

## **M/S Alcon Electronics Pvt. Ltd vs Celem S.A. Of Fos 34320 Roujan, France & ... on 9 December, 2016**

**Equivalent citations: AIR 2017 SUPREME COURT 1, 2017 (2) SCC 253, 2017 (1) AJR 440, (2017) 1 WLC(SC)CVL 207, (2017) 1 ALLMR 439 (SC), (2017) 134 REVDEC 521, (2017) 169 ALLINDCAS 3 (SC), (2017) 120 ALL LR 200, (2017) 3 MAH LJ 734, (2017) 1 GUJ LH 83, (2017) 1 CIVILCOURTC 399, (2017) 1 CIVLJ 414, (2017) 3 MPLJ 41, (2017) 1 KER LT 20, (2017) 1 ICC 1044, (2016) 12 SCALE 645, (2017) 1 RECCIVR 561, (2017) 1 MAD LW 845, (2017) 1 ALL RENTCAS 6, (2017) 2 PUN LR 187, (2017) 1 CAL HN 56, (2017) 1 CLR 79 (SC), 2017 (1) KCCR SN 53 (SC)**

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**Bench: N.V. Ramana, A.K. Sikri**

REPORTABLE

IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10106 OF 2016  
ARISING OUT OF  
SPECIAL LEAVE PETITION (CIVIL) NO. 19791 OF 2013

M/S ALCON ELECTRONICS PVT. LTD.

...APPELLANT

VERSUS

Celem s.a. OF fos 34320 ROUJAN, FRANCE & ANR. ..RESPONDENTS

JUDGMENT

N.V. RAMANA, J.

In this appeal by special leave, the appellant—judgment debtor assails the impugned judgment dated 8th April, 2013 passed by the High Court of Bombay in Civil Revision Application No. 680 of 2011, whereby the High Court has dismissed the application filed by the appellant seeking declaration that the Judgment and Order dated 19th October, 2006 passed by the High Court of Justice, Chancery Division, Patents Court, England (hereinafter referred to as ‘the English Court’) is not executable before the District Court at Nasik, by confirming the order dated 15th April, 2011 passed by the District Judge-2, Nasik.

The facts in nutshell are that the respondents herein filed a Suit against the appellant before the English Court for infringement of patent vested in the respondents besides other reliefs. In the said suit, the appellant- defendant filed an application challenging the jurisdiction of the English Court. In that application, the reliefs sought by the appellant include the relief that the respondents—original claimants have to pay the costs to the appellant occasioned by filing the application to be summarily assessed. The English Court by its Order dated 19th October, 2006 dismissed the claim of the appellant and further directed it to pay the costs of application to the respondents—original claimants set at £ 12,229.75. Thereafter it appears that the appellant agreed to pay the costs and sought for some time. When the respondents filed a petition for execution in India, the appellant opposed it in an application on the ground that the order of English Court is not executable. The executing Court dismissed the same which was confirmed by the High Court. Hence the appellant is before us by way of this appeal.

The appellant made following submissions assailing the Judgment of the Courts below-

An interlocutory Order of 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 Civil Procedure Code (CPC for short).

In the alternative, the Order of the English Court in the present case does not amount to 'decree' under Explanation 2 to Section 44A of the CPC. Without prejudice to the aforesaid, the part of the order of the English Court relating to the payment of interest on costs should not be executed in view of the deletion of the erstwhile Section 35(3) of the CPC.

The Respondents have responded in the following manner. The decree passed by the English Court is very much a decree on merits as the English Court has not only given a detailed Judgment on merits of the matter but also considered the entire evidence as produced by the parties including oral evidence by way of witness statements, documentary evidence produced by the parties and the application challenging the jurisdiction of the English Court has been decided finally on merits of the case put forth by the defendants. Nothing further was required to be done insofar as consideration of the application of the appellant challenging the jurisdiction of the English Court is concerned.

It is submitted that Explanation-II to Section 44A is concerned, the same does not refer to costs which are defined under Section 35 of the CPC. The costs having been quantified have assumed the character of a money decree for costs which cannot be equated, either with a fines or penalty which is imposed on a party by the Court or taxes payable to a local authority or to a Government or other charges of like nature. It is the submission of the respondent that the legislative intent was to keep out of the purview of Section 44A the execution of the foreign decree if it related to payment of either taxes or charges of a like nature or a fine or penalty. Even an arbitration award has been excluded. At best it could be argued that compensatory costs in respect of false or vexatious claims which have been defined under Section 35A could be excluded.

It is further submitted that Section 13, CPC specifically excludes the execution of such decrees which are mentioned under Clauses (a) to (f) thereof and this Section does not mention decrees for the costs.

Furthermore they respond that the Judgments Act, 1838 of United Kingdom, as amended in 1993, provides that every judgment debt shall carry interest @ 8%. The rules framed in U.K. provide for interest to run from the date the Judgment is given. The rules also provide that a judgment or order takes effect from the day when it is given on merits or such dates as Court may specify. The Rules further provide that a party must comply with a judgment or order for the Payment of an amount of money (including costs) within 14 days of the date of Judgment or order unless the judgment or order specifies a different date for compliance or any of the rule specify a different date for compliance or the Court has stayed the proceedings or execution.

Moreover, all the Orders of the Court are required to be obeyed and implemented, unless the Court itself sets a date for its non-execution. Otherwise orders will only remain a piece of paper and merely decorate the file of litigant, which would lead to an impression being created in the minds of the litigants that they could with impunity avoid to obey the Court Order. It is neither the legislative intent nor the desire of the Judiciary.

Legislative intent of executing Orders relating to payments of costs is clear from amendment carried out to section 36, CPC to clarify that the provisions relating to execution of decree or order include payment under a decree or order as well.

We have heard the learned counsel on either side at length and perused the record. The following issues fall for our consideration:

Whether the order passed by the Foreign Court falls within the Exceptions to Section 13 of the CPC?

Whether the order passed by the Foreign Court amounts to a “decree” and the same is executable?

If answer to issue No. 2 is in affirmative, whether the decree for costs would fall within the ambit of Explanation 2 of Section 44A (3) of CPC and makes it inexecutable?

Whether interest on costs would fall within the ambit of Explanation 2 of Section 44A of CPC?

Whether the interest on costs can be executed in India in view of deletion of Section 35(3) of CPC?

In re Issue No. 1 — Admittedly the English Court passed an order dated 19th October, 2006 dismissing the application passed by the appellant questioning the jurisdiction

of the Court. The appellant itself at the time of filing the application has prayed the Court to summarily assess the costs to be paid to him in the event of his application being allowed. Both the appellant—defendant as well the respondents—claimants participated in the proceedings by adducing their respective oral as well as documentary evidence. Skelton arguments on behalf of both parties were filed before Court. The appellant herein has filed schedule of costs at £ 25,406.30. Then the English Court has passed a detailed order on 19th October, 2006 on the question of jurisdiction holding that it has jurisdiction to entertain the Suit and also directed the defendants to pay the costs of the application which was summarily assessed at a sum of £ 12,429.75.

It appears that the appellant herein has accepted the order and sought for time to pay the costs. Moreover, it did not choose to approach the appellate Court assailing the order and the same has attained finality. In spite of the same, the appellant filed the application opposing the execution petition filed by the respondents. The first and foremost ground of attack against the order passed by the English Court is that the order is not conclusive as per Section 13(b), CPC. Such argument appears to be attractive but we are not able to appreciate the same in the facts and circumstances of the case. Before we proceed further, it is appropriate to have a look at Sections 13 and 14 of CPC which read as under:

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— where it has not been pronounced by a Court of competent jurisdiction;

where it has not been given on the merits of the case;

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;

where the proceedings in which the judgment was obtained are opposed to natural justice;

where it has been obtained by fraud;

where it sustains a claim founded on a breach of any law in force in India.

Section 14. Presumption as to foreign judgments: The Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving

want of jurisdiction.

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.

A glance on the enforcement of the foreign judgment, the position at common law is very clear that a foreign judgment which has become final and conclusive between the parties is not impeachable either on facts or law except on limited grounds enunciated under Section 13, CPC. In construing Section 13, CPC we have to look at the plain meaning of the words and expressions used therein and need not look at any other factors. Further, under Section 14, CPC there is a presumption that the Foreign Court which passed the order is a Court of competent jurisdiction which of course is a rebuttable presumption. In the present case, the appellant does not dispute the jurisdiction of the English Court but its grievance is, it is not executable on other grounds which are canvassed before us.

The appellant contends that the order of the English Court is not given on merits and that it falls under Section 13(c) of the CPC as a result of which it is not conclusive and therefore inexecutable. We cannot accept such submission. 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) of the CPC.

Applying the same analogy to the facts of the case on hand, we have no hesitation to hold that the order passed by the English Court is an order on merits. The appellant who has submitted itself to the jurisdiction of the Court and on its own requested the Court to assess the costs summarily. While passing a reasoned order by dismissing the application filed by the appellant, English Court granted the costs against the appellant. Had it been the case where appellant's application was allowed and costs were awarded to it, it would have as well filed a petition for the execution of the order. Be that as it is, the appellant did not prefer any appeal and indeed sought time to pay the costs. The appellant, therefore, cannot be permitted to object the execution. It cannot be permitted to blow hot and cold at the same time. In our opinion, it is a pure abuse of process of law and the Courts should be very cautious in entertaining such petitions.

In *International Woollen Mills v. Standard Wool (UK) Ltd.*[1], this Court observed :

“...Even where the defendant chooses to remain ex parte and to keep out, it is possible for the plaintiff to adduce evidence in support of his claim (and such evidence is generally insisted on by the Courts in India), so that the Court may give a decision on the merits of his case after a due consideration of such evidence instead of dispensing with such consideration and giving a decree merely on account of the default of appearance of the defendant.

In the former case the judgment will be one on the merits of the case, while in the latter the judgment will be one not on the merits of the case. Thus it is obvious that the non-appearance of the defendant will not by itself determine the nature of the judgment one way or the other. That appears to be the reason why Section 13 does not refer to ex parte judgments falling under a separate category by themselves...” The principles of comity of nation demand us to respect the order of English Court. Even in regard to an interlocutory order, Indian Courts have to give due weight to such order unless it falls under any of the exceptions under Section 13 of the CPC. Hence we feel that the order in the present case passed by the English Court does not fall under any of the exceptions to Section 13 of the CPC and it is a conclusive one. The contention of the appellant that the order is the one not on merits deserves no consideration and therefore liable to be rejected. Accordingly, Issue No. 1 is answered.

In re Issue No. 2 — The next ground put forth by the appellant is that the order being an interlocutory order does not have the shades of a ‘judgment’ to be executed before the Indian Court and hence the order not being a ‘decree’ is inexecutable. To appreciate this, it is appropriate to have a look at Section 44A of CPC. Execution of decrees passed by Courts in reciprocating territory— Where a certified copy of 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.

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.

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.

As far as the explanation with regard to reciprocal territory is concerned, there is no dispute that England is a reciprocating territory for the purpose of above Section. Section 44A of CPC indicates an independent right conferred on a foreign decree holder for enforcement of a Decree/Order in India. Section 44A was inserted by Section 2 of the Civil Procedure Code (Amendment) Act, 1937 (Act No. 8 of 1937). This Section is meant to give effect to the policy contained in the Foreign Judgments (Reciprocal Enforcement) Act, 1933. It is a part of the arrangement under which on one part decrees of Indian Courts are made executable in United Kingdom and on the other part, decrees of Courts in the United Kingdom and other notified parts of Her Majesty's dominions are made executable in India. It is to be seen that as United Kingdom is a reciprocating territory and the High Court of Justice, Chancery Division, England being a recognized superior Court in England. Therefore, the order passed by that Court is executable in India under Section 44A of the CPC. Now we come to the next limb of the argument put forth by the appellant that the order passed by the English Court does not amount to a decree and hence it is not executable. It is no doubt correct, Section 44A of CPC deals with "execution of decrees passed by Courts in reciprocating territory". Before we further decide this issue it is appropriate to have a look at how decree, order and foreign judgment are defined under the CPC.

As per Section 2(2) of the CPC, "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144 of CPC but shall not include (a) any adjudication from which an appeal lies as an appeal from an order, or (b) any order of dismissal for default.

Then a "foreign judgment" is defined under Section 2(6) as judgment of a foreign Court. "Judgment" as per Section 2(9) of C.P.C. means the statement given by the Judge on the grounds of a decree or order. Order is defined under Section 2(14) of CPC as a formal expression of any decision of the Civil Court which is not a 'decree'. Then Explanation 2 to Section 44A (3) says "decree" with reference to a superior Court means any 'decree' or 'judgment'. As per the plain reading of the definition 'Judgment' means the statement given by the Judge on the grounds of decree or

order and order is a formal expression of a Court. Thus “decree” includes judgment and “judgment” includes “order”. On conjoint reading of ‘decree’, ‘judgment’ and ‘order’ from any angle, the order passed by the English Court falls within the definition of ‘Order’ and therefore, it is a judgment and thus becomes a “decree” as per Explanation to Section 44A(3) of CPC. In this case, the Court at England, after following the principles of natural justice, by recording reasons and very importantly basing on the application of the appellant itself, has conclusively decided the issue with regard to jurisdiction and passed the order coupled with costs. Hence in our considered opinion, the order passed by the Foreign Court is conclusive in that respect and on merits. Hence executable as a decree and accordingly the issue is answered.

In re Issue Nos. 3 & 4 — The next contention advanced is that the decree for costs does not attract the Explanation II of Section 44A which concerns itself with taxation or other charges of like nature or in respect of fine or other penalty. We have to first see the nature of the costs imposed by the decree for interpreting the relevant explanation. Before referring to the principles/guidelines in the decisions cited, it would be apposite to advert to the concept of ‘costs’ and the general principles governing the award of costs. Law Commission in its 240th Report on “Costs on Civil Litigation” provides valuable resource on nature of costs in India as well as England.

The ‘costs’ signifies the sum of money which the Court orders one party to pay to another party in respect of the expenses of litigation incurred. Except where specifically provided by the statute or by rules of the Court, the costs of proceedings are in the Court’s discretion.

In *Johnstone v. The Law Society of Prince Edward Island* [2], the Canadian Court of Appeal speaking through McQuaid, J described costs in the following words :

“... the sum of money which the court orders one party to pay another party in an action as compensation for the expense of litigation incurred. The definition continues to the effect that costs are awarded as compensation (i.e. reimbursement); there is, unlike damages, no restitution in integrum, that is to say, no concept in costs, as there exists in damages, that the injured person should be placed, in so far as money can do so, in the same position as he occupied before the injury was suffered”.

Under the Federal Rules of Civil Proceeding (USA), “costs shall be allowed as of course to the prevailing party unless the court otherwise directs.” In most of the States in US, the attorney’s fee is not allowed as litigation cost. Costs can even be on interim Application. A bill of costs is a certified, itemized statement of the amount of the expenses incurred in bringing or defending a law suit/proceeding. The charges/expenses claimed are taxed by the Court or its officer according to the procedural rules and set of norms.



The basis of assessment of costs in UK has been explained thus in Halsbury's Laws of England:

“Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs on the standard basis or on the indemnity basis, but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount. Where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue and will resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party. Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party. Where the court makes an order about costs without indicating the basis on which the costs are to be assessed, or makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis.” The Part 44 of the Civil Procedure Rules (CPR) in the USA contains general rules about costs and entitlement to costs. The rules are supplemented by practice direction. However, part 44 does not apply to the assessment of costs to the extent different provisions exist, for eg, Access to Justice Act, 1999 and the Legal Aid Act, 1988. Further, the general rule that the unsuccessful party will be ordered to pay the costs of the successful party unless the court makes a different order does not apply to family proceedings.

It is important to note that a penalty in this sense normally means a sum payable to the State, not to a private claimant, so the costs imposed on the basis of the indemnity is not a penalty or tax. Therefore, the Explanation II to Section 44A does not refer to the costs as contemplated under Section 35 of the CPC. The costs having been quantified have assumed the character of a money decree for costs and cannot be equated, either with a fine or penalty which is imposed on a party by the Court or taxes claimed and are taxes payable to a local authority, Government, or other charges of a like nature.

The appellant has advanced an argument that as per Section 35A of the CPC, no Court should pass any order for the payment of compensatory costs exceeding Rs.3,000/- or exceeding the limits of its pecuniary jurisdiction of the said Court whichever amount is less. It is thus argued by the appellant that in the present case, since the costs imposed exceed the bar imposed by Section 35A, therefore, the order of the English Court is not executable in the present case.

This argument lacks merit and deserves to be rejected. A bare perusal of Section 35A shows that bar operates on the Indian Courts with regard to imposition of costs in respect of false or vexatious claims or defences. The bar is not attracted in the present case as the Court that has ordered the costs is the High Court of Justice in England

which is not governed by the provisions of the CPC and that the respondent merely approached the Indian Courts for the satisfaction of a foreign decree. Moreover, the nature of compensatory costs prescribed in Section 35A of the CPC are different from 'costs' dealt with in Section 35 of the CPC as the former are limited to the claims of defences of a party which are frivolous or vexatious. It is settled that before awarding costs under Section 35A of the CPC, the Court should satisfy itself that the claim was false or vexatious to the knowledge of the party who put it forward and that the interests of justice require the award of such compensatory costs. In the present case, no claim has been advanced by the appellant that the claim filed by the respondents is false or vexatious, therefore, the bar in Section 35A is not applicable. Accordingly the issue is answered. In re Issue No. 5 — It is the case of the appellant that the claim for interest on costs is not recognized in the Indian law. It is to be noted that matters of procedure are to be governed by the *lex fori*, whereas the matters of the substance are governed by *lex causae*. In this case, the question whether the interest on sum of decree of costs to be executed in India is a matter of substance as the interest on decree is a substantive right of the decree holder and does not concern itself with the procedural law of the forum.

The appellant relied upon Section 35 of the CPC which enables Courts in India to impose litigation costs at the discretion of the Court. However, there is no provision under the CPC or the Interest Act, 1978 which permits imposition of interest on litigation costs. Further tried to impress upon that the amended Section 35(3) of the CPC permitted a Civil Court to grant interest on costs. The unamended Section 35(3) stated as follows: The Court may give interest on 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.

This Provision was consciously omitted in 1956 (pursuant to Act 66 of 1956). In view of the deletion of Section 35(3) of the CPC, it is argued that grant of interest on costs is no longer recognized under India law.

In this context, it is educative to read the following comments made in the Debate on the Bill against the deletion of Section 35 (3), by Hon'ble Member of Lok Sabha Shri Tek Chand;

“..In this connection, a reference has been made to section 35, sub- section (3), which according to clause 3 of the Bill, is to be omitted. Not that I have usurious propensities, but I do not like this provision. It is true that there should not be any profiteering by the people; I concede that, but there are instances when the costs amount to five figures or more, and there is no reason why, when an unsuccessful party is subjecting the successful party not only to a long dilatory and unending dispute, but also to frivolous and vexatious litigation whereby he is out of pocket to the tune of several thousands, the law or the legislature should be so solicitous that such person should not pay interest, if he does not propose to pay or if he intends to delay the payment of the costs. One unfortunate and unhappy feature of administration of civil law in our land, is apart from delays and objections of frivolous and vexatious nature, justice is made available, if at all, at a very high and

exorbitant price”.

The Hon’ble Member of Lok Sabha thus articulated that omitting sub-section (3) would encourage delay in realization of decree costs. A reference to the Report of Law Commission and the views expressed in Debate on the Bill, as extracted in the Law Commission Report (supra), would indicate that the consequences of deletion of sub-section (3) of Section 35 were very much considered by the Parliament. When the idea of deletion is not to encourage interest on costs as a source of income to the litigants, the Parliament did not choose positively to prohibit interest on costs by inserting suitable clause in Section 35.

It is to the reciprocal advantage of the Courts of all nations to enforce foreign rights as far as practicable. To this end, broad recognition of substantive rights should not be defeated by some vague assumed limitations of the Court. When substantive rights are so bound up in a foreign remedy, the refusal to adopt the remedy would substantially deprive parties of their rights. The necessity of maintaining the foreign rights outweighs the practical difficulties involved in applying the foreign remedy. In India, although the interest on costs are not available due to exclusion of Section 35(3), the same does not mean that Indian Courts are powerless to execute the decree for interest on costs. Indian Courts are very much entitled to address the issue for execution of the interest amount. The right to 8% interest as per the Judgments Act, 1838 of UK can be recognized and as well as implemented in India.

Therefore, we are of the considered opinion that the Execution Petition filed by the Respondents for execution of the order dated 19th October, 2006 passed by the English Court is maintainable under the relevant provisions. Therefore, we do not find any reason to interfere with the impugned order. Resultantly, the appeal is dismissed with costs.

.....J .  
(A.K. SIKRI)

NEW DELHI,  
DECEMBER 09, 2016

.....J .  
(N.V. RAMANA)

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- [1] AIR 2001 SC 2134
  - [2] 2 PEIR B-28 (1988)