
(2008) 02 BOM CK 0005

In the Bombay High Court

Case No : Chamber Summons No. 1438 of 2006 in Execution Application No. 18 of 2004 in Hong Kong Action No. 4761 of 2001

Sumikin Bussan International (Hong Kong) Ltd.

APPELLANT

Vs

King Shing Enterprises Ltd. (In Liquidation) and Manharlal
Trikamdas Mody and Another and ING Bank NV

RESPONDENT

Date of Decision : 13-02-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, 13, 44A, 44A(1), 47
Supreme Court Ordinance — Section 3

Citation : (2008) 5 BomCR 464

Hon'ble Judges : Vazifdar S.J., J

Bench : Single Bench

Advocate : Virag Tulzapurkar and Harinder Toor, Jaideep Raut and Vinayak Vengurlekar, instructed by Crawford Bayley and Co. in Chamber Summons No. 1438 of 2006 and Pradeep Sancheti and H.K. Sudhakar, instructed by Khaitan and Co, for the Appellant; Virag Tulzapurkar, Sr. Cou. and Harinder Toor, Jaideep Raut and Vinayak Vengurlekar, instructed by Crawford Bayley and Co. for defendant No. 2 and Birendra Saraf, instructed by DSK Legal, for the Respondent

Final Decision : Dismissed

Judgement

Vazifdar S.J., J.—This is the second defendant's chamber summons for dismissal of the above Execution Application and for revocation of an order dated 8.12.2003 granting leave under Order XXI Rule 22 of the CPC passed in Chamber Summons No. 777 of 2003 taken out in the above execution application. The second defendant has also sought the setting aside of the warrant of attachment dated 12.1.2004 and the warrant of sale dated 24.5.2004.

2. The High Court of Hong Kong Special Administrative Regional Court of First Instance passed in favour of the plaintiff a judgment and decree dated 31.5.2002 for a sum of US \$ 618,331.26 and interest thereon at the rate of 1% above the US prime rate from 18.1.2001 till payment and for costs. It is common ground that the decree has become final.

3. As stated above by an order dated 8.12.2003, passed in Chamber Summons No. 777 of 2003, the learned Judge granted leave under Order XXI, Rule 22 of the Code of Civil Procedure. The learned Judge clarified that all the contentions of the judgment debtor were kept open to be considered in appropriate proceedings.

4. On 12.1.2004 a warrant of attachment was issued with respect to the said flat. The said flat thereafter stood attached in execution. The warrant of sale was issued on 24.5.2004.

5. Defendant No. 2 had earlier filed Chamber Summons No. 531 of 2005 for stay of the execution proceedings. I am informed that this was on the basis of bankruptcy proceedings against defendant No. 2 in the Singapore Court. An ad interim stay was granted on 20.4.2005. The Appeal Court reversed the order. The Supreme Court by an order dated 3.3.2006 issued notice and ordered that in the meanwhile the proceedings may continue but that the final sale document shall not be executed. I am informed that the matter is pending before the Supreme Court.

6. Mr. Tulzapurkar, the learned Senior Counsel appearing on behalf of defendant No. 2, in support of the chamber summons raised two contentions. Firstly, he submitted that the Hong Kong Special Administrative Region is not a reciprocating territory within Section 44-A of the Code of Civil Procedure. Secondly, he submitted that in any event the Court of First Instance of Hong Kong Special Administrative Region which passed the said decree is not a superior Court notified u/s 44-A of the C.P.C.

7(A). Section 44-A of the CPC reads as under:

44-A. Execution of decree passed by courts in reciprocating territory: (1) Where a certified copy of a decree of any of the Superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in (India) as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such Superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of Section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in Clauses (a) to (f) of Section 13 .

Explanation I: "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 II: "Decree" with reference to a Superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.

(B). The Central Government in exercise of powers conferred by Explanation 1 to Section 44-A of C.P.C. issued a notification dated 18th November, 1968 which was published in the Government of India gazette on 23rd November, 1968. The notification reads thus:

G.S.R. 2096: In exercise of the powers conferred by Explanation 1 to Section 44-A of the Code of Civil Procedure, 1908 (5 of 1908). the Central Government hereby declares, with effect on and from the 1st December 1968, Hong Kong to be a reciprocating territory for the purposes of the said section and the following Courts in Hong Kong to be Superior Courts of that territory, namely:

- i) Supreme Court;
- ii) Victoria Dist. Court;
- iii) Kowloon Dist. Court;
- iv) Fanling Dist. Court;

8. With effect from 1.7.1997 the Peoples Republic of China resumed sovereignty over Hong Kong. With effect from that date the United Kingdom (UK) handed over Hong Kong to China. Thus with effect from 1.7.1997 Hong Kong ceased to be a colony of the United Kingdom and sovereignty over Hong Kong has been resumed by China. Admittedly no notification has been issued after 1.7.1997.

9. Mr. Tulzapurkar's first submission is answered against him by a judgment of a learned Single Judge of this Court in Kevin George Vaz Vs. Cotton Textiles Exports Promotion Council, .

There is no dispute that the notification of 23.11.1968 was issued before Hong Kong became a part of the Peoples Republic of China; that the proceedings were adopted by the judgment creditor after Hong Kong became a part of the Peoples Republic of China and that after the Government of China resumed the exercise of sovereignty over Hong Kong with effect from 1.7.1997 there was no new notification u/s 44-A of the C. P. C. The facts in this regard in the present case and in Kevin George Vaz v. Cotton Textiles Exports Promotion Council are identical. S.C. Dharmadhikari, J., held as under:

The larger question is whether because of such contingencies, a notification issued by Central Government notifying a territory as reciprocating territory for the purpose of Section 44-A along with courts mentioned therein, loses its legal sanction and authority if that territory ceases to be a part of a country and

becomes subject to the Authority of other State or Country. In such an eventuality, whether a fresh notification is necessary is the other question posed before me.

37. A bare perusal of explanation would demonstrate that the Legislature was aware of all such contingencies. Parliament while amending the C.P.C. has taken note of the fact that a territory outside India may be part of a country or may cease to be so and come under authority of another State or country and whenever such a contingency occurs, care is taken to see that holder of a foreign decree does not suffer. It took care, therefore, to exhaustively define the term "reciprocating territory" to mean any country or territory outside India. If reciprocating territory is defined to mean any country or territory outside India and as in the present case Hong Kong is admittedly a territory outside India, then as to which country exercises sovereign power over Hong Kong is wholly immaterial and irrelevant for our purpose. When the Parliament has enacted the provision in plain and unambiguous language, then, such word and language has to be construed and interpreted literally. There is no scope for reading into, adding or subtracting anything when the words are plain, unambiguous and clear as in the instant case. Therefore, it is not possible to accept the contention of Mr. Zaiwalla that upon HongKong becoming part of Republic of China it ceases to be a reciprocating territory and the notification reproduced above, would have no legal effect or efficacy after 1st July, 1997. If Mr. Zaiwalla's contentions are accepted that would mean reading something in Sub-section (1) of Section 44-A which is impermissible in law....

10. I must clarify that Mr. Tulzapurkar in support of this submission raised various other grounds and contentions. I have however not considered them as I am bound by the said judgment. Mr. Tulzapurkar's first submission is therefore answered against him.

11. This brings me to Mr. Tulzapurkar's second submission namely that the Court of the First Instance of Hong Kong Special Administrative Region which passed the said decree is not a Superior Court notified u/s 44-A of the C.P.C.

12. There is no dispute that there is now no Court in the Hong Kong Special Administrative Region known as the Supreme Court. In other words if we were to go by mere nomenclature, the Court that passed the decree namely the High Court of Hong Kong Special Administrative Region Court of First Instance, is not mentioned in the notification.

13. Section 44-A of the C.P.C. contains two requirements. Firstly, the place where the decree is passed must be a reciprocating territory. Secondly, the decree must be passed by any of the Superior Courts of that reciprocating territory. Explanation 1 to Section 44-A of C. P. C. mandates a further requirement namely that the Central Government must by notification in the official gazette declare the place to be a reciprocating territory and the Superior Courts with reference to such territory must also be specified in the said notification.

14. The judgment in Vaz's case holds Hong Kong Special Administrative Region to be a reciprocating territory covered by the said notification dated 23.11.1968. The question still remains whether the Court that passed the decree viz. High Court of Hong Kong Special Administrative Region Court of First Instance is covered by the said notification as a Superior Court.

15. Mr. Sancheti submitted that upon reunification of Hong Kong with the republic of China, the Supreme Court referred to in the notification dated 23.11.1968 continues to remain in existence in the same manner in which it did prior to reunification albeit known by a different name viz. High Court of the Hong Kong Special Administrative Region. He submitted therefore that the notification applies to the Court that passed the decree. The submission is well founded.

16. In support of this contention Mr. Sancheti relied upon the Hong Kong Reunification Ordinance. The relevant portion of Section 6 whereof reads as under:

CONSTRUCTION ON AND AFTER 1 JULY, 1997 OF WORDS AND EXPRESSIONS IN LAWS PREVIOUSLY IN FORCE

7. Any reference to the Supreme Court of Hong Kong shall be constructed as a reference to the High Court of the Hong Kong Special Administrative Region.

8. Any reference to the Court of appeal of Hong Kong shall be construed as a reference to the Court of appeal of the High Court of the Hong Kong Special Administrative Region.

9. Any reference to the High Court of Justice of Hong Kong shall be construed as a reference to the Court of First Instance of the High Court of the Hong Kong Special Administrative Region.

17. Mr. Sancheti then relied upon Section 3 of the Supreme Court Ordinance which existed prior to 1.7.1997 which reads as under:

ESTABLISHMENT OF COURTS

3. Supreme Court

(1) There shall be a Supreme Court consisting of the High Court of Justice and the Court of Appeal

(2) Subject to the provisions of this Ordinance, the Supreme Court shall be a Court of unlimited civil and criminal jurisdiction.

18. Mr. Sancheti also relied upon Section 8 of Hong Kong Reunification Ordinance which repealed the said Section 3 of the Supreme Court Ordinance. Section 8 of Hong Kong Reunification Ordinance reads as under:

ESTABLISHMENT OF COURTS

Section 3 of the Supreme Court Ordinance (Cap. 4) is repealed and the following substituted:

3. High Courts

(1) There shall be a High Court of the Hong Kong Special Administrative Region consisting of the Court of First Instance and the Court of appeal.

(2) Subject to the provisions of this Ordinance, the High Court shall be a Court of unlimited civil and criminal jurisdiction.

19. Based on the above provisions, Mr. Sancheti submitted that all that the Hong Kong Reunification Ordinance did was to change the name of the Supreme Court to "High Court of Hong Kong Special Administrative Region".

20. An analysis of Clauses 7, 8 and 9 by itself may have posed some difficulty in my answering the question. Foreign law is a question of fact and must be proved. The judgment creditor however has filed an affidavit of one Jal N. Karbhari, a solicitor practicing in Hong Kong since the year 1980. He has stated that he is aware of the names of the courts prior to the reunification of Hong Kong with China on 1.7.1997 and the names of the courts subsequent thereto when Hong Kong was renamed as Hong Kong Special Administrative Region. Apart from analysing the provisions of the Hong Kong Reunification Ordinance, he has stated in paragraph 6, that prior to 1997 and by virtue of the Supreme Court Ordinance the Supreme Court was established in Hong Kong. The Supreme Court, he further states, consisted of two divisions the High Court of Justice and the Court of Appeal. He has extracted Section 3 of the Supreme Court Ordinance and Section 8 of the Hong Kong Reunification Ordinance set out earlier.

21. In Paragraphs 9 and 10, J.N. Karbhari comes to a conclusion that is clear on a conjoint consideration of Section 3 of the Supreme Court Ordinance (as it existed prior to its repeal) and Sections 6 and 8 of the Hong Kong Reunification Ordinance namely ;

1) The name of the Supreme Court has been changed to "High Court of Hong Kong Special Administrative Region;

2) The name of the Court of appeal which was a division of the Supreme Court of Hong Kong has been changed to the Court of appeal of the High Court of Hong Kong Special Administrative Region; and

3) The name of other division of the Supreme Court of Hong Kong namely High Court of Justice has been changed to the Court of First Instance of the High Court of Hong Kong Special Administrative Region.

22. The affidavit filed by J.N. Karbhari remains unchallenged. I find in any event that no exception can be taken to his analysis of the above provisions including his conclusion that the Court of First Instance of the High Court of Hong Kong Special Administrative Region which passed the decree in the present matter is a part of the High Court of Hong Kong Special Administrative Region which was

earlier known as the Supreme Court of Hong Kong. In other words all that has transpired after reunification is that the names of the Supreme Court and its two divisions have changed.

23. A mere change in the name/title of a Court would not take it out of the purview of the notification issued u/s 44-A of the C.P.C. In other words, once a Court is notified u/s 44-A of the C.P.C. it would not be taken out of the purview of the notification merely by reason of a change in its name. A view to the contrary would lead to an entirely unwarranted result.

24. It is not as if the Supreme Court of Hong Kong and its two divisions ceased to exist and new courts were established in their place. Had that been the case, it would have been different. If it is found that a new Court is constituted in place of a Court notified u/s 44-A of the C.P.C. the notification would cease to be operative. This Court cannot extend the applicability of the notification to such new Court including on the ground of equivalence.

The question of equivalence does not even arise. There may well be more than one Superior Court in a territory. It is not necessary that reciprocity is accorded to all the Superior Courts of a reciprocating territory. It is for the Central Government to decide whether or not to accord reciprocity to the territories and the courts therein for the purpose of Section 44-A of the C.P.C. It is no part of the courts function to decide whether or not reciprocity ought to be granted to a particular territory and to the courts therein. This would depend on a number of factors which would raise substantial questions of policy with which the courts have nothing to do.

25. In the present case, however the Supreme Court of Hong Kong and its two divisions continue to exist even after reunification but are known by different names. The courts remain the same.

26. Mr. Tulzapurkar relied upon the judgment in Kevin George Vaz's case in support of the second submission. The judgment however is clearly distinguishable. In that case, the award/judgment sought to be notified u/s 44-A of the C.P.C. was passed by the Labour Tribunal, Hong Kong. Admittedly the same is not mentioned as a Superior Court in the said notification. The learned Judge held as under:

41. Even the plaintiff does not dispute the above fact because perusal of his claim Form II (Form of Claim) would show that it is filed before Labour Tribunal. Admittedly, the same is not mentioned as a Superior Court in subject notification. The Doctrine of Reciprocity accepted and recognised by us is on the basis that Indian District Courts being Principal courts of Original Civil Jurisdiction and also enjoying appealable and revisional powers ought not be called upon to execute and enforce foreign decrees, if the same are not rendered by courts of Equivalent Status. They should atleast be equivalent. They can be superior. This is because of the position and status as also jurisdiction of District Courts in India. Therefore, unless and until they are Superior Courts in a Reciprocating Territory,

there is no question of implementing and enforcing their decrees in India is the basis of the above principle. This Labour Tribunal is not a Superior Court even if Hong Kong is a reciprocating territory. Mr. Hidayatullah invited my attention to Paras 6 and 7 of the affidavit in reply filed on 20th January, 2006 and the additional affidavit in reply filed on 7th March, 2006. During the course of his oral arguments, he invited my attention to the ordinance and the basic law.

42. As observed above, it is immaterial as to whether the ordinance in Hong Kong grants status of a District Court or equates the award of Labour Tribunal with a decree of District Court in that territory. For the purpose of Section 44-A, at the cost of repetition, Explanation I, defines both terms and when it comes to a Superior Court, decree of which is sought to be enforced, even the Superior Court must be specified in the notification. That is the mandate of Section 44-A along with Explanation I and the same cannot be brushed aside and ignored by me. The Labour Tribunal has not been notified as Superior Court. It is not specified in the notification. In the result, the award and judgment dated 6th August, 2004 is not capable of being enforced and executed.

(emphasis supplied)

Thus in Kevin George Vaz's case the award/decreed was passed by a Court/Tribunal which was not mentioned in the notification. Further the learned Judge found that the Labour Tribunal is not a Superior Court.

27. Mr. Tulzapurkar also relied upon a notification dated 1.9.1955 published by the Central Government in the Gazette of India declaring the colony of Singapore to be a reciprocating territory for the purpose of Section 44-A of the C.P.C. and the Supreme Court of the colony of Singapore to be a Superior Court with reference to that territory. He then relied upon the notification published by the Government of India in the Gazette of India dated 25.6.1968 declaring the Republic of Singapore to be a reciprocating territory for the purpose of Section 44-A of the C.P.C. and the High Court of the Republic of Singapore to be the Superior Court with reference to that territory.

28. Mr. Tulzapurkar submitted on the basis of the said notifications that in a similar situation, the Government of India had in fact issued a separate notification u/s 44-A of the C.P.C.

29. In the absence of information and details regarding the Supreme Court of the colony of the Singapore and the High Court of the Republic of Singapore, it is not possible to draw any inference based on the notification. For instance, it is not clear whether there were two separate Superior Courts in the colony of Singapore. Nor is there any information as to whether there are two separate Superior Courts namely Supreme Court and the High Court in the Republic of Singapore.

30. Mr. Tulzapurkar, relied upon the judgment of a Full Bench of the Madras High Court in (Sheik Ali v. Sheik Mohamed) AIR 1967 Mad 45 and in particular the

observations in paragraph 8 that Section 44-A of the C.P.C. read with the notification made thereunder, exhaustively provide not only for executability in India of a foreign judgment in a reciprocating territory but also the procedure to be followed in execution. The judgment however, does not deal with the questions raised before me and is therefore of no assistance to Mr. Tulzapurkar.

31. Nor do I find Mr. Sancheti's reliance upon the judgment of the Supreme Court in *Rosiline George Vs. Union of India (UOI) and Others*, to be of any assistance to the judgment creditor. As paragraph 15 of the judgment itself indicates, what fell for the consideration of the Supreme Court was a treaty which was made available to British India by the 1942 Order. It was found as a fact that the obligations under the treaty continued after independence.

32. Mr. Tulzapurkar's second submission is also therefore rejected.

33. In the circumstances, the chamber summons is dismissed with costs fixed at Rs. 5000/- to be payable on or before 8.4.2008. The operation of this order is stayed upto 8.4.2008.