NAGPUR HIGH COURT

Ramkisan Janakilal

Vs

Harmukharai Lachminarayan

Second Appeal No. 716 of 1946. decided on 14.4.1954

(R. Kaushalendra Rao and Bhutt, JJ.)

11.04.1954. 14.04.1954

JUDGMENT

R. Kaushalendra Rao, J.

1. The principal question in this appeal is about the effect of an ex parte foreign decree.

2. The appeal is by the plaintiffs. They instituted the suit claiming damages from the respondent (defendant), who was a resident of Indore at the relevant time, for breach of a contract. According to the plaintiffs, the defendant offered to sell gunny bags to the plaintiffs. They accepted the offer. But the defendant failed to deliver the bags as agreed. So, the plaintiffs claimed damages for breach of contract.

3. The case of the defendant was that it was the plaintiffs who offered to purchase gunny bags from him and that he accepted the offer at Khandwa for delivery of the bags at Indore. The defendant denied that there was any breach of contract on his part in not giving delivery of the bags to the plaintiffs, and asserted that it was the plaintiffs who were responsible for the breach. The defendant further pleaded that he had filed a suit against the plaintiffs, being civil suit No.57 of 1944 in the Court of the Munsiff at Indore, for recovery of damages resulting from the breach of the contract and obtained an ex parte decree therein on merits against them. The plaintiffs applied to the Indore Court for setting aside the ex parte decree but failed. They also preferred an appeal against the order refusing to set aside the ex parte decree but it was dismissed. The defendant asserted that the decree of the Indore Court was conclusive between the parties and consequently the suit was not maintainable.

4. The learned trial Judge upheld the plea of the defendant that the decree of the Indore Court was binding on the plaintiffs and that their suit was not maintainable. He accordingly dismissed the suit without trying it on merits. The decision was maintained on appeal to the Additional District Judge, Khandwa.

5. In the present case it is not disputed that the plaintiffs were not residents of the Indore State. Nor is it suggested that they had any moveable or immovable property within the territorial

jurisdiction of the Court at Indore. It is true that the contract in question was entered into at Indore. But, as is evident from the leading decision on the question of jurisdiction of a foreign Court, the fact that the contract was made at Indore was not sufficient to clothe that Court with jurisdiction in an action 'in personam'. In - *'Gurdyal Singh v. Raja of Faridkot[1]',* their Lordships of Privy Council observed:

> "All jurisdiction is properly territorial, and 'extra territorium jus dicenti, impune non paretur'. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory, while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory; and it may be exercised over movables within the territory; and, in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (e.g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any Foreign Court ought to recognize against foreigners who owe no allegiance or obedience to the power which so legislates.
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> In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced 'in absentem' by a Foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by International Law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except (when authorized by special local legislation) in the country of the 'forum' by which it was pronounced."

(p.238).
So, the short point for consideration is whether the plaintiffs in the present case can be said to have submitted to the jurisdiction of the Court at Indore.

6. It was found that the plaintiffs had not appeared in the Court at Indore prior to the passing of the decree. It is admitted that they had authorized a person to attend on their behalf, but he too did not, in fact, put in an appearance on behalf of the plaintiffs. It is not disputed that they unsuccessfully applied to get the ex parte decree set aside on the ground that the agent had been prevented by illness from appearing. An appeal against the order refusing to set aside the decree also failed. The learned appeal Judge regarded the subsequent conduct of the present plaintiffs as indicative of their intention to submit to the jurisdiction of the Court at Indore when the suit was pending. Because the plaintiffs had the intention to submit to jurisdiction the learned Judge held that they had in fact, submitted to the foreign jurisdiction. Reliance was placed on the observation of Niamatullah, J., in - *'Sheo Tahal Ram v. Binaek Shukul[2]',* to the effect that submission to jurisdiction need not be by "some overt act in Court". The observation of Niamatullah, J., was obiter because the learned Judge did not hold in that case that the defendant had submitted to the jurisdiction of the foreign court by
reason of any intention on his part to submit to that jurisdiction. It is difficult to subscribe to the view that mere intention on the part of the defendant to submit to the jurisdiction of the foreign

Court is tantamount to submission to that jurisdiction. The law does not normally take note of intention which is not translated into action. Actually both Sulaiman, Ag. C.J., (p.692) and Niamatullah, J., (p.694) acted on the rule that in order that a foreign judgment or decree should be binding on the defendant, the submission to jurisdiction must be before the passing of the judgment or the decree.

7. There is ample support for the proposition that submission to jurisdiction must be in the proceeding prior to the passing of the decree in question and not subsequent to it: see - '*Sivaraman Chetti v. Iburam Saheb*[3]*,* - *'Narappa v. Rangasami*[4]*',* - *'Narappa v. Govindaraja*[5]*',* and - *'Wazir Sahu v. Munshi Das*[6]*',* To quote Jackson,J., in - *'Narappa v. Govindaraja, (supra)*:

> "The law is correctly stated in AIR 1931 Allahabad 689 and Dicey as quoted fully in this case seems to be correctly understood at page 753, only we should excise 'probably' (two lines from bottom). To give jurisdiction and therefore validity to the decree there must be submission before judgment is pronounced. Submission afterwards unless, as in our case, supporting an inference that there was submission before, is only effective as creating a sort of estoppel such as that in - *'Malhar Narayan Prabhu v. Vishnu Sonu*[7]*',* There the judgment-debtor took no objection to the execution, and allowed it to proceed to sale, and the Court held that to allow him subsequently to protest would seem very strange either in law or in equity." (p.434).

If a decree as originally passed was a nullity for want of jurisdiction, an unsuccessful attempt for setting aside such a decree leaves it where it was. As observed by Jackson, J. –

> "It is not as though after refusing to set aside the ex parte decree the Court proceeded to pass a fresh decree."

(p.435).

8. Reference may be made to a Canadian decision reported in - *'Esdale v. Bank of Ottawa*[8]*,* There the Court ruled that there was no voluntary submission so as to make a foreign judgment binding when the defendant had taken no part in the foreign proceedings merely by reason of his subsequent action to get the default judgment annulled.

9. The respondent relied upon - *'Mt Janki Sethani v. Laxmi Narayan*[9]*,* In that case the suit was brought on the basis of an ex parte decree passed against the defendant by the civil Court in Bhopal State. The British Indian Court held that the appearance of the defendant for the purpose of obtaining an adjournment orher application for setting aside the ex parte decree, which was disallowed and an appeal against the order failed, amounted to submission to the jurisdiction of the Bhopal Court. The learned Additional Judicial Commissioner relied upon the decision in - '*Harris v. Taylor*'[10]*,* which has been subjected to much criticism. In a recent case - 'Dulles' Settlement (No.2), In re', 1951-1 Ch 842 Lord Justice Denning, with whom Evershed, M.R., agreed, observed at page 851:

> "'*Harris v. Taylor* ' is an authority on 'res judicata' in that the defendant was not allowed in

> our courts to contest the service on him out of Manx Jurisdiction; because that was a point that he had raised unsuccessfully in the Manx court, and he had not appealed against it. To that extent he had submitted to the jurisdiction of the Manx court and was not allowed to go back on it. But the case is no authority on what constitutes a submission to jurisdiction generally."

It may be observed that in '*Mt. Janki Sethani v. Seth Laxmi Narayan* ' (supra) there was, apart from an attempt to set aside the ex parte decree, also appearance for the purpose of obtaining an adjournment. That was presumably before the passing of the decree without raising any objection as to jurisdiction. To that extent the resulting decision is distinguishable. But the decision cannot be regarded as correct in so far as it was based on the subsequent action of the defendant to get the ex parte decree set aside.

10. It is necessary to refer to some more decisions which were cited at the bar. They are - '*Oomer Hajee Ayoob Sait v. Thirunavukkarasu Pandaram*[11]', - '*Subramania v. Annaswami*[12]', - '*Hari Singh v. Muhammad Said*[13], and - '*Guiard v. De Clermont and Dormer*[14]', In the two Madras cases, there were acts during the trial prior to the passing of the decree on the part of the defendant which were construed as amounting to submission to the jurisdiction of the foreign Court. The decisions did not proceed on the basis that any act subsequent to the decree amounted to submission to the jurisdiction of the foreign Court. In '*Hari Singh v. Muhammad Said* ' (supra) an application was made to set aside the ex parte decree in question and on that application failing an appeal was preferred to the Raja of the Poonch State. In that appeal the defendant succeeded. Later on, however, in consequence of a review application the success obtained by the defendant on appeal to the Raja was set at naught and the defendant's position became worse than it would have been, had they not taken any steps to set aside the 'ex parte' decree. The appeal to the Raja was regarded as amounting to a submission to the jurisdiction of the Poonch courts. The Court, therefore, held that the decree was binding with the observation that the result was curious (p.92). The case was held to be governed by the principle of the decision in - *Guiard v. De Clermont and Donner (supra)*'. The facts of that case are, however, distinguishable from the present case. There a judgment on default for damages and costs was entered against the defendants by the Tribunal of Commerce of the Seine in France. On the basis of that judgment a conditional order of attachment against the moneys belonging to the defendants in a bank at Paris was made. Thereupon, the defendants filed an "opposition" in the Tribunal of Commerce asking the default
judgment to be re-opened. The tribunal allowed the "opposition", heard the case on merits and gave judgment in favour of the defendants with costs. The plaintiff appealed to the Court of Appeal in Paris and that Court held that the first judgment of the tribunal having been executed by the plaintiff the defendants' "opposition" was too late and was, therefore, not admissible. Accordingly, the appeal was allowed. The plaintiff thereupon sued in England on the judgment of the French Court of Appeal restoring the first judgment of the tribunal. The English Court held that the judgment was enforceable as the defendants had voluntarily appeared in the French proceedings, and that it took its whole force and effect from the decision of the Court of Appeal and was not merely the original default judgment. That decision was given after the defendants submitted to the jurisdiction and invoked a decision on the merits of the case. The principle was applied to similar facts in AIR 1941 Patna 109. But, the Patna High Court did not doubt the proposition that submission to jurisdiction to render a foreign decree binding must be prior to the

passing of it. *Hari Singh v. Muhammad Said* and *Mt. Janki Sethani v. Seth Laxmi Narayan (supra),* were taken to be incorrect in so far as they laid down anything to the contrary. The former was also doubted by the Madras High Court in *Narappa v. Govindaraja (supra)*.

11. The decree of the Court at Indore cannot be said to be with jurisdiction and binding on the plaintiffs. Initially, the Court had no jurisdiction over the non-resident plaintiffs. They did not submit to its jurisdiction prior to the passing of the decree. The fact that the plaintiffs instructed some one on their behalf to appear in the Court at Indore did not amount to submission to jurisdiction. In 18 Mad 327, the defendant instructed his counsel to appear on his behalf in the foreign Court and the counsel only appeared to say that he had no instructions. Thereupon an 'ex parte' decree was passed which was held to be a nullity, notwithstanding the unsuccessful application by the defendant to get the decree set aside. The plaintiffs in the present case are in a stronger position than the defendant in *Sivaraman Chetti v. Iburam Saheb (supra)*, because none appeared at all on their behalf in the Court at Indore prior to the passing of the decree. Subsequent unsuccessful action to get the 'ex parte' decree set aside cannot be considered to have rendered it valid.

12. We do not consider that the effect of the decree of the Court at Indore is in any way different because of Article 261 of the Constitution. The fact that Indore is a part of the territory of India from 26-1-1950 does not mean that the legal character of the decree passed by a Indore Court prior to that date is changed. The decree in question was, as held by us, by a Court which was without jurisdiction. The Constitution cannot be said to have retrospectively clothed that Court with jurisdiction. The normal rule that a statute, in the absence of words to that effect or necessary implication, is not retrospective equally applies to the construction of the Constitution: - '*Janardhan Reddy v. The State of Hyderabad*'[15], The provisions in the Constitution cannot be held applicable to pending proceedings: - '*Keshavan Madhavan Menon v. State of Bombay*[16]',

13. In - *'Bhagwan v. Rajaram*[17]', the Court had to consider the question whether a decree passed by a Court against a person who had submitted to its jurisdiction could
ever become enforceable by reason of any subsequent event. A decree passed by the Court at Sholapur against a permanent resident of Akalkot State, then a foreigner who did not submit to the jurisdiction of the Court, was held executable by the Akalkot Court consequent on the merger of the Akalkot State with the State of Bombay. The Full Bench was of opinion that the decree of the Sholapur Court was not an absolute nullity. The character of the Akalkot Court and the status of the defendant having altered in the meanwhile the impediment which was initially there in the decree being enforced in the Akalkot Court disappeared and the decree which was unenforceable till that change came about became enforceable and executable in the Akalkot Court.

14. We do not know what exactly were the terms of the merger order with which their Lordships were dealing in *Bhagwan v. Rajaram (supra).* We are not dealing with a case of merger in our own State in the present case.

15. The question before us is whether the subsequent changes in the law can be said to alter the character of the decree passed prior to the new law. Article 261 of the Constitution is prospective. There is no provision which has made decrees which were ineffective in this State prior to the Constitution effective. Nor do we see any warrant to imply such a provision. On this aspect of the question we find ourselves in respectful agreement with the view taken by Venkataramaiya and

Vasudevamurthy, JJ., in - *'Subbaraya Setty and Sons v. Palani Chetty and Sons*[18]*',* and by Wanchoo, C.J., and Modi, J., in - *'Premchand v. Shah Danmal*[19]*',*

16. The appeal is accordingly allowed. The decrees of the Courts below are set aside and the case is remanded to the first Court for trial of the rest of the issues. The costs shall abide the event. Appeal allowed.

Cases Referred.

[1] 22 Cal 222 (PC)
[2] AIR 1931 All 689 at p.694
[3] 18 Mad 327
[4] AIR 1933 Mad 393
[5] AIR 1934 Mad 434
[6] AIR 1941 Pat 109
[7] AIR 1924 Bom 351
[8] 51 DLR 485 (Can)
[9] AIR 1926 Nag 77
[10] (1915) 2 KB 580 at pp.587 and 588
[11] AIR 1936 Mad 552
[12] AIR 1948 Mad 203
[13] AIR 1927 Lah 200
[14] 1914-3 KB 145
[15] AIR 1951 SC 217 at p.225
[16] AIR 1951 SC 128 at pp.129-130
[17] AIR 1951 Bom 125 (FB)
[18] AIR 1952 Mys 69
[19] AIR 1954 Raj 4