

EXECUTION OF FOREIGN DECREES

A Person who has obtained a decree from a court in a foreign country can approach an Indian court for enforcement of the said decree under the Civil Procedure Code, the Supreme Court has ruled in November 2000 in *m.v. A.L. Quamar -vs- Tsavliris Salvage (International) Ltd.*

"Section 44A of the code enables a foreign decree holder to execute a foreign decree in this country," a division bench comprising Justices S B Majmudar and Umesh C Banerjee said dismissing an appeal of Merchant Vessel A L Quamar against an Andhra Pradesh High Court order.

The High Court had held that it was competent to issue attachment orders against the merchant vessel on the basis of a decree against it issued by the High Court of Justice Queen's Bench Division Admiralty Court in an action by Tsavliris Salvage (International) Ltd.

Relying on decision by a New Zealand Supreme Court and an Australian judgement, Justice Banerjee, writing the judgement for the bench, said a foreign decree holder could invoke the jurisdiction of an Indian court under Section 44A of the code.

Justice Banerjee said "One can conclude that whereas the domestic law, execution scheme is available under Sections 37, 38, 39, 41 and 42, Section 44A depicts an altogether different scheme for enforcement of foreign judgements through Indian Courts."

The court said that when a decree is obtained from an Indian court to enforce in the country two years after it was obtained, "there exists a mandatory obligation to serve a notice to show cause against the execution."

However, the court said in case of Section 44A, which enabled a foreign decree holder to approach an Indian court for execution, requirement of show cause notice was not mentioned even if the decree was over two-years old.

"In fine, the legal fiction created by Section 44A makes the Andhra Pradesh High Court, the court which passed the decree and as such competency of the High Court to entertain the execution proceeding cannot be doubted in any way," Justice Banerjee said.

The court said the dismissal of the appeal would not preclude m.v. A L Quamar to obtain release of the attached ship on furnishing a bank guarantee of a nationalised bank for suitable amount to the satisfaction of the Registrar of the Andhra Pradesh High Court, pending the execution proceedings.

"Once such Bank guarantee is furnished by the appellant and requisite undertakings as earlier ordered by the High Court are filed, the ship will be released from attachment and will be permitted to sail out of the Port of Vishakhapatnam," the court ordered.

The prime law of India is that where there is an express agreement to, submit to the jurisdiction of a foreign court, a judgment pronounced by such court binds the parties, and effect will be given to such a judgment in Indian courts. The governing legislation for judgments pronounced by foreign courts is the Code of Civil Procedure 1908.

Section 2(6) of the Code defines a "foreign judgment" to mean any judgment of a foreign court. Section 2(5) of the Code defines a 'foreign court' to mean a Court outside India and not established or continued by the authority of the Central Government (of India)

In other words, a foreign judgment means an adjudication by a foreign court on a matter before it. A judgment given by a foreign court does not cease to

be so when, as a consequence of political change, the territory where the court was situated at the time of the judgment becomes part of India

Such a judgment, for the purposes of enforcement and execution, will be conclusive, that is, it will be recognised and will operate as *res judicata* (also fulfilling the conditions of it) save in certain exceptional cases. These are mentioned in section 13 of the Code, which reads as follows

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 -

- :- where it has not been pronounced by a Court of competent jurisdiction;
- :- where it has not been given on the merits of the case;
- :- 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;
- :- where the proceedings in which the judgment was contained are opposed to natural justice;
- :- where it has been obtained by fraud; and
- :- where it sustains a claim founded on a breach of any law in force in India [an example of this would be a foreign judgment for a gambling debt]

The foreign court must be competent to try the suit, not only as regards pecuniary limits of its jurisdiction and the subject-matter of the suit, but also with reference to its territorial jurisdiction, and the competency of the foreign court is to be judged not by the territorial law of the foreign state, but by the rules of private international law

Undoubtedly, the foreign court has jurisdiction to deliver a judgment in rem, which may be enforced or recognised in an Indian court, provided that the subject matter is within its jurisdiction. It cannot, however, sit in judgment on, say, immovable property situated outside the country of its jurisdiction

In other words, as laid down by the Supreme Court of India in one of its judgments, the courts of a country generally impose a three-fold restriction on the exercise of their jurisdiction

:- jurisdiction in rem (binding not only the parties but the world at large) by a court over res outside the jurisdiction will not be exercised, because it will not be recognised by other courts;

:- the court will not deal directly or indirectly with title to immovable property outside the jurisdiction of the state from which it derives its authority, and

:- the court will not assist in the enforcement within its jurisdiction of foreign penal or revenue laws

The operation of section 13 would be better appreciated by the following illustration: A sues B in a foreign court. If the suit is dismissed, the decision will operate as a bar to a fresh suit by A in India on the original cause of action, unless the decision is inoperative by reason of one or more of the circumstances specified. If a decree is passed in favour of A in the foreign court and A sues B on the judgment in India, B will be precluded from putting in issue the same matters that were directly and substantially in issue in the suit in the foreign court, unless the decision is once again inoperative for the said exceptions

Though a foreign judgment may be enforced by a suit in India, it must not be assumed that Indian courts are bound in all cases to take cognisance of the suit and they may refuse to entertain it on grounds of expediency

It is also relevant to consider section 14 of the Code. It states -

The Court shall presume, upon production of any document purporting to be a certified copy of 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

Execution of Foreign Judgments

A judgment of an Indian court can only be enforced by proceedings in execution, against that, a foreign judgment may be enforced by proceedings in execution in certain cases only. These are mentioned in sections 44 and 44A of the Code. In all other cases, a foreign judgment can only be enforced by a suit on the judgment. If such a suit is dismissed, no subsequent application to execute that judgment will lie - for it has become merged in the decree dismissing the suit

This stand is brought out through the Code distinguishing between foreign judgments of countries which are 'reciprocating territories' and those which are not. Section 44A of the Code reads as follows -

1. Where a certified copy of a decree of any of the superior court of any reciprocating territory has been filed in a District Court [of India], 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

Reciprocating Territory means any country or territory outside India and so notified

Decree for this purpose means a decree or judgment under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of 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

From time to time, the Government has issued notifications recognising the following as reciprocating countries: Hong Kong, Singapore, New Zealand, Cook Islands, Trinidad & Tobago, United Kingdom, Northern Ireland, Trust Territory of Western Samoa, Papua New Guinea and Bangladesh.

When a suit emanates from any of these countries, the concerned Indian court will proceed forthwith to enforce the foreign judgment, provided it is not affected by any of the exceptions enumerated in section 13. If it emanates from any other country, the enforcement would have to be sought by filing a suit in India on the foreign judgment. Again, the Indian court would pass a judgment in terms of the foreign judgment, provided it is not affected by the said exceptions

The decree -

:- would have to have all the attributes of finality, - would be for payment of a sum of money,

:- (passed in a foreign currency) could provisionally be claimed in Indian rupees converted at the rate prevailing on the institution of the proceedings, with a right to claim the amount due at the rate prevailing on the date of the courts eventual judgment;

:- would not proceed for enforcement, and, if proceeded with, such proceedings may be stayed if, in an appeal against it, the judgment-granting country stays its execution;

:-· would be enforced even though against a state or a state-owned entity, so far as it relates to commercial activities;

:-· could provide for interest on the money claim, in addition to the original amount. If it is silent, interest could be claimed on the decretal amount from the date of filing the suit in India. Costs could also be awarded in consonance with provisions of the Code

A suit on a foreign judgment must be brought within three years from the date of judgment (Article 101 of the Limitation Act 1963). The pendency of an appeal in the foreign country will not bar a suit on a foreign judgment

Enforcement of Foreign Arbitral Awards

There has been a phenomenal growth in international arbitration involving Indian parties - both the governing law and the venue of arbitration are foreign. An award in such a case would be meaningless, unless it can be enforced without hurdles and with the least inquiry and review by the courts where enforcement is sought

An arbitration award can only be enforced when an order is made by the courts of the country where enforcement is sought. This principle is also reflected in the Indian system. In India, foreign arbitration awards, in terms of enforcement, were governed by the Foreign Awards (Recognition and Enforcement) Act 1961 ("the Act") which gave effect to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958. India had made two reservations while ratifying the Convention, namely-

:-· that it would apply the Convention to the recognition and enforcement of an award only if it was made in the territory of another reciprocating contracting state; and

:- that it would apply the Convention only to differences arising out of legal relationships which were considered as commercial under Indian law

There is also the Geneva Convention, adopted by India through the Arbitration (Protocol and Convention) Act 1937

Article 1(i) of the New York Convention specifically states as follows

This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of the state other than the state where the recognition and enforcement of such awards is sought, and arising out of differences between persons, whether physical or legal

Section 7 of the Act, which corresponds with the provisions of the New York Convention, specifies that a foreign award may not be enforced if the party against whom the award is sought to be enforced proves to the court enforcing the award any of the following

- (1) that the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the arbitration agreement was not valid under the law to which the parties have subjected it (or, in the absence of any condition thereon) under the laws of the place of arbitration;
- (2) that there was no due compliance with the rules of fair hearing;
- (3) the award exceeded the scope of submission to arbitration;
- (4) the composition of the arbitral authority or its procedure was not in accordance with the arbitration agreement of the parties or (failing such agreement) was not in accordance with the law of the place of arbitration;
- (5) the award has not yet become binding on the parties, or has been set aside, or suspended by a competent authority of the country in which the award was made;

(6) if the court dealing with the award is satisfied that (a) the subject-matter of the difference is not capable of settlement by arbitration under the law in India; or (b) the enforcement of the award will be contrary to public policy

An arbitration award made outside India is distinct from a foreign judgment (see definition of decree above). Identical with foreign judgments, the Act deals with the question of enforcement of awards of a foreign reciprocating territory as defined in it

So far, the Government has notified the following countries for that purpose: United Kingdom, the Netherlands, United States of America, Sweden, Syria, Philippines, Thailand, Austria, Germany, Switzerland, Czechoslovakia, Russia, Finland, Greece, Ecuador, Bulgaria, Romania, Norway, Poland, Hungary, France, Germany, Japan, Tanzania, Nigeria, Tunisia, Ghana and Morocco

Any person interested in enforcing a foreign award may apply in writing to any court having jurisdiction over the subject matter of the award. The application will be numbered and registered in the court as a suit between the applicant as the plaintiff and the other as defendants. The court will direct notice to be given to the parties requiring them to show cause why the award should not be filed. The court, on being satisfied that the foreign award is enforceable under the Act, will pronounce judgment on it. A decree will follow. No appeal will lie from such a decree except insofar as the decree is in excess of or not in accordance with the award. Several High Courts of the land, including Bombay, have made detailed rules regarding the procedure and the forms to be used for applications for enforcement of foreign awards

The new Arbitration and Conciliation Ordinance 1996 (which follows the UNCITRAL Model Law), while repealing both the 1937 and 1961 Acts, retains the existing law. India continues to be a party to the Conventions. It deletes, however, the old irritant, which provided that the 1961 Act will not apply to an award arising from an arbitration agreement governed by the law of India. This will rectify the alarm generated by the Supreme Court of India

decision in *National Thermal Power Corp. v Singer Co.* in which it was held that an award made outside India will still be an award on an arbitration agreement governed by the law of India, if the substantive law of the contract is Indian law.

The emerging legal issues on "jurisdiction" as regards transactions over the internet can hardly ignore the legal aspects involved in the execution/enforcement of foreign decrees. Even after exercise of jurisdiction, the Courts may be unable to help the plaintiff in getting relief in case the local laws of the country concerned have certain restrictions for the execution/enforcement of foreign judgements or decrees in the country.

Under Indian Law, execution of decrees, whether foreign or domestic, is governed by the provisions of the Code of Civil Procedure, 1908 (CPC) (as amended from time to time).

Under the Indian law there are two ways of getting a foreign judgement enforced. Firstly by filing an Execution Petition under Section 44A of the CPC (in case the conditions specified therein are fulfilled). Secondly by filing a suit upon the foreign judgement/decree.

Under S. 44A of the CPC, a decree of any of the Superior Courts of any reciprocating territory are executable as a decree passed by the domestic Court. Therefore in case the decree does not pertain to a reciprocating territory or a superior Court of a reciprocating territory, as notified by the Central Government in the Official Gazette, the decree is not directly executable in India. In case the decree pertains to a country which is not a reciprocating territory then a fresh suit will have to be filed in India on the basis of such a decree or judgement, which may be construed as a cause of action for the said suit. In the fresh suit, the said decree will be treated as another piece of evidence against the defendant.

However in both the cases the decree has to pass the test of S. 13 CPC which specifies certain exceptions under which the foreign judgement becomes inconclusive and is therefore not executable or enforceable in India.

In this chapter, various decisions of the Supreme Court of India, various High Courts and other Courts are discussed in order to bring the law on the point, in perspective. In order to show a comprehensive view of the law, along with the ratio decidendi a short averment of the facts of the case are also given so that the decisions can be rightly appreciated. Each of the aforesaid exceptions, under S. 13 have been dealt with separately and at the end of each discussion, a broad proposition culled out from the decisions of the Courts is laid down so that it is easier to remember the law on the point. However, the proposition may not be exhaustive to cover all circumstances.

It will be seen from the above that even if a judgment or a decree is passed by a foreign Court against an Indian defendant, the judgment or decree may not be enforceable against him due to the operation of S. 13 of CPC. It can be seen that, the plaintiff has to come to the Indian courts to either get the foreign judgment executed under S. 44A or file a fresh suit upon the judgment for its enforcement. Therefore by getting a decree in the foreign Court, the plaintiff only avoids the inconvenience of leading evidence in the Indian Courts but runs a much bigger risk under S. 13. Therefore it may be advisable for a foreign plaintiff to institute claims in India itself in case the defendant is in India. Since international transactions would involve more of documentary evidence and that comparatively leading of evidence may not be that inconvenient, it may be advisable to avoid the risk under S. 13 and file claims in India itself.

The Supreme Court held in *Thyssen Stahlunion GMBH vs. Steel Authority of India Ltd.* that,

"A foreign award given after the commencement of the new Act (i.e. Act of 1996) can be enforced only under the new Act. There is no vested right to

have the foreign award enforced under the Foreign Awards Act [i.e. Foreign Awards (Recognition and Enforcement) Act, 1961]".

In *Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd.* the Supreme Court decided whether a "foreign award" given after the commencement of the Act of 1996, but where the arbitration proceedings started before the commencement of the Act of 1996, will be governed by the Act of 1996.

The learned Judges held that a foreign award passed on 13/8/1996 could be enforced with the same vigour under the Ordinance as it could be under the Act of 1996. The learned Judges held that although the Act of 1996 was brought into force w.e.f.22/8/1996 vide Notification No.GSR 375(E) dt.22/8/1996 published in the Gazette of India, for all practical and legal purposes it shall be deemed to have been effective from 25/1/1996, i.e. the date when the first Ordinance came into force, since the provisions of the said Act and Ordinance are similar and there is nothing in the Act to the contrary so as to make the Ordinance ineffective as to either its coming into force on 25-1-1996 or its continuation upto 22-8-1996. The learned Judges held that the object of the Act of 1996 is to minimise supervisory role of the court and to give speedy justice.

Under the Arbitration Act, 1940 the arbitral award had to be filed in a court to obtain a decree, which is dispensed with under the Act of 1996. In one proceeding there may be different stages. In the first stage, the court may have to decide about the enforceability of the award. Once the court decides that the foreign award is enforceable, there arises no question of making the foreign a rule of court/decree. If the object and purpose can be served in the same proceedings, there is no need to take two separate proceedings resulting in multiplicity of litigation.