

(1929) 03 MAD CK 0024
In the Madras High Court

N.P.L. Palaniappa Chetty

APPELLANT

Vs

N.M.R. Nagappa Chettiar and Others

RESPONDENT

Date of Decision : 26-03-1929

Acts Referred:

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

Citation : AIR 1930 Mad 146 : 123 Ind. Cas. 600

Hon'ble Judges : Wallace, J;Odgers, J

Bench : Division Bench

Judgement

Odgers, J.—This appeal and Appeal No. 47 of 1928 were originally heard by myself and Curgenvin, J., but owing to the latter's illness before he left the Courts last year we were unable to deliver our judgments. In the meantime an informal application was made to me which is now put in the form of petition that we should ask Mr. Brook Elliot, a member of the Ceylon Bar to either appear as an amicus curiae, or as a witness for help us in the elucidation of the Ceylon procedure in this case as contained in the Ceylon Procedure Code, We have given very careful consideration to this request and we are indebted to Mr. Brook Elliot for so readily placing his services and knowledge at our disposal. But we consider that the only way in which Mr. Brook Elliot could be of any real assistance would be if he were asked his opinion as to the very question that we have to decide. An expert in foreign law is called as I understand it to state what the law of a foreign country on a particular point is; an Advocate of the Scottish Bar is often called as a witness in the English Courts to explain the Law of Scotland on any particular point that arises. But in this case we have the law laid down for us in a particularly elaborate manner in the Ceylon CPC and it appears to us that it is our duty to interpret that Code as best we can and that we are not entitled to rely on any outside opinion, however eminent, as to the interpretation of that Code.

2. This was a suit to enforce payment of Rs. 8,000 the balance due on foot of a certain mortgage and a foreign judgment obtained by the plaintiff in the District

Court of Colombo. Defendant No. 1 had effected this mortgage to the plaintiff on the security of certain properties in Ceylon on 3rd April, 1917. The suit in the Colombo District Court on the mortgage document was started on 10th November, 1918, and on 12th May, 1919, there was a preliminary decree followed on 4th July, 1919, by a final decree and on 16th October, 1919, the plaintiff purchased the properties in Court auction for Rs. 9,000 odd and in 1920 sold them by private sale for Rs. 33,000. After giving credit for this, the suit was brought for the balance of Rs. 8,000. On 18th October, 1922, the present suit in the Indian Court was started and the learned Subordinate Judge found that the claim was barred by limitation as to the original cause of action as the document could not be held to be a registered document for the purpose of limitation. The learned Judge curiously enough did not give any finding as to the limitation with regard to the foreign judgment, and it is practically uncontested that the plaintiff has under Article 117, Limitation Act, six years in which to bring his suit in British India on the foreign judgment. The authority of *Gurunadha Ramaseshayya v. Tripurasundari Cotton Press, Bezwada* 94 Ind. Cas. 515 : 49 M. 468 : 50 M.L.J. 520 : AIR 1926 Mad. 615 : 24 L.W. 102 : (1926) M.W.N. 450 precludes him from relying on the document registered outside British India. The only question in this appeal really is whether the foreign judgment was one based on the merits or not within Section 13(b), Civil Procedure Code. The respondents' Advocate faintly contended that there was no submission to the jurisdiction on the part of the defendant and no service on him but the document which is the original plaint contains clear submission to the jurisdiction for it states:

It shall be lawful for the said obligee or his afore written at once to sue for and recover payment of the said sum of Rs. 27,000.

3. It is obvious, I think, that the words "to sue for" must mean to sue in the Courts of the country where the obligation was entered into and the obligor is Nawanna Moona Roona Nagappa Chetti of Sea Street in Colombo and the obligee is also described as of the same address. In this case there was substituted service as provided for in the Ceylon Civil Procedure Code, Sections 60 and 61. The latter makes substituted service as effective as if it had been made on the defendant personally. There is no reason to suppose that substituted service was not ordered and effected in this case with due regard to the procedure of the Ceylon Courts.

4. The record in the case is called the Journal and u/s 92, Ceylon CPC the Journal is to commence with the institution of the action and in it shall be minuted as they occur, all the events in the course of the action, i. e, the original application and every subsequent step, proceeding and order; each minute shall be signed and dated by the Judge, and the Journal so kept shall be the principal record of the action. This document is Ex. E, and it appears from that, that substituted service was effected on 5th May, 1919, on the affidavit of the process-server and Fiscal's Report stating that notice was affixed to the mortgage property. The difficulty is caused by the entry of 12th May and by some of the provisions of the

Ceylon CPC to which reference will be made in a moment. On 12th May, 1919, the Journal states:

Mr. Kondaiya files affidavit and moves that decree nisi be ordered to issue for the 21st May, 1919.

5. That motion was allowed by the District Judge and a decree nisi was issued on 17th May, 1919. Finally substituted service of notice of the decree nisi was effected on 2nd July, 1919, and the decree nisi was made absolute on 4th July, Execution by sale was ordered to issue on 11th August. The affidavit referred to under the entry of 12th May is stated to be the affidavit printed at 7 page of the supplemental documents which is by the agent of the plaintiff sworn on 8th May, 1919, and it sets out the facts and states that a sum of Rs. 30,000 and odd is due to the plaintiff. That question is whether such an affidavit was used in evidence so as to enable it to be said that ex parte decree was a decree on the merits and secondly whether such an affidavit is admissible under the Ceylon CPC or whether the Court is bound to pass judgment for the plaintiff in case the defendant does not appear though served. The) Chapter on default is Chap. XII, Section 85 provides that "if the defendant fails to appear on the day fixed for his appearance and answer, * * * * and if the Court is satisfied by affidavit of the process-server * * * * 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 to pass a decree nisi in favour of plaintiff in the Form No. 22 in Schedule II hereto."

6. This form is headed "Form of decree nisi in default of appearance of defendant," and it will be observed that the Court has apparently no option except to pass a decree nisi in the plaintiff's favour though it may proceed to hear the case ex parte. It is attempted to be said that the words "shall proceed to pass a decree nisi" really mean to hear the case and if it decides to pass a decree, to do so. But that is certainly not what the section says. The CPC further provides in Section 87 that no appeal shall lie against any decree nisi or absolute for default. But the Court may set aside, the decree for good cause shown. Further Section 90 says that where there are more defend-ants than one, the Court shall not be obliged to pass a decree for default against a defendant for failing to appear at a stage of the action provided that one defendant at least appears at that stage. This appears to make it quite clear that u/s 85 the Court is bound to pass, a decree. When we come to Chap. XIX on the trial on cases Section 167 provides: "The evidence of the witnesses shall be given orally" and Section 179:

The Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit," and Section 180:

In the event of such an order being made the Court may order the attendance of the declarant or deponent for viva voce cross-examination.

7. It does not seem clear how this affidavit at page 17, if that is the one referred to in the Journal of the 12th May, was allowed to be used there being no order

apparently u/s 179 for the substitution of affidavit evidence for viva voce. There is another difficulty in this case. Under Ceylon Ordinance VII of 1840, Section 2, no mortgage can be a mortgage except when signed by the party making it in the presence of a notary public and two witnesses, and by Section 68, Ceylon Evidence Act, one attesting witness must be called. The admission of a party with regard to the execution of a mortgage Will not do: see AIR 1925 203 (Privy Council) . This would seem to be another indication that the case did not proceed on the merits. It will be observed that the Ceylon procedure differs from our own in that an opportunity is afforded to the defendant who has not appeared after decree nisi to come forward and show cause why the decree should not be made absolute, instead of our procedure of moving to set aside the ex parte decree obtained by the plaintiff. One of the latest cases on the subject is S.S.A.S. Arunachalam Chettiar Vs. A.M. Muhammad Salihu Marakkayar and Others, . The authority as far as this Court is concerned is contained in the Full Bench case Mahomed Kasim & Co. v. Seenii Pakir 100 Ind. Cas. 555 : 50 M. 261 : 52 M.L.J. 240 : 25 L.W. 307 : 39 M.L.T. 319 : AIR 1927 Mad 265 which was a case from Penang. There, there was no trial and no taking of evidence. The case was held to fall within the decision in Keymer v. Viswanatha Reddi 38 Ind. Cas. 683 : 40 M. 112 : 15 A.L.J. 92 : 21 M.L.T. 78 : 32 M.L.J. 35 : 5 L.W. 342 : 19 Bom L.R. 206 : 21 C.W.N. 358 : 25 C.L.J. 233 : 10 Bur. L.T. 175 : 44 I.A. 6 (P.C.), where the defendant refused to answer interrogatories and his defence was thereupon struck out and the defendant was placed in the same position as if he had not defended. In the King's Bench Division in England on a suit brought on this foreign judgment it was held not to have been on the merits of the case within Section 13 (b), Civil Procedure Code. In the Full Bench case Krishnan, J., one of the referring Judges with reference to A. Janno Hassan Sait Vs. S.N. Mahamad Ohuthu, which is overruled by the Full Bench observes as follows:

That was a Ceylon case where also a similar rule prevails as in Penang entitling the Court to give a decree without any trial when the defendants being served do not appear; though the Ceylon rule gives power to the Judge to take evidence if he thinks fit, there is nothing to show that in the particular case any evidence was taken." It is further to be observed that Section 13, Civil Procedure Code, speaks of a foreign judgment, In the Journal there does not seem to be any trace of a judgment. whatever but only a decree. In the absence of any indication that this affidavit was used and considered by the District Judge and as to how and under what authority it was allowed to be filed and having regard to the provisions of law with regard to the proof of a mortgage document it seems to me impossible to say that this decree in Ceylon was obtained on the merits. Mr. Justice Krishnan says that the Ceylon Code is identical with the-rules of the Penang Court and he adds that the procedure in the District Court of Colombo is that where no defence is entered and affidavit of service filed, judgment follows as a matter of course. In that case there was nothing to show that any evidence was recorded or the Court went into the merits though the defendants were ex parte. I am, therefore, inclined to think that in this case the judgment of which

there is none was not on the merits and that the appeal should be dismissed with costs two sets for defendant No. 1 and for defendants Nos. 2 and 3 jointly.

Wallace, J.

8. The main point raised in this case is almost precisely the same is that in Appeal No. 47 of 1928, namely, whether a decision of the District Court, Colombo, in a regular suit in which all that appears from the record is that on the defendant's non appearance, the plaintiff's proctor filed an affidavit and the Court passed a decree nisi and then a decree absolute under Sections 85 and 86, Ceylon CPC was a decision on the merits which would entitle the plaintiff to judgment on the foreign judgment under a. 13 (b), Civil Procedure Code. In my judgment in Appeal No. 47 of 1928, I have given reasons for holding that such a decision is not on the merits, and I need not repeat them here.

9. In the present case, the decree obtained by the plaintiff in the District Court of Colombo was an ex parte decree on the mortgage. He brought the property to sale in execution in Colombo and realised part of the decree amount and he is now suing on the foreign judgment to recover the balance in the Subordinate Judge's Court of Ramnad. The discussion of the point u/s 13 (b) by the trial Court is hardly adequate, but the matter has been fully argued before us here, and, as I held in Appeal No. 47 of 1928, my conclusion is that the decision was not on the merits On this point, the appeal must fail.

10. It is unnecessary, therefore, to go into the other points such as whether the District Court, Colombo, had jurisdiction to pass the decree, it being alleged that the defendant was not a resident at the time within its jurisdiction and was not served at all and had no knowledge whatever of the suit or the decree and that the manner in which process was taken out was a fraud upon the District Court and whether the decree therefore, offends against the principles of natural justice. The appeal must, therefore be dismissed with costs (two sets) as decided by my learned brother.