

Execution of Foreign Decrees

Report No. 84.

EXECUTION OF FOREIGN DECREES

In a judgment of the Karachi High Court in the case of Munawar Ali Khan v Marfani and Company Ltd (PLD 2003 Ka 382), an important proposition is discussed: whether a decree passed by a foreign court under private international law can be executed under Section 44-A read, with Rule 23-A of Order XXI of the Code of Civil Procedure 1908, and in case of objection, whether non-furnishing of security would not be fatal. The Court held that there are some anomalies in the CPC which need to be considered by the Law and Justice Commission. Apparently, the Secretariat of the LJCP has not yet received copy of the judgment which was proposed to be sent for its consideration, however, the said judgment having been published in PLD, is examined in this working paper.

Brief facts of the case are that in June 1989, the respondents (Marfani and Company) filed a suit against the appellants claiming that the appellants (Munawar Ali Khan) had agreed to sell and the respondents had agreed to purchase certain immovable properties in Hyde Park Mansions, London. According to the agreement between the parties certain amounts by way of service charges under leases were required to be paid by the appellants to the respondents, which they failed to pay despite completion of sale and purchase in May 1986. The respondent-company filed a suit in the British Court and Writ of Summons were issued to the appellants all of whom were residents of Pakistan.

Thereafter the respondents sought to execute the decrees through this Court (High Court of Sindh) under section 44-A, C.P.C. The appellants filed objections but by an Order a learned Single Judge ruled that the objections could not be heard unless the appellants furnish security in terms of Order XXI Rule 23-A of the CPC. The appellants preferred appeals against the aforesaid order before a Division Bench which were disposed of by a consent order whereby the order of the learned Single Judge was set aside and the matter was remanded to the learned Single Judge. Upon remand the learned Single Judge hearing the execution applications noticed that the Appellate Bench had not decided the question of requirement of furnishing security under Order 21, Rule 23-A, C.P.C. and thereafter proceeded to consider the question of non-furnishing of security as well as the merits of the case. By the impugned order the Court held that furnishing security was a condition precedent for objecting to execution of any money decree including a decree of a foreign Court and therefore, the appellants' objections could not be heard.

The attention of the Court was invited to Cheshire and North's Treatise on Private International Law where the authors recorded their opinion in the following words:

“According to the decisions that have dealt with the matter up to the present, it is undoubted that the various circumstances considered above

exhaust possible cases in which a foreign Court possesses international competence. Thus it is not sufficient that the cause of action, as for instance a breach of contract or a commission of a tort accrued in foreign country”.

The Court observed:

Indeed it appear to be correct in asserting that under the traditional Common Law rules of private international law an action on the basis of a foreign judgment could only be maintained if the defendant in the aforesaid judgment was a resident or at least physically present in the foreign country at the time of commencement of proceedings or had submitted to or agreed to submit to the jurisdiction of such foreign Court. The mere fact that the cause of action had accrued within the jurisdiction of such Court would not confer competence upon such Court in an international sense so as to make its judgments recognizable and enforceable in Britain.

As far as the question of exercise of jurisdiction of British Courts over non-resident foreigners is concerned the common law principles seem to have stated in Cheshire and North quoted above in Chapter-12. Several rules premised on judgments of high authority have stated at pages 302—305 and it appears that British Courts are competent to exercise jurisdiction where a claim is brought to enforce, rescind, dissolve or otherwise affect a contract or to recover damages or obtain any other remedy in respect of breach of contract in cases where a contract was made within the jurisdiction of such ‘Courts or the breach is committed within such jurisdiction.

The Court observed:

Nevertheless, the cases and the statement of law relied upon ... presents a somewhat anomalous situation that whereas the English Courts would assume jurisdiction over a non-resident foreigner in a case like the present one, they would decline to recognize or enforce a foreign judgment where jurisdiction on similar circumstances has been assured by a foreign Court. This anomaly appears to be acknowledged by English Courts and jurists and therefore, in certain cases it has been held that the power of the Court to allow service of motion in foreign countries ought to be exercised with extreme caution.

The Court further observed:

We have gone through the cases cited by learned counsel for the parties and it seems that when a defendant appeared before a foreign Court only to protest against assumption of jurisdiction he cannot be assumed to have voluntarily submitted to such jurisdiction. Nevertheless, when he also takes up defenses on merits a clear submission can be inferred. Similarly when he applies to have a default judgment set aside and appeals as to merits of the claim such appeal would normally amount to submission to jurisdiction. Nevertheless, if the appeal or application is merely premised

upon a jurisdiction issue it would not be treated as submission. Unfortunately none of the applications moved by the appellants for setting aside the ex prate judgment have been placed on record.

It was held by the Court that in the circumstances since there is no material to show that the appellant had submitted to the jurisdiction of the Courts in Britain and in view of the binding precedents, we are constrained to allow this appeal on the ground that the foreign judgment was not pronounced by a Court of competent jurisdiction. In view of the above it is not necessary to examine the remaining contentions. The impugned judgment of the learned Single Judge is therefore, set aside, but there shall be no order to costs. A copy of this judgment may be forwarded to the Secretary, Ministry of Law, Government of Pakistan and Secretary, Pakistan Law Commission to consider the desirability of amending the relevant provisions of C.P.C. in view of the anomalies pointed out.

The above mentioned judgment is also examined by a former Federal Law Secretary in an Article, "Recognition And Enforcement of Foreign Decrees", published in PLD 2003 J 114 who concluded:

It is apparent that under the Convention for the purpose of jurisdiction in an action in personam, as was the case in *Munawar Ali Khan v Marfani & Co. Ltd.* [PLD 2003 Karachi 382}, the Court giving the judgment or passing the decree shall be considered to have jurisdiction only if the defendant had, at the time when the proceedings were instituted, his habitual residence in the state of the Court which gave the judgment or passed decree. A decree of a foreign Court in action in persnam in which the court assumed jurisdiction under its own system of laws on any ground other than the presence of the defendant within the jurisdiction, such as locality of cause or action or forum of convenience, shall not be recognized and enforced under the Convention. Although Pakistan is not a Contracting State of the Hague Convention but its provision relating to jurisdiction of foreign Courts can usefully be referred to support the view that the rule established in the cases of *Sadar Gurdyal Singh, Swindles and Sons and Ghulam Ahmad, supra*, is in accord with the international view on the subject.

It may be pertinent to mention that in family disputes in general and in cases of custody of children in particular the order/decrees of the courts are often flouted either by removing the custody of minor from outside the jurisdiction of courts and some times they are removed to outside countries to make the jurisdiction of Pakistan Courts Coram non judice and to make decrees/ orders unexecutable.

Keeping in view the situations recently a bilateral legal protocol has been signed between Pakistan and Britain at judicial level to meet such like situations. Still an effective procedure is required to execute foreign decrees in Pakistan and vice versa. Presently the laws, provision of laws on the subject are Section 44-A and 13 of the Code of Civil Procedure 1908, they are:

[44A. Execution of decrees passed by Courts in the United Kingdom and other reciprocating territory,... (1) Where a certified copy of a

decree of any of the superior Courts of the United Kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in [Pakistan] as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate, shall, for the purpose 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) Section 13.

Explanation 1.—“Superior Courts” with reference to the United Kingdom, means the High Court in England, the Court of Session in Scotland, the High court in Northern Ireland, the Court of Chancery of the County Palantine of Lancaster and the Court of Chancery of County Palantine of Durham.

Explanation 2.—“Reciprocating territory” means [the United Kingdom and such other country of territory as] the [Federal Government] may, from time to time, by notification in the [Official Gazette], declare to be reciprocating territory for the purposes of this section; and “superior Courts”, with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 3.—“Decree”, with reference to a superior Court, means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, and

(a) with reference to superior Courts in the United Kingdom, includes judgments given and decrees made in any Court in appeals against such decrees or judgments, but

(b) in no case includes an arbitration award, even if such award is enforceable as a decree or judgment.]

Section 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 face of the proceedings to be founded on an incorrect view of Internal Law or a refusal to recognize the law of [Pakistan in cases in which such law is applicable;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
- (e) where it has been obtained by fraud;
- (f) where it sustains a claim founded on a breach of any law in force in [Pakistan].

Before proceeding further it may be relevant to trace the history its application in the Subcontinent. Section 44-A of CPC dealing with execution of decrees passed by Courts in the United Kingdom and other reciprocating territory was added vide Section 2, of Act VIII 1973 when the Subcontinent was part of Great Britain. The said execution continued in force to the dominion of Pakistan by virtue of section 18 of the Indian Independent Act 1947. When Pakistan became republic, the extension was renewed by the UK Order in Council, Reciprocal Enforcement of Judgments (Pakistan) Order 1958. This section is applicable only to the extent of judgments of the Superior Courts of United Kingdom which are High Court in England, the Court of Session in Scotland, the High Court in Northern Ireland, the Court of Chancery of the country Palantine of Lancaster and the court of Chancery of country Palantine of Durham. The other reciprocating territories whose decrees are executable in Pakistan are, Fiji, Singapore, Australian Capital, New Zealand, Northern Territory of Australia, as declared by the Federal Government.

The scope of execution under section 44-A of the CPC is subject to fulfillment of conditions laid down in section 13 of the Code which are:

1. The decree must be pronounced by a Court of competent jurisdiction;
2. It has been given on the merit of the case;
3. It must be on correct application of International Law;
4. It should not be opposed to natural justice;
5. It should not be based on fraud; and
6. It should not be on a breach of any law in force in Pakistan.

Apparently the section was added to execute decrees of British Courts through the District Courts of this subcontinent. Similarly, there was a provision in section 45 for execution of decrees in foreign territory which has been omitted by Ordinance XXVII Of 1981. Now the decrees of United Kingdom and reciprocating territories are executable in Pakistan, but decrees of Pakistani Courts are not executable either in British or in the reciprocating countries.

It may be relevant to mention that the Indian CPC has been amended in 1952 and the words, "the United Kingdom" has been deleted. Similarly, Explanation

1,2,3 of section 44-A CPC has also been amended extending the scope of execution of foreign decrees of the superior courts of any country in the world instead of the UK or dominions. The Indian CPC has also retained section 45 of the CPC relating to execution of decrees in foreign territory. The relevant provisions read as under:

44-A. 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 provision of section 47 shall as from the filing of the certified copy of the decree apply to the proceeding 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) section 13.

Explanation 1- '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 2- '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.

45. [section 229A] Execution of decrees in foreign territory.

So much of the foregoing sections of this part as empowers a court to send a decree for execution to another Court shall be construed as empowering a Court in any state to send a decree for execution to any Court established by the authority of the Central Government outside India to which the State Government has by notification in the Official Gazette declared this section to apply.

In the circumstances, the need to suggest ways and means to execute decrees, judgments and final orders of the Courts of Pakistan in foreign countries, be

ensured in the same manner as decrees of UK and other reciprocal countries are executable in Pakistan. It may be pertinent to mention that Section 45 in the Code of 1908 was available empowering the foreign courts to execute decrees of Pakistan courts but was omitted by the Ordinance XXVII of 1981 whereas this provision has been retained in the India code of civil procedure. If the omitted provision may be revived, this may help in executing decrees against the fugitive judgment debtors living abroad and having assets in foreign countries. Similarly, orders of the Guardian court could also be effectively implemented against person who remove person of a minor by taking them out of country to make jurisdiction of the court Coram non judice.

It may also be relevant to note that according to sub-section (1) of section 44-A of the Code 1908, a decree of UK can be executed in Pakistan as if it is passed by a District Court. In our judicial system District Court is a Court of appeal except where the Court has Original jurisdiction conferred on it by law, all decrees passed by a Civil Court is executed by that Court either itself or through another Court of competent jurisdiction. A district Court can execute only those decrees passed by it in its original Civil Jurisdiction. Similarly, a High Court can execute its own decrees when it is passed in its Original civil jurisdiction. In the case of *Munawar Ali Khan v Marfani & Co. Ltd* (PLD 2003 Kar 382) a decree of British Court was sought to be executed through Karachi High Court which was not a proper forum because under sub-section (1) of section 44-A of the Code, only a District Court can execute a decree of United kingdom as if it had been passed by the District Court.

The need to review the international laws and the laws of counties to provide a specific provision for enforcement of judicial directives/decrees against fugitive judgment debtors are of immense importance. The need can better be understood by this hypothetical proposition, that, in a case between spouses for the custody of a minor child the court direct that interim custody be handed over to one of the parent till final decision of case. The person who is in custody of the minor removes him to a foreign country. In the circumstances the court is helpless to issue a writ against that person to produce the minor before it. Had there a bilateral judicial protocol beside specific provision in their procedural law the direction could be implemented through the foreign court of competent jurisdiction. Similarly, a decree of maintenance, dower etc against a person living abroad who has no assets in Pakistan is of no value if it is not executable in a foreign country in same way decrees of foreign countries are executable in Pakistan. The same situation may arise where decrees of huge amount passed by a Banking Court against persons who has no assets in Pakistan but has in foreign country, the decree is of no value if it is not executable abroad in the same manner as it is executable in Pakistan.

Perhaps some exercise to implement the decrees of Pakistani Courts in foreign jurisdiction through administrative action is underway which cannot legally bound a court in absence of legal force/ procedure laid down in their laws relating to enforcement and execution of decrees. A Pakistani Court cannot transfer its

decree to a foreign court unless provision supporting transfer to a foreign court is in the CPC, similarly a foreign court cannot receive a decree for execution unless there is some provision for the purpose in their procedural laws, even a decree passed by Pakistani Court cannot be executed in Azad Kashmir in absence of this provision, therefore, in absence of specific law only an administrative protocol cannot serve the purpose.

It is therefore purposed that:

1. The heading of Section 44-A of the Code of Civil Procedure 1908 may be rephrased as under:-

Execution of decrees passed by Courts in the reciprocating country and territory.

2. In subsection (1) of section 44-A of the code of Civil Procedure 1908 the expression "United Kingdom", be omitted;
3. In sub-section (1) of section 44-A of the Code of Civil Procedure 1908 after the word reciprocating, the words, "country and" be added.

The proposed amendments are indicated in the comparative table below:

Existing Provision	Proposed Amended
<p>Section 44-A CPC</p> <p>Execution of decrees passed by courts in the united Kingdom and other reciprocating territory.</p> <p>Where a certified copy of a decree of any of the superior courts of the United kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in [Pakistan] as if it had been passed by the District Court.</p>	<p>Section 44-A CPC</p> <p>Execution of decrees passed by courts in the reciprocating country and territory.</p> <p>Where a certified copy of a decree of any of the superior courts of.....or any reciprocating country and territory has been filed in a District Court, the decree may be executed in [Pakistan] as if it had been passed by the District Court.</p>

A
Bill

Further to amend the Code of Civil Procedure, 1908

Whereas it is expedient to amend the Code of Civil Procedure, 1908 (Act V of 1860) for the purpose hereinafter appearing;

It is hereby enacted as follows:-

1. Short title and commencement.-(1) This act may be called the Code of Civil Procedure (Amendment) Act, 2003.
(2) It shall come into force at once.
2. Amendment of section 44-A, act V of 1908.- In the Code of Civil Procedure, 1908 in section 44-A.--
 - (i) In the marginal heading, for the words "Execution of decrees passed by Courts in the United Kingdom and other reciprocating territory" the words "Execution of decrees passed by courts in the reciprocating country and territory" shall be substituted.
 - (ii) In sub-section (1) for the words "United Kingdom or any reciprocating" the words "reciprocating country and" shall be substituted.

Commission's deliberation on 10.06.2006

The working paper was considered by the Commission in its meeting held on 10.6.2006 and the following are the deliberations:-

The Commission considered the proposal to amend Section 44-A of the CPC 1908 which empowers the courts in Pakistan to execute a foreign decree. The Secretary explained that the proposed amendment is made on the observation of the High Court of Sindh in PLD 2003 Kar 382. The Chief Justice High Court of Sindh explained to the Commission that it was his judgment although he does not remember the questions involved therein however, as he recalls it related to decree passed in a foreign country having a reciprocating agreement with Pakistan for execution of decree of the courts within the two countries. The Chief Justice further expressed that the execution of decree under Section 44A of the CPC further requires fulfillment of certain conditions laid down in Section 13 of the Code which are :-

- (i) its pronouncement by the court of competent jurisdiction ;
- (ii) given on the merits of the case ;
- (iii) passed on correct application of the international law
- (iv) not to be opposed to natural justice ;

(v) should not be based on fraud.

The Chairman expressed that presently the conditions to be fulfilled by the decree of the foreign court for execution is not in question however, Section 44A of the Code still contains the words “the superior courts of the United Kingdom which requires to be deleted / substituted as done I the Indian CPC. The other members agreed to the views of the Chairman and the Commission approved that the words “United Kingdom” may be deleted from Section 44A and words “reciprocating country and territory” may be replaced for it.