THE HIGH COURT OF SINDH, KARACHI

Execution No. 51 of 2019
[Mena Energy DMCC versus Hascol Petroleum Limited]

Decree Holder	:	Mena Energy DMCC, through Mr. Ijaz Ahmed Zahid, Advocate.
Judgment Debtor	:	Hascol Petroleum Limited through Mr. Arshad M. Tayebaly, Advocate.
Date of hearing	:	06-05-2021.
Date of decision	:	12-10-2021.

O R D E R

Adnan Iqbal Chaudhry J. – This Execution Application is brought under section 44-A CPC for enforcing a foreign judgment dated 15-06-2018 passed in case No. CL-2015-000620 by the High Court of Justice, Business and Property Courts of England and Wales, Commercial Court (QBD).

2. By the foreign judgment, the Decree Holder [DH], a company incorporated in the UAE, has been awarded USD 9,500,000/- against the Judgment Debtor [JD], a company incorporated in Pakistan. The Execution is filed at Karachi as the JD has assets at Karachi. The foreign judgment is as follows:

> *"MENA ENERGY DMCC* *Claimant*
>
> *- and –*
>
> *HASCOL PETROLEUM LIMITED* *Defendant*
>
> ---
>
> *Judgment by consent*
>
> ---
>
> ***UPON** reading terms of the Settlement Agreement dated 19 January 2018 between the parties*
> ***AND UPON** the parties having consented to the terms of this Judgment*
> ***BY CONSENT IT IS ORDERED THAT:***
> 1. *Judgment be entered for the Claimant in the sum of US$9,500,000.*
> 2. *The Defendant shall pay the said sum of US$9,500,000 forthwith.*
> 3. *There be no order as to costs or interest.*
>
> *Dated this 15th day of June 2018."*

3. The JD has filed objections to the Execution. An earlier order requiring the JD to deposit the decretal amount is presently suspended in HCA No. 241/2020 on the JD's contention that the deposit required by Order XXI Rule 23-A CPC does not apply to a foreign decree. Mr. Ijaz Ahmed, learned counsel for the DH pressed for a hearing of the Execution submitting that the order passed in the HCA does not stay the hearing of the objections. To that, Mr. Arshad Tayebaly, learned counsel for the JD conceded.

4. Section 44-A CPC reads as under:

> "**44-A. Execution of decrees passed by Courts in the United Kingdom and other reciprocating territory.** (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 Pakistan as if it had been passed by the District Court.
> (2) Together with the certified copy of the decree shall be filed 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 or 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 1.** "Superior Courts", with reference to the United Kingdom, means the High Court in England, the Court of Session 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.
> **Explanation 2.** "Reciprocating territory" means the United Kingdom and such other country or territory as the Federal Government may, from time to time, by notification in the official Gazette, declare to be 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 3**. "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 payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, and

a) with reference to superior Courts in the United Kingdom, includes judgments given and decrees made in any Court in appeals against such decrees or judgments, but
b) in no case includes an arbitration award, even if such award is enforceable as a decree or judgment."

Sub-section (3) of section 44-A CPC stipulates that the Court shall refuse execution of a foreign 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 CPC, which in turn stipulates as follows:

> "**13. When foreign judgment not conclusive.-** A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except –
> (a) Where it has not been pronounced by a Court of competent jurisdiction;
> (b) Where it has not been given on the merits of the case;
> (c) Where 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 Pakistan in cases in which such law is applicable;
> (d) Where the proceedings in which the judgment was obtained are opposed to natural justice;
> (e) Where it has been obtained by fraud;
> (f) Where it sustains a claim founded on a breach of any law in force in Pakistan."

5. It is not disputed by the JD that the foreign judgment is a 'decree' by a 'superior Court of the United Kingdom' within the meaning of section 44-A CPC and its Explanation clauses. As regards the words 'District Court' in section 44-A, Mr. Ijaz Ahmed Advocate submitted that those include the High Court of Sindh at Karachi exercising 'District Court jurisdiction'[1] in civil suits within its pecuniary jurisdiction; hence the Execution before this Court. To that, Mr. Arshad Tayebaly, learned counsel for the JD did not object.

6. The objections of the JD are that the foreign judgment/decree is not 'conclusive' within the meaning of section 13 CPC, *ergo*

[1] Full Bench of the High Court of Sindh in *Rimpa Sunbeam Cooperative Housing Society v. Karachi Metropolitan Corporation* (PLD 2006 Karachi 444).

inexecutable, and the DH can at best file a suit on the basis of the foreign judgment. To elaborate, Mr. Arshad Tayebaly Advocate first submitted that since the foreign judgment is based on a settlement agreement between the parties, it cannot be said to have been given 'on the merits of the case' within the meaning of clause (b) of section 13 CPC. For that, he placed reliance on *Gudemetla China Appalaraju v. Kota Venkata Subba Rao* (AIR (33) 1946 Madras 296). Second, he submitted that payment to the DH under the Settlement Agreement is conditioned on an approval of the State Bank of Pakistan [SBP approval], also a requirement of section 5 of the Foreign Exchange Regulation Act, 1947; and therefore, until the SBP approval, the foreign decree cannot be executed, alternatively, it will be hit by clause (c) of section 13 CPC for refusing to recognize Pakistani law. Learned counsel added that the JD has applied to the SBP for said approval, but the same has yet to be issued. Mr. Tayebaly's third objection was that the foreign decree based on the Settlement Agreement was only a contract between the parties, and in view of the enunciation *in Peer Dil v. Dad Muhammad* (2009 SCMR 1268), the remedy of the DH was not an Execution but a suit for breach of contract. The last objection taken was that by clause 16 of the Settlement Agreement the parties had agreed that only the Courts of England and Wales would have jurisdiction to decide any dispute arising under or in connection with the Settlement Agreement.

7. Mr. Ijaz Ahmed, learned counsel for the DH submitted that before the foreign Court there was a claim by the DH and a counter claim by the JD; that the counter-claim of the JD was dismissed and it was held liable to the DH, and that is when the parties entered into the Settlement Agreement dated 19-01-2018; that under clause 6.1 of the Settlement Agreement as amended by Addendum dated 23-01-2018, a draft of the consent judgment signed by both parties and been retained in escrow with the stipulation that if the JD does not pay, the DH will be free to present the consent judgment to the foreign Court for sealing, and that is how it came to be passed; and

therefore in such circumstances, section 13(b) CPC was not attracted. Learned counsel submitted that the case of *Gudemetla* relied upon by the JD was distinguishable, and he in turn relied on the cases of *Abdul Wahid v. Abdul Ghani* (PLD 1963 Karachi 990) and *Ghulam Hussain v. Fatima Bibi* (PLD 1975 Lahore 95). As regards the SBP approval, Mr. Ijaz Ahmed submitted that obtaining such approval was the obligation of the JD; that not only did the JD delay making the requisite application to the SBP, it also did not pursue the same; that the JD cannot take advantage of its own wrong; that in any case, the SBP approval for remitting the money abroad is no impediment to the Execution, as once the money is recovered at Karachi, the DH will apply to the SBP for remitting it abroad. Regarding *Peer Dil's* case, learned counsel submitted that said case was not for the proposition that an Execution can never been filed to enforce a compromise decree, and in that regard he relied on *Montgomery Flour and General Mills v. MCB Bank Ltd.* (2015 CLD 1590) and *Samba Bank Ltd. v. Syed Bhais* (2013 CLD 2080).

8. Heard the learned counsel and perused the record.

9. It is settled that by virtue of section 13 CPC a foreign judgment as between the parties thereto is accepted in Pakistan as being conclusive as to the matter thereby directly adjudicated, provided it does not fall within any of the exceptions listed under section 13; and that a foreign judgment that qualifies under section 44-A CPC can be executed thereunder in Pakistan as a decree; but if the Pakistani Court is satisfied that the foreign judgment falls within any of the exceptions to section 13, then it is to refuse execution, for then the Pakistani law does not recognize such decree to be conclusive between the parties.[2] The fine line between the rule of conclusiveness of a foreign judgment under section 13 CPC and the rule of *res judicata*

[2] *Grosvenor Casino Ltd. v. Abdul Malik Badruddin* (1997 SCMR 323), and *Muhammad Ramzan v. Nasreen Firdous* (PLD 2016 SC 174).

was explained by the Supreme Court of India in *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul Wajid* (AIR 1963 SC 1) as under:

> "(35) The rule of conclusiveness of a foreign judgment as enacted in S. 13 is some-what different in its operation from the rule of res judicata. Undoubtedly both the rules are founded upon the principle of sanctity of judgments competently rendered. But the rule of res judicata applies to all matters in issue in a former suit which have been heard and finally decided between the parties, and includes matters which might and ought to have been made ground of attack or defence in the former suit. The rule of conclusiveness of foreign judgments applies only to matters directly adjudicated upon. Manifestly, therefore, every issue heard and finally decided in a foreign court is not conclusive between the parties. What is conclusive is the judgment. Again, the competence of a Court for the application of the rule of res judicata falls to be determined strictly by the municipal law; but the competence of the foreign tribunal must satisfy a dual test of competence by the laws of the State in which the Court functions, and also in an international sense."

In *R. Viswanathan*, the Supreme Court of India had also held that in considering whether a judgment of a foreign Court is conclusive, the domestic Courts will not enquire whether conclusions recorded thereby are supported by the evidence, or are otherwise correct, because the binding character of the judgment may be displaced only by establishing that the case falls within one or more of the six clauses of section 13 CPC and not otherwise. That observation in *R. Viswanathan* was also endorsed by a learned Division Bench of this Court in *Karachi Gas Company Ltd. v. Hasham Issaq* (PLD 1981 Kar 197).

10. The first objection raised by the JD is that the foreign judgment falls within the exception clause of section 13(b) CPC, i.e. it has not been given 'on the merits of the case', rather it is on the basis of a settlement agreement between the parties. In support of that objection, Mr. Arshad Tayebaly Advocate placed reliance on *Gudemetla China Appalaraju v. Kota Venkata Subba Rao* (AIR (33) 1946 Madras 296). In that case a consent decree was passed by a court in a territory in India governed under French law, and a single Judge of the Madras High Court held that such decree was not on the merits of

the case and thus hit by section 13(b) CPC. It appears that such finding was given in facts where no dispute/case was pending between the parties before the foreign court, rather they had approached that court with a draft consent decree so as to create a collateral for a contract between them inasmuch as, under the French law prevailing in that territory, immovable property thereat could only be made liable under a decree of a French court. On the other hand, in the instant case, the consent judgment was passed to dispose of a case pending between the parties before the foreign court. Therefore, the case of *Gudemetla* is clearly distinguishable. In fact, it was similarly distinguished by a Division Bench of the Rajasthan High Court in *Satya Narain v. Balachand* (AIR 1955 Rajasthan 59) to observe that *Gudemetla* was not for the view that judgments of foreign courts on compromise are not judgments on the merits of the case. The Division Bench then went on to hold:

> "6. …….. If, therefore, an 'ex parte' decree which was based on evidence is a judgment on merits, we feel that a judgment based on a compromise entered into by the parties is in no worse position, the place of evidence in such a case being taken by the consent of the defendants. What happened in this case was that the defendants originally contested the suit and filed their written statements. Later on, they decided to compromise the matter and a decree was passed on the basis of the compromise arrived at between the parties. We are of opinion that such a decree must be held to be conclusive and cannot be held to be one not on the merits."

Gudemetla was again distinguished in *Mohammad Abdulla v. P.M. Abdul Rahim* (AIR 1985 Madras 379) where it was held:

> "6. S. 13(b) by itself does not speak about any controversy. The element of controversy may be relevant only to find out whether the adjudication was on merits. …….. This is not a case of a judgment being obtained on the simple ground of non-appearance of the defendant or on his failure to comply with a provision of law. This is a case of a controversy existing on the date of the suit, which got solved by the judgment-debtor agreeing to take a decree subsequently. ……. If the procedure adopted by a foreign Court permitted the passing on of a judgment on service of summons duly on the defendant and taking note of a written consent for a decree by the defendant, it would still be a judgment on merits, having all qualities of a judgment."

11. Given the case-law discussed above, it cannot be laid down as a rule that every foreign judgment by consent of the parties is not a judgment on the merits of the case so as to attract section 13(b) CPC. The case-law shows that where such question is raised, the enforcing Court inevitably considers the circumstances in which the judgment came to be passed by consent. Therefore, I proceed to examine that aspect.

12. Recitals to the Settlement Agreement show that the parties were litigating under contracts of supply of gasoil and fuel oil where under shipments were made by the DH to the JD at Karachi. The foreign court seized of the case had split the trial into two parts, the first to determine liability between the parties, and the second to determine quantum of liability. The first part of the trial determined against the JD by judgment dated 16-02-2017 (reported as *Mena Energy DMCC v. Hascol Petroleum Ltd.*, [2017] 1 Lloyd's Law Reports 607). It was just before the second part of the trial that the parties came to an agreement on the quantum of the JD's liability and the manner of its payment to the DH, i.e. the Settlement Agreement dated 19-01-2018, which was then modified by an Addendum dated 23-01-2018.

13. Under the Settlement Agreement, the JD agreed to pay a sum of USD 9,500,000/- in full and final settlement of the DH's claim pending before the foreign court, in four installments commencing from 19-05-2018 (clause 1.2) by remitting the same to the DH's bank account at Dubai (clause 2.1). In the meanwhile, the JD was to provide to the DH bank guarantees in PKR equivalent to each installment from a bank in Pakistan (clause 5). The parties agreed to retain with an escrow drafts of four consent judgments duly signed by the parties, the first one being for USD 9,500,000/-, with the stipulation that if the JD does not pay the first installment or does not furnish the bank guarantee, then the entire amount of USD 9,500,000/- will immediately become due and owing, and the DH will be at liberty to present the consent judgment to the foreign court with the prayer to

pass/seal the same and proceed to enforce it (clauses 6.1, 6.2 and 6.7 as modified by the Addendum). Upon the execution of the Settlement Agreement the parties agreed to apply to the foreign court for a consent order to stay the case pending before it until the enforcement of the Settlement Agreement becomes necessary (clause 7).

The JD did not make any payment under the Settlement Agreement, nor did it provide the agreed bank guarantees. Therefore, the DH presented the draft of the first consent judgment of USD 9,500,000/- to the foreign court with an application to pass/seal the same. Notice of that application was given to the JD. However, the JD's Solicitors informed the foreign court that the JD did not wish to contest the passing/sealing of the consent judgment (pages 33 and 237); and that is how it came to be passed.

14. Thus, before the foreign court the circumstances were that by a prior judgment the JD had already been held liable to make payment to the DH; that pending trial for determining the quantum of the JD's liability, the JD agreed to pay a certain sum to the DH in full and final settlement; and then on its failure to pay, the JD consented to the passing of a judgment against it for the agreed sum. In my view, those circumstances were the very 'merits of the case' before the foreign court on which it proceeded to pass judgment. Surely, the words 'merits of the case' in section 13(b) of the CPC are not intended to require a discussion of the evidence in a case where the defendant accepts liability and concedes judgment. The case of *Satya Narain supra* takes the same view. Therefore, in the given circumstances, the foreign judgment against the JD was on the merits of the case, not falling under clause (b) of section 13 CPC.

15. Mr. Arshad Tayebaly, learned counsel for the JD had then relied on *Peer Dil v. Dad Muhammad* (2009 SCMR 1268) to submit that against a compromise decree, which is essentially a contract between the parties, the remedy of the aggrieved party is not an Execution but a suit for breach of contract. However, one look at the foreign judgment/decree reproduced above will show that though it is by

consent of the parties, it is not a compromise decree in the sense propounded by learned counsel, in that it does not incorporate the terms of the Settlement Agreement nor does it direct the JD to make payment in line with its contract with the DH. Rather it is a money decree directing the JD to pay "forthwith". The circumstances leading to the foreign decree clearly show that it came to be passed not to maintain the Settlement Agreement, but as a consequence of the breach of the Settlement Agreement.

16. Nevertheless, *Peer Dil's* case does not expound the argument of learned counsel for the JD. In that case, the facts were that during arbitration the parties arrived at a compromise resulting in a consent award which was then made rule of court by decree. Subsequently, the party who alleged breach of the consent award filed suit for specific performance. The other party contended that the suit was barred by *res judicata* by reason of the decree whereby the award was made rule of court. To that objection to the maintainability of the suit the Supreme Court answered that since the decree was of a compromise agreement, it was essentially a contract, and on the breach thereof a fresh cause of action had arisen making the suit maintainable. Regards the question whether a compromise decree is executable, it was observed that: "Whether a subsequent suit is barred by reason of section 47 CPC depends upon the existence of a decree which is executable for the purpose of the relief sought to be enforced in subsequent suit." Thus, *Peer Dil* does not lay down that a compromise decree can never be executed, but that a fresh suit to enforce the compromise agreement can be filed where the compromise decree does not cover the relief sought in the fresh suit. In *Montgomery Flour and General Mills v. MCB Bank Ltd.* (2015 CLD 1590) a learned Division Bench of the Lahore High Court had also observed that *Peer Dil* does not bar execution of all compromise decrees.

17. Clause 3 of the Settlement Agreement recognized that in order for the JD to make payment to the DH out of Pakistan, the JD would be required to obtain the SBP approval, and the JD undertook to use its best endeavors to obtain such approval. Mr. Arshad Tayebaly submitted that clause 3 of the Settlement Agreement was incorporated keeping in view section 5 of the Foreign Exchange Regulation Act, 1947 prevalent in Pakistan which places a restriction on payments from Pakistan to a person resident outside Pakistan except with the approval of the SBP. Learned counsel therefore submitted that under the Settlement Agreement the SBP approval was a condition to payment, and until such approval is given by the SBP the decree is inexecutable. However, in taking such stance learned counsel did not demonstrate that the JD is otherwise willing and able to make payment. Clause 4 of the Settlement Agreement had provided that if the SBP approval is not obtained prior to the due date of an installment, the JD shall pay simple interest on the installment @ 6% per annum unless the JD deposits an equivalent amount in PKR in an Escrow Account in Pakistan pending the SBP approval. Though the JD did make an application to the SBP for the requisite approval, but pending such approval it did not opt to deposit the money in an escrow account to avoid interest, nor is it willing to make the deposit in Court. Therefore, the case is not that the JD is ready with the payment but for the SBP approval.

18. Nonetheless, as already stated, the foreign decree does not require payment to be made as per the Settlement Agreement, but it is a money decree. This Execution is brought to enforce the money decree, not the Settlement Agreement. Therefore, the commitment of the JD under clause 3 of the Settlement Agreement that it will obtain the SBP approval, is no impediment to the Execution of the foreign decree. This is not to say that the provisions of the Foreign Exchange Regulation Act, 1947 are ignored by the foreign decree, but only that the DH has been left to the law that is applicable to enforce the decree. Presently, when there is no amount available for remitting to

the DH abroad, the provisions of section 5 of the Foreign Exchange Regulation Act have yet to be triggered. At this stage, recovery of that amount is being sought by attachment and sale of the local assets of the JD, which proceeds, if any, will obviously materialize in Pakistani rupee with this Court. It will then be for the DH to obtain the approvals required under the Foreign Exchange Regulation Act, 1947 read with the Protection of Economic Reforms Act, 1992 for converting and transferring that money abroad.

19. The last objection raised by Mr. Arshad Tayebaly was that that this Court does not have jurisdiction inasmuch as, by clause 16 of the Settlement Agreement the parties had agreed that only the Courts of England and Wales would have jurisdiction to decide any dispute arising under or in connection with the Settlement Agreement. However, as already discussed, the matter before this Court is for execution of the foreign decree under section 44-A CPC, and not for adjudicating any dispute between the parties under or in connection with the Settlement Agreement. Therefore, clause 16 of the Settlement Agreement is also no impediment to this Execution.

20. To conclude, the foreign decree is conclusive between the parties within the meaning of section 13 CPC and is executable under section 44-A CPC. Consequently, **the objections of the JD are dismissed and the Execution is allowed.**

The assets of the JD that are sought to be attached and sold are mentioned in the Execution Application read with CMA No.s 300/2019 and 301/2019. Under cover of statements dated 28-04-2021 and 05-05-2021 the JD has also filed a list of its assets. Therefore, subject to any charge or encumbrance existing on those assets, and as a first step towards execution, the following assets of the JD are hereby attached until further orders as follows:

(i) The JD is prohibited from transferring the shares held by it in the following companies together with any bonus and right shares:

(a) Hascombe Lubricants (Pvt.) Ltd.,
having its office at Suite No. 105-106, The Forum, Khayaban-e-Jami, Block 9, Clifton, Karachi;

(b) VAS LNG (Pvt.) Ltd.
having its office at Suite No. 102, 1st Floor, The Forum, Khayaban-e-Jami, Block 9, Clifton, Karachi;

(c) Hascol Terminals Ltd.
having its office at Plot No.s D-15 to D-18, G5 and G6, North Western Industrial Zone, Port Qasim Authority, Bin Qasim, Karachi.

(ii) The JD is prohibited from withdrawing or transferring the credit balances of its bank accounts maintained with the banks listed in CMA No. 300/2019, the details of which are in Appendix 'A' to this order (filed by the JD), and said banks are restrained accordingly.

(iii) The JD is prohibited from transferring or charging in any way the immovable properties listed in Appendix 'B' to this order.

The above order of attachment of movables shall be transmitted by the office to the companies and banks mentioned in sub-paras (i) and (ii) above as per Order XXI Rule 46(2) CPC, and said companies and banks shall report compliance to the Nazir of this Court. Along with the relevant compliance of Order XXI Rule 54(2) CPC, the attachment order of the immovable properties in sub-para (iii) above shall be communicated to the relevant record keepers and Registrar of properties. CMA No. 143/2021 stands disposed of as above.

JUDGE

Karachi
Dated: 12-10-2021