(1997) 11 MAD CK 0152

In the Madras High Court

T.E. Haja Maideen and Another APPELLANT

Vs

Moona Abdul Latif RESPONDENT

Date of Decision : 25-11-1997

Acts Referred:

Arbitration Act, 1940 — Section 20
Civil Procedure Code, 1908 (CPC) — Section 13(b)
Foreign Exchange Regulation Act, 1973 — Section 47(3), 47(3)

Citation : (1998) 1 MLJ 519

Hon'ble Judges : K. Govindarajan, J

Bench : Division Bench

Judgement

K. Govindarajan, J.—The petitioners obtained a decree in Originating Summons No. 238 of 1984 of the High Court of the Republic of

Singapore, and they filed E.P. No. 1 of 1989, on the file of the District Court, East Thanjavur at Nagapattinam, to execute the same. The lower

court dismissed the same finding that the alleged order to be executed is not a final order, that the petitioners have not obtained any permission

from the Reserve Bank of India as required under Sections 26(6) and 47(3) of the Foreign Exchange Regulation Act, 1973 and that the alleged

decree had been superseded. Aggrieved against the same, the petitioners have filed the above revision.

2. On the basis of the ''order for leave'', on the file of the High Court of the Republic of Singapore in Oringinating Summons No. 238 of 1984

dated 2.4.1984, in which it was ordered that ""pursuant to Section 20 of the Arbitration Act (Chapter 16), the plaintiffs be at liberty to enforce the

award of M/s. M. Momamoo, S.K. Jafer, T.A. Aminullah, K. Hammed Ghouse Maricar and Al Chidambaram for payment of $80,747,13 in the same manner as judgment or order to the same effect; and that the costs of the application and of any judgment which may be entered hereunder

be taxed and paid by the defendant to the plaintiffs.

3. In the said order, the defendant, Moona Abdul Latif was given 14 days time after the service of the Order to apply to set aside the order and it

is further directed that the award shall not be enforced until after the expiration of that period or he applied within that period to set aside the order,

or until after the application is finally disposed of. Thereafter on 16.1.1985 the plaintiffs filed an affidavit before the High Court of the Republic of

Singapore to the effect that the defendant has not made any application to set aside the order even after the expiration of the said period of 14

days'' from 2.4.1984 and that the estimated cost was $12,000.00.

4. Subsequently, under the provisions of Reciprocal Enforcement of Judgment Act, 1958, the High Court of Malaysia at Kuala Lampur entertained

an application in Originating Summons No. Al89/84 and in the said Application, the counsel oh both sides appeared and it was Ordered that the

defendant should pay to the plaintiffs a sum of $80, 747, 13 only by instalments of $3,000.00 per month with effect from 8.4.1985 to the date of

full realisation and costs to be taxed pur-suant to Section 11 of the Debtors Act, 1957. Thereafter, it seems, the High Court, of Malaysia at Kuala

Lampur adjudicated the defendant as bankrupt in No. 4303/92-86, dated 6.10.1986. On this background, the plaintiffs filed E.P. No. 1 of 1989

to execute the Origi-nating Summons No. 238 of 1984 on the file of the High Court of the Republic of Singapore.

5. Section 44-A of the Code deals with the powers and the manner of execution of foreign decrees. It provides for execution in India of a decree

of any superior courts of any reciprocating territory. Section 44-A of the Code was inserted in the Code of Civil Proce-dure by Section 2 by

Amendment Act, 1937. Subsequently it was amended in 1952. u/s 44-A of the Code execution of a foreign decree is entrusted to a District Court

by filing a certified copy of a decree of any of the superior courts of any reciprocating territory. Such filing of the decree of foreign court becomes

executable in India as if it had been passed by the District Court.

6. Section 44-A of the Code reads as follows:

Execution of decrees passed by Courts in recip-rocating territory:: (1) Where a certified copy of a decree of any of the superior courts of any

reciprocating territory has been filed in a District Court, the decree may be executed in 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 purpose of proceedings under this section, be conclusive proof of the extent of such

satisfaction of 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 a

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 clauses (a) to (f) of Section 13.

Explanation-I: ''Reciprocating territory'' means any country or territory outside India which the Central government may, by notification in the

Official Gazette, declare to be a reciprocating territory for the purposes of this section; and ''Superior Courts'', with reference to any such territory,

means such courts as may be specified in the said notification.

Explanation-II: ''decree'' with reference to a superior court means any decree or judgment of such Court under which a sum of money is payable,

not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an

arbitration award, even if such an award is enforceable as a decree or judgment.

7. But the District Court shall refuse to execute such a decree if it shown to the satisfaction of the court that the decree falls within any of the

exceptions specified in Clauses (a) to (f) of Section 13 of the Code, which reads as follows:

13. When foreign judgment not conclusive: 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-

(a) Where it has not been pronounced by a Court of competent jurisdiction;

(b) Where it has not been given on the merits of the case;

(c) Where it appears on the face of proceedings to be founded on an incorrect view of international law or refusal to recognise the law of India in

cases in which such law is applicable;

(d) Where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) Where it has been obtained by fraud;

(f) Where it sustains a claim founded on a breach of any law in force (India).

8. While assailing the finding of the lower court that the judgment sought to be executed had not been given on merits and it is not a final order, the

learned Se-nior Counsel appearing for the petitioners has submitted that the order passed by the High Court of Malaysia at Kuala Lampur in

Originating Summons No. A-189 of 1984 granting permission to the respondent to pay the amount in instalments and the said order was passed in

the presence of the respondent. So, it cannot be said that the order passed by the High Court Of the Republic of Singapore in Originating

Summons No. 23 8 of 1984 is not a final order.

9. Explanation II to Section 44-A defines ''decree'' in which it is staled as follows:

''decree'' with reference to a superior court means any decree or judgment of such court under which a sum of money is payable, not being a sum

payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration

award, even if such an award is enforceable as a decree or judgment.

10. The order dated 2.4.1984 in Originating Sum-mons No. 23 8 of 1984, which the petitioners wanted to execute may be an arbitration award.

But in view of the above proviso, it cannot be said as a decree. It is an order issuing notice to the defendant to raise objection for the passing of

final order. The affidavit dated 16.1.1985 showing the estimated cost itself proves that the order sought to be executed is not the final decree and

not passed on merits.

11. The learned Counsel appearing for the petitioners has relied on the decision in Mohamed Abdulla v. P.M. Abdul Rahim (1985) 1 M.L.J. 24

wherein the learned Judge has held as follows:

Section 13 (b) of the Code by itself does not speak about any controversy. The element of controversy may be relevant only to find out whether the adjudication was on merits. Even if that test is to be applied I find that at the relevant point of time there was in fact a controversy and that only

forced the plaintiff to go to court and that controversy was eased out subsequently after the service of summons on the defendant and the

defendant passing on the letter of consent. This is not a case of a judgment being obtained on the simple ground of non-appearance of the

defendant or on his fail-ure to comply with a provision of law. This is a case of a controversy existing on the date of the suit, which got solved by

the judgment-debtor agreeing to take decree subsequently.

On the basis of the said judgment, the learned Counsel has submitted that since the order passed by the High Court of the Republic of Singapore

was not set aside, and, accepting the order dated 2.4.1984 the defendant had given consent to pay the decree amount in instalment, now it cannot

be alleged that there is no decree at all. As the petitioners want to execute the order dated 2.4.1984 passed by the High Court of the Republic of

Singapore and not the order passed by the High Court of Malaysia directing the respondent to pay the amount in instalments, the nature of the

order has to be seen only on the basis of the order dated 2.4.1984 itself and not on the basis of the sub-sequent action. The decision cited by the

learned Senior Counsel has dealt with a case in which the parties have given a written consent and on that basis the decree was passed. In support

of the submission that the order passed by the High Court of the Republic of Singapore is a final order and passed on merits, no material is placed

before me.

12. The Full Bench of this Court in the case of R.A. Mahmomed Kashim v. Seeni Pakir 52 M.L.J. 240. AIR 1927 Mad 265 considered a foreign

judgment which was passed on default of appearance of the defendant without trial on evidence. this Court following the Privy Council decision in

Keymer''s case reported in AIR 1916 P.C. 121 held that this was not a judgment on the merits of the case. It also said that there was in principle

no distinction between a case where the defence of the defendant was struck out for not answering the interrogatories and the case such as the one

before them where the defendant did not appear at all. In both the cases, this Court said, the merits of the case had not been gone into. It

overruled an earlier judgment of this Court in A. Janno Hassan Sait Vs. S.N.

Mahamad Ohuthu, , which had held that in a case where the

defendant did not appear and raise a defence, there would be an implied admission of the plaintiff''s claim and hence the ex parte judgment should

be considered as a judgment on merits.

13. The abovesaid decision of the Full Bench of this Court was followed in a subsequent decision of this Court in the case of S.S.A.S.

Arunachalam Chettiar Vs. A.M. Muhammad Salihu Marakkayar and Others, . Here also this Court said that under the provisions of Section 13(b)

of the CPC a foreign judgment was not a judgment on merit where the defendant though served had re-mained absent and a judgment against him

was pronounced ex parte.

14. In A.N. Abdul Rahman v. J.M. Mahomed Ali AIR 1928 Rang 319 an ex parte judgment of a for-eign court where the judgment had been

granted without taking the plaintiff''s evidence but only on his pleading sin view of the absence of the defendant to appear and defend the suit, was

considered as not a judgment on merit under Sec,13(b) of the Code of Civil Procedure. The court observed that a decision on merits involves the

application of the mind of the court to the truth or falsity of the plaintiff''s case; and therefore though a judgment passed after a judicial

consideration of the matter by taking evidence may be a decision on the merits even though passed ex parte, a decision passed without evidence of

any kind but passed only on the plaintiff''s pleadings cannot be held to be a decision on merits.

15. In the case Ephrayim H. Ephrayim Vs. Turner, Morrison and Co., the provision of Section 13(b) were once again considered. In that case a

foreign judgment was obtained from the court at Basra. The defendant had been served with the writ of summons. The defendant had given a

power of attorney to a pleader in Basra which power of attor-ney was in force at the time when the suit was heard. On behalf of the defendants

the pleader applied for an adjournment which was not granted. Thereafter, the court proceeded to go into the papers in the form of proceedings

and to pass a decree against the de-fendants. The court held that no defence had been raised but merely an adjournment was asked for which was

refused. The judgment which proceeded ex parte had proceeded on the evidence of the plaintiff and the papers in the form of suit. The court held that in such a case the judgment cannot be said to be one which is not on merits. Therefore, it held that the judgment though it was ex parte was on

merits and hence was not hit by Section 13(b).

16. While considering the similar issue, the Division Bench of this Court in R.M.V. Vellachi Achi Vs. R.M.A. Ramanathan Chettiar, has held as

follows:

No oral evidence has been let in by the parties since the appellant conceded before the trial court that the respondent is an Indian subject and

never resided in Singapore. The learned First Additional Subordinate Judge on this point found that the respondent did not submit to the

jurisdiction of the Singapore Courts and that the Singapore Court which passed the judgment Ex. A-17 against the respondent is not competent to

pass such a judgment and the judgment, therefore, was a nullity.

17. In this case, the respondent is able to establish that the order dated 2.4.1984 even assuming that the same is a decree or final order, has been

passed by the court having no competent jurisdiction to pronounce the same, and so it cannot be executed in view of Section 13(a) of the Code.

18. It is the admitted fact that the defendant is a permanent resident of Malaysia and not Singapore. On that basis the learned Counsel appearing

for the respondent has submitted that the order passed by the High Court of the Republic of Singapore dated 2.4.1984 cannot be construed as a

Court having Competent jurisdiction to pass that order against a resident of Malaysia. The learned Senior Counsel appearing for the petitioner has

submitted that the said submission is not correct, since the respondent went to To sustain the order and to avoid the hurdle u/s 13(a) of the Code,

the petitioners have to prove that the court which passed the order had competent jurisdiction. But, no material is available before the court to

come to the conclusion that even at the time of passing the order dated 2.4.1984 the defendant was a resident of Singapore. On the other hand,

the fact that the order was subsequently transferred to Ma-laysia, and the subsequent order obtained by the petitioners/plaintiffs in the High Court

of Malaysia at Kola Lampur on 18.4.1985 itself could how that the defendant was a resident of Malaysia. Moreover, the lower court, on the basis

of the documents held that the respondent is a permanent resident of Malaysia. According to Section 13(a) of the Code, foreign judgment, if not pronounced by a court of competent ju-risdiction cannot be conclusive and u/s 44-A(3) of the Code, the District Court shall refuse to execute the

allege decree.

19. In the light of these authorities and from the above discussion, it is clear that the order sought to be executed is not a decree as it is not a final

order. Even if it is taken as a final order, since the said order was not passed on merits, that to a court which is not having competent jurisdiction, it

cannot be executed as it is prohibited under Sections 13(a) and (b) of the Code.

20. The lower court has taken the declaration of the defendant as an insolvent before the Malaysian Court as one of the grounds to reject the

execution petition. Admittedly, the defendant has been adjudicated as insolvent by the High Court of Malaysia at Kuala Lampur in Bankruptcy No.

4303/92-86 dated 6.10.1986. Such finding of the lower court cannot be sustained in view of the decisions in Epoh, Indian Overseas Bank. Vs.

S.M. Mohamed Musthaba Sahib and Others, , in which the Division Bench has held as follows:

The decision of the Indian Courts are also in accordance with the view we have taken. The ear-lier case in In Re: Mogi and Co: The Yokohama

Specie Bank, Ltd., , where Rankin, J., held that the Presidency Towns Insolvency Act was a statutory of Indian Legislature and operated

wherever, but not else-where, that Legislature could given the law and that the Act did not operate as regards immovables belonging to an

insolvent in a for-eign country unless it was shown that the foreign law will give effect to the Act. To the same effect is the decision in In Re:

Sumermull Surana, , which followed In Re: Mogi and Co: The Yokohama Specie Bank, Ltd., , where it was held that the adjudication order did

not operate to vest the insolvent''s immovables property situated in a foreign State in the Official Assignee. The point has been elaborately dealt

with in Lakhpat Rai Sharm Vs. Atama Singh, Dealing with the effect of Section 44-A, Civil Proce-dure Code, the learned Judge observed that the

moment a certified copy of a decree of any of the superior courts of any reciprocating territory and a certificate from such superior court stating the

extent, if any to which the decree had been satisfied or adjusted were produced in a District Court in India, men the decree might be executed in

India as if it had been passed by the District Court. Regarding the effect of the adjudication in a for-eign country, after referring to the various

decisions, the learned Judge held that there was nothing in law to find that the adjudication order would affect the immovable property of the

insolvent in another country.

It is clear from the decisions referred to above that so far as immovable property is concerned, the adjudication of the debtor will have no effect,

and if the decree-holder satisfied the requirements of Section 44-A Civil Procedure. Code, execution can proceed.

21. The lower court rejected the case of the petitioners on the ground that as the order sought to be executed had been superseded as held in the

order dated 30.9.85 in E.P. No. 2 of 1985 which order had become final and so there is no order to execute as claimed by the petitioners. On

30.9.1985 the Advocate appeared for the petitioners made an endorsement in E.P. No. 2 of 1985 to the effect that ''since the decree under

execution has been superseded this E.P. may be dismissed as not pressed''. Having got the earlier execution petition dismissed on the ground that

the order dated 2.4.1984 was superseded, the question of executing the said order now would not arise.

22. The learned Senior Counsel appearing for the petitioners has submitted that the lower court is not correct in holding that the petitioners should

get permission from the Reserve Bank of India or the Central Government under the relevant provisions of the Foreign Exchange Regulation Act,

1973 to execute the decree. Referring to Section 47(3) of Foreign Exchange Regulation Act, the learned Senior Counsel has submitted that the

said provision refers only the legal proceedings being brought in India to recover any sum and not with respect to the proceedings relating to the

Foreign judgments or decrees. To appreciate the said contentions, it is necessary to extract the necessary provisions.

23. Section 9 of the said Act, as far as it is material for our purpose is as follows:

Restrictions on payments: (1) Save as may be provided in and in accordance with any general or special exemption from the provisions of this sub-

section which may be granted conditionally or unconditionally by the Reserve Bank, no person in, or resident in, India shall

(a) make any payment to or for the credit of any person resident outside India;

(b) receive, otherwise than through"" an authorised dealer, any payment by order or on behalf of any person resident outside India.

24. Section 47(3) of the said Act reads as follows:

47. (3) Neither the provisions of this Act nor any term (whether express or implied) contained in any contract that anything for which the

permission of the Central Government or the Reserve Bank is required by the said provisions shall not be done without that permission, shall

prevent legal proceedings being brought in India to recover any sum which, apart from the said provisions and any such term, would be due,

whether as debt, damages or otherwise, but-

(a) the said provisions shall apply to sums required to be paid by any judgment or order of any court as they apply in relation to other sums;

(b) no steps shall be taken for the purpose of en-forcing any judgment or order for the payment of any sum to while the said provisions apply

except as respects so much thereof as the Central Government or the Reserve Bank, as the case may be, may permit to be paid.

25. Section 9 of the Foreign Exchange Regulation Act totally prohibited making any payment to any person outside India without necessary

permission as contemplated under the provision. The submission of the learned senior counsel appearing for the petitioners that Section 47(3) of

the said Act will apply only to the decrees obtained in India and not to the decrees obtained outside India cannot be sustained. Section 47(3) of

the Act speaks about the decrees obtained in India and further proceedings regarding the recovery of the amount pursuant to the decree. Sub-

Sections (a) to (c) of Section 47 are exceptions to Section 47(3) of the Act and those provisions will apply to the decrees other than the decrees

obtained in India.

26. The Division Bench of this Court in R.M.S. Shanmugham Chettiar and Others Vs. Gian Cheng Kiet, , has held as follows:

The words ''any judgment or order for the payment of any sum'' have to be read together. The words for the payment of any sum'' qualify the

words ''any judgment or order''. The sub-section specifically says that no steps shall be taken for the purpose of enforcing such judgment, viz., a

judgment for the payment of any sum. Undoubtedly, the judgment in question is one for payment of money and the decree-holder is a resident out-

side India. No steps shall be taken for the purpose of enforcing this judgment without obtaining the necessary permission Of the A.B. Lobo Vs.

Fateh Khan, , one of us had to consider a similar question. it was held there that execution of a decree by a resident out-side India cannot be

levied before obtaining the necessary permission of the Reserve Bank of the Central Government.

27. Kailasam, J., in A.B. Lobo Vs. Fateh Khan, , has held as follows:

Sec:5(1), Clauses (a) and (c) of the Foreign Exchange Regulations Act (VII of 1947) are clear that no payment shall be made to or for the credit

of any person resident outside India or made to or for the credit of any person by order or on behalf of any person resident outside India, without

the permission from the Reserve Bank of India. The learned Counsel for the respondent submitted that the Foreign Exchange Regulation Act is

applicable only to payment of moneys outside India, and not for payment in India to a foreigner or a citizen. I am unable to accept the contention,

for Section 5 does not permit such interpretation. the learned Counsel also referred to the preamble of the Act, wherein it is provided that the aim

of the Act is for providing for the regulation of certain payments, dealings in foreign exchange and securities and the import and export of currency

and bullion. The first part of the preamble clearly shows that the object of the enactment was to regu-late payments also. It cannot be said that

Section 5 is beyond the scope of the preamble. I accept the objection raised by the judgment-debtor to the decree payment of the decree amount

to the decree-holder or his power of attorney agent. I allow the petition with costs.

28. Following the said decision, in R.M.S. Shanmugham Chettiar and Others Vs. Gian Cheng Kiet, , the Bombay High Court in Algemene Bank

Nederland NV Vs. Satish Dayalal Choksi, , has held as follows:

Under Section 47(3), therefore, a suit for the enforcement of a guarantee for which permission of the Reserve Bank Central Government would

have been required u/s 26(5) can be brought in India. Filing of a suit, therefore, on such a guar-antee cannot be said to be contrary to any law in

India because Section 47, Sub-section (3) expressly permits such legal proceedings in India. Such proceedings abroad cannot be said to be

violative of any law in India. However, no steps can be taken for the purpose of enforcing any judgment or order for the payment of any sum under such a guar-antee except in respect of so much thereof as the Central Government or the Reserve bank may permit to be paid. With the result that

before a, foreign decree passed on such a guarantee can be executed in India, permission of the Reserve Bank or the Central Government for

realising such sum is necessary.

Section 47(3)(b) says, ""No steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to which the said

provisions apply except as respects so much thereof as the Central Government or the Reserve Bank may permit to the paid. An application under

Order 21, Rule 22 is certainly a stop for the purpose of enforcing a judgment. Under Order 21, Rule 11 every application for execution of a

decree shall be in writing signed and verified by the applicant and shall contain, inter alia, various particular in-cluding the made in which the

assistance of the court is required. Under Order 21, Rule 22, inter alia, where an application for execution of a foreign decree is filed under the

provisions of Section 44-A, leave is obtained ended Order 21, Rule 22, it is necessary to to make an application under Order 21, Rule 11. These

are, therefore, clearly proceedings for the purpose of enforcing a foreign judgment. Assuch steps can be taken permission of the Re-j serve Bank

or the Central Government, as the case may be, is necessary u/s 47(3)(b).

29. In this case, admittedly, the petitioners have not obtained any permission either from the Central Government or from the Reserve Bank of

India. Hence, even on that ground also the petitioners cannot sustain the proceedings.

30. I do not find any merits in this revision. Accordingly, the same is dismissed. No costs.

