**(2018) 10 DEL CK 0151**

**Delhi High Court**

**Case No:** Regular First Appeal No. (OS) (COMM) 4 OF 2018 AND Civil Miscellaneous APPL. 3577-3578 OF 2018

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| Century Metal Recycling Private Limited | APPELLANT |
| Vs | |
| Sachin Chhabra & Ors | RESPONDENT |

**Date of Decision:** Oct. 9, 2018

**Acts Referred:**

- Code of Civil Procedure, 1908 - Section 13, 16, 20, 21, 44A, Order 37 Rule 1

**Hon'ble Judges:** S. Ravindra Bhat, J; A.K.Chawla, J

**Bench:** Division Bench

**Final Decision:** Dismissed

**Judgement**

A. K. CHAWLA, J

1. The appellant (hereafter â€œCenturyâ€), in this regular first appeal challenges the judgment and order dated 01.12.2017 of the learned Single Judge,

in the leave to defend applications by the Respondents/defendants (â€œSachinâ€ and â€œTCCâ€ respectively hereafter) in the summary suit instituted

under Order XXXVII CPC. The impugned judgment dismissed the summary suit against all three defendants including the third defendant (hereafter

'Tarun'), with the liberty to the plaintiff to approach the court of appropriate jurisdiction.

2. Briefly, the relevant facts are that Century had instituted a suit for recovery of money against the defendants under Order XXXVII CPC. The suit

proceeded on the premise that Century having its registered office at New Delhi and factory at Tatarpur, Distt. Faridabad (now Distt. Palwal) was

inter alia engaged in the business of manufacture and trading of aluminum alloy ingots and allied products and that, it used to import aluminum scrap,

which was the principal raw material for manufacture of aluminum alloy, from USA. For the purpose, it used to place orders and make advance

payments to Metal Worldwide Inc. in short 'MWI', registered and incorporated under the US laws and of which, the first respondent and his wife Ms.

Seloni Chhabra were the majority shareholders and directors. In the plaint, Century also averred that the purchase orders were placed from New

Delhi and so were the advance payments made by Century to MWI through its bankers at New Delhi through electronic transfers; payments were

made by Century on the representations and promises made by the first respondent that the goods would be shipped immediately on the receipt of

advance payments. Such business transactions are said to have started amongst the parties in December, 2009 and continued upto January, 2011.

During the course of such transactions, Century made a total payment of US$ 29,01,379/- to MWI and as against which it received goods valued at

US$ 22,75,379/-, leaving a balance sum of US$ 6,26,000/-, against which MWI failed to supply the goods inspite of repeated requests and reminders.

For the recovery of advance payments for such undelivered goods, Century filed a suit (Century Metal Recycling Pvt. Ltd. vs. Metal Worldwide Inc.

et al.) and a partial summary judgment was passed by the District Judge, Florida, USA on 05.02.2016 in its favour and against MWI (to the extent of

US $ 7,00,000/- together with interest thereon @15% p.a. from 1st April, 2011 to February, 2016 besides Attorney's fees and costs in the sum of US$

6373 and US$ 26.36 respectively). The decree had to be satisfied by MWI and Worldwide Metal LLC in short 'WMLLC' jointly and severally.

3. WMLLC, is a limited liability company incorporated after the dissolution of MWI and was a party to the suit in which the summary judgment dated

05.02.2016 came to be passed by the District Judge, Florida. For the remainder of the case or the issues, the matter was kept pending for decision.

During this course, on a joint motion filed by the parties and the agreement arrived at, a consent judgment came to be passed against the second

respondent i.e TCC Wireless Inc. on the assertion of successorsâ€™ liability in the sum of US$ 3,50,000/- which was also to bear interest in

accordance with 28 USC, 1961. Parties also agreed that the Attorney's fees and costs would be payable to Century in the manner provided. In

addition, the first respondent furnished personal guarantee dated 20.07.2016 to secure the payment in favour of Century in terms of the joint motion

dated 20.07.2016 and the order entering consent judgment dated 05.08.2016 in short 'the foreign judgment' passed by the Magistrate Judge, Distt. of

Maryland, Florida.

4. Century alleged that on the agreement arrived at and under the said foreign judgment, an action by way of suit was maintainable and enforceable in

India and that, the foreign judgment was conclusive. Sachin in his application sought leave to defend the suit on diverse pleas viz.

(i) he was permanent resident of Florida (USA), where he has been residing since 1999 and did not own any asset-movable or immovable in India;

(ii) no judgment was passed against him in the order dated 05.02.2016 and that on the joint motion, the consent judgment was passed for an amount of

US$ 3,50,000/- against TCC and though, he stood personal guarantor for the same amount, he had consented only to personal jurisdiction and venue in

the State or Federal Court located in Baltimore, Florida or in the jurisdiction where he owned property at the time of enforcement action and in view of

the fact that he did not own any property within the territorial jurisdiction of this court, the suit proceedings were not maintainable before this court;

(iii) the suit did not fall in any of the clauses of Order 37 Rule 1;

(iv) he was not a majority shareholder and director-in-charge or responsible for the affairs of the respondent no.2; and,

(v) provisions of Order XXXVII CPC could not be used as execution proceedings against him; more so, for the reason that he did not own any asset

within the territorial jurisdiction of the court. TCC took the similar plea for the court being bereft of the territorial jurisdiction in entertaining the suit.

5. Adverting to the judgment dated 05.02.2016 and the foreign judgment dated 05.08.2016 Tarun alleged that he had not furnished any guarantee and

the suit as against him was wholly malafideand without any cause of action. It was also averred that the order/judgment relied upon was no judgment

as against Tarun inasmuch as he was not a majority shareholder of TCC. More-so, when TCC was a separate juristic entity.

6. Century contested the pleas raised by the respondents. By the impugned order granting leave to defend to first two respondents, the suit was

dismissed with liberty to approach the court of appropriate jurisdiction.

7. According to Mr. Rahul Gupta, learned counsel for Century, the impugned order is unsustainable. Century asserts that suit was at the stage of

consideration of the applications seeking leave to defend and at this stage, the suit itself could not be dismissed on the ground of lack of territorial

jurisdiction inasmuch as, it invited adjudication of mixed questions of fact and the law and that, the plaint disclosed that a part of cause of action had

arisen within the territorial jurisdiction of the court as the purchase orders as also the advance payments were made by Century at Delhi and the

goods were also agreed to be delivered at Delhi. It is also pleaded that Sachin, was a citizen of India holding Indian passport bearing New Delhi

address; under the compromise settlement, he had admitted his liability and bound himself to pay the judgment/settled amount waiving all his rights to

contest the enforcement of the consent judgment. Centuryâ€™s counsel submitted, the principle ""debtor has to find creditor"" is attracted in the given

facts and circumstances of the case.

8. Mr. Gupta argued, as regards the doctrine of merger, cited by the impugned judgment, is inapplicable in the facts and circumstances of the case. In

the written submissions filed, reference is made to M/s Mechelec Engineers & Manufacturers vs. M/s Basic Equipment Corporation, AIR 1977 SC

577; Gurdip Singh Kalra vs. Surjit Singh Sood. (2003) 105 DLT 267; A.B.C. Laminart Pvt. Ltd. vs. A.P. Agencies Salem, 1989 (2) SCC 163; Oil and

Natural Gas Commission vs. Utpal Kumar Basu & Ors., 1994 (4) SCC 711; Nawal Kishore Shrma vs. Union of India & Ors., 2014 (9) SCC 329;

Yash Chhabra vs. Maya Jain, 2015 (151) DRJ 316 (DB);and, Badat and Co. Bombay vs. East India Trading Co., AIR 1964 SC 538.

9. According to the respondents, the impugned judgment did not invite any interference especially in view of the law enunciated thereunder. It was

pointed out that no part of the cause of action arose in Delhi or within this courtâ€™s jurisdiction; even the personal guarantee relied upon was not

executed in Delhi. Furthermore, counsel pointed out that the goods were supplied to the US buyer and that money was partly received in Delhi was an

irrelevant aspect.

10. A plain Construction of the plaint and the specific pleadings leave no doubt that the suit was founded on the basis of the joint motion for consent

judgment dated 20.07.2016 and the resultant foreign judgment dated 05.08.2016. Here itself, it would be relevant to note that on 05.02.2016 the Unites

States District Judge, District Court, Maryland Florida had passed a partial summary judgment only against MWI while Attorney's fees and costs

awarded there-under were payable by MWI and WMLLC, jointly and severally. The suit instituted by Century on the basis of the foreign judgment is

however against Sachin, TCC and Tarun and not against either MWI or WMLLC, for whatever reasons. Filing of the suit only against Sachin, TCC

and Tarun is founded on the basis of the foreign judgment dated 05.08.2016 subsequent to the passing of the partial summary judgment dated

05.02.2016, on the assertions of liability of TCC (as a successor, i.e as a company duly registered and incorporated under the US laws which

undertook the liability to discharge the debt). The suit as against Sachin is founded on the personal guarantee extended by him for the discharge of

such debt liability by TCC, which he executed on 20.07.2016 at Florida and forms part of the joint motion for consent judgment. No specific basis for

the suit as against Tarun emerges from the plaint. The specific averments made in paras 18 & 21 to that effect are, as under :

18. That it is stated that the plaintiff is filing the present suit on the basis of joint motion and stipulation for entry of consent judgment dated 20.07.2016

submitted by the parties before Hon'ble Distt. Courts United States and the personal guarantee dated 20.07.2016 furnished by defendant No.1 Mr.

Sachin Chhabra and order/judgment of dated 5.8.2016 passed by United States Distt. Courts as mentioned herein above.

21. That it is stated that the cause of action to file the present suit arose on 5.2.2016 when the Hon'ble United Stated Distt. Courts passed a summary

judgment in favour of the plaintiff company and against the defendants in the sum of US $ 7,00,000 along with interest and attorney fees. The cause of

action further arose on 20.7.2016 when the parties filed a joint motion and defendant no.1 also submitted his personal guarantee before United States

Distt Courts and also arose on 5.8.2016 when the Hon'ble Court of United Stated Dist. Courts passed order/judgment on 5.8.2016. The cause of

action arose when the defendants despite the aforesaid consent order and personal guarantee have not paid the amount to the plaintiff. The cause of

action to file the present suit continues to exist on the date of filing of the present suit.

11. From the foregoing, it is clear that the cause of action for institution of the suit is squarely founded on the joint motion for consent dated 20.07.2016

and the consequent foreign judgment dated 05.08.2016. In other words, the suit is not founded on the original cause of action having arisen within the

territorial jurisdiction of this court. Interestingly, both the parties have placed reliance upon the judgment of the Supreme Court in Badat and Co.

Bombay vs. East India Trading Co., AIR 1964 SC 538 and the learned Single Judge adverting to the majority view has culled out the ratio thereof in

the impugned judgment, as under:

Â ""27. .....

Supreme Court however held (i) if the plaintiff was suing upon the original cause of action, there would have been no difficulty and the High Court

could have granted leave under Clause 12 of the Letters Patent for Bombay to the plaintiff to institute the suit; (ii) however the plaintiff had chosen to

sue not on the original cause of action but on the basis of the foreign judgment and the arbitral award; (iii) the judgment furnishes an independent

cause of action; (iv) the question would be, whether the cause of action furnished by it arose between the limits of original jurisdiction of the High

Court; (v) the judgment was rendered in New York and therefore the cause of action furnished by it arose at that place and not anywhere else; (vi)

this cause of action is really independent of the cause of action afforded by the contract and therefore if advantage was sought to be taken of it, the

suit would not lie at Bombay; (vii) the Doctrine of Merger has been consistently held in England not to apply to a foreign judgment, with the result that

despite the fact that a plaintiff has obtained a foreign judgment, he may nevertheless sue upon the original cause of action, instead of upon the

judgment; (viii) when the plaintiff sues upon the original cause of action, no doubt the Court within whose jurisdiction, the cause of action arose, would

be entitled to entertain the suit; (ix) but if on the other hand, the plaintiff chooses to sue upon the judgment, he cannot found jurisdiction for the

institution of the suit on the basis of the original cause of action because once he chooses to rest himself on the judgment obtained by him in a Foreign

Court, the original cause of action will have no relevance whatsoever, even though it may not have merged in that judgment; (x) since the plaintiff in

that case had chosen to sue on the foreign judgment and cause of action whereof did not arise within the limits of the original jurisdiction of the High

Court of Bombay, the suit based upon that judgment was beyond the jurisdiction of the Court.

12. Badat's case (supra) dealt with a situation of enforcement of foreign awards and foreign judgments based upon the awards and the applicability of

the Arbitration Protocol and Convention Act, 1937 under which, certain commercial awards made in foreign countries are enforceable in India as if

they were made on reference to arbitration in India. Badat's case (supra) in the considered opinion of this court does not aid Century in any manner

either on facts or the law. As observed to earlier, the suit is not founded on the original cause of action. In fact, the original debtor MWI against whom

the cause of action had arisen on account of Century's business transactions during the period from the year 2009 to 2011, is not even a party to the

suit proceedings. TCC's liability under the foreign judgment has come to be fixed on the assertions of successor's liability on the joint motion of consent

judgment and therefore, cause of action for the institution of the suit on the basis of the foreign judgment dated 05.08.2016 by any means can be said

to have any relation to the original cause of action.

13. This takes the court to consider another aspect of the matter of institution of the suit on the basis of the foreign judgment. The order entering

consent judgment is of the Magistrate Judge, Distt. of Maryland and reads, as under :

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

(NORTHERN DIVISION)

Â CENTURY METALÂ *

RECYCLINGPRIVATE *

Â LIMITED,Â *

Â PlaintiffÂ * Case No.: 12-cv-02650-JMC

Â v.Â Â *

METAL WORLDWIDE, *

Â INC., et al.Â *

Â DefendantsÂ *

ORDER ENTERTING CONSENT JUDGMENT

Upon consideration of the parties' Joint Motion and Stipulation for Entry of Consent Judgment on Count Ten and for Withdrawal of Remaining

Unresolved Counts(""Joint Motion and Stipulation""), the Court states as follows :

Â The Court ORDERSthat judgment is ENTERED

AGAINST Defendant TCC Wireless, Inc. in the amount of Three Hundred Fifty Thousand Dollars ($350,000.00), for which sum let execution issue,

on Count Ten of Plaintiff's Substitute Second Amended Complaint filed on December 4, 2014 (ECF No. 162) (""SSAC"");

The Court APPROVES Plaintiff's withdrawal of Count One of the SSAC as to the underlying contract, along with Counts Two, Three, and Eight of

the SSAC;

The Court ORDERSthat theClerk shall close this case though such closure will not preclude Plaintiff from filing an enforcement action as to this

Consent Judgment and any collection proceedings in aid of execution should the need arise;

The Court ORDERS that the jury trial scheduled for October 24, 2016, is CANCELLED;

The Court, beyond the precise terms of this Order, is not otherwise taking any other position as to the other terms of the stipulation between the

parties as part of their global resolution as outlined in ECF No. 246. To the extent any of the terms beyond those specifically contained in this Order

are later challenged or disputed in this Court or any other, it will be up to that subsequent judicial officer to determine any issues that may be raised as

to the interpretation or enforceability of those terms.

The Court ORDERS that copies of this Order be sent to all counsel and parties of recorded.

SO ORDERED.

Â Â Â Sd/-

Â Â Â J. Mark Coulson

Â Â United States Magistrate Judge

14. Here, it is relevant to note at the onset that this order (the foreign judgment), is passed by the Magistrate Judge and not the Distt. Judge passing

the partial summary judgment dated 05.02.2016. Does this order passed by the Magistrate Judge, Florida, which is premised on the consent terms and

not on merits, qualify the test of its conclusiveness as stipulated under Section 13 of the Code of Civil Procedure, of course, is a matter of

consideration. Section 13 CPC reads, as under:

When foreign judgment not conclusive - A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same

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.

15. The above-said provision is a substantive provision of law. It lays down the statutory principle for the enforceability or the institution of an action

founded on a foreign judgment inasmuch as these provisions not only apply to the proceedings of execution under Section 44A CPC but also to the

institution of the suit, on account of the independent obligation cast upon the debtor under it. It was therefore imperative for Century to at least plead in

the plaint that the suit instituted did not fall within the exceptions (a) to (f) of Section 13 for the foreign judgment to be conclusive and on which the suit

was founded. There is however, not even an iota of any such pleading in the plaint. Therefore, in the absence of any pleading, there cannot be any

adjudication of facts and law, which require to be considered and decided by the court to record its finding as to whether the foreign judgment in

question did not fall within the exceptions of clause (a) to (f) of Section 13. In view thereof, a mere mention thereof in the joint motion of consent

judgment dated 20.07.2016 ipso facto does not tantamount to the conclusiveness of the foreign judgment as contemplated under Section 13 CPC as

observed to by the learned Single Judge terming it to be a lip service. We have therefore, no reason to differ with the observations made by the

learned Single even to that effect.

16. Be that as it may, assuming, the foreign judgment is binding amongst the parties as regards the liability of debt, could a court be invested with the

territorial jurisdiction by consent of the parties independent of the statutory provisions for the purpose. Answer thereto, certainly has to be in the

negative. It is worthwhile to observe that the suit in question is not a suit inherently attracting a right in the immovable property which falls under the

purview of Section 16 CPC but a simple suit for recovery of money and governed by Section 20 CPC. A suit founded even on a foreign judgment,

which may be conclusive under Section 13 CPC, is equally to satisfy the conditions of Section 20 CPC and there is no exception to it. Thus, in the

absence of its institution on the basis of the cause of action having arisen within the territorial jurisdiction of this court, it was required to satisfy the

other test of respondents (defendants) or any one of them, actually and voluntarily residing or carrying on business or personally working for gain

within the territorial jurisdiction of this court or acquiesce in its institution. Undisputedly, the second respondent is a company registered and

incorporated under the US laws and has no business activity within the jurisdiction of this court. Cause of action, founded on the personal guarantee

extended by Sachin at Florida arose there; there is nothing to indicate that such cause of action, or any part of it arose within the jurisdiction of this

court. No part thereof therefore, can be said to have arisen within the jurisdiction of this Court. The Plaint does not show any cause of action against

Tarun. Thus, the only other aspect as regards the jurisdiction of this court requiring consideration would be in relation to the aspects of residence and

carrying on business, as provided for under Section 20 CPC. To that effect, the averments made in the plaint are only to the effect that the the first

respondent was permanent resident of 1, Ring Road, Lajpat Nagar-IV, New Delhi. Save such averment, there is no other averment in the pleadings

for the first and third respondents actually and voluntarily resided there at the time of the commencement of the suit, which is the requirement under

Section 20 CPC.

17. In the leave to defend application supported by an affidavit, the first respondent categorically deposed that he was permanent resident of Florida

(USA) and has been residing USA since 1999. Similarly, the respondent no.3 in such application stated that he was permanent resident of Maryland

(USA) and has been residing in USA since 2005. They also categorically averred that they did not own any movable or immovable property in India.

But for a mere denial to such averments and production of a copy of the passport issued to Sachin from New Delhi, Century did not rely on any other

material to even prima facie show that the said respondents were actually and voluntarily residing or carrying on business of personally working for

gain within the territorial jurisdiction of this court.

18. Undoubtedly in the normal course, on an application, leave can possibly be granted unconditionally and thereafter the matter could be considered

on the issue of territorial jurisdiction separately, but, in a given case, when the facts and circumstances of the case are by itself plain and simple and do

not require any further consideration, there is no reason why, the suit cannot be disposed of if the jurisdiction of the court is not made out. None of the

judgments quoted in the written submissions of Century is of any avail to it. In Mechelec Engineers (supra), the High Court had declined to interfere in

the order of unconditional leave to defend granted to the defendant. In Gurdip Singh Kalra (supra), on the principles of law leave to contest came to be

granted with conditions. Similar was the case in Yash Chopra (supra). Whether leave to defend be granted conditionally or unconditionallyof course

has to be considered in the peculiar facts and circumstances of every case. In ONGC's case (supra), the court dealt with the aspect of jurisdiction of

High Court in exercise of its jurisdiction under Article 226 and the underlying principle of Section 21 as regards to objection to jurisdiction being

considered by the appellate or revision court. Similar was the case of Nawal Kishore Sharma (supra). A.B.C. Laminart's case (supra) was a case

where the parties by contract ousted the jurisdiction of other courts, where a part of cause of action had arisen. None of the judgments have any

application to the case in hand inasmuch as the cause of action for the institution of the suit in the case in hand is of Florida, USA and no part thereof

can be said to have arisen within the territorial jurisdiction of this court. The reliance placed on the judgments supra is wholly misconceived.

19. For the foregoing reasons, it is held that the appeal is without merit and is therefore, dismissed with no order as to costs.