

(1936) 09 MAD CK 0041
In the Madras High Court

Thirunavakkaru Pandaram and Another	APPELLANT
Vs	
Parasurama Ayyar and Another	RESPONDENT

Date of Decision : 17-09-1936

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 44

Citation : AIR 1937 Mad 97 : 167 Ind. Cas. 13 : (1936) 44 LW 752

Hon'ble Judges : Cornish, J

Bench : Single Bench

Judgement

Cornish, J.—The appellants have appealed against the order of the lower Appellate Court which has held them liable to execution of a personal decree passed against them in a Cochin Court. The appellants were defendants Nos. 1 and 2, and were minors at the time when the suit was filed. The 3rd defendant was the executor appointed by their father's will and was also the testamentary guardian. The 3rd defendant was sued in that capacity. None of the defendants appeared in the suit. An ex parte decree was made, the Court appointing the Nazir as the guardian in the suit of the two minor defendants. In pursuance of Section 44, Civil Procedure Code, the decree was transmitted to the Tinnevely District Munsif's Court for execution, by attachment and sale of certain movable property of the first two defendants within the jurisdiction of the Tinnevely Court. Objection to execution was made by the appellants that they were not subject at the time of the suit to the jurisdiction of the Cochin Court and that, therefore, this ex parte decree was not executable against them in British India. Both the lower Courts have held that the defendants had submitted to the jurisdiction of the Cochin Court. The ground of this decision was that suits had previously been brought in Cochin by the 3rd defendant, executor, suing as guardian of the two minor defendants in respect of a business carried on in Cochin, and that moneys due to the estate had been recovered in those litigations. The lower Appellate Court seems to have thought that the circumstance that the minors had a business in Cochin would make them liable to the jurisdiction of that Cochin Court. No doubt any movable or immovable

property within the limits of the Cochin Court would be subject to that Court's jurisdiction: *Sirdar Gurdyal Singh v. Rajah of Faridkote* (1894) A.C. 670 : 10 T.L.R. 62 : 11 R. 340 : 22 C 222 : 21 I.A. 171 : 4 M.L.J. 267 : 6 Sar. 503 (P.C.) But the question here is whether a personal decree can be executed against the defendants in respect of their movable property outside the limits of the Cochin Court's jurisdiction.

2. In *Emanuel v. Symon* (1908) 1 K.B. 302 Buckley, L.J. stated the five cases in which in an action in personam the Courts will enforce the judgment of a foreign Court. They are: (1) where the defendant is a subject of the foreign country in which the 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. It is, I think, clear, upon the evidence that the defendants were neither subjects of the Cochin State nor residents therein at the time when the present suit was filed. In fact in the execution petition they are all described as residents of Travancore. There is some evidence that they had a residence in Travancore but the evidence goes to show that Tinnevely was the permanent place of residence of defendants Nos. 1 and 2. It is obvious that even if a business or a place of business ever existed in Cochin at the time of the suit, this circumstance would not make the defendants either subjects of or residents in the Cochin State. The only question, therefore, is whether there can be said to have been a submission by the defendants to the jurisdiction of the Cochin Court and can this submission be inferred from the fact that, litigation has been previously carried on in the Cochin Courts by the third defendant on behalf of the other defendants. The solution would seem to depend upon the proper application of the third of the cases stated in Buckley, L.J.'s judgment *supra*. The Lord Justice repeats what was said by Fry, J. in *Rousillon v. Rousillon* (1880) 14 Ch. D 351 : 49 L.J. Ch. 338 : 42 L.T. 679 : 28 W.R. 623 : 44 J.P. 663 Fry, J.'s statement in turn is founded upon what Blackburn, J. stated in delivering the judgment of the Court in *Schibsby v. Wastenholtz* (1871) 6 Q.B. 155 : 40 L.J.Q.B. 73 : 24 L.T. 93 : 19 W.R. 587 Page of (1871) 6 Q.B.--[Ed.] where it was said:

We think it clear, upon principle that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of the tribunal was not binding upon him.

3. This rule has been interpreted by a Bench of this High Court in an unreported case cited in *Asanalli Nagoor Meera and Others Vs. K.M. Mahadu Meera and Others*, and apparently approved there, as meaning that if a party in a suit in a foreign Court has on some previous occasion, invoked the jurisdiction of the foreign Court as plaintiff, he must by that previous conduct be bound to the jurisdiction in any subsequent litigation in that foreign Court to which he is made a party. In *Omer Hajee Ayoob Said v. Thirunavikkarasu, Pandaram* 71 M.L.J.

93 : 162 Ind. Cas. 904 : 43 L.W. 607 : (1936) M.W.N. 478 : 8 R.M. 1071 : AIR 1936 Mad. 552 : 59 M. 918 another Bench has expressed the opinion that if a person has filed suits in a Court having jurisdiction he cannot thereby by implication be taken to submit himself, to the jurisdiction of the same Court when that Court has no jurisdiction. But in the last case it was held that there was evidence that the defendant had submitted to the Court's jurisdiction. I think the difficulty disappears if it is borne in mind that the principle has reference to a suit upon a foreign judgment. There is not in the English Rules of Procedure any process corresponding to Section 41 of the Indian CPC enabling a foreign decree to be transmitted to an English Court for execution. A foreign judgment for liquidated sum of money such as was the judgment in the present case, creates a debt between the parties, and a party in whose favour judgment has been given may either sue in the English Court on the debt, the original cause of action, or he may sue upon the judgment. In such a suit the unsuccessful plaintiff in the foreign Court having chosen his forum is estopped in the event of his being sued upon that judgment in the English Court, as he might very well be in respect of a counter-claim from contending that the foreign Court had no jurisdiction. That, in my opinion, is the meaning of the passage from the judgment of Blackburn, J. *Schibsby v. Westenholz* (1871) 6 Q.B. 155 : 40 L.J.Q.B. 73 : 24 L.T. 93 : 19 W.R. 587 already quoted. Similarly, if the defendant in the foreign suit has appeared in the suit, thus recognising the jurisdiction of the Court, he cannot in a subsequent action upon the judgment be heard to say that the Court had no jurisdiction. As stated by Buckley, L.J, in *Harris v. Taylor* (1915) 2 K.B. 580 : 84 L.J.K.B. 1839 : 113 L.T. 221

the doctrine applicable to these cases is that if the defendant has placed himself in such a position that it has become his duty to obey the judgment of the foreign court, then the judgment is enforceable against him in this country,

4. And *Schibsby v. Westenholz* (1871) 6 Q.B. 155 : 40 L.J.Q.B. 73 : 24 L.T. 93 : 19 W.R. 587 is cited as the authority for that doctrine. The proposition that if a party has once appeared before a foreign Court in the character of the plaintiff, he is for ever afterwards to be regarded as having submitted to the jurisdiction of the foreign Court in any subsequent action, by any person or upon any cause of action, which may be brought against him, seems to me to go far beyond the principle stated by Blackburn, J., and to be entirely outside the doctrine upon which that principle is founded. In my judgment there was no submission by the defendants to the jurisdiction of the Cochin Court, and consequently the decree passed against them, in that suit *ex parte* is not executable against them in British India. The appeal, therefore, succeeds and is allowed with costs throughout.