

(2003) 09 MAD CK 0198

In the Madras High Court

Case No : Civil Revision Petition (NPD) No. 826 of 2002 and CMP. No. 8430 of 2002

M/s. Archean Granites Pvt. Ltd.

APPELLANT

Vs

Gagrat Gardi and Co., The Outer Temple 222/225 Stand
London WC2R 1BA

RESPONDENT

Date of Decision : 09-09-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13, 13(a), 13(a), 13(b), 13(b)

Citation : (2003) 09 MAD CK 0198

Hon'ble Judges : S.R. Thangavelu, J

Bench : Single Bench

Advocate : V. Venkadasalam, for the Appellant;

Final Decision : Allowed

Judgement

S.R. Thangavelu, J.—The revision arises against the order dated 22.4.2002 made by the Ninth Assistant Judge (Tenth Assistant Judge In Charge), City Civil Court, Chennai in E.P. No. 56 of 201 in Queen's Bench Division England G. No. 1/1995 by passing an order in favour of the decree holder by allowing execution petition. As against the same, the judgment debtor preferred this revision petition by contending that since the foreign judgment was the one not passed on merits, it will be covered u/s 13 (b) of the CPC despite the procedure mentioned u/s 44A of the Civil Procedure Code. It is true that Section 44A of the CPC deals with the execution of the decrees passed by the Courts in reciprocating territory. Explanation (1) to | Section 44A of the CPC provides that the reciprocating territory means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section.

2. It is not in dispute that the decree passed in England can be executed in India, as it is a reciprocating territory. The Law of Civil Procedure governing the institution of suits, service of summons upon the defendant, the liberty to the

plaintiff to apply for a decree against the defendant in case of the defendant's default of appearance, in the Supreme Courts of Penang and Singapore, are all similar and identical and are on the same pattern as the procedural laws in England i.e., the Rules of the Supreme Court. Therefore, the decrees passed in the Courts of Penang and Singapore are executable in India; so also, the decree passed in England is also executable.

3. This derivation is made as Per the recitals mentioned in paragraph 31 of the judgment in the case of R.M.V. Vellachi Achi Vs. R.M.A. Ramanathan Chettiar, There is also no dispute about the question of reciprocating territory and the dispute involves in a different direction.

4. The judgment debtor relied upon proviso to Section 44A of the CPC wherein it is mentioned that the provisions of Section 47 of the CPC shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of Section 13 of the Civil Procedure Code.

5. Learned counsel for the petitioner relied upon Section 13 (b) of the CPC wherein it is provided that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except where it has not been given on the merits of the case. It was further mentioned that the decree sought to be executed was not passed on merits of the case and so, it is hit u/s 13 (b) of the CPC and therefore becomes inexecutable.

6. So far as Section 44A of the CPC is concerned, it was observed in the " case of M.V. Al Quamar Vs. Tsavlis Salvage (International) Ltd. and Others, that the above section is a departure from the scheme of execution of domestic decree and by virtue of Section 44A (3) of the Civil Procedure Code, all defences under Sections 13 (a) to (f) are available to a defendant. In paragraph 60(5), it has been observed as follows :

In such execution proceedings, the judgment-debtor of a foreign Court decree will be entitled to satisfy the executing Court in India that the foreign decree cannot be executed against him as it is hit by any of the exceptions specified in clauses (a) to (f) of Section 13 of the Civil Procedure Code.

7. Before advertng to the applicability of the above provisions of law, I have to deal with the important facts of this case. On 10.3.1995, a decree in G. No. 1/1995 was passed by the Queen's Bench of England against the judgment debtor company for certain legal services rendered to the same for appearing on behalf of them in an arbitration case. Since the petitioner had not paid the (sic) professional fees, a suit was filed in the Queen's Bench Division, England. On 7.2.1995, Mr. C.S. Ashok Kumar, a junior counsel attached to M/s. Rangarajan

and Prabhakaran, Advocates at No. 152, Thambu Chetty Street, Madras, served the order of writ upon the petitioner and in spite of such service, as no notice of intention to defend was given by the petitioner, it was adjudged that the petitioner/defendant do pay the respondent/plaintiff certain sum with costs, etc. This order was passed on 10.3.1995 in the High Court of Justice, Queen's Bench Division.

8. It is on 2.2.1996, a Master of the Queen's Bench Division of the Supreme Court of England and Wales certified to the effect that a writ was issued on 3.1.1995 against the petitioner for payment of a particular sum pursuant to Section 35A of the Supreme Court Act, 1981, that it was duly served on the seventh day of February 1995 personally by C.S. Ashok Kumar, junior advocate to the firm, that the petitioner/defendant did not give notice of intention to defend, that no objection was raised to the jurisdiction of the Court and that no stay of the said judgment is in force. Again, it is to be mentioned that before passing the decree, the statement of claim filed by the respondent was also narrated thereunder. It is under such circumstances, the petitioner would contend that the above said foreign decree was not passed on merits.

9. Learned counsel for the respondent pointed out the reasoning given by the Court below and contended that although the petitioner/defendant did not give notice of intention, the Court, which Passed the decree, has taken into consideration the statement Of claim made by the respondent/plaintiff and upon satisfying self with the amount due from the petitioner/ decree has been passed. In that way, there was application of mind upon the claim made against the petitioner and only upon judicial scrutiny the decree was made and so, it cannot be said to be without merits.

10. Learned counsel for the petitioner cited two case laws, which are as follows:

- i. R.M.V. Vellachi Achi Vs. R.M.A. Ramanathan Chettiar, and
- ii. M/s. International Woolen Mills Vs. M/s. Standard Wool (U.K.) Ltd.,

11. In the latter case, it was held that the judgment and decree do not indicate whether any documents were looked into and/or whether the merits of the case were at all considered. In that case, the defendant repudiated the claim by mentioning in his reply that the goods were of inferior quality and not as per the contract. It was held that the Court has not applied its mind nor dealt with this aspect. Therefore, it was further held that it has not examined the points at controversy between the parties and the judgment was not on merits.

12. Way back in the case of A. Janoo Hassan Sait by his Authorised Agent, Dada Beg Mahomed Vs. M.S.N. Mahamad Ohuthu, such a distinction was sought to be made from the proposition laid down in the case of Kevmer Vs. Viswanadham Reddi (1916 40 Mad 112 = 5 L.W. 342). In that case, the "defendant has been put in, but it was ordered to be struck out because of the defendant's failure to answer interrogatories. Therefore, the decision given in such circumstances was

held to be one not on merits. By way of making a distinction therefrom an attempt was made in A. Janoo Hassan Sait by his Authorised Agent, Dada Beg Mahomed Vs. M.S.N. Mahamad Ohuthu, wherein the following observations were made :

It will be seen that in accordance with this principle, ex parte decrees are by no means necessarily decrees not passed upon the merits. It is only when a defence has been raised and for some reason or another has not been adjudicated upon that the decision can be said to be not upon the merits. In other instances of ex parte decrees, they must be deemed to be decrees passed upon the merits.

In the present case no appearance at all was put in on behalf of the first defendant and the case was allowed to proceed ex parte and consequently it must be deemed to have been passed upon the merits.

13. The above observation was subsequently placed before the Full Bench in the case of R.E. Mahomed Kassim and Co. Vs. Seenii Pakir Bin Ahmed and Others, which had dealt with the issue upon reference to a Full Bench with the following question :

Does a suit lie in this country on a foreign judgment given on default Of appearance of the defendant on the plaint legations without any trial on evidence?

The Full Bench decided overruling the observations made in Subramanya Chetty Vs. Ramakrishnamma and Others, What happened in that case was that at the hearing of the suit, the defendant did not appear in the Court to contest it, though the suit summons had been properly served on the defendant in accordance with the rules in that Court. According to the rules of procedure of that Court, where the defendant did not appear after proper service of summons/ judgment would be given without trial and without taking any evidence and solely on the ground of default of appearance of the defendant.

14. On the facts mentioned above Coutts Trotter, C.J. in R.M.V. Vellachi Achi Vs. R.M.A. Ramanathan Chettiar, gave his opinion, which is as follows :

It was argued and very likely correctly argued that the English law was different. The answer to that is we are bound by the statute on which the decision in Keymer's case was based. That statutory provision is Section 13(b) of the CPC under which an exception to the conclusiveness of a foreign judgment in a British Indian Court is where it has not been given on the merits of the case. As I understand Mr. Alladi Krishnaswami Ayyar's argument, he says that it is not like the case of the defendant's defence being struck out for not answering interrogatories or being out of time or anything of the kind; for that may be held not to be a defence on the merits because ex hypothesi the position is the defendant was precluded from going into the alleged merits which he had set up and he says it is quite different where the defendant does not appear at all because that is a clear intimation by him that he admits the validity of the

plaintiffs claims and that is just as good as if the plaintiff has actually proved it by evidence. I think the decision of their Lordships of the Privy Council impliedly excludes any such distinction and I regret to say that I cannot agree with the attempt made by two learned Judges of this Court to draw this distinction in Janoo Hassan Vs. Mahamad Ohuthu, ILR 47 Mad 877 = A. Janoo Hassan Sait Vs. S.N. Mahamad Ohuthu, and I think that the case must be regarded as no longer law.

15. The Full Bench decision referred in R.E. Mahomed Kassim and Co. Vs. Seeni Pakir Bin Ahmed and Others, which dealt with the enforceability of a judgment obtained in the Supreme Court of Penang, has been followed in almost all the High Courts. That decision was rendered some decades back and had been uniformly followed by this Court in the case of M.K. Sivagaminatha Pillai Vs. Nataraja Pillai and Others, and in the case of Mahamtnad Sheriff and Co. Vs. Abdul Jabbar (ILR 1966 1 Mad 18), in which, a Bench of this Court had to deal with the similar issue arising out of a foreign judgment rendered by the Supreme Court of Singapore on default of appearance of the defendant.

Veeraswami, J (as he then was), while delivering the judgment on behalf of the Bench after referring to the relevant decisions/ followed and applied the principle enunciated by the Full Bench. The learned Judge pointed out that the decree that followed as a matter of course solely on the ground of default of the defendant's appearance could not be a judgment on merits, as no evidence was adduced and there was no judicial consideration on the ten-ability or justness of the claim. By relying upon the above observations, it was held as follows :

The decree can be executed u/s 44A only if all the conditions of Section 13(a) to (f) are satisfied. In other words, even if the Singapore High Court was a Court of competent jurisdiction either because of the residence of the defendant in Singapore or because of his voluntarily submitting to the jurisdiction of the foreign Court, the decree cannot be executed if, u/s 13 (a) the decree had not been given" on the merits of the. case. The foreign decree can be executed u/s 44A only if all the conditions are concurrently satisfied....

16. Coming again to the present facts of the case, what I am able to find from the decree is that it was so adjudged, as no notice of intention to defend was given by the defendant despite service made upon him. Of course, there is a statement of claim wherein the details of claim were described. The statement of claim by itself, is not evidence unless the author is examined and the authenticity of the basis for the claim is analysed. Apparently, that has not been shown to have been made.

17. As a matter of fact, I had an occasion to go through Halsbury's Laws of England Fourth Edition wherein the following mention was made at the end of paragraph 543 :

Judgment in the chancery division includes the words "upon hearing the evidence". In the Queen's Bench Division, the evidence is not mentioned in the

judgment.

Although the form of the judgment of the Queen's Bench Division does not contain the column for evidence, it is for the decree holder to show initially a prima facie case that the decree was passed on merits and only if that is shown, the burden is on the revision petitioner/defendant to resist the execution to establish to the satisfaction of the Court that the foreign decree suffers from any one of the infirmities covered by the exceptions specified in clauses (a) to (f) of Section 13 of the Civil Procedure Code.

18. In order to make a judgment to be called on merit,,, there should be an adjudication on the controversial aspects of the case of either side and that can be made only after giving opportunity to the other side being heard. Adjudication on merits as envisaged by the lower Court upon the claim of the plaintiff alone may not set at naught the controversy with the other side. The sustainability of the party, who instituted the suit, may only come to light when the merit of the case of one party was heard. Mere sustainability may not be taken as resolving issue in question or the controversy raised unless and until the : person,, who raised the objection is heard. Therefore, whatever merits that one can have upon instituting the suit,: the consideration of the same alone may not amount to a judgment on merits in as much as no conflicting facts are, got into resolved.: Therefore, the said judgment cannot be equivalent to that on merits.

19. When apparently the decree, on the very reading of, it, does, say that there is no trial, that there is no evidence, that there is no application of mind and that the decree is passed automatically without any judicial consideration of either side, I have to take that the order passed by the Court below is not on merits. Only if there is a prima facie case based on merits, then, the burden shifts to the petitioner/defendant/judgment debtor. Upon the above reasonings, what I find is that the decree is not based on merits and is covered under the proviso to Section 13 (b) of the Civil Procedure Code. It becomes inexecutable in this Court.

20. Leaving this question aside, arguments were advanced as to what would be a District Court in the City of Madras in order to apply Section 44A of the Civil Procedure Code. Reliance was placed upon the judgment cited by the petitioner in the case of In Re: The Cauvery Spinning and Weaving Mills Ltd., which would say that according to Section 44A of the Civil Procedure Code, the execution petition was not filed in a District Court, since in the City of Madras, the Principal, civil Court of original jurisdiction was held in that case as High Court of Madras. That case law becomes inapplicable because those definitions were taken from the Companies Act, with which, I am not concerned in this case. However, I have already found that the decree was not passed on merits and becomes inexecutable in Indian Courts. The revision petition is allowed-setting aside the order passed by the Court below. No costs. Consequently, the above CMP is dismissed as unnecessary.