The suit of the defendants was predicated on the allegation that the defendants have paid monies to the plaintiff or his companies on 13 occasions for purchase of 50% of the founder shares of the two Indian companies and since the permissions were not forthcoming from the Government authorities, the amount had to be remitted back with interest @18% P.A. in U.S. Dollars. Two agreements were stated to have been arrived at on 21.1.1984 ? one for return of money invested and another for refund of 1.4 million U.S. Dollars for purchase of acquisition of technology and machinery. It was alleged that both the agreements were to commence on 30.11.1984 and the payment had to be completed by February, 1985. This claim is alleged by the plaintiff to be fraudulent as there was neither any understanding for payment of interest nor was there any such second agreement.

5. The plaintiff claims that the defendants obtained an ex parte judgment/decreed fraudulently without serving any notice or summons on the plaintiff and it is claimed that the said decree is a nullity and void ab initio. It is in view thereof that separate reliefs have been claimed in the suit. The defense to the execution petition is also more or less on the same grounds.

6. The stand of the defendants in their written statement is that, apart from the objections to jurisdiction, maintainability, absence of grounds as provided u/s 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as the said Code), bar of limitation, the plaintiff chose not to appear despite being duly served with the writ of summons on 17.4.1989. The service is stated to have been effected by Mr. Tarun Banga, an Advocate based in Delhi, who has filed an affidavit to that effect. The defendants claim that the suit was filed since the plaintiff failed to remit the amount and along with the claim schedule "A" attached to the Statement of Claims was filed while the money received was filed as schedule "B" and the balance amount along with interest was filed as schedule "C". The defendants claim that the plaintiff entered into a memorandum of understanding with defendant No. 2 when this amount was remitted. It is the English Courts which are stated to have jurisdiction since the amount was remitted from England and was partly repaid back in England and the decree is stated to be as per procedure and laws applicable in England.

7. On the pleadings of the parties, the following issues were framed on 17.9.2002:

Issues

1. Whether the judgment and decree of the High Court of Justice Queen's Division Bench, England being No. 1988 Folio No. 1090 is nullity on the grounds stated in paras 8 & 9 of the plaint?
2. Whether this Court has no territorial jurisdiction to try the suit as alleged in para No. 1 of the preliminary objections of the written statement?
3. Whether the suit is not maintainable as alleged in para No. 2 of the preliminary objections of the written statement?
4. Whether grounds as provided in Section 13 CPC are not available to the plaintiff to challenge the judgment and decree as alleged in para No. 3 of preliminary objections of written statement?
5. Whether suit is barred by limitation?
6. Relief.
8. There were no separate issues framed in the execution petition and both the matters have been taken up simultaneously. The plaintiff himself entered into the witness box as PW1 while the defendants only tendered certain documents.
9. The issues framed, as aforesaid, would show that issue No. 1 is predicated on the defense as taken in paras 8 and 9 of the written statement where it has been pleaded that the Courts in England had the jurisdiction and the same has to be seen as per the law prevalent in that country. The suit is claimed to be barred by law of limitation. In para-9 it is alleged that the plaintiff was duly served with summons and had failed to enter appearance. In para-2 of the preliminary objections, a defense has been taken that the remedy lies in the plaintiff seeking

to set aside the decree in the Court which had passed the decree.

10. In my considered view, issues No. 1 to 4 are all inter linked and it would be appropriate to discuss and arrive at a finding based on a complete discussion on the factual and legal position in that behalf.

Issues 1 to 4

1. Whether the judgment and decree of the High Court of Justice Queen's Division Bench, England being No. 1988 Folio No. 1090 is nullity on the grounds stated in paras 8 & 9 of the plaint?

2. Whether this Court has no territorial jurisdiction to try the suit as alleged in para No. 1 of the preliminary objections of the written statement?

3. Whether the suit is not maintainable as alleged in para No. 2 of the preliminary objections of the written statement?

4. Whether grounds as provided in Section 13 CPC are not available to the plaintiff to challenge the judgment and decree as alleged in para No. 3 of preliminary objections of written statement?

11. The provisions of the said Code have to be averted to for the purposes of consideration of the matter. Section 2(6) of the said Code defines 'foreign Court' to mean the judgment of a foreign Court while Section 2(5) defines 'foreign Court' to mean a Court situate outside India and not established or continued by the authority of the Central Government. It is not in dispute that in the present case the decree which is sought to be enforced is a foreign judgment. The provisions of Section 13 of the said Code deal with the "foreign judgment" and reads as under:

13. When foreign judgment not conclusive.

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to 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].

12. Section 14 refers to the presumption as to foreign judgments and reads as under:

14. Presumption as to foreign judgments.

The Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

13. Section 44A of the said Code dealt with the execution of decree passed by a Court in reciprocating territory evidence and reads as under:

44A. Execution of decrees passed by Courts in reciprocating territory.

(1) Where a certified copy of 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 to 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.

14. It is not in doubt that the Courts in England have been treated as the Courts in reciprocating territory. The decree which has been passed is in the following terms:

In The High Court Of Justice

1988 FOLIO No. 1090

Queen's Bench Division

Commercial Court

In The Matter Of The Foreign Judgments (Reciprocal Enforcement) Act Of 1933
Part I

Between:

- 1) Barnes Investment Limited
- 2) Devidas Budrani
- 3) Naraindas Essardas And Sons (Uk) Limited

....plaintiffs and-

- 1) Raj Kumar Gupta
- 2) United Watches Limited
- 3) United Polypropylene Limited
- 4) United Bracelets Limited
- 5) United Straps Limited
- 6) International Industrial Development Consultants Private Limited
- 7) United Builders Constructions (India) Pvt. Limited
- 8) R.K. Towers Pvt. Ltd.

....Defendants I, William Keith Topley, Master of the Supreme Court of Judicature in England, hereby certify that the Writ of Summons, a copy of which is hereunto annexed was issued out of the Queen's Bench Division (Commercial Court) of the High Court of Justice in England on the 29th March 1988 by Barnes Investments Limited, Devidas Budrani and Naraindas Essardas and Sons (UK) Limited the above named plaintiffs against Raj Kumar Gupta, he above named First Defendant, for payment of the sum of US \$ 1,248,415.49 and Indian Rupees 3,609,821.01 in respect of the claim for debt and damages.

That the said Writ was duly served on the 17th April, 1989 upon the said First Defendant, Raj Kumar Gupta by personal service and service of the said Writ was acknowledged on behalf of the First Defendant on the 17th of April, 1989.

That the said plaintiffs obtained judgment against the said First Defendant in the Queen's Bench Division (Commercial Court) of the High Court in England for payment of the sum of US \$ 1,248,415.49 and Indian Rupees 3,609,821.01 in respect of a claim for payment of the sums set out in Schedule 3 of the Statement of Claim together with interest upon the sums set out in Schedule 3, a copy of which is annexed hereunto.

That no objection has been made to the jurisdiction of the Court and that proper

service has been effected on the First Defendant, for which such service was acknowledged.

No stay of execution on the said judgment has been granted and no notice of appeal against the said judgment has been entered. The time for appealing against the judgment has now expired.

The said judgment in the action aforesaid was given on the grounds that no defense has been served by the First Defendant herein.

The said judgment carries interest at the rate of 15% per annum from the date of the said judgment.

That the following pleadings in the action consisted of:

1. Writ of Summons.
2. Amended Statement of Claim.
3. Concurrent Writ of Summons.

Dated this 29th day of November, 1990

....Sd....

A Master of the Supreme of Judicature

15. Along with the aforesaid decree, a copy of the writ of summons issued and the statement of claim filed together with the three schedules have been annexed.

16. The aforesaid are the only documents which have been filed in the proceedings before this Court. The decree, thus, states that the writ was duly served on 17.4.1989 upon the plaintiff herein by personal service and was acknowledged by him. It is further stated that in view thereof the plaintiffs in the suit (defendants herein) obtained a judgment against the first defendant therein (plaintiff herein) for the payment of the amount in question. The decree also states "the said judgment in the action aforesaid was given on the grounds that no defense has been served by the First Defendant herein". It is, thus, apparent that it is the absence of the plaintiff herein to defend the suit which has resulted in such a decree. There is nothing filed on record to show whether the defendants herein led any evidence in that suit to substantiate their claim. The defendants did not even take care to produce Mr. Banga in the witness box.

17. The defendants have filed a copy of the affidavit of Mr. Tarun Banga, Advocate whereby he has affirmed that he had served the summons and obtained the receipt of service duly signed and stamped. The affidavit goes on to state that the acknowledgement receipt duly signed by the Administrative Office of the corporate office was enclosed with the affidavit. However, no such copy is available with the said affidavit.

18. Learned Counsel for the defendants seeks to contend that in view of what is stated in the decree about the service having been effected upon the plaintiff, nothing more was required to be done in view of the provisions of Section 44A of the said Code. On the other hand, learned Counsel for the plaintiff contends that when the service itself has been denied, it was the bounden duty of the defendants to at least have filed the documents evidencing the receipt of the summons by the plaintiff.

19. On examination of the aforesaid matter, I am of the considered view that though the certified copy of the decree states that service has been effected on the plaintiff, the plaintiff having disputed the same, the defendants were required to file a certified copy of the document evidencing such receipt. The defendants, in fact, did file the affidavit of Mr. Tarun Banga, Advocate but for reasons best known, failed to file a copy of the annexures to the said affidavit which evidenced such a receipt. The plaintiff has also relied upon a certificate alleged to have been issued dated 11.8.1994 by the Admiralty and Commercial Registry of the Royal Courts of Justice Strand London to the effect that there had been no acknowledgement of service filed in the action in question. The original certificate, however, has not been filed and on cross-examination the plaintiff was not able to give any satisfactory answer about the original documents. The other aspect is that the word "NO" has been written in the letter in a manner which may throw some doubt on the authenticity of the document and, thus, it cannot be said that the plaintiff has been able to prove that document.

20. Even if for the sake of arguments, it is assumed that the certificate as contained in the decree must be presumed a the final certificate of service against the plaintiff, there is a major hurdle which comes in the way of the defendants. This hurdle arises from the fact that a bare perusal of the decree shows that the judgment has been returned against the plaintiff on the sole ground of his not having entered any appearance. Learned Counsel for the defendants did seek to contend that if the service had been effected properly and the plaintiff chose not to appear, the defendants cannot be burdened with any further obligation and the plaintiff must suffer the consequences thereof. In normal circumstances this would have been the position, but the decree being a foreign judgment, the same is open to be categorized as non-conclusive if it has not been given on the merits of a case as mandated by Clause (b) of Section 13 of the said Code.

21. The aforesaid aspect is no more rest integra in view of the judgment of the Apex Court in *M/s. International Woolen Mills Vs. M/s. Standard Wool (U.K.) Ltd.*, where it has been held that in case of a foreign judgment and the conclusiveness in respect of the same, an ex parte decree cannot be presumed to be on the merits. The observations made by the Mumbai High Court in *Algemene Bank Nederland NV Vs. Satish Dayalal Choksi*, have been approved in the said judgment, where in para-26 of the judgment clearly states that what is stated in para-28 and 29 of the judgment in *Algemene Bank Nederland NV v. Satish*

Dayalal Choksi (supra) lays down the correct proposition of law. The observations made in para-28 and 29 of *Algemene Bank Nederland NV v. Satish Dayalal Choksi* (supra) are as under:

25. In support of the proposition that such a decree could not be a decree on merits. Reliance has been placed upon the authority in the case of *Algemene Bank Nederland NV Vs. Satish Dayalal Choksi*, . In this case a summary suit had been filed in Hong Kong. In that suit leave to defend was granted to the defense. Thus the High Court had prima facie considered the merits of the matter and had granted unconditional leave. Thereafter the defendant filed a written statement. It appears that the defendant applied to the Reserve Bank of India for foreign exchange in order to engage lawyer in Hong Kong and his application was not granted by the Reserve Bank of India.

As a result the defendant could not appear at the trial and an ex parte decree came to be passed against the defendant.

The question which arose before the Court was whether such a decree could be said to be a decree on merits. A large number of authorities were cited before that Court and it was ultimately held as follows:

28. In the light of these authorities I have to see whether in the present case the Hong Kong court gave its decision on the merits of the controversy. The Hong Kong Court had before it the defense which was filed by the present defendant. The defense questioned the execution of the guarantee to repay the debts of *Madhusudan & Co. Ltd.*

The entry of 7.4.85 in the Register of Guarantees was also questioned by the defendant. In the absence of the defendant, these contentions raised by him could not have been considered. The judgment which is before me does not indicate whether actually any evidence was led before the Hong Kong Court and whether the Court went into the merits of the case. The judgment merely sets out that "on the defendant's failure to appear and upon proof of plaintiff's claim," the judgment is entered for the plaintiff. The plaintiff-Bank has emphasised the words "upon proof of plaintiff's claim". They have also produced the original guarantee which bears in one corner a sticker showing that it was exhibited before the Hong Kong Court. The plaintiff-Bank has not said in its affidavit that the documents which were tendered before the court were properly proved or that anybody on behalf of the bank had given evidence to establish the plaintiff's claim. This becomes relevant because it is the contention of the defendant that the guarantee which he had given was a blank and undated guarantee. It had been misused by the plaintiff-Bank in the present case. The defendant has also relied upon alterations and erasures in the plaintiff-Bank's register of guarantees to show that this undated guarantee was subsequently entered in the register by altering another entry to indicate that it was given around 7th April 1985.

There is no material to show that these aspects of the dispute were ever

examined by the Hong Kong Court. The Court seems to have proceeded to pronounce the judgment in view of the defendant's failure to appear at the hearing of the case to defend the claim on merits.

29. In my view, in these circumstances, the case before me falls under the ratio laid down by the Privy Council in Keymer's case AIR 1916 P.C. 121. The decision of the Hong Kong Court is not given on examination of the points at controversy between the parties. It seems to have been given ex parte on the basis of the plaintiff's pleadings and documents tendered by the plaintiff without going into the controversy between the parties since the defendant did not appear at the time of the hearing of the suit to defend the claim. The present judgment, Therefore, is not a judgment on the merits of the case. Hence this is not a fit case where leave can be granted under Order 21 Rule 22 of the CPC for the purpose of executing the decree here.

22. A perusal of the aforesaid would show that in the facts of the case it was found that there was nothing on record to show whether actually any evidence was led before the foreign court or that the court went into the merits of the case. The judgment was based merely on the failure of the defendant to appear and upon proof of the plaintiff's claim. It was, in fact, argued that the expression "upon proof of plaintiff claim" was sufficient to enforce the decree. This plea was negated.

23. The facts of that case are quite similar to the present one. In fact, if one may see the facts in the present case stand on a higher footing as there is no such expression used "upon the proof of plaintiff claim". A bare perusal of the decree, reproduced above, would show that the decree is predicated only on the ground that no defense had been served by the first defendant therein (plaintiff herein). Thus, it is an identical case where the merits of the controversy have not been gone into.

24. Learned Counsel for the defendants did seek to contend that a decree has been passed in terms of the procedures prevalent in the Courts in England. Assuming that to be so, if it has to be enforced within the territory of India, it must be within the mandate of Section 13 of the said Code. It is obvious that it is not a decision on merits which is a mandatory requirement under Clause (b) of Section 13 of the said Code.

25. It is not necessary for this Court to go into the merits of the claim of the defendants since the suit filed is only for declaration and injunction and what is stated to be executed is the decree as it is.

26. The plaintiff has taken a plea of the absence of a decree by a competent jurisdiction but in view of the fact that the amounts were advanced from England and were remitted back to England, it cannot be said that the England Courts were without the territorial jurisdiction to consider the merits of the case.

27. Insofar as the territorial jurisdiction of this Court is concerned to try the suit,

it is within the territory of this Court that the defendants seek to enforce the decree. The plaintiff resides and works in Delhi and it is, thus, within the jurisdiction of this Court only that the question of legality and validity of the enforcement of the decree had to be examined.

28. The defendants have also raised an objection about the maintainability of the suit, but then both the objections to the execution and the suit have to be examined together as they have been tried together and the issues have been framed only in the suit. It cannot be said that the plaintiff is devoid of a remedy to object to the execution of the decree.

29. In view of the aforesaid finding, I am of the considered view that the suit and the objections of the plaintiff are liable to succeed while the defendants cannot execute the decree on the ground that the judgment and decree fails to meet the parameters of Clause (b) of Section 13 of the said Code.

Issue No. 5: Whether suit is barred by limitation

30. The defendants have raised the plea of limitation. There is no positive evidence led in that behalf. The plaintiffs had filed objections to the execution and have also filed a suit for declaration and injunction. It cannot be said that the plaintiff is disentitled to the relief on grounds of limitation nor has this aspect been seriously canvassed before this Court by the learned Counsel for the defendants.

Issue No. 6: Relief

31. In view of the aforesaid findings, a decree is passed in favor of the plaintiff and against the defendants in CS (OS) No. 138/1995 declaring that the judgment of the High Court of Justice, Queen's Division Bench, Commercial Court in case bearing No. 1988, Folio No. 1090 is not conclusive as to the matter between the plaintiff and the defendants, a decree of permanent injunction is passed restraining the defendants from enforcing the said decree. EA(OS) No. 278/94 (Under Order 21 Rule 58 of CPC by JD-1), being the objections filed to the execution, must also succeed while the execution petition for enforcement of the decree is liable to be dismissed on account of the decree not meeting the parameters as set out in Clause (b) of Section 13 of the said Code.

32. Parties are left to bear their own costs.

33. Decree sheet be drawn up accordingly.