
(1912) 08 MAD CK 0040
In the Madras High Court

Ramanathan Chettyar and Another APPELLANT
Vs
Kalimuthu Pillay and Another RESPONDENT

Date of Decision : 18-08-1912

Acts Referred:

Contract Act, 1872 — Section 263

Citation : (1913) 24 MLJ 619

Hon'ble Judges : Sankaran Nair, J; Napier, J

Bench : Full Bench

Judgement

Napier, J.—This is an appeal from the judgment and decree of the Additional Subordinate Judge of Madura, dismissing a suit by the

plaintiffs against defendants Nos. 1 and 2 on a foreign Judgment. Plaintiffs sought to recover Rs. 7,336-1-7 from defendants being balance of the

amount with interest due under a decree obtained by them in Suit No. 106 of the Supreme Court of Singapore. The decree is Exhibit A. The suit

was brought by the plaintiffs against Oona Kavenna Suvenah Pillay, two other persons with whom this suit has no concern, Oona Kavenna and

Co., and the two defendants to the present suit as carrying on business in Singapore under the firm name of Oona Kavenna and Co. The allegation

in the plaint in the Court of Singapore, so far as appears from a writ of summons for service out of the jurisdiction (Ex. B), is that all the defendants

made two promissory notes of August 2, 1905, jointly and severally payable to the plaintiffs and two pro-notes of the same date made in like

manner payable to V.V.R. Somasundaram Chetty and endorsed to the plaintiffs. According to the evidence of the plaintiffs in the present suit, the

pro-notes were executed by the 1st defendant's son, that is, the 1st defendant in the Singapore suit, for himself and as agent for the firm of S.K.

and Co., that is, the defendant's firm and by the other persons as sureties. It is not alleged that the present defendants either of them signed the pro-notes as it is admitted by the plaintiff and they had left Singapore in 1903 and 1904 respectively. He proves, however, that the amounts for which the pro-notes were given were debts due from the firm of U.K. and Co. It appears that the order of the Court dated February 17th, 1906, an uncurrent writ of summons was issued and ordered to be served on the two present defendants out of the jurisdiction (Ex. B) and that, subsequently, all parties were served with notice to show cause why Judgment should not be entered up against the present defendants (Ex. D) and on the proof to the satisfaction of the Court of the service out of jurisdiction, leave was given to enter up judgment as prayed on 28th May 1906 (Ex. E) and judgment was so entered up on May 30th, 1906, (Ex. A.). To the present suit on this decree, various defences were raised by the two defendants but the suit was dismissed on the ground that the defendants were not carrying on business in Singapore at the time of the institution of the suit in the Singapore Court, their agent being only engaged in winding-up the affairs of the firm and, that being so, the Court had no jurisdiction to entertain the suit. In this Court, the defendants urge the various pleas set up in the lower Court and I now proceed to deal with them.

The first plea is that accepted by the Lower Court. I am unable to agree with the Subordinate Judge. There was no dissolution of the partnership and the plaintiff's agent, P.W. 1, swears that the business was still being carried on. Even if they had dissolved partnership, their obligations continued in all things necessary for winding-up the business (Contract Act, see 263). The Subordinate Judge himself uses the phrase "the business of the firm had practically failed." The dismissal of the suit on the ground relied on by the Subordinate Judge cannot be sustained.

2. The next plea is that the 1st defendant in the Singapore suit was not in fact the agent for the defendants at the date of the suit. I agree with the Subordinate Judge that he was. It is contended that the power-of-attorney given by the second defendant in this suit to the son of the 1st defendant in the Singapore suit was with reference to some private business of his own in Singapore. This is not so. The document (Ex. K) is given by him as a trader carrying on business under the name of Oona Kavenna Suvenah Pillay and Co., and appoints him agent for the business then being carried

on by him and is signed by him with the firm same as well as his own. It is also inconsistent with his evidence in this suit in which he wears that he

gave the power-of-attorney as agent only. That plea, therefore, fails. It is next argued that there was in fact no service out of the jurisdiction on

these defendants. I am satisfied on the evidence of Thiruvengedam P.W. No 3 that he did serve the defendants in India as sworn to by him in his

affidavit before the Court at Singapore (Ex. F) That plea, therefore, fails. It is next contended the 1st defendant in the Singapore suit was only

made a party as a son of the 1st defendant to make him personally liable. This contention was not raised before the Lower Court and is clearly

untenable. He had signed the pro-notes as agents for the firm in discharge of the firm's debts and was sued and served as 1st defendant as their

agent. The service of the summons is proved by the plaintiff against P.W. 1. That plea, therefore, fails.

3. The facts as I find them, therefore, are as follows. The two defendants were carrying on business in Singapore through their agent at the date of

the making of the pro-notes, he having been duly appointed their agent by the power-of-attorney dated March 16th, 1905 (Exhibit K.) He signed

the pro-notes on August 5th, 1905, as their agent in discharge of the firm's liabilities. The suit was brought against him as agent of the firm, against

the firm and against the defendants as partners in the firm. The agent was duly served in the jurisdiction and the partners were served with a

concurrent writ out of the jurisdiction in British India, they being B British Indian subjects. It is argued by the defendants that even on these facts,

the Court has no jurisdiction to pass a decree against them. The law is now settled as laid down by Fry, J. in *Rousillon v. Rousillon* (1880) 14 Ch

D. 351, following *Schibsby v. Westenholy* (1870) 6 Q.B. 155 and *Copin v. Adamson* (1874) 9 Ex. 335 and was lately affirmed by the Court of

Appeal in the same words in *Emanuel v. Symon* (1908) 1 K.B. 302. The circumstances that give jurisdiction are, alternatively: - (1) where the

defendant-is a subject of a foreign country in which a judgment has been obtained; (2) where he was resident in the foreign country when the

action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued, (4) where he has

voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained. Selection of forum,

submission by appearance and contract to submit are treated, in Mr. Dicey's Conflict of Laws under one heading "submission".

4. It is first argued that the defendants were residents by virtue of the presence of the agent carrying on business for the firm and that service on him

is good service. An incorporated Company is resident wherever it substantially carries on business and so a foreign corporation carrying on

business by an agent can be made liable to the jurisdiction by service on the agent within jurisdiction. See *Newby v. Van Oppen* (1872) L.R. 7

Q.B. 293 *Haggin v. Comptoir D'Escompte De Paris* (1889) 23 Q.B.D. 519 and *La Bourgoyne* (1899) PR P. 1. But a partnership stands on a

different footing. It is an aggregate of individuals having no corporate existence. It is true, that when a suit is filed against a firm service on an agent

at the principal places of business of the firm within the jurisdiction, is good service on the firm, whether any members of the firm are out of the

jurisdiction or not, under the Rules of the Supreme Court, Order XLVIII(a), Rule 1 and Order XXX Rule 1, of the CPC of 1908; but even

assuming that there was procedure corresponding to this in the Supreme Court of Singapore, that does not make judgment against the firm a

personal decree against the foreign defendants which can be enforced in a foreign Court. This has been expressly decided in *Thambi Marakayar v.*

Hamed Marakayar (1911) 22 M.L.J. 109 and it is supported by the clear authority of *Russell v. Cambefort* (1889) 23 Q.B.D. 526. We have,

therefore, only to consider the effect in a suit against the partners individually of service on an agent for the firm who held the power-of-attorney

from one partner on behalf of the firm. The point was decided by this Court against the plaintiff's contention in *Nellakaruppa Settiar v. Mahomad*

Ibrahim Saheb ILR (1896) M. 112. In that case, the summons was served on one of the partners resident within the jurisdiction of the Court in

Ceylon but it was held that that service did not make the personal decree enforceable by a suit in this Court against a British Indian subject, a

member of the partnership who was himself at the time not resident in the jurisdiction of the Ceylon Court. It is argued that this decision is incorrect

and reliance is placed on *The Bank of Australasia v. Harding* (1850) 19 L.J.C.R. 345 *The Bank of Australasia v. Nias* (1851) 20 L.J.Q.B. 284,

Copin v. Adamson (1874) 9 Ex. 335, *Fazal Shaw Khan v. Gafur Khan ILR* (1891) M. 82 and *Annamalai Chetty v. Murugesu Chetty ILR* (1903)

M. 544, a case decided by the Privy Council. This latter case was a suit in British territory against a French subject, not personally resident in

British India, on a judgment obtained against him in Pondicherry where he resided. It was sought to make him liable in British India by service on a

relative within the jurisdiction of the District Court on the allegation that the business was a joint family business of which the relative was the

managing member. The finding of these facts was against the plaintiff in the High Court and this was upheld by the Privy Council. The Board go on

to make the following observation: - ""In both courts in India, it was apparently assumed that the question of jurisdiction turned on Section 17 of the

Code of Civil Procedure, and that although the defendant was a foreigner, and although the cause of action arose in a foreign country and although

the defendant did not personally reside within the local limits of the jurisdiction of any court in British India, and was not even temporarily in Arcot

when sued there, yet he could be sued in the Arcot Court if he carried on business through an agent in the local limits of that Court's jurisdiction.

This assumption appears to their Lordships to require more attention than it has received. Their Lordships see no reason for doubting the

correctness of the decision of the case of Girahar Damodar v. Kassigar Hiragar ILR (1893) B. 662, where the defendant was a native of Cutch

and the cause of action arose within the local limits of the jurisdiction of the British Indian Court in which the action was brought."" The actual words

cannot be relied on in support of the plaintiffs contention as their Lordships expressly reserve the point but the approval of Girdhar Damodar v.

Kassigar Hiragar ILR (1893) B. 662, makes it necessary to examine that case. ""The suit was brought by the plaintiff in the Court of Small Causes

to K recover from the defendant the sum of Rs. 1,300-11-6 being the price of the goods sold by the plaintiff to the defendant resided in. Cutch out

of the jurisdiction of the Court, and that he carried on business in Bombay by a Munim. It was also the fact that no leave of the Court had been

obtained for the institution of this suit."" It must be assumed from these words that the contract was entered into in Bombay by the munim on behalf

of the defendant, that he was not resident in Bombay at the time the contract was made and that he was not personally served within the

jurisdiction. Sir Charles Sarjeant, C.J., held that by carrying on business within it, they accepted the protection of the territorial authority and might

be fairly regarded by so doing as " submitting to the jurisdiction of the Courts of the country, and further in view of the great number of non-British

subjects carrying on business in Bombay through Munims and other agents, the Legislature, in giving jurisdiction to the court when the defendant

carries on business within the local limits, must be assumed to have intended those provisions to apply to non-resident foreigners. It should be

noted that the first ground on which the learned Chief Justice puts his judgment is not the ground of residence but of submission which I will deal

with later on. It appears, therefore, that the High Court of Bombay held that the Legislature intended the provisions of the Procedure Act to apply

to foreigners and also that the defendant had submitted to the jurisdiction and the Privy Council must have accepted either or both of these

propositions : but the case did not raise the question of enforceability in Cutch of this judgment and the Board does not pronounce on this.

5. The two cases, in which the Bank of Australasia were plaintiffs, are treated in Dicey's "Conflict of Laws" as examples of other conditions which

he groups together under the general head of submission : but there are observations as to residence and service on which the plaintiff relies. The

Bank was one established under a Local Act of Australasia, one of the sections of which provided that it should sue and be sued in the name of its

Chairman. A suit was accordingly brought against the Bank and the Chairman served within the jurisdiction and judgment obtained. On that

judgment, suits were brought in the High Court of justice against the two defendants and both the Court of common Pleas and the Court of

Queen's Bench in the two cases held the plaintiff entitled to recover. In the first case, *The Bank of Australasia v. Harding* (1849) 19 L.J.C.P. 345

Wilde, C.J., uses the following language: - "'If the defendant had given a power-of-attorney, would not notice to his attorney be sufficient?'" and

Creswell J., referring to the Chairman, says: - "'Being his own appointed agent he had notice of the proceedings.'" (This observation does not

appear in the judgment in the Law Journal Reports). In the second case *The Bank of Australasia v. Nias* (1850) L.J.Q.B. 284. Lord Campbell,

C.J., uses equally definite language: - "'Nor is there anything at all repugnant to the Law of England, or to the principles of natural justice, in enacting

that actions on such contracts, instead of being brought individually against all the shareholders in the company, should be brought against the

Chairman whom they have appointed GO represent them. A judgment recovered in such an action, we think, has the same¹ effect beyond the territory of the Colony which it should have had if the defendant had been personally served with process, and, being a party to the record, the recovery had been personally against him." The language of the learned judges in these two cases seems to me to be applicable to cases where the persons sought to be made liable are not members of a company but are individuals who have appointed a person to represent them; and it must be noted that this is not a Company incorporated under the Companies Act when a suit would of course, not be against an individual share-holder. It is an association of individuals authorised by a local Act to sue and be sued by their chairman; and the language of some of the judges goes a long way towards making the presence of the agent with a right to sue, residence and notice on him good service on which to found a suit on the judgment.

6. Copin v. Adamson (1871) 9 Ex. 335 does not decide this point and will be considered on the second point. The last case, Fazal Shan Khan v.

Gafar Khan ILR (1891) M. 82, was one in which the defendant appeared by an agent and defended the suit. The Bench uses the following words:

- "It appears, however, from the evidence that the appellant carried on business by his agent within the limits of the territory. Moreover, the defendant did not protest that the Court had no jurisdiction, but appeared by an agent and defended the suit. Having done so, and having taken the chance of a judgment, in his favour, he cannot now, when an action is brought against him on the judgment take exception to the jurisdiction." It is difficult to say on which of the two propositions the Court founded its judgment. On the facts, there was certainly a clear submission. On the whole, in spite of the language used in these judgments on which the plaintiff relies, I am not prepared to hold that the law allows service on an agent of a partnership to create jurisdiction on the ground of residence.

7. The next condition is, where the defendant has submitted to the jurisdiction in any of the three ways grouped together under that head. In the view I take, this must be largely a question of fact in each case. In this case, the two parties now sued did, for many years, carry on business as a firm in the jurisdiction of the Court of Singapore and each of the defendants was

at one time managing the business there. Each of them did, at one time, give a power-of-attorney to a relative to manage the firm's business during their absence. "One of those powers has been exhibited in the case and has already been referred to It is in English form and confers the widest powers. It authorises the agent, on behalf of the firm, to demand, sue for, collect and receive etc., the rents and profits of any tenancies, to take and use all lawful proceedings and means by distress or action or otherwise for recovering such rents and for enforcing the performance of any covenants or for evicting, ejecting or recovering damages from tenants; to demand, sue for, enforce payment of all monies, securities or personal estate and to prove in any bankruptcy for any property due; to adjust, settle, compromise or submit to arbitration any debt; to commence, prosecute or enforce or defend, answer or oppose all actions and other legal proceedings and demands touching any of the matters aforesaid or any other matters in which the defendant may be held interested and generally to act as his attorney in relation to all matters in which he may be interested. Now it is obvious that this power to sue, on behalf of the defendants, can only have reference to the Supreme Court of Singapore or the Courts subordinate to its jurisdiction. It is clearly established that, if they had been plaintiffs in the suit, there would have been a selection of the forum and it is also clear that if, in any contract, there had been an agreement that suits should be decided by the Court of the place of business, there would have been a contract to submit. I can see no reason why a power-of-attorney of this character which, presumably, is brought to the notice of persons dealing with the firm, should not be evidence that the members of the firm adopted the Court of Singapore as the forum before which their claims were to be brought. Is there anything in the decisions which compels me to hold otherwise? This point does not appear to have been pressed on the judges of this Court, who decide the case *Nalla Karuppa Settiar v. Mahomed Iburam* ILR (1896) M. 112. There was no power-of-attorney in that case, the service having been on one resident partner; and it may be that the facts in that case were not clearly as strong as they are in the present case. The decision went entirely on the question whether the defendant was constructively resident and whether service on the resident partner was sufficient to found jurisdiction. The

case reported in Shaik Atham Sahib v. David Saheb ILR (1909) M. 469 and Sivaraman Chetti v. Ibram Sahib ILR (1895) M. 327, are of no

assistance on this point. The question there was whether the defendant had in fact submitted himself to the jurisdiction by appearance in the suit. In

one case, it was held that he had and in another that he had not. But this point does not arise in the present case nor is any assistance to be derived

from the decision of the Privy Council in Gurdyal Singh v. The Raja of Faridkot ILR (1894) C. 222, which was an attempt to enforce an exparte

judgment recovered against a person, who had not been served in any way, was non-resident and was not carrying on business within the territory

of the State. I can find no decision laying down that the facts such as are provided in this case, are not evidence of submission in one of its forms. I

am strengthened in the view that I take by the language of the judges in the two Bank of Australasia cases to which I will now refer. The facts have

already been set out. There a Colonial Act provided that all actions and suits instituted by the Bank and all actions and suits prosecuted against the

Bank shall be instituted by and prosecuted against the Chairman for the time being of the said Bank, and in the judgment of Wilde, C.J., in the case

against The Bank of Australasia v. Harding (1849) 19 L.J.C.P. 345, he states as follows: - ""It appears that the defendant was a partner in the

Company and that the Act provided that certain rights should be conferred on partners, and that the business should be carried on under certain

regulations, all conducing to their benefit. It may be judicially taken that such an Act has been obtained at the request of the partners. By this Act it

is contemplated that the business of the Company could be more conveniently carried on if one member were sued instead of all, and execution

might be issuable against the property of the rest."" The only point strongly argued was whether the remedy by execution was in substitution of the

remedy against the partners individually. It seems to me that, if the defendant had thought that this Act which was procured for his benefit could not

be considered as a submission by him to the forum, in which the Chairman was authorised to sue and be sued, that point would have been taken in

the two cases. The fact that the power of the Chairman to sue in the Courts Was given by the statute and not by a power-of-attorney as in this

case, does not, I think, make any difference, and one learned judge, as already pointed out, treated the Chairman as his agent for this purpose.

These two cases are authorities which have never been questioned and I am unable to distinguish them on principle from the present case. They are treated by Mr. Dicey as examples of submission and it is clear that they are not cases where the defendant's liability is based on the fact that he was the plaintiff in the Lower Court, or appeared in the suit or contracted with the other party to the suit to submit the matter of the suit to the jurisdiction of the Court. It must, therefore, be that submission in one form or other must be a mixed question of law and fact, and where we find, as appears in this case, that the agent is specifically appointed to bring suits of all sorts with reference to the partnership in the forum in which he is subsequently sued, I cannot construe this as anything but a submission to the forum within meaning of one of the conditions required for giving a jurisdiction. That Court having acquired jurisdiction and service out of jurisdiction by order of the Court being proved, the defendants prima facie are bound by the judgment and, as they have not raised any defence to the suit, the plaintiffs should have been given a decree in the Lower Court. The decision of the Lower Court is reversed. There will be decree for Rs. 7,336-1-7 with costs. Subsequent interest at 6 per cent, from date of plaint.

Sankaran Nair, J.

8. I agree.