

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

**NOTICE OF MOTION NO 3578 OF 2011
IN
SUIT NO. 2540 OF 2011**

BNP Paribas (suisse) SA ...Plaintiff/Applicant
vs.
Atit Omprakash Agarwal & Anr. ...Defendants

AND

**NOTICE OF MOTION NO 314 OF 2013
IN
SUIT NO. 2540 OF 2011**

Atit Omprakash Agarwal ...Applicant/Orig.Deft.No.1

In the matter between :

BNP Paribas (suisse) SA ...Plaintiff
vs.
Atit Omprakash Agarwal & Anr. ...Defendants

AND

**NOTICE OF MOTION NO 271 OF 2014
IN
SUIT NO. 2540 OF 2011**

Sharad Satyanarayan Agarwal ...Applicant/Orig.Deft.No.2

In the matter between :

BNP Paribas (suisse) SA ...Plaintiff
vs.
Atit Omprakash Agarwal & Anr. ...Defendants

Mr.Zal Andhyarujina with Mr.Kunal Dwarkadas, Ms.Mona Bhide,
Mr.Rajeseckhar Upadhyaya and Ms.Kanika Gupta I/b. Dave Girish and Co.
for Plaintiff.

Mr.Mayur Khandeparker with Mr.Dikshat Mehta I/b. Mr.Sanjay Sinha for Defendant No.1.

Mr.Cherag Balsara with Mr.Devesh Juvekar, Mr.Mayur Shetty I/b. Rajani Assocaites for Defendant No.2.

CORAM : S.C. GUPTE, J.

4 AUGUST 2017

P.C. :

This is a suit based on a foreign judgment under Section 13 of the Code of Civil Procedure (“Code”). It seeks a decree in the sum equivalent to USD 5,00,000 as also court costs in the sum equivalent to CHF 28,960 and attorney costs of CHF 10,000 and interest.

2 Notice of Motion No.3578/2011, which is taken out by the plaintiff, is in the nature of an application for attachment before judgment. It seeks, in the first place, a direction to the Defendants to disclose all their assets, movable and immovable, including bank accounts, with relevant details and secondly, a temporary injunction restraining the Defendants from creating *inter alia* third party rights in, or parting with possession of, the assets or properties. In pursuance of an ex parte ad-interim order passed by a learned Single Judge of this court on 18 January 2012, the Defendants were directed to make disclosures in terms of the first prayer, though restricted to immovable properties of the Defendants. The defendants were also restrained from disposing of, alienating or encumbering, or creating any third party rights in their immovable properties. The plaintiff now presses for further reliefs.

3 Notice of Motion No.314/2013 is taken out by Defendant No.1 for recall of the ex-parte ad-interim order of 18 January 2012 and for

striking off the name of Defendant No.1 from the array of parties.

4 Notice of Motion No.271/2014 is taken out by Defendant No.2 also for recall of the ex-parte ad-interim order.

5 The parties at the hearing before this court argued Notice of Motion No.3578/2011 presumably on the footing that it is this motion, which decides the fate of the other two motions as well.

6 It is the Plaintiff's case that in November 1999, one Southgate Corporate Holdings Limited (hereinafter for short referred to as "Southgate") represented by Defendant No.2 herein, who is also the director of Southgate, opened a bank account with the Plaintiff bank. Defendant No.2 declared himself to be the beneficial owner of such account. On 10 September 2001, Defendant No.2 executed a Power of Attorney in favour of Defendant No.1 for operating the account on behalf of Southgate. It is the Plaintiff's case that on 18 September 2001, there were two credits of USD 5,00,000 and USD 4,99,985 in this account. It is the case of the Plaintiff that the credit of USD 5,00,000 was a mistaken credit, which was not due. It is submitted that pursuant to this credit, Defendant Nos.1 and 2 immediately took steps to empty the bank account in great haste, transferring the funds for their own benefit. In or about September 2003, this error was noticed at the Plaintiff's end by their auditors, M/s.Deloitte. The Plaintiff thereafter communicated the fact of this wrongful credit to Defendant Nos.1 and 2 and called upon the latter to refund the amount. The plaint describes various attempts on the part of the Plaintiff to sort out the issue through meetings between the parties, which bore no result. As a result, legal notices were sent by the Plaintiff to the

Defendants, followed by a criminal complaint filed on 8 November 2006. This complaint alleged an offence on the part of the Defendants and Southgate under Article 141 bis of the Penal Code (Swiss Penal Code), which provided for a custodial sentence not exceeding three years or a monetary penalty for unlawful use of financial assets inadvertently coming into the possession of the accused. On 21 December 2006, the Plaintiff filed civil proceedings against the Defendants and Southgate in the District Court of the Republic and Canton of Geneva (hereinafter for short referred to as “Swiss Court”) for a decree in the sum of USD 5,00,000 along with interest and costs. The Defendants were duly summoned to appear before the Swiss Court and served with the summons but refused to accept the service. It is the Plaintiff's case that the summons were, nevertheless, served on the Defendants and such service amounted to due service under the Swiss Law. In spite of the court summons, the Defendants failed to appear at the hearings. An *ex parte* decree was thereupon passed by the Swiss Court holding the Defendants to be jointly and severally liable to pay a sum of USD 5,00,000 along with interest of 5% per annum and expenses of CHF 28,906 and attorney fee of CHF 10,000 along with interest at the rate of 5% per annum from the date of the judgment, i.e. 4 September 2008, till payment. Based on this judgment, a decree is sought in the present suit against the Defendants purportedly under Section 13 of the Code. It is the case of the Plaintiff that the judgment is neither against Indian Law nor does it fall within any of the exceptions to Section 13 of the Code. It is submitted that the Swiss Court was competent to pass the judgment and the same was passed after the court examined the facts and documents produced before it. It is submitted that this judgment, accordingly, is conclusive and enforceable against the Defendants, who reside or carry on business in India within the local limits of the jurisdiction of this Court.

7 The present notice of motion is taken out, as noted above, purportedly seeking an injunctive relief against the Defendants, restraining them from creating third party rights in, or parting with possession of, their properties, pending the hearing and final disposal of the suit. The relief, it is not disputed, must be shown to be falling within the four corners of Order 38 Rule 5 of the Code, before this court could grant the same. For any relief to be granted under Order 38 Rule 5, the plaintiff has to make out, firstly, a *prima facie* case on the merits of the claim and secondly, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is either about to dispose of the whole or any part of his property or to remove the whole or any part of it from the local limits of the jurisdiction of the court.

8. Let us, therefore, consider, firstly, if the Plaintiff has made out a *prima facie* case in support of its claim. The Plaintiff relies on a decree passed by the Swiss Court, which is obviously a foreign judgment within the meaning of Section 13 of the Code. The Swiss Court is not a court in a reciprocating territory within the meaning of Section 44-A of the Code. So there is no question of execution of the decree passed by the Swiss Court straightway under Section 44-A of the Code. The question we have to consider is, whether the judgment of the Swiss Court is conclusive as to any matter directly adjudicated upon between the same parties by it. There are six exceptions to treating any foreign judgment as conclusive on any matter thereby directly adjudicated upon. In the present case, the contest to the conclusiveness of the foreign judgment is under three exceptions, namely, exceptions (b), (c) and (f). Exception (b) is a case where the foreign judgment is not given on the merits of the case, whilst exception (c) is applied where the foreign judgment appears on the face of the proceedings

to be founded on a refusal to recognise the law of India in cases in which such law is applicable. Exception (f) triggers in when the foreign judgment sustains a claim founded on a breach of any law in force in India. Learned Counsel for both the Defendants submit that in the present case, the so called foreign judgment comes within the mischief of each of these three exceptions.

9. I have advisedly used the word “so called” in the foregoing paragraph whilst referring to the judgment, since it is the case of the Defendants that what is produced by the Plaintiff is merely “an excerpt from the minutes of the record chamber of the District Court of the Republic and Canton of Geneva”; the entire copy of the foreign judgment has not been produced; and that the copy of the minutes does not appear to be a copy certified in any manner by a representative of the Central Government of the country in which it is stated to have been passed, as contemplated by Section 86 of the Indian Evidence Act, 1872. Let me at the outset deal with this issue. What is relied on by the Plaintiff in the present suit is a decree purportedly passed by the Swiss Court in favour of the Plaintiff and against the Defendants. Even if what is produced by the Plaintiff is an extract of the minutes as suggested by the Defendants, what that means is, as of now, there is no complete evidence of the foreign judgment. There is no implication as yet that there is no foreign judgment at all. The only implication is, what is produced is not to be accepted as conclusive evidence of the judgment. Section 13 provides for conclusiveness of a foreign judgment. In a suit based on a foreign judgment, the Plaintiff, of course, will have to prove the foreign judgment. What we are concerned with at this stage is, whether there is *prima facie* proof tendered of such foreign judgment. And that the Plaintiff in the present case certainly has.

Availability of the entire copy of the foreign judgment, in case the minutes are not held to be such a copy, as well as the requirement of Section 86 of the Evidence Act for authenticating such copy, are matters to be considered as part of the trial. For the purposes of the present application, it is sufficient that a case of a foreign judgment is *prima facie* established before this court.

10 Let us now consider the objections to the presumptive value of the foreign judgment in the present case under the exceptions provided in Section 13. As noticed above, it is firstly submitted that the judgment is not on merits. It is said to be an *ex parte* decree upon noting absence of the Defendants despite service of court summons. At the outset, it is important to note that a judgment does not cease to be a judgment on merits simply because it is passed *ex parte*. If the defendant chooses to remain absent, the court is bound to proceed in his absence. The Orissa High Court in the case of **Chintamoni Padhan vs. Paika Samal**¹, held that a judgment on merits is one which is entered after a full trial of the issues through pleadings, presentation of evidence, and arguments by both sides; the expression “judgment on merits” implies that it must have been passed after contest and after evidence has been led by both sides. This statement of law by Orissa High Court was expressly refuted by the Supreme Court in **International Woolen Mills vs. Standard Wool (U.K.) Ltd.**² as incorrect. The Supreme Court noted that in a given case it was possible that even though the defendant had not entered evidence, the Plaintiff might prove his case through oral and documentary evidence and if after consideration of such oral and documentary evidence, an *ex parte* decree is passed, it would be a decree on merits. What is important to see is whether the court

1 AIR 1956 Ori 136 : ILR 1956 Cut 174

2 (2001) 5 SCC 265

applied its mind to the matter in issue and considered the evidence produced before it in order that it may be said that there has been an adjudication upon the merits of the case. Even where the defendant chooses to remain *exparte* and to keep out, it is possible for the plaintiff to adduce evidence in support of his claim, so that the court may consider the matter on merits after taking into account the pleadings of the Plaintiff and the evidence before it. It is only where such evidence is dispensed with and a decree is passed merely on account of default of appearance on the part of the defendant that the decree can be said to be not on merits. A decision by way of penalty for default of appearance cannot be termed as a decision on merits. If a decree is passed after considering the material placed before the Court and after applying its mind, even though it is passed *exparte*, it would still be a decree on merits.

11. Let us now consider if this mandate is satisfied in the present case. Before we do so, we must note one more argument of the Defendants. Learned counsel for the defendants submitted that any consideration of merits must be reflected in the judgment itself. The foreign judgment is Exhibit-Y to the plaint and English translation thereof is produced at Exhibit-Z. The judgment indicates the matters considered by the Swiss Court before passing its judgment. The first of such matters is the 'payment demand'. Learned Counsel for the Defendants argued that it is merely the demand of payment of USD 5,00,000, which is considered by the court in this behalf. *Prima facie* that does not appear to be the case. It is the plaint as a whole, which appears to have been termed as "payment demand". Such payment demand not only indicates the parties before the court and the facts of the case, but the applicable law including the laws of territorial jurisdiction and limitation, the examination of the facts in the light of these

laws, the joint and several liability of the three defendants before the court including the Defendants herein, are all matters forming part of this payment demand. It ends with prayers in the form of a conclusion. On a *prima facie* view of the matter, therefore, it does appear that all these aspects, which form part of the plaint, are considered by the Swiss Court, when it says it has rendered the judgment after considering the payment demand. Secondly, the judgment considers the absence of the defendants at the introduction of the hearings. It notes that the defendants have been absent though duly summoned and served with the summons to appear before the court. It also considers notifications of hearings delivered to the defendants at their address in India. It considers whether, in the circumstances of the case, the summons for hearing issued to the Defendants herein can be treated as valid service. It further considers Article 78, 79 al.1 and 176, al.1 LPC. These Articles form part of the Swiss Law applicable to the dispute. These have been referred to and explained in the evidence of Christian Luscher, who is a qualified lawyer practicing law in Switzerland and a partner of the law firm CMS VON ERLACH PONCET having offices at Zurich and Geneva. The deponent, who was the lawyer who appeared at the hearings before the Swiss Court, has explained the meaning and purport of the various articles. The procedure laid down in the articles referred to in this behalf, is explained by the Plaintiff in its plaint. Under this procedure, the court has to examine *inter alia* whether the prayers / reliefs sought are not in gross contradiction with the statements of facts and evidence submitted and after considering the same pass the judgment. Of course, since these are matters of foreign law, a proof will have to be tendered of this law, may be in the form of an affidavit of a person who is conversant with such law. As of now, there is nothing brought out by the Defendants that there is no such law in Switzerland or

that the law there is any different. We can safely proceed whilst considering the merits of the Plaintiff's case from a *prima facie* standpoint that this is the law in Switzerland and that this law was applied by the Swiss Court when it rendered its judgment.

12. The foregoing discussion sufficiently indicates that the foreign judgment we are concerned with in the present case is not a judgment given simply on the ground of absence of the Defendants either as a penalty or otherwise. It is a judgment which is rendered by the court after applying its mind to all the germane aspects of the matter. All these aspects were laid bare in the plaint, and the reliefs claimed therein were not in contradiction with the statement of facts in the plaint and the evidence submitted before the court. The foreign judgment, thus, does not come within the exception provided for in clause (b) under Section 13.

13. The next objection to the conclusiveness of the foreign judgment is on the basis of the exception provided under clause (c) of Section 13, which covers a judgment founded on a refusal to recognize the law of India. Learned Counsel for the Defendants submits that at least two provisions of Indian law are ignored or refused to be recognised by the Swiss Court. The first, of course, is the provision of limitation. It is submitted that the Indian law provides for limitation of three years for recovery of money paid under mistake. Insofar as the Swiss Court has entertained the present claim beyond three years, it has clearly disregarded, it is submitted, the Indian law on the point. In the first place, a refusal to recognise Indian law can be the basis of an objection under clause (c) only in cases in which such law is applicable. It is an established principle of International Private Law, and it is very much recognised as such by the

Indian law, that insofar as the period within which a suit or an application is to be brought before the court is concerned, it is the local law of the country in which such suit or application is brought which covers the subject. In other words, it is the *lex fori* which governs the matter of limitation. The suit having been brought before the Swiss Court, it is the law of Switzerland which fixes the period of limitation and not the Indian law. The Swiss law appears to have been fairly applied to the claim brought before the Court. The plaint explains how the Swiss Law of Limitation makes the suit against the defendants herein and Southgate maintainable. The relevant articles of the Swiss Law clearly support the plaintiff's case on limitation. This also takes care of the argument under clause (f) of Section 13 that the judgment sustains a claim founded on a breach of the law of limitation in force in India. It is very much an Indian law in the matter of limitation for filing of a civil suit that *lex fori* is the deciding factor. If a foreign court entertains a civil suit based on the law of limitation applicable in that country, the judgment it renders is neither founded on a refusal to recognise the law in India within the meaning of clause (c) nor on a breach of law in force in India within the meaning of clause (f).

14. Learned counsel for the defendants relies on the judgment of Gauhati High Court in the case of **California Pacific Trading Corporation Vs. Kitply Industries Ltd.**³ and contends that a foreign decree which is passed in a suit filed beyond the period of limitation provided under the Indian Limitation Act is against the public policy of India. With great respect to the learned Judge of the Gauhati High Court, the judgment does not appear to state the correct law. As I have noted above, insofar as the fundamental policy of Indian Law concerning a foreign decree is concerned, it recognizes the rule of private international law that the matters of³

³ (2011) 3 Com.L.J. 518 (Gau.)

limitation are governed by *lex fori* and if the foreign suit is within time provided by that law, the decree is executable in India, if covered by Section 44A of the Code, or is otherwise conclusive under Section 13 of the Code so as to sustain a suit in India. This is stated in the clearest of terms by a Division Bench of our Court in the case of **Nabibhai Vazirbhai vs. Dayabhai Amulakh**⁴. The Division Bench stated the law as follows :

“.... suits and applications must be brought within the period prescribed by the local law of the country within which the suit or the application is brought, that is to say, it is the lex fori which governs.”

15. The second provision of Indian law, which is said to be breached, is the provision of Section 230 read with Section 182 of the Contract Act. The submission is that the Defendants can at best be described as agents of Southgate, who is the principal. The principal in this case is clearly a disclosed principal and accordingly, there is no presumption that there is any contract to the contrary making the agent personally liable on contracts entered into by him on behalf of his principal. The definition of “agent” under Section 182 includes within it any person employed to do any act for another or represent such other in dealing with a third person. It is submitted that both these Defendants, Defendant No.1 being an authorised signatory of the company Southgate and Defendant No.2 being a director, are merely engaged to do acts for, or represent, Southgate in its dealings with the Plaintiff and their principal having been disclosed in the present case, there is no presumption of a contract to the contrary. The argument suffers from a basic fallacy. The Defendants herein are not arraigned as party defendants to the Swiss suit on the ground that they are ⁴agents of Southgate. The case against them is on the footing that they are co-conspirators with Southgate in what the Swiss Law terms as “a criminal

⁴ AIR 1916 Bom. 200.

conspiracy". Article 50 of the Swiss law provides for liability of several persons, who jointly cause damage, whether as instigators, principals or accessories. In case of any damage jointly caused, they are jointly and severally liable to the damaged party. The judge is, of course, given a discretion to determine whether and to what extent they may have a right of recourse against one another but as between them on the one hand and the damaged party on the other, they are jointly and severally liable. Article 52 provides that if several persons are liable to the damaged person for the same damage based on different legal grounds, whether in tort or in contract or as a result of a legal requirement, then the provision regarding recourse among persons who have jointly caused damage shall be applied accordingly. The plaint termed as "payment demand" has discussed in detail this aspect of the case, which, in turn, the court has considered, as I have noted above. So much for the second objection on the ground of refusal to recognise Section 230 read with Section 182 of the Contract Act. Again, if the objection has no force under clause (c) of Section 13, then it equally has no force under clause (f) of Section 13.

16. In sum, the Plaintiff has clearly made out a *prima facie* case on merits. The Plaintiff's suit is based on a foreign judgment, which is a judgment rendered on merits and which does not involve refusal to recognise, or breach of, any Indian law. If that is so, *prima facie* the judgment is conclusive of the matters stated therein, namely, the liability owed by the Defendants to the Plaintiff. What is sought to be enforced in India by means of filing of the present suit is not the original claim for money paid under mistake but the foreign judgment decreeing the dues of the Defendants owed to the Plaintiff. The applicable Article under the Limitation Act, 1963 will, accordingly, be Article 101 which provides for a

period of limitation of three years from the date of the foreign judgment. The suit is thus, within time under Indian law.

17. That brings us to the question as to whether the Plaintiff has made out any case for relief in the nature of an attachment before judgment. There is clearly an averment made in the affidavit in support of the notice of motion that the Defendants are likely to deal with, transfer, dispose of, or create third party rights in their assets with a view to defeat the decree that may be passed in the plaintiff's favour and that, accordingly, it is just and convenient that pending the hearing and final disposal of the suit, the Defendants be restrained by an interim injunction from making any transfer of or creating any third party rights in or parting with possession of the assets. The question is, has the Plaintiff made out any basis for making such averment. Learned Counsel for the Defendants submits that neither the plaint nor the affidavit in support of the motion indicates the basis for making such averments. The question simply is this: Are the facts before the court sufficient to warrant an inference of such likelihood? Let us consider the facts before this court. In the first place, there is a clear mistaken payment, on which there is not even a statable defence as of now. Neither is any such defence in fact stated. The second aspect is that the Defendants *prima facie* appear to have clearly tried to evade the process of the Swiss Court and even after service of the writ of summons, failed to present themselves before the Swiss Court. The third aspect is that having failed to present themselves before the Swiss Court and suffered a decree, they are now trying to make a virtue of their absence before the Swiss Court and on that basis, are contesting the Plaintiff's application before this court. (Of course, they are within their right to do so. This aspect is considered here merely to assess the likelihood of the defendants transferring their assets

out of the local limits of the jurisdiction of this court.) Fourthly, and most importantly, though they have addresses in Mumbai in India, the Defendants actually hold passports of other countries. Defendant No.1 holds the passport of Belize, whilst Defendant No.2 holds the passport of Grenada. In other words, we are considering here the case of defendants, who have a place of business in India but who hold passports of Belize and Grenada and who have opened an account with the Plaintiff in Switzerland and having mistakenly received monies in that account, wiped off that account in Switzerland. Can such defendants be seen as likely at least at this *prima facie* stage to shift their assets out of India to defeat the decretal dues payable to the plaintiff ?

The answer seems to me to be in the positive.

18. This court, by its order dated 18 January 2012, has already directed the Defendants to disclose their immovable assets and bank accounts and restrained the Defendants from disposing of, alienating, encumbering or creating third party rights in respect of, their immovable properties. There is a clear case for continuation of that ad-interim relief. The Defendants, as noted above, have taken out two separate notices of motion, namely, Notice of Motion Nos.314/2013 and 271/2014, seeking recall of the *ex parte* ad-interim order. In pursuance of the oral directions issued in these two motions, though the Defendants have made disclosures, such disclosures are contained in sealed envelopes. It is necessary to open the sealed envelopes and take the affidavits of disclosure on record, with copies being furnished to the Plaintiff. It is necessary to restrain the defendants from disposing of any of these assets pending the hearing and final disposal of the suit.

19. Accordingly, all three motions are disposed of in terms of the following order :

(I) Notice of Motion No.3578/2011 is allowed by restraining the Defendants from disposing of, alienating, encumbering or creating third party rights in, the property disclosed in the affidavits earlier filed before this court in sealed envelopes;

(II) Prayer clause (b) of the Notice of Motion is deferred, to be heard along with the suit;

(III) The sealed envelopes be opened and the affidavits be taken on record and copies be furnished to the Plaintiff;

(IV) Notice of Motion Nos.314/2013 and 271/2014 are dismissed; and

(V) Costs to be costs in the cause.

20. At the request of learned Counsel for Defendant No.1, it is ordered that the seal envelopes shall not be opened for a period of four weeks from today.

(S.C. GUPTE, J.)