

(1967) 01 DEL CK 0013

In the Delhi High Court

Case No : Regular First Appeal No. 4D of 1956

Bharat Nidhi Limited

APPELLANT

Vs

Megh Raj Mahajan and Another

RESPONDENT

Date of Decision : 05-01-1967

Acts Referred:

Citation : (1967) 3 DLT 140

Hon'ble Judges : S.K. Kapur, J; Narain Andley, J

Bench : Division Bench

Advocate : Y. Dayal and A.R. Wig, for the Appellant;

Judgement

S. K. Kapur and S. N. Andley, JJ.

(1) On 24th August, 1949, Bharat Nidhi Limited than known as Bharat Bank Limited, the plaintiff appellant, filed a suit against Megh Raj Mahajan, defendant-respondent, for recovery of Rs. 61,194.00, being the debit balance in the cash credit account with the plaintiff. On 20th December, 1949, the Senior Subordinate Judge, Sialkto, decreed the suit and the present suit for recovery of Rs.63,004.00 was filed on 12th June, 1954, on the basis of the judgment of the Senior Subordinate Judge, Sialkto. The judgment and decree were passed ex parte and there is an observation in the decree that "a summons was duly served upon the defendant, notwithstanding which he has not appeared to defend the suit." It may be pointed out at this stage that it is from this observation that the Trial Court concluded that the defendant had been properly served with a notice issued by the Sialkto Court. From this finding the learned counsel for the appellant wants us to deduce that the defendant was physically in Pakistan when he was served with the notice and when the action was commenced. He then bases an argument on the physical, presence of the defendant on the date of the suit, which shall be dealt with later, that the decree of the foreign Court was enforceable in India. There appears to be no warrant for this contention because a defendant may be duly served even outside Pakistan. The only question that arises is: whether the judgment and decree were nullity having been passed by a

foreign Court ? The answer will primarily depend on whether the defendant was a non- resident foreigner qua the Sialkto Courts on the relevant date. There has been some controversy at the bar as to what the relevant date is. According to Mr. Yogeshwar Dayal, the learned counsel for the appellant the relevant date would be date of the commencement of the action, while Mr. Whig, the learned counsel for the defendant, maintains that the crucial date is the date of the decree. I will advert to this controversy also a little later. It is not disputed that the defendant never submitted to the jurisdiction of the Sialkto Court. It is also not disputed that both on the date of the institution of the action and on the date of the judgment the Sialkto Court was a foreign Court. The question, as I have said above, Therefore, is; was the defendant a non-resident foreigner qua Pakistan Courts on the relevant dates ? In paragraph 4 of the plaint as originally filed there was no allegation about the domicile, nationality or residence of the defendant. In reply to paragraph 4 in the written-statement the defendant categorically stated.-

"IT is denied that the amount, if any, to the plaintiff was payable at Sialkto, or any other place in Pakistan on the 24th August, 1949, when the defendant had since long before ceased to reside or carry on business in Sialkto and had actually migrated to India and had become Indian national." The plaintiff filed his replication to the said written-statement and while dealing with paragraph 4 of the written-statement said -

"ALLEGATIONS in para. 4 which are contrary to the facts mentioned in para. 4 of the plaint are not admitted to be correct and are denied." It necessarily follows that statement of the defendant about his having actually migrated to India permanently and become Indian national was not denied. Mr. Yogeshwar Dayal sought to overcome this difficulty by pointing out that the plaintiff filed an amended plaint and the defendant an amended written-statement. Although there was no change so far as paragraph 4 is concerned, but says Mr. Yogeshwar Dayal that no replication having been filed to the amended written-statement the admission in the replication should not bind the plaintiff. It appears that amendment of the plaint was made because in the original plaint the plaintiff had sought to enforce the foreign decree and an objection was taken by the defendant that judgment of a foreign Court and not the decree could be the basis of a suit u/s 13, Civil Procedure Code. The plaintiff, Therefore, amended his plaint by adding the word "judgment" before decree in the relevant paragraphs of the plaint. For the purpose of the present controversy that makes no difference and I do not think Mr. Yogeshwar Dayal is right in his contention. In my opinion, paragraph 4 of the replication to the first written-statement filed by the plaintiff would, for the purpose of the present dispute, operate as an admission.

(2) Mr. Yogeshwar Daval then pointed out that the burden of issue (iiA), which read-"Whether the Sialkto Court had no jurisdiction to pass this decree for the reasons mentioned in Paras-4, 11 and 13 of the written-statement"-Was on the

defendant and the parties at the time of framing issues do not appear to have taken any notice of the admission. Even if that be so, the defendant could very well rely on the admission for proving one of the facts having a bearing on the issue. That, however, is not the end of the matter. The defendant appeared as his own witness as D. W. 5. and stated-

"PRIOR to Partition I was residing at Sialkto. I migrated to India in the beginning of the month of September, 1947 due to civil disturbances. I left Sialkto for good. Thereafter I settled in India. I got myself registered as a displaced person in India ...I have never been to Pakistan or Sialkto thereafter. --- *** --- There is admittedly no rebuttal to this evidence of the defendant and I have no hesitation in accepting the statement. It would follow that the defendant was resident of Sialkto till September 1947, he shifted in September 1947 to the territories comprised in India after 15th Augst, 1947, became a permanent domicile and resident thereof with no intention of going back to Pakistan, and never went to Pakistan after September 1947. Consequently, both on the date of the institution of the suit in Sialkto and on the date of the judgment the defendant was a domicile and resident of India. Under Article 5 of the Constitution as well, which according to the decision of their Lordships of the Supreme Court in *Mohamed Reza Debstani v. The State of Bombay and others*", came into force on 21-11-1949, read with section 3(28) of the General Clauses, Act, the defendant would be a citizen of India. The defendant not having submitted to the jurisdiction of the Sialkto Court in a personal action against him a decree pronounced in absentem would be an absolute nullity. This has been so laid down by the Judicial Committee in *Gurdyal Singh v. Raja of Faridkto*. Mr. Yogeshwar Dayal relying on the above-quoted observation in the decree passed by the Sialkto Court about the defendant having been duly served says that it must be presumed that the defendant was served with the summons in the Sialkto suit when physically present in Pakistan and such presence was enough to render the foreign decree and the judgment valid and binding on the defendant. Relying on the *Conflict of Laws* by Graveson, Fifth Edition, page 543, and Cheshire's *Private International Law*, Seventh Edition, page 547, Mr. Yogeshwar Dayal contends that a foreign judgment obtained against a non-resident foreigner can be enforced if the defendant is present within the jurisdiction at the date of the institution of the proceedings -even though his presence may be for only a short time. It is not necessary to resolve this controversy because the evidence of the defendant as D.W.5 clearly establishes that he never visited Pakistan after September 1947. As I have said earlier, the observation in the Sialkto decree would be justified even if the defendant had been served in any territory outside Pakistan. From the evidence it must be held that the defendant was neither a national, nor domicile, nor a citizen nor a resident of Pakistan either on the date of the commencement of the suit or on the date of the decree. He did not submit to the jurisdiction of the Pakistan Courts and he was not served while present in Pakistan.. In these circumstances, the decree must be held to be a nullity not enforceable in India u/s 13 of the Civil Procedure Code. This appeal must, Therefore, fail and is

dismissed but in the circumstances of the case the parties are left to bear their own costs.