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# Enforcement of Arbitral Awards in India

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# 1. Introduction

Worldwide commercial growth has been inexorably tied to the demand for more efficient and expedient methods of resolving arising disputes in all areas, clearly delineating obligations, rights to awards and requirements of all parties concerned. This has given rise to a widespread and extremely useful system of arbitration to avoid the cost, inconvenience, and sheer long-windedness of in-court settlement of a particular matter.

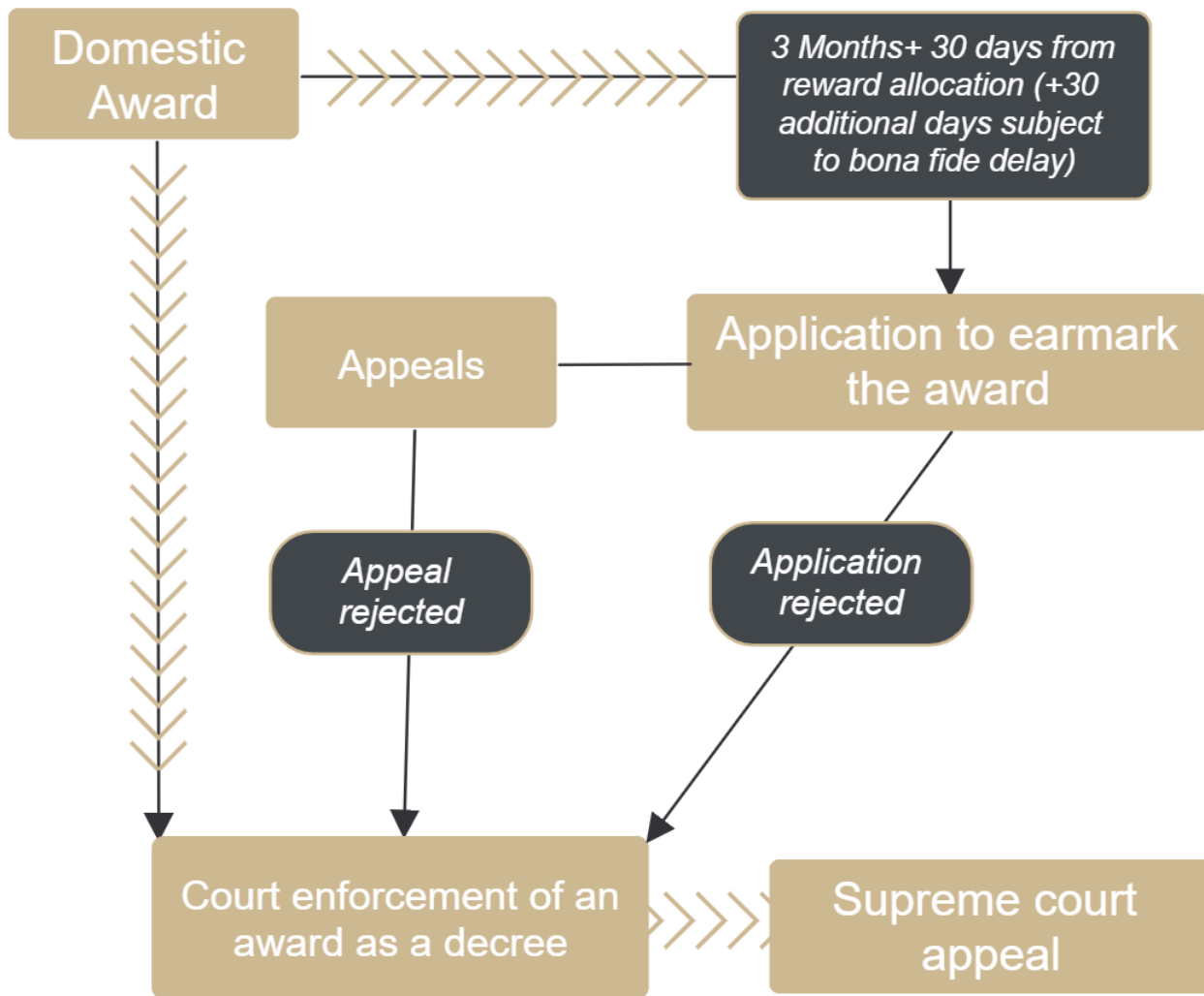
A major issue with this method for the resolution of disputes between concerned parties is the frequent abandonment of the arbitration at inopportune moments in the process. Ensuring the subsequent mandated awards or interdictions are carried out as required is almost always more complicated than simply going straight into court proceedings, discouraging some from engaging with arbitrators in the first place. In addition, both parties are free to object to any orders made in the conclusion of the arbitration process, governed by the Arbitration & Conciliation Act, 1996 (A&CA) as well as the CPC. This objection is carried out through a formal appeal in court, which, in India, is governed by the Code of Civil Procedure, 1908 (CPC). To avoid such cost-incurring action being taken, scrupulous care and attention must be given to the fairness of dealings and satisfaction of all parties insofar as is reasonably feasible throughout the process.

Any award or interdiction concerning Indian jurisdiction, regardless of origin being domestic or abroad, is enforced by Indian courts. Domestic conclusions of the arbitration process (Those seated in India) are regulated by the provisions of Part 1 of the A&CA. Awards seated abroad are regulated through the provisions set out in Part 101 of the A&CA

## 2. Enforcement of domestic awards

There is a cool-off period of 90 days after the receipt of an award before one can apply for enforcement and execution. Following the expiry of this period, enforceability, if found by the court no further challenge as to the arbitral award validity is possible (once the execution stage is reached).

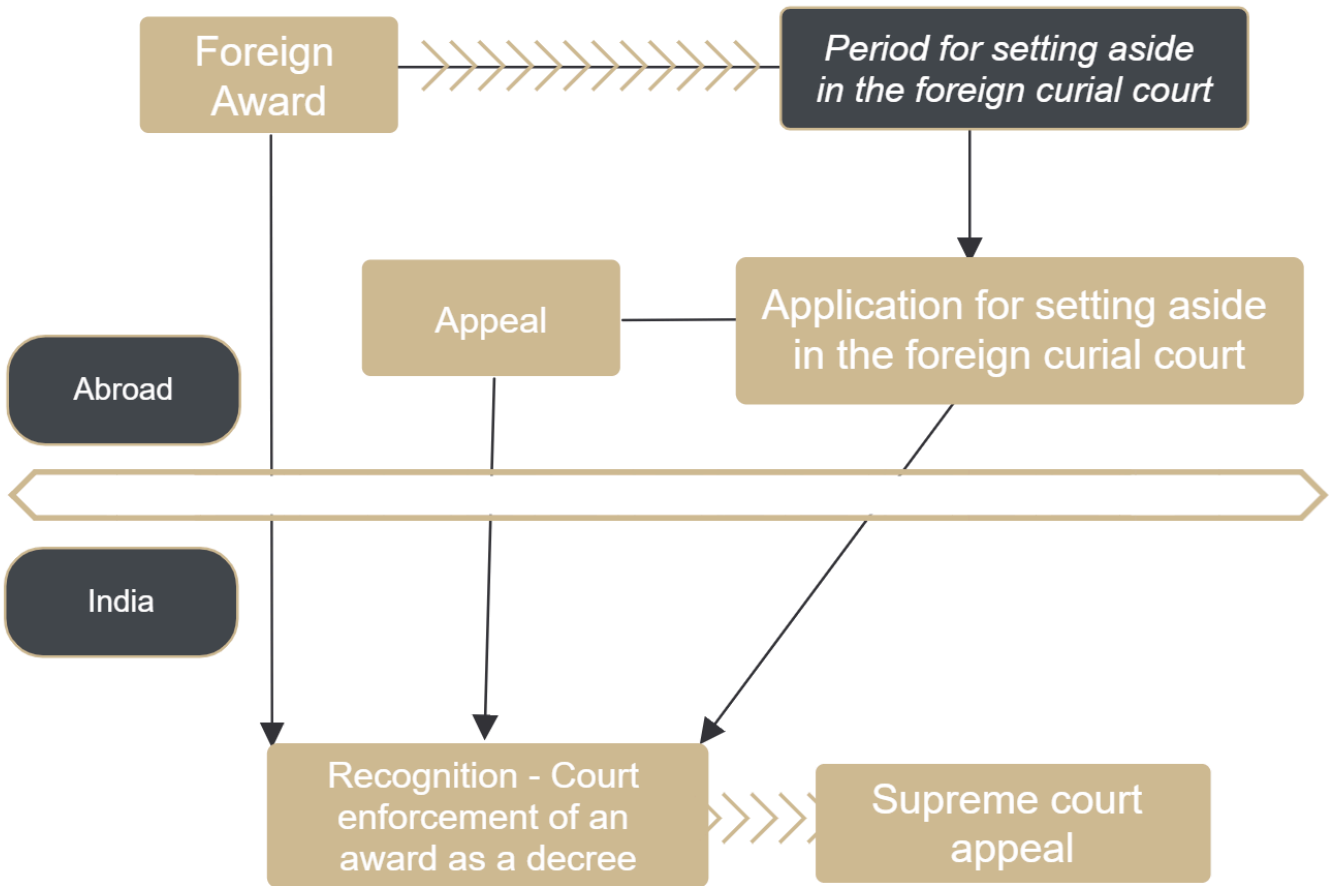
However, for the duration of the 90-day interim period, the award is open to challenge through the use of Section 34 of the A&CA. Prior to the Arbitration and Conciliation (Amendment) Act 2015 (“Amendment A&CA”), “setting aside” applications would effectively constitute a stay on any proceedings regarding award execution. This act has now required that in order to actualise an effective challenge of an award, one must file a separate application if they also wish to seek a stay on the execution of an award.



### 3. Enforcement of foreign awards

India is a signatory to the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (“Geneva Convention”) as well as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (“New York Convention”). If an award is made in a state which is recognised as a convention-compliant country by India, and the recipient benefits of a binding award from a country which is a signatory to these conventions, the award in question is considered as enforceable in India.

The two-stage process of foreign award enforcement in India is triggered by the filing of an execution petition. A Court determines *prima facie* whether the associated award does not breach the requirements of the A&CA. The award is enforced in the same fashion as a decree of that court once found to be enforceable. Parties must be mindful, at this point, of the various challenges that may subsequently arise, such as mandatory filing of an authenticated or original award copy, including the underlying agreement itself, before the court. Time-wasting or trivial objections are sometimes taken by the opposite party in an attempt to slow proceedings, which can also be a challenge.



Regarding enforcement of foreign awards, the following requirements apply.

One must have an original award or a certified copy, having been obtained in the manner required by the country of the original award. One is also required to provide evidence to prove the award is a foreign award, when appropriate or required.

It is clearly set out in the A&CA, in Section 47, that the above “shall be produced before the court”, contemporaneous with the application, in order that the foreign award may be enforced. However, since this legislation, an overriding precedent has come about through an Indian Supreme Court judgement<sup>1</sup>. This judgement interpreted that the word “shall” appearing in this particular section of the A&CA, relating to the production of the evidence as specified in the provision at the time of application, has to be read as “may”. It was noted that this would mean that in the case of an enforcement application, the applicant “need not necessarily produce before the court a document mentioned therein at the time of the application”. This position is further expanded upon, with the interpretation of the word “shall” as “may” being restricted “only to the initial stage of the filing of the application and not thereafter.”

<sup>1</sup> PEC Limited v. Austbulk Shipping SDN BHD (Civil Appeal No. 4834 of 2007)

## 4. Domestic and Foreign arbitral award enforcement conditions

The following grounds may be resorted to when challenging an award, in order to render it enforceable:

- a. Either or both parties were subject to some form of bona fide incapacity prior to agreement
- b. The law to which the parties volunteered to have the agreement subject to was not fully complied with, or under the law of the country where the award was made (especially in the case of foreign awards).
- c. Proper notice of appointment of an arbitrator or arbitral proceedings has not been provided
- d. The award is ultra vires (beyond the powers of) the agreement or submission to arbitration.
- e. Decisions on matters beyond the scope of the submission to arbitration are contained within the award.
- f. Arbitral authority or procedure composition is ultra vires of agreement.
- g. Arbitral authority or procedure composition is not compliant with the law of the territory where the arbitration took place (regarding foreign awards).
- h. The (foreign) award is yet to bind the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made.
- i. The particular subject matter of the dispute does not benefit from settlement by arbitration under Indian law.
- j. Award enforcement would contravene the public policy of India.

## 5. Stamp duties and registration requirements of awards – domestic and foreign

### a. Domestic Awards

- I. The provisions for stamping of arbitral awards with specific stamp duties are set out in the Stamps Act 1899. An award which is unstamped or is incompletely stamped is not admissible for any purpose,\* which may be authenticated on payment of the deficiency and penalty, provided it was original (Section 35). Problems pertaining to the stamping and registration of an award or documentation thereof may be raised at the stage of enforcement under the Act. (M. Anasuya Devi and Anr v. M. Manik Reddy and Ors<sup>2</sup>). The Supreme Court had also observed that the stamping and registration requirement for awards is within the remit of Section 47 of the CPC and not covered by Section 34 of the Act.
- II. The quantum (sum total) of stamp duty to be paid varies widely between states and stamp types. Currently, in Delhi, in line with the Stamp (Delhi Amendment) Act 2001, Schedule 1A, the stamp

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<sup>2</sup> (2003) 8 SCC 565

duty for arbitral awards is calculated at roughly 0.1% of the value of the property to which the award relates. By contrast, the stamp duty stands at five hundred rupees in Maharashtra as per the Stamp Act of this state. It is compulsory to register an award if it affects immovable property, failing which, it shall be rendered invalid, as per Section 17 of the Registration Act, 1908

## b. Foreign Awards

The Supreme Court of India<sup>3</sup> has held that a foreign award is not subject to any stamp requirement. It has been decided in the Delhi High Court that foreign awards are eligible for immediate enforcement as decrees, and are not subject to a registration requirement. The reasoning is that stamp duty cannot obstruct the decision-making process as to award enforceability.<sup>4</sup> A similar approach had been adopted by the Bombay High Court in the case of Vitol S.A v. Bhatia International Limited<sup>5</sup> and the High Court of Madhya Pradesh in Narayan Trading Co. v. Abcom Trading Pvt. Ltd<sup>6</sup>

## 6. How courts examine awards

Courts cannot expand the grounds for refusal of enforcement, as the listed grounds are exhaustive. A given executing court may only satisfy itself on a superficial basis concerning the award and is not permitted to re-examine the award nor the merits of the case.

Accordingly, this exercise is not an “appeal” on merits against the order of the tribunal, but merely review-based, as an award enforceability enquiry has to be made first by the court, followed by holding that it is enforceable with enforcement occurring thereafter.

## 7. Arbitral award enforcement: Appropriate forum & limitation

The Supreme Court recently ruled that execution proceedings can be initiated by an award holder (where assets are located) before any court in India.<sup>7</sup> In the case the subject-matter of the arbitration is of a specified value,<sup>11</sup> commercial courts established under the Commercial Courts, Commercial/ Division and Commercial Appellate Division of High Courts Act 2015 (“Commercial Courts Act”) would have jurisdiction, as provided below:

### I. Award arising out of an India seated arbitration (being an International Commercial Arbitration)

The Commercial Courts Act and the Amendment Act sets out that the Commercial Division of a High Court, where assets of the opposite party lie, shall have jurisdiction for applications relating to the enforcement of such awards if the subject matter is pecuniary. In the case of any other -subject matter, Commercial Division of a High Court which would have jurisdiction as if the subject matter of the award was a subject matter of a suit shall have jurisdiction, i.e., where the opposite party resides or carries on business or personally works for gain.

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<sup>3</sup> M/S. Shri Ram EPC Limited v Rioglass Solar SA (2018) SCC Online 147

<sup>4</sup> 174 (2009) DLT 391

<sup>5</sup> 2014 SCC OnLine Bom 1058

<sup>6</sup> 2012 SCC OnLine MP 8645

<sup>7</sup> (2018) 3 SCC 622

## II. Award arising out of an India seated arbitration (not being an International Commercial Arbitration)

As per the Commercial Courts Act and the Amendment Act, for such cases, the appropriate court would be the Commercial Court exercising such jurisdiction which would ordinarily lie before any principal Civil Court of original jurisdiction in a district, as well as the Commercial Division of a High Court in the exercise of its ordinary original civil jurisdiction.

## III. Foreign Awards

Where the subject matter is money, the Commercial Division of any High Court in India, where assets of the opposite party lie, shall have exclusive jurisdiction. In the case of any other subject matter, the Commercial Division of a High Court which would have jurisdiction as if the subject matter of the award was a subject matter of a suit shall have jurisdiction.

### A. Award enforcement limitation period

#### i. Domestic awards

Since arbitral awards are deemed as decrees for the purposes of enforcement<sup>8</sup>, the Limitation Act 1963 applies to arbitrations. The limitation period for the enforcement of such an award is twelve years.

#### ii. Foreign awards

Various High Court interpretations exist regarding a limitation period within which a party may enforce an award. The Bombay High Court<sup>9</sup> has observed that since a given foreign award does not meet the definition of a decree per se and would not have a binding effect on parties concerned unless a competent court records it as enforceable. In the absence of this, a two-step process would commence, thus, this foreign award enforcement application would fall under the remit of the Schedule to the Limitation Act's residuary provision, that is, a three-year limitation period. Thereafter, regarding such a decree, the limitation period for execution would extend to twelve years from when the award had received decree recognition. However, the Madras High Court dissented, by reference to foreign awards as deemed decrees, and the corresponding limitation period would be twelve years. It held that "the foreign award is already stamped as a decree and the party having a foreign award can straight away apply for enforcement of it and in such circumstances, the party having a foreign award has got 12 years (sic) time like that of a decree holder."<sup>10</sup>

The Act provides that certain conditions (as listed above) have to be assessed prior to the enforcement of a foreign award, and where the court is satisfied that the foreign award is enforceable, the award would be deemed to be a decree of that court (As per s39 of the A&CA) The Supreme Court in *M/s. Fuerst Day Lawson Ltd v. Jindal Exports Ltd* held that under the Act a foreign

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<sup>8</sup> (2016) 11 SCC 313)

<sup>9</sup> *Noy Vallesina v Jindal Drugs Limited* 2006 (5) BomCR 155

<sup>10</sup> *Compania Naviera 'Sodnoc' v. Bharat Refineries Ltd.* AIR 2007 Mad 251



award is already stamped as a decree. It observed that “In one proceeding there may be different stages. In the first stage, the Court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign (sic) awards as a rule of court/+decree again.”<sup>11</sup>

## 8. Enforcement of domestic decrees in India: Appropriate forum & limitation

### I. Appropriate forum

Execution proceedings for enforcement can be initiated once a decree is fully passed. Provisions from this execution can be found in Order XXI and Section 36 to 74 of the CPC.

A “decree-holder” is defined as that person that has had a decree passed in their favour or for whom an order capable of execution has been made. A “judgment-debtor” is that person against whom an order capable of execution has been made, or a decree has been passed.

In the first instance, the proceedings to execute a decree must be initiated before the court which passed it. On the basis of appropriate discretion, this court may transfer to have a different court execute the degree. This can be for a range of rationales, including the locus of the property or the locus of the judgment debtor against which the decree is sought to be executed, as set out in s39 of the CPC.

#### A. Limitation Period

The period of limitation for the execution of a decree (other than a decree granting a mandatory injunction, in which case, it is three years) is twelve years from the decree commencement date, as per the Limitation Act 1963. However, there is no period of limitation for an application for execution of a decree granting a perpetual injunction.

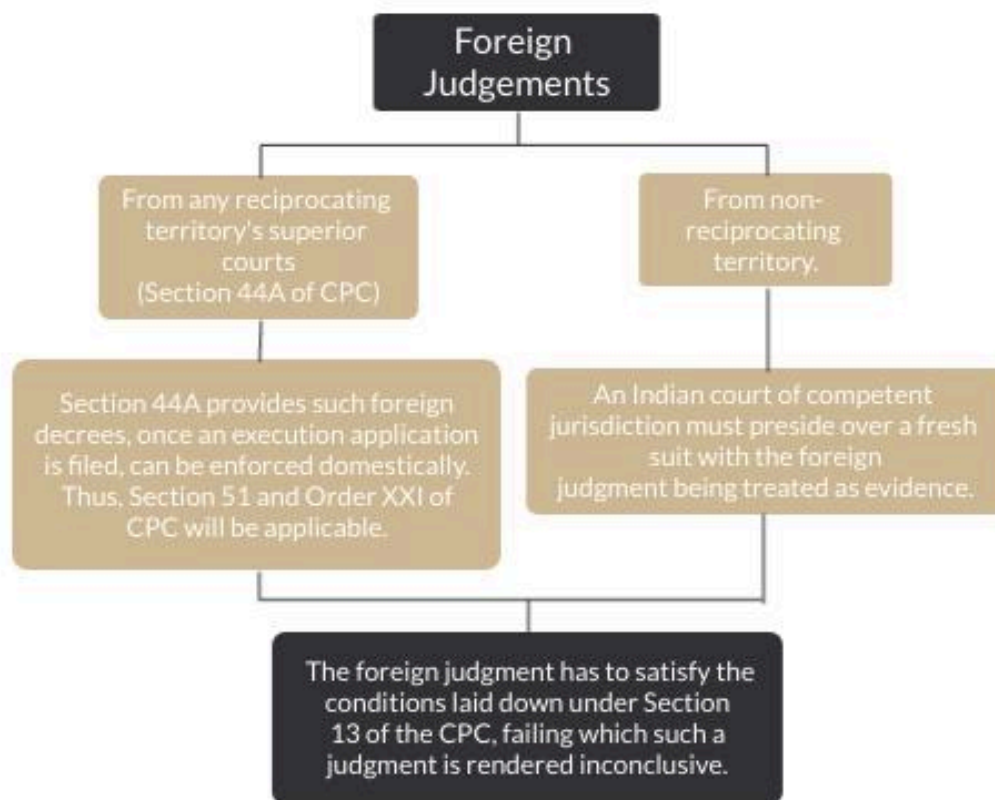
## 9. Enforcement of foreign judgements in India

Section 2(6) of the CPC defines “foreign judgment” as “*the judgment of a foreign Court,*” which refers to a court situated outside India and not established or continued by the authority of the Central Government.

At the time of enforcement of foreign judgments in India, two situations may arise depending on whether the foreign judgment is passed by a court in: (i). A reciprocating country;<sup>19</sup> (ii). A non-reciprocating country. A party seeking enforcement of a decree of a court in a reciprocating country is required to file execution proceedings in India while in the case of a decree from a non-reciprocating country, a fresh suit has to be filed before the relevant court in India. The time limit for filing a suit for enforcement for such foreign judgments is three years from such judgment being delivered.

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<sup>11</sup>2001 (6) SCC 356



## 10. Procedure for enforcement of foreign judgments

The first major step towards foreign judgment enforcement domestically is the filing of execution proceedings through the procedure laid out Section 44A and Order XXI of the CPC, as demonstrated in the diagram above.

1. It has been established by the High Court of Bombay that Section 44A clearly gives jurisdiction to the same court which, for the purposes of execution of the decree, can be construed as being a District Court.<sup>12</sup>
2. In contrast to this, the view that the High Court of Delhi has taken is far more unsettled. Section 5(2) of the Delhi High Courts Act 1966 decrees that, notwithstanding the contents or provisions of any current law in force, this court shall also have original and ordinary civil jurisdiction for all suits of whose value exceeds ₹ two crores (in respect of the said territories). Thus, it is the view of the Delhi High Court judge for the case of *Messer Griesheim GmbH v. Goyal MG Gases Pvt. Ltd.* that to avoid “unnecessary confusion...There is no legal impediment ... to approach the High Court in the first instance for execution of the decree of a value of more than Rs. 20 lakhs, as in the instant case.”<sup>13</sup> Subsequently, this was set aside by the Delhi High Court, Division Bench, observing that “the legislature has vested such ‘District Court’ the power to execute the ‘foreign decree’ as if it had been passed by itself” as opposed to the High Court of Delhi. Further appeal before the Supreme Court of India was granted and carried out, where it was decided that a stay on the judgment of the Division Bench ought to be

<sup>12</sup> AIR 2003 Bom 490

<sup>13</sup> 139 DRJ 556

granted.<sup>14</sup>

### I. Requirements for enforcement of foreign judgments

Upon the filing of a certified copy of a decree, (under Section 44A of the CPC) in any reciprocating territory, with any of the superior courts of said territory, provided it has been filed in a district court, execution domestically as if it had been passed by the district court is permissible. The certified copy of the decree must be filed along with a certificate from such superior court detailing the degree to which, if any, the decree has been satisfied or adjusted. This constitutes conclusive proof of the extent of such adjustment or satisfaction.

### II. Grounds for challenge to enforcement of foreign judgments

CPC s13 stipulates a foreign judgment is granted permission to act as *res judicata* through conclusive action. However, this requires conscience and respect of any matter adjudicated upon thereby, non-inclusive of reasons provided in the foreign judgment. One must note, however, that this cannot be applied in the following scenarios.

- a. A Court of competent jurisdiction has not offered their pronouncement. In the process of competence vetting of a foreign court, certainty is required regarding jurisdiction in terms of pecuniary and territorial limits, as well as rules of private international law, as the concerned court must be vested with this jurisdictional range.
- b. The merits of the case have not led to it being given;
- c. On the face of the proceedings, it appears to be founded upon a lack of assent to the law of India in such cases in which such law is applicable or an erring view of international law;
- d. Judgment was obtained in proceedings that are or were in opposition to natural justice; e.g. obtained by fraud;
- e. A claim founded on a breach of any law in force in India is sustained

### III. Judicial Approach

Courts have been consistent in the view that a party, if not voluntarily submissive to the jurisdiction of a foreign court, would not be bound by the jurisdiction of this court<sup>15</sup>. Establishing voluntary submission to the jurisdiction of the foreign court is dependent of the set of facts and circumstances of the case in question, by example, if a defendant were to question both the jurisdiction and challenges the action on merits of the court where the suit is instituted, he is said to have voluntarily submitted to the jurisdiction.<sup>16</sup> The High Court of Madras has noted that instances of submission to the jurisdiction of the foreign court are denoted in the following:

1. The Judgement has been obtained against a person who is a subject of the foreign country on prior occasions.
2. The action is commenced when the person is resident in the foreign country
3. Where a person selects, as the forum for taking action in the capacity of a plaintiff, the foreign Court, in which forum he is later sued

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<sup>14</sup> 1 July 2014 in EFA (OS) 3 of 2014) 23. SLP (C) No. 22539/2014

<sup>15</sup> AIR 1973 Mad. 141 + AIR 1938 Cal 511

<sup>16</sup> AIR 1938 Cal 511

4. Where, upon a summons, the party voluntarily appears
5. Where a person has contracted to submit himself by an agreement to the same forum in which the judgment is obtained.<sup>17</sup>

A judgment shall be considered to be given on merits if oral and/or documentary evidence, on behalf of the plaintiffs, is adduced.<sup>18</sup> The Odisha High Court observed that a judgment would be enforceable if it is based on a consideration of the evidence, regardless of brevity.<sup>19</sup> The High Court of Bombay, in a similar fashion, held that validity extended to ex parte decrees.<sup>20</sup> Summary procedure-pursuant judgments, in the absence of examination of the evidence, will not be considered as judgments given on merits of the case. Further, judgments based on terms of settlement or consent are also considered as being given on merits of the case, and therefore valid, as observed by the Bombay High Court<sup>21</sup>. However, cases where the decree results from the simple absence of the defendant, either in a formal manner or by way of penalty, the judgment will not be considered as being based on the merits of the case.

Similarly, the Supreme Court<sup>22</sup> observed that enforcement of a foreign judgment would be resultant to failure to observe the proper judicial process. An example of this would be if the minimum requirements of natural justice were not adequately observed by the court. Thus, adequate opportunity for parties to present their respective cases is required along with the giving of reasonable notice. In addition, if the foreign court was imposed upon or tricked into giving the judgment, this defined foreign judgment would be rendered unenforceable.

## 11. Enforcement of foreign judgments from non-reciprocating countries

A foreign judgment, originating from a non-reciprocating country, can only be granted the possibility of being enforced through the filing of a suit directly upon the judgment. The party is left with the option to sue on the basis of the original cause of action, or, on the foreign judgment in the domestic court or both. The decree resulting would subsequently be eligible for execution in India.

Where dismissal based on merits applies to a foreign judgment, no further application will be available for foreign judgment execution of such, as it had merged in the decree which dismissed such suit for execution. Where a decree, (in favour of the party filing such a suit for enforcing the foreign judgment), is passed, it is immediately eligible for execution

### I. Requirements for enforcement of foreign judgments from non-reciprocating territories

The filing of a certified copy of the foreign judgment is mandatory along with the plaintiff filing process.

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<sup>17</sup> 1914 Mad. 556

<sup>18</sup> 2001 5 SCC 265

<sup>19</sup> AIR 1961 Ori 136

<sup>20</sup> 2014 3 AIR Bom R 193

<sup>21</sup> AIR 2006 Bom 134

<sup>22</sup> AIR 1963 SC 1

In the Evidence Act 1872 (“Evidence Act”), Section 86 requires that subsequent to this, the evidentiary value would thus be placed on the judgement, and be certified in manner, as required by the aforementioned statute. An additional certificate, by the foreign country’s representative of the Central Government of India, is required under the same section of the Evidence Act. The specifically provided procedure under this section does not, strictly speaking, exclude other possible methods of provision of proof, e.g. an official’s deposition as to what, in his presence, occurred in the foreign jurisdiction court.

Such foreign judgments sought to be executed in India, as a *prima facie* requirement, must satisfy the CPC’s Section 13 tests described above.

## II. Procedure for execution of foreign judgments from non-reciprocating territories

### A. Filing a fresh suit in the relevant court of jurisdiction in India

In order to institute the fresh filing of a suit, one must file a ‘plaint’(in a court of competent jurisdiction) according to the directions outlined in the CPC under Orders VI and VII, in tandem with the remuneration of all applicable court fees. CPC Order V stipulates that notice must be served to the defendant, ordering him to file his reply within a specified date and naturally summoning his appearance.

Order VIII of the CPC specifies that subsequent to plaintiff suit institution and defendant notification, the defendant must ensure the filing of their written statement, along with any desired (optional) counterclaims or “set-offs”, within 90 days of service of the summons, in the specified court.

After mutual party completion of pleadings in the suit, Order XIV of the CPC provides the court with the means to frame the issues, shortly thereafter moving onto evidence production, admission and denial. In the conclusion of this process, examination and recording documentary and/or oral evidence can be considered as completed.

Following matter hearing conclusion, the pronouncement of the judgment in an open court takes place. The specified court must then draw up a decree within fifteen days of this pronouncement. Failure to appear by a defendant, when the suit is called for hearing, irrespective of whether summons have been duly served upon him, permits the court the power to make an order that the suit can be heard *ex parte*.

### B. Fresh suit filed under Commercial Courts Act

In commercial dispute cases ascertained to be of a specified value (as discussed earlier), the Commercial Courts Act permits the initiation of a suit.

In commercial disputes of specified value such as the above, a party may make an application<sup>23</sup> (with the opposite party being issued a notice) for summary judgment, asking that the court decide (without recording oral evidence) on the claim underlying the commercial dispute.

The court may pass a summary judgment, in advance of issues being framed, through considering the following:

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<sup>23</sup> Order XIII-A, Rule 4 of the CPC

1. The defendant has no real prospect of successful claim defence OR the plaintiff has no real prospect of claim success, as often may be the case; and
2. No other compelling reason as to why the claim (prior to recording the oral evidence) should not be disposed of has been adduced.

When, to a court, a judgment creditor has a possibility of success, but this prospect is unlikely, a conditional order against the judgment debtor can be passed by the court, inclusive of but not limited to, a condition mandating that judgment debtor deposits a sum of money, to act as a security for the judgment.<sup>24</sup>

## 12. Modes of Execution

Since foreign judgments and awards and domestic awards (from reciprocating countries) must undergo execution domestically as an Indian court decree, the modes of execution for foreign judgments and awards, along with domestic awards and judgments are held in common.

Upon the making of a decree-holder application for execution of the decree/award (whether domestic or foreign), the execution of the decree/award may be ordered by the court through one or more of the following methods:

1. Delivering up of any property specifically decreed
2. Through sale without attachment of any property or by attachment and sale
3. By arrest and detention in prison (where payment of money is involved in a decree, execution by detention in prison shall be possible only subsequent to an opportunity being granted by a judgment debtor to show cause as to why he should not be imprisoned. The court must be satisfied and record in writing that the judgment debtor would likely delay or obstruct the decree execution.)
4. Through receiver appointment
5. In accordance with the nature of the relief granted may require, any other manner within reason is permitted. However, “going behind the decree” by an executing court is not permissible, i.e. the court simply does not hold the power of decree term modification and must interpret the decree in its original form. Where multiple decree-holders are present or known of, after deduction of realisation costs, the assets shall be distributed among all such persons.

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<sup>24</sup> Order XIII-A, Rule 7 of the CPC