M/S. International Woolen Mills vs M/S. Standard Wool (U.K.) Limited on 25 April, 2001

Equivalent citations: AIR 2001 SUPREME COURT 2134, 2001 AIR SCW 1806, (2001) 2 CURLJ(CCR) 543, (2001) 3 MAD LJ 99, (2002) 1 MAD LW 28, (2001) 3 RECCIVR 158, (2001) 44 ALL LR 354, (2001) 3 ICC 336, (2000) 38 ALL LR 773, (2001) 1 BLJ 117, (2000) 1 ALLCRILR 845, (2001) 4 SCJ 427, 2001 UJ(SC) 2 1007, (2001) 3 ALLMR 554 (SC), 2001 ALL CJ 2 1317, (2001) 2 CURCC 148, (2001) WLC(SC)CVL 504, (2001) 2 CIVILCOURTC 448, (2001) 3 SUPREME 554, (2001) 3 SCALE 516, 2001 (5) SCC 265, (2001) 5 JT 147 (SC)

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Bench: V.N. Khare, S.N. Variava

CASE NO.:
Appeal (civil) 3316 of 2001
Appeal (civil) 3317 of 2001

PETITIONER:
M/S. INTERNATIONAL WOOLEN MILLS

Vs.

RESPONDENT:
M/S. STANDARD WOOL (U.K.) LIMITED

DATE OF JUDGMENT: 25/04/2001

BENCH:
V.N. Khare & S.N. Variava

JUDGMENT:

L...I...T.....T.....T.....T.....T.....T.....T..J S. N. VARIAVA, J.

Leave granted.

Heard parties.

Both these Appeals are against a Judgment dated 9th December, 1999 and are being disposed of by this common Judgment. The parties will be referred to in their capacity in Civil Appeal arising out of SLP (Civil) No. 2250 of 2000. Briefly stated the facts are as follows :

> In 1996 the Appellant had placed an order with the Respondent for purchase of greasy fleece wool. The goods were shipped to Mumbai on C.I.F. terms in September 1996. The Appellant claimed the goods from Mumbai and took them to Ludhiana. The Appellant did not pay the price of the goods on the ground that after taking delivery it was found that the goods were of an inferior quality. The Respondent sent a Lawyer's notice dated 18th October, 1997. The Appellant, through his lawyer, sent a reply dated 8th November 1997.
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> On 19th January, 1998 the Respondent filed a case in Central London Country Court in United Kingdom. The Respondent claims that the Appellant was served with the summons of that case. The Appellant claims that he had not been served in that case. For our purposes we are not concerned with this controversy and express no opinion thereon. On 20th April, 1998, an ex-party decree came to be passed by the Central London County Court. The decree reads as follows :
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> "IT IS ORDERED that There be Judgment for the Plaintiff in the sum of US $49,178.50 plus interest of US $717 00 ANF court costs. A total of US $49,895.50 plus £ 243.75."

On 20th August, 1998 the Respondent filed an Execution Application in the Court of Civil Judge (Senior Division), Ludhiana. Upon receipt of the summons in the execution proceedings the Appellant filled an Application praying for dismissal of the execution application as it was filed without following the procedure prescribed under Sections 38, 39 and 40 of the Code of Civil Procedure. In reply to this Application the Respondent contended that the execution was under Section 44- A of the Code of Civil Procedure and as such there was no requirement to observe the provisions of Sections 38, 39 and 40 of the Code of Civil Procedure. In view of this stand the Appellants filed another Application stating that the decree was not on merits and as per the provisions of Section 44(A) read with Section 13(b) of the Code of Civil Procedure the Court had to refuse to execute the decree. Both the Applications were heard by the Civil Judge (Junior Division), Ludhiana. By two separate Orders dated 15th March, 1999, both the Applications were dismissed.

The Appellant then filed Civil Revision No. 2703 of 1999 against two Orders dated 15th March, 1999. This Civil Revision came to be dismissed by the impugned Judgment dated 9th December, 1999. By this Judgment the High Court found that the decree was not on merits but it still dismissed the Revision on the ground that the second Application was barred by the principles of constructive res-judicata. It is against this Judgment that these two Appeals have been filed. The Appellant has filed the Appeal [arising out of SLP (Civil) No. 2250 of 2000] against dismissal of their Revision. The Respondent has filed Appeal [arising out of SLP (Civil) No. 5332 of 2000] against that portion of the impugned Judgment which holds that the decree was not on merit.

One further fact which must be mentioned is that the Appellant has now filed a Suit in Ludhiana against the Respondent claiming damages in a sum of Rs. 4 lacs for having supplied goods of an inferior quality and for having committed a breach of the contract. That Suit is still pending. The first question for consideration is whether the High Court was right in holding that the second Application was barred on principles of constructive res-judicata. It must be noted that the first Application was on the ground that the provisions of Sections 38, 39 and 40 of the Code of Civil Procedure had not been complied with. In that Application the defence taken was that the decree was being executed under the provisions of Section 44-A of the Code of Civil Procedure. In view of this stand, before any decision was given, the second Application had been filed. Both the Applications were heard together. In other words the second Application was filed and heard before any decision was given in the first Application. Both the Applications were only decided on 15th March, 1999. There was thus no question of their being a decision finally deciding a right or claim between the parties. Mr. Hingorani however submitted that this case would be covered by Explanation IV to Section 11 of the Code of Civil Procedure. He submitted that in the earlier Application the defence regarding non compliance of Section 13(b) could have been taken but had not been taken. He submitted that it was not open to the Appellants to take such a defence in a subsequent Application. In our view there is no substance in this submission. Explanation IV to Section 11 of the Code of Civil procedure would have come into play only if some decision had been finally given before the second Application was filed. In that event it could have been urged that all available points should have been urged before that decision was given. In this case the second Application was filed before any decision on the first Application was given. The Appellants could have, instead of filing a second Application, amended their first Application and taken these pleas in that Application itself. Had they amended the first Application there would be no bar of res-judicata or constructive res judicata. If that be so one fails to understand how the second Application was barred by principles of res-judicata or constructive res- judicata. To be remembered that the Orders were passed after hearing arguments on both the Applications. Under such circumstances no question arises of their being any res-judicata or constructive res-judicata.

At this stage it must be mentioned that Mr. Hingorani relied upon cases of Janki Vallabh v. Moolchand and others reported in AIR (1974) Rajasthan 168, Baijnath Prasad Sah v. Ramphal Sahni and another reported in AIR (1962) Patna 72, P.K. Vijayan v. Kamalakshi Amma reported in AIR 1994 SC 2145, Mohanlal Goenka v. Benoy krishna Mukherjee and Ors. reported in (1953) SCR 377 in support of his submission that the principles of res-judicata and/or constructive res-judicata also apply to execution proceedings. It is not necessary to deal with these authorities as there can be no dispute to the proposition that principles of res-judicata and/or constructive res-judicata apply to execution proceedings. However, as stated above, in this case there was no final decision which operated as res- judicata.

The second question which arises is whether the above mentioned decree of the English Court could be executed in India. Section 44-A of the Code of Civil Procedure reads as follows :

> "44-A (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 purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or 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 purpose of this section, and "superior Courts', with reference; to any such territory, means such Courts as may be specified in the said notification.

Explanation 2 - "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."

By virtue of Sub-section (3) the Court shall refuse execution if it is shown to the satisfaction of the Court that the Decree falls within any of the Exceptions in clauses (a) to (f) of Section 13.

Section 13 reads as follows :

"13. 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 the proceedings to be founded on any incorrect view of international law or a 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 in India.

Thus under sub-clause (b) if the decree has not been given on the merits of the case then the foreign judgment is not conclusive between the parties and the same cannot be executed in India.

The question which then arises is whether the Decree, set out herein, above can be said to be a decree on merits. Parties have cited a large number of authorities of various High Courts on the question as to when a decree can be said to be on merits. In support of the contention that the above mentioned decree is on merits reliance has been placed upon the case of Sheikh Abdul Rahim alias S.A. Rahim vs. Mohamed Din and another reported in AIR (1943) Calcutta 42. In this case it has been held by the Calcutta High Court that a person asserting that the judgment was not on merits because no evidence was given must prove the same as there is a presumption in Section 114 of the Evidence Act that judicial acts have been regularly performed. On this principle the Calcutta High Court has held that even though a decree was given ex-parte the same must be presumed to be on merits. In our view the law laid down in this case cannot be said to be the correct law. Section 114 merely raises the presumption, under illustration (e) thereof, that judicial acts have been regularly performed. To say that a decree has been passed regularly is completely different from saying that the decree has been passed on merits. An ex-parte decree passed without consideration of merits may be decree passed regular if permitted by the rules of that Court. Such a decree would be valid in that country in which it is passed unless set aside by a Court of Appeal. However, even though it may be a valid and enforceable decree in that country, it would not be enforceable in India if it has not been passed on merits. Therefore for a decision on the question whether a decree has been passed on merits or not, the presumption under Section 114 would be of no help at all. It must be mentioned that in support of submission that it must be presumed that all formalities were complied with and the decree passed regularly reliance was also placed on cases of Krishna Kumar v. State of Haryana reported in AIR 1999 SC 854 and The Commissioner of Income Tax, A.P. v. M. Chandra Sekhar reported in AIR 1985 SC 114. In our view these authorities are of no help in deciding the question under consideration. Even if we presume that all formalities were complied with and Decree was passed regularly it still would not lead to the conclusion that it was passed on merits.

In the case of Middle East Bank Ltd. vs. Rajendra Singh Sethia reported in AIR 1991 Calcutta 335 a decree had been passed ex parte and without service of notice on the judgment- debtor. A number of authorities were cited before the Court including the case of Abdul Rahim (supra). The Court held that even though a decree may be ex parte it may still be on merits provided it could be shown that the Court had gone through the case made out by the Plaintiff and considered the same and taken evidence of the witnesses put up by the Plaintiff. It was held that if an ex parte decree was passed in a summary manner under a special procedure without going into the merits and without taking evidence then those decrees would not be executable in India. Based on this authority it was submitted that a decree could be said to be not on merits only if it is passed in a summary manner in any special or summary procedure. It was submitted that such a decree i.e. a decree which has not been passed in a summary manner in a summary proceeding would be a decree on merits. This authority itself makes it clear that the decree would not be on merits if Court has not gone through and considered the case of the Plaintiff and taken evidence of witnesses of the Plaintiff. It must also be noted that in this case the Court ultimately held that the concerned decree was not a decree on merits.

Reliance was placed upon the case of Gustave Nouvion vs. Freeman and another reported in 15 Appeal Cases 1, wherein it was held that if a foreign judgment finally and conclusively settles the existence of the debt so as to become res judicata between the parties, then the action can be brought on such a judgment. Based on this it was submitted that as the judgment and decree of the English Court would operate as res judicata between the parties, it would be a decree on merits, which could be enforced in India. It must be seen that this judgment is based upon the English law. The law in India is different by virtue of Section 13 of the Code of Civil Procedure which provides that if a decree is not on merits it cannot be enforced in India.

Reliance was also placed upon the case of D.T. Keymer vs. P. Visvanathan reported in AIR 1916 Privy Council 121. In this case it has been held as follows :

> "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 had 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 ever 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 decision 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 that sub-section 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 Lordships' 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."

It was submitted that this Judgment lays down that decree is not on merits if defence of the defendant has been struck off. It is submitted that as, in the present case, defence had not been struck off, the present decree would be a decree on merits. In our view no such principle can be drawn from this authority, if anything, this is an authority against the proposition that the present decree was a decree on merits.

Reliance was also placed upon the case of Ishri Prasad vs. Sri Ram reported in AIR 1927 Allahabad 510. In this case it was held that the phrase 'the merits of the case' has to be understood in contradistinction to a judgment by way of penalty. It was held that if a decree is passed by way of

penalty or on default then such a decree would not be a decree on merits but if the decree is passed otherwise even though it is an ex-parte it will be a decree on merits.

Reliance was also placed upon the case of Ram Chand vs. John Bartlett reported in Vol. III Indian Cases 523. In this case it has been held as follows :

> "The next contention that has been raised for the appellant to show that the respondent's suit on the foreign judgment did not lie, is that the said judgment was not passed on the merits, and that, therefore, it cannot be enforced by the Indian Courts. In my opinion this contention has no force. The writ of summons issued by the High Court in England was, it is admitted, duly served on the appellant in this country, but the latter did not, within the time allowed for that purpose, enter an appearance and deliver a defence. The respondent had (under the rules of procedure that govern the Supreme Court) the right, at the expiration of the prescribed period, to enter final judgment for the amount claimed, with costs. The writ aforesaid was especially endorsed with the statement of claim, containing all the necessary particulars, and there is nothing to show that the application for leave to serve the writ was not supported by affidavit or other evidence stating the several particulars required by Order XI, rule
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> 4. In short, the proceedings held in the high Court of England appear to have been strictly in accordance with the existing rules of procedure, which are not shown to be in any way contrary to the fundamental principles of justice and fair play ; and the judgment passed against the defendant on the facts of the case must be considered as one passed on the merits. It does not proceed on any preliminary point, i.e., a point collateral to the merits of the case, but is based on the merits as disclosed by the pleadings before the Court, if the defendant did not, in spite of notice of action, choose to appear and defend it, the judgment passed by the Court in plaintiff's favour was not the less a judgment on the merits, because it was not founded upon detailed evidence which the plaintiff might have produced had the defendant entered an appearance and contested the claim. The position to my mind is the same as if the defendant had appeared and confessed judgment. In support of his contention that the judgment in question cannot be considered as one passed on the merits, the appellant's counsel has relied on the following passage in Sir William Rattigan's Private International Law (1895) at pages 234-235:
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> "It would seem to be equally plain that, if, for instance, it should happen that by the law of a foreign country, a plaintiff was entitled to judgment simply on the non-appearance of a defendant who had been duly served, and without adducing any evidence whatever in support of his claim, or if the wrong-headedness of a foreign Judge should induce him to so decide, the plaintiff would not be entitled in an English Court to sue upon a judgment so obtained. If on no other ground, such a judgment of a foreign Court would, at all events, be so contrary to the fundamental principles of the Law of England as, for this reason alone, to be incapable of receiving

any effect in a British Court."

The above passage does not, however, as I read it, support the present appellant's position, as it cannot, in my opinion, be affirmed in this case that the plaintiff has obtained judgment from the High Court in England "simply on the non-appearance of the defendant without adducing any evidence whatever in support of his claim." Under Order XI, rule 4, the plaintiff's application for leave to serve the writ of summons out of the jurisdiction must be supported by affidavit or other evidence stating that the plaintiff has a good cause of action * * * * and the grounds upon which the application is made, and leave can only be granted if the Court or Judge is satisfied that the case is a proper one for the service prayed for. The necessary procedure must be presumed to have been followed in this case, and it has not been shown by the appellant that it was not so followed. The affidavit filed by the present plaintiffs- respondents in pursuance of the above rule, would, in my opinion, constitute "evidence in support of the claim" within the purview of the principle laid down in the passage quoted above, and the judgment obtained after service of the writ on the defendant as required by the rules of the Supreme Court would, I think, be a judgment on the merits. If, however, the passage relied upon does not bear the construction I have placed upon it, if, that is to say, it means that thee can be no judgment on the merits, unless, after the service of the writ on the defendant in the regular way the plaintiff has adduced some evidence, oral or documentary, in support of his claim, such as he would have produced if the defendant had appeared and contested the claim, then, with all possible respect for the learned author of that passage, I venture to think that the rule laid down by him is expressed in too wide language, and I should be reluctant to follow it unless it were supported by clear authority. I can discover no such authority either in Dicey's "Conflict of Laws" (p. 411), or in any other standard text-book on the subject; and I do not think that the maxim enunciated by Sir William Rattigan himself as the one applicable in such cases, viz., that the judgment passed must not contravene the fundamental principles of a rational system of law, supports the wide proposition, which it has been urged, is laid down in the passage quoted above."

In our view the passage in Sir William Rattigan's Private International Law (1895) at pages 234-235, reproduced above, states the correct law. With great respect to the learned Judges concerned the restricted interpretation sought to be given cannot be accepted. With greatest of respect to the learned Judges we are unable to accept the broad proposition that any decree passed in absence of Defendant, is a decree on merits as it would be the same as if Defendant had appeared and confessed Judgment. We also cannot accept the proposition that the decree was on merits as all documents and particulars had been endorsed with the statement of claim. With the greatest of respect to the learned Judges they seem to have forgotten at stage of issuance of writ of summons the Court only forms, if it at all does, a prima-facie opinion. Thereafter Court has to be consider the case of merits by looking into evidence led and documents proved before it, as per its rules. It is only if this is done that the decree can be said to be on merits. It was also submitted that the burden of proving that a decree was not on merits is entirely on the Appellants. It was submitted that no evidence had been led by the Appellants to show that the decree was not on merits and for that reason it must be presumed that the decree is on merits. In support of this submission reliance was placed upon the authority in the cases of R.M.V. Vellachi vs. R.M.A. Ramanathan reported in AIR 1973 Madras 141, R. Viswanathan vs. Rukn-ul-Mulk Syed Abdul Wajid reported in 1963 (3) S.C.R. 22. Undoubtedly the burden of proving that the decree is not on merits would be on the party

alleging it. However Courts never expect impossible proofs. It would never be possible for a party to lead evidence about the state of mind of the judge who passed the decree. Of course, amongst other things, the party must show that the decree does not show that it is on merits, if necessary the rules of that Court, the existence or lack of existence of material before the Court when the decree was passed and the manner in which the decree is passed. All this has been done in this case. It was also submitted that the Courts of law are not concerned with the result and even though the result may be repugnant to the Court, still the Court cannot relieve the party from the burden if the law provides for a contingency. In support of this reliance was placed upon the case of The Martin Burn Ltd. vs. Corporation of Calcutta reported in AIR 1966 S.C. 529 and Firm Amar Nath Basheshar Dass v. Tek Chand reported in AIR 1972 S.C. 1548. There can be no dispute to this proposition. However this proposition cuts both ways. If the decree is not on merits then, even though the Court may be reluctant to leave the Respondents remedy less, the Court would still have to refuse to enforce the decree. In support of the proposition that such a decree could not be a decree on merits. Reliance has been placed upon the authority in the case of Algemene Bank Nederland NV v. Satish Dayalal Choksi reported in AIR 1990 Bombay 170. In this case a summary suit had been filed in Hong Kong. In that suit leave to defend was granted to the defence. Thus the High Court had prima facie considered the merits of the matter and had granted unconditional leave. Thereafter the defendant filed a written statement. It appears that the defendant applied to the Reserve Bank of India for foreign exchange in order to engage lawyer in Hong Kong and his application was not granted by the Reserve Bank of India. As a result the defendant could not appear at the trial and an ex parte decree came to be passed against the defendant. The question which arose before the Court was whether such a decree could be said to be a decree on merits. A large number of authorities were cited before that Court and it was ultimately held as follows :

> "28. In the light of these authorities I have to see whether in the present case the Hong Kong court gave its decision on the merits of the controversy. The Hong Kong Court had before it the defence which was filed by the present defendant. The defence questioned the execution of the guarantee to repay the debts of Madhusudan & Co. Ltd. The entry of 7.4.85 in the Register of Guarantees was also questioned by the defendant. In the absence of the defendant, these contentions raised by him could not have been considered. The judgment which is before me does not indicate whether actually any evidence was led before the Hong Kong Court and whether the Court went into the merits of the case. The judgment merely sets out that "on the defendant's failure to appear and upon proof of plaintiff's claim," the judgment is entered for the plaintiff. The plaintiff-Bank has emphasised the words "upon proof of plaintiff's claim". They have also produced the original guarantee which bears in one corner a sticker showing that it was exhibited before the Hong Kong Court. The plaintiff-Bank has not said in its affidavit that the documents which were tendered before the court were properly proved or that anybody on behalf of the bank had given evidence to establish the plaintiff's claim. This becomes relevant because it is the contention of the defendant that the guarantee which he had given was a blank and undated guarantee. It had been misused by the plaintiff-Bank in the present case. The defendant has also relied upon alterations and erasures in the plaintiff-Bank's register of guarantees to show that this undated guarantee was subsequently entered

> in the register by altering another entry to indicate that it was given around 7th April 1985. There is no material to show that these aspects of the dispute were ever examined by the Hong Kong Court. The Court seems to have proceeded to pronounce the judgment in view of the defendant's failure to appear at the hearing of the case to defend the claim on merits.
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> 29. In my view, in these circumstances, the case before me falls under the ratio laid down by the Privy Council in Keymer's case (AIR 1916 P.C. 121). The decision of the Hong Kong Court is not given on examination of the points at controversy between the parties. It seems to have been given ex parte on the basis of the plaintiff's pleadings and documents tendered by the plaintiff without going into the controversy between the parties since the defendant did not appear at the time of the hearing of the suit to defend the claim. The present judgment, therefore, is not a judgment on the merits of the case. Hence this is not a fit case where leave can be granted under Order 21 Rule 22 of the Code of Civil Procedure for the purpose of executing the decree here."

In our view this authority lays down the correct proposition of law.

Reliance was also placed upon the case of Chintamoni Padhan and others vs. Paika Samal and ors. reported in AIR 1956 Orissa 136. In this case it has been held that a judgment on the merits is one which is entered after a full trial of the issues through pleadings, presentation of evidence, and arguments by both sides. It is held that the expression 'judgment on the merits' implied that it must have been passed after contest and after evidence had been let in by both sides. In our view the authority also cannot be said to be laying down the correct law. In a given case it is possible that even though Defendant has not entered evidence the Plaintiff may prove its case through oral and documentary evidence. If after consideration of oral and/or documentary evidence an ex parte decree is passed, it would be a decree on merits.

In the case of Trilochan Choudhury vs. Dayanidhi Patra reported in AIR 1961 Orissa 158, the above mentioned decision in Chintamoni Padhan's case has been overruled. In this case it is held that under Section 13(6) even an ex parte judgment in favour of the plaintiff may be deemed to be a judgment given on merits if some evidence is adduced on behalf of the Plaintiffs and the judgment, however brief, is based on a consideration of that evidence. Where however no evidence is adduced on the plaintiff's side and his suit is decreed merely because of the absence of the defendant either by way of penalty or in a formal manner, the judgment may not be one based on the merits of the case. In our view this authority lays down the correct law. In the case of Govindan Asari Kesavan Asari vs. Sankaran Asari Balakrishnan Asari reported in AIR 1958 Kerala 203, it is held as follows :

> "In construing S. 13 of the Indian Civil Procedure Code we have to be guided by the plain meaning of the words and expressions used in the section itself, and not by other extraneous considerations. There is nothing in the section to suggest that the expression judgment on the merits has been used in contradistinction to a decision on a matter of form or by way of penalty.

> The section prescribes the conditions to be satisfied by a foreign judgment in order that it may be accepted by an Indian Court as conclusive between the parties thereto or between parties under whom they or any of them litigate under the same title. One such condition is that the judgment must have been given on the merits of the case. Whether the judgment is one on the merits, must be apparent from the judgment itself. It is not enough if there is a decree or a decision by the foreign Court. In fact, the word 'decree' does not find a place anywhere in the section. What is required is that there must have been a judgment. What the nature of that judgment should be is also indicated by the opening portion of the section where it is stated that the judgment must have directly adjudicated upon questions arising between the parties.
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> The Court must have applied its mind to that matter and must have considered the evidence made available to it in order that it may be said that there has been an adjudication upon the merits of the case. It cannot be said that such a decision on the merits is possible only in cases where the defendant enters appearance and contests the plaintiff's claim. Even where the defendant chooses to remain ex parte and to keep out, it is possible for the plaintiff to adduce evidence in support of his claim (and such evidence is generally insisted on by the Courts in India), so that the Court may give a decision on the merits of his case after a due consideration of such evidence instead of dispensing with such consideration and giving a decree merely on account of the default of appearance of the defendant.

In the former case the judgment will be one on the merits of the case, while in the latter the judgment will be one not on the merits of the case. Thus it is obvious that the non-appearance of the defendant will not by itself determine the nature of the judgment one way or the other. That appears to be the reason why S. 13 does not refer to ex parte judgments falling under a separate category by themselves. A foreign Court may have its own special procedure enabling it to give a decision against the defendant who has failed to appear in spite of the summons served on him and in favour of the plaintiff, even without insisting on any evidence in support of his claim in the suit.

Such a judgment may be conclusive between the parties so far as that jurisdiction is concerned, but for the purpose of S. 13 of the Indian Civil Procedure Code such a judgment cannot be accepted as one given on the merits of the case, and to that extent the law in India is different from the law in other jurisdictions where foreign judgments given for default of appearance of defendants are also accepted as final and conclusive between the parties thereto. This position was noticed and recognised in AIR 1927 Mad 265 (D). The contention that the defendant who had chosen to remain ex parte, must be taken to have admitted the plaint claim was also repelled in that case as unsound and untenable. His non-appearance can only mean that he is not inclined to come forward and contest the claim or even to admit it.

His attitude may be one of indifference in that matter, leaving the responsibility on the plaintiff to prove his claim if he wants to get a decree in his favour. Such indifference on the part of the defendant cannot necessarily lead to the inference that he has admitted the plaintiff's claim. Admission of the claim is a positive act and it cannot be inferred from any negative or indifferent

attitude of the person concerned. To decree the plaint claim solely on account of the default of the defendant and without considering the question whether the claim is well-founded or not and whether there is any evidence to sustain it, can only mean that such a decree is passed against the defendant by way of penalty.

It will not satisfy even the minimum requirements of a judgment on the merits of the claim. What such requirements are, have been explained in Abdul Rehman v. Md. Ali Rowther, AIR 1923 Rang 319 (J), in the following terms :

> "A decision on the 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 his pleadings cannot be held to be a decision on the merits."

The same view was taken by the Patna high Court also in Wazir Sahu v. Munshi Das, AIR 1941 Pat. 109 (K), where the question when an ex parte decision can be said to be on the merits, was answered as follows :

> "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 the 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 on the consideration of the truth or otherwise of the plaintiff's claim."

We are in respectful agreement with the view taken in these two cases."

In our view this authority lays down the correct law. In the case of R.M.V. Vellachi v. R.M.A. Ramanathan Chettiar reported in AIR 1973 Madras 141, the facts were almost identical to the present case. In that case also an ex parte decree had been obtained. In this case it was held as follows : "The Law of Civil Procedure governing the institution of suits, service of summons upon the defendant, the liberty to the plaintiff to apply for a decree against the defendant in case of the defendant's default of appearance, in the Supreme Courts of Penang and Singapore, are all similar and identical and are on the same pattern as the procedural laws in England, i.e., "The Rules of the Supreme Court". The Full Bench decision of this Court referred to above in ILR 50 Mad 261 = (AIR 1927 Mad 265) (FB) which dealt with the enforceability of a judgment obtained in the Supreme Court of Penang has been followed in almost all the high Courts. This decision was rendered about 45 years back and had been uniformally followed by this Court. (Vide: the Bench decision of Jagadisan, J. and Kailasam, J., in Sivagaminatha v. Nataraja, AIR 1961 Mad 385. It is unnecessary to refer to all the cases and it is sufficient to refer to the latest Bench decision of this Court reported in Mohammad Sheriff and Co. V. Abdul Jabbar ILR (1966) 1 Mad 18 in which a Bench of this Court had to deal with a similar problem arising out of a foreign judgment rendered by the Supreme Court of Singapore on default of appearance of the defendant. Veeraswami, J., (as he then was), delivering the judgment on behalf of the Bench, after referring to the relevant decisions, has followed and

applied the principle enunciated by the Full Bench.

The learned Judge pointed out that the decree that followed as a matter of course solely on account of the default of the defendant's appearance could not be a judgment on merits, as no evidence was adduced and there was no judicial consideration of the tenability or justness of the claim. In view of this recent pronouncement of the Bench of this Court which is binding upon us, the matter does not require further elaboration. It is true that under Section 44-A sub-clause (3), the burden is upon the defendant who resists execution, to establish, to the satisfaction of the Court which is called upon to execute the decree, that the foreign decree suffers under any one of the infirmities covered by any of the exceptions specified in clauses (a) to (f) of Section 13, Civil Procedure Code. We may refer to the Bench decision of the Calcutta High Court in Abdul Rahim v. Mohamed Din, AIR 1943 Cal 42. In the instant case, the respondent has discharged his burden by placing ample materials that the foreign judgment cannot be executed because the High Court of Singapore was not a "Court of competent jurisdiction" within the meaning of Section 13 (a) and that the defendant has not voluntarily submitted to the decision of the Tribunal and also that the decree of the High Court of Singapore was not given on the merits of the case within the meaning of Section 13 (a)."

On the basis of this law let us now see whether the present decree is a decree on merits. It is to be seen that between the parties there is a controversy whether the Appellant/defendant was at all served. As stated above it is not necessary for us to resolve this controversy. For the purposes of this Order only we will presume that the Appellant had been served. Facts on record disclose that before service was effected an affidavit had been filed in the English Court by one Kaashif Basit, Solicitor for the Respondent, to which affidavit had been annexed copies of the the invoice and other relevant documents. On the basis of this affidavit an order in the following terms came to be passed :

> "UPON reading the Affidavit of Kaashif Basit sworn 20 January 1998 IT IS ORDERED that the Plaintiff be at liberty to serve the Summons in this action on the Defendant at 31, Industrial Area-A, Ludhiana- 141003, Punjab, India, or elsewhere in India, and that the time for acknowledging service shall be 23 days after service of the Summons on the Defendant."

This shows that leave to serve the Appellant was granted after reading the affidavit. Thus at this stage the Court had presumably seen the documents annexed thereto. The Court has been careful enough to note that it had read the affidavit. However, at this stage, only a prima facie opinion was being formed. Thereafter the said Mr. Kaashif Basit, Solicitor for the Respondent had filed an affidavit of service stating that service had been effected on one Yash Paul, who is claimed to be an employee of the Appellant. To this Affidavit also all relevant documents were annexed. Thereafter no documents are tendered nor any evidence led. The English Court then pronounces the judgment and decree, which has been set out herein above. It does not even say that the second Affidavit had been read. This Judgment and decree does not indicate whether any documents were looked into and/or whether the merits of the case was at all considered. It merely grants to the Respondent a decree for the amounts mentioned therein. To be noted that the Appellant had, by his letter dated 8th November, 1997, replied to the Notice of the Respondent dated 18th October, 1997. In this reply it had been mentioned that goods were of inferior quality and not as per contract. Court has not

applied its mind or dealt with this aspect. It has not examined points at controversy between the parties. It is given ex-parte as Appellant did not appear at hearing of Suit. It is not a judgment on merits.

On the principles of law enunciated herein above, in our view, it is clear that such a decree cannot be said to be a decree on merits. Such a decree cannot be enforced in India. In this view of the matter Civil Appeal No. of 2001 [arising out of SLP (Civil) No. 2250 of 2000] is allowed and the Application of the Appellant that this decree cannot be enforced in India as it is not on merits is made absolute. Civil Appeal No. . of 2001 [arising out of SLP (C) No. 5332 of 2000] stands dismissed. There will be no order as to costs in both the Appeals.