
(1940) 09 PAT CK 0017
In the Patna High Court

Wazir Sahu and Another

APPELLANT

Vs

Munshi Das

RESPONDENT

Date of Decision : 03-09-1940

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13

Citation : AIR 1941 Patna 109

Hon'ble Judges : Meredith, J;Chatterji, J

Bench : Full Bench

Judgement

Meredith, J.—This is an appeal from a decision of the learned subordinate Judge at Patna, dated 11th March 1939, modifying a decision of the Munsif at Barh, dated 28th, April 1938. The learned Munsif dismissed the suit but without costs. The subordinate Judge upheld the dismissal and allowed costs to the defendant. Hence this appeal by the plaintiffs. The suit was for recovery of Rs. 1116-12-3 besides interest in pursuance of a judgment passed by the French Court at Chandernagar. The appellants Wazhr Sahu and Kara Sahu are members of a joint family and carry on business at Chandernagar. They are also partners with one Rameshwar Prasad in a firm Karu Sahu Rameshwar Prasad carrying on business at Barh in Patna District. The defendant Munshi Dass is described as the sole owner of a firm Munshi Dass Gopichand.

2. On 13th July 1933 the appellants brought a suit for damages in the French Court for breach of a contract made with the defendant for the supply at Chandernagar of castor oil cakes. The plaintiffs contended that they had advanced earnest money and gunny bags and they claimed Rs. 637 as damages for breach of contract, Rs. 72 for earnest money and Rs. 91 as price of the empty bags. On 10th March 1934, they obtained an ex parte decree in Chandernagar for Rs. 800 odd, besides costs and interest (judgment Ex. 3). On 26th May 1934, in accordance with the procedure of the French Courts the defendant was notified of this decree.

3. On 26th June 1934 the defendant filed what is known in French procedure as

an "opposition" a proceeding partaking of the nature of a rehearing application but apparently wider in scope, since upon such application the French Courts reconsider the case on the merits, and do not confine themselves to the question whether process had been properly served. On 23rd March 1935, the application in opposition was rejected, and the ex parte decree was confirmed: vide Ex. 3a.

4. The plaintiffs attempted without success to execute their decree in the Chandernagar Courts and subsequently in the Courts at Barh. The present suit was then filed at Barh on 20th April 1937, on the judgments of the Chandernagar Courts (vide para. 6 of the plaint), stating that the cause of action had arisen on 23rd March 1935, when the judgment was passed in the re-hearing case confirming the ex parte judgment, dated 16th March 1934. The suit was brought under the provisions of Section 13, Civil P.C. Section 13 is in the following terms:

13. A foreign judgment shall be conclusive as to 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 the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of British 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 in British India.

5. The defence was that the foreign judgment was not conclusive in the matter of the claim, because it had not been pronounced by the Court of competent jurisdiction; it had not been given on the merits of the case, and it had been obtained by fraud. Clauses (a), (b) and (e) of Section 13 were therefore applicable. The Courts below found that the judgments were not without jurisdiction, as the defendant had voluntarily submitted to the jurisdiction of the French Court by filing his application in opposition. They also found however that the judgments had not been given on the merits of the case, and that they had been obtained by fraud. Mr. Baldeva Sahay's first contention for the appellants is that there was no evidence to support the finding of fraud. The principal allegation of fraud made was that the proceedings had been taken behind the defendant's back; he had never appeared before the Chandernagar Courts; and the "opposition" had not been filed by him but by the plaintiffs themselves in his name.

6. On this point, however, the concurrent findings of the Courts below are that there was no fraud and that the defendant did appear before the French Courts. The lower appellate Court notwithstanding this finding proceeds to hold that the judgments of the French Court had been obtained by fraud. It is contended that the only materials put forward by the Court below in support of this finding are

based on mistakes of record. This contention seems to be correct. The passage in the judgment of the lower appellate Court relating to fraud is as follows:

Defendant alleges that no firm of the name of Wazir Sahu Kara Sahu exists in Chandernagar, but plaintiffs managed to get a decree in the name of the firm Wazir Sahu Karu Sahu and hence the decree must be considered to be a fraudulent one. In the judgment (Ex. 3) it has been held that no firm of the name of Wazir Sahu Karu Sahu exists in Chandernagar. Under the circumstances, it cannot but be held that the plaintiffs with some fraudulent object instituted a suit against the defendant after changing the name of their firm and managed to secure a fraudulent decree.

7. Even if the plaintiffs had misdescribed themselves in any such manner and the French Court had come to the finding in question, that would form no basis for a finding of fraud, but in fact the statements made by the Court below are quite incorrect. The plaintiffs did not sue in the French Court as a firm. Both in Ex. 3 and in Ex. 3a they are described merely as "Wazir Sahu and Karu Sahu, both sons of late Jhari Sahu, Teli by caste, merchants-residing in Chandernagar, plaintiffs" and it is noteworthy that the defendant is described as "Munshi Das, son of Lachhman Das, Teli by caste, merchant, owner of the firm known as Munshi Dass Gopichand, residing at Barh."

8. Both in the suit at Chandernagar and in the present suit at Barh the plaintiffs described themselves individually, and not as a firm. No question arose before the French Court as to the existence of any firm Wazir Sahu Karu. Sahu, and the Court there never held that no such firm existed in Chandernagar. The statement of the Court below,

under the circumstances it cannot but be held that plaintiffs with some fraudulent object instituted a suit against the defendant after changing; the name of their firm and managed to secure a fraudulent decree,

is entirely incorrect. As this is the only basis put forward for the finding of fraud, that finding is unsupported by any evidence and cannot be sustained. Mr. Baldeva Sahay next contends that the Courts below are wrong in holding that the judgments were not upon the merits. He contends that Ex. 3, though ex parte, was upon the merits, and that in any case Ex. 3a was certainly upon the merits.

9. The Courts below have held that Ex. 3 was not upon the merits, merely because it was ex parte. As for Ex. 3a, the lower appellate Court holds that it was not on the merits, because one of the points taken by the defendant in the rehearing case was that there was no firm of the name of Wazir Sahu Karu Sahu, and the plaintiffs instituted their suit in Chandernagar in the name of a fictitious firm, but the judgment of the rehearing case does not show that this point had been dealt with. It is enough to say that this point could not have been dealt with in the rehearing case, because no such point arose or could arise upon the pleadings. Even however had one of the issues not been dealt with, that in itself would not be enough to justify a finding that the decision was not upon the

merits. It is of course possible that the finding of the lower Appellate Court might be right though the reasons given for it are wrong, and the question whether these decisions were on the merits has to be considered.

10. On the question whether an ex parte judgment is or is not a judgment on the merits a large number of rulings have been cited. These rulings go back to the Privy Council case, *Keymer v. Visvanatham Reddi* AIR 1916 P.C. 121 and include *Mehr Singh v. Isher Singh* AIR 1932 Lah. 649, *Kulwant v. Dhan Raj Dutt* AIR 1935 Lah. 396, *Ishri Prasad v. Sri Ram* AIR All. 510, *Derby McIntyer & Co. Ltd. v. Mitter & Co.* (35) 62 Cal. 682 and *Mohamed Kasim v. Seenii Pakir* AIR 1927 Mad. 265. I do not consider it necessary to examine these rulings in detail, because it seems to me that however much they may appear to differ, a principle emerges from their perusal which reconciles them all.

11. This principle is very clearly stated by Jai Lal J., in *Mehr Singh v. Isher Singh* AIR 1932 Lah. 649 and it is this. An ex parte decision may or may not be on the merits. The mere fact of its being ex parte will not in itself justify a finding that the decision was not on merits. That is not the real test. The real test is not whether the decision was or was not ex parte, but whether it was merely formally passed, as a matter of course, or by way of penalty, or it was based upon a consideration of the truth or otherwise of the plaintiff's claim.

12. To my mind that is the true principle. *Keymer v. Visvanatham Reddi* AIR 1916 P.C. 121 is quite consistent with it, since that is a case of penalty judgment. *Mohamed Kasim v. Seenii Pakir* AIR 1927 Mad. 265 is consistent with it too, since that was a case of a formal decree based on no evidence. *Ishri Prasad Vs. Sri Ram*, is really based on this very principle. The question which we have to ask is therefore whether Ex. 3, the ex parte judgment, was passed merely for default or it is based on a consideration of the truth or otherwise of the claim. *Prima facie*, it may be presumed that a judgment of a French Court in an ex parte case will be based upon a consideration of the truth of the claim, because that is what the French CPC prescribed. Article 434 of the French Code runs as follows:

Si le demandeur ne se presente pas, le tribunal donnera défaut et renverra le defendeur de la demande. Si le defendeur ne comparait pas. il sera donne défaut, et les conclusions du demandeur seront adjugees si elles se trouvent justes et bien verifiees.

13. That is to say, it prescribes that if the defendant does not appear he will be treated as a defaulter, and the plaintiffs' claim will be decreed if found just and well proved. When we turn to Ex. 3 we find nothing to suggest that this article was not strictly complied with. On the contrary, it is stated in the judgment that the Court put the case "under deliberations," and later that the Court delivered the following judgment "after deliberations." Moreover, before the judgment the plaintiffs' pleader was heard on the case, and the letters of the defendant, which were said to form the basis of the contract, were considered; in the circumstances, in my view, the ex parte judgment in this case was clearly one

upon the merits.

14. With regard to Ex. 3a, the judgment upon the "opposition," the position is, in my view, equally clear. I have already indicated that the scope of the French "opposition" proceeding seems to be wider than that of a rehearing proceeding in British India.

15. The case in *Guiard v. De Clermont* (1914) 3 K.B. 145 shows that in such a proceeding the Court goes into the merits upon opposition. Indeed in that case the claim which had been decreed *ex parte* was dismissed upon the merits in the "opposition," though it is true that that order was again set aside by the appellate Court on the ground that the "opposition" was out of time (under Article 158, French Civil P.C.). It also appears from Ex. 3a that the merits of the claim were considered. The defendant Munshi Dass himself raised the issue of the merits in his application in opposition. It appears that he prayed *inter alia* that the *ex parte* judgment might be cancelled, and on the merits (the expression used in the quaintly worded French official translation into English is "in the main," but I understand that means on the merits) it might be declared that the case of Wazir Sahu and others was quite unacceptable, their claim "badly established," and the claim might be dismissed and the plaintiffs ordered to pay costs.

16. On this the Court framed the questions for its decision as "How the claim may be settled?" and "Who may be condemned to costs?" Having heard the pleaders and noted that the defendant's case was "denial of the debt and besides that specially he made no commercial transaction with the defendants (originally plaintiffs) and that lastly the procedure taken up appears to be materially (and) fraudulent," then the Court pronounced its decision in the main, which may be paraphrased as follows: That it appeared from the documents and especially from the correspondence of Munshi Dass that Munshi Dass had in bad faith taken up a plea that the jurisdiction lay in Patna by reason of a suit which he had filed then. That he was putting up this false plea left an unfavourable impression regarding his case. That he had given no explanation with regard to Rs. 72, earnest money, received by him, and that it appeared from the submitted documents of the case that he was "of evil intention and brought no legal justification to the fact of his present opposition." Hence it was held that the opposition was regular in form, but badly established in the basis, and accordingly the *ex parte* judgment was confirmed "to come out with its full and entire effect", consequently the President of the Republic of France authorises and orders to all Nazirs when legally asked for, to put the present judgment to its execution.

17. It is surely plain from all this that the Court considered the merits of the case and held that the defendant's version was false and that the claim was just. The decision was, therefore, one on merits. That disposes of the two points upon which the Courts below dismissed the suit. Mr. Mahabir Prasad for the respondent, however, raises the plea of jurisdiction in regard to which the Courts

below were against him.

18. The position with regard to jurisdiction in the case of foreign judgments has been clearly stated by the Privy Council in *Gurdial Singh v. Raja of Faridkot* (95) 22 Cal. 222.; 1941 P/15 & 16 A personal decree by the Courts of any foreign country against a person who was not a citizen of that country and was not resident in it will be regarded in the British Courts as an absolute nullity, unless there is something to show that the defendant had himself in some way voluntarily submitted to the jurisdiction of that foreign Court.

19. In the present case the defendant admittedly did not reside in Chandernagar, but in Barh. It is not contended that he had in any way submitted to the French Court at the time when the ex parte judgment (EX. 3) was passed against him. Exhibit 3, therefore, must be held to have been without jurisdiction unless the subsequent conduct of the defendant in filing the opposition could date back so as to validate the ex parte judgment. On this point it is argued with much force that nothing that happens subsequently can give any validity to something which is a complete nullity.

20. It has been laid down in *Sheo Tahal Ram Vs. Binaek Shukul*, that if the original judgment is a nullity, nothing subsequently done by the defendant can make it otherwise. This is the view taken also by the Madras Courts: *Narappa Naicken v. Govindaraja Naicken* AIR 1934 Mad. 434, *Narappa Naicken v. Rangasami Naicken* AIR 1933 Mad. 393 and *Sivaraman Chetti v. Iburam Saheb* (95) 18 Mad. 327. In my opinion this is correct, and if *Hari Singh v. Muhammad Said* AIR 1927 Lah. 200 and *Janki Sethani v. Laxmi Narayan* AIR 1926 Nag. 77 lay down anything to the contrary they must be taken to be incorrect. *Guiard v. De Clermont* (1914) 3 K.B. 145 does not really conflict with this view, since in that case it was the appellate judgment which was held to be with jurisdiction and that judgment was subsequent to the defendant's submission to the jurisdiction by filing his opposition.

21. The same, I think, applies to *Harris v. Taylor* (1915) 2 K.B. 580 for it appears that there was a submission to jurisdiction in the form of an application to the foreign Court to set aside an order for service out of jurisdiction, before the delivery of the judgment which was in question. The ex parte judgment was without jurisdiction, and the subsequent judgment (Ex. 3A) could not operate to validate anything which was nullity. That however does not end the matter. I have already indicated that the appellants based their case on the second judgment as well as on the first. The second judgment was clearly passed with jurisdiction, because there was a voluntary submission to jurisdiction by the defendant before it was passed. The defendant himself in fact asked for this decision. He was prepared to take the benefit of it if the decision was in his favour, and he must be prepared also to be bound by it if the decision is against him. Possibly, the second judgment could not be said to decree the claim, since it merely confirmed the original decree. Here, however, it is important to notice the wording of Section 13, which says that "a foreign judgment shall be conclusive as

to any matter thereby directly adjudicated upon between the same parties." The question, therefore, resolves itself into whether, though Ex. 3A did not perhaps in itself amount to a decree upon the claim, or validate the previous decree, it could nevertheless be said to be a direct adjudication of the question whether the plaintiffs were entitled to recover the amount previously decreed.

22. In my opinion, the answer to this question must be in the affirmative. If it is answered in the affirmative, then Ex. 3A is conclusive upon the question of the plaintiffs' right to recover the sum in question as claimed by them in the present suit. The answer is in the affirmative, since I have already held that Ex. 3A was an adjudication upon the merits of the claim itself. The defendant deliberately and voluntarily submitted the merits of the claim to the decision of the French Court. It was the defendant in the opposition proceeding who raised the issue of the merits. The Court framed an issue accordingly, and decided that issue against him. If Ex. 3A had not adjudicated upon the claim, the fact that it confirmed Ex. 3, which was a nullity, would be of no avail to the plaintiffs; but though it cannot give any force to Ex. 3, Ex. 3A can amount to an adjudication in itself, and in my view, the matter of the correctness of the claim was directly adjudicated upon in Ex. 3A after the defendant had had a hearing upon the merits. Mr. Mahabir Prasad further argues that Ex. 3A did not decide all the necessary issues, as it did not decide the question whether the contract was with the plaintiffs, or with some nonexistent firm Wazir Sahu Karu Sahu. Therefore, he argues, it cannot be conclusive on the correctness of the claim.

23. The answer to this is that no such issue arises. Both in Chandernagar and in Barh the plaintiffs sued not as a firm but as members of a joint family trading together. Had the present suit been brought upon the contract, it might perhaps have been open to the defendant to take a defence that his contract was not with the plaintiffs, but with an alleged firm in Chandernagar, Wazir Sahu Karu Sahu, which was actually non-existent, as no such firm was licensed. The present suit, however, was not on the contract but on the foreign judgment (and indeed at that time any claim upon the contract itself would have been barred by limitation). For that reason, questions regarding the validity of the contract and the rights of the plaintiffs to recover on a contract could not arise. The foreign judgment said that the plaintiffs were entitled to recover this sum. Section 13 says that with certain exceptions that judgment is conclusive on that point.

24. Once, therefore, it is held that none of the exceptions specified in the section are applicable, that ends the matter. The plaintiffs then have conclusively established that they are entitled to recover the sum in question, and the defendant cannot be allowed to go behind the conclusive foreign judgment and re-open the issues as to the merits. The fact that the foreign judgment may fail to show that every separate issue, such as the status of the contracting parties, or the measure of damages, was separately framed and decided, is irrelevant unless it can be shown that that failure brings the case within the purview of one of the exceptions to Section 13.

25. Here it is argued, though somewhat faintly, that exception (d) of Section 13 is applicable and the proceedings in the French Court were opposed to natural justice, as evidence was not properly taken and the documents were not legally proved. I confess to some difficulty in understanding what precisely is meant by the expression "natural justice," which the Legislature in its wisdom has seen fit to employ. No one however unless very insular in his ideas could imagine that it means British justice as opposed to French justice, or the justice of any other particular foreign country.

26. The fact therefore that the French Court may not have followed the procedure of British Courts and observed British Indian rules as to evidence, can afford no ground for finding that the proceedings were opposed to natural justice. In my view, it has not been established that any of the exceptions to Section 13 are applicable to the facts of this case. The French judgment is therefore conclusive. upon the fact that the plaintiffs are entitled to recover the amount claimed by them.

27. The appeal must therefore succeed, and I would set aside the decision of the lower appellate Court and decree the suit with costs throughout.

Chatterji J.

28. I agree that the appeal must be allowed. So far as the ex parte judgment, Ex. 3 is concerned, I entirely agree with my learned brother that it was given on the merits of the case, but was without jurisdiction. As regards the judgment, Ex. 3 (a), there can be no doubt that it was passed with jurisdiction because the defendant himself by filing an "opposition" invited the Court to give a decision. On the question whether that judgment was given on the merits, it may be said that by it there was no direct adjudication upon the plaintiffs' claim inasmuch as it did not give them any decree with respect to their claim. No doubt Section 13, Civil P.C., simply says that a foreign judgment shall be "conclusive evidence." But where foreign judgment is made the sole foundation of a suit, the relief asked for in the suit must be such as is awarded by the foreign judgment. In the present suit this condition is not satisfied by the judgment, Ex. 3 (a).

29. The true position however is this. By the ex parte judgment, Ex. 3 the defendant was made liable for the amount now claimed by the plaintiffs. The defendant then filed an "opposition" by which he wanted not merely to set aside the ex parte judgment but to re-open the whole case and obtained a dismissal of the suit--and this is the scope of an "opposition" under the French procedure. He thus took the chance of a decision on the merits of the case. "Whatever decision might be given on his "opposition" would certainly be binding on him. The Court after considering the facts of the case gave a decision adverse to him, by which the ex parte judgment was confirmed. The ex parte judgment therefore must be taken to be a part of the judgment Ex. 3 (a). According to this latter judgment the ex parte judgment was "to come out with its full and entire effect." No doubt the ex parte judgment by itself was without jurisdiction, but the judgment Ex. 3

(a) which confirmed it took its full force and effect. In support of this view reference may be made to *Guiard v. De Clermont* (1914) 3 K.B. 145.

30. The facts of that case were these: The plaintiff, who resided and carried on business in Paris, commenced proceedings in the Tribunal of Commerce of the Seine against the defendants, who were merchants carrying on business in London, for breach of contract. A notification of these proceedings was sent to the French Consul in London, who informed the defendants that certain legal documents had been received by him for them and requested them to take them up. The defendants, although they had reason to suspect to what the documents related, declined to take them. Thereafter, judgment by default for damages and costs was entered against the defendants in the tribunal of commerce, and intimation thereof was given in the same way as in connexion with the commencement of the proceedings, but the defendants took no notice thereof until the plaintiff obtained the issue of a *saisie-arret* or conditional order attaching any money belonging to them in the hands of the Credit Lyonnais Bank in Paris.

31. The defendants had a sum of 41 or 81 due to them in the bank at the time, and the bank intimated to them that the *saisie-arret* had been issued, whereupon the defendants filed, an "opposition" in the Tribunal of Commerce asking that the default judgment should be re-opened. The Tribunal of Commerce allowed the "opposition," heard the case on the merits, and gave judgment for the defendants with costs. The plaintiff appealed to the Court of appeal in Paris, and the Court held that the first judgment of the Tribunal of Commerce having been executed by the plaintiffs, the defendants' "opposition" was too late and was therefore not receivable, and accordingly the plaintiff's appeal was allowed, and the original judgment by default in favour of the plaintiff was restored. The plaintiff then sued on the judgment of the Court of appeal. It was held

that the judgment was enforceable inasmuch as (1) the defendants had voluntarily appeared in the French proceedings, and (2) the judgment took its whole force and effect from the decision of the Court of appeal and was not merely the original default judgment.

32. One of the contentions raised on behalf of the defendants in that case was that the judgment sued upon was a default judgment and nothing more; This contention was disposed of by Lawrence J., who decided the case in the following words:

Secondly they say that the judgment upon which they are now sued is a default judgment and nothing more. In a sense that is true, but I do not think it is true in the sense which enables them to treat it as a default judgment with regard to which they have not appeared, seeing that that judgment now takes its whole force and effect not from the original decision of the Tribunal of Commerce of the Seine of 3rd March 1907, but takes its force and validity from the judgment of the Court of appeal of 1909.

32. The same reasoning applies with equal force to the present case. No doubt in

that case the judgment sued upon was passed by the Court of appeal, but this fact does not make any difference in principle. In the present case the French Court hearing the "opposition" could set aside the ex parte judgment, Ex. 3 and at the same time dismiss the suit or could as well confirm the ex parte judgment. Its decision confirming the ex parte judgment stands on no different footing from the judgment of the Court of appeal restoring the default judgment of the first Court in the case in *Guiard v. De Clermont* (1914) 3 K.B. 145.

36. In this view, the plaintiffs in this suit are entitled to enforce the judgment, Ex. 3(a) as confirming the ex parte judgment Ex. 3.