

# Dispute Resolution Hotline

March 18, 2014

## BOMBAY HIGH COURT CLARIFIES LAW REGARDING EXECUTION OF A FOREIGN DECREE AND BANKRUPTCY PROCEEDINGS

- A foreign decree even if from a reciprocating territory as per Section 44A of the CPC, has to satisfy the test prescribed by Section 13 of the CPC for it to be conclusive and executed in India.
- A foreign decree from a non- reciprocating territory can be executed by initiation of a suit.
- Winding-up action will lie in both the cases, but the burden to establish that the decree falls within the limitation prescribed by Section 13 of the CPC in the former will be on the judgment debtor, but in the later a negative burden will be imposed on the decree holder
- If on preliminary enquiry in the later, the decree holder is not able to discharge the burden, winding-up proceedings will fall.

### INTRODUCTION

In its decision in *Marine Geotechnic LLC ("Marine") v Costal Marine Construction & Engineering Ltd ("Costal")*<sup>1</sup>, the Bombay High Court ("**Court**") explained the Indian position with regards to execution of foreign decrees in India and initiation of winding-up (bankruptcy) proceedings based on a foreign decree, while refusing to maintain winding-up proceedings initiated by Marine based on an ex-parte default summary judgment obtained from United States District Court, Southern District of Texas, Huston Division ("**US District Court**").

### FACTS

Marine obtained an ex-parte default summary judgment for a sum of US \$ 437,731 from the US District Court. On September 15, 2012 Marine served a statutory notice demanding the aforesaid sum from Costal. On October 8, 2012, Costal replied denying liability and claiming that they were unaware of any such decree. Based on this, Marine initiated the present winding-up proceedings.

### ARGUMENTS

Marine contended that the valid decree against Costal had not been satisfied and thus was a 'debt due' by Costal to Marine.

Costal contended that the decree of the US District Court was not a decree from a reciprocating territory under Section 44A of the Civil Procedure Code ("**CPC**") and was hit by of Section 13 of the CPC<sup>2</sup>, being an ex-parte summary judgment with no evidence of service on Costal and no adjudication on merits. Hence the decree of the US District Court could not be considered as conclusive under Indian Law and the sum decreed thereunder could not constitute a 'debt due' by Costal to Marine. In light of this Costal contended that the winding-up proceedings were not maintainable.

### JUDGMENT

The Court dismissed the winding-up proceedings and opined as follows:

#### Enforcement of decrees from a reciprocating and a non-reciprocating Territory

The court explained that foreign decrees under Indian law are classified into two broad categories i.e. decrees from reciprocating territory and non-reciprocating territories. Decrees from territories which the Central Government has notified as 'reciprocating' under Section 44A of CPC are decrees from reciprocating territory all other decrees are decrees from non-reciprocating territories.

The court further explained that if the decree is of a recognized court in a reciprocating territory, then it can straightaway put it into execution, following the procedure under section 44A and Order XXI, Rule 22 of the CPC. At that time, the judgment-debtor can only resist the decree-holder by raising any of the grounds under Section 13 of the CPC.

Whereas in case the decree is of a court in a non-reciprocating foreign territory, a party has to file a fresh civil action (suit) on that foreign decree, or on the original underlying cause of action, or both in a domestic Indian court of competent jurisdiction. Also the burden to show that the foreign decree, if he sues on it, satisfies the tests of Section 13 is on the person seeking execution. But once the person seeking execution satisfies the court that the parameters of Section 13 of the CPC are met, it is not possible to examine the sufficiency of evidence on merits before the foreign court, or to test the correctness of the decision.

The court explained that Section 13 of the CPC provides substantive law and is an enunciation of the well-established private international law principle that a court will not enforce a foreign judgment of a competent court. On the other hand Section 44A of the CPC is an enabling provision which enables a decree holder to put a decree of a court in a reciprocating territory into execution. Thus, irrespective of it being a decree from a reciprocating or a non-

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reciprocating territory, if a foreign decree fall under the limitations subscribed by Section 13 of the CPC, it is not regarded as conclusive as to the matter thereby adjudicated upon.

## Enforceability of ex-parte default judgments in India

Relying on the Supreme Court's decision in *International Woolen Mills v Standard Wool (UK) Ltd*<sup>3</sup> the court held that a decree, whether from reciprocating or non-reciprocating territory, that follows a judgment that is not on merits cannot be enforced in India.

The court explained that a decree, just by the virtue of being ex-parte decree cannot be regarded as a decree which is not on merits of the case. If a foreign court while delivering its judgment has considered and weighed the claimant'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, where 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.

## Initiating winding-up proceedings based on a foreign decree

With regards to initiation of winding-up proceedings against the a judgment- debtor based on a foreign decree, the court opined that a 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 as it is not a 'debt due'. On the other hand 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.

The Court further explained that a winding up petition based only on a foreign decree of a non-reciprocating territory, absent even a minimal prima-facie assessment under Section 13 of CPC, is not maintainable. In such as a case, it is for the petitioning-creditor to show that the tests of Section 13 of CPC are met. But if while examining the petition, the court finds that a fuller enquiry is needed, for instance, requiring evidence as to service, no order of winding up can be made.

Relying on the Court's judgment in *Intesa Sanpaolo SPA v Videocon Industries Ltd*<sup>4</sup>, the Court finally explained that 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.

## ANALYSIS

The present judgment has answered most of the questions with regard to enforcement of a foreign decree and institution of winding-up proceedings based on a foreign decree. The take away for lawyers conducting trials against Indian Parties in their jurisdiction is to ensure that before a foreign court issues a final judgment against an Indian Party, the conditions stipulated under Section 13 of the CPC are satisfied. This should also be the approach especially in cases of an ex-parte default judgment and the foreign court should be requested to deliver a decision on merits against the Indian party rather than a decision in summary.

Another strategic take away for lawyers from non-reciprocating territory is that if the decree obtained from their courts passes the test laid down in Section 13 of the CPC, execution in India could be expedited by using the route of initiating winding-up proceedings against the defaulting Indian party.

– Prateek Bagaria & Vyapak Desai

You can direct your queries or comments to the authors

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<sup>1</sup> Company Petition No. 67 of 2013; decision dated March 5, 2014, per G.S. Patel, J.

<sup>2</sup> For text of Section 13 & 44A of the CPC, [click here](#).

<sup>3</sup> AIR 2001 SC 2134

<sup>4</sup> Company Petition No. 528 of 2012; decision dated December 5, 2013, per N.M. Jamdar, J.

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