
(1937) 04 BOM CK 0012
In the Bombay High Court
Case No : First Appeal No. 234 of 1935

Mallappa Yellappa Bennur	Vs	APPELLANT
Raghavendra Shamrao Deshpande		RESPONDENT

Date of Decision : 05-04-1937

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13

Citation : AIR 1938 Bom 173 : (1938) 40 BOMLR 77

Hon'ble Judges : Rangnekar, J;Macklin, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Rangnekar, J.—This case illustrates some of the difficulties which a judgment-creditor in this country meets with in realizing the fruits of his decree, and it raises a point of some importance relating to the effect to be given to a foreign judgment u/s 13 of the Civil Procedure Code. First as to the facts : The Native State of Savanur lies in the district of Dharwar and the Collector of the district is generally the Political Agent there. It is common ground that the State has an independent civil and criminal jurisdiction. Any decree made by a Court in the State has the effect of a foreign judgment in British India. The appellant as manager of a joint and undivided Hindu family advanced certain moneys to the respondent who admittedly was a watandar and a mankari holding watan property within the jurisdiction of the Savanur State. In June, 1920, an account of the monetary dealings was made up, and a sum of Rs. 15,000 odd was found due by the respondent to the appellant in respect of which the former executed a promissory note in favour of the latter. He, however, failed to pay the amount due and raised disputes about the accounts, whereupon at his instance the appellant agreed to refer the matter to arbitration. There was a submission in writing by which two arbitrators were appointed, one being a pleader practising in the Savanur Court, and the other, according to the evidence of the pleader in the Dharwar Court not contradicted anywhere by the respondent, was a relation

of the respondent himself. The arbitrators, according to the evidence of the pleader, went through the accounts between the parties, gave some remissions and made an award on January 7, 1922, for Rs. 17,000 with three per cent, interest on it in favour of the appellant. This award admittedly was made in Savanur. The respondent failed to pay the sum awarded to the appellant by the award, and so the appellant applied in the Savanur Court, in accordance with Clause 20 of the second schedule of the CPC which obtains in the Savanur State, for getting the award filed and for having a decree made thereon in terms of the award. This application was registered as suit No. 3 of 1922 in the Court of the First Class Subordinate Judge at Savanur. The defendant was examined in the proceedings, and his evidence shows that not only he admitted the dealings between the parties but he admitted the award and consented to a decree being passed in terms of the award. In the application, which was subsequently registered as a plaint, it was stated by the appellant that both he and the respondent were residents of Savanur and were residing in Savanur, and it is clear from the record of that Court that this allegation was never denied by the respondent. Accordingly the First Class Subordinate Judge of Savanur passed a decree on January 7, 1922, in favour of the appellant and against the respondent. Thereafter the respondent made a default in payment of the decree, and the appellant applied to execute the decree by attaching the watan lands of the respondent in Savanur. The respondent appeared in those proceedings and contended that the lands being watan could not be attached. That contention was accepted by the Court, and the darkhast was struck off. An appeal from that decision met with the same result. Thereafter the appellant attempted to carry out the decree by filing a darkhast in the Dharwar Court. It was necessary for him to produce a certificate from the Political Agent under the CPC which he did, but the respondent then applied to the Political Agent and had the certificate recalled on the ground that there was no reciprocity between the Courts in British India and the Courts in Savanur. Accordingly in August, 1925, this second darkhast was struck off. It is worthy of note that up till that moment it was never contended by the respondent that he was not either a subject of the Savanur State or he was not residing in Savanur when the Savanur Court passed a decree against him in 1922 ; nor was it contended by him that the award decree was obtained by fraud. Having thus failed in his attempts to realize the fruits of the decree which he had obtained, the appellant instituted a suit, which gives rise to this appeal, on January 6, 1928, in the Court of the First Class Subordinate Judge at Dharwar. The respondent appeared and raised various pleas to the suit. Most of these pleas were raised u/s 13 of the Civil Procedure Code. On the merits he admitted that there were dealings between him and the appellant, but pleaded that the liability in respect of those dealings was satisfied by payments from time to time and there was nothing due to the appellant. He then alleged that the award was obtained by fraud and in collusion with the arbitrators, that it was a hollow award, and that although he never resided in the Savanur State but always resided in British territory, an invalid decree was obtained by the appellant in the Savanur Court. He further alleged that the appellant had

promised not to execute the decree against the respondent and had perpetrated a fraud by alleging that that Court had jurisdiction in getting a decree on the award. No issue was raised, and, obviously, could be raised-, on the merits, if the judgment of the Savanur Court was a valid foreign judgment. On October 21, 1929, which was the day of the hearing, the respondent failed to put in an appearance in Court with the result that on almost all the issues raised as regards the validity and effect of the judgment of the Savanur Court, the then learned First Class Subordinate Judge recorded findings in favour of the appellant and awarded the appellant's claim. Meanwhile, however, the respondent on November 26, 1928, ten months after the institution of the suit in the Dharwar Court, filed a suit in the Court of the First Class Subordinate Judge at Savanur, contending that the decree made by that Court was invalid on the ground that as he did not reside within the jurisdiction of the Savanur Court, that Court had no jurisdiction over him and. could not bind him by any decree which it could make. Upon this, in spite of the objection raised by the appellant, the Savanur Court set aside the first decree on October 30, 1929. The appellant preferred an appeal to the High Court in Savanur, but the appeal was dismissed by that Court on July 15, 1930. Having obtained this second judgment in his favour, the respondent appeared in the Dharwar Court in the suit, got the ex parte decree set aside, and on October 3, 1930, applied to that Court to amend his written statement by pleading that the judgment in favour of the appellant passed in 1922 was set aside and, therefore, the appellant had no cause of action against him, The appellant put in a counter-written statement pleading that the second judgment of the Savanur Court was invalid in that it contravened all the provisions of Section 13 of the CPC and, therefore, it could not be given effect to in British India. The objection, however, was repelled by the then First Class Subordinate Judge of Dharwar, and the respondent was allowed to amend the original written statement on October 25, 1930, and four more issues were raised on the contentions of the parties made in these circumstances. Before, however, this order was made, the appellant had applied to amend his plaint, which, as I have stated, was based on the judgment of the Savanur Court of 1922, by pleading the original cause of action, namely, the award made in his favour in the arbitration proceedings in 1922. This application was rejected with costs by the learned Judge. He was succeeded by another Judge, who heard the arguments in the case; no evidence was led on behalf of the respondent; the appellant himself was examined and supported his case, and he also examined the pleader of Savanur, who was one of the arbitrators, on the merits of the award; and in the result the learned First Class Subordinate Judge dismissed the plaintiff's suit. He held in effect that the first judgment was set aside by the second judgment by the same Court, and that the second judgment was not vitiated by any of the circumstances mentioned in Section 13 of the Civil Procedure Code, and it is from that judgment that the present appeal is made.

2. Mr. Murdeshwar on behalf of the appellant has raised three contentions : (1) That the learned Judge was wrong in recognizing the second judgment of the

Savanur Court and in giving effect to it; (2) that, in any event, the learned Judge ought to have held that by reason of the conduct of the respondent and the circumstances to which I have referred, the respondent was precluded or estopped from contending that the first judgment was set aside and invalid and from proving the second judgment; and (3) that, in any case, the lower Court ought to have accepted the appellant's application for amendment.

3. Now, a foreign judgment as such has no operation in British India. The only way in which a foreign judgment can be enforced in British India is by bringing an action upon it and or by executing the foreign judgment in certain specified cases u/s 44 of the Civil Procedure Code. In matters of foreign judgments, it is clear the Courts in British India follow the rules laid down by the English Courts. Before a foreign judgment can be regarded as having extra-territorial validity, at least one of the following conditions must be satisfied :-

(1) The defendant should be a subject of the foreign country. This is based upon the ground of allegiance, which involves an obligation to comply with the judgments of the Courts of that country. (2) The defendant was resident in the foreign country at the time when the action was begun against him. (3) The defendant was served with process while temporarily present in the foreign country (4) The defendant in his character as plaintiff in the foreign action himself selected the forum where the judgment was given against him. (5) The defendant voluntarily appeared. (6) The defendant had contracted to submit to the jurisdiction of the foreign Court (Halsbury, Volume VI, 2nd Edition, paragraph 385).

Section 13 of the CPC provides that a foreign judgment may operate as res judicata except in the six cases specified in that section and subject to the other conditions mentioned in Section 11. The question in this case is, whether the judgments in this case-one relied on by the appellant and the other by the respondent-can be recognised as valid foreign judgments, and, if so, which, so as to operate as res judicata?

4. It is clear from the facts stated at the outset that the first judgment is effective and the plaintiff would be entitled to a decree on it unless the existence of the second judgment comes in his way. The respondent was a watandar and mankari holding watan property in the Savanur State. The award was made in that State. A suit to enforce the award was filed in the proper Court in the State. The plaintiff in his plaint in the Savanur Court alleged that both he and the respondent were residing in Savanur and were within the jurisdiction of that Court. This allegation was not denied by the respondent in his evidence and in his written statement. He was examined and he admitted the award and consented to the decree being made in accordance with it. It is clear, therefore, that even if the Savanur Court had no jurisdiction over the respondent on the ground that he was a resident of Dharwar, still as he had voluntarily submitted to the jurisdiction of the Savanur Court and consented to have a decree made on the terms; of the award, that Court had upon the well-recognized " principle of

submission" jurisdiction over him, and any decree made by it would be given not only territorial recognition but extra-territorial recognition by the Courts of all civilized countries.

5. It is clear on the authorities that whether a foreign Court is or is not a Court of competent jurisdiction, is to be determined by principles of international law. At p. 398 in that well-known treatise on Private International Law by Westlake (7th ed.) the learned author observes in paragraph 319 as follows :-

Coming now to the question of competence reserved in para. 311, it must first be observed that what we have here to deal with is international competence, not domestic, for the question of giving effect to a judgment in another country is distinct from that whether the competence on which the judgment is founded is a reasonable one for internal purposes."

He then refers to the opinion expressed by Lord Hobhouse in the Judicial Committee in *Ashbury v. Ellis* [1893] A.C. 339. Then he continues to observe (p. 398) :-

Hence also the competence here considered has nothing to do with the rules by which litigation may be portioned out among different courts existing in the same country, as for instance between the tribunals of commerce) and what are called civil tribunals in France. If the foreign suit was not brought in the right court of a country which as a territory was internationally competent, this was matter of defence which ought to have been pleaded in that court.

At p. 399 the learned author observes as follows :-

It is only a particular case of this, if the defendant has become party to an instrument by which his domicile for the purpose of the obligations thereby created is declared to be at a certain spot, in default of his electing another.

In *Schibsby v. Weistenholz* (1870) L. R. 6 Q.B. 155. Lord Blackburn observed as follows (p. 161) :-

If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them.

6. In Dicey's *Conflict of Laws*, 5th ed., p. 32, the general principle is stated in these words :-

The Courts of any country have a right to exercise jurisdiction, i.e., are Courts of competent jurisdiction, over any person who voluntarily submits to their jurisdiction.

At p. 221 in the same treatise Rule 56 is as follows :-

The Court has jurisdiction in an action over any person who has by his conduct precluded himself from objecting to the jurisdiction of the Court.

The English Courts have gone to such an extent now that even if the defendant had merely appeared to contest the jurisdiction of the foreign Court, that Court would, on deciding adversely to that claim, have had jurisdiction to decide the issue on the merits. [See remarks of Court of Appeal in *Harris v. Taylor* [1915] 2 K. B. 580 and *Wansborough Paper Co., Ltd. v. Laughland* [1920] W. N. 344. 398 in Dicey under the heading " Jurisdiction in Actions in Personam " the third case is put in these words :-

Where the party objecting to the jurisdiction of the Courts of such country has, by his own conduct, submitted to such jurisdiction, i.e., has precluded himself from objecting thereto-

(a) by appearing as plaintiff in the action ; or

(b) by voluntarily appearing as defendant in such action ; or

(c) by having expressly or impliedly contracted to submit to the jurisdiction of such Courts.

7. To the same effect are the remarks of Lord Selborne in the leading case in *Gurdayal Singh v. Raja of Faridkot* ILR (1894) Cal. 222, which I think are very important. At pp. 237-238 the learned law Lord observed as follows :-

Under these circumstances, there was, in their Lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of suit ("Actor sequitur jorum rei"), which is rightly stated by Sir Robert Phillimore (*International Law*, Vol 4, Section 891) to " lie at the root of all international, and of most domestic, jurisprudence on this matter." All jurisdiction is properly territorial", and " extra territorium jus dicenti, impune. turn paretur." Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory, while" they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, question of status or succession governed by domicile, it may exist as to persons domiciled, or who living were domiciled, within the territory. As between different provinces under one sovereignty (e.g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction ; but no territorial legislation can give jurisdiction which any Foreign Court ought to recognize against foreigners who owe no allegiance or obedience to the Power which so legislates.

In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a Foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by International Law an absolute nullity. He is under no obligation of any kind to obey it, and it must be

regarded as a mere nullity by the Courts of every nation, except (when authorized by Special local legislation) in the country of the forum by which it was pronounced.

These are doctrines laid down by all the leading authorities on International Law ; among others, by Story (Conflict of Laws, 2nd edition, Sections 546, 549, 553, 554, 556, 586), and by Chancellor Kent (Commentaries, Vol. I, p. 284, note (c) 10th edition), and no exception is made to them in favour of the exercise of jurisdiction against a defendant not otherwise subject to it by the Courts of the country in which the cause of action arose, or (in cases of contract) by the Courts of the locus solution's. In those cases, as well as all others, when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice.

8. From the facts stated above it is clear that most of the grounds on which a foreign Court has, by the international law, jurisdiction over a foreigner were present in this case. There was the allegiance to the State ; the instrument on which the appellant's claim is based, namely, the award, was made within the State ; the respondent was served with a summons in the suit, and even if he was temporarily present in Savanur at the time, he was bound to obey the judgment of the Court, for temporary protection by a State involves temporary allegiance; the respondent admitted that he was residing in the State ; but above all he appeared and submitted voluntarily to the jurisdiction of the Savanur Court; and, therefore, the first judgment is clearly a judgment of a competent foreign Court and as such is binding on the respondent, unless it is subject to the infirmities specified in Section 13. The contentions in that behalf made by the respondent were repelled by the learned First Class Subordinate Judge, and, in our opinion, rightly. Therefore, the question that now falls to be determined is, how far the second judgment of the Savanur Court is a valid judgment, so that effect can be given to it under the international law by this Court ?

9. Now, ordinarily it is not open to the Courts in British India to sit in appeal over a foreign judgment, and we cannot refuse to recognize a foreign judgment because it proceeds on grounds which would not be adequate in British India, unless it offends against the rules u/s 13. But there is strong opinion in favour of the view that the Court has a discretion in the matter ; and, amongst others, one of the objections to the validity of a foreign judgment is that that judgment was not given on the merits of the case. The English Court steers clear of an inquiry into the merits of the case upon the facts found. But; even in England, in *Rudd v. Rudd* [1924], P. 72, it was observed that where the procedure in the foreign Court offends against English feelings of substantial justice, the judgment of the foreign Court will not be considered. In *Walker v. Witter* (1778) 1 Doug. 6. Mr. Justice Mansfield said : " Foreign judgments are a ground of action everywhere, but they are examinable." In *Reimers v. Druce* (1856) 23 Beav. 145 Mr. Justice Romilly did not enforce a foreign judgment proceeding on what he deemed to be

an erroneous view of private international law. In *Pemberton v. Hughes* [1899] 1 Ch. 781, it was observed as follows (p. 790) :-

... English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice.

10. It seems that the law on this subject in this country is more elastic and wider than that in England, and this is clear from Clause (b) of Section 13 of the Code. Under that clause the Courts in this country have a right to examine the judgment to see whether it has been given on the merits.

11. In this case it is argued by the appellant that the second judgment offends against Clauses (b) (c) (e), and (f) of Section 13 of the Civil Procedure Code. His contentions are as follows : The judgment in the second suit was not passed on merits in that it ignored the defences raised by the appellant that the burden of proof as to the respondent's residence in Savanur at the time of the first judgment was wrongly thrown on him ; that the second judgment shows a clear refusal to recognize the law of British India and sustains a claim founded on a breach of the law in force in British India, and in particular the Court ought to have held that the question of jurisdiction of the Savanur Court at the time of the first suit was barred by *res judicata*, and this contention though raised in the second suit by him was ignored by the Courts.

12. The question of burden being wrongly placed on the appellant in the second suit is not material, though it seems to me well founded. The Savanur Courts relied on the alleged admission of the appellant in his plaint in the Dharwar suit. There in paragraph 6 of the plaint the appellant stated as follows :-

Although all transactions pertaining to the suit, between plaintiffs and the defendant have taken place within the jurisdiction of this Court, moreover, as the defendant resides now within the jurisdiction of this Court also, and for reasons mentioned above, this Court has jurisdiction to try this suit.

In our opinion, this hardly involves an admission that the respondent resided in Dharwar at the time of the first suit in Savanur. If, therefore, this was the only ground raised by the appellant we can hardly refuse to recognize the second judgment as binding on us or as having no extra-territorial; validity.

13. There seems to be considerable force in the argument that the foreign Court refused to hold that the contention of the respondent in the second suit was barred by *res judicata*. Before the second suit was decided, the Dharwar Court had held that the Savanur Court had jurisdiction over the respondent at the time of the first suit. The respondent might have appealed against this. The judgment of the Dharwar Court was then in force and binding on him. It is clear on authorities that a foreign judgment can be pleaded as *res judicata* [*Ricardo v. Garcias* (1845) 12 Cl & F. 368]. The judgment of the Dharwar Court was a foreign judgment and was relied upon in the second suit and it was clearly the duty of the Savanur Court to give it the effect which a British Court would have

given it under the law prevailing in British India. Under the judgment of the Dharwar Court the appellant had acquired certain rights, which were ignored in the second suit by the Savanur Court. It is a principle of international law that rights acquired under the law of one civilized country ought to be recognized in all other civilized States, and the principle is that where the Court of a foreign country bases its judgment on the deliberate refusal to recognize a right duly acquired under the law of England, the English Court will refuse to recognize the foreign judgment. (See Dicey, p. 455, and *Simpson v. Fogo* (1863) 1 H. & M. 195. Apart from this, however, the last contention on behalf of the appellant is, in our opinion, conclusive of the question raised in this case. The appellant contends that this second judgment of the Savanur Court is founded on a complete disregard of international law in that it has ignored "the principle of submission," which is recognized by all civilized countries and which confers upon a foreign Court jurisdiction over a foreigner. The respondent appeared in the first suit and voluntarily submitted to the jurisdiction of the Savanur Court. It follows, therefore, that that Court had jurisdiction over him. This contention was raised by the appellant at the outset in the second suit but was not accepted by both the trial Court and the appellate Court. No copy of the judgment of the trial Court is on the record, but we have before us a copy of the judgment of the appellate Court. This is what is observed in it on this point :-

The appellant urges that the respondent has submitted himself to the jurisdiction of the Savanur Court, in Civil Suit No. 3 of 1922. The law on this point is "The general rule therefore is that consent cannot give jurisdiction and want of jurisdiction cannot be waived." Therefore, respondent, having submitted himself to the jurisdiction of this Court, cannot give jurisdiction as required by law. I will quote 51 Cal.372. "If it was any other point except a point of jurisdiction, their Lordships will pay no attention to it, but they are bound to take notice of an objection to the jurisdiction however late in the day it may be raised, if it be that on the facts admitted or approved, it is manifest that there is a defect of jurisdiction." The parties admittedly live outside the jurisdiction of the State. No transaction took place here and on the face of it, this Court, in my opinion, has no jurisdiction. The extract of the judgment quoted above is clear that the question of jurisdiction can be brought up at any time. Therefore no question of limitation has arisen in this Court.

With all respect to the learned Judge there seems to be here a curious mixture of the principle of submission with the plea of limitation; and if the authorities to which I have referred are correct, the ordinary principle that consent cannot confer jurisdiction has no application to the facts of this case.

14. A foreign judgment is impeachable for breach of any of the conditions specified in Section 13. Rule 106 in Dicey is in these words (p. 453) :-

A foreign judgment may be held invalid when the Court pronouncing the judgment refuses to give such recognition to the law of other nations as is required by the principles of the conflict of laws.

15. A foreign judgment, which totally disregards the comity of nations or which knowingly and perversely disregards the rights given to a British subject by the law of his country, will not and cannot be held to be of any effect in this country. I am not convinced that we are bound to accept the views of a foreign Court when they plainly conflict with international law. An invalid foreign judgment has no effect in this Court, and, in our opinion, the view taken by the learned First Class Subordinate Judge is wrong.

16. Having regard to the conclusion which we have reached in this case, we do not think it necessary to express any opinion on the two contentions as regards the estoppel and as regards the right of the appellant to have his plaint amended.

17. The appeal, therefore, must be allowed ; the decree made by the learned First Class Subordinate Judge must be set aside; and there will be a decree for Rs. 8,500 in favour of the appellant, with costs throughout and interest on judgment at six per cent.

Mackin, J.

18. I agree.