

BANK OF BARODA VS. KOTAK MAHINDRA BANK LTD. – LIMITATION FOR EXECUTION OF FOREIGN DECREE

(Whether it raises more questions than it answers- An analysis.)

In a recent judgment¹ the Hon'ble Supreme Court delved into a significant question of *limitation for filing an application for execution of a foreign decree of a reciprocating country in India.*

Apposite facts of the case:

Vysya Bank, the predecessor of the respondent Kotak Mahindra Bank Ltd. (“**respondent**” / “**KMBL**”), issued a letter of credit for US \$1,794,258 on behalf of its customer M/s. Aditya Steel Industries Limited in favour of M/s. Granada Worldwide Investment Company, London. The appellant Bank of Baroda (“**appellant**” / “**BOB**”) was the confirming bank to the said letter of credit. The Visa Bank issued instructions to the London branch of the appellant on 12.10.1992 to honour the letter of credit. Acting on this instruction the London branch of the appellant discounted the letter of credit for a sum of US \$ 1,742,376.41 and payment of this amount was made to M/s Granada Worldwide Investment Company on 13.10.1992.

The appellant filed a suit against the Visa Bank for recovery of its dues on 19.04.1993 in London. This suit was decreed by the High Court of Justice, Queens Bench, Divisional Commercial Court of London on 20.02.1995 and a decree for US \$1,267,909.26 along with interest thereon was passed in favour of the appellant bank and against Visa Bank. The decree was not challenged and became final.

On 05.08.2009, the appellant bank filed an execution petition in India, i.e. almost 14 years after the decree was passed by the London Court, for execution of the same in



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terms of Section 44A² read with Order 21 Rule 3 of the Code of Civil Procedure, 1908 ("Code") for recovery of Rs.16,43,88,187.86.

Fate of the execution petition before the courts below:

On 20.07.2013 the Additional City Civil & Session Judge, Bangalore acceded to the main contention of the respondent regarding limitation and dismissed the execution petition as time barred holding that Article 136³ of the Limitation Act, 1963 ("**the Act**") applies and the

² Section 44A of the Code - **Execution of decrees passed by the Courts in in the 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 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 to 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.

³ Article 136 of the Act-

<u>Description of suit</u>	<u>Period of limitation</u>	<u>Time from which period begins to run</u>
136. For the execution of any decree (other than a decree granting a mandatory injunction) an order of any civil court.	Twelve years	When] the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place: Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

execution petition should have been filed within 12 years of the decree being passed by the London Court. Aggrieved, the appellant bank approached the High Court, which vide judgment dated 13.11.2014 upheld the view of the trial court.

Rival submissions on behalf of the parties before Hon'ble Supreme Court of India ("SC"/"Apex Court"):

A. On behalf of the appellant, following points were urged before the SC:

- i. The Act does not prescribe any period of limitation for execution of a foreign decree passed in a reciprocating country.
- ii. In such eventuality, the principles of delay and laches, as applicable to writ proceedings, may apply. Replying on a list of dates, it was submitted that the appellant was pursuing the matter and was trying its best to get the matter settled with Visa Bank and, therefore, there was no delay in filing the execution petition.
- iii. Since no limitation is provided under the Act, the cause of action for filing an execution petition arises only when a petition is filed under Section 44A of the Code, which provides that a decree passed by a court in a reciprocating country should be treated as an Indian decree and, therefore, the limitation period of 12 years provided under Article 136 of the Act applies only from that date because that is the date when the cause of action for filing of execution petition arises when the foreign decree is treated to be an Indian decree.

B. *Per contra*, on behalf of the respondent following submissions were made:

- i. Law of limitation of England would apply in this case. The limitation period as per English Law is 6 years for execution of a decree, and hence the decree having been passed on 20.02.1995, no petition for execution of that decree could be filed after 20.02.2001.
- ii. The alternative argument was that even if the Act were to apply, the limitation period for execution of a foreign decree would be determined as per Article 136 of the Act.
- iii. Section 44A of the Code clearly provides that a decree passed in a reciprocating country should be treated as an Indian Decree and, therefore, the same must be enforced within 12 years from the date of passing of the decree as provided by Article 136 of the Act.

- C. From the above, it can clearly be seen that not only both the courts below but even the parties were clearly of the view that if the Act was to apply, limitation for execution of foreign decree would be 12 years under Article 136. In such case, the only disagreement was with respect to the starting point of limitation, which as per the appellant was the day when the execution application was filed in India but as per the respondent, the starting point of limitation for execution of a foreign decree was the date when the foreign decree was passed. SC finally dismissed the appeal and held that the Application for execution was barred by limitation, *albeit*, for different reason.

Issues that arose for consideration before the Apex Court:

- i. Does Section 44A merely provide for the manner of execution of foreign decrees or does it also indicate the period of limitation for filing execution proceedings for the same?
- ii. What is the period of limitation for executing a decree passed by a foreign court (from a reciprocating country) in India?
- iii. From which date the period of limitation will run in relation to a foreign decree (passed in a reciprocating country) sought to be executed in India?

Findings of the Apex Court:

A. On issue no.1:

- i. At the outset, the SC emphasized the change in the legal position after Section 44A was inserted in the Code in the year 1937. Prior to Section 44A, a decree passed by any court in a foreign country could not be executed in India and only a suit could be filed on the basis of the judgment passed by a foreign court. Section 44A brought about a change in law in respect of reciprocating countries, which agreed to respect the judgments and decrees passed in each other's courts.
- ii. Expressing disagreement with the first contention of the appellant that no limitation is applicable, SC held that the present proceedings being execution proceedings are not at par with writ proceedings. The word 'application' used in Section 3 of the Act is wide enough to include an application filed for execution of a decree, including a foreign decree. Therefore, the principles of delay and laches, which may be applicable to writ proceedings, cannot be applied to civil proceedings and are not at all attracted in proceedings filed under the Code, which must be filed within the prescribed period of limitation.

- iii. Turning down the second contention of the appellant the SC held that there is no concept of cause of action in so far as an execution petition is concerned. Cause of action is a concept relating to civil suits and not to execution petitions. In case of a decree, it becomes enforceable the day it is passed. Therefore, filing of an application under Section 44A will not create a fresh period for enforcing the decree. The clock of limitation cannot be kept in abeyance at the choice of the decree holder. SC disapproved the view taken by a Full Bench of the Madras High Court in the case of *Sheik Ali vs. Sheik Mohamed*⁴ that limitation will start running on filing of an application under Section 44A.
- iv. SC held that Section 44A is only an enabling provision, which enables the District Court to execute the decree as if the decree had been passed by an Indian Court and it does not deal with the period of limitation.

The Apex Court accordingly answered issue no.1 by holding that Section 44A only enables the District Court to execute a foreign decree and further provides that the District Court shall follow the same procedure as it follows while executing an Indian decree, but it does not lay down or indicate the period of limitation for filing such an execution petition.

B. On issue no. 2:

- i. Conscious of the effect of economic globalization leading to widespread international and cross-border transactions, SC delved upon a question that if the decree is to be executed in another jurisdiction, which law should apply? Whether the law of limitation as applicable in the cause country or forum country would apply? The expressions 'cause country' and 'forum country' would mean the country in which the decree was passed (i.e. England in this case) and the country in which the decree is sought to be executed (i.e. India in this case), respectively.
- ii. If Article 136 of the Act is to apply then the period of limitation for filing application seeking execution of any foreign decree would be 12 years regardless of the limitation which may be prevalent in the country where the decree was passed i.e. cause country, which is 6 years in terms of Section 24 of the Limitation Act, 1980 of the United Kingdom.

⁴ AIR 1967 Mad 45

- iv. In recent years, almost all the common law countries have either brought a new legislation or by judicial decisions have now taken the view that the law of limitation cannot be termed as a purely procedural law⁵.
- v. The view worldwide appears to be that the limitation law of the cause country should be applied even in the forum country. As India becomes a global player in the international business arena, it cannot be one of the few countries where the law of limitation is considered entirely procedural. In cases where the remedy stands extinguished in the cause country it virtually extinguishes the right of the decree holder to execute the decree and creates a corresponding right in the judgment debtor to challenge the execution of a decree. These are substantive rights and cannot be termed to be procedural.

The Apex Court accordingly answered issue no.2 by holding that the limitation period for executing a decree passed by a foreign court (from reciprocating country) in India will be the limitation prescribed in the reciprocating foreign country i.e. the cause country. SC held that the Act is a substantive law and not procedural law.

C. On issue no. 3:

- i. As far as Article 136 of the Act is concerned, the same only deals with decrees passed by Indian courts.
- ii. The Apex Court arrived at this conclusion on the basis of the reasoning that the Act has been framed mainly keeping in view the suits, appeals and applications to be filed in Indian courts and wherever the need was felt to deal with something outside India, the Act specifically deals with that situation like Article 39 of the Act (dealing with dishonoured foreign bills) and Article 101 of the Act (dealing with suit upon a judgement including foreign judgement).

⁵ SC analysed the transition in the legal position as regards the classification of statute of limitation i.e. whether procedural or substantive. Referring to Dicey's observation in 'Conflict of Laws' 6th Edition the court observed that the earlier view was that the law of limitation being a procedural law, the law of the forum country would govern the field. Indian courts have normally taken the view that the law of limitation is a procedural law. However, there is a change in view. The present view is entirely different and appears to be that law of limitation is not a procedural law especially when it leads to extinguishment of rights or remedies. This view is reflected in Dicey's 'Conflict of Laws' 14th Edition as well as in Cheshire & North's Private International Law 15th Edition.

- iii. When dealing with the applications for execution of decrees, the law makers could have easily said 'including foreign decrees' in Article 136. This having not been said, it appears that the intention of the legislature was that Article 136 would be confined to decrees of Indian Courts. Furthermore, Article 136 clearly states that the decree or order should be of a civil court. A civil court, as defined in India, may not be the same as in a foreign jurisdiction. The new Limitation Act was enacted in 1963 and presumably the law makers were aware of the provisions of Section 44A of the Code. When they kept silent on this aspect, the only inference that can be drawn is that Article 136 only deals with decrees passed by Indian Civil Courts.
- iv. Section 44A of the Code in its sub-section (1) and (2) sets out the twin requirements of filing a certified copy of the decree and a certificate from the court in the cause country stating the extent, if any, to which the decree has been satisfied or adjusted. It is essential to comply with both the above requirements and no foreign decree can be executed unless both the requirements are met and the certified copy as well as the certificate are filed. However, that does not mean that nothing else has to be filed. The executing court cannot execute the decree unless the decree holder also provides various details of the judgment debtor i.e. his address etc. in India and the details of the property of the judgment debtor. These particulars will have to be provided by a written application filed in terms of clause (2) of Rule 11 of Order XXI of the Code.
- v. Therefore, a party filing a petition for execution of a foreign decree must also necessarily file a written application in terms of Order XXI Rule 11 clause (2). Without such an application it will be impossible for the court to execute the decree. Therefore, this application for executing a foreign decree will be an application not covered under any other article of the Act except Article 137⁶ and the applicable limitation would be 3 years.

⁶ Article 137 of the Act –

<u>Description of suit</u>	<u>Period of Limitation</u>	<u>Time from which period begins to run</u>
137. Any other application for which no period of limitation is provided elsewhere in this division.	Three years	When the right to apply accrues.

- vi. Coming back to the question as to from which date the limitation starts, the Apex Court answered this question by holding that period of limitation would commence from the date of passing of the decree in the cause country. This conclusion was arrived at after analysing following 2 situations, which the court could think of:
- The *first situation* is where the decree holder does not take any steps in the cause country for execution of the decree during the period of limitation prescribed in that country. In such a situation, he loses his right to execute the decree even in the cause country and it would be a travesty of justice if the person having lost his right to execute the decree in the cause country is permitted to execute the decree in a forum country. This would be against the principle that the law of limitation is not merely a procedural law. This would mean that a person who has lost his/her right or remedy to execute the foreign decree in the court where the decree was passed could take benefit of the provisions of the Indian law for extending the period of limitation. The limitation period in India is 12 years for executing a money decree whereas in England it is 6 years. There may be countries where the limitation for executing such a decree may be more than 12 years. The right of the litigant in the latter situation would not come to an end at 12 years and it would abide by the law of limitation of the cause country which passed the decree. Hence, limitation would start running from the date of decree was passed in the cause country and the period of limitation prescribed in the cause country would apply and not the one prevailing in the forum country.
 - The *second situation* is when a decree holder takes steps-in-aid to execute the decree in the cause country. The proceedings in execution in the cause country may go on for some time, and the decree may be executed/satisfied partly but not fully. The judgment debtor may not have sufficient property or funds in the cause country to satisfy the decree etc. In such eventuality what would be done? In such circumstances, the right to apply under Section 44A will accrue only after the execution proceedings in the cause country are finalized and the application under Section 44A of the CPC can be filed in India within 3 years of the finalization of the execution proceedings in the cause

country, as prescribed by Article 137 of the Act. The decree holder must approach the Indian court along with the certified copy of the decree and the requisite certificates within this period of three years. It is also clarified that applying in the cause country for a certified copy of the decree or the certificate of part-satisfaction, if any, of the decree, as required by Section 44A will not tantamount to step-in-aid to execute the decree in the cause country.

The Apex Court accordingly answered issue no.3 by holding that the period of limitation would start running from the date the decree was passed by the foreign court of in a reciprocating country i.e. the cause country. However, if the decree holder first takes steps-in-aid to execute the decree in the cause country, and the decree is not fully satisfied, then he can file a petition for execution in India for recovery of the balance amount within a period of three years from the finalization of the execution proceedings in the cause country.

Conclusion:

Going by the rationale, this judgment essentially sets out two scenarios as discussed above, for the operation of limitation qua application for execution of a foreign decree of a reciprocating country, in India. Though the law laid down by the SC in this judgement is succinctly clearly, and is the law of the land going forward, following aspects need to be considered and pondered over:

I Whether the judgment aims at filling up the gap in the statute i.e. The Limitation Act, 1963

- (i) Law Commission of India in its 193rd report published in the year 2005 proposed amendment in the law of limitation by way of The Limitation (Amendment) Act, 2005 and recommended insertion of a specific provision i.e. Article 136A to provide limitation for execution of foreign decrees. However, no such amendment was brought on the statute book by the Indian Legislature.

- (ii) In the judgement in reference, the Apex court held that the limitation period for executing a decree passed in cause country/ foreign country, in India will be the limitation prescribed in the cause country. Infact, the SC appeared to have endeavoured to overcome the gap i.e. absence of a provision in the Act prescribing the period of limitation of limitation for execution of a foreign decree. Although, the conclusion drawn by the SC, based on the limitation law prescribed in the reciprocating country, is widely recognized across the globe, however, in our view, this void should have been filled up or its cure should have come by way of amendment in the legislation.

II. In the absence of a specific mention as to whether this judgment would apply retrospectively or prospectively, what would be its effect on the maintainability of such execution petitions, seeking execution of a foreign decree, which though have been filed beyond the limitation period applicable in the *cause country* but within 12 years in terms of Article 136 of the Act in the *forum country/India* and are pending as on the date of this judgment?

- (i) The judgment pronounced by Apex Court acknowledges the fact that Indian courts had consistently taken the view that the law of limitation was a procedural law.
- (ii) The judgment dated 04.10.12 passed by Hon'ble Delhi High Court in the matter of *NNR Global Logistics Shanghai Co. Ltd. Vs. Aargus Global Logistics Pvt. Ltd.*⁷ is one such precedent where the Delhi High Court, following the consistent view, held the Law of Limitation was a procedural law. In fact, this judgment also cites extract of 193rd report of Law Commission observing as follows “*Law Commission of India in its 193rd report on 'Transnational Litigation -Conflict of Laws - Law of Limitation' discussed how in the context of expansion of international trade it has become necessary to take notice of the fundamental changes in the law of limitation in all common law countries. While recommending that India should adopt the practice in civil law countries, it was pointed out that as of now the law of limitation was considered in India as part of the procedural law and not the substantive law*”.

⁷ MANU/DE/4897/2012; O.M.P. 61 of 2012 and O.M.P. 201 of 2001

- (iii) The Apex court also concluded that as far as Article 136 of the Act is concerned, the same only deals with decrees passed by Indian courts. Hence, one can argue that since the SC has interpreted the applicability of an existing provision in the Act, therefore, it should apply even to the pending execution petition.
- (iv) In light of the above, will a judgment debtor be entitled to raise an objection in a pending execution petition that since Article 136 is not applicable to a foreign decree, therefore, the execution petition if filed beyond the period of limitation prescribed in the cause country, though filed within 12 years, be dismissed as being time barred?
- (v) In our view this judgment may create a paradoxical situation. In case an executing court dismisses an execution petition on the ground of non-applicability of Article 136 of the Act, a question would arise i.e. which other article of the Act would then be applicable to such execution petition. Would it be correct to state, in light of this judgment, that it would be Article 137 of the Act which would be applicable? In our view, the answer in most of cases would be in the negative in as much as Article 137 of the Act, as held by Hon'ble Supreme Court, would operate only in the situation when decree holder comes to India only after taking steps for enforcement in the cause country and the foreign decree remained partly unsatisfied.
- (vi) Again, if the judgment is understood to have a prospective effect for the reason that it changes the classification of a law by laying down that the law of limitation would be no more procedural, wouldn't this imply that the judgment acknowledges the legal position existing prior to its pronouncement to be correct and therefore, the finding that Article 136 of the Act would apply only to the domestic decree would lose much of its effect for the pending applications seeking enforcement of foreign decree.

II. Whether the ratio laid down in this judgment will have a bearing on the issue of limitation for filing application seeking enforcement of a Foreign Award?

- (i) This question becomes all the more germane in light of a recent judgment dated 19.02.2020 passed by Hon'ble Delhi High Court in the matter of *Cairn India Ltd.*

& Ors. Vs. Government of India⁸ whereby the Hon'ble court has held that "the provisions of Article 136 of the Limitation Act would apply to a petition for enforcement of a foreign award".

Although there may be a counter argument to the above question that both these judgments i.e. the judgment passed by Hon'ble Supreme Court and the judgment passed by Hon'ble Delhi High Court operates in two different domains i.e. while the judgment passed by Hon'ble Supreme Court revolves around Section 44A of Code dealing with execution of foreign decree, the judgment passed by Hon'ble Delhi High Court, on the other hand, focuses on enforcement of foreign award under Arbitration & Conciliation Act, 1996. However, going by the rationale given by SC in the above judgment, how far it would be feasible to segregate the two spheres in so far as the applicability/non-applicability of Article 136 of the Act is concerned, is yet to be seen.

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⁸ O.M.P. (EFA) (Comm.) 15/2016