

(1927) 02 MAD CK 0053
In the Madras High Court

S.S.A.S. Arunachalam Chettiar

APPELLANT

Vs

A.M. Muhammad Salihu Marakkayar and Others

RESPONDENT

Date of Decision : 02-02-1927

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13

Citation : AIR 1928 Mad 133 : (1927) 26 LW 803

Hon'ble Judges : Kumaraswami Sastri, J;Jkumaraswami Sastri, J;Curgenven, J

Bench : Full Bench

Judgement

Kumaraswami Sastri, J.—Plaintiff is the appellant. The plaintiff's father had dealings with defendants 1 to 4 who are Mahomedan merchants who carried on business in 1914 and 1915 in Colombo. Defendants 1, 2 and 4 by their agents and defendant 3 personally executed a bond in favour of the plaintiffs father for Rs. 75,000 on the 29th September 1914 and also created a sub-mortgage document executed in their favour by third persons. The plaintiff's father filed suit No. 4186 of 1915 in the District Court of Colombo on the 25th May 1915 and obtained an ex-parte decree on the 18th June 1915 which is filed as Ex. A in this case. The decree states that the defendants did not appear either in person or by proctor or by counsel although duly served with summons. The property which was sub-mortgaged was sold in execution of the 10th January 1916 and was purchased by the plaintiff for a sum of Rs. 100 and finding that he could not obtain anything more by execution in the Colombo Court, the plaintiff (his father having died meanwhile) filed a suit in the Sub-Court of Tanjore on the foreign judgment and prayed for a decree for Rs. 56,765-4-11 the balance due under the judgment and decree of the Colombo Court. Various pleas were raised but it is only necessary to consider the plea that no suit would lie on the judgment of the Colombo Court as that judgment was not on merits. The Subordinate Judge dismissed the suit.

2. It is argued by Mr. Raja Ayyar for the appellant that the proceedings of the Colombo Court show that the decree was not ex parte but was on the merits,

that the decree though passed without examination of witnesses was really on the merits, that even if it were not so he was entitled in this suit to prove his claim and that it was on the defendants to show that the plaintiff's claim in respect of the amount which he sues to recover is unfounded. So far as the first point is concerned, it is clear that the suit was not decided on its merits. The procedure in the District Court of Colombo is that where no defence is entered, an affidavit of service is filed and judgment follows. In the present case the defendants, though served, did not enter appearance or file any written statement. Thereupon the plaintiff filed an affidavit of service and a decree followed as a matter of course. Reference was made to Ex. D a certified copy of processes and their returns in suit No. 4186 of 1915 of the Colombo District Court but there is nothing there to show that any evidence was recorded or that the Court went into the merits though the defendants were *ex parte*. All that appears from Ex. D. is that when the case came on the 9th June it was called and the defendants who were said to be served were absent and that an *ex-parte* trial was fixed for the 18th June. On the 18th June the case was called and an affidavit of service was filed. On the 16th July a decree nisi was passed and on the 20th July the case was called, the defendants were absent and a decree absolute was made. Under the rules an affidavit of service had to be filed and the affidavit filed on the 18th June was simply an affidavit of service. No evidence was recorded as regards the merits of the claim. In fact as was pointed out before, the decree that was passed states that the defendants did not appear. There can be little doubt that the decree was not on the merits but was an *ex-parte* decree.

3. The next question is whether a decree could be passed on the foreign judgment. Section 13, Civil P C, enacts 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 are or any of them claim litigating under the same title except in the cases mentioned in Clauses (a) to (f) of the section. The clause which is material in the present case is Clause (b) which refers to judgments not given on the merits of the case; The argument of Mr. Raja Ayyar is that if it was given on the merits, it would be conclusive and would operate as *res judicata* but that if it was not on the merits the parties would be at liberty to proceed as if the case was open, the plaintiff adducing evidence in support of his claim and the defendants raising defences and that the trial should proceed as it was an ordinary suit. I am unable to accede to this contention which is opposed to all the authorities. I think the matter is concluded, by the decision of their Lordships of the Privy Council in *Keymer v. Viswantham Reddi* AIR 1916 P.C. 121.

4. This was a case where a suit was filed in England by Keymer against Viswanatham Reddi claiming a sum of money due on certain bills drawn. Defence was entered. The plaintiff obtained leave to administer certain interrogatories to the defendant which the defendant omitted to answer. Thereupon an application was made to the Court in England to strike out the defence and enter judgment

and a judgment was given. Upon that judgment a suit was filed in Madras and the defence was that as the judgment of the English Court had not been given on the merits of the action a suit could not be maintained on the foreign judgment u/s 13, Sub-clause (b) Civil P.C. A decree was passed by Bakewell, J., but on appeal Sir John Wallis, C.J., and Seshagiri Ayyar, J., allowed the appeal and dismissed the suit with costs. An appeal was preferred to the Privy Council and their Lordships of the Privy Council affirmed the decree of this High Court. The Lord Chancellor in giving judgment after referring to the facts observed:

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 the sub-section must refer to some general class of cases and Sir Robert Finlay, was asked to explain to what class of cases 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 on 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.

5. In *Oppenheim & Co. v. Hajee Mahomed* AIR 1922 P.C. 120 a judgment was passed on an award in England under Order 54, Rule 14, of the rules of the Supreme Court, the defendant being ex parte, and an action was brought on the foreign judgment in this Court. *Coutts Trotter J.*, held that the action on the judgment of the Court in England could not, having regard to the decision in *Keymer v. Viswanatham Reddi* AIR 1916 P.C. 121, be maintained as the judgment was entered in default of appearance and the action not been tried on the merits. He, however, gave a decree for the amount specified in the award. So far as the view taken by the learned Judge as to the non-maintainability of the suit no objection was taken before the Privy Council. The argument of Mr. Raja Ayyar that *Keymer's* case AIR 1916 P.C. 121 can be distinguished on the ground that the defence was struck out for not answering the interrogatories and judgment entered, whereas in the present case the decree was passed ex parte, which argument seems to have been accepted in *A. Janno Hassan Sait Vs. S.N. Mahamad Ohuthu*, cannot stand in view of the judgment of a Full Bench of this Court in *Mahomed Kasim & Co. v. Seenii Pakir* AIR 1927 Mad. 265. The authorities on the subject have been referred to by the referring Judges in their order of reference and it was held that the only test is whether the suit was disposed of on the merits. The learned Chief Justice in dealing with a similar argument observed:

As I understand Mr. Alladi Krishnaswamy 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 plaintiff's claim 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 *A. Janno Hassan Sait Vs. S.N. Mahamad Ohuthu*, and I think that case must be regarded as no longer law.

6. As was pointed out in this case the rules of the Supreme Court of Penang provide that where the defendant does not appear, judgment can be given without trial and without taking evidence if it is proved that the defendant was properly served with the notice of action. The Ceylon Code which has been referred to in the course of the argument before us contains identical provisions and no distinction can be made on the ground that the provisions of the law are different. I think the decision of the Full Bench above referred to really concluded the matters so far as we are concerned.

7. I think Section 13 clearly limits the cases where a foreign judgment can be sued upon and that if the case falls within any of the exceptions, no suit would lie. There is no authority to support the argument of Mr. Raja Ayyar that a foreign judgment if it falls within Clause (b) of the exceptions imposes a prima facie liability and that the plaintiff will in the absence of proof by the defendant of the unsustainability of the suit be entitled to a decree. His argument is that whereas in the case of the other clauses the suit would have to be dismissed, in the case of Clause (b) the suit would have to go on and be tried on the merits. This is not supported by any authority and is opposed to the decisions I have referred to above. I am of opinion that the judgment of the Colombo District Court which was obtained under the rules of that Court which enact that where the defendant is ex-parte the plaintiff is entitled to a decree merely on proving that the defendant was properly served is not a judgment obtained on the merits of the case and that Section 13, Clause (b) bars a suit on that judgment.

8. This appeal fails and is dismissed with costs.

Curgenven, J.

9. The circumstances of this case are not, I think, distinguishable from those of the Full Bench case, Appeal No. 61 of 1924, *Mahomed Kasim & Co. v. Seenai Fakir* AIR 1927 Mad. 265 to which I was a party, because it is clear from an examination of the records of the suit in the Colombo Court that the decree and judgment were not given "on the merits of the case" in the sense that any evidence was taken in support of the averments in the plaint. Some attempt has been made to found an argument upon the word "conclusive" in Section 18, and to contend that, although a judgment otherwise than upon the merits may not be conclusive, it yet shifts the onus on to the party against whom it was recorded. But in the first place we are precluded by the Full Bench decision from accepting

any such doctrine, and, apart from that consideration, if the adjudication which the foreign judgment embodies is not conclusive it cannot be in any intelligible sense an adjudication at all for the purposes of the subsequent litigation. It can thus form no cause of action, and the parties are relegated for their cause of action, to the original obligation.

10. I agree, therefore, that the appeal should be dismissed with costs.