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

**APPEAL NO. 380 OF 2017
IN
NOTICE OF MOTION NO. 3578 OF 2011
IN
SUIT NO. 2540 OF 2011
WITH
NOTICE OF MOTION NO. 2001 OF 2017
IN
APPEAL NO. 380 OF 2017**

Atit Omprakash Agarwal .. Appellant
Vs.
BNP Paribas (Switzerland) SA & Anr. .. Respondents

**WITH
APPEAL (L) NO. 357 OF 2017
IN
NOTICE OF MOTION NO. 3578 OF 2011
IN
SUIT NO. 2540 OF 2011
WITH
NOTICE OF MOTION (L) NO. 1775 OF 2017
IN
APPEAL (L) NO. 357 OF 2017**

Sharad Satyanarayan Agarwal .. Appellant
Vs.
BNP Paribas (Switzerland) SA & Anr. .. Respondents

Mr. Mayur Khandeparkar a/w. Dikshat Mehra i/b Sanjay Sinha for the Appellant in APP 380/17.

Mr. Chirag Balsara a/w. Mr. Devesh Juvekar, Mr. Mayur Shetty, Mr. Dikshat Mehra i/b M/s. Rajani Associates for the Appellant in APPL 357/17.

Mr. Zal Andhyarujina a/w. Mr. Kunal Dwarkadas, Mr. Rajshekhar Upadhyay i/b Dave & Girish & Co. for the Respondent No.1.

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

DATE : 18th DECEMBER, 2017.

ORAL JUDGMENT : *(Per Smt. Vasanti A. Naik, J.)*

Since the issue involved in these appeals is identical and similar orders of the learned Single Judge are appealed against in the same, they are heard together and are decided by this common judgment.

The appeals are 'Admitted' and heard finally at the stage of admission with the consent of the learned counsel for the parties.

2. Based on the foreign judgment, under Section 13 of the Civil Procedure Code (hereinafter referred to as 'the Code' for the sake of brevity) original plaintiff BNP Paribas (Switzerland) SA Bank has sought the execution of the decree of USD 5,00,000 and costs in the sum equivalent to CHF 28,960 and the attorney costs of CHF 10,000 with interest. It is the case of the appellants that in November, 1999 Southgate Corporate Holdings Ltd. represented by Atit Agarwal, the appellant in Appeal No. 380 of 2017 who is also the director of Southgate Corporate Holdings Ltd. had opened the account with the plaintiff-bank. Sharad Agarwal, the appellant in Appeal No. 357 of 2017 had executed a power of attorney in favour of Atit Agarwal on 10.09.2011 for operating the account of the Southgate. It is the case of the plaintiff- BNP Paribas bank that on 18.09.2001 two credits of USD 5,00,000 and USD 4,99,985 were made in this account. According to the BNP Paribas Bank, the credit of USD 5,00,000/- was a mistaken credit that was not due. Sharad Agarwal and Atit Agarwal however hurriedly got the funds transferred from the said account for their own benefit. After the bank noticed the error, Sharad Agarwal and Atit Agarwal were called upon to deposit the sum of USD 5,00,000 with the bank. Since the amount was not repaid, a suit was filed by the plaintiff-bank in the District Court of the Republic and Canton of Geneva for the recovery of USD 5,00,000 with interest and costs. Despite the service of notice on Sharad Agarwal and Atit Agarwal, no appearance was made on their behalf in the said proceedings. The suit was decreed for a sum of USD 5,00,000 and the fees of the attorney and the expenses

of CHF were decreed. The judgment of the Swiss Court is sought to be executed by Suit No.2540 of 2011. In the said suit filed by the plaintiff-bank against Sharad Agarwal and Atit Agarwal, a notice of motion was filed for grant of temporary injunction restraining Sharad Agarwal and Atit Agarwal from creating third party rights in the assets and properties belonging to them. Another notice of motion was taken out by the plaintiff-bank for attachment before judgment. Ex parte ad interim relief was granted in favour of the plaintiff-bank in the two notices of motion. The respondents Sharad Agarwal and Atit Agarwal had taken out a notice of motion for recall and vacating of the ex parte ad interim relief. By the order dated 04.08.2017, the learned Single Judge granted the prayer in the notice of motion filed by the plaintiff-bank and restrained appellants-Sharad Agarwal and Atit Agarwal from alienating their property or creating any third party interest therein. The prayer for attaching the property before judgment was granted. The order of the learned Single Judge dated 04.08.2017 is appealed against in these intra Court appeals.

3. The learned counsel for the appellants-Sharad Agarwal and Atit Agarwal submitted that the learned Single Judge ought to have held that the judgment of the Swiss Court would fall within the exceptions to the provisions of Section 13 of the Code. It is submitted that the foreign judgment would not be conclusive as to any matter directly adjudicated upon between the same parties or the parties under whom they or any of them claim litigating under the same title, if the exceptions to the provisions under Section 13 would apply. It is stated that a foreign judgment would not be conclusive as to any matter directly adjudicated upon, when the judgment is not given on the merits of the case. It is submitted that the provisions of Section 13(b) of the Code would apply to the case in hand as it is apparent from the judgment of the Swiss Court, that it is not given on the merits of the case. It is submitted that the judgment is not based on the pleadings and evidence tendered by the

plaintiff-bank as no evidence was tendered by the plaintiff-bank before the Swiss Court. It is stated that the judgment is a 'default' judgment in view of the non appearance of the appellants-Sharad Agarwal and Atit Agarwal before the Swiss Court. It is submitted that evidence was not tendered by the plaintiff-bank in the suit before the Swiss Court and it would be apparent from a reading of the judgment that it is not given on the merits of the case. It is submitted that under Section 14 of the Code, the Court would presume that the foreign judgment was pronounced by a Court of competent jurisdiction upon the production of the certified copies of the foreign judgment but in the instant Court the plaintiff-bank has not produced the certified copies of the judgment of the Swiss Court. It is submitted that the learned Single Judge should not have relied on the affidavit tendered in this Court by the lawyer of the plaintiff-bank in the Swiss Court to prima facie hold that the judgment was given on the merits of the case. It is submitted that the learned Single Judge could not have recorded the finding that in the Swiss Courts the plaintiff's pleadings are recognized by the words "payment demand" and the judgment of the Swiss Court was given on the merits of the case as the plaintiff's "payment demand" was considered by the Swiss Court before granting the decree. It is submitted that it should be apparent from the judgment of the foreign Court that it is given on the merits of the case and the judgment itself should speak whether it was rendered on the merits of the case or not. The learned counsel relied on the judgment of the Hon'ble Supreme Court in the case of **International Woolen Mills Vs. Standard Wool (U.K.) Ltd.** reported in (2001) 5 SCC 265 to substantiate their submissions. Reliance is also placed on the judgment of this Court in the case of **Algemene Bank Nederland NV Vs. Satish Dayalal Choksi** reported in AIR 1990 Bom 170 to canvass that the judgment of the Swiss Court would not be a judgment given on merits.

4. Shri Andhyarujina, the learned counsel for the plaintiff bank has

supported the order of the learned Single Judge. It is submitted that the merits do not have to be reflected from the judgment of the foreign Court and it would not be necessary that there is individual consideration of the pleadings and the evidence tendered by the plaintiff before the foreign Court. It is stated that it is apparent from the judgment of the Swiss Court that the Swiss Court had considered the pleadings of the plaintiff-bank that were set out extensively in the payment demand (plaint) and that the documents tendered by the plaintiff-bank were also considered. It is stated by referring to the affidavit filed by Mr. Christian Luscher-the Swiss lawyer in this Court that the plaintiff-bank had filed the documents evidencing its allegations with regard to the unlawful use of financial assets provided for, in the relevant article of the Swiss Penal Code. It is stated that it is clearly set out in the affidavit of the counsel for the plaintiff-bank that the ex parte judgment was passed in favour of the plaintiff-bank on the basis of the facts and evidence produced before the Court, as is provided in Article 80 of the Civil Procedural Law of Geneva. It is stated that the affidavit of the counsel for the plaintiff-bank was rightly noted by the learned Single Judge while granting the prayer made in the notice of motion filed by the plaintiff-bank. It is submitted by placing reliance on the judgment in the case of **Janardhan Mohandas Rajan Pillai and Anr. Vs. Madhubhai Patel & Ors.** reported in **AIR 2003 Bombay 490** that a decision or pronouncement could be made without evidence being led by the parties if there is sufficient material for the adjudicating authority to draw a conclusion in respect of the issues involved in the case. It is submitted that in every matter it is not necessary that the evidence should be led. It is submitted by referring to the provisions of Section 13(b) and 13(c) of the Code that in clause (b) of Section 13 the words “where it appears on the face of the proceedings” that find place in Clause (c) of Section 13, are absent. It is submitted that in Section 13(b) the words “where it appears on the face of the proceedings” as found in Section

13(c) are intentionally omitted. It is stated that in view of the omission of the words “where it appears from the face of the proceedings” in Clause (b) of Section 13, it is clear that the legislature did not intend that the foreign judgment would not be conclusive as to any matter adjudicated upon between the parties where it did not appear on the face of the proceedings that the judgment was not given on the merits of the case. The learned counsel sought for the dismissal of the appeals.

5. To answer the questions in these appeals, it would be necessary to consider the law laid down by the Hon'ble Supreme Court in the judgment reported in **2001 5 SCC 265** where the Hon'ble Supreme Court has extensively dealt with the objection pertaining to the provisions of Section 13(b), that the judgment was not given on merits. In the said judgment, the Hon'ble Supreme Court has laid down “that the submission that the decree was on merits as all documents and particulars had been endorsed with the statement of claim cannot be accepted as it must not be forgotten that at the stage of issuance of writ of summons the Court only forms, if it at all does, a prima-facie opinion.” It was observed that “thereafter the Court has to consider the case of merits by looking into the evidence led and the documents produced before it, as per rules.” It is observed that only if this is done that the decree can be said to be on merits. It is held that in a given case it is possible that even though the defendant has not entered evidence, the plaintiff may prove its case through oral and documentary evidence. It is held that if after consideration of oral and/or documentary evidence an ex parte decree is passed, it would be a decree on merits. The Hon'ble Supreme Court laid down that where however no evidence is adduced on the plaintiff's side and his suit is decreed merely because of the absence of the defendant either by way of penalty or in a formal manner, the judgment may not be one based on the merits of the case. While holding so, the Hon'ble Supreme Court considered the judgment of the Patna High Court in the case of **Wazir Sahu v. Munshi**

Das, reported in **AIR 1941 Pat. 109** where the question when an ex parte decision can be said to be on the merits, was answered as follows and the Hon'ble Supreme Court had agreed with the said view :-

"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."

It appears from the judgment of the Supreme Court that an ex parte judgment in favour of the plaintiff may be deemed to be a judgment given on merits if evidence is adduced on behalf of the plaintiff and the judgment is based on the consideration of that evidence. Where however, no evidence is adduced on the plaintiff's side and the suit is decreed merely because of the absence of the defendant, either by way of penalty or in a formal manner, the judgment may not be one, based on the merits of the case. In the case before the Hon'ble Supreme Court, the judgment did not indicate whether the documents were looked into and or whether the merits of the case were considered at all and the plea of the defendant was dealt with. In the aforesaid set of facts, the Hon'ble Supreme Court had held that the judgment was not a judgment on merits and was not enforceable in India.

6. While seeking the enforcement of the judgment of the foreign Court, it would be necessary for the successful plaintiff to satisfy the Court that the requirement of the provisions of Section 13 of the Code are fulfilled. By keeping the aforesaid principles in mind, it would be necessary to consider whether the judgment of the Swiss Court was a judgment given on merits. The judgment of the District Court of the Republic and Canton of Geneva is a short judgment. It would be necessary to reproduce the entire judgment with a view to decide whether the Swiss Court had given the judgment on merits. The judgment reads thus:

JUDGMENT OF THE DISTRICT COURT

4th Chamber

On Thursday 4th of September 2008

(excerpt from the minutes of the Record Chamber of the District Court of the Republic and Canton of Geneva)

Between

BNP PARIBAS (SUISSE) SA, the plaintiff, having its head office at Place de Hollande 2, 1204 Geneva, represented by Advocate LUSCHER Christian, having its registered office at Cours des Bastions 14, Case postale 401, 1211 Geneve 12, and having elected its domicile for the subject of the present matter by its Advocate.

And

SOUTHGATE CORPORATE HOLDINGS LTD, Defendant in abstentia, having its registered office at Omar Hodge Building, Wickhams, Ky 1, cp 362, Road Town, Tortola, British Virgin Islands.

Mister Sharad Satyanarayan AGARWAL, Defendant in abstentia,

Mister Atit Omprakash AGARWAL, Defendant in abstentia,

Both domiciled at Bategaon Village, Bhoisar East, taluka Palghar, district THANE 401501, India.

“Considering the payment demand of USD 500,000 -plus interests of 5% per annum applicable since the 23rd of December 2001, filed on the 21st of December 2006 with the view of the introduction of the same in front of the High Court of Geneva by BNP Paribas (Switzerland) S.A. against Southgate Corporate Holdings Ltd. Sharad Satyanarayan Agarwal and Atit Omprakash Agarwal;

Considering the absence of the defendants at the introduction hearings on the 4th of October 2007 (SOUTHGATE CORPORATE HOLDINGS LTD) and on the 29th of May 2008 (Atit Omprakash Agarwal and Sharad Satyanarayan Agarwal);

Considering that the defendants have been duly summoned and duly served with the summons to appear before the Court, the same were notified to them;

Considering that indeed, the notifications to Southgate Corporate Holdings Limited with regards to the hearing of the 4th of October 2007 have been delivered to it on the 26th of March 2007 and that the notifications to Atit Omprakash Agarwal and Sharad Satyanarayan Agarwal for the introduction hearings of the 29th of May 2008 have been delivered to them on the 28th of January 2008 at the address "Bategaon Village, Bhoisar East, taluka, Palghar, district THANE, 401501, India" but have been refused by the defendants for some unexplained reasons;

Considering that in these circumstances, the notification of the summons for hearings to Atit Omprakash Agarwal and Sharad Satyanarayan Agarwal shall be deemed to be validly effected;

Considering the articles 78, 79 al.1 and 176, al. 1 LPC;

Considering additionally that the present judgment shall be notified to the defendants Atit Omprakash Agarwal and Sharad Satyanarayan Agarwal at the address provided by the plaintiff to which the defendants could have been served and not anymore to the address mentioned in the summons of hearings;

ON THESE GROUNDS

THE DISTRICT COURT

Determining in abstentia:

1. *Jointly and severally orders Southgate Corporate Holdings Limited, Atit Omprakash Agarwal and Sharad Satyanarayan Agarwal to pay to BNP PARIBAS (Switzerland) S. A., the amount of USD 500,000 along with the interests of 5% per annum applicable since the 23rd of December 2001 till the date of realization of payment.*

2. *Orders the defendants to pay all the expenses amounting to CHF 28,906 including a procedural indemnity fixed to CHF 10,000. -as a due participation to the fees of the plaintiff's Counsel.*

Court Associate

The Judge

Luciana FINARELLI

Jean REYMOND"

It is observed by the Hon'ble Supreme Court in para 29 of the judgment reported in **(2001) 5 SCC 265** that whether the judgment is one on merits must be apparent from the judgment itself. It would be necessary to consider whether it appears from the judgment of the Swiss Court that the judgment is given on merits. The judgment of the Swiss Court only refers to the payment demand of USD 5,00,000 + interest @ 5% per annum as claimed by the plaintiff-bank. The judgment does not disclose that the pleadings in the plaint of the plaintiff-bank were considered by the Swiss Court and/or any other evidence viz, documents was considered. Admittedly, no evidence was adduced by the plaintiff-bank before the Swiss Court. There is nothing on record to show that the documents tendered by the plaintiff-bank were considered by the Swiss Court before granting a decree for a sum of USD 5,00,000 in favour of the plaintiff-bank. It appears from the short judgment of the Swiss Court that the judgment is a 'default' judgment. After referring to the prayer in the plaint, the Swiss Court had only referred to the service of the summons of hearing on Sharad Agarwal and Atit Agarwal and that they had not appeared before the Court after receiving the summons for hearing. We do not find that any document or evidence, whatsoever, was considered by the Swiss Court before rendering the judgment dated 04.09.2008. We do not appreciate the submission made on behalf of the plaintiff-bank that merits do not have to be reflected from the judgment and the judgment may not mention that the evidence of the plaintiff in the form of documents is considered. The learned Single Judge had referred to the affidavit filed by the counsel for the plaintiff-bank in this Court to observe that under the procedure, the Swiss Court had to examine, inter alia whether the reliefs

sought are not in gross contradiction with the statement of facts and the evidence submitted and after considering the same pass the judgment. We have perused the affidavit of Mr. Christian Luscher, the counsel for the plaintiff-bank in the Swiss Court. In the affidavit, it is mentioned that in view of Article 80 of the Civil Procedural Law of Geneva an ex parte judgment can be passed in favour of the claim based on the evidence produced before the Court. Admittedly, evidence was not tendered by the plaintiff-bank before the Swiss Court. When it is apparent from the Swiss judgment that it is not given on merits, it may not be permissible for the plaintiff to assert that it is indeed given on merits by filing the affidavit of the counsel who had represented it in the foreign Court. The judgment itself should reflect that it is based on the merits. The counsel for the party seeking the execution of the judgment of the foreign Court would support his client and also the judgment rendered by the foreign Court. To accept the case of the plaintiff-executant that the judgment is based on merits, only on the basis of the affidavit of the counsel for the plaintiff would be reading in the judgment of the foreign Court, something that is not there. It would be extremely risky to answer the question whether the judgment is given on merits, by relying on the affidavit of the counsel before the foreign Court, specially, when the judgment of the foreign Court apparently discloses that the judgment was not given on merits. We are clearly of the prima facie view that the judgment of the Swiss Court is not given on merits as the judgment does not disclose that the pleadings of the plaintiff-bank and the evidence tendered by it was duly considered by the Swiss Court while passing the judgment in favour of the plaintiff-bank. The evidence of the plaintiff could not have been considered as the plaintiff had tendered none. The judgment reported in **AIR 2003 Bombay 490** and relied on by the counsel for the plaintiff-bank would not be applicable to the case in hand. In the case in the reported judgment, a suit for defamation was filed by the plaintiff before the English Court for seeking

damages and the said suit was stayed after finding force in the preliminary objection against the tenability of the suit before the English Court. The order granting stay was challenged in appeal and while dismissing the appeal, costs were imposed on the original plaintiff before the English Court and by filing the execution proceedings in India, the defendant had sought the execution of the judgment imposing costs. In the peculiar facts of the said case where costs were awarded in favour of the defendants and the defendants had brought the suit in the Indian Court for the execution of the said judgment to the extent of imposition of the costs that this Court observed that a decision or pronouncement can be made without evidence being led by the parties. The said observation would not apply to the case like the one in hand. It would be necessary to refer to the law laid down by the Hon'ble Supreme Court in the judgment reported in **International Woolen Mills** (supra), wherein the Hon'ble Supreme Court has clearly laid down that "An ex parte decision may or may not be on the 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. 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 find on a reading of the judgment of the Swiss Court that it was formally passed as a matter of course and by way of penalty and it was not based on the consideration of the truth or otherwise of the plaintiffs case. Since it prima facie appears that the judgment of the Swiss Court was not given on merits, the prayers made in the notice of motion filed by the plaintiff-bank should not have been granted. Since the Swiss judgment was not made on the merits of the case, prima facie the same would not be conclusive as to any matter directly adjudicated upon between the parties. The plaintiff-bank has not made out a prima facie case as the judgment of the Swiss Court was not made on the merits of

the case. By granting the prayers made in the notice of motion, appellants- Sharad Agarwal and Atit Agarwal were put to extreme hardship as their properties were attached before judgment and they were restrained from alienating their property and creating third party rights therein.

7. In the case in the judgment reported in **AIR 1990 Bom 170** the judgment did not reveal that the documents filed by the plaintiff before the foreign Court were considered as the same was rendered only on the basis of the plaintiff's pleadings without going into the controversy between the parties after the defendant did not appear at the time of the hearing of the suit to defend the case. In the instant case, we find that evidence is not adduced by the plaintiff and the judgment also does not disclose that the same is given on the basis of the plaintiff's pleadings. Even if the same had been made on the basis of the plaintiff's pleadings without considering the documents and the evidence adduced by the plaintiff and without going into the controversy between the parties, the same would not have been a judgment given on merits. If leave could not have been granted for the execution of the judgment, that was sought to be executed in the case before this Court in the judgment reported in **AIR 1990 Bom 170**, it goes without saying that prima facie the judgment in the instant case may not be capable of execution in Courts in India. The plaintiff-bank would not have been entitled to the prayers made in the notice of motion on the basis of the Swiss judgment.

8. In the result, the appeals are allowed. The order of the learned Single Judge dated 04.08.2017 is hereby set aside. The prayers made in the notice of motion stand rejected. In the circumstances of the case, there would be no order as to costs.

9. At this stage, the learned counsel for the respondents seeks the continuation of the ad-interim relief granted by this Court on 18.01.2012 as also the continuation of the order of the learned Single Judge in para 18 of

the order appealed against for eight weeks.

The prayer made by the counsel for the respondent-bank is strongly opposed by the learned counsel for the appellants.

However, in the circumstances of the case, since the ad interim relief is operating in favour of the respondent-bank from 18.01.2012, we continue the same only for a period of eight weeks. We however reject the prayer made by the counsel for the respondent-bank to continue the relief granted for the first time by the order appealed against, pertaining to the bank accounts as the same was granted only after deciding the notice of motion. The Prothonotary and Senior Master is directed to return the envelopes submitted by the appellants after the completion of eight weeks, if no interim relief is granted to the respondent-bank till then.

Order accordingly.

[SARANG V. KOTWAL, J.]

[SMT. VASANTI A. NAIK J.]