

(1964) 07 MAD CK 0013

In the Madras High Court

Case No : Second Appeal No. 1423 of 1961

AS. S. RM. Swaminathan Chettiar

APPELLANT

Vs

E.M. Chokkalingam Chettiar

RESPONDENT

Date of Decision : 10-07-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 1, Order 6 Rule 17, Order 8 Rule 8, 10, 12

Evidence Act, 1872 — Section 78(6)

Citation : (1965) ILR (Mad) 118

Hon'ble Judges : Natesan, J

Bench : Single Bench

Advocate : R. Ramamurthi Ayyar and G.K. Subramania Ayyar, for the Appellant;
K. Sarvabhauman, for the Respondent

Final Decision : Allowed

Judgement

Natesan, J.—The Defendant, in a suit on a foreign judgment, who has lost in both the Courts below, is the Appellant in the Second Appeal.

2. The parties are Nattukkottai Chettiers, and the Plaintiff, by his power-of-attorney agent, instituted a suit, Civil Suit No. 5 of 1951, on the file of

the Sub-divisional Court, Moulmein, Burma, against the Defendant represented by his power-of-attorney agent, for specific performance of a

contract of sale of two plots of land, claiming in the alternative, compensation. On contest, the suit was dismissed, and the Plaintiff took up the

matter in appeal to the District Court at Amherst, Burma, in Civil Appeal No. 3 of 1957, and was successful in Appeal, the District Court, by

judgment dated 10th July 1957, granting a decree in favour of the Plaintiff for Rs. 3,000 with costs. The suit, out of which this second appeal

arises, was instituted in the District Munsif's Court, Pudukkottai, on the

judgment in the aforesaid proceeding. The Defendant, the present Appellant, raised various contentions. It is needless to refer to the same in detail, as it is now beyond dispute that the judgment of the foreign Court was one on contest in a Court of competent jurisdiction and has become final. The learned District Munsif over-ruled the defences, and, on 25th March 1959, decreed the suit holding that the judgment of the foreign Court was binding on the Defendant. There was an appeal there from, Appeal Suit No. 51 of 1959, Sub-Court, Tiruchirappalli and, on 12th July 1960, the appeal was allowed, the decree of the lower Court set aside and the suit remanded for fresh disposal, giving the Plaintiff an opportunity to have the judgment of the foreign Court relied upon duly certified, as required u/s 78(6) of the Indian Evidence Act.

3. Meanwhile and pending the Appeal No. 51 of 1959 (Appeal Suit) on 19th August 1959, the Defendant deposited the amount of the decree due under the foreign judgment in the Court of the Sub-Divisional Judge, Moulmein, and prayed in that Court for entering up satisfaction. The Plaintiff had notice of the deposit, and it is stated that on his contest that there had been a merger of the decree of the foreign Court in the decree passed by the District Munsif, Pudukkottai the application for recording of satisfaction was dismissed. The Defendant preferred an appeal against that order, and the said appeal was also dismissed. The Defendant preferred a second appeal in the matter, Civil Second Appeal No. 19 of 1961, on the file of the Chief Court Rangoon. The said second appeal was pending, when the appeal, out of which the present Second Appeal arises, was disposed of and on 11th January 1962, the Chief Court, Rangoon, allowed the appeal of the Defendant, holding that the present Appellant, could validly deposit the decree amount due under the foreign decree in the Sub-divisional Court of Moulmien under Order XXI, Rule 1 of the Code of Civil Procedure, which it is stated corresponds to the similar provision here. Against the judgment of the Chief Court Rangoon the Plaintiff took out an application for special leave under the Burma Union Judiciary Act, and, it is stated, that the application has been rejected. It also transpires that following the order passed in the Civil Second Appeal No. 19 of 1961, by the Chief Court, Rangoon, full satisfaction in Civil Suit No. 5 of 1951, was also entered on 30th April 1964.

4. These facts in respect of the proceedings in Burma are not part of the regular pleadings (the plaint or the written statement) nor in evidence now.

They are set out as pleaded in Interlocutory Application No. 1112 of 1960, on the file of the District Munsif, Pudukkottai, and in Civil

Miscellaneous Petition Nos. 5956 of 1963 and 5388 of 1964, petitions for admitting additional evidence in the Second Appeal. It may also be

stated that the Defendant, who had paid the decree amount into the Court at Moulmein, applied to the District Munsif, Pudukkottai, for recording

satisfaction of the decree in Original Suit No. 62 of 1958. Ex-facie, the application was untenable and that was dismissed by order, dated 18th

December 1959. An appeal there from was also dismissed.

5. Now, when the District Munsif, Pudukkottai, as a result of the order of remand, became seized of the suit in its entirety, the Defendant applied

in Interlocutory Application No. 1112 of 1960, above referred to for leave to file an additional written statement. The Defendant, by the said

Interlocutory Application wanted to plead in defence to the Plaintiff's action on the foreign judgment, that he had paid the entire amount due under

the foreign decree and that, in law and in equity, it had the effect of satisfying the decree. In the affidavit in support of the application, the Plaintiff's

knowledge of the deposit is referred to, and it is also stated that the foreign Court (District Munsif's Court, Moulmein) held that the decree had

merged with the decree of the District Munsif's Court, Pudukkottai. It is, however, pleaded in the said affidavit that after the remand the payment

will be good and has the effect of satisfying the judgment of the foreign Court and rendering the suit in this country in fructuous. It is averred in the

affidavit that the Court can take notice of and give effect to subsequent events as the Defendant could not have taken plea earlier. There is no

denial in the counter affidavit filed by the Plaintiff of the deposit of the decree amount in the foreign Court. In fact the contention raised is that the

payment has not been recognized by the foreign Court and was deliberately made with a view to defeat the rights which had accrued to the Plaintiff

by the institution of the suit in this country. It is also averred that only such defences as are open at the time of the institution of the suit can be put

forward, and that the Defendant cannot be permitted to make a payment for the claim made in this country except in a manner recognized by the

District Munsif's Court, Pudukkottai.

6. The said Application No. 1112 of 1960, was filed on 21st September 1960. It was adjourned for counter to 11th October 1960. After the

filing of the counter, it got adjourned on several dates along with the suit. It was taken up for trial along with the suit and dismissed on 30th

November 1960, when judgment was pronounced in the suit decreeing the same. The learned District Munsif not having permitted the amendment

of the written statement, the judgment of the learned District Munsif naturally does not make any reference to the defence of payment, and

discusses only the other defences of the Defendant on the merits of the case.

7. On the appeal therefrom, the Defendant confined his attack to two points. It was urged for him that the procedure adopted by the learned

District Munsif disposing of the application for additional written statement along with the suit was extremely irregular and had prejudiced him. It

was contended, that in the circumstances of the case, the additional written statement should have been permitted and the defence put forward in

the additional written statement examined on the merits. It was next urged that the Defendant having paid the entire amount due under the foreign

judgment, that was a bar to a decree on the foreign judgment. The learned Subordinate Judge observed, with reference to the disposal of the

application for additional written statement, that there could be no two opinions that such a procedure was highly irregular. Having held so, the

learned Subordinate Judge went into the merits of the application for additional written statement, and in the view that it was apparently that the

intention of the Defendant was to see that the suit in the District Munsif's Court was dismissed somehow or other commented adversely on the

conduct of the Defendant. The learned Subordinate Judge observed that, after the Plaintiff filed the suit on the foreign judgment and obtained a

decree in the District Munsif's Court, Pudukkottai, the Defendant could have easily paid the money in this country and requested the Court to

enter up full satisfaction. The learned Subordinate Judge also makes a point of the fact that on the date of the application for receiving the

additional written statement, the foreign Court's decree had not been satisfied, the application for entering up satisfaction in Moulmein Court having

been dismissed though the order of dismissal was pending appeal. In his view, in

the circumstances it could not be said that the suit on the foreign judgment was not maintainable. The learned Subordinate Judge concluded that no prejudice had been caused to the Defendant by the disposal of Interlocutory Application No. 1112 of 1960, along with the suit. The learned Subordinate Judge would, however, remark that, if there had been prejudice, the additional written statement must be ordered to be received, an additional issue must be ordered to be framed and the suit directed to be tried on the additional issue as well.

8. As set out above, now pending second appeal, the validity of the deposit made by the Defendant has been accepted by the Chief Court, Burma, and the view taken by the District Munsif's Court, Moulmein, and the Court of appeal therefrom that there was a merger of the decree of the foreign Court in the decree of the District Munsif's Court, Pudukkottai, found against. Satisfaction also has been entered up in Burma. Learned Counsel appearing for the Appellant naturally, therefore, contends that this Court can take notice of the subsequent events and mould the relief accordingly. It is also urged that even mere deposit of the amount in the Moulmein Court was sufficient, that there was no need to have satisfaction recorded, that, at any rate, the order recording satisfaction would date back and that when the trial Court in this case passed the decree, there was no executable decree of the foreign Court, the foreign decree having been satisfied in law by the deposit into Court. It is contended that, as sought to be pleaded in the additional written statement, the payment of the entire decree amount into Court itself was a defence to the action, and the trial Court ought to have permitted the additional written statement and examined the defence on the merits. Learned Counsel appearing for the Respondent contended on the contra, that, in the present case, the deposit was made only on 19th August 1959, after a decree had been given on 25th March 1959, that when the deposit was made the suit had already been decreed in this country, and that the Defendant could not take advantage of the order of remand. It is argued, that, the deposit having been made when the decree of the District Munsif's Court, Pudukkottai, was subsisting, it was not a valid deposit, and that in the circumstances the trial Court was justified in rejecting the application for additional written statement.

9. To take up for consideration the question whether the trial Court should have allowed the application for additional written statement to put

forward a ground of defence which has arisen after the institution of the suit, I need refer only to Order VIII, Rule 8 of the Code of Civil

Procedure, which provides that any ground of defence which has arisen after the institution of the suit or the presentation of a written statement

claiming a set-off may be raised by the Defendant or Plaintiff, as the case may be in his written statement. That shows that the Defendant is not

precluded from raising in his written statement defences which arise after the institution of the suit. The principles applicable to the amendment of

plaints would equally apply to the amendment of the written statements. That the new defences sought to be raised was not convincing to the Court

hearing the application will by itself not be a ground for refusing to permit the additional defence. In this case, the order of remand has not imposed

any limitations on the scope of the trial; and under Order VI, Rule 17 of the CPC the pleadings could be amended at any stage, and it cannot be

disputed that even after remand the suit continues to be a suit within the meaning of Order VI, Rule 17. The trial Court had, in this much seisin of

the case after remand as before remand. It must also be noted that the application for amendment had been filed along before the trial, and the

matter had got adjourned several times. The new defence sought to be made out would be practically, on admitted facts as was apparent from the

affidavit and counter-affidavit filed in the application, and the trial of the suit would not have been delayed by allowing the additional defence.

10. The observations of the learned Subordinate Judge that the Defendant could have well paid the money in the District Munsif's Court overlooks

the fact that the decree of the foreign Court despite the payment here would be executable. Even while the decree passed on 25th March 1959,

was subsisting there was no merger of the foreign decree in that decree. It is not necessary in this case, to consider the question as to what would

have happened, if the decree passed on 25th March 1959, had not been set aside. As it stands, the decree had been set aside, and the plea of

satisfaction of the foreign judgment was taken before an effective decree had been passed in this country. The whole argument that the payment

into Court in Burma at Moulmein was bad proceeded on the basis that there was a merger. Learned Counsel, Mr. R. Ramamurthi Iyer, appearing

for the Appellant cited in this connection the decision in Fakuruddeen Mahomed Assan v. Official Trustee of Bengal (1881) ILR 7 Cal. 82, 83.

Therein, it is observed:

The foreign Court does not stand in a higher position than the British Court so that a decree of the latter should be merged in that of the former.

According to the explanation given u/s 12 of the Code of Civil Procedure, (corresponding to Section 10 of the present Code of Civil Procedure)

the pendency of a suit in a foreign court does not preclude Courts in British India from trying a suit founded on the same cause of action". It seems

to follow, therefore, as a necessary consequence, that the existence of a decree in a foreign Court is no bar to the execution of decree of a Court in

British India, even though the cause of action in both suits be the same.

11. Learned Counsel for the Appellant refers to this authority for the position that it would similarly be open to the foreign Court, namely, the Court

at Moulmein, to execute the decree which had become final and the payment towards that decree which had become final was in the

circumstances legal particularly as the Defendant was appealing against the decree of the District Munsif's Court, Pudukkottai. Reference was also

made, in this connection, to Darbar Patiala v. Narain Das Gulab Singh ILR (1943) Lah. 79, where at page 101, it is observed as follows:

I am free to confess that I have never heard the term "merger" used in the sense in which it was used by the Respondents in their objections or by

their learned Counsel in this Court. I have heard the decree of a lower Court becoming merged in a decree passed by a Court of appeal. I have

also known this to be another way in which a decree can be extinguished but that is only when the rights of a decree-holder and the liability of a

judgment debtor become united in one and the same person. This however involves an essential condition of the co-extensiveness of such rights

and liabilities. This term is also used when there is a coalition of the lesser estate with the greater one. That is one of the methods by which a

mortgage security is extinguished. Blackstone says in 2 Com. 177 that "whenever a greater and a lesser estate coincide and meet in one and the

same person without any intermediate estate, the lesser is immediately annihilated or in the law phrase is said to be merged, that is sunk or

drowned in the greater". Similarly there may be a merger of a debt in a decree

or of the rights of the tenants in those of the landlord when the rights of both come to vest in the same people. But how can a decree of one Court be said to merge in the decree of another Court simply because another Court has chosen to pass another decree on the same cause of action? The nearest case that I can think of for the present is that of a decree obtained from a British Indian Court on a judgment of a foreign Court. But even then the judgment and decree of the foreign Court cannot be said to be merged in the decree passed by the British Indian Court. The decree of the foreign Court remains, in spite of the decree passed in the British Indian Court executable in the foreign country where it was passed.

12. It may be that the Defendant wanted to avoid paying in Indian Currency, but it cannot be overlooked that the Plaintiff himself had obtained a decree in a foreign Court. It is not his case that there was no asset of the Defendant available in the foreign Court and his idea also evidently is to recover his debt in Indian currency. The fact that the intention of the Defendant was to see that the suit in this country was dismissed, as inferred by the learned Subordinate Judge even if it be true, cannot be a ground for not permitting a new defence open to him in law.

13. According to the learned Counsel for the Defendant, payment into the Court at Moulmein would itself be a defence to the action in this country, at least so long as a decree had not been passed, and would be satisfaction of the foreign judgment. Learned Counsel appearing for the Appellant referred, in this connection, to the passage in Dicey's Conflict of Laws (seventh edition) where at page 1053 it is stated as follows:

So again, a foreign judgment in favour of the Plaintiff which purports to be final and conclusive on the merits is, if followed by effective execution or satisfaction, an answer to any action brought by the Plaintiff. But such a judgment, as has been seen, does not extinguish the original cause of action; if, therefore, it is not followed by execution or satisfaction, it can afford no defence to an action brought in England on the original claim.

When satisfied however, it acts as an estoppel against any action based on the original cause of claim.

14. In Halsbury's Laws of England, third edition, volume VII at page 150 it is stated as follows:

A foreign judgment that has been satisfied by the Defendant cannot be sued

upon in England the satisfaction being a bar to all further proceedings on the judgment.

15. To examine the position a little more, in Cheshire's Private International Law, fourth edition, at page 587 it is stated as follows:

This doctrine, which was laid down in 1842, is that where a foreign court of competent jurisdiction has adjudicated a certain sum to be due from

one person to another, the liability to pay that sum becomes a legal obligation which may be enforced in this country by action. Once the judgment

is proved, the burden lies upon the Defendant to show why he should not perform the obligation.

16. In *Godard v. Gray* (1870) 6 Q.B. 139, 148, Blackburn J. referring to the principle in which foreign judgments are enforced observed:

But in England and in those states which are governed by the Common law, such judgments are enforced, not by virtue of any treaty, nor by virtue

of any statute, but upon a principle very well stated by Parke B. in *Williams v. Jones* (1845) 13 M. and W. 623, 633: "Where a Court of

competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an

action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and

enforced," And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the

Defendant from the performance of it, must form a good defence to the action.

17. This principle has been adopted in our country also--Vide *Nallatambi Mudaliar v. Ponnusami Pillai* (1879) ILR 2 Mad. 400. In *Nallakaruppa*

Settiar v. Mohamed Ibura Saheb (1896) ILR 20 Mad. 112, 114, it is observed as follows:

The true principle on which the judgments of foreign Courts are enforced in England is that the judgment of a Court of competent jurisdiction over

the Defendant imposes a duty, or obligation, on the Defendant to pay the sum decreed which the English Court is bound to enforce, and

consequently that anything which negatives that duty, or forms a legal excuse for not performing it is a defence to the action.

18. In this case, the contention of the Defendant is that before the suit was taken up for trial, he had deposited the entire amount due under the

foreign judgment and is therefore, relieved of the obligation to pay the sum for which the foreign judgment was given. It is contended that the

deposit in Moulmein Court is therefore a defence to the action in this country, and the Court cannot enforce the obligation on the foreign judgment

which was no longer subsisting. It is contended for the Appellant and rightly that under Order XXI Rule 1 Code of Civil Procedure, money

payable under a decree may be paid into the Court whose duty it is to execute the decree and that it would be sufficient discharge of the decree

and it is not necessary to have the satisfaction certified and recorded.

19. Learned Counsel for the Appellant points out that the law in Burma has to be presumed to be the same as in this country, and it is for the party

pleading a difference to establish that such a difference exists. This principle is not disputed by the learned Counsel for the Respondent as the

position is well established--Vide Halsbury's Laws of England, third edition, volume VII, page 176.

20. It follows from the above discussion that the Defendant had a tenable defence to the action, when the suit was taken up for trial. The failure to

appreciate this position has led the appellate Court to uphold the dismissal of Interlocutory Application No. 1112 of 1960, by the trial Court. If the

factum of deposit is proved, in the absence of a final judgment of the foreign Court holding that the deposit is bad, this Court will have to go into

the question whether there has been a discharge of the obligation under the foreign judgment on which the action is based. Now, pending the

second appeal it is stated for the Defendant that the foreign Court has recognized the validity of the deposit and the discharge of the decree. But it

is stated by the Respondent's learned Counsel that his instructions are that there is yet no finality to the order in Civil Second Appeal No. 19 of

1961, on the file of the Chief Court Rangoon. I think that in the circumstances while permitting the Defendant to raise the plea of discharge of the

foreign judgment the Plaintiff should be given an opportunity to meet the new defence put forward. I, therefore, set aside the decrees of the Courts

below and remand the suit to the District Munsif's Court, Pudukkottai, for fresh disposal.

21. The Defendant has not attacked the judgment of the learned District Munsif on the merits of the case either in the lower appellate Court or here

in second appeal. It is, therefore, not open to the Defendant to once again canvass the findings given by the learned District Munsif in his judgment,

dated 30th November 1960, on issues 1 and 2. The learned District Munsif will allow the application Interlocutory Application No. 112 of 1960.

It will be open to the Defendant to file an additional written statement or amend the original written statement setting out the subsequent

proceedings in Burma. The Plaintiff may file a further written statement in answer. In the circumstances no orders are necessary on the applications,

Civil Miscellaneous Petition Nos. 5956 of 1963 and 5388 of 1964, for admitting additional evidence in this Court. The Defendant may have these

documents exhibited in the trial Court. The Plaintiff will be at liberty to let in any documentary evidence he may rely on for the contention that there

has been no finality to the proceedings regarding the satisfaction relied on by the Defendant.

22. In the result, the Second Appeal is allowed and the matter remanded to the trial Court for disposal, in the light of the observations made

above.

23. As regards costs, I consider it just in the circumstances that the cost incurred by the Plaintiff so far in the trial Court and in the lower appellate

Court should be borne by the Defendant as decreed. The costs in this Second Appeal shall follow the result of the final decision of the trial Court.

The further costs of the trial Court would be provided for by the trial Court as may appear to it just and proper. The Court-fee paid on the

memorandum of Second Appeal will be refunded. No leave.