

(1942) 03 CAL CK 0028
In the Calcutta High Court

Sheikh Abdul Rahim alias S.A. Rahim

APPELLANT

Vs

Mohamed Din and Another

RESPONDENT

Date of Decision : 24-03-1942

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 44A, 44A(3), 47

Citation : AIR 1943 Cal 42

Hon'ble Judges : Derbyshire, C.J.;Gentle, J

Bench : Full Bench

Judgement

Derbyshire, C.J.—This is an appeal against an order of the District Judge of 24 Parganas in certain execution proceedings u/s 47, Civil P.C. The appellant is Sheikh Abdul Eahim, the decree-holder and the respondents are the judgment-debtors Mahammed Din and Hazi Monowar Din. In the proceedings in question the decree-holder sought to execute in the Alipore Court a decree which he had obtained against the defendants and others in the High Court in London. The plaintiff decree.holder acted as agent in London for the defendants and others who were trading in co-partnership in Calcutta. The plaintiff claimed that he was entitled to recover certain sums of money by way of commission from the defendants and their partners. On 3rd February 1937, the plaintiff issued a writ against the defendants claiming a sum of ?1313-13-11 as commission. Apparently, the writ was served out of the jurisdiction of the Supreme Court in England and the defendants duly appeared to the writ on 27th July 1937. Each party was represented by a solicitor. The writ itself was specially endorsed under Order 3, Rule 6 of the Rules of the Supreme Court. There were negotiations between the parties with the result that the proceedings were dragged out, but eventually the matter was ordered to be tried by a special referee in the Court in London. No pleadings were delivered in the action other than the statement of claim endorsed in the writ. On 17th February 1939, the matter came before Mr. T. Eastham, one of the official referees, and he dealt with it and gave a certificate in these words:

I, T. Eastham, K.C, having tried this action pursuant to an order of Master Simner dated this 16th February 1938, whereby the said action was ordered to be tried by an Official Referee and on hearing the counsel for the plaintiff and the defendants not appearing do hereby order that judgment be entered for the plaintiff on the claim for the sum of ₹1313-13-11 (one thousand three hundred and thirteen pounds, thirteen shillings and eleven pence) with interest at 4 per cent, per annum from 3rd February 1937 to the date of this judgment (17th February 1939) with costs to be taxed.

2. Pursuant to that certificate and order the formal judgment, which in India would be described as a decree, was drawn up which recited:

The action having by an order dated 16th February 1938 been referred for trial to His Honour T. Eastham, K. C, one of the Official Referees of the Supreme Court, and the said Official Referee having tried the said action, and having by his certificate dated 17th February 1939 directed that judgment be entered for the plaintiff on the claim for the sum of ₹1313-13-11 (one thousand three hundred and thirteen pounds thirteen shillings and eleven pence) with interest at 4 per cent, per annum from 3rd February 1937 to the day of this judgment (17th February 1939) with costs to be taxed. It is this day adjudged that the plaintiff recovers ₹1523-17-8 and costs to be taxed. The above costs have been taxed and allowed at ₹79-17-9 as appears by a Taxing Officer's certificate dated 20th April 1939.

3. As is customary it is signed by the solicitor for the plaintiff. There is a certificate attached to that as follows:

I certify that the above copy judgment is a true copy of a judgment obtained in the High Court in England and this copy is issued in accordance with Section 10 of the Foreign Judgments.

(Reciprocal Enforcement) Act, 1933.

F. Arnold Baker.

A Master of the Supreme Court of Judicature in England,

Dated 22nd May 1939.

4. The plaintiff decree-holder has proceeded I in the Court at Alipur, appeal u/s 44A, Civil P.C., which came into operation in 1938. That section provides:

(1) Where a certified copy of a decree of any of the superior Courts of the United Kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in British India as if it had been passed by the District Court. (2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment. (3) The provisions of Section 47 shall as from the

filing of the certified copy of the decree apply to the proceedings of a District Court executing K 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 Clause (a) to (f) of Section 13.

5. Section 13, Civil P. C, provides:

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 (b) where it has not been given on the merits of the case.

6. The defendants judgment-debtors say that the judgment given in England was not given upon the merits of the case in that the defendants were not present in Court when the matter was heard and adjudicated upon. They also allege that the matter was adjudicated upon without evidence being given by the plaintiff. It must be remembered that when an action is referred to an Official Referee of the Supreme Court in London for disposal u/s 89, Judicature Act of 1925, the Official Referee has, as far as the conduct of the case and the adjudication are concerned, the same powers as a Judge of the High Court. Now, it is clear in this case that the defendants were not present at the hearing; the Official Referee's certificate makes that clear. It is not apparent from any of official documents in the case that evidence was taken. As far as the absence of the defendants is concerned, that is clearly a matter for which they are to blame. They had a firm of solicitors on the record in London, Messrs T.L. Wilson & Co., who as the correspondence shows were conducting the matter on their behalf, and it is clear that the solicitors for the defendants knew that the matter would come before the Official Referee because they said in their letter of 5th January 1939 to the plaintiff's solicitor:

We are in receipt of your letter of 4th January and, as requested, confirm that unless we receive further instructions from our professional clients in India before the date of trial, we shall not appear at the hearing.

7. There is a letter dated 7th February 1939 from Mr. Kirk, plaintiff's solicitor to Messrs. Wilson & Co., defendants' solicitors which states:

Referring to your letter of 25th January last, my client does not agree that the statements in your letter are correct and he has heard from India that no proper arrangement has been made. Under the circumstances the matter must proceed to trial and it will be heard in accordance with the notice of trial given in this case.

8. The matter duly appeared before the Official Referee with the result that has been seen. As regards the suggestion that the judgment was irregular because no evidence was given, there is a presumption which is set out in 8. Evidence Act, that judicial acts have been regularly performed. The presumption applies in this case. It is for the defendants to rebut it. But they have given no evidence

which would rebut that presumption and their contention that the judgment was invalid because to evidence was given must fail. There remains the further question of whether by reason of the absence of the defendants at the trial the judgment in question has not been given on the merits of the case. The learned Judge was of the opinion that the defendants being absent the judgment was not given on the merits of the case. If the mere absence of the defendant could prevent a judgment given in his absence from being one on the merits of the case, there would be every incentive for the defendant to be absent when the matter came on for disposal, and, in such an event, he would always say that the judgment was not on the merits of the case, even though the absence was due to his own fault. I cannot think that that is the position. The test as laid down by the Judicial Committee is to be found in 44 I.A. 6 (16) AIR 1916 P.C. 121 : : 40 Mad. 112 : Keymer v. Visvanatham Reddi. There in an action in the King's Bench Division of the High Court of Justice in England to recover a liquidated amount, the defendant having failed to comply with an order to answer interrogatories his defence was struck out and judgment was entered for the amount claimed in accordance with the rules. The plaintiff subsequently sued the defendant in the High Court at Madras upon the judgment. It was held by the Privy Council that the judgment sued on was one which had not been given on the merits of the case within the meaning of Section 13(b), Civil P.C. Lord Buckmaster giving the decision of the Board said at page 9 of the report:

The whole question in the present appeal is whether, in the circumstances narrated, judgment was given on 5th May 1913, between the parties on the merits of the case. Now, if the merits of the case are examined, there would appear to be, first, a denial that there was a partnership between the defendant and the firm with whom the plaintiff had entered into the arrangement ; secondly, a denial that the arrangement had been made ; and, thirdly, and a more general denial, that even if the arrangement had been made the circumstances upon which the plaintiff alleged that his right to the money arose had never transpired. No single one of those matters was ever considered or was ever the subject of adjudication at all. 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, Sub-section (b). It is quite plain that that sub-section must refer to some general class of case, and Sir Robert Finlay was asked to explain to what class of case in his view it did refer. In answer he pointed out to their Lordships that it would refer to a case where judgment had been given upon the question of the Statutes of Limitation, and he may be well founded in that view. But there must be other matters to which the sub-section refers, and, in their Lordships' view, it refers to those cases where, for one reason or another, the controversy raised in the action has not, in fact, been the subject of

direct adjudication by the Court.

9. Now, in the present case, it is impossible to say that the controversy raised has not in fact been the subject of direct adjudication by the Court. The plaintiff claimed commission; he set out the commission that he was entitled to in a statement of claim endorsed on the writ. The defendants at all material times knew that the plaintiff was claiming that commission and their agents knew that the Court would adjudicate upon that claim on 17th February 1939. On 17th February 1939, the defendants for their own purposes were not present at the hearing and were not represented at the hearing. They were content to let matters take their own course. We have no notes as to what happened. The Court dealt with the matter and we must presume, dealt with the matter in a way that the Court should deal with the matter. But the result of the Court's dealing with the matter was that the Court awarded that the plaintiff should recover a sum of ₹1313-13-11 with interest at 4 per cent, from the defendants in respect of the plaintiff's claim against the defendants.

10. It seems to me to be clear that the controversy raised in the action was the subject of direct adjudication by the Court. If the defendants were absent through some inadvertence or accident they could apply within eight days to have that judgment set aside. They did not do so. If they had any grounds for impugning the validity of that judgment they would have appealed to the Court of appeal in England. They did not do so. In my opinion, the defendants here have failed to show to the satisfaction of the Court, as was the burden on them, that this decree falls within exception (b) of Section 13, namely, that it has not been given on the merits of the case. No other matter arises for our determination. I am of the opinion, for these reasons, that this appeal must be allowed and the matter remitted to the District Judge for him to deal with the application according to law in the light of what we have said. The appellant is entitled to his costs-the hearing-fee being assessed at eight gold mohurs. The cross-objection is not pressed and it is dismissed without costs.

Gentle, J.

11 I agree and desire to add a few words only. It is quite clear from the provisions of Section 44A(3), Civil P. C, that the burden is upon the judgment-debtors to establish that a decree obtained from a Court which is sought to "be executed in a Court in this country was not one which was obtained or adjudicated upon its merits. The wording of the sub-section is as follows:

A 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 Clause (a) to (f) of Section 13.

12. The only document, and indeed the only matter upon which reliance is placed by the judgment debtors, is the certificate of the learned official referee in London dated 17th February 1939, in which he certifies that having tried the action and on hearing counsel for the plaintiff and the defendants not appearing,

he orders judgment for the sum specified. I do not think that this certificate conclusively shows that no evidence was called and the learned official referee merely heard counsel. Firstly the document is not a judgment as it is understood in this country as was argued by the learned advocate for the judgment-debtors. It is merely a form of certificate recording that the suit had been tried and that there was no appearance by the defendants and appearance only being on behalf of the plaintiff. Order 36, Rule 31 of the Rules of the Supreme Court applied to the suit when tried before the official referee. This rule provides:

If when a trial is called on, the plaintiff appears, and the defendant does not appear, the plaintiff may prove his claim, so far as the burden of proof lies upon him.

13. My Lord has pointed out that there is a presumption that the judicial proceedings have been conducted in accordance with the requirements. The defendants not having appeared it was then for the plaintiff formally to prove his case in compliance with Order 36, Rule 31. There is no evidence whatever to remove that presumption or indeed any evidence that testimony was not called when the trial took place before the official referee. In my view, there is nothing in support of ; the contention which was put forward by the judgment debtors that the decree obtained in the King's Bench Division is not one upon the merits, and it being the burden of the judgment-debtors to establish that it was not obtained upon the merits it follows, so far as this aspect of the matter is concerned, that the judgment-debtors fail. I have nothing to add to the other part of the case which my Lord has dealt with in his judgment, and I agree that this appeal should be allowed.