

(1996) 12 MAD CK 0012
In the Madras High Court
Case No : C.R.P. No. 431 for 1992

Yazman Hume Quarries Sdn., Bhd.

APPELLANT

Vs

Chellappan and 7 others

RESPONDENT

Date of Decision : 24-12-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 6(2), Order 13 Rule 7(1), Order 13 Rule 8, 13, 13(a)(f)
Foreign Exchange Regulation Act, 1973 — Section 47, 47(3)(b)

Citation : (1996) 12 MAD CK 0012

Hon'ble Judges : S.S. Subramani, J

Bench : Single Bench

Advocate : Nageswaran, for the Appellant; S. Sampath Kumar, for the Respondent

Judgement

S.S. Subramani, J.—Petitioner herein obtained a decree for recovery of money in Suit No. C 23-721/86, on the file of High Court of

Malaya at Kuala Lumpur. The same was sought to be executed by filing an Execution Petition on the file of District Judge, Salem. Respondents

herein who are defendants in the suit, objected to the execution on the ground that the decree obtained from the foreign Court cannot be executed

against them, since it violates Sections 13 and 44-A of the Code of Civil Procedure.

2. The contention was accepted by the Court below which dismissed the Execution Petition. That order is under challenge before this Court.

3. Before going to the relevant case-law and provisions in the Code of Civil Procedure, let us consider what was the judgment and how a decree was passed.

4. Learned counsel for the petitioner placed before me a copy of the plaint and

how the judgment was pronounced. He also brought to my notice

the procedure that is followed in the High Court of Malaya, in regard to money claims as well as in cases where defendant remained ex parte.

5. The suit was filed on 25-3-1986 for recovery of a sum of 2,32,101-16 with interest at 18% per annum from the date of filing of the suit till date

of realisation and costs Learned counsel also placed before me an affidavit stated to have been filed by petitioner before the High Court of Malaya

wherein the plaintiff-Quarries have said that summons had been served on the defendants and they failed to appear. The Certificate of non-

appearance before that Court has been filed in this case. It is dated 27-11-1986. It reads thus:-

Affidavit of service of the Writ of Summons on the above named 1st and 2nd defendant at No. 88, Kampong Muniandy, 61/2 Miles Klang Road,

Kuala Lumpur and on the 3rd defendant at No. 128, 61/2 Miles Klang Road, Kuala Lumpur both on Tuesday the 18th day of November, 1986

at 12.00 p.m. and 12.02 p.m. respectively and both having been filed this 26th day of November, 1986.

It is hereby certified that no appearance has been entered for the said 1st, 2nd and 3rd defendants. Dated the 27th day of November, 1986. . .

On the same date, a judgment in default was also pronounced. The same reads thus:-

No appearance having been entered by the 1st, 2nd and 3rd defendants herein it is this day adjudged that the above named 1st, 2nd and 3rd

defendants do pay the plaintiff the sum of 2,32,101-16 together with interest thereon at the rate of 8% per annum from the 25th day of March,

1986 to the date of realisation and costs of 225-00. Dated the 27th day of November, 1986"".

6. Order 13 Rule 1(1) of the Rules of the High Court 1980(Malaya at Kuala Lumpur) Says:

13(1) (1) where a writ is endorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to enter an

appearance, the plaintiff may, after the time limited for appearing, enter final judgment against that defendant for a sum not exceeding that claimed

by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any"".

Order 13, Rule 6(1) says:

Where a writ is endorsed with a claim of a description not mentioned in rules 1 to 4, then, if any defendant fails to enter an appearance, the

plaintiff may, after the time: ""limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the

statement of claim was not endorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that

defendant had entered an appearance.

Order 13, Rule 6 (2) says thus:-

Where a writ issued against a defendant is endorsed as aforesaid, but by reason of the, defendant's satisfying the claim or complying with the

demands thereof or any other like reason it has become unnecessary for the plaintiff to proceed with the action, then if the defendant fails to enter

an appearance, the plaintiff may, after the time limited for appearing, enter judgment with the leave of the Court against the defendant for costs"".

Order 13, Rule 7 (1) is more important. It reads thus:-

7 (1) Judgment shall not be entered against a defendant under this order:

unless-----

a) the plaintiff produces a certificate of non-appearance in Form 17; and

b) either an affidavit is filed by or on behalf of the plaintiff proving due service of the writ or notice of the writ on the defendant, or the plaintiff

produces the writ indorsed by the defendant's solicitor with a statement that he accepts service of the writ on the defendant's behalf"".

It is on the basis of Rule 13 (7) (1) of the Order (extracted above), the affidavit for nonappearance is filed, and thereafter the judgment in default is

given. Now, the question that has to be considered is, whether the said judgment can be executed in India.

7. Section 13 of the CPC deals with foreign judgments and how far it is non-conclusive. It says thus:-

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same 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) to(e) omitted.

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

Regarding the executability of a foreign decree, the relevant provision of the Code is S.44-A. The relevant portion of S..44-A, The relevant

portion of S.44-A, C.P.C, reads thus:-

44-A, Execution of decrees passed by Courts in reciprocating 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) Omitted

(3) The provisions of Section 47shall 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 2 of Sec.44-Asays thus:-

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"".

So, a combined reading of Section 13and Section 44-A makes it clear that a decree of a reciprocating territory can be executed through a District

Court, and the judgment-debtor is entitled to contest the Execution Petition if it can be shown that the judgment is not conclusive, i.e., it comes

within any of the Exception under Sec. 13(a) to (f).

8. In this case, the contention of the respondents is that the judgment is not on merits and is one taken for default. If a judgment is given for non-

appearance and no evidence is taken, the same cannot be executed in India] As against the said contention, learned counsel; for the decree holder

submitted that if opportunity is given to the defendants to appear and they have failed to appear, then, the judgment has to be treated on merits and

the remedy of the defendant is only to have the same set aside under order 13,

Rule 8 of the procedure in the High Court of Malaya. According to learned counsel, the defendants having failed to adopt that procedure, and in spite of opportunity having been given, and having failed to avail the same, they cannot contend that the judgment is not in merits. Which of these contentions is to be accepted, is to be considered.

9. In one of the earlier decisions of the Privy Council reported in AIR 1916 P.C. 121 : 21 CWN 358 (Privy Council) it was held that any judgment of England obtained after the defence was struck off for default for not answering interrogatories, and the suit had thus become an undefended one, was not a judgment on merits, and suit founded on it in this country must fail. In fact, that decision was rendered in an appeal preferred against a decision of this Court reported in ILR 39 Madras 95 (Viswanathan v. Keymer). Their Lordships of the Privy Council held thus:-

The question as to whether that defence is well established depends upon considering what are the terms of Section 13 of the Code of Civil

Procedure, and what is the meaning of the phrase there contained as to a judgment given "on the merits of the case". Section 13 begins by a

general provision that foreign judgments shall be conclusive as between parties to the litigation. It is in these terms: "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". But to that general provision there are certain definite exceptions, and one of them is as follows: "Except where such

judgment has not been given on the merits of the case".

The whole question in the present appeal is, whether, in the circumstances narrated, judgment:

was given on the 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 has entered into the arrangement:

secondly, a denial that the arrangement had been made: and, thirdly, 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 over 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 decisions 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 subsection 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 Lordship's 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".

10. Thereafter, another decision reported in AIR 1922 P.C. 120 16 L.W. 33 (Oppenheim & Co. v. Md.Haneed) also interpreted the principle in the same way. In that case, a suit was filed in Madras on an ex parte judgment obtained in England. The suit was filed here on the original cause of action as well as on the Award. The main point decided in that case was, that the Award passed in accordance with English law cannot be impugned before this Court on any ground of irregularity, but it was taken for granted in it that the suit so far as it was based on English judgment that followed the Award, cannot be maintained as it was a judgment by default.

11. After the decision reported in AIR 1922 P.C. 120:16 L.W. 33 (supra), a Bench of this Court, in the decision reported in AIR 1925 Madras

155= A. Janoo Hassan Sait by his Authorised Agent, Dada Beg Mahomed Vs. M.S.N. Mahamad Ohuthu, held that even though a judgment was passed in an ex parte decree proceedings, it was on merits and, therefore, held that the suit is maintainable. That was Ceylon case, entitling the Court to give a decree without any trial when the defendant after being served, does not appear, though it gives power to the Judge to take evidence, if there was nothing before Court to show that any evidence was taken. The decision of the Privy Council reported in AIR 1916 P.C.

121=5 L.W.342 (supra) was sought to be distinguished in AIR 1925 Madras 155=20 L.W. 677 (supra), by stating that in a case where the

defendant filed his defence which was subsequently struck off, is entirely different from a case where the defendant does not appear and no

defence was raised. In the opinion of the Bench in Jannoo Hassan's case (supra) a presumption was drawn that by absenting himself, the

defendant is admitting the claim. The distinction that was sought to be made in Jannoo Hassan's case (supra) was doubted, and it resulted in a

reference to a Full Bench, and the decision of the Full Bench is reported in AIR 1927 Madras 265=25 L.W. 307 (R.E. Mahomed Kassim & Co.

v. Seeni Pakir). Courts- Trotter, C.J., expressing the opinion of the Full Bench, said thus:-

. . .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 Janoo Hassan v. Mahomed Ohuthu and I think that the case must

be regarded as no longer law".

In the concurring judgment, Krishnan, J. said (at page 270 of the Reports) thus:-

. . .I have no doubt whatever that under S.13(b) of the CPC a decree obtained on default of appearance of the defendant without any trial on

evidence is a case where the judgment must be held not to have been given on the merits of the case.

The third Judge of the Full Bench also agreed with the opinion of the other two learned Judges.

12. In AIR 1946 Madras 448=59 L.W. 315 (Nemichand v. Y. V.Rao), the learned Judge was considering a decree obtained in the State of

Mysore which was then a foreign country. It was held in that case thus:

A suit was instituted in the State of Mysore. The defendant submitted to the jurisdiction of the Court by filing the written statement. On the day of

hearing, however, the plaintiff appeared but the defendant remained absent. The Court thereupon, without hearing any evidence, passed a decree

in favour of the plaintiff. The plaintiff tried to execute the decree in British India:

Held that as the decree was passed without any evidence being given it was not given on merit and was not valid.

Emphasis supplied

13. In AIR 1952 Calcutta 508 (Indian & General Investment Trust Ltd. v. Sri Ramchandra Mardaraja Deo Raja of Khalikote), in para 41 of the judgment (at page 524 of the Reports,) a learned Judge of the Calcutta High Court held thus:-

. . .A decision is said to be not on the merits when the Court does not go into the case as a whole but decides it upon a point which cannot be said to arise on the merit. Thus where the defence was struck out because an order for interrogatories was not complied with, and an action decreed, it was held not to be on the merits...

14. In AIR 1973 Madras 141 (R. M.V. Vellachi Achi v. R.M.A. Ramanathan Chettiar), their Lordships held that a foreign decree passed solely due to default of appearance without taking any evidence in proof of the claim will not be considered one as passed on merits.

15. In AIR 1990 Bombay 170 (Algemene Bank Nederland NV v. Satish Dayalal Choksi), Mrs. Sujata Manohar, J., as the Honourable Judge

then was, had occasion to consider a similar question. In paragraph 20 of the judgment, the learned Judge, after stating the facts of the case,

considered the decision reported in AIR 1927 Madras 265 (FB) (supra) and followed this Court's decision. In the case before the Bombay High

Court, the suit was a summary suit where an unconditional leave was granted to the defendant. Thereafter, he filed his defence. But, at the final

hearing, he failed to appear. Hence, an ex parte decree was pronounced in favour of the plaintiff-Bank. In that case, the judgment read thus:-

. . .the defendant having failed to appear and upon proof of the plaintiff's claim," judgment is entered for the plaintiff.

It was that case which the learned Judge interpreted as an ex parte judgment not on merits. We will have occasion to consider this judgment once

again in a later portion of this order.

16. In AIR 1991 Calcutta 335 (Middle East Bank Ltd., v. Rajendra Singh Stethia), a learned Judge of that High Court held thus (in paragraph

53):-

The ex parte decree may be on merits, that is, a decree passed in absence of the defendant but nevertheless the Court had gone through the case

made out by the plaintiff and duly considered the same or had taken evidence of the witnesses put up by the plaintiff. Again ex parte decree may

be passed in a summary manner under certain special procedure without going into the merits of the case and without taking any evidence. Both

types of ex parte decree are executable in domestic forum in which it has been passed. But if such decree is a foreign decree passed in a

reciprocating territory, then such decree is executable in this Court, if it is conclusive u/s 13 of the Code"".

In the above case, the learned Judge, after considering decisions of various High Courts, held as follows in paragraph 51:-

The preponderance of judicial opinion as deduced from the decisions referred to above appears to be that a judgment or decree: passed by a

Court under a summary procedure, where the Court has no occasion to determine the truth or falsity of contentions raised on or which may be

raised and a judgment will be entered in favour of the plaintiff merely because the defendant failed to appear or to apply for leave to defend or if

applied, the leave was refused is a decree or judgment which cannot be held to have been given on merits"".

Thereafter, the learned Judge considered Order 14 of Rules of Supreme Court of England. In paragraph 52 of the judgment, learned Judge held as

follows:-

In a procedure similar to the procedure under Order 14 of Rules of Supreme Court of England, the Court has only to be satisfied before entering a

judgment in favour of the plaintiff that the defendant must have entered an appearance, the statement of claim must have been served on the

defendant, and on affidavit in support of the application by summons verifying the facts on which the claim to which the application relates is based

and stating that in the deponents' belief there is no defence to that claim. It cannot, however, be said that such a judgment and decree is not

executable, but such judgment has not been given on the merits of the case, and as such is not conclusive foreign judgment within the meaning of

Section 13 of the Code of Civil Procedure.

17. In AIR 1943 Punjab & Haryana 92 (Gurdas Mann v. Mohinder Singh Brar), the Court said that if a judgment is given on the basis of

pleadings of plaintiff alone, and merely because defendant chose not to appear, the Court proceeded to pass a decree ex parte, such a decree can

be held only as one for default and not on merits.

18. In a very recent decision of our High Court reported in 1996 Ali India High Court Cases 1225=1995-1-L.W.53 (Dr. David

C.Arumainayagam v. Dr.Geetha C.Arumai nayagam), Jayasimha Babu J. has considered the correctness of a decree of divorce passed by a

foreign Court. In para 16 of the judgment (at page 1229) it was held thus:-

Clause (b) of Section 13 states that if a foreign judgment has not been given on the merits of the case, the Courts in this country will not recognise

such judgment. This clause, should be interpreted to mean (a) that the decision of the foreign Court should be on a ground available under the law

under which the parties are married, and (b) that the decision should be a result of the contest between the parties. the latter requirement is fulfilled

only when the respondent is duly served and voluntarily and unconditionally submits himself/herself to the jurisdiction of the Court and contests the

claim or agrees in the passing of the decree with or without appearance. A mere filing of the reply in the claim under protest and without submitting

to the jurisdiction of the Court, or an appearance in the Court either in person or through a representative for objecting to the jurisdiction of the

Court, should not be considered as a decision on the merits of the case. In this respect the general rules of the acquiescence to the jurisdiction of

the Court which may be valid in other matters and areas should be ignored and deemed inappropriate.

Emphasis supplied

19. In view of the above settled position of law, let us consider how far the contention of the learned counsel for the petitioner could be sustained. I

have already extracted the judgment passed by the foreign court., The very heading of the judgment is "JUDGMENT IN DEFAULT. If further

says, "No appearance having been entered by the 1st, 2nd and 3rd defendants herein IT IS THIS DAY ADJUDGED. . ." From a reading of this,

it is clear that the judgment was passed only due to the non-appearance of the defendants, and no evidence was taken. In this connection, the

Certificate under the Reciprocal Enforcement of Judgment Act No. 99 may also be considered. Copy of the Certificate was placed before me by

learned counsel for the petitioner. It is in the nature of an affidavit by Registrar of the High Court of Malaya. There also, it is made clear that the

judgment was obtained against the defendants due to non-appearance to the

Writ of Summons which was duly served on them.

20. From the above facts and materials placed before me, it can never be doubted that the money decree was passed against the defendants only

because they did not appear before that Court. No evidence was taken, and the claim was also not proved. Under the above circumstances, the

respondents herein are justified in challenging the execution of that decree by the concerned District Court in India. If the Court is satisfied that

there is no adjudication of the rights of parties, and the judgment was not rendered on merits of the case, it has to refuse to execute the same. The

contention of the learned counsel for the petitioner that the respondent did not choose to have the decree set aside in spite of opportunity having

been given to them is, therefore, without any merits.

21. In this connection, it may also be noted that the decree cannot be executed since it violates Section 13(f) of the Code of Civil Procedure. As

per the judgment, the decree-holder, petitioner herein, is entitled to recover a sum of Rs. 2,32,101.16 p with interest thereon at 8% per annum in

additions to the cost. To recover that amount on the basis of the foreign decree, provisions of Foreign Exchange Regulation Act will have to be

complied with. u/s 47 of the Foreign Exchange Regulation Act 1973, even in respect of enforcing a judgment or order for payment of any sum,

permission of the Reserve Bank of India or Central Government is required, and, only on getting such permission, the decree-holder is entitled to

execute the judgment or order and that too for the sum for which sanction or permission is granted by Reserve Bank of India or Central

Government. Section 47 (3) (b) & (c) of FERA Act, 1973 provides for the same. In this case, no such permission has been obtained. The effect

will be that if the judgment is allowed to be executed, the same will amount to sustaining a claim founded on a breach of law enforced in India. This

is also a ground which enables the Court to refuse execution. The decision reported in AIR 1990 Bombay 170 (supra) has also uphold such

objection, and the same is clear from paragraph 332 of that judgment. So, before executing the foreign decree, permission from the Reserve Bank

of India or Central Government will have to be obtained.

22. In the decision reported in 1996 - 1. L.W 721, Mrs. Shoba Viswanathan v. D.B. Kingslay, the question regarding violation of Foreign

Exchange Regulation Act was considered and it was held that the violation of provisions of the said Act will affect the economy of the nation. It

was further held that the provisions contained in that Act are enacted to safeguard the economy of India, and any violation of the same will be

opposed to public policy. In the result, confirming the decision of the Executing Court, the Civil Revision Petition is dismissed. There will be no

order as to costs.