

(1924) 04 MAD CK 0035
In the Madras High Court

A. Janoo Hassan Sait by his Authorised Agent, Dada Beg
Mahomed

APPELLANT

Vs

M.S.N. Mahamad Ohuthu

RESPONDENT

Date of Decision : 16-04-1924

Acts Referred:

Citation : (1924) ILR (Mad) 877 : (1924) 20 LW 677 : (1924) 47 MLJ 356

Hon'ble Judges : Phillips, J;Madhavan Nair, J

Bench : Full Bench

Judgement

Phillips, J.—This is a suit upon a foreign judgment of the Colombo Court against the Ist defendant. The Ist defendant and his brother who

were trading in partnership executed a power-of-attorney to one Sheikh Abdul Rahiman under which he was empowered to sue in the Courts of

Ceylon and to appear before any Court or Courts of Justice either as plaintiff or defendant, etc. The power is a very wide one and gives the agent

very full powers to represent the principals. Under the provisions of that power Abdul Rahiman appointed one Abdul Guddus as his sub-agent

during his absence from Ceylon. A suit was filed in 1915 on four promissory notes against Abdul Rahiman and Abdul Guddus, but upon their

pleading that they were merely agents of Ist defendant's firm another suit was brought against the Ist defendant. Notice of the suit was served on

Abdul Guddus as Ist defendant's agent and the judgment on which the present suit is based was passed in his absence.

2. The first question for consideration is whether the Ist defendant had submitted to the jurisdiction of the foreign Court, and on this point I must

agree with the learned District judge that he did so by executing the power of attorney in favour of Abdul Rahiman empowering the latter to

conduct litigation in the Ceylon Courts, namely in a place where the agent was conducting business for his principals, and it is clearly a contract

binding him to appear in those Courts and amounts to submission to the jurisdiction of those Courts. In this connection I would refer to the case

reported in Ramanathan Cheddar v. Kalimuthu Pillai ILR (1912) M 163 : 1912 24 MLJ 619.

3. The next question raised for the respondent is that the foreign judgment sued on was not one obtained on the merits. Ordinarily, a judgment

delivered ex parte is deemed to be one on the merits; but it is contended here that in summary suits similar to those provided for by Order 37 of

the CPC an ex parte judgment cannot be deemed to be one passed on the merits. Reliance is placed on the case reported in Viswanadha Reddi v.

Keymer ILR (1914) M 95 : 27 MLJ 670 the decision in which was confirmed by the Privy Council in Keymer v. Viswanatham Reddi ILR (1916)

M 112 : 32 MLJ 35. In that case a defence had been put in, but it was ordered to be struck out because of defendant's failure to answer

interrogatories. The decision given in these circumstances was held to be one not on the merits. There are no doubt some observations in the

judgment of this Court which would go to show that a foreign judgment passed in default of appearance is not a decree on the merits, and two

cases are therein referred to as supporting this proposition. One of these is The Delta (1876) I Prob Div. 393 and the other is The Challenge and

Due D'Aumale (1904) Prob. Div. 41. In the first of these cases the foreign judgments had not been delivered when the suit was filed in England

and also it was held that the evidence of the French and Italian Advocates examined left it doubtful whether the foreign judgment in that case would

have, even in France or Italy, the force of res judicata. In the second case it appears that the defendants had not submitted to jurisdiction. In the

judgment of the Privy Council which is reported in Keymer v. Viswanatham Reddi ILR (1916) M 112 : 32 MLJ 35 their Lordships in referring to

the question u/s 13 (b), Civil Procedure Code, state that that section refers to "" those cases where for one reason, or another the controversy

raised in the action has not in fact been the subject of direct adjudication by the Court. "" From this it would appear that it is necessary in the first

place that some controversy should be raised in the action and in the second place that after it has been raised it should not have been finally

decided. This principle is the same as that enunciated by Lord Herschell in *Noviou v. Freeman* (1889) 15 AC r : "" In a Court of competent

jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they

may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation

exists A which cannot thereafter in that Court be disputed, and can only be questioned in an appeal to a higher tribunal. "" It will be seen that in

accordance with this principle, ex parte decrees are by no means necessarily decrees not passed upon the merits. It is only when a defence has

been raised and for some reason or another has not been adjudicated upon that the decision can be said to be not upon the merits. In other

instances of ex parte decrees, they must be deemed to be decrees passed upon the merits. In the present case no appearance at all was put in on

behalf of the first defendant and the case was allowed to proceed ex parte and consequently it must be deemed to have been passed upon the

merits.

4. A further question is raised, namely, that the first defendant had no notice at all of the suit and that consequently the whole decree is a nullity as

coming u/s 13(d), namely, "" where the proceedings in which the judgment was obtained are opposed to natural justice. ""* A good deal of argument

has been addressed to the question as to whether at the time that the notice was served upon him Abdul Guddus was the agent of the first

defendant. It appears that he was appointed as first defendant's agent and had acted as such and there is no evidence to show that the agency had

ceased at the time when the notice was served upon him. The foreign Court held that the notice was sufficient, and that decision must be taken to

be correct in the absence of any evidence to the contrary. If there was any irregularity in the service of the notice, that point cannot be raised in the

Courts of this country as a ground for questioning the validity of the foreign decree, as was held in *Pemberion v. Hughes* (1899) 1 Chan. 781

where it was remarked by Lindley, M. R., at page 790 : "" If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in

a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they

offend against English views of substantial justice. "" If first defendant had definitely proved that Abdul Guddus was in no sense his agent at the time of the service of the notice and that consequently he was totally unaware of the proceedings in the Colombo Court, this might be an answer to the validity of the judgment; but this has not been shown and consequently I must hold that the judgment is valid.

5. In this view, I think it is unnecessary to discuss the further questions raised as to whether the death of first defendant's brother terminated Abdul

Rahiman's agency and consequently the sub-agency of Abdul Guddus. They were at one time admittedly first defendant's agents and it is not

shown that they had ceased to be so at the time the notice was served on the latter.

6. The appeal is accordingly allowed and the decree of the Court of first instance restored with costs both here and in the lower appellate Court.

Madhavan Nair, J.

7. I agree.