

# Dispute Resolution Hotline

January 10, 2017

## SUPREME COURT ALLOWS EXECUTION OF AN ENGLISH COURT'S INTERLOCUTORY ORDER

- Recognizes enforceability of an English Court's interlocutory order unless it falls foul of Section 13<sup>1</sup> of the Code of Civil Procedure ("CPC")
- Holds that necessity of maintaining foreign rights outweighs practical difficulties in applying the foreign remedy
- Clarifies that a foreign judgment which has become final and conclusive between parties is not impeachable either on facts or law except on limited grounds enunciated under Section 13 of CPC

The Supreme Court ("Court") in *M/S Alcon Electronics Pvt. Ltd. ("Appellant") vs. Celerm S.A. OF Fos 34320 Roujan, France & Anr. ("Respondents")*<sup>2</sup> has held the execution of an interlocutory order of an English Court pertaining to dismissal of challenge to its jurisdiction, including order for costs and interest thereon, to be maintainable in Indian Courts.

### BRIEF FACTS

The Respondents had filed a suit against the Appellant before the English Court to which the Appellant had filed an application challenging jurisdiction. The English Court by order dated October 19, 2006 ("English Order") dismissed the Appellant's application further directing it to pay the costs of the application to the Respondents. The Appellant did not file any appeal against the English Order and appeared to have agreed to pay the costs after seeking time.

When the Respondents filed a petition for execution of the English Order in India, the Appellant opposed it on the ground that the English Order is not executable. The executing court dismissed the Appellant's opposition which was confirmed by the High Court of Bombay on April 8, 2013 ("Impugned Judgment"). The Appellant thereafter filed an appeal before the Apex Court against the Impugned Judgment, culminating in the present judgment.

### APPELLANT'S ARGUMENTS AGAINST EXECUTION

- An interlocutory order of the English Court with respect to its own jurisdiction (with or without a direction for payment of costs) does not amount to a judgment 'on merits of the case' and is therefore not conclusive under Section 13(b) of the CPC;
- In the alternative, the English Order does not amount to 'decree' under Explanation 2 to Section 44A of the CPC ("Explanation 2")<sup>3</sup>;
- The part of the English Order relating to the payment of interest on costs should not be executed in view of the deletion of the erstwhile Section 35 (3) <sup>4</sup> of the CPC;

### RESPONDENT'S ARGUMENTS IN SUPPORT OF EXECUTION

- The English Order is very much a decree on merits as the English Court has given a detailed judgment considering entire oral and documentary evidence produced by parties;
- As far as Explanation 2 is concerned, the same does not refer to costs which are defined under Section 35<sup>5</sup> of the CPC;
- Costs having been quantified have assumed the character of a money decree for costs which cannot be equated either with fines or penalty imposed on a party by Court or taxes payable to a local authority or to a Government;
- Section 13 of CPC specifically excludes execution of decrees mentioned under Clauses (a) to (f) and the same does not mention decrees for costs;
- UK Law provides for every judgment debt to carry an interest @ 8 % to run from the date on which the judgment is given on merits or such dates as the Court may specify;
- Legislative intent of executing orders relating to payment of costs is clear from the amendment to Section 36<sup>6</sup> of the CPC which clarifies that provisions relating to execution of a 'decree' or 'order' include payment under the said decree or order as well;

### ISSUES BEFORE THE COURT

1. Whether the order passed by the foreign court falls within the exceptions to Section 13 of CPC?
2. Whether the order passed by the foreign court amounts to a "decree" and the same is executable?

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3. If answer to issue No. 2 is in affirmative, whether the decree for costs falls within the ambit of Explanation 2 of Section 44A of CPC and makes it in-executable?
4. Whether interest on costs would fall within the ambit of Explanation 2 of Section 44A of CPC?
5. Whether the interest on costs can be executed in India in view of deletion of Section 35(3) of CPC?

## JUDGMENT

- With regards to the first issue, the Court held that for an order or decree to be conclusive, it should have been obtained after following due judicial process by giving reasonable notice and opportunity to all proper and necessary parties to put forth their case. Once these requirements are fulfilled, the executing court cannot enquire into the validity, legality or otherwise of the judgment. Considering that the English Court had (i) duly considered oral and documentary evidence adduced by parties; (ii) passed a detailed order on the question of jurisdiction; (iii) and that the Appellant did not prefer an appeal against the same thereby giving it finality, the Court held that the English Order cannot be said to not have been given on merits.
- The Court then dealt with the second issue regarding the English Order being an interlocutory order therefore not having the shades of a 'judgment' to be executed before the Indian Court. The Court looked into the definitions of a 'decree', 'order' and 'judgment' as per the CPC read with Explanation 2 (which provides that 'decree' with reference to a superior court means any 'decree' or 'judgment') to conclude that 'decree' includes judgment and 'judgment' includes 'order'. It therefore held that since the English Order fell within the definition of 'order', it is a judgment and thus becomes a 'decree' as per Explanation 2.
- Regarding issues three and four, the Court discusses general international principles governing the award of costs, thereafter distinguishing 'costs' from 'penalty' in that penalty normally means a sum payable to the State, and not to a private claimant, thereby holding that the costs imposed in the circumstances of this case would not amount to a penalty or a tax.
- Regarding issue five and the Appellant's case that the claim for interest is not recognized under Indian Law, the Court noted that matters of procedure are to be governed by the *lex fori*, whereas matters of substance to be governed by *lex causae* and that in this case the interest on decree is a substantive right of the decree holder and does not concern itself with the procedural law or forum. It therefore held that even though interest on costs are not available in India due to exclusion of Section 35 (3) of CPC, the same does not mean that Indian Courts are powerless to execute the said decree for interest on costs.

## ANALYSIS

The Apex Court has clarified the position at common law that a foreign judgment which has become final and conclusive between parties is not impeachable either on facts or law except on limited grounds enunciated under Section 13 of CPC. In doing so, the Court has given due recognition to the reciprocal advantage of the courts of all nations to enforce foreign rights as far as is practicable and that therefore maintaining foreign rights outweighs the practical difficulties involved in applying the foreign remedy. The Court has adopted a positive approach by ensuring that foreign rights are not impinged upon due to mere technicalities and practical difficulties and has upheld principles of comity of nations.

– Siddharth Ratho & Vyapak Desai

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<sup>1</sup> **13. When foreign judgment not conclusive.**—A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except,—

- (a) where it has not been pronounced by a Court of competent jurisdiction;
- (b) where it has not been given on the merits of the case;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of 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;

<sup>2</sup> Civil Appeal No. 10106 of 2016 arising out of SLP ( Civil) No. 19791 of 2013

<sup>3</sup> **44A. Execution of decrees passed by Courts in reciprocating territory.**—(1) Where a certified copy of a decree of any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

Explanation I: "Reciprocating territory" means 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 this section, and "Superior Courts", with reference to any such territory, means such courts as may be specified in the said notification.

Explanation II: "Decree" with reference to a superior Court means any decree or judgment of such court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.

<sup>4</sup> The un-amended Section 35 (3) States as follows: "The Court may give interest on the costs at any rate not exceeding six per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

<sup>5</sup> Section 35

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

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\*Sub-section (3) omitted by Act 66 of 1956, sec. 3 (w.e.f. 1-1-1957)

<sup>6</sup> **36. Application to orders.**—The provisions of this Code relating to the execution of decrees (including provisions relating to payment under a decree) shall, so far as they are applicable, be deemed to apply to the execution of orders (including payment under an order).

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