
(1960) 10 MAD CK 0024
In the Madras High Court
Case No : Appeal No. 112 of 1957

M.K. Sivagaminatha Pillai

APPELLANT

Vs

Nataraja Pillai and Others

RESPONDENT

Date of Decision : 12-10-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13

Citation : AIR 1961 Mad 385 : (1961) 74 LW 325 : (1961) 2 MLJ 1

Hon'ble Judges : Kailasam, J; Jagadisan, J

Bench : Division Bench

Advocate : N. Natesan, for the Appellant; M.S. Venkatarama Iyer and V. Krishnan, for the Respondent

Final Decision : Dismissed

Judgement

Kailasam, J.—The plaintiff (appellant herein) filed a suit before the Subordinate Judge of Tirunelveli for recovery of Rs. 12,537-11-11 based upon a foreign judgment obtained by the plaintiff in the District Court, Colombo. The plaintiff and his mother Kuppammal were trading as partners under the name and style of "M.K. Sivagaminathan" in Princess Street, Bombay. Defendants 1 and 2 were carrying on business in partnership in Colombo under the name and style of "Jayalakshmi and Co." Defendants 1 and 2 borrowed from the plaintiff several sums under hundis drawn on the defendants and made, payable thirty days after sight to the order of the Indian Overseas Bank Ltd, Colombo. Defendants 1 and 2 accepted to pay the amount due under those hundis but failed to pay when they were presented to them on the due dates.

2. The plaintiff and his mother filed a suit No. 15437/S on 7-10-1953 in the District Court at Colombo for recovery of Rs. 10,671-35 cents. Summonses were issued to defendants 1 and 2 and they accepted the summons. Defendants 1 and 2 filed proxy through their Proctor and moved for the grant of leave to appear and defend the action unconditionally. The additional District Judge, Colombo passed an order on 8-12-1953 holding that the defendants were prima facie

liable in respect of the bills and observed that he was not satisfied with the bona fides of the defence raised by the first defendant.

The Court ordered the first defendant to give security in the sum of Rs. 7000 as a condition of filing answer and granted time for security and answer till 21st December 1953. It may be noted that though the second defendant received the summons he remained ex parte. The first defendant failed to furnish security on the due date and on the application of the plaintiff judgment was entered in favour of the plaintiff on 21st December 1953. On 2nd February 1954, the first defendant applied for stay of execution proceedings and submitted that on the 17th December he had filed a petition of appeal against the order directing him to give security as a condition for filing answer.

The learned Additional District Judge of Colombo directed execution to be stayed on the first defendant furnishing security for Rs. 7000 and granted time till 27th February 1954. The first defendant did not furnish any security. The first defendant filed an appeal to the Supreme Court of Colombo and the Supreme Court by an order dated 7th October 1954 dismissed the appeal. The plaintiff applied for execution of the decree but could not realise the amount from the defendants.

3. The plaintiff filed the present suit before the Subordinate Judge, Tirunelveli, based on the judgment of the District Court, Colombo. The defendants raised various contentions and resisted the suit. The learned Subordinate Judge dismissed the suit. The lower Court found that the plaintiff has not proved that the judgment of the Colombo Court in S. No. 15437/S, dated 21st December 1953 is conclusive on the matter arising for adjudication between the parties.

4. In the appeal before us the learned counsel for the appellant contended that the judgment in No. 15437/S District Court, Colombo is a foreign judgment on merits and the Subordinate Judge ought to have given a decree on that judgment. The main contention put forward by the learned counsel for the respondent is that the judgment of the Colombo Court is in the nature of an order for default and it was not given on the merits of the case.

5. According to the procedure Prevailing before the District Court, Colombo, action on a cause for a debt due on the promissory note is instituted by presenting a plaint in the form prescribed. The procedure to be followed in the Civil Courts in Ceylon is governed by the CPC of Ceylon. Section 7 of the CPC of Ceylon runs as follows:

"The procedure of an action may be either regular or summary. Illustrations

In actions of which the procedure is regular, the person against whom the application is made is called upon to formally state his answer to the case which is alleged against him in the application before any question of fact is entertained by the Court, or its discretion thereon is in any degree exercised.

In actions of which the procedure is summary, the applicant simultaneously with

preferring his application supports with proper evidence the statement of fact made therein; and if the Court in its discretion considers that a prima facie case is thus made out--

(a) either the order sought is immediately passed against the defendant before he has been afforded an opportunity of opposing it, but subject to the expressed qualification that it will only take effect in the event of his not showing any good cause against it on a day appointed therein for the purpose; (b) or a day is appointed by the Court for entertaining the matter of the application on the evidence furnished, and notice is given to the defendant that he will be heard in opposition to it on that day if he thinks proper to come before the Court for that purpose".

Chapter LIII, Sections 703, 704, 705 and 706 are the relevant rules governing the summary procedure. Section 704(1) provides that in any case in which the plaint and summons are in the prescribed form, the defendant shall not appear or defend the action, unless he obtains leave from the Court to appear and defend; and in default of his obtaining such leave the plaintiff shall be entitled to a decree. This section also provides that the defendant shall not be required to give security unless the Court thinks his defence not to be prima facie sustainable, or feels reasonable doubt as to its good faith.

Section 705 provides that the plaintiff who sues and obtains such summons must on presenting the plaint produce to the Court the instrument on which he sues, and he must make affidavit that the sum which he claims is justly due to him from the defendant thereon and that if the instrument appears to the Court to be properly stamped, and not to be open to suspicion by reason of any alteration or erasure or other matter on the face of it, and not to be barred by prescription, the Court may in its discretion make an order for the service on the defendant of the summons above mentioned. Section 706 provides that the Court shall, upon application by the defendant give leave to appear and defend the action on such terms as the Court thinks fit, if the defendant discloses a defence or facts which would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

6. In this case the proceedings of the District Court of Colombo are found in Ex. A. I, a certified copy of the decree and judgment in No. 15437/S. After the filing of the plaint summons was issued. In the records we do not find a copy of any affidavit by the plaintiff stating that the Sum which he is Justly due to him from the defendants as required u/s 705. The first defendant had filed an affidavit praying for leave to appear and defend the action unconditionally.

In that statement he denied that he was carrying on business in partnership with the second defendant and contended that he was not aware whether the bills were duly accepted and that there was no consideration for acceptance of the bills. The leave prayed for was not granted as the learned Additional District Judge was not satisfied with the bona fides of the defence and therefore ordered

the first defendant to give security in a sum of Rs. 7000 as a condition for filing answer. As the defendant did not file an answer or furnish security, the Court entered judgment for the plaintiff as prayed for.

7. It has now to be considered whether the judgment passed by the Colombo District Court is it foreign judgment enforceable by the Courts in India. The learned counsel for the first respondent contends that the judgment was not given on merits, and that by reason of Section 513(b) of the C. P. Code it is not conclusive. The leading case on the subject is given by the Privy Council in *Keymer v. Viswanathan Reddi*, ILR Mad 112: (AIR 1916 PC 121). In that case the plaintiff sued the defendant in the Court of King's Bench in London for a sum of money alleging it to be due to him in respect of transactions he had with the defendant as a member of a firm in Madras who under arrangements between them consigned goods to the plaintiff for sale in London, The defendant denied liability and refused to answer interrogatories which the plaintiff was allowed to exhibit and thereupon the defence was struck out and the defendant was ordered to be placed in the same position as if he had not defended and judgment was entered for the plaintiff. A suit was brought in the Madras High Court on that judgment. This matter was taken up to the Privy Council and their Lordships observed,

"In point of fact what happened was that, because the defendant refused to answer the interrogatories which had been submitted to him, the merits of the case were never investigated and his defence was struck out. He was treated as though he had not defended, and judgment was given upon that footing. It appears to their Lordships that no such decision as that can be regarded as a decision given on the merits of the case within the meaning of Section 13(b)".

The above decision of the Privy Council was followed in a Full Bench, decision of the Madras High Court in *R.E. Mahomed Kassim and Co. Vs. Seenii Pakir Bin Ahmed and Others*, . That case arose out of a suit brought by the plaintiff in the Sub-Court of Ramnad on a judgment of the Supreme Court of Penang obtained by him against the defendants. At the hearing of the suit, in Penang the defendants did not appear in court to contest it.

They were declared to have been properly served and in accordance with the rule of procedure of that court by which in suits in which defendants being properly served, do not appear and contest, judgment is given for the plaintiff-claim without any trial. The Full Bench held that the case was governed by the decision in ILR Mad 112: (AIR 1916 PC 121) and they were bound by it. Krishnan J. observes that the case is clearly one where the decision was given without any evidence at all. But under the rules governing the Penang Court, where a defendant does not appear, a decree is given as a matter of course. *S.S.A.S. Arunachalam Chettiar Vs. A.M. Muhammad Salihu Marakkayar and Others*, is the decision of a Bench of the Madras High Court. The plaintiff filed a suit in the Sub-Court, Tanjore on a foreign judgment obtained by him in the Colombo District against the defendants. According to the rules of the Colombo Court, where the defendant

was ex parte, the plaintiff was entitled to a decree merely on proving that the defendant was properly served. Their Lordships held that the judgment so obtained was not on the merits of the case. At page 804 (of Mad LW); (at p. 133 of AIR) Sir Kumaraswami Sastriar J. observes as follows:

"So far as the first point is concerned, it is clear that the suit was not decided on its merits. The procedure in the District Court of Colombo is that where no defence is entered, an affidavit of service is filed and judgment follows. In the present case the defendants, though served, did not enter appearance or file any written statement. Thereupon the plaintiff filed an affidavit of service and a decree followed as a matter of course. Reference was made to Ex. D a certified copy of processes and their returns in suit No. 4186 of 1915 of the Colombo District Court, but there is nothing there to show that any evidence was recorded or that the court went into the merits though the defendants were ex parte." His Lordship at the end of the judgment concludes,

"I am of opinion that the judgment of the Colombo District Court which was obtained under the rules of that Court which enact that where the defendant is ex parte the plaintiff is entitled to a decree merely on proving that the defendant was properly served is not a judgment obtained on the merits of the case and that Section 13(b) bars a suit on that judgment."

8. In *P.L.S. Firm, Colombo v. Sulaiman*, 1930 57 M LJ 459 : (AIR 1930 Mad 149) a Bench of this Court held that a decree nisi passed by the District Court of Colombo, u/s 85 of the Ceylon Civil Procedure Code, in a suit on a promissory note or a hundi where the defendant is ex parte, is not a decision on the merits of the case within the meaning of Section 13(b) of the Civil Procedure Code; and that the fact that an affidavit, which was a reduplication of the plaint, was filed in the court at the time of the passing of a decree nisi by the court does not make it a decision on the merits. Section 85 of the CPC of Ceylon provides that when the defendant has been duly served with summons, if the defendant fails to file his answer on the day fixed therefore and if on the occasion of such default of the defendant the plaintiff appears, then the court shall proceed to hear the case ex parte and pass a decree nisi in favour of the plaintiff. In the above case also an affidavit which was alleged to have been filed as a reduplication of the plaint was relied on. At page 462 (of Mad LJ) : (at p. 150 of AIR) their Lordships observed:

"The affidavit relied on does not appear in the journal and it is not explained under what provision of law it has been used. It may be that it is the practice of the Colombo Courts to use affidavits of this kind before ordering the issue of the decree nisi, but in the absence of any evidence on the point it seems to me that the affidavit in question cannot be relied upon to make this , decree on the merits."

Their Lordships after considering the merits of the case; and Ss. 703 and 708 came to the conclusion that the decree is admittedly one for default and not a decree on merits. It may be pointed out that the case before us is one under the

summary procedure. Under Ss. 7 and 705 the plaintiff is required to the an affidavit along with an application supporting the statement in the plaint that the sum claimed by him is justly due to him from the defendant. It is not clear whether any such affidavit was filed before the Ceylon Court. No such affidavit has been filed along with the journal of the Ceylon Court which is marked as Ex. A. 1 in the case.

9. In a recent case reported in *S. Jayam Sunder Rajaratnam Vs. K. Muthuswami Kangani*, their Lordships the Chief justice and Panchapakesa Ayyar J. have held that although the judgment and decree of a foreign court might have been passed ex parte, if it was passed on a consideration of the evidence adduced in the case, the decision must be deemed lo have been on the merits and that a suit, on that judgment is maintainable in a court in India. The defendant, who was the appellant before their Lordships, was ex parte in the suit in the District Court of Muwaraeliya, holden at Hatton, Ceylon.

According to the procedure obtaining in Ceylon, a decree nisi was passed after taking the evidence of the plaintiff and finally the decree was made absolute after notice of the decree nisi had been, served on the defendant and the latter had tailed to appear in spite of the notice. My Lord the Chief Justice dealing With the contention observes that the only point he (counsel for the defendant-appellant) could urge in support of this contention was that the appellant was ex parte in that suit and that it is clear however, that though the judgment and decree of a foreign court might have been passed ex parte, if it was passed on a consideration of the evidence adduced in the case, the decision must be deemed to have been on the merits. In the case above cited, though the decree Was passed ex parte the evidence of the plaintiff was taken and the judgment was given on a consideration of the evidence adduced in the case.

We respectfully agree with the decision of the Bench and held that even though a decree in a foreign court may be passed ex parte, it will be binding if evidence was taken and the decision was given on a consideration of the evidence. As observed in *Wazir Sahu and Another Vs. Munshi Das*, , the real test is not whether the decision was or was not ex parte but whether it Was merely formally passed, as a matter of course, or by way of penalty, or it was based upon a consideration of the truth or otherwise of the plaintiff's claim.

10. In the present case, as observed already, the records do not disclose whether any affidavit at all was filed by the plaintiff as required under the Ceylon Procedure Code. Even if it was filed before the court, it is not before us. The judgment of the District Court, Colombo is as follows: "Enter judgment for plaintiff as prayed for". The security and answer as directed by the Additional District Judge on 8th December 1953 were not furnished by 21st December 1953 and immediately on 21st December 1953 the learned Additional District Judge entered judgment.

The judgment is clearly not on a consideration of the evidence but was passed as

the defendant failed to furnish security and to file an answer as directed by the Additional District Judge. We are of opinion that the judgment of the Colombo District Court in No. 15437/S is one for default and not given on the merits of the case. The appeal is dismissed. There will be 110 order as to costs in this appeal.