

(1990) 09 CAL CK 0026
In the Calcutta High Court
Case No : Execution Case No. 2 of 1987

Middle East Bank Ltd.

APPELLANT

Vs

Rajendra Singh Sethia

RESPONDENT

Date of Decision : 17-09-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 3, Order 21 Rule 41, 11, 13, 44A
English Bankruptcy Act, 1914 — Section 7, 7(2), 9
Presidency Towns Insolvency Act, 1909 — Section 17

Citation : AIR 1991 Cal 335

Hon'ble Judges : Prabir Kumar Majumdar, J

Bench : Single Bench

Advocate : Hirak Mitra and S.P. Majumdar, for the Appellant; Gautam Chakraborty, R.K. Khanna and Samit Talukdar, for the Respondent

Judgement

1. This is an application under Order 21, Rule 41 of the CPC for examination of judgment-debtor Rajendra Singh Sethia as to his property in a proceeding for execution of a foreign decree passed by the High Court of Justice, Queens Bench Division of England.

2. Sometime in January, 1984 the plaintiff-decree-holder, Middle East Bank Ltd., filed a suit in the Queen's Bench Division in the High Court of Justice in London against amongst others the respondent/judgment-debtor, Rajendra Singh Sethia. The suit was filed against the respondent/judgment-debtor along with four others. The writ of summons was served on the respondent/ judgment-debtor and the other defendants in the suit. The said writ of summons was accepted by the Solicitors of the third defendant (the judgment-debtor by the name of Messrs. Iringhans). A certificate of such service was issued by the Master of Queens Bench Division of the Supreme Court of England and Wales.

3. On 8th February, 1985 the plaintiff/ decree-holder obtained a judgment against the five defendants including the respondent/ judgment-debtor in the Commercial Court of Queen's Bench Division in the High Court of England for

payment of a sum of Rs. US \$23,547,972.16c inclusive of interest until judgment together with the cost on a solicitor and own client basic. The said judgment and decree also allowed interest at the rate of 15% per annum on and from 16th April, 1985.

4. On the basis of the certified copy of the said decree filed in this Court along with other documents, the plaintiff-decree-holder in or about April, 1987 filed an execution application in this Court by making an application together with the tabular statement, and on the then known assets of the respondent/ judgment-debtor asked for appointment of Receiver as also sale of 456 Equity Shares standing in the name of the respondent/ judgment-debtor in Shethia Properties Pvt. Ltd., a company incorporated under the Companies Act, 1956 in West Bengal as also asking for necessary other orders for in-junction against the respondent/ judgment-debtor.

5. It is stated by the plaintiff/decree-holder that on the said application this Court on 23rd April, 1987 passed an order of injunction against the respondent/ judgment-debtor from disposing of any of the said shares. By a further order dated 18th June, 1987 this Court was pleased to appoint a Receiver in respect of the said shares standing in the name of the respondent/judgment-debtor. The respondent/judgment-debtor was also directed to deliver the share scrips to the Receiver appointed therein.

6. It is alleged by the plaintiff/ decree-holder that pursuant to the said order, the Receiver held meetings and made attempts to make respondent/judgment-debtor deliver the said shares but the Receiver failed to get delivery of the same or to comply with the order. According to the plaintiff/ decree-holder, the face value of the said share was Rs. 100/- each and for 456 shares hardly a paltry sum of Rs. 45.600/- could be realised. It is further stated by the plaintiff/decree-holder that the same could not be taken as even partial satisfaction of the decree passed against the respondent/judgment-debtor. The plaintiff/decree-holder also states that it is not aware of any other assets of properties owned or held by the respondent/judgment-debtor.

7. The plaintiff/decree-holder, therefore, claims that the respondent/judgment-debtor be directed to appear before this Court for being examined as to his assets and properties out of which the decree can be satisfied and for such purpose a date be fixed by this Court and a notice be served upon the respondent/ judgment-debtor for such purpose.

8. The plaintiff/ decree-holder also claims that for non-compliance with any such order which may be passed herein this Court may direct the Sheriff by issuing a warrant of arrest to produce judgment-debtor this Court so that he may be examined in Court or, if necessary, be committed to prison.

9. The judgment-debtor Rajendra Singh Shethia has filed an affidavit affirmed on 25th April, 1989. The case of the respondent/ judgment-debtor is that pursuant to a petition dated 3rd August, 1984 and numbered 2324 of 1984 of the David

Barry Dein, trading as London & Overseas (Sugar) Co. of London, a creditor, filed on 9th August, 1984, the High Court of Justice in Bankruptcy at London passed a Receiving Order dated 5th November, 1984 which was made against the respondent/judgment-debtor. It is also the case of the judgment-debtor that the plaintiff/ decree-holder lodged a claim in the sum of ? 22,666,919.69 in personal bankruptcy of the judgment-debtor with Mr. G. A. Auger Trustee-in-Bankruptcy of M/s. Stoy Hay-ward of No. 8, Baker Street, London WIM IDA.

10. The respondent / judgment-debtor claims that by reason of the aforesaid Receiving Order dated 5th November, 1984, the plaintiff/ decree-holder is debarred from taking any further step or proceedings for realisation of its decretal claim against the respondent/judgment-debtor under the English Law.

11. The respondent/judgment-debtor also states that the application moved by the plaintiff/decreed-holder in this Court was moved ex parte and no notice of such application was ever served upon the respondent/ judgment-debtor. The respondent/judgment-debtor also states that he was not aware of any appointment of Receiver in respect of the shares standing in his name in Shetia's Properties Pvt. Ltd. He also states that he was not aware of any of the orders dated 22nd April, 1987 or 18th June, 1987 passed by this Court. The respondent/ judgment-debtor claims that such orders were obtained ex parte and by gross and total suppression of material facts from this Court.

12. In the affidavit-in-reply filed on behalf of the plaintiff/decreed-holder, the plaintiff/decreed-holder was, however, denied that the plaintiff/decreed-holder lodged any claim with the Trustee-in-Bankruptcy in England. The plaintiff/decreed-holder has also denied and disputed the other allegations made by the respondent/judgment-debtor by his said affidavit.

13. Mr. Gautam Chakraborty the learned counsel for the respondent/judgment-debtor appearing with Mr. Samit Talukdar has a point of objection as to the maintainability of this application taken out by the plaintiff/ decreed-holder and the execution proceeding initiated in respect of the said foreign judgment. Mr. Chakraborty submits that the judgment sought to be executed is a foreign judgment and decree which can only be executed under the procedure laid down in S. 44A of the Code of Civil Procedure. It is the further submission of Mr. Chakraborty that foreign judgment cannot be enforced or executed if it is not conclusive within the meaning of S. 13 of the Code of Civil Procedure. He submits that 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 the situation contemplated in S. 13(a) to (d). Mr. Chakraborty submits that the judgment and decree sought to be executed by the plaintiff/decreed-holder has not been given on the merits of the case, and further, the proceedings in which the judgment was obtained are opposed to natural justice.

14. It is his submission that in the instant case the decree has not been passed

on merits. It is a summary judgment and, therefore, not on merits. Mr. Chakraborty contends that this judgment and decree sought to be executed by the plaintiff/decree-holder in this Court is a judgment passed under O. 14, R. 3 of the Rules of Supreme Court which indicates a summary procedure.

15. Mr. Chakraborty has referred to several decisions of this Court, the Privy Council as also of other High Courts in support of his contention that the judgment and decree sought to be executed by the plaintiff/decree-holder has not been given on merits of the case, Mr. Chakraborty has cited a decision of this Court in *Derby McIntyre and Co., Ltd. Vs. Mitter and Co.* a decision in the case of *R.E. Mahomed Kassim and Co. Vs. Seeni Pakir Bin Ahmed and Others*, a decision again of Madras High Court in the case of *R.M.V. Vellachi Achi Vs. R.M.A. Ramanathan Chettiar*, , a decision of Privy Council in the case of *D. T. Keymer v. P. Vishwanath Reddy*, reported in AIR 1916 PC 121 and lastly a very recent decision of Bombay High Court in the case of *Algemene Bank Nederland NV Vs. Satish Dayalal Choksi*,

16. Mr. Chakraborty has also submitted that in any event this execution application cannot be taken out in this country by the plaintiff/decree-holder in view of the bankruptcy proceedings pending against the petitioner. Mr. Chakraborty has also contended that under S. 7 of the English Bankruptcy Act, 1914, this is not executable. He refers to S.7 of the said English Bankruptcy Act, which states that on the making of the receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose.

17. Mr. Chakraborty has also referred to sub-section (2) of S.7 the said Bankruptcy Act which says, that this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.

18. Mr. Chakraborty has also referred to S. 9 of the said Bankruptcy Act which, inter alia, provides that the Court may at any time after the presentation of a bankruptcy petition, stay any action, execution, or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just. Mr. Chakraborty also contends that similar provisions are also contained in S. 17 of the Presidency Towns Insolvency Act which, is more or less similar to the provisions referred to above.

19. Mr. Chakraborty has also taken another point of objection. He had contended

that where a foreign judgment is obtained against a person in his absence, the same is a nullity. Mr. Chakraborty contends that when summary judgment was passed by the English Court, the judgment-debtor, Ranjit Singh Sethia, was not residing in England. Mr. Chakraborty in this connection has cited decision of Andhra Pradesh High Court reported in AIR 1962 A P 400 and also a decision reported in Laxmichand and Others Vs. Mst. Tipuri and Others,

20. Mr. Hirak Mitra, the learned counsel appearing for the plaintiff/decreed-holder has submitted that the decree sought to be executed is a decree passed in a proceeding under O.14 of the Rules of Supreme Court of England and this procedure as laid down in O. 14 always contemplates a summary judgment unless the defendant is given leave to defend the suit. He contends that this Rule does not confer a right upon a plaintiff to proceed under O. 14 in every case in which this procedure may be appropriate, but only on the ground that the defendant has no defence to a particular claim or a part of a claim.

21. Mr. Mitra contends that in the instant case the defendant has not asked for leave to defend or in any event no leave was granted to the defendant to contest the suit. He submits that in absence of leave, the Court on an application made under Rule 14 of the Rules of the Supreme Court of England, has to enter a judgment in favour of the plaintiff in this summary manner.

22. Mr. Mitra submits that this procedure is somehow similar to the procedure as contemplated by Chapter 13A of the Rules of Original Side of this Court. It is the submission of Mr. Mitra that any judgment passed under this peculiar procedure is very much a judgment on merits as the court, before entering a judgment in favour of the plaintiff has to consider the merits of the case. Mr. Mitra submits that in the present case the defendant entered appearance but thereafter did not take any steps for obtaining leave to defend the suit. Mr. Mitra contends that the judgment passed in the summary manner under the like procedure of Order 14 of Rules of Supreme Court of England the judgment is held to be on merits. Similarly, Mr. Mitra has also contended that in a similar procedure in our country any judgment and decree passed in a summary manner cannot be said to be not on merits.

23. Mr. Mitra has referred to a judgment of Bombay High Court in Baldeo Das v. Mohanlal reported in AIR 1948 Bom 232. This is a decision rendered by a bench presided over by the Chief Justice Chagla, as he then was. It has been held by the Bombay High Court, in the context of Section II of the Code of Civil Procedure, that an ex parte decree passed, in a summary suit filed on the original side of the High Court, on the defendant's non-compliance with the condition precedent of his getting leave to defend the suit, operates as res judicata being a decree on merits.

24. Mr. Mitra has also referred to another decision of our Court in Sheikh Abdul Rahim alias S.A. Rahim Vs. Mohamed Din and Another, Here, on the date of the hearing the defendant was not present and was not represented, the court

awarded that the plaintiff should recover the claim amount. The bench presided by Chief Justice Derbyshire, as he then was, held that if the defendants were absent through some inadvertence or accident they could apply within eight days to have that judgment set aside. If they would have any ground they could have appealed to the Court of Appeal in England. They did not do so. Hence, the defendants failed to show to the satisfaction to the Court that the judgment has not been given on the merits of the case.

25. Mr. Mitra has also submitted that the cases relied on by Mr. Chakraborty on this point were all "default judgments" and not on judgments under Order 14 of RSC of England. Mr. Mitra submits that in instant case, the defendant was residing at London at the material time. He entered appearance but the judgment was entered on behalf of the plaintiff due to the fact that judgment debtor failed to obtain leave to defend the suit or no such leave was ever granted. Mr. Mitra has also contended that whether Sethia was or was not resident in England at the material time, such question cannot be reopened at this stage.

26. Mr. Mitra further submits that the judgment debtor is estopped from contending that the decree is not executable, as in previous proceedings relating to execution this Court allowed the initiation of execution proceedings by appointing a Receiver in respect of the shares of the judgment debtor in Sethia Properties and other consequential reliefs. Therefore, this question at this stage is barred by res judicata on record.

27. On the question of bankruptcy, Mr. Mitra contends that proceedings may continue until an order was made staying the proceedings. He has referred to a decision in (1957) 3 All ER 241. Mr. Mitra has also contended that foreign court cannot direct vesting of insolvency property situated in another country. Mr. Mitra in this connection has referred to a case reported in Epoh, Indian Overseas Bank. Vs. S.M. Mohamed Musthaba Sahib and Others, He has also referred to a passage from Cheshire's Private International Law, 11th Edition page 911, Chapter 37 on Bankruptcy. It is stated that it is clear that an English adjudication cannot of its own force have any effect on property situated in say Australia.

28. In order to appreciate the respective contentions, I will first refer to the relevant provision of the CPC with regard to the execution of foreign judgment. Section 44A of CPC indicates the procedure of execution of decree passed by courts in reciprocating territory. It is, however, not in dispute that the United Kingdom is the reciprocating territory. Section 44A of the CPC is as follows:-

44A. (1) Where a certified copy of a decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings

under this section be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of Section 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 (1) of Section 13. Section 13 of the CPC is as follows:

13. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties between parties under whom they or any of them claim litigating under the same title except -

a) where it has not been pronounced by a Court of competent jurisdiction;

b) where it has not been given on the merits of the case;

c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable.

d) where the proceedings in which the judgment was obtained are opposed to natural justice.

e) where it has been obtained by fraud.

f) where it sustains a claim founded on a breach of any law in force in India.

29. In January, 1984 the suit was filed in a Queens Bench Division of the High Court of Justice in England. On 12th January, 1984 the writ of summons was served on the Solicitor of Rajendra Singh Shetia, the respondent judgment debtor, in London. It is, however, alleged by respondent/judgment debtor, which is disputed by the plaintiff decree-holder, that since 30th January, 1984 Rajendra Singh Shetia left England and has been residing in India. On 8th February, 1985 the decree was passed by the Queens Bench Division, and on 16th January, 1989 the present objection has been filed.

30. It appears from the certificate dated 4th July, 1986 issued by the learned Master of the Queens Bench Division of the Supreme Court of England and Wales that the writ of summons was issued out of the Queens Bench Division of the High Court of Justice in England on 11th January, 1984 by Middle East Bank Ltd., the plaintiff against, inter alia, R. Sethia, the third defendant for payment of the sum of US \$ 19,656,397.37 together with contractual interest in respect of claim arising under a guarantee given by the third defendant in the plaintiffs favour, whereby the third defendant guaranteed repayment to the plaintiff of all monies due to the plaintiff from the second defendant. That the said writ was duly served on 12th January, 1984 on, inter alia, the said third defendant by service on his Solicitors, Messrs Tringhams; that M/s. Tringhams accepted service of the writ on behalf of, inter alia, the said third defendant by endorsing their

acceptance on the original writ of summons on that date; that Messrs. Tringhams subsequently filed a form of acknowledgment of service on behalf of, inter alia, the third defendant on 25th January, 1984.

31. That on 8th February, 1985 the said plaintiff obtained judgment against, inter alia, the said third defendant in the commercial court of the Queen's Bench Division of the High Court in England for payment of the sum of US \$ 23,547,972.16 (inclusive of interest until judgment) together with the plaintiff's costs on a solicitor and own client basis if not agreed in respect of the amounts due to the plaintiff from, inter alia, the third defendant under a "written guarantee dated 21st April, 1982, which judgment was obtained on the ground that the third defendant had no defence to the claim against him that no objection has been made to the jurisdiction of the Court. That the pleadings in the action consisted of the points of claim endorsed on the writ of summons dated 11th January, 1984 and that no defence was filed on behalf of third defendant.

32. The statement of claim so far as material in respect of the judgment debtor is this, the first defendants are a subsidiary of the second defendants. The third, fourth and fifth defendants are at all material times directors of the second defendants. The first defendants requested the plaintiffs to grant them credit facilities by means of overdraft up to US \$ 4,140,300. The plaintiffs agreed to grant an overdraft facility of US \$ 4,140,300 to the first defendants. The second defendants by a letter dated 21 st July, 1981 requested the plaintiff to grant them credit facilities of US \$ 4,500.000 The plaintiffs agreed to grant said credit facilities of US \$ 4,500 to the second defendants on the terms and conditions that, the third and fourth defendants and Mr. F. A. Nasim would provide personal guarantee as security for repayment. Pursuant to the agreement between the plaintiffs and the second defendants, the third and fourth defendants and Mr. F. A. Nasim jointly and severally agreed to guarantee the - payment or discharge to the plaintiffs and on demand in writing to pay or discharge to the plaintiffs all monies and liabilities due and owing or incurred by the second defendants whether actually or contingently and whether as Principal or Surety including interest, costs, charges and expenses in consideration of plaintiffs giving time credit on banking facilities and accommodation to the second defendants. The guarantee was limited to US \$ 5,000,000 excluding interest accruing after the date of demand. By a further guarantee in substitution of earlier guarantee, the third, fourth and fifth defendants jointly and severally agreed to guarantee the payment or discharge to the plaintiffs all monies and liabilities due owing or incurred by the second defendants whether actually or contingently and whether as principal or surety including interest, cost charges and expenses in consideration of the plaintiffs giving time credit and/ or banking facilities to the second defendants. The guarantee was limited to US \$ 30,000.000 excluding interest accruing after the date of demand and costs.

33. The judgment dated 8th February, 1984 in the said action passed by the

Hon"ble Mr. Justice Bringham, Judge in Chambers, Queens Bench Division, Commercial Court, High Court of Justice, inter alia, stipulates that each of the defendants having given notice of intention to defend herein and the Court having under Order 14 Rule 3 decreed that judgment as herein after provided be entered for the plaintiffs against the first, third, fourth and 5th defendants.

It is this day adjudged:

That the first defendant pay the plaintiff US \$ 5,869,324.31 (inclusive of interest until judgment) or the sterling equivalent at the time of payment of the plaintiffs cost to be taxed if not agreed on a party and party basis, that each of the third, fourth and fifth defendant to pay the plaintiffs US \$ 23,547.972.16 (inclusive of interest until judgment) at the time of payment and the plaintiffs case to be taxed if not agreed on a Solicitor and own client basis.

34. This is the judgment in favour of the plaintiff Middle East Bank Ltd. against the defendant including the present judgment debtor, the third defendant in the said Action. Order 14 Rule 3 of the Rules of Supreme Court is as follows:

"(3)-(i) Unless at the hearing of an application under Rule 1 either the Court dismisses the application or the defendant satisfies the court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed, (2) The Court may by order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any counter claim made or raised by the defendant in the action".

As stated above and as would appear from the provisions of our Code of the Civil Procedure that where a certified copy of the decree of any of the superior court or any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it has been passed by the District Court. It is not in dispute that the decree has been passed by a reciprocating territory and u/s 44A of the Code of Civil Procedure, the decree may be executed in India as if it had been passed by the District Court.

35. By sub-section (3) of Section 44A of the Code, it is provided that the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the court for the decree falls within any of the exceptions specified in clauses(a) to (f) of Section 13. Therefore, it is open to the judgment debtor to contend that the judgment passed in England is not a foreign judgment within the meaning of Section 13 of the Code or the same is not conclusive because the judgment falls within any of the exception specified in cls. (a) to (f) of Section 13 of the Code.

36. As stated above, it has been contended on behalf of the judgment debtor

that the said judgment is not conclusive because the said judgment had not been given on the merits of the case.

37. I will now refer to the decisions on this point cited at the Bar.

38. The Judicial Committee of Privy Council in the case of *D. T. Keymer v. P. Visvanathani Reddy* reported in AIR 1916 PC 121 held on the fact of the case that the action had not in fact been the subject of direct adjudication by the English Court, and it was not the judgment given on the merits of the case within the meaning of exception in Section 13(b) of CPC of 1980. There, a suit for money was brought in the English Court against the defendant as partner of a certain firm, wherein the latter denied that he was a partner and also that any money was due. Thereupon, the defendant was served with certain interrogatories to be answered. On his omission to answer them his defence was struck off and judgment entered for the plaintiff. Subsequently a suit was instituted in Madras against the defendant on the basis of the judgment given by the English Court on the said case. It has been held that the judgment was not one given on the merits within the meaning of the exception in Section 13(b) of the Code of Civil Procedure.

39. This Court in the case of *Derby McIntyre and Co., Ltd. Vs. Mitter and Co.* held that a foreign judgment given by default under summary procedure in the absence of appearance by the defendant and filing of any defence by him and without any consideration of the plaintiffs evidence is not a judgment given on the merits of the case and thus coming under the exception contained in Section 13(b) of the Code of Civil Procedure, and such a judgment is not conclusive as to any matter thereby adjudicated upon. Here, the plaintiffs obtained a judgment against the defendants in the Queens Bench Division in London. Their claim was for a liquidated amount comprising money lent, disbursements, commission and so on, in relation to a cargo of Mica shipped to the United Kingdom by the defendant which is an Indian firm carrying on business in Calcutta. The plaintiff first endeavoured to serve the defendant in London through a representative; but they were unable to do so and eventually, with the leave of the Court, they served writ out of the jurisdiction in Calcutta. The defendant, however, put in no appearance to the action and consequently the plaintiffs, employing the expeditious procedure which is common to so many Courts in the British Empire, signed judgment against the defendant by default. No evidence seems to have been called. After this judgment had been obtained, the plaintiffs wishing to enforce their decree and to take advantage of the principles of *res judicata*, brought a suit on the English Judgment before this Court. In the said case of *Derby McIntyre & Co. Ltd.*, Cunniff, J. analysing the case cited before him found that the decisions related to three different categories or classes of cases. First, there was a category in which a defence was put in, but was struck out and the judgment was artificially given by default without any judicial consideration of the plaintiff's evidence at all. Secondly, there was a class of cases where no defence had ever been on the file and again there was no consideration of the

plaintiff's evidence by the Court, the judgment being given by default under that summary procedure. Thirdly, a case in which there was no defence again, but whether the plaintiffs evidence was considered in the same manner or another. Cunliffe, J. observed that the case before him was clearly within the second category as above, and he held that it was clearly a case within the ambit of *Keyner v. Visvanathan Reddi* AIR 1916 PC 121. As stated above, this Court in the said decision ultimately held that the case as was before the Court did come under the exception of S. 13(b) of the Code of Civil Procedure.

40. The next case is *R.M.V. Vellachi Achi Vs. R.M.A. Ramanathan Chettiar*, . There the plaintiff filed the suit against the respondent for recovery of very large sum on the basis of advances to the firm of which he was a partner in Singapore High Court. The plaintiff obtained a decree against the respondent and sought to realise their decree amount by adjudication and sale of the immovable property belonging to the respondent in the Court of Subordinate Judge, Cuddalore. The execution petition was filed u/s 44A of the Code of Civil Procedure. The execution petition was resisted by the respondent on the ground that the said decree was not one passed on merits, and the decree could not be executed u/s 44A of the Code of Civil Procedure. It was also the contention on behalf of the respondent resisting the execution petition that the respondent never submitted to the jurisdiction of Singapore High Court and the judgment has been given without any trial on evidence. The Madras High Court, held that it would be clear from Section 13(b) of the CPC that the foreign judgment will be conclusive only if there was an adjudication between the same parties on the merits of the case. In other words, if a foreign judgment is not passed on the merits of the case, whatever the procedure might be in the foreign country in passing judgment, such a foreign judgment will not be conclusive. It is, therefore, open to the parties to resist execution of such foreign decree u/s 44A of the Code of Civil Procedure.

41. The next case cited is the full bench decision of Madras High Court in the case of *Md. Kassim & Co. v. Seenii Pakir Bin Ahmed* reported in AIR 1927 Mad 265. There a suit has been filed before the Court in this country by the plaintiff on a judgment of Supreme Court of Penang obtained by him against the defendant. The suit in Penang was on a deed of compensation executed by the defendant for money out of dealings in Penang. At the hearing of the suit the defendant did not appear in Court to contest it. The writ was declared to have been properly served. In accordance with procedure of that Court, the defendants being properly served and having not appeared and contested, the judgment was given for the plaintiff without any trial. The Full Bench of Madras High Court considering the various decisions on the point held, inter alia, that u/s 13(b) of the CPC a foreign decree obtained on default of appearance of the defendant without any trial on evidence is a case where the judgment must be held not to have been given on the merits of the case and no suit lies in British India on such a foreign judgment.

42. The Lahore High Court in the case of Mehar Singh v. Ishar Singh, AIR 1932 Lah 649 held that the true test for deciding whether the judgment has been given on the merits is whether it has been given as a penalty for any conduct of the defendant or whether it is based on a consideration of the truth or otherwise of the plaintiff's case.

43. O.P. Verma Vs. Lala Gehrilal and Another, held that in order that a judgment of a foreign court may successfully pass the test of having been given on merits, such a judgment must not have been given either as a matter of penalty or as a matter of mere form based on special or summary procedure inasmuch such a trial does not offer any real or substantial opportunity to the defendant to contest the suit as a matter of right which he receives it under a regular procedure. It is not to say that ex parte judgment per se is not a judgment on the merits what really matters is whether the procedure according to which the suit has been decreed requires the Court to determine the truth or falsity of the contentions raised or which may be raised, where it so requires and the court applies its mind to the contentions raised on either side there cannot be but a judgment on merits. Where the procedure does not so require and a decree may be entered in favour of the plaintiff merely because defendant has failed to appear and the judgment given on default or where he has failed to apply for leave to defend or if applied such leave was refused, then such a judgment cannot be held to be on the merits.

44. In R.M.V. Vellachi Achi Vs. R.M.A. Ramanathan Chettiar, , the Madras High Court had held that a foreign judgment solely due to default of appearance without taking any evidence in proof of claim will not be held as passed on merits.

45. In another decision in K.M. Abdul Jabbar Vs. Indo Singapore Traders P. Ltd., , the Madras High Court has held that a decree by a foreign court (Singapore Court) under the summary procedure after refusing leave to defendant sought for by defendant is not a judgment on merits. Hence, the judgment cannot be considered as conclusive as contemplated u/s 13 of Code of Civil Procedure.

46. A recent case on the point is the decision of Bombay High Court in the case of Algemene Bank Nederland NV Vs. Satish Dayalal Choksi, . There, the plaintiff sought to execute in Bombay a decree of the Supreme Court of Hongkong obtained by the plaintiff applicant against the defendant. The plaintiff bank in Hongkong had dealings with one M/s. Madhusudan & Co. Ltd. According to the plaintiff bank, the defendant executed in favour of the plaintiff bank a personal guarantee for repayment of the company's debt and as the said Madhusudan & Co. was agreeable to discharge its liability to the plaintiff bank, the plaintiff bank filed a suit against M/s. Madhusudan & Co. Ltd. The suit was decreed against the said M/s. Madhusudan & Co. Ltd. and also against the guarantors who gave personal guarantee to the plaintiff bank at Hongkong. The judgment debtor resisted the execution of the decree on, inter alia, various ground and one of them was that the said judgment and decree passed in Hongkong was not on merits and as such the matter under the exceptions contained in Section 13(b) of

the Code of Civil Procedure.

47. The Bombay High Court, *inter alia*, observed that the judgment of the Hongkong Court set out that on the defendant's failure to appear and upon proof of plaintiff's claim the judgment is entered for the plaintiff. Before Bombay High Court the plaintiff bank, however, emphasised the words "upon proof of plaintiff's claim". The Bombay High Court found that 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. The Bombay High Court also found that there is no material to show that this aspect of the dispute was ever examined by the Hongkong Court and it appeared to the Bombay High Court that Hongkong Court seemed to have proceeded to pronounce judgment in view of the defendant's failure to appear at the hearing of the case to defend the claim on merits. The Bombay High Court on the facts of the case concluded that a decision of Hongkong Court was not given on examination of the points of controversy between the parties and it seems to have given *ex parte* decree on the basis of the plaintiff's pleadings and document 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 High Court, therefore, held that the judgment was not a judgment on merits of the case.

48. As I have stated above, Mr. Hirak Mitra the learned counsel for the plaintiff/decree-holder contended that the judgment was passed in a procedure contemplated under Order 14 of Rules of Supreme Court which is more or less similar to the provisions of Chapter 13A of our original Side Rules of this Court. Mr. Mitra has also contended that in the present case the defendant entered appearance but thereafter did not contest the action filed by the decree holder in England. Mr. Mitra has contended that even an *ex parte* decree passed by Court is held to be a decree on merits and the parties are bound by the principles of *res judicata*. In support of this contention Mr. Mitra has cited the case *Baldev Das Karson Das v. Mohanlal Bahin* reported in AIR 1948 Bom 232 (*supra*) wherein the Bombay High Court has held that an *ex parte* decree passed, in a summary suit filed in the original side of the High Court and the defendant's non-compliance of the condition precedent of his getting leave to defend the suit operates as *res judicata* being a decree on merits. I have also indicated above that the decision was rendered in the context of Section 11 of the Code of Civil Procedure. The Rule of conclusiveness of foreign judgment u/s 13 is somewhat different in its operation from the rule of *res judicata*. The rule of *res judicata* applies to all matters in issue in a former suit and includes the matters which might and ought to have been the ground of attack or defence in the former suit. Rule of conclusiveness of foreign judgment applies only to matters directly adjudicated upon. Manifestly, therefore, every issue finally heard and decided in a foreign court is not conclusive between the parties. What is conclusive is the judgment. See *R. Viswanathan Vs. Rukn-ul-Mulk Syed Abdul Wajid*, The Supreme Court also observed that the judgment to be conclusive u/s 13 of the CPC means an

adjudication by a foreign court upon the-matter before it, and not a statement or the reasons for the order. Therefore, in my view, in the context of Section 13 the judgment and decree given by default under a summary procedure, as in this case, in the absence of appearance by the defendant and filing of any defence by him, and without any consideration of the plaintiff's evidence is not a judgment given on the merits of the case.

49. The decision of this court in Sheikh Abdul Rahim alias S.A. Rahim Vs. Mohamed Din and Another, is distinguishable on facts. There the Court found as a fact that each party was represented by a solicitor. There were negotiations between the parties with the result that the proceedings were dragged out, but eventually the matter was ordered to be tried by a Special Referee. The defendant was not present and was not represented at the hearing. The Court did not have any note as to what happened, and proceeded under a presumption that the Court (Special Referee) dealt with the matter in a way that the court hall deal with the matter.

50. On the facts as stated above, it appears that the judgment dated 8th February, 1984 which is sought to be executed in this proceedings proceeded on recording that each of the defendant having given notice of intention to defend herein and the court having under Order 14 Rule 3 ordered that the judgment as hereinafter provided be entered for the plaintiff against the first, third, fourth and fifth defendants. The said judgment thereafter stipulated that each of the third, fourth and fifth defendant to pay the plaintiffs US\$23,543.972.16. It will also appear from the certificate referred to above that the judgment was obtained on the ground that third defendant had no defence to the claim against him. The said certificate dated 4th July, 1986 also stipulated that the pleadings in the action consisted of the points of claim endorsed on the writ of summons dated 11th January, 1984 and that no defence was filed on behalf of the third defendant. I have also indicated above, the nature of the points of claim of the plaintiff. It does not appear from record whether the court applied its mind to the truth or falsity of the plaintiffs case or that the adjudication of plaintiffs claim was made on merits. I have also referred to above, the cases particularly the case Derby Mc Intyre & Co. and case before Madras High Court in R.M.V. Vellachi Achi Vs. R.M.A. Ramanathan Chettiar, as also the Bombay case that the proceedings were of summary nature under the Rules of the court passing the decree.

51. The preponderance of judicial opinion as deducted from the decisions referred to above appears to be that a judgment or decree passed by a court under a summary procedure, where the Court has no occasion to determine the truth or falsity of contentions raised or which may be raised and a judgment will be entered in favour of the plaintiff merely because the defendant failed to appear or to apply for leave to defend or if applied, the leave was refused is a decree or judgment which cannot be held to have been given on merits.

52. In a procedure similar to the procedure under Order 14 of Rules of Supreme Court of England, the Court has only to be satisfied before entering a judgment

in favour of the plaintiff that the defendant must have entered an appearance, the statement of claim must have been served on the defendant, and on affidavit in support of the application by summons verifying the facts on which the claim to which the application relates is based and stating that in the deponent's belief there is no defence to that claim. It cannot, however, be said that such a judgment and decree is not executable, but such judgment has not been given on the merits of the case, and as such is not conclusive foreign judgment within the meaning of Section 13 of the Code of Civil Procedure.

53. The ex parte decree may be on merits, that is, a decree passed in absence of the defendant but nevertheless the Court had gone through the case made out by the plaintiff and duly considered the same or had taken evidence of the witnesses put up by the plaintiff. Again ex parte decree may be passed in a summary manner under certain special procedure without going into the merits of the case and without taking any evidence. Both types of ex parte decree are executable in domestic forum in which it has been passed. But if such decree is a foreign decree passed in a reciprocating territory, then such decree is executable in this Court, if it is conclusive u/s 13 of the Code.

54. I have, therefore, no hesitation to hold on the facts of the case that the said judgment and decree dated 8th February, 1984 is not a judgment on merits within the meaning of Section 13(b) of the Code.

55. Mr. Chakraborty has, however, urged other incidental point that it is a case of personal action and a decree by a foreign court in absence is a nullity. In the view, I have taken, I need not consider this objection at this stage.

56. Mr. Chakraborty has also taken another point that under the provision of Bankruptcy Act in England this decree is not executable. It is also not clear from the materials on record in this proceeding whether any steps have been taken in the Bankruptcy proceeding or the said bankruptcy proceeding was with the knowledge of the plaintiffs on record. There is some assertion by the judgment debtor and denial thereof by the plaintiff/decreed-holder. I need not deal with this point here as I have already held that the judgment and the decree sought to be executed had not been passed on merits and as such is not conclusive within the meaning of S. 13 of the CPC and the case clearly comes within the exception under S. 13(b) of the Code of Civil Procedure.

57. For the reasons aforesaid, I am not inclined to make any order for examination of judgment debtor as to his property. This application under Order 21, Rule 41 of the CPC is dismissed. There will be no order as to costs.

58. Application dismissed.