

L E X  
**WITNESS**

Volume 10 Issue 7 | February 2019

₹65 US \$6 UK £4

**expert speak**



**Ashu Kansal**  
Partner, Adhita Advisors  
P47

**expert speak**



**Sharad Tyagi**  
Partner, Fair & Just Legal  
P38

**expert speak**



**Rohan Swarup**  
Senior Associate,  
Singh & Singh  
P32



**let's arbitrate**



**S. Ravi Shankar**  
Sr. Partner, Law Senate  
P28

**The Great Indian Politics & Judicial Rides**

**Democratic Enough?**

**P08**

**expert speak**

**Jayashree Shukla Dasgupta**  
Partner, Dhir & Dhir Associates  
**Umang Thakar**  
Associate, Dhir & Dhir Associates

**P16**

**expert speak**

**Rajesh Sivaswamy**  
Senior Partner,  
King Stubb & Kasiva

**P22**

**expert speak**

**Hardeep Sachdeva**  
Senior Partner, AZB & Partners  
**Nitin Saluja**  
Associate, AZB & Partners

**P20**

# Effect of Foreign Decrees under Insolvency Regime

■ Jayashree Shukla Dasgupta & Umang Thakar



The execution of foreign decrees in India has always been a tricky proposition with the various international principles and treaties in play. The same is governed by Section 44A of the Code of Civil Procedure, 1908 (“CPC”), which provides that a decree passed by a Superior Court of a reciprocating territory can be executed as a decree passed by an Indian Court. In order to have better understanding of the process of execution of foreign decrees in India, one has to explore the concept of reciprocating and non-reciprocating countries vis-à-vis the laws in India. The case of Usha Holdings LLC & Anr. vs. Francorp Advisers Pvt. Ltd.<sup>1</sup> (Usha Holdings matter”) is a recent judgement by the National Company Law Appellate Tribunal (“NCLAT”) that will give us some perspective.

In the Usha Holdings matter, NCLAT held that an Adjudicating Authority has no jurisdiction to decide the question of legality and propriety of a foreign judgment and decree in an application under Sections 7 or 9 or 10 of the Insolvency and Bankruptcy Code, 2016 (“IBC”). The NCLAT also held that since an Adjudicating Authority is not a court or tribunal and the Insolvency Resolution Process is not a litigation, the Adjudicating Authority has no jurisdiction to decide whether a foreign decree is legal or illegal. The NCLAT also reiterated the findings in the matter of Binani Industries Limited Vs. Bank of Baroda & Anr.<sup>2</sup>

However, the NCLAT held that a monetary claim does not relate to supply of goods or services and, therefore, the application under Section 9 of IBC by the appellants against the ‘Corporate Debtor’ was not maintainable.

In order to obtain a better perspective, it is important to briefly dwell upon the findings of the National Company Law Tribunal (“NCLT”) at the stage of dealing with petition filed under Section 9 IBC in the Usha Holdings matter. Under combined reading of Section 44A along with Section 13 and 14 of CPC, the NCLT reiterated the following requisites for execution of a decree based on foreign judgment:-

A. A certified copy is sine qua non for recognizing a decree as valid in India.

B. It is required to be executed in the District Court of this Country.

C. It is also required that the decree should be pronounced by a Court of Competent jurisdiction and on merits.

D. The decree must not have been obtained by fraud and it must not be founded on a breach of any law in force in this Country<sup>3</sup>.

Further, the NCLT held that the Petitioner has founded its claim and consequential default on the basis of a decree and order obtained in the United States of America, both of which were not certified copies. The NCLT also held that a decree needs to be made, as the rule of the district court in India, if at all, it is to be executed in India. However, the petitioner failed to show any



D-55, Defence Colony,  
New Delhi-110 024.  
Tel: 91(11) 42410000,  
Fax: 91 (11) 42410091  
E:expertsspeak@dhirassociates.com



notification of the reciprocation between United States and India as required under Section 44A of CPC<sup>4</sup>. Further, it was held that the judgement passed by the foreign court is not regarded as the one on merit.

As already stated above, NCLAT while not touching upon the settled law on the issue of execution of foreign decree, held that the Adjudicating Authority has no jurisdiction to decide whether the foreign decree is legal or illegal.

In view of the aforesaid ruling, it is important to understand the concept of reciprocating and non-reciprocating countries, which is as follows:

## RECIPROCATING COUNTRIES

The foreign judgement or a foreign decree can be executed in India as per the procedure under CPC. However, a foreign decree or a foreign judgement<sup>5</sup> shall pass the test of the conclusive judgement as laid down under Section 13 of CPC. To understand the procedure further, it is pertinent to look at the definitions of reciprocating countries. It

is defined under Explanation I of Section 44A of CPC as "Any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare as a reciprocating territory." Thus, the certified copy of the foreign decree or the judgement of any superior courts of any reciprocating territory, once filed in the district court, the said decree or judgment would be executed in the same manner as if it has been passed by the District Court of India.

## NON RECIPROCATING COUNTRIES

In case of non-reciprocating country, the foreign judgement or a decree cannot be executed in the same manner as explained above. To get the foreign decree or foreign judgement of a non-reciprocating country executable, one has to initiate civil proceedings and satisfy the Court of competent jurisdiction in India in accordance with Section 13 and 14 of CPC and then, proceed with the execution. The certified copy of the foreign judgements would be treated

evidentiary in nature and the civil court will decide the question of legality of the foreign judgement. Moreover, the entire procedure for the execution is laid down in Order 21 of CPC.

**The above mentioned position has also been discussed by the Bombay High Court, Madras High Court and the Supreme Court as follows:**

In *Marine Geotechnics LLC vs. Costal Marine Construction & Engineering Ltd*<sup>6</sup>, the Bombay High Court explained the position with regard to execution of foreign decrees in India and initiation of bankruptcy proceedings. The Court held that the winding up process cannot be an alternative for a necessary and required civil proceeding. A winding up petition based on a foreign decree or judgment of a non-reciprocating country cannot evade or run away from the test laid down under Section 13 of CPC. Further, it was held that a foreign decree holder from a non-reciprocating territory may initiate a winding up petition on the original or underlying cause of action. The existence

of the foreign decree from the non-reciprocating authority does not bar the filing of such winding up petition.


Moreover, in the latest pronouncement by the Supreme Court in *Alcon Electronics Pvt. Ltd. vs. Celem S.A. OF FOS 3420 Roujan, France and Anr.*<sup>7</sup> which pertains to the relevant issue in hand, the apex court was of the opinion that if a foreign remedy has already determined the substantive rights of the parties, mere requisites of the Indian court shall not defeat the claim. The opinion of the court is corroborated by the reasoning that recognized foreign rights shall be given preference over practical difficulties involved in applying the foreign remedy, otherwise the same will result in the deprivation of the rights of the parties. Thus, it can safely be surmised that compliance to the procedural requirement shall not foreclose the substantive rights bound up in a foreign remedy.

Furthermore, In the case of *Mrs. Jai Rajkumar & Anr. vs Standbic Bank & Anr*<sup>8</sup>, suit was filed by the shareholder/director of the Corporate Debtor seeking declaration that the judgment passed by High Court of Justice Queen Bench Division, England against the Corporate Debtor is non-conclusive under Section 13 of CPC, null and void and therefore, unenforceable in India. However, the Madras High Court held that in light of Section 14 (1) (a) of IBC and Section 25 (2) (b) of IBC, institution of the said suit by shareholder / Director is prohibited against the Corporate Debtor until CIRP process<sup>9</sup>. It was further held that the instant forum is the competent

jurisdiction and not the NCLT to assail the foreign decree but the same has to be done by the Resolution Professional (“RP”) if permitted by NCLT<sup>10</sup>. It is pertinent to note that the foreign decree passed by High Court of Justice Queen Bench Division, England was also challenged in NCLT by appealing against the admission order of the Corporate Debtor and the same was dismissed. The Appellate Tribunal held that “The decree passed by the High Court of Justice, Queens Bench Division, Commercial Court of England, can be challenged only before the Court of Competent Jurisdiction. The same cannot be assailed before the Adjudicating Authority till its existence is denied”.

## CONCLUSION

The foreign decree or judgements passed by non-reciprocating countries cannot be directly put for execution and as per the judgement in *Usha Holdings* matter by the Adjudicating Authority, NCLT cannot decide the legality of the decree of both reciprocating and non-reciprocating countries. Thus, it can be suggested that the judgement passed by a foreign court must be put for execution in a civil court in case of reciprocating authorities and in case of non-reciprocating authorities, winding up petition or a suit maybe filed.

It is evident that even with the overriding effect of the IBC, there are certain areas of law that do not come under the purview of IBC. It is evident that the Adjudicating Authority does not feel the need to over reach its position and pass a judgement relating to a subject matter that is beyond its subject jurisdiction. 



**Jayashree Shukla Dasgupta** is a Partner at Dhir & Dhir Associates. Her professional experience spans nearly 20 years in the area of Banking and Finance, Arbitration, Consumer and Land Acquisition Laws. She has expertise in handling civil litigations and is currently heading the litigation team of the Firm dealing with Banking Dispute Matters. Jayashree is also a qualified Insolvency Professional.



**Umang Thakar** is an associate at Mumbai branch of the firm. His area of expertise include civil litigation, company matters and arbitration. He regularly appears before High Court, DRT, NCLT besides other judicial and quasi-judicial forums

<sup>1</sup>Company Appeal (AT) (Ins.) No. 44 of 2018, dated 30.11.2018, <sup>2</sup>Company Appeal No. 82 of 2018, dated 14.11.2018 [Para 13 & Para 14]

<sup>3</sup>*Usha Holdings L.L.C & Anr. Vs Francorp Advisors Pvt Ltd* [(1B)-196(PB)/2017:Para 28], <sup>4</sup>*Usha Holdings L.L.C & Anr. Vs Francorp Advisors Pvt Ltd* [(1B)-196(PB)/2017:Para 29], <sup>5</sup>Defined in Section 2 (5) and Section 2 (6) of CPC, 1908, <sup>6</sup>2014 (2) BOM CR 769, <sup>7</sup>(2017) 2 SCC 253 [Para 37]

<sup>8</sup>Order dated 04.12.18 passed by Madras High Court in C.S.(Comm. Div.) D.No.41408 of 2018, <sup>9</sup>*Ibid* (Para 33), <sup>10</sup>*Ibid* (Para 52)