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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
PAMIDIGHANTAM SRI NARASIMHA; J., ALOK ARADHE; J.
SLP (C) NO. 4774 OF 2023; April 21, 2026

MESSER GRIESHEIM GMBH (NOW CALLED AIR LIQUIDE DEUTSCHLAND GMBH)
versus
GOYAL MG GASES PRIVATE LIMITED

Code of Civil Procedure, 1908 - Section 13(b) – Foreign Judgment 'On Merits' vs. Summary Judgment - A foreign decree cannot be regarded as having been rendered "on the merits" within the meaning of Section 13(b) of the CPC if it is passed without any investigation into the substantive issues or where a party is foreclosed from a full opportunity to defend despite disclosing bona fide triable issues - Adjudication by way of a summary procedure, which refuses leave to defend in the face of highly contested facts and statutory contemporaneous documents (such as audited Balance Sheets under the Companies Act), amounts to a premature adjudication that denies a fair trial. *[Paras 41, 46, 52-86]*

Code of Civil Procedure, 1908 - Section 13(b), (c), (d), and (f) – Refusal to Enforce Summary Foreign Judgment: Even if a foreign court (English Court) is a court of competent jurisdiction by contractual agreement, its summary judgment is unenforceable in India under Section 44A if it fails the substantive tests of Section 13 - Denying leave to defend where triable issues exist violates procedural fairness [Section 13(d)]; failing to consider binding statutory conditions imposed by Indian regulatory authorities attracts Section 13(c); and enforcing a liability in direct breach of those statutory conditions brings the decree within the prohibition of Section 13(f). *[Paras 85, 86, 87]*

Foreign Exchange Regulation Act, 1973 (FERA) - Section 47 – Statutory Scheme Governing Enforcement vs. Initiation of Proceedings - There is a clear statutory and conscious distinction under Section 47 of FERA between the initiation of legal proceedings to determine liability and the subsequent taking of steps for the purpose of enforcing a judgment - While there is no absolute legal bar or prohibition for an Indian or foreign court to adjudicate and determine contractual liability, the actual enforcement or execution of such an adjudicated sum or decree is strictly subject to the regulatory regime of the State - Prior approval/permission of the Central Government or the Reserve Bank of India (RBI) is a sine qua non(mandatory condition precedent) before any steps can be set in motion for the execution of such a decree. *[Relied on Alcon Electronics (P) Ltd. v. Celem S.A. of France, (2017) 2 SCC 253; International Woollen Mills v. Standard Wool (U.K.) Ltd., (2001) 5 SCC 265; IDBI Trusteeship Services Ltd. v. Hubtown Ltd., (2017) 1 SCC 568; LIC of India v. Escorts Ltd., (1986) 1 SCC 264; Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644; Paras 33, 34, 73-81]*

[Arising out of impugned final judgment and order dated 21-12-2022 in EFAOS No. 3/2014 passed by the High Court of Delhi at New Delhi]

For Petitioner(s): Ms. Mohna, AOR

For Respondent(s): Mr. P Chidhambaram, Sr. Adv. Mr. Anil Kumar, AOR Mr. Simran Mehta, Adv. Mr. Ramesh Allanki, Adv. Mr. Aruna Gupta, Adv.

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JUDGMENT

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I. Introduction

1. Leave granted.

2. This civil appeal is against the judgment and order passed by the Division Bench of the High Court of Delhi[1], refusing to enforce a foreign judgment passed by the High Court of Justice, Queens Bench Division (English Court) for being non-compliant of the requirements of Section 13 of the Code of Civil Procedure, 1908 (CPC). Two questions have arisen for our consideration. The first relates to the enforceability of the summary judgment on the ground that it violates principles of natural justice for not giving sufficient opportunity to the respondent/defendant. The second relates to the bar of enforcement in view of the conditional *prior permission* given by the Reserve Bank of India (RBI) under the repealed Foreign Exchange Regulation Act, 1973 (FERA).

2.1 For the reasons to follow, we have explained how shifting from its 'default judgment' to a summary jurisdiction and proceeding to decree the suit filed by appellant, after dismissing the respondent's application for leave to defend has denied fair trial to respondent, thereby rendering the foreign judgment unenforceable as per Section 13

[1] In EFA(OS) No. 3/2014, dated 21.12.2022.

CPC. We have thus upheld the decision of the Division Bench and dismissed the Civil Appeal.

2.2 In this view of the matter, the other question did not arise for consideration. However, in order to clarify the position of law and in view of the detailed submissions of learned counsels, we answered the issue and held that under Section 47 of FERA, there is a distinction between the *'legal proceedings being brought in India'* and *'no steps shall be taken for the purpose of enforcing.'* While there is no prohibition for initiating legal proceedings, but before taking necessary *steps* for enforcement of the decree, permission of the Central Government/RBI is necessary. In other words, while there is no bar for Courts to determine and adjudicate the liability, its enforcement will be subject to the regulatory regime of the State. This interpretation balances the values of *access to justice* and the *regulatory control.* To this extent, the judgment of the High Court stands reversed on the principle of law as it applied at the relevant time.

II. Facts

3. The dispute originates from a Share Purchase and Co-operation Agreement (SPCA) executed on 12.05.1995 between the appellant, a foreign company and the respondent, an Indian Company, for establishing a joint venture company in India for manufacturing and conducting business in industrial gases. Subsequently, by an addendum dated 07.11.1996, the appellant's shareholding was increased from 30% to 49%, and three nominee directors were appointed to the respondent's Board.

On the same day, parties also entered into a Technical Collaboration Agreement relating to the supply of helium gas.

4. At a Board meeting, the respondent made a decision to obtain overseas borrowing for financing the acquisition of plants and machinery, and the nominee directors of the appellant assured the arrangement of such funds. This agreement fructified in arranging such funding through Citibank UK (lender Bank), which sanctioned External Commercial Borrowing (ECB) facility up to USD 7 million. The lender bank's sanction was subject to the respondent obtaining necessary approvals from the Government of India and the RBI. That was a time when foreign exchange was regulated under the FERA.

5. On 02.04.1997, the Government of India granted permission for the ECB and directed the respondent to obtain RBI approval under the FERA. The permission stipulated that, *"no additional foreign exchange liability, either express or implied, is being assumed under the arrangements."* Thereafter, RBI granted an in-principle approval on 28.05.1997, subject to compliance with the Government's conditions and final RBI approval.

6. On 30.06.1997, the respondent executed the Loan Agreement with Citibank N.A., London, and the appellant irrevocably and unconditionally guaranteed the due repayment and performance of all obligations of the borrower and undertook to pay, upon first demand, any amount due and payable by the borrower but remaining unpaid.

7. The Agreement provided that it would be governed by English law[2], and also that the parties submitted to the jurisdiction of the English Courts for adjudication of disputes, waived objections to such forum, and consented to the enforcement and execution of any judgment passed against their properties.[3] It was further stipulated that any judgment

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[2] **Clause 31.1 English Law:** This Agreement shall be governed by, and shall be construed in accordance with English law.

[3] **Clause 31.2 English Courts**: Each of the parties hereto irrevocably· agrees for the benefit of each of the Agent, the Arranger and the Banks that the courts of England shall have jurisdiction to hear and determine any suit, action or proceedings, and to settle any disputes, which may arise out of or in connection with this Agreement (respectively

obtained in England would be recognized and enforced, subject to the provisions of Section 13 of CPC in case of enforcement in India.[4] The Obligors undertook to obtain and maintain all necessary authorisations and approvals required under applicable laws to ensure the legality and enforceability of the Agreement[5], and the Guarantor was entitled, upon discharge of its obligations, to be subrogated to the rights of the lenders against the Borrower.[6]

8. On 24.07.1997, the Government of India recorded the loan agreement and clarified that provisions inconsistent with its earlier sanction would be void and not binding on the Government or RBI. Subsequently, the RBI granted final approval on 12.08.1997 while leaving the guarantee issue open. On 03.09.1997, the RBI permitted the furnishing of a guarantee by the appellant, subject to two conditions: (i) *"There is no outgo of foreign exchange by way of any fee, direct or indirect, for the proposed guarantee" and* (ii) *"in case of invocation of guarantee, no liability whatsoever will extend to the Indian Company."*

9. During the period of 1997-1998, certain disputes concerning the acquisition of another company by the appellant, which, according to the respondent, was in violation of a non-compete clause contained in the SPCA, arose between the parties. Litigation ensued before the Bombay High Court and Delhi High Court, however, details of such disputes are not relevant for the present purposes.

10. While the parties were engaged in multiple proceedings across judicial forums, the lender-bank, on 08.10.2001, invoked the guarantee against the appellant due to default in repayment by the respondent. The appellant promptly discharged the outstanding liability amounting to USD 4.78 million together with interest on 09.10.2001 and demanded reimbursement by invoking the subrogation clause of the loan agreement. Respondent failed to make payment and asserted that the amount paid was in partial discharge of other liabilities owed by the appellant to the respondent and not under subrogation rights.

III. Judgment of the English Court and the Execution Proceedings initiated by Appellant:

11. On 17.01.2003, the appellant instituted proceedings before the English Court seeking recovery of the amount paid under the guarantee. Respondent did not enter

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"Proceedings" and "Disputes") and, for such purposes irrevocably submits to the jurisdiction of such courts. 31.3 Appropriate Forum: Each of the Obligors irrevocably waives any objection which it might now or hereafter have to the courts referred to in Clause 31.2 (English Courts) being nominated as the forum to hear and determine any Proceedings and to settle any Disputes and agree not to claim that any such court is not a convenient or appropriate forum.

Clause 31.3 Appropriate Forum: Each of the Obligors irrevocably waives any objection which it might now or hereafter have to the courts referred to in Clause 31.2 (English Courts) being nominated as the forum to hear and determine any Proceedings and to settle any Disputes and agree not to claim that any such court is not a convenient or appropriate forum.

Clause 31.6 Consent to Enforcement: Each of the Obligors hereby consents generally in respect of any Proceedings to the giving of any relief or the issue of any 'process in connection with such Proceedings including the making, enforcement or execution against any property whatsoever (irrespective of its use or intended use) of any order or judgment which may be made or given in such proceedings.

[4] **Clause 12.5 Governing Law and Judgments:** In any proceedings taken in its jurisdiction of incorporation in relation to this Agreement, the. choice of English law as the governing law of this Agreement and any judgment obtained in England will be recognized and (subject, in the case of enforcement in India, to the provisions of section 13 of the Code of Civil Procedure 1908 of India) enforced.

[5] **Clause 14.1 Maintenance of Legal Validity:** Each of the Obligors shall be obtain, comply with the terms of and do all that is necessary to maintain in full force and effect all authorisations, approvals, licences and consents required in or by the laws and regulations of its jurisdiction of incorporation to enable it lawfully to enter into and perform its obligations under this Agreement and to ensure the legality, validity, enforceability or admissibility in evidence in its jurisdiction of incorporation of this Agreement.

[6] **Clause 16.12 Subrogation**: When the Guarantor has met its obligations in full under this guarantee and indemnity, it shall be subrogated· to the rights under this Agreement of the Banks and Agent against the Borrower.

appearance or file a reply, and consequently, on 06.02.2003, the English Court passed a default judgment directing payment of USD 5,120,833.56 with interest at 8% per annum along with costs.

12. Thereafter, on 25.03.2003, the appellant issued a statutory notice under Sections 433(e) read with 434(1)(a) of the Companies Act, 1956, seeking winding up of the respondent-company based on the default judgment. The respondent replied, contending that the foreign judgment was not enforceable in India as it was passed *ex parte* and did not constitute a judgment on the merits under Indian law.

13. Faced with the situation of unenforceability, the appellant applied for the setting aside of the default judgment and requested the passing of a summary judgment on the merits as per the rules of the UK High Court. Respondent being duly served, contested the invocation of proceedings before the English Court and contended that it has good defences on merits and that, the adjudication should not be under summary jurisdiction. Further, the respondent also contested that the default judgment should not be set aside.

14. On 07.02.2006, the English Court, however, passed a summary judgment against the respondent after setting aside the earlier default judgment. Respondent was directed to pay USD 5,824,564.74 and Euro 31,364.74 together with interest at 8% per annum and costs of 90,000 Pounds. No appeal was filed by the respondent against the said judgment.

15. Thereafter, on 21.02.2006, the appellant sold its entire 49% shareholding in the respondent company to existing shareholders, resulting in the respondent ceasing to be a joint venture company. On 26.04.2006, the appellant filed an execution petition before the Delhi High Court under Section 44A of the CPC seeking execution of the UK decree in India. A winding-up petition was also filed to enforce the decretal sum.

16. By judgment dated 29.11.2013, the learned Single Judge of the Delhi High Court dismissed the respondent's objections under Section 13 of CPC and held that the English Court's judgment was passed on merits and was enforceable in India. The Court also directed the respondent to pay the decretal sum within twelve weeks and to secure the amount by depositing title deeds of property free from encumbrances.

17. Aggrieved by the dismissal of the objections, the respondent filed an appeal before the Division Bench, which by judgment dated 01.07.2014, held that the Delhi High Court was not a "District Court" under Section 44A CPC and, therefore, lacked jurisdiction to execute the foreign decree. Accordingly, the execution petition was directed to be transferred to the competent District Court and the objections were to be decided afresh. The said judgment was challenged before this Court.

18. By judgment dated 28.01.2022 [7] this Court set aside the judgment dated 01.07.2014, and held that jurisdiction to execute foreign decrees under Section 44A vests in the Delhi High Court in exercise of its original civil jurisdiction. The appeal before the Division Bench was restored for decision on merits.

IV. Analysis of the Impugned Order

19. The Division Bench of the Delhi High Court heard the appeal, and by its judgment dated 21.12.2022, the appeal was allowed, and the order dated 29.11.2013 of the Single Judge was set aside.

20. By the order impugned before us, it was held that the foreign judgment was contrary to the provisions of law in force in India and had been rendered without consideration of

[7] Griesheim GmbH v. Goyal MG Gases (P) Ltd., (2022) 11 SCC 549.

material evidence, thereby attracting the bar under Section 13 of CPC. Upon examination of the Balance Sheets and Minutes of the Meetings of the Board of Directors dated 27.05.2002 and 31.01.2003, the Division Bench observed that repayment of the loan by the appellant and its treatment as an adjustment against the claims of the respondent had been expressly recorded therein. It was further noted that the said documents were duly approved in meetings attended by the nominee director of the appellant, who had signed and seconded the resolutions, and that in view of Sections 211 and 215 of the Companies Act, 1956, such Balance Sheets were required to present a true and fair view of the financial position of the company, thereby indicating that no liability remained due from the respondent to the appellant.

21. The Division Bench further held that the English Court, while passing summary judgment, had failed to consider material evidence, including the aforesaid Balance Sheets, Minutes of Meetings and relevant correspondence, particularly the e-mail dated 20.02.2003 issued by the respondent disputing the alleged liability. It was also held that the conditions imposed by the RBI in its approval dated 03.09.1997, including the stipulation that no liability would be fastened upon the respondent upon invocation of the guarantee, continued to govern the transaction. The Division Bench observed that the English Court had neither taken into account binding conditions nor the applicable legal regime prevailing at the relevant time. In this view of the matter, the Division Bench held that the foreign judgment does not satisfy the requirement of Section 13 of the CPC for enforcement in India.

V. Submissions

A. On behalf of the Appellant

22. Learned senior counsel Dr A.M. Singhvi commenced his argument by stating that this case serves as a classic example of the old saying that *the difficulties of the litigant in India begin when he has obtained a decree*. The submissions of the learned senior counsel can be formulated as follows:

22.1 Decree passed by the English Court was valid, binding and enforceable in India, and did not fall within any of the exceptions enumerated under Section 13 of the CPC. It was contended that upon discharge of the outstanding loan liability pursuant to invocation of the guarantee, the appellant became subrogated to the rights of the lender under the Loan Agreement and was therefore entitled to recover the amounts paid from the respondent.

22.2 The English Court was a court of competent jurisdiction, as the Loan Agreement expressly provided that English law would govern the contract and that disputes would be subject to the jurisdiction of the English Courts. Respondent voluntarily submitted to the jurisdiction of the English Court and participated in the proceedings without objecting to jurisdiction. Respondent is estopped from raising any objections as regards the judgment, decree and enforceability of the foreign judgment.

22.3 Decree passed by the English Court was a judgment on merits, rendered after consideration of pleadings and evidence, and therefore did not attract the bar under Section 13(b) of CPC. It was submitted that mere adoption of a summary procedure or absence of cross-examination would not render the decree opposed to natural justice, particularly when the respondent had been afforded sufficient opportunity to contest the proceedings.

22.4 Further, the decree was not contrary to Indian law and did not violate the provisions of the FERA or any RBI conditions. It was contended that even assuming that regulatory

permissions were required, such permission could be obtained at the stage of remittance and not prior thereto.[8] It was also urged that the repeal of the FERA and its replacement by the Foreign Exchange Management Act indicated a liberalised regime governing foreign exchange transactions, thereby removing any impediment to the enforcement of the decree.

22.5 RBI had issued subsequent circulars granting general permission for repayment by an Indian borrower to a foreign guarantor, and that such circulars superseded earlier conditional approvals relied upon by the respondent. Learned senior counsel contended that the conditions imposed by the RBI were regulatory in nature and did not extinguish the contractual rights of subrogation arising in favour of the appellant upon payment under the guarantee.

22.6 Appellant also denied that the Balance Sheets and financial statements of the respondent constituted any admission of non-liability. It was submitted that the appellant had consistently recorded dissent to the treatment of the loan in the financial statements and had sought reconstitution of the Board and an independent audit of accounts. It was urged that objections relating to findings of fact by the English Court could not be raised in execution proceedings in India once the foreign judgment had attained finality.

22.7 Lastly, it was stated that an executing court cannot go behind the decree.

B. On behalf of Respondent

23. Learned senior counsel, Mr P. Chidambaram, appeared on behalf of the respondent and supported the conclusions drawn by the Division Bench of the High Court of Delhi, holding that the foreign decree is unenforceable under Section 13 read with Section 44A of CPC. Details of his submissions are as follows:

23.1 The primary submission is that the judgment of the English Court is not enforceable in India, as it is contrary to the provisions of Section 13 of the CPC. It is contended that fastening liability upon the respondent pursuant to the invocation of the guarantee is in violation of the statutory permissions granted by the RBI under the FERA, 1973, which expressly stipulated that no liability would extend to the Indian company in the event of the invocation of the guarantee.

23.2 The English Court had ignored the mandatory provisions of Indian law, including the conditions imposed by the RBI, while granting approval for the loan transaction. Such permissions formed an integral part of the transaction and were binding upon the parties, and that disregard of those statutory conditions rendered the foreign judgment liable to be refused for enforcement under Section 13(c) and Section 13(f) of the CPC.

23.3 Provisions of FERA continued to apply notwithstanding its repeal, as the permissions granted thereunder were preserved under the savings clause contained in the Foreign Exchange Management Act, 1999 (FEMA). It is further submitted that any transaction undertaken in violation of mandatory permissions granted under the earlier regime would remain unenforceable in law.

23.4 Balance sheets and financial statements of the respondent for the relevant years clearly reflect that there exists no subsisting liability upon the respondent, and that the relevant documents were duly approved and signed by the concerned parties, including the nominee director of the appellant. He would submit that under the provisions of the

[8] For the purpose he relied on the decision of this Court in *Renusagar Power Co.* vs. *General Electric* (1994) Supp. (1) SCC 644; LIC Vs. Escort (1986) 1 SCC 264.

Companies Act, 1956, such financial statements constituted an admission of the financial position of the company and could not be disregarded while determining liability.

23.5 Judgment of the English Court was not rendered on the merits, and the respondent was not afforded an adequate opportunity to defend the proceedings. Learned senior counsel contended that the absence of a full trial, including opportunity for cross-examination, and the summary nature of the proceedings resulted in a violation of principles of natural justice.

23.6 RBI circulars dated 01.07.2013 and 10.12.2021, relied upon by the appellant, are inapplicable as they pertain only to cases where the creditor bank is in India, and the creditor bank in the present case is in England. Nonetheless, even if the abovementioned circulars were applicable, the specific permission issued by the RBI in exercise of its statutory powers has statutory force and would not be considered rescinded by the general circular.

23.7 Judgment of the English Court is in violation of Indian laws, namely the FERA, the Companies Act and the RBI directions that have force of law in India, hence on this ground alone the enforcement of the foreign judgment must be denied.

VI. Statutory Scheme Governing Enforcement of Foreign Judgments:

24. The statutory framework governing the recognition and enforcement of foreign judgments in India is principally contained in Sections 2(5), 2(6), 13, 14, and 44A of the CPC. Section 2(6) defines a "foreign judgment" as the judgment of a foreign court, while Section 2(5) defines a "foreign court" as a court situated outside India and not established by the authority of the Central Government.

25. The procedural mechanism for the execution of foreign decrees is primarily governed by Section 44A CPC, which provides a special mode for the enforcement of decrees passed by superior courts of reciprocating territories. Under sub-section (1) of Section 44A, a certified copy of a decree passed by a superior court of a reciprocating territory may be filed in a District Court in India, and the decree may thereafter be executed as if it had been passed by the District Court itself. The expression "reciprocating territory" under Section 44A refers to any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of the section.

26. The enforcement of a foreign decree can be refused 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. Section 13 is reproduced herein for ready reference:

"***13. When foreign judgment is 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 recognise the law of India 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 India."

27. The legislative intent underlying Section 13 reflects the principle of comity of courts and recognition of final adjudications rendered by competent foreign tribunals, subject only to narrowly construed exceptions.[9] The principles governing conclusiveness under Section 13 CPC may broadly be summarised as follows:

(a) *Court of competent jurisdiction*: A foreign judgment is not conclusive unless it is pronounced by a court of competent jurisdiction, both under the law of the foreign country and in the international sense recognised under private international law.[10]

(b) *Judgment to be on Merits*: A judgment must be rendered on merits, meaning that the court must have considered the evidence and adjudicated upon the substantive rights of the parties. A decree passed mechanically, by default, or without examination of the objections would not be conclusive.[11]

(c) *Incorrect View of International Law or Refusal to Recognise Indian Law*: A foreign judgment would not be conclusive where it is founded on an incorrect view of international law or refuses to recognise the law of India in cases where such law is applicable.[12]

(d) *Proceedings Opposed to Natural Justice*: A judgment rendered in violation of principles of natural justice, including absence of proper notice or denial of opportunity of hearing, is not enforceable. The requirement of natural justice relates to procedural fairness and not to the correctness of the decision on merits.[13]

(e) *Judgment Obtained by Fraud:* foreign judgment obtained by fraud is not entitled to recognition, and the fraud contemplated includes not only fraud on merits but also fraud relating to jurisdictional facts.[14]

(f) *Judgment Sustaining a Claim Founded on Breach of Indian Law:* foreign judgment sustaining a claim that is contrary to Indian law in force shall not be recognised or enforced in India.

VII. Issues for consideration

28. On the basis of the submissions advanced by the appellant and the respondent, two broad issues arise for consideration.

I. Whether the judgment of the English Court is in consonance with the requirements of Section 13 of CPC read with 44A.

II. Whether the judgment is rendered unenforceable in view of the conditions imposed by RBI in exercise of the statutory power under FERA.

Re: Issue I. Whether the judgment of the English Court is in consonance with the requirements of Section 13 of CPC read with 44A.

29. As already indicated, pursuant to the permission granted by RBI, Citibank disbursed the loan on 28.10.1997. It is a matter of record that respondent even paid first two instalments on 23.09.1999 and 30.09.2000. It is in this backdrop that the facts leading to initiation of the present legal proceedings and concluding with the judgment impugned be required to be examined in detail.

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[9] Alcon Electronics (P) Ltd. v. Celem S.A. of France, (2017) 2 SCC 253.
[10] R. Viswanathan vs Rukn-Ul-Mulk Syed Abdul Wajid, 1962 SCC OnLine SC 112.
[11] Alcon Electronics (P) Ltd (supra); China Shipping Development Co. Ltd. v. Lanyard Foods Ltd., (2008) 142 Comp Cas 647.
[12] Y. Narasimha Rao v. Y. Venkata Lakshmi, (1991) 3 SCC 451.
[13] Sankaran Govindan v. Lakshmi Bharathi, (1975) 3 SCC 351; R. Viswanathan (supra).
[14] Satya v. Teja Singh, (1975) 1 SCC 120.

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30. Certain disputes relating to alleged breaches of the SPCA and TSSA, particularly concerning the non-compete clause, arose between the appellant and the respondent. Around the same time, the appellant seem to have expressed its intention to disinvest in India. In view of the pending rights and liabilities of the parties, particularly in view of the alleged claim of approximately Rs. 500 Crore of the respondent against the appellant, parties are stated to have arrived at a mutual understanding that the appellant would discharge the respondent's debt to the lender bank, as a set off to the claims of the respondent.

31. It is the case of the respondent that instead of abiding by the terms of the agreement, appellant initiated legal proceedings before the English Court. This resulted in a default judgment dated 06.02.2003 directing the respondent to pay USD 5,120,833.56 with interest at 8% per annum, along with costs. Having realised the difficulty in enforcing a default judgment, the appellant filed an application on 06.07.2005 seeking its recall and for passing of a summary judgment. Consequently, the application was accepted and summary proceedings were permitted.

32. Before the English Court, the respondent raised various defences, including those relating to the three agreements said to be subsisted between the parties. These defences are also recorded in the UK judgment and are reproduced hereinbelow for ready reference:

"Defences"

"10. In reaching decisions on both applications, I think it essential first to consider the merits of Goyal's response to the substance of the claim made by Messer under the loan agreement. The basis of the response is to be found in two witness statements made by Mr Dhar, now the Deputy General Manager of Goyal. Goyal rely on three separate alleged agreements, albeit Mr Nash, counsel for Goyal, made it clear that the first was not put forward at the present hearing as itself providing any defence to the claim by Messer and the third is of more direct relevance to the exercise of the court's discretion in deciding whether or not to set aside the default judgment.

11. The first agreement is said to have been made orally at a meeting of Goyal' s board on 13 June 1997, and so some 2 weeks before the loan agreement was executed. Mr Dhar' s evidence is that it was then agreed that, in the event that Messer was called upon to pay under the proposed guarantee to be given to Citibank, it would not have recourse to either the other shareholders in Goyal or Goyal. I shall refer to this alleged agreement as "the June 1997 non-recourse agreement".

12. The second (also oral) agreement is said to have been made in August and September 2001. Messer is alleged to have agreed to pay the amounts outstanding under the loan agreement and not to look for repayment from Goyal. In April 2001, Goyal's lawyers in India had written to Messer making unspecified allegations of breaches by Messer of both the SPCA and the TSSA and claiming INR 5 billion (some US $ 111m) in damages. Mr Dhar's evidence is that he and Mr Goyal (representing the Indian shareholders of Goyal) had discussed the claim by Goyal in August and September 2001 with a Mr Allcock, one of Messer's nominated directors on the board of Goyal. Mr Dhar says that Mr Allcock wanted to reach a compromise and Messer was prepared to compensate Goyal and to continue with the joint venture. Mr Dhar continued:

"We discussed the settlement of Goyal' s claims against Messer, Goyal made it clear that it would only be prepared to settle the claims if Messer accepted responsibility for the balance owed by Goyal under the Loan Agreement. This was of critical importance to Goyal because a large proportion of that loan had been invested in assets which had to be written off after the disputes with Messer had arisen…. In return, Goyal would be responsible for the domestic borrowing and Goyal and the Goyal shareholders would not pursue certain claims against Messer. This deal was agreed between Mr Goyal and myself on behalf of the Goyal shareholders and Mr Allcock on behalf of Messer in September 2001. The parties proceeded with the joint venture in good faith.

The agreement set out above was considered by the Goyal shareholders to be a sensible commercial deal that would avoid further litigation with Messer. It was agreed that the particulars of this agreement would be discussed and finalised after Mr Allcock had discussed with his colleagues what was required to formalise the agreement."

13. I shall refer to this alleged agreement as the September 2001 Agreement.

14. The third agreement (also oral) on which Goyal (by Mr Dhar's evidence) relies is an agreement, or at least a representation, by Messer prior to the commencement of the proceedings in this court, that the proceedings were being brought for Messer's own internal purposes and, whilst they would culminate in a default judgment, that judgment would not be enforced. I shall refer to this alleged agreement as the December 2002 Agreement.

15. It is Mr Foxton's submission, on behalf of Messer, that these alleged agreements are "so lacking in credibility and cogency, and so inconsistent with the verifiable facts, that they cannot begin to justify a refusal to set aside the default judgment" nor provide, should it prove to be material, any real prospect of a successful defence to Messer's claim under CPR 24.2. I agree, I must therefore set out as succinctly but, I hope, sufficiently as I can my reasons for that conclusion."

33. The English Court proceeded to pronounce summary judgment after rejecting the respondent's application for leave to defend. It would be apposite, before proceeding further, to reproduce the operative portion of the judgment rendered by the English Court:

"Summary Judgment

54. I have already addressed such defences as Goyal has sought to raise. None, in my judgment, provide any real prospect of a defence to the claim succeeding. Messer is entitled to summary judgment. No issues have been raised on the amount of the claim. At 16 January 2006 the claim was for the principal sum of US$ 4,794,762.98 together with interest calculated in accordance with the loan agreement of US$ 996,842.94. A small further amount of interest will be due when this judgment is handed down. There is also a claim under clause 17.5 of the loan agreement to recover certain legal fees. If there are any points to be made on the precise amount of the Part 24 judgment to be entered they should be raised when this judgment is handed down if they cannot be agreed beforehand."

34. The principles relating to foreign determination acquiring the status of enforceability under Section 13 CPC is well articulated in the decision of this Court in, *Alcon Electronics (P) Ltd. v. Celem S.A. of France*[15], this Court noted that:

"*14. A plain reading of Section 13 CPC would show that to be conclusive an order or decree must have been obtained after following the due judicial process by giving reasonable notice and opportunity to all the proper and necessary parties to put forth their case. When once these requirements are fulfilled, the executing court cannot enquire into the validity, legality or otherwise of the judgment.*

16….. A judgment can be considered as a judgment passed on merits when the court deciding the case gives opportunity to the parties to the case to put forth their case and after considering the rival submissions, gives its decision in the form of an order or judgment, it is certainly an order on merits of the case in the context of interpretation of Section 13(c) CPC."

35. Reference must also be made to observations of this Court in *Sankaran Govindan v. Lakshmi Bharathi*[16] where it was held as under;

"*40….. The expression "contrary to natural justice" has figured so prominently in judicial statements that it is essential to fix its exact scope and meaning. When applied to foreign judgments, it merely relates to the alleged irregularities in procedure adopted by the adjudicating*

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[15] (2017) 2 SCC 253.
[16] (1975) 3 SCC 351.

court and has nothing to do with the merits of the case. If the proceedings be in accordance with the practice of the Foreign court but that practice is not in accordance with natural justice, this Court will not allow it to be concluded by them. In other words, the courts are vigilant to see that the defendant had not been deprived of an opportunity to present his side of the case. The wholesome maxim audi alteram partem is deemed to be universal, not merely of domestic application, and therefore, the only question is, whether the minors had an opportunity of contesting the proceedings in the English court…"

36. Further, this Court has taken a view in *International Woollen Mills v. Standard Wool (U.K.) Ltd.*[17] that;

"*17. ….To say that a decree has been passed regularly is completely different from saying that the decree has been passed on merits. An ex parte decree passed without consideration of merits may be a decree passed regular if permitted by the rules of that court. Such a decree would be valid in that country in which it is passed unless set aside by a court of appeal. However, even though it may be a valid and enforceable decree in that country, it would not be enforceable in India if it has not been passed on merits.*

18. In the case of Middle East Bank Ltd. v. Rajendra Singh Sethia a decree had been passed ex parte and without service of notice on the judgment-debtor. A number of authorities were cited before the Court including the case of Abdul Rahim. The Court held that even though a decree may be ex parte it may still be on merits provided it could be shown that the court had gone through the case made out by the plaintiff and considered the same and taken evidence of the witnesses put up by the plaintiff. It was held that if an ex parte decree was passed in a summary manner under a special procedure without going into the merits and without taking evidence then those decrees would not be executable in India. Based on this authority it was submitted that a decree could be said to be not on merits only if it is passed in a summary manner in any special or summary procedure. It was submitted that such a decree i.e. a decree which has not been passed in a summary manner in a summary proceeding would be a decree on merits. This authority itself makes it clear that the decree would not be on merits if the court has not gone through and considered the case of the plaintiff and taken evidence of the witnesses of the plaintiff. It must also be noted that in this case the Court ultimately held that the decree concerned was not a decree on merits."

(emphasis supplied)

37. In the execution proceedings, Ld. Single Judge took the view that the summary judgment of the English Court was pronounced after hearing the parties and after examining the witness statements. However, the Division Bench, by the order impugned before us observed as under;

"63. ….By not affording an opportunity to appellant/JD to defend its case, the English Court has not only deprived appellant/JD of its legitimate rights to defend itself but also it is against the interest of justice. Even if it is taken that the appellant's case was premised on weak foundation; at least an opportunity to stand before the Court should have been afforded to the appellant/JD."

(emphasis supplied)

38. We must also make a reference to the decision of this Court in *IDBI Trusteeship Services Ltd. v. Hubtown Ltd.*[18] wherein principles relating to grant of leave to defend after amendment of Order XXXVII Rule 3 CPC have been formulated in the following manner:

"17. Accordingly, the principles stated in para 8 of Mechelec case [will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in Milkhiram case , as follows:

[17] (2001) 5 SCC 265.
[18] (2017) 1 SCC 568

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17.1. If the defendant satisfies the court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.

17.2. If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.

17.3. Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.

17.4. If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5. If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.

17.6. If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court."

39. Further, following *IDBI* (supra), this Court in *B.L. Kashyap & Sons Ltd. v. JMS Steels and Power Corporation*[19] reiterated the principles in following manner:

"*33. It is at once clear that even though in IDBI Trusteeship , this Court has observed that the principles stated in para 8 of Mechelec Engineers case shall stand superseded in the wake of amendment of Rule 3 of Order 37 but, on the core theme, the principles remain the same that grant of leave to defend (with or without conditions) is the ordinary rule; and denial of leave to defend is an exception. Putting it in other words, generally, the prayer for leave to defend is to be denied in such cases where the defendant has practically no defence and is unable to give out even a semblance of triable issues before the court.*

33.2. Thus, it could be seen that in the case of substantial defence, the defendant is entitled to unconditional leave; and even in the case of a triable issue on a fair and reasonable defence, the defendant is ordinarily entitled to unconditional leave to defend. In case of doubts about the intent of the defendant or genuineness of the triable issues as also the probability of defence, the leave could yet be granted but while imposing conditions as to the time or mode of trial or payment or furnishing security. Thus, even in such cases of doubts or reservations, denial of leave to defend is not the rule; but appropriate conditions may be imposed while granting the leave. It is only in the case where the defendant is found to be having no substantial defence and/or raising no genuine triable issues coupled with the court's view that the defence is frivolous or vexatious that the leave to defend is to be refused and the plaintiff is entitled to judgment forthwith. Of course, in the case where any part of the amount claimed by the plaintiff is admitted by the defendant, leave to defend is not to be granted unless the amount so admitted is deposited by the defendant in the court.

33.3. Therefore, while dealing with an application seeking leave to defend, it would not be a correct approach to proceed as if denying the leave is the rule or that the leave to defend is to be granted only in exceptional cases or only in cases where the defence would appear to be a

[19] (2022) 3 SCC 294.

meritorious one. Even in the case of raising of triable issues, with the defendant indicating his having a fair or reasonable defence, he is ordinarily entitled to unconditional leave to defend unless there be any strong reason to deny the leave. It gets perforce reiterated that even if there remains a reasonable doubt about the probability of defence, sterner or higher conditions as stated above could be imposed while granting leave but, denying the leave would be ordinarily countenanced only in such cases where the defendant fails to show any genuine triable issue and the court finds the defence to be frivolous or vexatious."

(emphasis supplied)

40. Even while a Court adjudicates and determines a *lis* in summary jurisdiction, the Court must determine whether the defendant has a "realistic", as opposed to a merely "fanciful" prospect of success. A claim can be regarded as realistic only where it carries a degree of conviction and is more than merely arguable. At the same time, the jurisdiction to grant summary judgment is not intended to convert the proceeding into a "mini-trial", but rather to enable cases where there is no real prospect of success to be disposed of summarily. Nevertheless, the court is not required to accept factual assertions at face value without analysis, particularly where such assertions are contradicted by contemporaneous records. In forming its opinion, the court must consider not only the material actually placed before it at the summary stage but also such evidence as may reasonably be expected to be available at trial. Further, even where a matter does not initially appear complex or where no immediate conflict of fact is evident, the court ought to exercise caution in rendering a final determination without trial if reasonable grounds exist to believe that a fuller investigation into the facts may materially affect the outcome of the case.

41. We may now advert to the issue as to whether a judgment passed by a Foreign Court in a summary manner, by refusing to grant leave to defend, can be regarded as having been rendered "on the merits". A decree passed by Foreign Court may be treated as having been rendered "on the merits" where the Court has applied its mind to the substantive issues of the case. Conversely, where a decree is passed without any investigation into merits, it cannot be said to have been rendered "on the merits" within the meaning of Section 13(b) of the CPC. The Privy Council in *Daniel Thomas Keymer* v. *P. Viswanatham Reddi*[20] dealt with the issue whether a decree passed by the Foreign Court, in a case, where the defence was struck off, could be treated as one rendered on the merits.

The Privy Council answered the said issue in the negative, holding that such a decision could not be regarded as one on merits of the case within the meaning of Section 13(b) of the CPC. The aforesaid legal proposition was approved in *L. Oppenheim and Co.* v. *Hajee Mahomed Haneef Sahib*[21], wherein it was held that the decision of the English Court rendered in default of appearance, cannot be treated as one "on the merits". A similar view has been taken by Rajasthan High Court in *O.P. Verma* v. *Lala Gehrilal*[22], by the Madras High Court in *K.M. Abdul Jabbar* v. *Indo-Singapore Traders (P) Ltd.*[23], as well as by the Calcutta High Court in *Middle East Bank Ltd.* v. *Rajendra Singh Sethia*[24], which in our opinion, lays down the correct principle of law.

"**45.** On an earnest and careful consideration of the provisions contained in this Order, we find it difficult to hold that a decree passed in a suit brought under these provisions without

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[20] AIR 1916 PC 121.
[21] AIR 1922 PC 120
[22] 1960 SCC OnLine Raj 89
[23] 1980 SCC OnLine Mad 186
[24] 1990 SCC OnLine Cal 247

going into the merits of the case and because the defendant failed to appear or because he was not given leave to defend can be held to be a judgment on the merits of the case. The crucial consideration which persuades us to incline to this conclusion is that, in such a case, there is hardly any consideration of the contentions raided on behalf of the defendant and the judgment happens to be given more as a matter of form or technicality rather than after an investigation of the points involved." (emphasis supplied)

"**7**……Almost all the High Courts have taken a uniform view that a decree passed by a Court under the summary procedure after refusing leave to defend sought for by the defendant is not a judgment on merits. As a matter of fact, no decision of any Court has been cited before me by learned counsel for the first respondent taking a contrary view…."

"**51**. The preponderance of judicial opinion as deducted from the decisions referred to above appears to be that a judgment or decree passed by a court under a summary procedure, where the Court has no occasion to determine the truth or falsity of contentions raised or which may be raised and a judgment will be entered in favour of the plaintiff merely because the defendant failed to appear or to apply for leave to defend or if applied, the leave was refused is a decree or judgment which cannot be held to have been given on merits."

42. Therefore, when the dispute before the Court is demonstrative of the fact that the highly contested facts compel deeper scrutiny, disposal of the case in summary jurisdiction would cause great prejudice to the party seeking leave to defend. Not only in India, even under the law that governs U.K. Courts, this principle is followed as per the practice and procedure. Civil Procedure Rules CPR 24.2 specifies the grounds on which summary judgment may be granted in the following manner:

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if-

(a) it considers that-

(i) that claimant has no real prospect of succeeding on the claim or issue; and

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other reason why the case or issue should be disposed of at a trial."

43. The principles to be adhered to in passing a summary judgment have been crystallised in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd.*[25] in the following manner:

"I. The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman[26]

II. A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable. ED & F Man Liquid Products v Patel[27]

III. In reaching its conclusion the court must not conduct a "minitrial", it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily: Swain v Hillman.

IV. This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may

[25] [2009] EWHC 339 (Ch)
[26] [2001] 2 All ER 91
[27] [2003] EWCA Civ 472 at [8]

be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

V. However, in reaching its conclusion, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond.[28]

VI. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co.[29]

VII. On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

VIII. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.

IX. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success."

44. In resisting the claim as well as in the application for leave to defend, respondent relied upon three agreements. The first of these agreements is stated to have been concluded at a meeting of the respondent's Board on 13.06.1997, prior to execution of the loan agreement, whereby it was allegedly agreed that in the event the appellant was required to discharge its obligations under the proposed guarantee issued in favour of the lending bank, it would not seek recourse against the respondent or its shareholders. The second agreement was asserted to have been reached during September 2001, in the backdrop of disputes arising from alleged breaches of the SPCA and TSSA and consequent monetary claims raised by the respondent against the claimant; under this arrangement, the appellant was to assume responsibility for the outstanding loan liability in consideration of settlement of claims and continuation of the joint venture, while the respondent and its shareholders would refrain from pursuing certain claims against the appellant. The third agreement, relied upon by the respondent, was described as an understanding or representation made prior to commencement of proceedings, to the effect that the proceedings were being initiated merely for internal purposes of the claimant and that, although a default judgment might be obtained, the same would not be enforced against the respondent.

[28] (No 5) [2001] EWCA Civ 550
[29] 100 Ltd [2007] FSR 63

45. We are not inclined to examine whether the defences set by the respondent are sufficient in all respects or not. For our purposes, it is sufficient to draw a conclusion as to whether the said defences are *realistic* and not *fanciful*. Even as per the principles followed by the English Court while exercising jurisdiction to grant summary judgment, the Court cannot convert the proceedings into a mini trial. More than anything, when the assertions are supported by contemporaneous documents and there is every possibility to expect supporting oral and documentary evidence from both sides, the Court will refrain from proceeding with summary judgment. A word of caution is also that where a matter does not initially appear complex or where no immediate conflict of fact is evident, the Court must not proceed with summary determination without trial.

46. Respondent's defences involved proof of oral agreements between the parties and require detailed examination on the basis of oral as well as documentary evidence. There are contemporaneous documentary material in the form of Balance Sheets and Minutes of Board Meetings, documents which carry statutory significance under Sections 194[30], 210[31], 211[32] and 215[33] of the Companies Act, 1956. While we are not entering into the merits of the defences, existence of such material documents with presumptive value compels us to conclude that the respondent was foreclosed without a full opportunity.

47. Further, the respondent contended that the Balance Sheet for the financial year 2001-02 had been duly approved and signed by all members of the Board of Directors, including Mr. Winfrid Schmidt, the nominee Director representing the appellant. It was urged that Mr. Schmidt had actively participated in the meetings of the Board and had seconded the resolutions adopting the audited Balance Sheet and profit and loss account. The entries contained in the Balance Sheet, particularly those relating to the treatment of the ECB loan, recorded the company's position that no amount was payable to the appellant and that any demand made by it lacked merit. Relevant portion of the Balance Sheet entry pertaining to year 2001-02 is extracted as below:

"19. B (II) TREATMENT OF ECB LOAN REPAYMENT

The Company had taken a term loan (in the form of ECB) of 7 Million US Dollars from Citibank International Plc, London that was guaranteed by Messer Griesheim GmbH (Messer). During the year Messer paid the entire outstanding amount of ECB Loan & Interest amounting to UCB 4. 78 million 4. 78 Million (equivalent to Rs. 2236 lacs approx.) i.e. principal USD 4. 66 million and interest USD 0.12 Million to Citibank, Plc London. Messer has made this payment pursuant to understanding with the Company to partially compensate the company for the loss suffered by the company due to Messer 's non cooperation in implementing various projects and breach of certain clauses, of Share Purchase and Cooperation Agreement dt. 12-05-1995 between the Company and Messer.

As per Mutual understanding with Messer, the Company has adjusted Rs. 58 lacs in the Interest Expenses and Rs. 2078 lacs towards loss suffered by the Company in the value of its investment in Capital Work in Progress and balance amount of Rs. 100 lacs has been adjusted towards the Company's claim. of Rs. 50,000 lacs against Messer for the loss suffered by the Company on account of breach of certain clauses of Share Purchase and Cooperation Agreement dt. 12.05.1995." (emphasis supplied)

48. Further, para-2 provided that:

"CONTINGENT LIABILITIES NOT PROVIDED FOR:

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[30] Section 194: Minutes to be evidence.
[31] Section 210: Annual accounts and balance-sheet.
[32] Section 211: Form and contents of balance-sheet and profit and loss account.
[33] Section 215: Authentication of balance-sheet and profit and loss account.

"(a) Guarantees given and letters of credit issued by bank on behalf of company Rs.287.94 lacs (Previous year 163.36 lacs)

(b) Contrary to the understanding with the Company, Messer Greisheim, GmbH, had made a demand on the company to make payment of the amount of USD 4.78 Million (equivalent to Rs. 2236 Lacs) being the amount of ECB Loan paid by Messer to Citi Bank. The Company is of the view that contentions of Messer has no merits. "

49. The Minutes of the Meetings dated 27.05.2002 and 31.01.2003 reveal that the Balance Sheets and accounts were adopted unanimously, with the participation and signatures of the nominee Director of the appellant. In the Minutes of Meeting dated 27.05.2002, it has been noted as under: -

"1. ADOPTION OF THE AUDITED BALANCE SHEET AS AT 31ST DEC. 2001 AND PROFIT & LOSS ACCOUNT FOR THE ENDED ON THAT DATE AND THE REPORTS OF THE DIRECTORS AND AUDITORS THEREON

The Chairman stated that the Audited Balance Sheet of the Company as at 31st December,2001 and Profit & Loss Account for the year ended on that date together with schedules, annexures and attachments having already been circulated and lying with the Members for quite some time. The Chairman read the Auditor's Report. However, annexure to the Auditor's Report was taken as read with the permission of the Members present.

After discussions on the Accounts the following Resolution was proposed as an ordinary Resolution by Mr. S. C. Goyal and seconded by Mr. Winfrid Schmidt.

RESOLVED THAT Audited Balance Sheet as at 31 December, 2001 and Profit &Loss Account for the year ended on that date and the Reports of the Directors and Auditors thereon as laid before the Members of this Meeting be and are hereby adopted."

The Chairman put the resolution on vote by show of hands, which was carried unanimously."

50. Similarly, Minutes of Meeting dated 31.01.2003 recorded as under:

" (iii) RESOLVED FURTHER that the Draft Balance Sheet as at 31st December, 2002 and profit & loss account of the Company together with accounting policies, schedules and notes thereon, for the year ended 31st December, 2002 together with relevant attachments having placed before the Board, be and are hereby approved and the same be authenticated in terms of section 215 of the Companies Act, 1956 by at least two Directors, one of whom shall be Managing Director along with Company Secretary of the Company and the same may be submitted to the Statutory Auditors of the Company for their Reports thereon.

Thereafter, Balance Sheet as at 31.12.2002 and Profit& Loss Account for the year ending 31.12.2002 were signed by Mr. S.C. Goyal, Managing Director, Mr Winfrid Schmidt and Mr. G.K. Balaya, Directors of the company along with Mr. N.K. Bagri, Company Secretary of the company and then these were forwarded to the Statutory Auditors of the company for their report thereon, who were present in the office ..."

51. Although the English Court had referred to the Balance Sheet and the Minutes of Meetings, certain other correspondence, including the respondent's e-mail dated 20.02.2003 disputing the appellant's subsequent objections raised vide communication dated 19.02.2003, does not appear to have formed part of the record of summary adjudication. The Division Bench of the High Court has taken note of the said e-mail dated 20.02.2003 and arrived at the conclusion that reliance on such evidence could have made a material difference to the outcome. The attempt on the part of the appellant to dispute the entries in the Balance Sheet, after having participated in and assented to their adoption, could not have been readily accepted in summary adjudication, particularly when statutory presumptions and material communications had not undergone the required test of proof in a full-fledged trial.

52. In our considered view, triable issues were disclosed. The respondent sought leave to defend, adduced contemporaneous documents in support of its defence. It was incumbent upon the English Court to refrain from disposing of the case by way of summary judgment. The grant of summary judgment resulted in premature adjudication of disputed questions of fact and effectively denied the respondent a meaningful opportunity to establish its case through oral evidence and cross-examination.

53. Having considered the matter in detail, we are of the opinion that the procedure adopted in rendering of the foreign judgment sought to be enforced is not consistent with the well-established principles of law.

Consequently, the summary disposal of the claim in the presence of triable issues cannot be sustained, and we are constrained to hold that the foreign judgment, falls foul of the requirement of Section 13(b) CPC.

Re: Issue II. Whether the judgment is unenforceable in view of the conditions imposed by RBI in exercise of the statutory power under FERA:

54. In view of our decision on the first issue, it is not necessary for us to delve into the present issue relating to bar of enforceability of the foreign decree in view of the RBI communication dated 03.09.1997. However, as substantial arguments were advanced on this issue, we will proceed to give our opinion even on this issue.

55. There is no dispute about the fact that the mandatory requirement of obtaining the prior permission of Government of India as well as that of the RBI was secured by the parties before availing external borrowing. However, the question relates to the consequence of the conditions imposed by RBI while granting permission by its letter dated 03.09.1997. In other words, whether the condition that "*In case of invocation of guarantee no liability whatsoever will extend to the Indian company*" would operate as an absolute bar to enforcement for all times to come as contended by Mr. Chidambaram.

56. In light of the competing submissions, the question that arises for consideration is twofold: first, the true import and legal effect of the RBI condition dated 03.09.1997 within the framework of the then prevailing foreign exchange law; and second, whether enforcement of the foreign decree, in disregard of such condition, would attract the bar contained in Sections 13(c) and 13(f) of the CPC or is enabled under Section 47 of the FERA Act, 1973.

57. The purpose and object of the FERA Act, 1973 is explained in *LIC of India v. Escorts Ltd.*[34]. The position as it existed when the conditional permission was granted, when the Act was in operation can well be appreciated in the following background;

"4. The present state of Indian economy which has to operate under the existing world economic system is such that India needs foreign exchange and, lots of it, to meet the demands of its developmental activities. It has become necessary to earn, conserve and build up a reservoir of foreign exchange. So the Parliament and the executive Government have been taking steps, from time to time, to regulate, to conserve and improve the foreign exchange resources of the country and the proper utilisation thereof in the interests of the economic development of the country. The Foreign Exchange Regulation Act, 1973 was enacted for that purpose.

63….. The object of the Foreign Exchange Regulation Act, as already explained by us, undoubtedly, is to earn, conserve, regulate and store foreign exchange. The entire scheme and design of the Act is directed towards that end. Originally the Foreign Exchange Regulation Act, 1947 was enacted as a temporary measure, but it was placed permanently on the Statute Book by the Amendment Act of 1957. The Statement of Objects and Reasons of the 1957 Amendment

[34] (1986) 1 SCC 264.

Act expressly stated, "India still continues to be short of foreign exchange and it is necessary to ensure that our foreign exchange resources are conserved in the national interest". In 1973, the old Act was repealed and replaced by the Foreign Exchange Regulation Act, 1973, the long title of which reads: "An Act to consolidate and amend the law regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency and bullion, for the conservation of foreign exchange resources of the country and the proper utilisation thereof in the interest of the economic development of the country." We have already referred to Section 76 which emphasises that every permission or licence granted by the Central Government or the Reserve Bank of India should be animated by a desire to conserve the foreign exchange resources of the country. The Foreign Exchange Regulation Act is, therefore, clearly a statute enacted in the national economic interest…."

58. It is in this context that we must exercise certain provisions of FERA.

"Section 8 - Restrictions on dealing in foreign exchange

(1) Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India, purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange: Provided that nothing in this sub-section shall apply to any purchase or sale of foreign currency effected in India between any person and a moneychanger.

Explanation- For the purposes of this sub-section, a person, who deposits foreign exchange with another person or opens an account in foreign exchange with another person, shall be deemed to lend foreign exchange to such other person.

(2) Except with the previous general or special permission of the Reserve Bank, no person, whether an authorised dealer or a money-changer or otherwise, shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the rates for the time being authorised by the Reserve Bank.

(3) Where any foreign exchange is acquired by any person, other than an authorised dealer or a money-changer, for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose or, as the case may be, fail to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be so used or the conditions cannot be complied with the said person shall, within a period of thirty days from the date on which he comes to know that such foreign exchange cannot be so used or the conditions cannot be complied with, sell the foreign exchange to an authorised dealer or to a moneychanger.

(4) For the avoidance of doubt, it is hereby declared that where a person acquires foreign exchange for sending or bringing into India any goods but sends or brings no such goods or does not send or bring goods of a value representing the foreign exchange acquired, within a reasonable time or sends or brings any goods of a kind, quality or quantity different from that specified by him at the time of acquisition of the foreign exchange, such person shall, unless the contrary is proved, be presumed not to have been able to use the foreign exchange for the purpose for which he acquired it or, as the case may be, to have used the foreign exchange so acquired otherwise than for the purposes for which it was acquired.

(5) Nothing in this section shall be deemed to prevent a person from buying from any post office, in accordance with any law or rules made thereunder for the time being in force, any foreign exchange in the form of postal orders or money orders."

59. Section 8 restricts dealings in foreign exchange and mandates that, except with the previous general or special permission of the RBI no person other than an authorised dealer shall purchase, acquire, borrow, sell, transfer, lend or exchange foreign exchange

with any person who is not an authorised dealer. The section thus establishes a controlled regime whereby acquisition, use, and disposal of foreign exchange remain subject to regulatory supervision and purpose-specific compliance.

60. In view of the existing legal regime and also in compliance of Clause 14.1 of the Loan Agreement, an application dated 26.12.1996 was presented to Joint Secretary (ECB), Department of Economic Affairs seeking approval of the ECB. The said application is reproduced herein for ready reference:

"…The CITIBANK International Plc, London, has in principle agreed to grant the foreign currency loan of USD 3 Million for financing the Working capital requirements. The sanction letter for the loan is enclosed.

We are also enclosing herewith application for seeking approval for External Commercial Borrowing of USD 3 million for Rupee Expenditure/ Working Capital, and request you to grant the approval at the earliest.

You are also requested to grant exemption from the application of Withholding Tax on all interest payments, agency and arrangement fee and reimbursement of out of pocket expenses under Section 10 (15) (iv) (f) of the Income Tax Act, 1961.

Thanking you,

Yours faithfully,

For GOYAL MG GASES LIMITED"

(emphasis supplied

61. Said application was accorded approval by Department of Economic Affairs vide communication dated 02.04.1997. The relevant portion of said communication is as follows:

"Dear Sirs,

With reference to your letter no. GMG/FIN/6.21, dated 26-12- 1996, on the subject cited above, I am directed to convey the approval of the Government of India, Ministry of Finance, Department of Economic Affairs, for your obtaining a foreign currency loan from M/s. Citibank International Plc, London, for financing the import of capital goods, on the following terms and conditions: -

……..

2. No other charges in foreign currency or Indian Rupee other than those specifically authorized in terms of this sanction will be permitted for payment.

4. You are requested to obtain the approval of the Reserve Bank of India, Exchange Control Department, through your banker under FERA, 1973 in order to satisfy the Reserve Bank that the terms of the Government approval are complied with and that no additional foreign exchange liability, either express or implied, is being assumed under the arrangements.

7. The Reserve Bank of India, would be advised to allow you to draw the loan and effect the advance payment/down payment only after your agreement with the lender is taken on record by this Department. You are, therefore, requested to make available to this Department one executed copy of the loan agreement, immediately after it is entered into, along with the enclosed proforma duly filled (in duplicate), with reference to this sanction letter. Please note that if the said executed copy of the agreement along with proforma is not made available to this Department within three months from the date of issue of this letter, the approval for External Commercial Borrowings contained herein shall automatically lapse unless specifically extended by this Department."

(emphasis supplied)

62. Thereafter, respondent applied to RBI vide application dated 24.04.1997 seeking its approval for the purpose of availing loan. RBI granted 'in-principle' approval to respondent

on 28.05.1997 and stated that respondent shall approach RBI for final approval after the loan agreement is taken on record by the Government of India.

63. Accordingly, Government of India took the loan agreement on record on 24.07.1997 and noted that;

"Dear Sirs,

With reference to your letter no. GMG/FIN/6.21, dated 30-061997, on the subject cited above, I am directed to convey the approval of the Government of India, Ministry of Finance, Department of Economic Affairs, to include item no. (h) and (i) under para (1) of this Department's sanction letter of even no. dated 01-04-1997 (Sanction No. 765/23), as under: -

(h) Commitment fee: 0.2% p.a. on the undrawn portion of the loan, payable in arrears.

(i) Transfer fee: USD 750/-

2. With reference to para 6 of the above mentioned letter, you. have furnished to this Department an executed copy of the loan agreement for an amount of USD 7 Million which has been taken on record by this Department. While the terms and conditions of our above sanction letter appear to have been correctly incorporated in the loan agreement, any provisions of the loan agreement, which are found to be at variance with the provisions of the said sanction letter shall be void and be not binding on the Government of India or Reserve Bank of India."

(emphasis supplied)

64. Pursuant to the same, RBI granted final approval to the loan on 12.08.1997 appending various regulatory conditions upon approval of the loan facility. Relevant portion of RBI's final approval, as is necessary for our purposes, is reproduced below:

"Dear Sir,

Midterm/Longterm Foreign Exchange Loan/Credit Final Approval-Regn No. 40958

Kindly refer to your application dated 30.07.97 made in Form 83.

2. We are giving herebelow our Final approval for raising Foreign Currency Loan/Credit of US$ 7 Million from Mis Citibank. Intl. Plc, London subject to the following terms and conditions.

…..

7. As regard issue of guarantee we shall be advising you separately in due course."

(emphasis supplied)

65. RBI, however, left the issue of guarantee open by stating that, "*as regards issue of guarantee we shall be advising you separately in due course.*" Subsequently, on 20.08.1997, respondent wrote a letter to RBI informing that the lender bank is not allowing to withdraw the loan because the issue of guarantee has not been decided and therefore requested for grant of clearance.

66. Accordingly, RBI on 03.09.1997 accorded permission for issuance of guarantee by appellant for securing the loan subject to two conditions:

"i) There is no outgo of foreign exchange by way of any fee, direct or indirect, for the proposed guarantee.

ii) In case of invocation of guarantee, no liability whatsoever will extend to the Indian Company."

(emphasis supplied)

67. Thus, the ultimate analysis falls on the interpretation and consequence of said condition. However, before we delve into the true import of the RBI condition, we must first refer to how the same have been dealt and considered by Courts below.

(i) Findings of the English Court on RBI communication dated 03.09.1997

68. Having examined the statutory framework within which letter dated 03.09.1997 has been issued, it is necessary to appreciate the judgment rendered by the English Court. While passing the summary judgment dated 07.02.2006, English Court had specifically considered the respondent's reliance on the RBI communication dated 03.09.1997. It was observed that;

"19. The RBI was provided with a copy of the loan agreement. The conditions were, on the evidence of Indian law adduced on behalf of Messer., standard provisions intended to ensure that if the guarantor paid the lender, the borrower would have no liability to the lender. That would make sense. It is difficult to see why the RBI, having permitted Goyal to use foreign exchange to meet its liabilities under the loan agreement, should be concerned that the same liabilities were owed to Messer, provided they ceased to be owed to Citibank. In any event, the incidence of Indian foreign exchange law would, as Mr Foxton submitted, only invalidate a contractual obligation if Indian was the proper law of the contract or the law of the place for its performance. Neither apply."

(ii) Findings of the Single Judge

69. Before the Single Judge, when respondent agitated its objections with regard to RBI conditions, the same were dispelled by observing as under;

"44. As regards the requirement of prior permission under the FERA, it must be noticed that FERA is no longer in existence and has been substituted by the Foreign Exchange Management Act, 1999 ('FEMA'). The current circular of the RBI which is relevant is Circular No. 12/2013-14 dated 1st July 2013. The relevant portion of the Circular reads as under:

"The Reserve Bank vide its Notification No. FEMA.29/RB2000 dated September 26, 2000 has granted general permission to a resident, being a principal debtor to make payment to a person resident outside India, who has met the liability under a guarantee. Accordingly, in cases where the liability is met by the non-resident out of funds remitted to India or by debit to his FCNR(B)/NRE account, the repayment may be made by credit to the FCNR(B)/NRE/NRO account of the guarantor provided, the amount remitted/credited shall not exceed the rupee equivalent of the amount paid by the non-resident guarantor against the invoked guarantee."

45. In any event, as explained in Renusagar even an ex post facto permission of the RBI could be obtained by the DH if it seeks to repatriate the funds deposited by the JD in the execution proceedings. It would be for the DH to comply with all the requirements of the RBI at that stage. Consequently, this objection is without merit.

50. As regards the objection that the High Court at England ignored the provisions of FERA, the DH is right in pointing out that the permission could be obtained even at a subsequent stage. Under a Master Circular dated 1st July 2013, the RBI has granted general permission to a principal debtor to make a payment to a person residing outside India, who has made the liability under guarantee. It has been held in Silver Shield Construction Co. Ltd. v. Recondo Ltd. 1994 (15)CLA 92 (Bom) and Dhanraj Mal Gobindram v. M/s. Shamji Kalidas and Co. 1961 (3) SCR 1020 that the permission of RBI under Section 47(3) (b) of FERA need not be obtained prior to filing of the execution petition."

(iii) Findings of the Division Bench:

70. The Division Bench however took a contrary view and observed that;

"52……. We note that in the impugned judgment and decree passed by the English Court, it has been observed that the condition imposed by the RBI that 'if the guarantor paid to the lender, the borrower would have no liability to the lender', makes sense. However, it further questioned as to why RBI had granted permission to appellant/JD to use foreign exchange to meet its liabilities under the loan agreement and recorded that the incidence of Foreign Exchange Law would invalidate the contractual obligation as a submission of learned counsel - Mr. Foxton, who

represented respondent/DH. On this aspect we find that while observing so, the UK Court did not consider Clause -

14.1 of the loan agreement, which reads as under:-

"Maintenance of Legal Validity: Each of the Obligors shall obtain, comply with the terms of and do all that is necessary to maintain in full force and effect ail authorizations, approvals, licences and consents required in or by the laws and regulations of its jurisdiction of incorporation to enable it lawfully to enter into and perform its obligations under this agreement, and to ensure the legally, validity, enforceability or admissibility in evidence in its jurisdiction of incorporation of this Agreement."

53. The above apparently shows the respondent/DH was bounden to take permission from RBI for implementation of the Loan Agreement and the RBI, while granting the permission, had put the twin conditions.

54. ……….On this aspect we find that the present case does not come within the ambit of Section 47(3)(b) of FERA. These provisions are applicable in cases where permission is required to be obtained for the first time from RBI after final decree is passed so that foreign currency can be sent abroad. The learned Single Judge on this issue has relied upon Supreme Court's decision in Renusagar Power Co. Ltd. Vs. General Electric Co. 1994 Supp (1) SCC 644 to hold that ex post facto permission from RBI could be obtained by the DH for repatriating the funds deposited by the appellant/JD. Upon going through decision in Renusagar Power Co. Ltd. Vs. General Electric Co. and applying it to the facts of the present case, we find that no doubt in view of said decision ex post facto permission can be obtained from the RBI to remit the funds, however, when the decree itself is found to be vitiated, being against the prescribed procedure of law recognized in India, the occasion for obtaining ex post facto permission from RBI by the decree holder in respect of awarded amount, does not arise at all. We have already observed that the decree passed by the Court in UK is without any merit and abrogative. Also, in the present case the respondent/DH was the Guarantor to the lender located in a foreign country. We also find that once a conditional permission has been granted by the RBI, any claim beyond the said conditions is contrary to law."

(emphasis supplied)

(iv) True import of Section 47, FERA and RBI conditions dated 03.09.1997:

71. Matters relating to performance of contracts, relating to external commercial borrowings in the context of the Act is laid down in Section 47 of FERA. As resolution of this issue turns on the true and correct interpretation of Section 47, the same is reproduced herein for ready reference;

"47. Contracts in evasion of the Act *.-(1) No person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of this Act or of any rule, direction or order made thereunder.*

(2) Any provision of, or having effect under, this Act that a thing shall not be done without the permission of the Central Government or the Reserve Bank, shall not render invalid any agreement by any person to do that thing, if it is a term of the agreement that, that thing shall not be done unless permission is granted by the Central Government or the Reserve Bank, as the case may be; and it shall be an implied term of every contract governed by the law of any part of India that anything agreed to be done by any term of that contract which is prohibited to be done by or under any of the provisions of this Act except with the permission of the Central Government or the Reserve Bank, shall not be done unless such permission is granted.

(3) Neither the provisions of this Act nor any term (whether express or implied) contained in any contract that anything for which the permission of the Central Government or the Reserve Bank is required by the said provisions shall not be done without that permission, shall prevent legal proceedings being brought in India to recover any sum which, apart from the said provisions and any such term, would be due, whether as debt, damages or otherwise, but-

(a) the said provisions shall apply to sums required to be paid by any judgment or order of any Court as they apply in relation to other sums;

(b) no steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to which the said provisions apply except as respects so much thereof as the Central Government or the Reserve Bank, as the case may be, may permit to be paid; and

(c) for the purpose of considering whether or not to grant such permission, the Central Government or the Reserve Bank, as the case may be, may require the person entitled to the benefit of the judgment or order and the debtor under the judgment or order, to produce such documents and to give such information as may be specified in the requisition.

(4) Notwithstanding anything contained in the Negotiable Instruments Act, 1881, neither the provisions of this Act or of any rule, direction or order made thereunder, nor any condition, whether expressed or to be implied having regard to those provisions, that any payment shall not be made without permission under this Act, shall be deemed to prevent any instrument being a bill of exchange or promissory note."

(emphasis supplied)

72. Sub-section (3) of Section 47 clarified that neither the provisions of FERA nor contractual stipulations requiring prior permission of the Central Government or the Reserve Bank shall prevent legal proceedings from being instituted in India to recover sums otherwise due. However, the latter part of the provision engrafts an express limitation in mandatory terms, stipulating that "*no steps shall be taken for the purpose of enforcing any judgment or order… except… as the Reserve Bank… may permit*."

73. The statutory distinction between the institution of proceedings and the enforcement of a judgment assumes considerable significance. While the legislation expressly permitted adjudicatory proceedings to determine liability, it has simultaneously restricted execution of such a determination in the absence of regulatory approval. The use of the expression "no steps shall be taken" manifests an intention to impose a condition precedent to enforcement. The scheme of the provision thus makes the legislative position clear that there is a conscious distinction between the initiation of proceedings and the stage of enforceability. The underlying purpose is to ensure that access to a judicial remedy is not foreclosed and that liability may be determined by a competent court, while at the same time preserving the authority of the Central Government and the RBI to decide whether, and to what extent, such adjudicated liability may ultimately be enforced. The power to grant or refuse permission, therefore, continues to vest in the regulatory authorities, and the enforceability of any decree remains subject to the grant of such permission.

(v) The stage at which the RBI permission is required:

74. The real controversy, therefore, narrows down to the stage at which permission of the RBI is required, if at all, for the purpose of enforcement of the foreign decree. In other words, whether it must be before initiation of the enforcement proceedings or even thereafter.

75. Mr. Chidambaram strongly relied on the decision of this Court in *Asha John Divianathan v. Vikram Malhotra & Ors.*[35] to contend that Section 8 specifically uses the expression "prior permission" and that must operate as a clear bar. He would contend that under similar circumstances this Court has held that transfer of property without permission under Section 31 is prohibited under law. On careful scrutiny, we notice that the transaction in *Asha John* (supra) was without any prior permission whatsoever, and

[35] (2021) 19 SCC 629.

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therefore the Court was compelled to conclude that the transaction is prohibited. In so far as the present case is concerned, a prior permission was sought and RBI has granted the prior permission. Under these circumstances, we are of the opinion that principles laid down in *Asha John* (supra) have no application in facts and circumstances of the present case.

76. In *Renusagar Power Co. Ltd. v. General Electric Co.*[36] the Court had to deal with a situation where the permission was in fact refused by the Central Government. This Court considered the matter and directed as under:

"84. Shri Venugopal has urged that Section 47(3) cannot be applied in the present case because it postulates a situation where permission of the Central Government has not been sought and that in the present case permission was sought but was refused earlier. In our view the earlier refusal by the Government to give its approval to the rescheduling of payment of instalments does not in any way preclude the Government of India from considering the matter in the light of the subsequent developments and it cannot be said that merely because the Government of India had refused to give its approval to rescheduling of payment of instalments it would not grant permission under Section 47(3) of FERA to the enforcement of the judgment that may be passed in these proceedings. It has also been urged that Section 47(3) of FERA is applicable where the legal proceedings are brought in India to recover a sum which is 'due', i.e., as liquidated sum presently owing and the said provision would not apply to an obligation to pay on a future date. We do not find any support for this submission from the language of Section 47(3) of FERA wherein the words used are "to recover any sum which, apart from the said provisions and any such term, would be due, whether as debt, damages or otherwise". The words "would be" which precede the word "due" indicate that the quantum of the amount has to be fixed in the legal proceedings and that it need not be a predetermined amount. Moreover in the present case, we are concerned with the proceedings for the enforcement of the award wherein the amount due has already been determined by the Arbitral Tribunal. We are, therefore, unable to hold that the enforcement of the award would involve violation of any of the provisions of FERA and for that reason it would be contrary to public policy of India so as to render the award unenforceable in view of Section 7(1)(b)(ii) of the Act."

77. The reliance placed on the decisions in *LIC of India* (supra) and *Renusagar* (supra) does not materially advance the contention urged, having regard to the distinct statutory setting and the stage at which the present controversy arises. In *LIC of India* (supra), the Constitution Bench was concerned with the interpretation of Section 29(1) of FERA, where the expression used was merely "permission" without the qualifying word "previous", and the issue was whether such permission could be granted ex post facto for validating a transaction. The ratio of that decision turned on the textual distinction between provisions expressly requiring "previous permission" and those employing the word "permission" simpliciter. The present case, however, arises in the context of Section 47(3)(b), which operates at a materially different stage, namely, the enforcement of a judgment, and which, in express and prohibitory terms, mandates that "*no steps shall be taken for the purpose of enforcing any judgment or order… except as the Reserve Bank… may permit.*" The language employed is negative thereby creating a statutory embargo on enforcement in the absence of permission.

78. Likewise, in *Renusagar* (supra) the Court was concerned with the permissibility of enforcing a foreign arbitral award and whether the earlier refusal of governmental approval would foreclose consideration of permission at a subsequent stage. The decision proceeded on the footing that the competent authority retained the discretion to consider the grant of permission in light of subsequent developments and did not lay down that

[36] 1994 Supp (1) SCC 644

enforcement could proceed in the absence of permission as contemplated under Section 47(3)(b). On the contrary, the reasoning in *Renusagar* (supra) implicitly affirms the necessity of such permission at the stage of enforcement, while clarifying that refusal at an earlier point does not render the statutory power to grant permission otiose. The decision, therefore, cannot be read as dispensing with the statutory requirement of prior permission before enforcement, nor as supporting the contention that execution may proceed independent of regulatory sanction.

79. On the other hand, Bombay High Court had to deal with situation similar to facts of the present case, though the issue arose under Section 26(6). The High Court, in *Algemene Bank Nederland NV v. Satish Dayalal Choksi*[37] took the view that;

"32…..Under section 47(3), therefore, a suit for the enforcement of a guarantee for which permission of the Reserve Bank/Central Government would have been required under Section 26(6) can be brought in India. Filing of a suit, therefore, on such a guarantee cannot be said to be contrary to any law in India because S. 47 sub-sec. (3) expressly permits such legal proceedings in India. Such proceedings abroad cannot be said to be violative of any law in India. However, no steps can be taken for the purpose of enforcing any judgment or order for the payment of any sum under such a guarantee except in respect of so much thereof as the Central Government or the Reserve Bank may permit to be paid. With the result that before a foreign decree passed on such a guarantee can be executed in India, permission of the Reserve Bank or the Central Government for realising such sum is necessary.

33. Section 47(3)(b) says, "No steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to which the said provisions apply except as respects so much thereof as the Central Government or the Reserve Bank may permit to be paid". An application under Order 21 Rule 22 is certainly a step for the purpose of enforcing a judgment. Under Order 21 Rule 11 every application for execution of a decree shall be in writing signed and verified by the applicant and shall contain, inter alia, various particulars including the mode in which the assistance of the court is required. Under order 21 Rule 22, inter alia, where an application for execution of a foreign decree is filed under the provisions of sec. 44A, leave is necessary. Therefore, before any leave can be obtained under Order 21 Rule 22, it is necessary to make an application under O. 21 R. 11. These are, therefore, clearly proceedings for the purpose of enforcing a foreign judgment. Before such steps can be taken permission of the Reserve Bank or the Central Government, as the case may be, is necessary under section 47(3)(b).

34. It was contended by Mr. Tulzapurkar, learned Counsel for the plaintiff-Bank, that such permission can be obtained after leave is granted under Order 21 Rule 22 but before the actual execution is levied. This contention cannot be accepted in view of the express provisions of section 47(3)(b). Section 47(3)(b) clearly prohibits any step being taken for the purpose of enforcement without the permission of the Reserve Bank or the Central Government. It does not say that actual execution shall not be levied without such permission. In fact, once leave is granted under O. 21 R. 22, nothing further is required to be done and the plaintiff Bank can proceed with execution. A prior permission of the Reserve Bank or the Central Government, as the case may be, is therefore required before taking any step for the enforcement of the decree, including an application under O.

21 R. 22. Such permission has not been obtained by the plaintiffBank. Without such permission it cannot proceed."

80. The view taken by the Bombay High Court in *Algemene Bank* (supra) is more directly referable to the question arising in the present case, as it construed Section 47(3)(b) in the context of execution proceedings relating to a foreign decree. The High Court held that the expression "*no steps shall be taken for the purpose of enforcing any judgment*" is wide enough to include applications under Order XXI of CPC. On that basis,

[37] 1989 SCC OnLine Bom 282

it was held that permission of RBI or the Central Government must be obtained before initiating such steps in execution. This construction emphasises the mandatory nature of the restriction operating at the stage of execution, while at the same time recognising the distinction drawn by the statute between the institution of proceedings on the one hand and the taking of steps in enforcement on the other. The decision in *Algemene Bank* (supra), therefore, lends support to the view that although adjudication of liability is not interdicted, the execution process itself cannot be set in motion in the absence of the requisite regulatory permission.

81. Having considered the matter in detail, we are of the opinion that there is no prohibition for initiation of proceedings and for a determination as regards the liability. However, after obtaining a declaration, for its implementation, obtaining permission from RBI is *sine qua non*. In other words, without RBI approval, it is not possible to take steps for enforcement of a decree.

82. The elasticity of obtaining ex-post facto permission as suggested in *LIC of India* and *Renusagar* (supra) will have practical problem. While these judgments do not overrule the necessity to obtain permission of RBI as a mandatory requirement, they have suggested a way out by provisioning ex-post facto permission. There is a practical problem in this approach in the sense that if the Indian court affirms executability of the foreign decree and thereafter the Central Government or the RBI refuses to grant permission, the whole exercise would be redundant. On the other hand, if the parties are required to take RBI permission first and then approach the court for execution, two consequences would follow; (i) If RBI refuses permission, matter ends there - further enforcement would not arise. Maybe the party could challenge the legality and validity of the order refusing permission in writ proceedings, that's a different matter and (ii) On the other hand, if permission is granted, the party will approach the court for execution then in which case, the only question remaining for court to consider is compliance of Section 13 CPC coupled with Section 47(3)(b), FERA.

83. In view of the above discussion, we have no hesitation in rejecting Mr. Chidambaram's submission that there is absolute and total bar of enforcement of a decree by virtue of the conditional permission in its letter dated 03.09.1997. This submission is therefore rejected. In the normal course, a party obtaining foreign judgment can seek enforcement in India if such a judgment qualifies the test laid down in Section 13 of CPC. The Central Government/RBI can exercise its regulatory power under Section 47(3) of FERA and grant its approval before any further steps are taken for implementing the judgment.

84. Returning to the facts of the present case, in view of our finding on issue no. 1, that the foreign judgment is violative of requirements of Section 13 CPC, our findings on issue no. 2 will have no consequence. We have decided issue no. 2 in view of the fact that detailed submissions were made by both the parties. We also considered it necessary to clarify the position in view of the text of Section 47 of FERA coupled with its interpretation by Bombay High Court.

85. At this juncture, it would also be apposite to clarify that the objections raised by the respondent do not extend to all the grounds enumerated under Section 13 of CPC. Upon careful consideration, we find that the English Court possessed jurisdiction over the parties and the subject matter. The Loan Agreement executed between the parties expressly provided that the contract would be governed by English law and that disputes arising therefrom would be subject to the jurisdiction of the English Courts. A reading of clause 12.5, 31.1 and 31.2 leads to inescapable conclusion that English Court was a competent

court. Likewise, no case of fraud within the meaning of Section 13(e) CPC has been made out. To that extent, the judgment of the English Court cannot be faulted under clauses (a), and (e) of Section 13 CPC.

86. However, for the reasons already recorded, we are of the considered opinion that the foreign judgment suffers from fundamental infirmities under clauses (b), (c), (d) and (f) of Section 13 CPC. The adjudication by way of summary judgment in the presence of bona fide triable issues renders the judgment one not delivered on merits within the meaning of Section 13(b). Further, the failure of the English Court to give due effect to statutory permissions and conditions imposed under Indian foreign exchange law attracts the mischief of Section 13(c). Despite triable issues, respondent was not granted leave to defend which stands in teeth of clause (d) of Section 13. The enforcement of liability contrary to binding statutory conditions also brings the decree within the prohibition contained in Section 13(f), being opposed to the law in force in India. Accordingly, while the foreign judgment satisfies certain procedural requirements, it nonetheless fails the substantive tests mandated under clauses (b), (c), (d) and (f) of Section 13 CPC.

VIII. Conclusions:

87. For the reasons stated above, which are distinct from those that are adopted by the Division Bench of High Court, we are of opinion that the judgment of English Court is not enforceable in terms of Section 44A of CPC since it falls foul of exceptions enumerated in Section 13 of CPC, as already noted above.

88. The appeal therefore fails and is dismissed. There shall be no order as to costs.

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