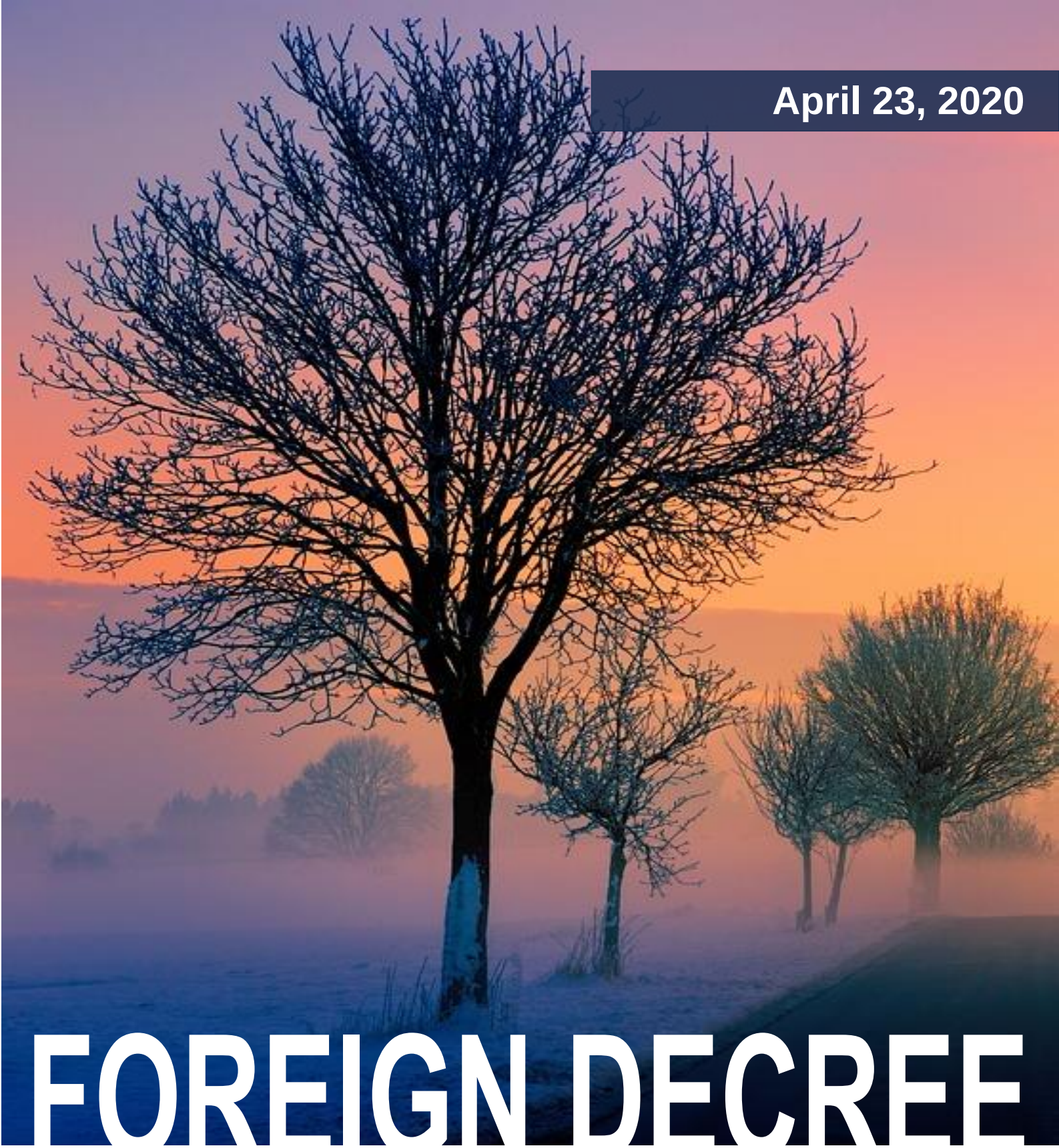

April 23, 2020

FOREIGN DECREE

- ENFORCEABILITY & ITS AMPLITUDE OVER A PERIOD OF TIME

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SOLICITORS AND ADVOCATES

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Background/History

Section 44A **("Section")** was introduced/inserted by way of an amendment to the Code of Civil Procedure, 1908 **("CPC")** in 1937.

The amendment or rather the Section itself was brought in to enable enforcement of a decree (excluding an arbitration award) for payable of monies (excluding taxes and penalties) within the territory of '*British ruled India*' but only restricting the enforcement of a decree passed by the Superior Courts in the United Kingdom and other reciprocating territories. Further the scope of enforceability was restricted to a reciprocating territory pertaining to any country or territory situated in '*His Majesty's Dominions*' (countries ruled by the British) or any territory in India which the Governor General declared by a notification to be a reciprocating territory.

The relevant extract of the Section as it then read is as follows:

> ***"44A - Execution of decrees passed by Courts in the United Kingdom and other reciprocating territories***
> *(1) Where a certified copy of a decree of any of the superior Courts of the United Kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in British India as if it had been passed by the District Court.*
> *(2) Together with the certified copy of the decree shall be 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 of 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.*
> *….."*

The *Explanation 1* to the Section restricted the definition of '*Superior Courts*' of the United Kingdom to include the High Court in England, the Court of Sessions in Scotland, the High Court in Northern Ireland, the Court of Chancery of the County Palatine of Lancaster and the Court of Chancery of the County Palatine of Durham and;

The *Explanation 2* to the Section restricted the definition of '*Reciprocating territory*' to mean and include any country or territory in any part of '*His Majesty's Dominions or in India*', which the Governor General in Council may from time to time, by notification in the Gazette of India declare to be reciprocating territory for the purposes of this Section and the '*Superior Courts*' with reference to any such territory means such Courts as may be specified in the notification.

The *Explanation 3* to the Section defined '*Decree*' of a '*Superior Court*' to mean any decree or judgment of such Court under which a sum of money is payable and excludes monies payable as taxes or other monies payable in the nature of penalty or fine and with reference to '*Superior Courts*', the same included judgments and decrees rendered in any Court in appeals against such decrees or judgments but excludes an arbitration award even if such award is enforceable as a decree or judgment.

Prior to the introduction of the Section, there was no provision by which decrees passed by Courts outside India could be enforced by the British Indian Courts. The historical aspect of the Section is set out in *N.P.A. K Muthiah Chettiar and Ors. Vs. K.S.Rm. Firm Shwebo Burma and Ors.,*[1] and *Sheik Ali Vs. Sheik Mohammad* .[2]

[1] AIR 1957 Mad 25
[2] (1966) 2MLJ 346

Post Indian Independence, the Section was further amended. In *sub-section (1)* of the Section the words "*United Kingdom or*" was omitted by the CPC Amendment Act No. 71 of 1952. Further, the above *Explanations 1 to 3* were substituted and redefined to be *inclusive*. The words "*British India*" was replaced by the word "*the States*" and was further replaced with the word "*India*" by the CPC Amendment Act No. 2 of 1951.

The Section as amended from time to time now reads as:

> *"**44A – 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 it had been passed by the District Court.*
> *(2) Together with the certified copy of the decree shall be 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 of 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 of 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 as award is enforceable as a decree or judgment."*

Enforcement of a Foreign Decree

Foreign Judgment/Foreign Decree

A foreign judgment is defined under *Section 2 (6)* of the CPC as a judgment of a foreign Court. A foreign Court, under *Section 2(5)* of CPC, means a Court situated outside India and not established or continued by the authority of the Central Government. As mentioned above, a foreign decree as explained in the Section must be a decree of a "*Superior Court*" under which sums of money is payable except for the fact that the *Explanation* set out in the Section excludes the decree for a sum of money payable as tax or penalty. In the judgment of *Alcon Electronics Pvt. Ltd. vs. Celem S.A.,*[3] it was held that a penalty normally means a sum payable to the State and not to a private claimant and therefore, a decree for costs as contemplated under *Section 35A* of CPC cannot be equated with penalty and taxes as explained in *Explanation II* to the Section. The costs having been imposed by the Court assume the character of a money decree.

The *Explanation* further goes on to exclude an arbitration award from being considered as a decree under the Section, even if such an award is enforceable as a decree. Under the Section, 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. [4]

[3] 2017 (2) SCC 253.
[4] AIR 1990 Bom 170.

Whether an interlocutory order of a '*Superior Court'* of a reciprocating territory under the Section is enforceable in India?

In the *Alcon Electronic* judgment (*supra*) one of the appellant's arguments was that the order being an interlocutory order does not have the shades of a '*judgment*' to be executed before the Indian Court and hence, the order not being a '*decree*' is non-executable. Accordingly, the Supreme Court examined the following three definitions from CPC namely: -

(i) foreign judgment
(ii) order
(iii) decree

The Supreme Court held that:

"……

As per the plain reading of the definition 'Judgment' means the statement given by the Judge on the grounds of decree or order and order is a formal expression of a Court. Thus "decree" includes judgment and "judgment" includes "order". On conjoint reading of 'decree', 'judgment' and 'order' from any angle, the order passed by the English Court falls within the definition of 'Order' and therefore, it is a judgment and thus becomes a "decree" as per Explanation to Section 44A(3) of CPC. In this case, the Court at England, after following the principles of natural justice, by recording reasons and very importantly basing on the application of the appellant itself, has conclusively decided the issue with regard to jurisdiction and passed the order coupled with costs. Hence in our considered opinion, the order passed by the Foreign Court is conclusive in that respect and on merits. Hence executable as a decree and accordingly the issue is answered."

The interlocutory order in this judgment was thus held to be executable as a decree.

Reciprocating Territory and Non-reciprocating Territory

Reciprocating territory (as per the Section) means any country or territory outside India, which the Central Government may, by way of notification in the Official Gazette, declare to be a reciprocating territory and *'Superior Courts*' in relation to such a territory for this Section. The Central Government has in exercise of the powers conferred upon it by *Explanation I*, declared approximately 12 countries to have reciprocal arrangement with India which are –

(a) United Kingdom[5];
(b) Trinidad & Tobago[6];
(c) Hong Kong (Special Administrative Region)[7];
(d) Aden[8];
(e) Fiji[9];
(f) Papua and New Guinea[10];
(g) Bangladesh[11];
(h) Singapore[12];
(i) Federation of Malaya[13];

[5] Government of India - Ministry of Law, Notification No. SRO. 399 dated 01.03.1953
[6] Government of India - Ministry of Law, Notification No. G.S.R. 1458-B dated 31.07.1968
[7] Government of India - Ministry of Law, Notification No. G.S.R. 2096 dated 18.11.1968 along with Notification No. GSR 561(E) dated 13.07.2012
[8] Government of India - Ministry of Law, Notification No. G.S.R.183 dated 18.01.1956
[9] Government of India - Ministry of Law, Notification No. SRO. 959 dated 22.03.1954
[10] Government of India - Ministry of Law, Notification No. G.S.R. 1720 dated 26.09.1970
[11] Government of India - Ministry of Law, Notification No. G.S.R. 318 dated 11.02.1976
[12] Government of India - Ministry of Law, Notification No. SRO 1867 dated 01.09.1955
[13] Government of India - Ministry of Law, Notification No. SRO. 4 dated 03.01.1956

(j) New Zealand[14];
(k) The Cook Islands and the Trust Territories of Western Samoa;
(l) And the United Arab Emirates[15] being the latest entry, for the purpose of enforcing a foreign Decree in India.

In a peculiar matter of *Kevin George Vaz vs. Cotton Textiles Export Promotion Council,* [16] the Bombay High Court in the year 2006, whilst dealing with an award/judgment passed by the Labour Tribunal in Hong Kong, extensively dealt with the meaning and scope of the definition of the term '*Reciprocating Territory*'. In the said case, it was argued that though Hong Kong was notified as a '*Reciprocating Territory*' w.e.f. 1st December, 1968, the reciprocal arrangement between Hong Kong and India ceased to have any legal effect since the exercise of sovereignty over Hong Kong was handed over to the Government of China from the United Kingdom in the year 1997. The notification of declaring Hong Kong to be a '*Reciprocating Territory*' under the Section was issued at the time when the British Government was ruling Hong Kong. The case however proceeded when Hong Kong was part of the Republic of China and not under the British rule. On the date of the award/judgment being 6thAugust, 2004, the position continued. The question which came to be decided was whether the notification issued by the Central Government loses its legal sanction and authority when a territory ceases to be a part of the country and becomes a subject to the authority of another state of the country and in such an eventuality, whether a fresh notification was required?

Whilst holding that the award/judgment passed by the Labour Tribunal, Hong Kong is not enforceable in India since the award/judgment passed by the Tribunal is not a '*Superior Court*' in Hong Kong, the Bombay High Court also held that the notification would still have effect. The same was decided by the Bombay High Court taking into consideration the legislative intent and the exhaustive effect of the Section.

What happens when a decree is obtained from a non-reciprocating territory?
The Bombay High Court in the matter of *Marine Geotechnics LLC v. Coastal Marine Construction and Engineering Ltd,*[17] held that where a decree is obtained from a non-reciprocating territory, the option of the decree holder is to file a suit in Indian Courts based on that foreign decree or on the original underlying cause of action or both. The decree holder cannot simply execute such a foreign decree. If the decree on the other hand is from a reciprocating territory, then the same can be executed by straightaway filing an execution application following the procedure under the Section and under Order XXI Rule 11 (2) of CPC. The decree holder filing an execution application must obtain a certified copy of the decree along with a certificate from the superior court stating the extent to which the decree has been satisfied or adjusted and the same should be annexed to the application. However, a foreign decree from a reciprocating territory or a non-reciprocating territory has to surpass the tests of conclusiveness explained hereinafter laid down in Section 13 of CPC.

Tests of Conclusiveness

Section 13 of CPC states that a foreign judgment shall be conclusive unless:

- It has not been pronounced by a Court of competent jurisdiction;
- It has not been given on the merits of the case;
- It appears, on the face of the proceedings, to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
- The proceedings in which the judgment was obtained are opposed to natural justice;
- It has been obtained by fraud;
- It sustains a claim founded on a breach of any law in force in India.

[14] Government of India - Ministry of Law, Notification No. SRO. 3282 dated 15.10.1957
[15] Government of India - Ministry of Law, Notification No. G.S.R.38(E) dated 17.01.2020
[16] 2006 (5) BomCR 555 [Followed in 2008 (5) BomCR 464].
[17] 2014 (2) BomCR 769.

In the matter of *Saleem Abdulrahman Eracham Veetil vs. State of Gujarat & Ors,*[18] the High Court of Gujarat observed that Sections 13 and 14 of CPC enact a rule of *res judicata* in cases of foreign judgments. These provisions embody the principle of private international law that a judgment delivered by a foreign Court of competent jurisdiction can be enforced by an Indian court and will operate as *res judicata* between the parties thereto except in the cases mentioned in Section 13. A foreign judgment may operate as *res judicata* except in the six cases specified under Section 13 and subject to the other conditions mentioned under Section 11 of CPC.

In the *Alcon Electronics judgment* (supra), the Supreme Court had observed that a plain reading of Section 13 of CPC would show that to be conclusive, an order or decree must have been obtained after following the due judicial process by giving reasonable notice and opportunity to all proper and necessary parties to put forth their case. When once these requirements are required are fulfilled, the executing Court cannot enquire into the validity, legality or otherwise the judgment. It was further observed that a foreign judgment which has become final and conclusive between the parties is not impeachable either on facts or law except on the grounds enunciated under Section 13. In construing Section 13, the plain meaning of the words and expressions used in the section would have to be looked into and no other factors.

In the matter of *Marine Geotechnics LLC* (*supra*) it was observed that *Section 13* enunciates the well-established of private international law that a Court will not enforce a foreign judgment that is not of a competent court. What that section provides is, therefore, substantive law and not mere procedure. Section 13 makes no distinction between judgments of a Court in a reciprocating territory and those of Courts in non-reciprocating territories. That distinction comes only in Section 44A, an independent provision that says that a decree of a Court in a reciprocating state may be put into execution in India. A decree from a nonreciprocating state cannot be so executed. Decrees of both reciprocating and nonreciprocating territories must, however, satisfy the tests of Section 13. The difference is at what stage, and on whom lies the burden. Where a foreign judgment is not on merits, or violates any of the provisions of sub-clauses (a) to (f) of Section 13, it is not conclusive, even though it may accord with the domestic procedure of the country in which it was passed and is valid and enforceable in that country.

Also in the judgment of *Kevin George Vaz* (*supra*) it was held that not every foreign judgment, which is conclusive and about which, a presumption can be raised under Section 14, is capable of being executed in India. Such judgment furnishes an independent cause of action based upon which parties can be sued in India. However, if decrees pursuant to such judgments are to be executed through the medium of Indian Courts, then, conditions prescribed under Section 44A (1) have to be complied with. This is clear from sub-section (3) of Section 44A. Similarly, if such a decree is incapable of being executed because the District Court is satisfied that it falls within any of the exception specified in *Clauses (a) to (f)* of Section 13, then even if it is of a 'Superior Court' in reciprocating territory, the same cannot be executed in India.

In the judgment of *Radhamani India Limited vs. Imperial Garments Ltd.*[19] one of the contentions raised by the judgment debtor before the Calcutta High Court was that the foreign decree should be put into execution through the court which passed and only the unsatisfied part of the decree could have been filed under Section 44A. The Hon'ble Court held that Section 44A does not state that the decree-holder is required to put the decree into execution in the court which passed it before filing a decree in a competent District Court in India. It further held that from the reading of Section 44A along with section 13 of CPC, the legislature intended to give 2 options to the decree holder (i) to execute the decree through the Court which passed it (ii) to execute the decree wholly or partly through a competent District Court in India. It was the Hon'ble Court's view that the entire purpose of Section 44A would be defeated, if it is held that a decree cannot be filed in a competent District Court in India without first putting it into execution in the Court which passed it.

[18] Criminal Miscellaneous Application No. 13093 of 2016.
[19] AIR 2005 Cal 47

Whether an ex-parte decree is enforceable?
The Bombay High Court in the *Marine Geotechnics LLC* judgment (*supra*) further observed that an *ex-parte* decree is not necessarily one that is always and *ipso facto*, not on merits. If a Court has considered and weighed the plaintiff's case and assessed his evidence, it will be on merits, notwithstanding that it is *ex-parte*. Where however, there is a summary disposal of the case under some special statutory provision that obviates an examination of the merits and the taking of evidence, such a decree is not executable in India. Thus, for instance, if there is an immediate default summary judgment only on account of the defendants' failure to appear and without any examination of the material or the evidence, that judgment is not enforceable in India. In short, if a foreign judgment falls under any of the *Clauses (a) to (f)* of Section 13, it is not conclusive as to any matter thereby adjudicated upon. The judgment is open to collateral attack on the grounds mentioned in the clauses of Section 13.

To complement the observation hereinabove, the Bombay High Court referred to the dictum laid down in the judgment of *International Woollen Mills v. Standard Wool (UK) Ltd,*[20] which held as follows:

> *"...Even where the defendant chooses to remain ex parte and to keep out, it is possible for the plaintiff to adduce evidence in support of his claim (and such evidence is generally insisted on by the Courts in India), so that the Court may give a decision on the merits of his case after a due consideration of such evidence instead of dispensing with such consideration and giving a decree merely on account of the default of appearance of the defendant. In the former case the judgment will be one on the merits of the case, while in the latter the judgment will be one not on the merits of the case. Thus it is obvious that the non-appearance of the defendant will not by itself determine the nature of the judgment one way or the other. That appears to be the reason why Section 13 does not refer to ex parte judgments falling under a separate category by themselves ..."*

This judgment has also been followed in many recent Bombay High Court judgments. [21]

<u>Limitation Period for Enforcement</u>

As per Article 136 of the Limitation Act of 1963 **("Limitation Act")**, the limitation period for filing an application for execution of a decree is 12 years from the date of the decree. The Supreme Court in a recent case of *Bank of Baroda vs. Kotak Mahindra Bank,* [22] decided the issue of limitation for enforcing of a foreign decree in India.

The Supreme Court held that Article 136 of the Limitation Act only deals with decrees passed by Indian Courts. The Supreme Court further held that the limitation period for filing an application for executing a foreign decree will be covered under Article 137 of the Limitation Act.

The consequent question pertained to from which date the period of limitation would start in relation to a foreign decree sought to be executed in India. In this regard two expressions were coined by the Supreme Court for the purpose of the judgment: -

(i) 'cause country' being the country in which the decree was issued and
(ii) 'forum country' being the country in which the decree is sought to be enforced.

Further, the Supreme Court envisaged two situations to answer this: -

[20] AIR 2001 SC 2134 [Followed in 2017 (2) SCC 253].
[21] 2009 (4) Bom CR 242; Appeal No. 380 of 2017 in Notice of Motion No. 3578 of 2011; 2020 (2) ABR 505.
[22] Civil Appeal No. 2175 of 2020 in SLP (Civil) No. 8123 of 2015.

a. *First Situation*: Where the decree holder does not take any steps for executing the decree during the period of limitation prescribed in the cause country for executing a decree in that country, it was held that the limitation would start running from the date the decree was passed in the cause country and the period of limitation prescribed in forum country would not apply. In such a case the Supreme Court also held that a person has lost his right to execute the decree in the country where the cause of action arose. In case the decree holder does not take any steps to execute the decree in the cause country within the period of limitation prescribed in the cause country, the decree holder cannot come to the forum country and plead a new cause of action or plead that the limitation of the forum country should apply.

b. *Second Situation* – When a decree holder takes steps-in-aid to execute the decree in the cause country, in such a case, the Supreme Court held that the right to apply under the Section will accrue only after the execution proceedings in the cause country are finalised and the application under the Section can be filed within 3 years of the finalisation of the execution proceedings in the cause country as prescribed under Article 137 of the Limitation Act. This envisages a situation where the proceedings in execution may go on for some time and the decree may be satisfied partly (in the cause country) but not fully. Lastly, the Supreme Court also held that if a decree holder first takes steps-in-aid to execute the decree in the cause country and the decree is not satisfied at all, then a petition for enforcing the decree can be filed in India within a period of 3 years from the finalisation of execution proceedings in the cause country.

Winding up Proceedings and Insolvency and Bankruptcy Proceedings based on a Foreign Decree

In the *Marine Geotechnics LLC* judgment (Supra), the Bombay High Court held that: -

> *"For the purposes of a winding up petition, therefore:*
> *(a) It is not every foreign decree, irrespective of whether or not it is on merits, that can, therefore, be said to be a 'debt' for the purposes of Section 433(e) of the Companies Act, 1956. Any foreign decree, whether of a reciprocating or non-reciprocating territory, that is not on merits, or does not otherwise satisfy the requirements of Section 13 of the CPC, cannot be the basis of a winding up petition. It is not a debt due.*
> *(b) A foreign decree of a reciprocating territory, if found to be on merits and otherwise not afoul of CPC Section 13, is a debt due, and a winding up petition can be maintained on it even without it being put in execution.*
> *(c) The only manner in which a decree of a non-reciprocating territory can be recovered is if it is made to pass the test of Section 13 of the CPC. Usually, that is done by filing a suit on it (or on the original cause of action, or both). Once the parameters of CPC Section 13 are met, it is not possible to examine the sufficiency of evidence before the foreign court, or to test the correctness of the decision.*
> *(d) The winding up process cannot be used as a substitute for a necessary and required civil proceeding. A winding up petition based only on a foreign decree of a non-reciprocating territory cannot, absent even a minimal prima-facie assessment under CPC section 13, is not maintainable. Where such a petition is based only on the foreign decree of a non-reciprocating territory, it is for the petitioning-creditor to show that the tests of Section 13 CPC are met. At this stage, where the company court finds that a fuller enquiry is needed, for instance, requiring evidence as to service, no order of winding up can be made.*
> *(e) A party who has a foreign decree from a non-reciprocating territory may nonetheless maintain a winding up petition on the original or underlying cause of action. The fact that there is also a foreign decree does not bar the filing of such a petition."*

This is however prior to the Insolvency and Bankruptcy Code, 2016 coming into force. The position though seemingly similar, is completely different from the position under the Insolvency Bankruptcy Code. In the matter of *Stanbic Bank Ghana Limited v. Rajkumar Impex Ghana Limited* ,[23] the National Company Law Tribunal ("**NCLT**"), Chennai admitted the petition filed by the foreign financial creditor against the Corporate Debtor by observing that the decree by the London Court was conclusive and made on merits even though it was an *ex-parte* order. The NCLT further held that though it had no jurisdiction to enforce the foreign decree, there was however no bar in taking cognizance of the same.

The National Company Law Appelate Tribunal ("**NCLAT**"), in the judgment of *Usha Holdings LLC & Anr. Vs. Francorp Advisors Pvt. Ltd,* [24] however, held that the adjudicating authority has the jurisdiction to decide whether a foreign decree is legal or illegal and the findings given by the adjudicating authority on the legality and propriety of a foreign decree being without jurisdiction was considered nullity in the eyes of law. NCLAT, in another judgment, in the matter of *Peter Johnson John vs. KEC International Limited,* [25] held that where adjudication is sought in regards to a foreign decree obtained *ex-parte* falls within the purview of a pre-existing dispute placing an embargo on the powers of the adjudicating authority to initiate CIRP at the instance of a corporate debtor. It was further held that until adjudication fructifying in a decree favouring the petitioner, the claim of the petitioner could not be held to have crystallised into a '*debt payable in law*'.

Stamp Duty

There is no requirement of any stamp duty to be paid for enforcing a foreign decree. This section sets out our concern about a new defence that could be possibly be raised by parties whilst defending enforcement of a foreign decree.

There have been various judgments on whether Courts have power to proceed and act upon an arbitration clause in unstamped agreements/deficit stamped agreements. In *Gautam Landscapes vs. Shailesh Shah,* [26] the Full Bench of the Bombay High Court held that the Court could act upon an arbitration clause contained in an unstamped agreement/deficit stamped agreement. This was in reference to Section 9 (for interim reliefs) and Section 11 (for appointment of arbitral tribunal) of the Arbitration and Conciliation Act, 1996 (as amended) ["**Arbitration Act**"] and the Court held, *inter-alia*, that issue of whether the agreement was adequately stamped, required to stamped or impounded to be appropriately stamped could be deferred to the Arbitral Tribunal. Having said so, the Supreme Court in the *Garware Wallropes vs. Coastal Marine* ,[27] held that Courts cannot act upon the arbitration clause contained in an unstamped agreement/deficit stamped agreement insofar as proceeding further under Section 11 of the Arbitration Act is concerned. The Supreme Court *"partly overruled"* the *Gautam Landscapes* judgment. It could be accordingly presumed that the Supreme Court has not interfered with the Courts powers to grant interim reliefs under Section 9 of the Arbitration Act in relation to an unstamped/deficit stamped agreement.

In a petition to enforce foreign decree, the respondent could, on the basis of the above judgments and depending on the facts of its case, contend that the underlying agreement/contract between the parties was not duly stamped in accordance with Indian laws. Indian Courts are yet to test this kind of defence and lay down the law if the same will meet the conclusive test under Section 13 of CPC.

[23] NCLT Division Bench Chennai, CP No. 670/IB/2017.
[24] NCLAT Company Appeal (AT) (Insolvency) No. 44 of 2018.
[25] NCLAT Company Appeal (AT) (Insolvency) No. 188 of 2019.
[26] AIR 2019 Bom 149.
[27] 2019 (9) SCC 209.

Conclusion

The rapid increase in globalisation of all the sectors in the Indian economy has brought in a wave of massive and enormous changes to dispute resolution mechanisms in the country. Whilst greater focus has been laid on improvising alternate dispute resolution mechanisms, especially arbitration, in accordance with the global practices, the Section continues to remain dormant/obsolete. Instead of empowering the Section to be a 'fast raging bull', the Section continues to be a 'bear in hibernation'. India is yet to have reciprocal arrangements with many commercially developed nations under the Section. The Section has a scope for a wide range of changes that can empower and strengthen the Civil Courts in India to enable a speedy yet cautious enforceability of a foreign decree with strict timelines. Even if the Section is not empowered, the statute itself can be amended to introduce separate enforceability provisions which have greater powers to implement enforceability and make India 'foreign decree enforceable friendly'.

This paper has been written by Ranjit Shetty (Senior Partner) and Jonathan Jose (Associate).

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