
(2009) 04 BOM CK 0151

In the Bombay High Court

Case No : Execution Application No. 311 of 2008 and Notice No. 1759 of 2008 in Case No. 1994 M. No. 1976

Percy Shiavak Mistry

APPELLANT

Vs

Bennet Coleman and Company Ltd.

RESPONDENT

Date of Decision : 21-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 2, Order 19 Rule 3, Order 21 Rule 22, Order 41 Rule 27, 13

Citation : (2009) 4 BomCR 242 : (2010) 6 RCR(Civil) 781 : (2010) 5 RCR(Civil) 10

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : Darius Khambata, K.A. Setalwad, instructed by Mulla and Mulla and CBC, for the Appellant; J.J. Bhatt A.M. Chandurkar and Sumit Raghani, instructed by PDS and Associates, for the Respondent

Judgement

D.Y. Chandrachud, J.—On 10th June, 1994 an article was published in the Daily Edition of the Economic Times. The article, according to the plaintiff, contained statements which were defamatory. On 8th September, 1994, the plaintiff instituted proceedings before the High Court of Justice, Queen's Bench Division in the U.K. for seeking damages for libel and an injunction in respect of the publication of the defamatory article. Service of those proceedings was effected on Mr. Umesh Chandrasekhar, who according to the plaintiff, was the resident representative of the defendant in Great Britain and authorized to accept service of process. The defendant did not enter appearance in the proceedings in London. On 5th June, 1995, an affidavit was filed by the plaintiff's Solicitor, Mr. Peter Edward Marrow, in the firm of Tanners in order to seek a direction that service effected upon Mr. Umesh Chandrasekhar was effective service upon the defendant and that a judgment be entered, in default of defence, with damages to be assessed.

2. Four orders came to be passed by the High Court of Justice on 21st

September, 1995, 27th September, 1995, 16th June, 1998 and 11th May, 1999. By the first of the orders delivered on 21st September, 1995, judgment was entered for the plaintiff with damages to be assessed. Since the issue which is raised in these proceedings would turn on the text of the judgment, it would be necessary to extract the entirety of the judgment:

JUDGMENT AND ORDER UPON:

(a) That Plaintiffs Summons herein dated 28th July, 1995 being served upon Messrs Vijay Sharma, Solicitors for Mr. C. Umesh and

(b) A copy of the said Summons being sent by airmail to the registered office of India of the Defendant not less than 14 days prior to the hearing of the said Summons; and

(c) A further copy of the said Summons being sent by way of Notification only to Messrs Franks Charlesly & Co. by post or document exchange.

In accordance with the order of Master Murray dated 20th July, 1995.

AND UPON the Plaintiff abandoning his claim to injunctive relief.

AND UPON hearing the Plaintiff by their Counsel, the Defendant not attending and a representative from Messrs Vijay Sharma observing.

IT IS ORDERED:4

1. Judgment for the Plaintiff with damages to be assessed.
2. The costs of this application and of the action be paid by the Defendant to the Plaintiff.
3. Thereupon, on 27th November, 1995, a further judgment was entered adjudging thereby that the defendant would be liable to pay to the plaintiff damages to be assessed. The second judgment reads thus:

PURSUANT to the order of this Court dated the 21st day of September 1995 it is HEREBY ADJUDGED that the Defendant to pay the Plaintiff damages to be assessed.

4. On 16th June, 1998, damages were assessed against the defendant in the amount of Pound Sterling 32,500. The order reads thus

UPON HEARING Counsel for the Plaintiff and the Defendant not attending IT IS ORDERED:5

1. Damages assessed at ?32,500.00 with liberty to enter Judgment for such sum;
2. The Defendant to pay the costs of the assessment and the costs of the action, such costs to be taxed if not agreed; the Taxation to be on an indemnity basis;
3. Certificate for Counsel for today. Attendance of Country Solicitors to be allowed on Taxation.

5. On 11th May, 1999, judgment was entered against the defendant recording that in pursuance of the judgment dated 27th November, 1995, damages in the amount of ₹32,500.00 and costs assessed at ₹66,039.99 had been assessed and taxed. The defendant was called upon to pay to the plaintiff a sum of ₹98,539.99.

6. The decree of the High Court of Justice in the Queen's Bench Division dated 11th May, 1999 has been set into execution. Leave has been sought of the court under the Order XXI Rule 22 of the Code of Civil Procedure, 1908.

7. The defence to the application for execution is that: (i) the judgment of the Court in the U.K. was without jurisdiction in the absence of service on the defendant; and (ii) The judgment, in any event, was not rendered on merits.

8. The first submission on behalf of the plaintiff is that an appeal was filed by the plaintiff before Judge Holden, sitting as Judge of the High Court, against an order of the Master of the Court dated 3rd July, 1996, holding that the Writ of Summons had not been properly served on the defendant. Judge Holden held, on the basis of the material on record and on a balance of probabilities, that Mr. Umesh Chandrasekhar was a representative of the defendant in England and that the defendant had a place of business within jurisdiction. Judge Holden, however, furnished to the defendant liberty to apply to set aside the order of the Master of the Court. The Defendant filed an appeal against the judgment of Judge Holden. On 13th February, 1999, the Court of Appeal directed the defendant to deposit an amount of ₹7,097 as security for the plaintiff's costs. In default of the payment of costs, the appeal stood dismissed. In the circumstances, it was submitted that the defendant submitted to the jurisdiction of the court in the U.K. to decide (i) on the question of service; and (ii) whether the order to the effect that there was valid service should or should not be set aside. The finding that the defendant had a place of business and that it carried on business in England through a local representative would bind the defendant either on principles of res judicata or issue estoppel. The second submission on behalf of the defendant is that (i) it is a well settled principle of law that though a judgment is delivered *ex parte*, it may yet amount to a judgment on the merits of the cause; (ii) *ex facie* the article published by the defendant was defamatory; (iii) leave to appeal was granted to the defendant but the defendant chose not to avail of that leave and; (iv) at the stage at least of the assessment of damages, the plaintiffs had filed affidavits in support of the quantification of damages.

9. For the reasons which are now indicated hereafter, I am of the view that the defence to the execution application is liable to be upheld on the ground that the judgments delivered in the U.K. in the present case were not judgments on merits. Consequently by the provisions of Section 13(b) of the Code of Civil Procedure, 1908, the plaintiff is not entitled to an order in the execution proceedings.

10. The rules of procedure at the material time, in the U.K. as embodied in the Supreme Court Practice provided in Order 13 Rule 2 that where a writ is

endorsed with a claim against a defendant only for unliquidated damages then, if that defendant fails to give notice of intention to defend, the plaintiff may, after the prescribed time, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any. Order 19 Rule 3 provides that where the plaintiff's claim against a defendant is for unliquidated damages only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under the rules for service of the defence, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any. The note to Order 13 Rule 2 clarifies that the term "interlocutory judgment" means that such a judgment is interlocutory only as to amount, and is final as to the right of the plaintiff to recover damages, together with such costs as the amount thereof, when ascertained, entitles him to. Hence, an interlocutory judgment entered as between the plaintiff and the defendant is final in regard to the right of the plaintiff to recover damages and what then remains is an assessment of the damages. Form No. 40 is entitled "Default judgment in action for unliquidated damages" and contains a reference to the provisions of Order 13 Rule 2 and Order 19 Rule 3.

11. The defendant failed to enter appearance in the U.K. On 21st September, 1995, an interlocutory judgment was entered for the plaintiff in default. The judgment contains a recital that summons were served in accordance with the order passed by the Master of the Court on 20th July, 1995 and proceeds to record that the judgment was entered for the plaintiff with damages to be assessed "Upon hearing the plaintiff by their Counsel, the defendant not attending...". The judgment is a judgment in default of the appearance of the defendant. As a matter of fact, the affidavit that was made by the Solicitors of the plaintiff on 5th June, 1995 was for an order that judgment be entered in default of defence with damages to be assessed. No evidence was adduced before the court in the U.K. nor was there any consideration of the material on the record. Counsel appearing on behalf of the plaintiff urges that the article that was published in the Economic Times was ex facie defamatory. The point of the matter is, however, that there is no finding to that effect by the Trial Judge in the U.K. The substantive right that accrued in favour of the plaintiff therefore follows from a judgment which has not been rendered on merits. No evidence was led by the plaintiff at the stage when the right of the plaintiff to claim damages came to be crystalized by the judgment dated 21st September, 1995.

12. On 27th November, 1995, a judgment was entered by which the defendant was directed to pay to the plaintiff damages to be assessed. Damages were quantified by a judgment dated 16th June, 1998 in the amount of ₹32,500. A final judgment and decree was issued on 11th May, 1999 calling upon the defendant to pay an amount of \$98,539.99 inclusive of damages as assessed and costs as taxed. Neither of these judgments contains any material to indicate that the application filed by the plaintiff was considered on merits or that the court

had formed a view on the defamatory nature of the article. The judgment, therefore, cannot be held to be on the merits of the case of the plaintiff. Though the plaintiff in the rejoinder before this Court has stated that six affidavits were filed in pursuance of the order dated 16th May, 1997 passed by the Master of the Court, it is now conceded before this Court by Counsel for the Plaintiff that this was only at the stage of the assessment of damages and not when the judgment crystalising the liability of the defendant was delivered.

13. The law in India has been expounded in several judgments of the Supreme Court. In *R. Viswanathan Vs. Rukn-ul-Mulk Syed Abdul Wajid*, the Supreme Court held that the test to be applied in determining as to whether a foreign judgment is enforceable is not whether the conclusions in the judgment are supported by the evidence or are otherwise correct, because the binding character of the judgment can be displaced only by establishing that the case falls within one or more of the six exceptions carved out by Section 13. The Supreme Court held as follows:

...In considering whether a judgment of a foreign Court is conclusive, the Courts in India will not inquire whether conclusions recorded thereby are supported by the evidence, or are otherwise correct, because the binding character of the judgment may be displaced only by establishing that the case falls within one or more of the six clauses of Section 13, and not otherwise....

14. In *M/s. International Woolen Mills Vs. M/s. Standard Wool (U.K.) Ltd.*, the Supreme Court referred to the judgments of several High Courts and held that the law that has been formulated in the following judgments reflects the correct position in law viz. (i) *Algemene Bank Nederland NV Vs. Satish Dayalal Choksi*, (ii) *Trilochan Choudhary v. Dayanidhi Patra* AIR 1961 Ori 136, and (iii) *Govindan Asari Kesavan Asari Vs. Sankaran Asari Balakrishnan Asari*, The Supreme Court held thus".... In a given case it is possible that even though defendant has not entered evidence the plaintiff may prove its case through oral and documentary evidence. If after consideration of oral and/or documentary evidence an ex parte decree is passed, it would be a decree on merits." (Para 27)

15. Now it is a well settled principle of law that even an ex parte judgment can operate as res judicata because an ex parte decree is a decree on merits. Justice M.C. Chagla (as the Learned Chief Justice then was) speaking for a Division Bench of this Court in *Baldevdas Karsondas Patel v. Mohanlal Bapalal Bahia and Ors.* AIR 1948 Bom 232 held that in a summary suit where the condition on which leave to defend is given is not complied with, that may result in the coercive process of law. An ex parte decree is, however, a decree on merits passed by the court after it has heard and decided the matter. A defendant who does not appear before a foreign court despite being served runs the risk of an ex parte judgment in favour of the plaintiff and it is a settled principle of law that such a judgment may well be a judgment given on merits if evidence is adduced on behalf of the plaintiff and the judgment is based on a consideration of the evidence. This was also the view taken by me in a judgment of this Court in

China Shipping Development Co. Ltd. Vs. Lanyard Foods Ltd., . The appeal against the judgment is stated to have been dismissed. Consequently, the mere fact that the judgment has been rendered *ex parte* is not dispositive of the question as to whether the judgment has been rendered on merits. In *International Woolen Mills (supra)*, the Supreme court held that the burden of proving that the decree is not on merits is on the party alleging it. Such a party must demonstrate that the decree does not show that it is on merits. If necessary, the rules of that Court, the existence or lack of existence of material before the Court when the decree was passed and the manner in which the decree was passed would have to be adverted to. It would be necessary to briefly advert to the judgment of a Division Bench of this Court in *Abnamro Bank N.V. v. Satish Dayalal Choksi* (also known as *S.D. Choksi*) Appeal No. 869 of 1990 in Notice No. 671 of 1989, Appeal No. 869 of 1990 in Notice No. 671 of 1989. The judgment of the Division Bench, delivered on 3rd August, 1992 arose out of an appeal from the judgment of a learned Single Judge reported in *Algemene Bank Nederland NV Vs. Satish Dayalal Choksi*, . The judgment of the learned Single Judge, as already noticed earlier, has been expressly approved by the Supreme Court in its decision in *International Woolen Mills (supra)*. The learned Single Judge had after reviewing the material on record entered the finding that the judgment of the court in Hong Kong did not indicate whether evidence was actually led before that Court and whether the court went into the merits of the case. In appeal, additional evidence was adduced under Order 41 Rule 27 of the Civil Procedure Code, 1908. The Division Bench in appeal held that the additional evidence left no manner of doubt that the judgment of the court in Hong Kong was delivered after evidence was led and upon the court examining the merits of the case. The Division Bench held that an *ex parte* order can be held to be not on merits only in cases where the judgment is delivered on the ground of limitation or want of jurisdiction or where the defence is struck off. In such cases, the court declines to examine the merits because the suit is barred by limitation or the Court lacks jurisdiction to entertain the suit or the defendant. The judgment of the Division Bench, in so far as formulation of law is concerned, would have to be now read in the light of the subsequent judgment of the Supreme Court which expressly approves of the judgment of the learned single Judge out of which the appeal arose before the Division Bench. That apart, it is evident that the appeal came to be disposed of on the basis of the additional evidence which was adduced under Order 41 Rule 27 and which showed that the judgment of the Foreign Court was one which was rendered on merits.

16. In the present case, the defendant has established before the court that (i) under the rules of procedure which held the field in the U.K. at the material time, more particularly, Order 13 Rule 2 and Order 19 Rule 3, the plaintiff in a claim for unliquidated damages was entitled to judgment in default of appearance by the defendant; (ii) there was no evidentiary material before the Trial Court in England before a judgment was entered on 21st September, 1995 crystallising the liability of the defendant in an action based on the publication of material

which was alleged to be libelous ;(iii) the manner in which the decree was passed shows that the judgment was entered in default without any evidence; and (iv) the tenor of the decree would exfacie demonstrate that it was not based on a consideration of evidence documentary or oral and of the material on record.

17. In so far as present case is concerned, for the reasons already indicated, the defence to the execution must succeed for the reason that the judgment of the Foreign Court is not one which has been delivered on the merits of the case. Consequently, the defence has been established with reference to the provisions of Section 13(b) of the Civil Procedure Code, 1908. The execution application as well as the notice under Order 21 Rule 22 shall, accordingly, stand dismissed.

18. Based on the decree of the Foreign Court, the plaintiff had filed a Company Petition for winding up. A learned Single Judge of this court dismissed the Company Petition. An Appeal against the judgment was disposed of on 22nd August, 2007 with the consent of the parties with a direction that upon a deposit of an amount of Rs. 25,00,000/by the defendant within a period of four weeks, the plaintiff would be at liberty to file proceedings for execution of the foreign decree. The executing Court, it was agreed, would decide all contentions on merits. The amount was directed to be invested in a fixed deposit of a Nationalised Bank. In view of the order which has been passed in the Execution Application and the notice under Order 21 Rule 22, the defendant would be at liberty to withdraw the amount. This would be subject to the Defendant filing an undertaking before this court within one week from today to bring back the amount with interest, if so directed in an appeal against the present judgment and within such period as may be allowed by the court in appeal.