

(1992) 12 P&H CK 0050
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 1209 of 1991

Gurdas Mann and others

APPELLANT

Vs

Mohinder Singh Brar

RESPONDENT

Date of Decision : 09-12-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13, 44

Citation : AIR 1993 P&H 92 : (1993) 103 PLR 518

Hon'ble Judges : G.S. Garg, J

Bench : Single Bench

Advocate : M.P. Maleri, for the Appellant; S.S.Nijjar and Anand Chhiber, for the Respondent

Judgement

1. This revision is directed against the order of the executing court, dated September 20, 1990, whereby the objection petition u/s 47 of the Civil P. C. (for short the Code), filed by the petitioners, against the execution of a decree granted by the Supreme Court of Ontario, has been dismissed holding that the decree was on merits and, therefore, executable.

2. The decree-holder took out the execution of decree dated April 18, 1985 passed by the Supreme Court of Ontario in Canada by filing an execution application in the District Courts at Chandigarh. The judgment-debtors by way of an objection petition contended that the judgment and decree dated April 18, 1985 passed by the Supreme Court of Ontario was not executable in India, therefore, the court had no jurisdiction to proceed with the execution thereof. The precise objection was that the decree had not been given on the merits of the case and was thus, not executable. The other objections taken in the objection petition are no longer in dispute. As already noticed, the objections to the execution of the decree were dismissed by the executing Court holding that it could not be said that the decree in question had not been given on the merits of the case.

3. The parties are not at issue that the decree sought to be executed and passed

by the Supreme Court is by a Court having reciprocating territory within the meaning of S. 44A of the Code. S. 44A, inter alia, provides for execution of decrees passed by the superior Courts in reciprocating territories. Sub-section (1) of S. 44A of the Code clearly provides that where a certified copy of a decree of a superior Court of any reciprocating territory has been filed in the District Court, the same shall be executed as if it is a decree passed by the District Court. Sub-sec. (3) of S. 44A provides that the provisions of S. 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of S. 13 of the Code.

4. S. 13 of the Code provides that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except in certain situations covered by clauses (a) to (f) of this Section. Learned counsel for the petitioners has confined his attack only to one matter, namely, that the decree is not executable as it is covered by exception (b) of S. 13 of the Code, i.e. the decree sought to be executed has not been given on the merits of the case.

5. The controversy that needs determination in this case is, whether the decree in question has or has not been passed on the merits of the case. Once it is concluded that the decree of the foreign Court is on the merits of the case, it has to be held that the objections are frivolous and the decree is executable. But if it is held to the contrary then certainly the objections to the execution of the decree are well-founded and it has to be held that the decree is not executable.

6. In order to appreciate the contention of the learned counsel for the petitioners, it is necessary to notice the contents of the judgment of the Supreme Court of Ontario, which is sought to be executed. It reads :

"This action was heard this day without a jury at Toronto, Ontario, in the presence of counsel for the plaintiff, no one appearing for the defendants Gurdas Mann, Manjit Maan, Gurpanth Maan, Rajan Kumar, Dharampal Sidhu, Jatinder Dull, Jaswant Bhola, Manjit Singh or Gurmeet Singh although such defendants were properly served as appears from the affidavits of Hadfield Clarke, all sworn the 3rd day of July 1984 and filed, and the affidavit of Shane Stevens, sworn the 4th day of July 1984 and filed, and the Order of Master McBride made Tuesday, the 14th day of August 1984 and filed.

On Reading The Pleadings and Hearing the Evidence and the submissions of counsel for the plaintiff;

1. This Court Orders and Adjudges that the plaintiff shall have judgment against all the defendants for the amount of Seventy-two Thousand Eight Hundred and Sixteen dollars and Sixteen cents (\$72,816.16) together with interest thereon at

the rate of thirteen (13%) per cent per annum from the 15th day of August 1984, being the sum of Six Thousand Four Hundred and Four dollars and Seventy-one cents (\$ 6,404.71).

2. This Court Orders and Adjudges that the plaintiff shall also have his costs of this action as against all of the defendants.

This judgment Bears Interest at the rate of thirteen (13%) per cent per year commencing on April 18, 1984."

7. A reading of the judgment of the foreign Court shows that the defendants, now petitioners had been properly served but they chose not to appear and were, therefore, proceeded ex parte. The Court thereafter on reading the pleadings and hearing the evidence and the submissions of counsel for the plaintiff, decreed the suit for recovery of \$72,816.16 together with interest at the rate of thirteen per cent per annum commencing from April 18, 1984. From the judgment quoted above, it is abundantly clear that it is an ex parte decree. A reading thereof does not show that the plaintiff produced some evidence, either oral or documentary, before the passing of the decree. On persistent asking, the learned counsel for the respondent was unable to point out any evidence, oral or documentary which was produced before the Supreme Court of Ontario before the said Court passed the decree. The learned counsel by reference to "on reading the pleadings and hearing the evidence" was at pains to contend that the decree though ex parte, was on the merits of the case and the use of words "hearing the evidence" is clearly indicative of the fact that the evidence was led.

8. In *Algemene Bank Nederland NV Vs. Satish Dayalal Choksi*, , one of the objections to the execution of a decree of the Supreme Court of Hong Kong was that it violated the provisions of S. 13(b) of the Code, as is the case here. In this case, the suit was filed by the bank on the basis of a guarantee. The defendant filed his defence. The plaintiff filed list of documents in which the guarantee executed by the defendant in favour of the plaintiff-bank was disclosed. The defendant also filed his list of documents. The Court then fixed the dates for trial of the suit. The trial was adjourned from time to time at the instance of the defendant and ultimately he was proceeded ex parte on July 7, 1987. On the same day, an ex parte decree was granted to the plaintiff-bank. It was this decree, to the execution of which the objections had been raised. On consideration of the matter and after noticing the decisions reported in *D.T. Keymer v. P. Visvanathan* "Reddi AIR 1916 PC 121, *R.E. Mahomed Kassim and Co. Vs. Seenii Pakir Bin Ahmed and Others*, , *S.S.A.S. Arunachalam Chettiar v. A. M. Mohommad Salihu Marakkayar* AIR 1928 Mad 133, *A.N. Abdul Rahman v. J. M. Mohamed Ali* AIR 1928 Rang 319, *Derby McIntyre & Co. Ltd. v. Miner & Co.* 39 CWN 557 , *Ephrayim H. Ephrayim Vs. Turner, Morrison and Co.*, and *East India Trading Co. Vs. Badat and Co.*, it was concluded as under *Algemene Bank Nederland NV Vs. Satish Dayalal Choksi*,) :--

"In my view, in these circumstances, the case before me falls under the ratio laid

down by the Privy Council in Keymer's case AIR 1916 PC 121. The decision of the Hong Kong Court is not given on examination of the points at controversy between the parties. It seems to have been given ex parte on the basis of the plaintiff's pleadings and documents tendered by the plaintiff without going into the controversy between the parties since the defendant did not appear at the time of the hearing of the suit to defend the claim. The present judgment, therefore, is not a judgment on the merits of the case."

Before concluding as above, it was observed as under *Algemene Bank Nederland NV Vs. Satish Dayalal Choksi*,) :

"The judgment which is before me does not indicate whether actually any evidence was led before the Hong Kong Court and whether the Court went into the merits of the case. The judgment merely sets out that "on the defendant's failure to appear and upon proof of plaintiff's claim," the judgment is entered for the plaintiff. The plaintiff-bank has emphasised the words "upon proof of plaintiff's claim". They have also produced the original guarantee which bears in one corner a sticker showing that it was exhibited before the Hong Kong Court. The plaintiff-bank has not said in its affidavit that the documents which were tendered before the court were properly proved or that anybody on behalf of the bank had given evidence to establish the plaintiff's claim. This becomes relevant because it is the contention of the defendant that the guarantee which he had given was a blank and undated guarantee. It had been misused by the plaintiff-bank in the present case. The defendant has also relied upon alterations and erasures in the plaintiff-bank's register of guarantees to show that this undated guarantee was subsequently entered in the register by altering another entry to indicate that it was given around 7th April 1985. There is no material to show that these aspects of the dispute were ever examined by the Hong Kong court. The court seems to have proceeded to pronounce the judgment in view of the defendant's failure to appear at the hearing of the case to defend the claim on merits.

9. In *Trilochan Choudhury Vs. Dayanidhi Patra*, , the facts were that the defendant was proceeded ex parte after he had filed written statement and his lawyer withdrew his power for want of instructions. The plaintiff had, however, thereafter given evidence about the value of goods supplied and that no article had been returned and no payment had been made for the goods supplied. The decree was passed thereafter. It was in this backdrop, the question that fell for determination was, whether the judgment given by the foreign Court could be said to be one on the merits of the case in terms of S. 13(b) of the Code. The Division Bench on consideration of the matter and after noticing the decisions reported in *Mehar Singh v. Ishar Singh* AIR 1932 Lah 649, *Dr. Kulwant v. Dhan Raj Dutt* AIR 1935 Lah 396, *Ishri Prasad Vs. Sri Ram*, , *Vithal Bhai Shivabha v. Lal Bhai Bhimbhai* AIR 1942 Bom 199 , *Sheikh Abdul Rahim alias S.A. Rahim Vs. Mohamed Din and Another*, , *Mohd. Kassim and Co. v. Seeni Pakir* AIR 1927 Mad 265 (FB), *D.T. Keymer's case* AIR 1916 PC 121) (supra), *Jayam Sunder Raja*

Ratnam v. Muthuswami AIR 1958 Mad 203 , T. Sundaram Pillai Vs. Kandaswami Pillai, , Wazir Sahu and Another Vs. Munshi Das, and Govindan Asari Kesavan Asari Vs. Sankaran Asari Balakrishnan Asari, , concluded as under :--

"Thus, there seems to be complete unanimity of all the High Courts (with the exception of Chintamani Padhan and Others Vs. Paika Samal and Others,) that even an ex parte judgment in favour of the plaintiff may be deemed to be a judgment given on the merits of the case if some evidence is adduced on behalf of plaintiff and the judgment-however brief is based on a consideration of that evidence. Where however no evidence is adduced on the plaintiffs side and his suit is decreed merely because of the absence of the defendant either by way of penalty or in a formal manner, the principle laid down in the Privy Council decision reported in AIR 1916 PC 121 would apply and the judgment may not be one based on the merits of the case."

10. With a particular reference to the facts of the reported case, the Division Bench, however, came to the conclusion that the foreign judgment clearly showed that the plaintiff gave evidence before the Court and the learned Judge of Rangoon Court also gave his reasons for accepting plaintiffs claim and rejected the defendant's contention. In the circumstances, it was concluded by the Division Bench that the decision was on the merits of the case and would be conclusive between the parties under S. 13(b) of the Code. Learned counsel for the respondent, thus, cannot draw any support from Trilochan Choudhury Vs. Dayanidhi Patra, .

11. Having given thoughtful consideration to the entire matter, there is no hesitation to conclude that the judgment of the Supreme Court of Ontario cannot be said to be on the merits of the case in terms of S. 13(b) of the Code. The judgment does not show that any evidence oral or documentary was produced before the suit was decreed. Learned counsel appearing for the respondent-decreeholder also could not point out to any evidence which might have been produced before the Supreme Court of Ontario before passing the decree. The decree, as already noticed, was an ex parte decree and it refers to no evidence which might have been adduced in the Court before passing thereof. To me it appears that the decree was passed on the basis of pleadings alone merely because the defendant chose not to appear and was proceeded ex parte. Such a decree in view of the observations in *Algemene Bank Nederland NV Vs. Satish Dayalal Choksi*, has to be held to be one not on the merits of the case. I am in full agreement with the conclusions and observations made in *Algemene Bank of Nederland's* case (supra) in so far as it has been concluded therein that the judgment was not on the merits of the case.

12. For the aforesaid reasons, this revision petition is allowed, the order passed by the executing Court on September 20, 1990 is set aside and it is held that the judgment and decree of Supreme Court of Ontario, sought to be executed by the respondent herein being not on the merits of the case in terms of S. 13(b) of the Code is not executable. The parties shall bear their own costs.

13. Petition allowed.