



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 1450 OF 2003

IN

EXECUTION APPLICATION NO. 63 OF 2003

IN

QUEENS BENCH DIVISION

THE UNITED KINGDOM

SUIT NO. 1226 OF 2001

Islamic Investment company for the
Gulf (Bahamas) Ltd. Plaintiff/
Intended Claimant/
Judg.Creditor

versus

Symphony Gems N.V. and Ors. Defendants
Intended Defendants/
Judg. Debtors

AND

Mr. vijay K. Mehta Applicant

Mr. E.P. Barucha, Senior Counsl with Mr. J.B.
kamdia i/b. J. Sagar and Associates for the
plaintiff in chamber Summons no. 1633/2003.

ASPI Chinoi with F.E.D'vitre Senior Counsel with
M.S. Doctor, J.P. Seth i/b. Federal and Rashmikant
for the defendants in Chamber Summons no. 1633/2003

S. Purohit with H.K. Sudhakar and Thapliya for the
Applicant in Chamber summons no. 1450/2003.

CORAM: S.U. KAMDAR, J.

DATE : 17TH FEBRUARY, 2005.

JUDGMENT :

1. The present application has been taken out by the judgment debtor inter-alia seeking adjournment to raise the attachment in respect of flat no. 91, Maker Tower "L", Cuffe Parade, Mumbai. It has been further contended that the execution application no. 63 of 2003 should be rejected and or dismissed as against defendant no.3. Various other interim reliefs are sought.

2. The decree which is sought to be executed in the present proceedings is the decree dated 13.2.2002 passed by the High Court of Justice Queen's Bench Division, Commercial Court, United Kingdom. The said decree has been passed in the sum of 10,060,354.28 U.S. (\$) together with interest with a cost of 25,000 pound.

3. The present chamber summons raises a very interesting question of law i.e. whether the decree passed by the foreign court in its summary

jurisdiction is executable or not in India keeping in mind the provisions of section 13 and section 44(A) of the Code of Civil Procedure, 1908. A connected question which also arises for determination is whether a summary judgment in exercise of part 24 of the Civil Procedure Rules of the U.K. is a judgment on merits so as to be executable under section 13 of the Code of Civil Procedure, 1908.

4. Since for the reasons briefly enumerated herein I propose to refer the matter to the Division Bench for its determination thus, I do not propose to go into the details of the present case. However, few facts which are bare necessary for the purpose of the present order are as under :

5. An agreement dated 27.1.2000 was executed between the plaintiff/claimant and the defendant no.1 what is known as "Morabaha Financing Agreement". The said agreement on face of it is in respect of sale of certain goods but in essence is a transaction of finance. In respect of the said agreement an action was brought by the plaintiff/claimant in the U.K.

court by way of a summary jurisdiction. The said matter was heard by J. Tomlinson at the commercial Court of the Queen's Bench Division of the Royal Courts of Justice in England. By its order and judgement dated 13.2.2002 in 2001/Folio/1226 he refused leave to defend to the defendants and has passed a judgment and decree in the aforesaid amount. An appeal was preferred therefrom which has been rejected by the Court of Appeal (Civil Division). By the said order of the appellate court the judgment of the learned single judge has been upheld. The said appeal court order is dated 26.2.2002. This judgment and/or decree is sought to be enforced by filing the present Execution application by the decree holder for the recovery of the said amount and in consequence thereof the aforesaid flat no.91, situated at Maker Tower "L", Cuffe Parade, Bombay belonging to the defendants judgment debtors has been attached and has been sought to be put in for sale for the purpose of recovery of the aforesaid amount. In view of the aforesaid judgment the present chamber summons has been taken out inter-alia contending that the decree obtained by the plaintiff/decree holder is

not legal, valid and executable decree under international law by virtue of the provisions section 13 read with section 44(A) of the code of Civil Procedure, 1908.

6. Mr. Chinoy the learned counsel for the applicant judgment debtor has inter-alia contended that for the purpose of legal, valid and executable foreign decree a judgment has to be on merits of the case. He has relied upon the provisions of section 13(1) (b) of the CPC and has inter-alia contended that for executable decree or judgment it is a condition precedent that such a judgment or decree must be on merits. He has further contended that the decree passed in summary jurisdiction by way of summary judgment is not a judgment on merits and thus unenforceable by virtue of section 13(1)(b) and section 44(a) of the CPC. On the other hand the learned counsel for the plaintiff decree holder has contended that even if it is a summary judgment in a summary jurisdiction still it is a decree or judgment on merits as it considers the rival contention of the parties on merits and decides the issues whether the defendant has any case to grant a leave to defend or

not and therefore the said judgment is a judgment on merits and cannot be treated as an Ex-parte.

7. Before I deal with the rival submissions which it is necessary that the provisions of section 13 and 44(A) is reproduced as here 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].

"44-A. Execution of decrees 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 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, it is shown to the satisfaction of the court that the decree falls within any of the exceptions specified in clauses (a) to (f) to 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 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 judgement.]

8. The learned counsel for the appellant has in support of the contention relied upon various judgments and has contended that when a court refuses to grant leave to defend and consequently passes a decree it does not conduct any trial nor it decides the issues which are involved in evidence, oral as well as documentary and therefore a decree passed in such a summary jurisdiction is not a decree on merits. He has further contended that it is a settled proposition of law by the judgment of various courts that in a case of summary jurisdiction a trial begins only after the issue is considered whether leave to defend should be granted to the defendants either conditionally or unconditionally or the same should be all together refused and consequently an ex-parte decree should be passed. In support of his contentions that the said summary judgment is not a

decree on merits the learned counsel has relied upon the following judgements.

1. 1998 Mh..L.J. 956 D. Shanlal vs. Bank of Maharashtra.
2. AIR 2001 SCC 2134 - M/s. International Woollen Mills v/s. M/s. Standard Wool (U.K.)Ltd
3. [2003] EWHC 2399 Wyrill and Anr. v Ashleigh (Ch) Homes and Anr.
4. [1999] Lloyd's Society of Lloyd's v Fraser and Ors. Rep IR 156
5. 37 Bom.L.R. 252 Ramanlal Shantilal v. Chunilal Damodardas.

6. AIR (35) 1948 Baldevdas Karsondas Patel v.
Bom. 232 Mohanlal Bapalal Bahia and
Ors.
7. [2004] EWHC 2323 Bhatia Shipping and Agencies
(COMM)[2004] All Pvt Ltd v Alcobex Metals Ltd.
ER (D) 265 (Oct)
8. AIR 9133 Madras 544 Isidore Fernando vs.
Thommaï Antoni Michael
Fernando.
9. AIR 1981 Madras 118 K.M. Abdul v/ Indo
Singapore Traders P.Ltd.
10. AIR 1991 Calcutta 335 Middle East Bank Ltd vs.

Rajendra Singh Sethi

11. AIR 1927 Madras 265 *R.E. Mohamed Kassim vs.
Seeni Pakir-bin Ahmed and
Ors.*
12. 1999(4) All MR 122 *Dallah Alabaraka Investment
Co.Ltd vs. Ajitabh
Bachchan and Anr.*
13. 2001(1) Bom.C.R.325 *Bank of Baroda vs.
Manubhai Jehtabhai Patel
and Ors.*
14. 1986(L)No.1567 and *Libyan Arab Foreign Bank
1986(L) No.4048 v. Bankers Trust Co.*
15. AIR 1952v Calcutta *Indian and General
508 Investment Trust Ltd v.*

*Sri Ramchandra Mardaraja
Deo, Raja of Khalikote.*

16. 1990(1) Bom C.R.310 *R.B. Rajput vs. Hiralal
Bhagwandas Rajput and Anr.*

9. On the other hand the learned counsel for the plaintiff/decree holder has relied upon the judgment of the learned single judge of this court in the case of **Janardan Mohandas Rajan Pillai and Anr. v. Madhubhai Patel and Ors** reported in AIR 2003 Bom.490.

10. After considering the rival submissions I am of the opinion that in view of the judgment of the learned single judge of this court in the case of **Janardan Mohandas Rajan Pillai (supra)** which inter-alia holds that a judgment in summary jurisdiction is a decree on merits being directly contrary to the Apex Court judgment in the case of

M/s. International Wollen Mills (supra) matter requires to be considered by the division bench. In view of the fact that the learned Single judge has considered the said judgment and has taken a particular view which I am not in agreement with I am required to refer this matter to the division bench for its appropriate decision on the aforesaid issued. The learned single judge has in the judgment of Janardhan Mohandas Rajan Pillai (supra) in para-5 therein has held as under :

"5. the Apex court has enunciated the law on the subject as to whether a decree of a foreign court is executable in India the circumstances in which a decision could be considered to be on merits or a decision in default. The proposition that Mr. Grover sought to canvass that it is only if evidence is led in a matter that the decision can be considered to be on merit, is very wide. for example, if there is a decree bon admission, there would not be any need to lead evidence in the matter, yet if the decree is not satisfied it would always be open to the parties to execute the same. Again, in a case where a summary suit has been filed and leave to defend has not been granted by the court, the court can still decide the suit without any material on record, on the summons for judgment being moved. A decree [passed in such a suit can also be executed. Hence, it is not that in every matter evidence must be led for a judgment to be treated as a decision on merits.

11. Apart from the aforesaid judgment there are two other judgments of the learned single judge of this court namely of Rebello, J in the case of reported in 2000(1) Bom.C.R.325 bank of Baroda v. Manubhai Jethabhai Patel and Ors. and in the case of case of Dallah Albaraka Investment Co.Ltd vs. Ajitabh Bachchan and Anr. reported in 1999(4) All.M.R. 122 where the learned single judge has taken a view that if the decree is passed in summary jurisdiction in a foreign court then such a decree is a decree on merits and therefore the same is enforceable in law in India and the provisions of section 13(1)(b) of the act has no application. On the other hand the Calcutta High court has in the case of Middle East Bank Ltd v/s. Rajendra Singh Sethia reported in AIR 1991 Calcutta 335 has taken a totally contrary view and has held that a decree which is passed in summary jurisdiction is not on merits and has added that such a case does not go into the trial of the suit but merely decides whether a leave to defend should be granted or not to the defendant in the said proceedings. According to the view of the Calcutta High Court the summary judgment

in a summary jurisdiction is not a judgment on merits as neither the evidence is led nor the trial is conducted at that stage. This view of the Calcutta High court has been expressly affirmed by the Apex court in the judgment of **M/s. International Wollen Mills** (supra) wherein in para-18 of the judgment the apex court has held as under.

"18. In the case of Middle east Bank Ltd v. Rajendra Singh Sethia reported in AIR 1991 Cal 335 a decree has been passed exparte and without service of notice on the judgment-debor. A number of authorities were cited before the court including the case of Sheikh Abdul Rahim (AIR 1943 Cal 42) (supra). The court has held that even though a decree may be ex parte it may still be on merits provided it could be shown that the court has gone through the case made out by the plaintiff and considered the same and taken evidence of the witnesses put up by the plaintiff. It was held that if an ex parte decree was passed in a summary manner under a special procedure without going into the merits and without taking evidence then those decrees would not be executable in India. Based on this authority it was submitted that a decree could be said to be not on merits only if it is passed in a summary manner in any special or summary procedure. It was submitted that such a decree i.e. a decree which has not been passed in a summary manner in a summary proceeding would be a decree on merits. This authority itself makes it clear that the decree would not be on merits if the court has not gone through and considered the case of the plaintiff and taken evidence of witnesses of the plaintiff. It must also be noted that in this case the Court ultimately

held that the concerned decree was not a decree on merits."

12. The apex court has in the said judgment overruled the view taken by the Calcutta High Court in the case of Shaikh Abdul Rahim AIR 1943 Calcutta 42 and affirmed the aforesaid view in the case of Middle East Bank Ltd (supra). After considering the judgment of the Calcutta High court, the court has also approved the judgment of the Bombay High Court in the case of Algemene Bank Nederal NV v. Satish Dayalal Choksi reported in AIR 1990 Bom.170. In para-29 and 30 of the judgment the court has approved the judgment of the Kerala High court in the case of Govindan Asari Kesavan Asari v. Sankaran Asari Balakrishnan Asari reported in AIR, 1958 Kerala 203 and has inter-alia contended held that for the purpose of deciding the decree on merits it must be based on trial and evidence and cannot be in a summary manner. In para-29 and 30 of the judgment the apex court has held as under :

"29. In the case of Govindan Asari Kesavan Asari v. Sankaran Asari Balakrishnan Asari

reported in AIR 1958 Ker 203, it is held as follows :

" In construing S. 13 of the Indian Civil Procedure Code 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 contradiction 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. On 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 questioning arising between the parties.

. The court must have applied its mind 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 contest 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 the 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 S.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 him and in favour 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 S.13 of the Indian Civil Procedure Code 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 recognised in AIR 1927 Madras 265 (FB). The contention that the defendant who had chosen to remain ex parte must be taken to have admitted the plaintiff 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 favour. 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 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 *Abul Rehman v. Md. Ali Rowther*, AIR 1928 Rangoon 319, in the following terms :

. "A decision on the merit 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 v. Munshi Das, AIR 1941 Patna 109, 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."

30. In our view this authority lays down the correct law. "

13. The ratio of the judgment of the Kerala High

court and the Calcutta High court in the cases cited above has been expressly approved as a correct position of law by the Apex Court.

14. However the learned single judge of this court in the case of Janardan (supra) while considering the issue that whether the order of granting of cost was on merits or not has held in para-5 of the said judgment that even if the judgment is delivered in a summary jurisdiction under order 37 rule 2 or similar procedure in a foreign court then the judgment delivered will be treated as decision on merits. This view of the learned single judge in my opinion is directly contrary to the aforesaid paragraphs quoted by me in the judgment of M/s.International Wollen Mills (supra). The learned counsel for the defendant/judgment debtor has also relied upon the judgment of the apex court in the case of **Indian Bank v/s. Maharashtra State Co-operative Marketing Federation Ltd reported in AIR 1998 SC 1952** particularly the following portion of para-9 as under:

"9. Thus in classes of suits where adopting summary procedure for deciding them is permissible the defendant has to file an appearance within 10 days of the service of summons and apply for leave to defend the suit. If the defendant does not enter his appearance as required or fails to obtain leave the allegations in the plaint are deemed to be admitted and straightway a decree can be passed in favour of the plaintiff. The stage of determination of the matter in issue will arise in a summary suit only after the defendant obtains leave. The trial would really begin only after leave is granted to the defendant. This clearly appears to be the scheme of summary procedure as provided by Order 37 of the Code."

15. Since in my view the judgment of the learned single judge in the case of **Janardan Mohandas Rajan Pillai and Anr. (supra)** being not in conformity with the judgment of the Apex Court in the case of **M/s. International Wollen Mills (supra)** I find it difficult to follow the judgment of the learned single judge and thus I refer the present matter to the division bench of this court for the purpose of appropriate pronouncement on the proposition of law framed herein above.

16. I am also informed by the learned counsels for

the parties that an appeal against the judgment of the learned single judge in the case of Janardan (supra) has been filed being appeal No. 1122 of 2002. The said appeal has been admitted by order dated 13.4.2004 by the division bench of this court and thus the issue in any event is directly pending before the division bench and for that reason and also in exercise of my power conferred under Rule 28 of the (O.S.) High Court Rules, I make the present reference to the division bench for determining the aforesaid issue in law.

17. The office of Prothonotary and Senior Master is directed to place the paper and proceedings in the present case before the Honourable Chief Justice for appropriate directions in the matter.

18. In the meanwhile parties are directed to maintain complete status-quo.

sd/-
