

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**APPEAL NO. 38 OF 2016
IN
NOTICE NO. 131 OF 2014**

Neville Tuli Appellant

Vs.

Aabraaj Investment Management Respondent
Limited

Mr. Gaurav Joshi, senior counsel a/w Kazan Shroff & Mr. Siddharth R. i/b Nishith Desai Associate for the appellant.

Mr. Fredun Devitre, senior counsel a/w Durgaprasad Sabnis, Sanjeev Kumar, Anshul Sehgal, Wasim Beg, Akika Gogoi and Utkarsh Divyankar for the respondent.

**CORAM : SMT. VASANTI A. NAIK,
SARANG V. KOTWAL, JJ.**

DATE : DECEMBER 15, 2017.

P.C.

This intra court appeal arises from an order of the learned Single Judge, dated 14/07/2015 granting the prayers made in Notice no. 131 of 2014 for making the judgment of the Foreign Court absolute after holding that none of the defences to the execution of the Foreign Court order/judgment could be allowed.

The respondent no. 1 Abraaj Investment Management Limited (hereinafter referred as 'Abraaj' for the sake of brevity) had filed a claim against Bregawn Jersey Limited (hereinafter referred as "Bregawn") and the present appellant in the High Court of Justice, Queen's Bench Division Commercial Court in United Kingdom for a sum of 22 Million U.S. \$. A purchasing agency

agreement was executed between Bregawn and Abraaj under which art work was to be purchased by Bregawn acting on behalf of Abraaj for a purchase price of 19 million US \$. Bregawn was to, in turn sell the purchased art work to the India Asia Arab Art Fund Limited (hereinafter referred as 'IAAAF') for which the appellant was the guarantor. The purchase agreement between IAAAF and Abraaj was executed and under the said agreement the art work owned by Abraaj and invoiced for sale to IAAAF was to be sold by Abraaj and purchased by IAAAF. The appellant had provided the personal guarantee to Abraaj wherein he undertook the guarantee for performance of the obligations of Bregawn and IAAAF under the purchasing agency agreement and the purchase agreement respectively. The total invoice amount for the art work purchased by the appellant was equal to 22 Million and 571 US \$. After the execution of the agreements, Bregawn did not perform the part of his agreement, as a result of which the paintings could not be sold to IAAAF before the stipulated date. Abraaj therefore, filed the claim against Bregawn and the appellant in the High Court of Justice, Queen's Bench Division Commercial Court in United Kingdom. The claim was made by Abraaj on about 6 heads of claims. Justice Teare passed a preliminary order granting some claims on summary basis and rejecting some of them. It was held by Justice Teare that there was no dispute in regard to the claims made, but for the quantification, a trial was directed so as to assess the value of the art work that was returned. The trial proceedings came up before Justice Burton. Since the defence of Bregawn and the appellant was not in accordance with the Civil Procedure Rules, as were applicable to the proceedings in the High Court of Justice, time was granted on several occasions to amend the defence. Bregawn and the appellant however, did not make compliance. In the summary proceedings before Justice Teare, an order was passed against Bregawn and the appellant to pay costs. Though the costs were quantified, the same were not paid by Bregawn and the appellant. Since the costs were not paid and the defence was not amended, the defence of the

appellant and Bregawn was struck off. The trial was proceeded in the Court of Justice Burton and on an appreciation of the material on record, by the judgment dated 01/10/2010 the claim of Abraaj was partly granted and Bregawn and the appellant were directed to pay a sum of US \$ 23,086,151.97 with interest at the rate of 8%. Since Bregawn and the appellant failed to pay the amount to Abraaj, a suit was filed by him in this Court for the execution of the judgment and decree of the Foreign Court. Notice no. 131 of 2014 was filed in the said proceedings asking the appellant to show cause why the orders passed by the High Court of Justice, Queen's Bench Division Commercial Court, United Kingdom, dated 25/03/2010 and 05/10/2010 should not be executed against the appellant. The learned Single Judge has by the order dated 14/07/2015 allowed the prayer made in Notice no. 131 of 2014 after observing that none of the defences to the execution of the two orders were acceptable. The order of the learned Single Judge is appealed against in this intra court appeal.

Shri. Gaurav Joshi, the learned senior counsel appearing for the appellant submitted that the Foreign judgment and order could not have been executed in the instant case in view of the exceptions to the provisions of section 13 of the Code that the Foreign judgment shall be conclusive as to any matter directly adjudicated upon between the parties. It is submitted that the orders passed by the Foreign Court cannot be executed as the order of Justice Burton, dated 01/10/2010 was not given on the merits of the case. It is submitted that the provisions of Section 13 (b) would apply and to substantiate the submission, the learned senior counsel has referred to certain observations in the judgment of Justice Burton dated 01/10/2010, specially in paragraph nos. 6, 7 & 8 there of. It is submitted that the judgment is a default judgment. It is submitted that the defence of the appellant and Bregawn was struck off and the judgment was rendered in default as could be noted from the observations made by Justice Burton in paragraph 7 of the judgment. It is submitted that the quantification is

made by Justice Burton solely on the basis of the affidavit filed by the solicitor in support of the claim for damages. It is submitted by referring to the transcript of the proceedings in the court of Justice Teare and Justice Burton that the schedule was prepared by an art expert which Abraaj had instructed and therefore, the affidavit of the solicitor based on the schedule prepared by an art expert ought not have been accepted for quantifying the damages. It is submitted that though a reference is made to the valuation tendered by the appellant in the proceedings, the same was not duly considered either by Justice Teare or Justice Burton before passing the orders that are sought to be executed. It is submitted that the evidence in the form of the affidavit of a solicitor would be no evidence in the eye of law for quantifying the damages. Certain paragraphs in the order/judgment of Justice Burton and certain part of the transcripts are referred to by the learned senior counsel to substantiate the submission that the judgment rendered by the Foreign Court was not on merits and was only a default judgment. Reliance is placed on the judgment reported in **1970 Privy Council 342** to submit that when the judgment is based on the defence being struck off, the same would not be on the merits of the case. It is submitted that the facts of the matter before the Hon'ble Supreme Court and the facts involved in the instant case are similar. Reliance is also placed on the judgment reported in **2009 (5) Mh.L.J. 652** to substantiate the submission that when a decree is passed after the defence is struck off, the decree would not be based on consideration of evidence.

Shri. Devitre, the learned senior counsel appearing for the respondent no. 1-Abraaj supported the judgment appealed against. It is submitted that the judgment of the Privy Council as also the other judgments of the Hon'ble Supreme Court and this Court were considered by the learned Single Judge before holding that the judgment of the Foreign Court in this case was a judgment on merits. It is submitted that the judgment of Justice Burton cannot

be said to be one not on merits as it had referred to the affidavit of the solicitor, filed in support of the claim. It is submitted that on a reading of the judgment it is clear that not only the affidavit of the solicitor but several other aspects of the matter were considered by justice Burton before passing a decree in favour of Abraaj. It is submitted that it is observed in the judgment of Justice Burton that 'even in the absence of the defendants, the court cannot be blinkered and it is not obliged to accept everything that is said in a statement of claim or in the evidence before it, if it is apparent that what is said is unsupportable'. It is stated that after making the aforesaid observations, Justice Burton had proceeded to decide the claim of Abraaj on merits. Reference is made to certain portions of the judgment of Justice Burton to point out that the judgment is given on merits and is not a judgment in default. Reliance is placed on the judgment of the Hon'ble Supreme Court, reported in **1963 Supreme Court Reports 22** to submit that a Foreign judgment of a Competent Court is conclusive even if it proceeds on an erroneous view of the evidence or the law if the minimum requirements of the judicial process are assured. It is stated that sufficiency or otherwise of the evidence before Justice Burton cannot be a test for deciding whether the judgment is given on merits.

On a reading of the judgments of Justice Teare, Justice Burton and the learned Single Judge dated 14/07/2015, we find that the learned Single Judge has rightly held that the submission made on behalf of the appellant that the Judgment of the Foreign Court was not given on merits and that it fell within the exception to section 13 (b) of the Code was not acceptable. The learned Single Judge rightly considered the law laid down by the Hon'ble Supreme Court in the case of **International Woolen Mills V/s. Standard Wool (U.K.) Ltd. (2001) 5 Supreme Court Cases 265** for deciding whether the Foreign judgment in this case was given on the merits of the case. By applying the tests laid down in the said judgment and in the other judgments that were referred by the parties

before the learned Single Judge, it was rightly held by the learned Single Judge that the judgments of the Foreign Court in this case were given on merits. We have perused the well reasoned judgment of Justice Burton. After observing that the defendants had not appeared in the matter and their defence had been struck off and that 'the Court cannot be blinkered and is not obliged to accept everything that is said in a statement of case or in the evidence before it', Justice Burton proceeded to decide the claim of Abraaj on merits. Justice Burton has observed in the judgment that the case was fully and persuasively set out both in the pleadings and in the evidence of Mr. Watson of Allen & Overy so far as the quantification of the claim was concerned. Justice Burton was satisfied that the claim was properly set out and arrived at, as set out in the draft order. After considering that it was necessary to credit for the art work that had been released or returned by Bregawn, Justice Burton accepted the amount that was sought to be set off in arriving at the judgment sum of US \$ 23,086,151.97. It was observed on the basis of the unchallenged evidence and also in pursuance to clause 1 (a) of the obligations of the guarantor under the personal guarantee to pay the same if not paid to the claimant that the sum includes the costs of storage and handling. Not only was the affidavit of the witness considered along with the claim for set off but while considering the claim for compound interest, the judgment reported in **(2008) AC 561** was noted and Justice Burton had found that Abraaj would not be entitled to interest @ 20% as per the claim but would be entitled only to 8 % interest. While holding so, certain other material that is referred to in paragraphs 11-14 of the judgment was also considered. While accepting the claim of Abraaj towards actual handling and storage fees, Justice Burton found that the claim was acceptable and it was not a bad estimate for the amount of actual handling and storage fee which Abraaj would have incurred. We find on a perusal of the judgment of the Foreign Court that it is clearly given on merits. The sufficiency or otherwise of the evidence before the Foreign Court would not be a matter for deciding whether the

judgment was given on the merits of the case. Much has been said about the quantification of the damages on the basis of the affidavit of the solicitor. However, it is pointed out on behalf of Abraaj that the evidence of the solicitor would be an acceptable piece of evidence as he would be a legal representative of the parties. Even had it not been so, whether Justice Burton was justified in accepting the affidavit of the solicitor as an admissible piece of evidence or not cannot be a matter for deciding the question whether the judgment was given on merits. The submission made on behalf of the appellant could have been appreciated if we were to hear an appeal against the judgment of Justice Burton. The submission made on behalf of the appellant that the judgment is a default judgment cannot be accepted. Despite the fact that the defence of the appellant and Bregawn was struck off, the valuation tendered by the appellant was considered by the judges. When the valuation tendered by the appellant appears to have been considered by Justice Teare, it cannot be said that the judgment was not on merits, specially when the same was rendered after considering the evidence of the solicitor on affidavit, the law of United Kingdom and the Civil Procedure Rules as also the other evidence placed on record. We find that Justice Burton has quantified the damages under various heads only after being satisfied that loss was incurred to Abraaj in respect of the claims made. The judgment reported **1970 Privy Council 342** and relied on by the counsel for the appellant cannot be made applicable to the case in hand. In the said case, the judgment was not given on the merits of the case and only because, the defendant in that case had failed to answer the interrogatories and the defence was struck off that the judgment followed. Such is not the case here. In the instant case, the judgments of Justice Burton and Justice Teare are based on the merits of the matter, as is apparent from the judgments. It would not be for this Court to consider whether the Foreign Court proceeded on an erroneous view of the evidence or whether the evidence before the Foreign Court was sufficient or not for granting the claim made by Abraaj.

It is held by the Hon'ble Supreme Court in the judgment reported in **(2001) S.C.C. 265** that a decree may be ex-parte but still on merits provided it could be shown that the Court had gone through the case made out by the plaintiff, considered the same and decided it on the basis of the evidence of the witnesses. It was observed by the Hon'ble Supreme Court by referring to the Judgment in the case of **Wazir Shahu V/s. Munshi Das** that an Ex-parte decision may or may not be on merits but the mere fact of its being ex-parte will not in itself justify a finding that the decision was not on the merits as that is not the real test. The observations in the judgment in the case of **Wazir Shahu V/s. Munshi Das** that 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 considering the truth or otherwise of the plaintiff's case were accepted by the Hon'ble Supreme Court in paragraph 29 of the Judgment. By applying the tests laid down by the Hon'ble Supreme Court in the said judgment, it would be necessary to hold that the judgments of the Foreign Court in this case were given on the merits of the case and were not formally passed as a matter of course. While holding so, we reject the submission made on behalf of the appellant that the principles of natural justice were violated as the defence of the appellant was struck off without giving any opportunity to him. It appears from the record that several chances were granted to the appellant to pay the costs and to amend the defence and since that was not done, the defence was struck off.

Having rejected the submissions made on behalf of the appellant, we dismiss the appeal with no order as to costs.

At this stage, the learned counsel for the appellant seeks the continuation of the ad-interim relief for 6 weeks.

The learned counsel for the respondent no. 1 strongly opposes the prayer.

Since the ad-interim relief is operating for more than a couple of years, we continue the same for a period of 6 weeks only. Order accordingly.

[SARANG V. KOTWAL, J.]

[SMT. VASANTI A. NAIK, J.]