ORIGINAL CIVIL.

Before Cunliffe J.

1935

Jan. 9, 10, 16.

DERBY McINTYRE & CO., LTD.,

v.

MITTER & CO.*

Foreign judgment—Judgment by default without evidence—Decision on the merits—Suit on foreign judgment in British India—Code of Civil Procedure (Act V of 1908) s. 13 (b).

A judgment of the King's Bench Division in London, passed in default of appearance of the defendant under the summary procedure without any evidence being called, is not a judgment given on the merits of the case within the meaning of section 13 (*b*) of the Code of Civil Procedure, and a suit cannot be brought solely on such a judgment in British India.

Case-law discussed.

Keymer v. *Visvanatham Reddi* (1) followed,

A. Janoo Hassan Sait v. *Mahamad Ohuthu* (2) differed from.

ORIGINAL SUIT.

Relevant facts of the case and argument of counsel appear from the judgment.

Ormond and *Qasim* for the plaintiffs.

B. N. Ghosh and *S. N. Banerjee* (jr.) for the defendants.

Cur. adv. vult.

CUNLIFFE J. This case comes before me on a preliminary legal issue.

The plaintiffs obtained judgment against the defendants in the King's Bench Division in London. Their claim was for a liquidated amount, comprising money lent, disbursements and commission, in relation to a cargo of mica shipped to the United Kingdom by the defendants, who are an Indian firm carrying on business in Calcutta.

* Original Suit No. 1216 of 1934.

(1) (1916) I. L. R. 40 Mad. 112; L. R. 44 I. A. 6.

(2) (1924) I. L. R. 47 Mad. 877.

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The plaintiffs first endeavoured to serve the defendants in London through a representative; but they were unable so to do; and, eventually, with the leave of the Court, they served the writ out of the jurisdiction in Calcutta.

The defendants, however, put in no appearance to the action and consequently the plaintiffs, employing the expeditious procedure which is common to so many courts in the British Empire, signed judgment against the defendants by default. No evidence seems to have been called. That is not unusual; and it is not disputed that the judgment thus obtained was in every way regular under the rules of the King's Bench. After this judgment had been obtained, the plaintiffs, wishing to enforce their decree and to take advantage of the principles of *res judicata*, brought a suit on the English judgment before me here. Alternatively they again sued on the facts. They were met by a legal defence of a technical character which I am now about to decide: and also with a defence on the case as a whole.

The technical defence set up is one under section 13(*b*) of the Code of Civil Procedure. That section deals with the principle of *res judicata* in relation to a foreign judgment; but, whilst giving general effect to the principle, the section contains six provisos in the form of exceptions. It is on the second proviso to the section that the defendants here rely.

Section 13(*b*) runs as follows:—

> 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 under the same title except—
>
> (*b*) where it has not been given on the merits of the case.

By an earlier section of the Code, section 2, it is laid down that a "foreign judgment" comprises the judgment of an English court.

Section 13(*b*) has been the subject of considerable judicial interpretation. The leading case in this regard is the decision of the Privy Council in *Keymer* v. *Visvanatham Reddi* (1). That was an appeal from

(1) (1916) I. L. R. 40 Mad. 112; L. R. 44 I. A. 6.

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the Madras High Court, where it was sought to give effect to an English judgment obtained in similar, but not quite similar, circumstances to those prevailing here. The defendant in England there was an Indian subject, who put in a defence to the claim brought against him; but, after he put in the defence, the plaintiffs obtained permission of the court to administer interrogatories to him. For some reason or another he failed to comply with the direction of the court in relation to these interrogatories and, following the usual procedure, by reason of this disobedience, his defence was struck out, and the plaintiffs obtained judgment against him by default. Lord Buckmaster in delivering the judgment of the Board said this :—

> 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, and 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 these matters was ever considered or was the subject of adjudication at all. In point of fact what happened was that, because the defendant refused to answer the interrogetories, 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.

Lord Buckmaster added :—

> 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*).

There is another decision of the Privy Council which, by implication, at any rate, adopts the same view, the case of *L. Oppenheim & Co.* v. *Mahomed Haneef* (1). The case there was again an attempt to obtain judgment in Madras on a judgment given in England by default on an arbitration. The trial Judge, Coutts Trotter J., who afterwards became Chief Justice of Madras, felt himself bound by the *Keymer* case and said so. His decision was not

(1) (1922) I. L. R. 45 Mad. 496 ; L. R. 49 I. A. 174.

challenged before the Privy Council, but the judicial attitude he adopted is mentioned and approved of at page 501. Lord Cave there said:—

> The suit was heard by Coutts Trotter J., who held that, having regard to the decision of this Board in *Keymer* v. *Visvanatham Reddi* (1), the action upon the judgment could not be maintained, as the judgment had been entered in default of appearance and the action had not been tried upon its merits, and that the claim under the contract was statute-barred. This part of the judgment has not been challenged and need not be further referred to.

Later on, however, in the High Court of Madras, a Bench of two Judges in the case of *A. Janoo Hassan Sait* v. *Mahamad Ohuthu* (2) endeavoured to distinguish *Keymer* v. *Visvanatham Reddi* (1). They were considering an attempt to enforce a judgment in Madras based upon summary procedure in Ceylon. They came to the conclusion that a presumption must be drawn in a case where judgment goes by default, on it being shown that the defendant had no defence whatever. The presumption they thought must be that, as no defence was put on the file, there was in fact no defence to the action, and I think that they also must have assumed that the presumption in law arises in such cases that the Court has acted in a judicial manner in giving effect to the plaintiff's claim. That distinction, however, did not commend itself to a Full Bench of the Madras High Court in *R. E. Mahomed Kassim and Co.* v. *Seeni Pakir Bin Ahmed* (3), where the Court was considering the effect of the summary procedure in Penang. Coutts Trotter J., the then Chief Justice, dealt with the matter in this way. He said:—

> It seems to me impossible to argue that that is not clearly within the decision and even the wording of the Privy Council in *Keymer* v. *Visvanatham Reddi* (1). It was argued and very likely correctly argued that the English law was different. The answer to that is we are bound by the statute on which the decision in *Keymer's* case was based. That statutory provision is section 13 (*b*) of the Code of Civil Procedure under which an exception to the conclusiveness of a foreign judgment in a British Indian Court is where it has not been given on the merits of the case. As I understand Mr. Alladi Krishnaswami Ayyar's argument, he says that it is not like the case of the defendant's defence being struck out for not answering interrogatories or being out of time or anything of the kind; for that may be held not to be a defence on the merits because *ex hypothesi* the position is the defendant was

(1) (1916) I. L. R. 40 Mad. 112; L. R. 44 I. A. 6.
(2) (1924) I. L. R. 47 Mad. 877.
(3) (1926) I. L. R. 50 Mad. 261,271.

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precluded from going into the alleged merits which he had set up, and he says it is quite different where the defendant does not appear at all because that is a clear intimation by him that he admits the validity of the plaintiff's claim and that is just as good as if the plaintiff has actually proved it by evidence. I think that 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 *A. Janoo Hassan Sait* v. *Mahamad Oluthu* (1), and I think that that case must be regarded as no longer law.

This question was also considered in a Rangoon case, *A. N. Abdul Rahiman* v. *J. M. Mahomed Ali Rowther* (2), where Chari J. followed the Full Bench Madras view and observed :—

> It seems to me that 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 decison on the merits, even though passed *ex parte*, a decision passed without evidence of any kind cannot be held to be a decision on the merits.

As far as I have been able to ascertain, and as far as counsel in the case have been able to tell me, there are no decisions in relation to this important question in our own Court, but the minds of Judges in other Courts in India, apart from Madras and Rangoon, have been also applied to the problem. Curiously enough, the over-ruled Full Bench decision in *Janoo Hassan's* case (1) has been the keynote of the decisions in Upper India and also one decision in Bombay.

I commence with the consideration of the question contained in the case of *Mehr Singh* v. *Ishar Singh* (3). That is a very recent decision, where Jai Lal J. held that in a suit on a foreign judgment, where it was found that the defendant had appeared to defend the suit and was represented by counsel and in his defence produced a receipt which he alleged extinguished the liability under the plaintiff's claim, and where the case was adjourned for evidence of the parties, and the plaintiff's witnesses were heard, but on the adjourned hearing of the case the defendant absented himself, though his counsel were present, and where the court confined its judgment to the words

(1) (1924) I. L. R. 47 Mad. 877. (2) (1928) I. L. R. 6 Ran. 552, 557.
(3) (1932) I. L. R. 14 Lah. 58.

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"judgment for the plaintiff as prayed," that this was a judgment on the merits. The learned Judge expressed the view that the test of whether the judgment on the merits was within the meaning of section 13(*b*) is whether the judgment has been given as a penalty for any conduct by the defendant, or whether it is based on a consideration of the truth or otherwise of the plaintiff's case. He also held that, in the absence of a clear indication that a judgment was given by way of penalty, it must be assumed that the court considered that the plaintiff had proved his claim on the merits. Oddly enough, as I read the judgment, which it may be mentioned was a successful attempt to enforce a judgment of the court in British East Africa at Nairobi, *Janoo Hassan's* case (1) is not mentioned, but it will be seen that the principle in that case is accepted. *Janoo Hassan's* case (1), however, is specifically relied upon in another recent case decided in Bombay. That was a decision of Baker J., *Ephrayim* v. *Turner, Morrison & Co.* (2). The facts there were peculiar. It was an attempt in Bombay to realise judgment obtained in Iraq, and at the place of original venue, which was Basra, apparently very little was done by the defendant to bring his case before the court, although the defendant in Basra had employed professional assistance and his attorney had been given a special power. The learned Judge in referring to *Keymer's* case (3) sets out the principle decided there and then he begins the consideration of *Janoo Hassan's* case (1), and he follows the *ratio decidendi* of the decision by saying this :—

It was further held that ordinarily a judgment delivered *ex parte* is deemed to be on the merits, and it is only when a defence has been raised and for some reason or another has not been adjudicated upon that the decision can be said to be not upon the merits, and that the *ex parte* judgment in that case must be deemed to be one passed on the merits as the defendant did not at all appear in the case. This is practically on all fours with the present case. In the present case Turner, Morrison & Co. were served while they were actually residents in Basra. Although at the time when the suit came on for hearing Mr. Gillespie was not resident in Basra, the pleader Manasse,w ho

(1) (1924) I. L. R. 47 Mad. 877.
(2) (1930) 32 Bom. L. R. 1178 (1185); 128 Ind. Cas. 609 (612).
(3) (1916) I. L. R. 40 Mad. 112; L. R. 44 I. A. 6.

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held a power of attorney from the firm and was retained to appear in the case, was in Basra. He represented the defendants in fact. That he did not receive any instructions to defend the case on the merits does not, in my opinion, prevent the decision from being one on the merits. Applying the test that it is only when a defence has been raised and for some reason or another has not been adjudicated upon that the decision can be said to be not on the merits, it is clear that the present case, where no defence was raised, but merely an adjournment was asked for and the judgment proceeded on the evidence of the plaintiff and the papers in the former suit, cannot be said to be a case in which the judgment is not one on the merits.

Apart from Lahore and Bombay, the High Court of Allahabad has also decided in several cases that in certain circumstances a judgment by default is a judgment on the merits. An example of this line of decision is the case of *Ishri Prasad* v. *Sri Ram* (1). Judgment there was sought to be enforced from a judgment in the court of the Native State of Rampur. The following is a passage in the High Court judgment :—

> The defendant, notwithstanding due service of summons, has not contested the suit. The document is registered. The failure of the defendant to contest the suit amounts to an admission of the plaintiff's claim. Accordingly the plaintiff's suit is decreed.

It was held that the judgment in the Rampur court was a judgment on the merits of the case within the meaning of section 13(*b*) and that a certified copy of the judgment of the Rampur court produced in a court of British India was to be presumed to have been pronounced by a court of competent jurisdiction.

That case seems to represent the most extreme elongation of the principle laid down in the over-ruled *Janoo's* case.

Endeavouring to deduce the principles contained in this body of decisions, it seems to me that they deal with three different categories or classes of case. *Firstly*, there is the category in which a defence is put in, but is struck out and judgment is artificially given by default without any judicial consideration of the plaintiff's evidence at all. *Secondly*, there is the class of case where no defence has ever been on the file and again there is no consideration of the plaintiff's evidence by the Court, judgment being given by default

(1) (1927) I. L. R. 50 All. 270.

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under summary procedure. *Thirdly*, we have the position in which there is no defence again, but where the plaintiff's evidence is considered in some manner or another. The case before me now is clearly within the second category and in my opinion is also clearly within the ambit of *Keymer* v. *Visvanatham Reddi* (1). I think it would be doing violence to the language of section 13(*b*), if I held otherwise. It may be noted too that in *Keymer's* case (1) Lord Buckmaster, towards the end of his judgment, mentions a question put to Lord Finlay, the leading counsel for the appellant, in relation to the exact significance of sub-section (*b*). This question appears in the penultimate passage of the Board's judgment. The passage runs :—

> It is quite plain that that sub-section must refer to some general class of case, and Sir Robert 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 Statute 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.

Had I been conducting the case in the Privy Council and a similar question had been put to me, I venture with deference to think that I should have given a different answer. The very form of the question shows that in the Highest Judicial Tribunal of the Empire, they do, at times, make enquiries into the intentions and objects of the legislature where there is a doubt and a difficulty in construing the operation and meaning of a particular statute. If the query had been put to me, I should have said that, in my view, primarily, this sub-section was not meant to apply to British courts at all. I should have argued that it was a sub-section of a special nature, deliberately inserted as a proviso to the ordinary rule of *res judicata* in the Code, for the purpose of protecting persons in India from unfair and unmeritorious judgments of courts outside the British Empire where procedure and principles were possibly

(1) (1916) I. L. R. 40 Mad. 112 ; L. R. 44 I. A. 6.

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in use in no way compatible with the ideas of British justice. Owing to the language of section 2, the expression "foreign court" has been laid down to incorporate all courts functioning in various parts of the British Empire outside India, administering the same lines of jurisprudence and, in the main, the same lines of procedure; and, unfortunately, the provisions of the two sections must be read together.

The position in my opinion is an unfortunate one, for this reason that it enables a lawyer to give advice to Indian debtors, situated as these debtors were, something on this wise. The advisor may now say "if your foreign creditor sues you, in the ordinary "form which is encouraged in British courts by special "endorsement of the writ for a liquidated amount, "take care not to appear, because, if you do not appear, "you can defeat, or at any rate delay, his judgment by "relying on section 13, sub-section (*b*) of the Code of "Civil Procedure. When he sues you in an Indian "court, you will be able to force him back on his alter-"native right of suing you over again on the facts." It seems to me there is no escape from this conclusion.

Another important point to note in this connection is that the British legislature has recently passed a useful statute, known as the Foreign Judgments (Reciprocal Enforcement) Act of 1933. By that Act the mere registration of a foreign judgment, delivered in a country which has entered into an agreement with His Majesty's Government, can be sued upon in the Supreme Court in England. Conversely, it has been arranged in the enactment that British judgments can on a mutual basis be enforced by registration in foreign courts. The statute in question contains a schedule which sets out the various countries which have agreed to co-operate in his system. So far as the British Empire is concerned, the countries in agreement have been notified by means of Orders in Council. India, however, does not appear in the schedule; and unless the Code of Civil Procedure in this particular regard is drastically amended, I do not see how she

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could possibly appear in the list, as the basis of the whole arrangement is reciprocity.

For the reasons which I have set out, therefore, I decide, with reluctance, in favour of the defendants on this technical point. The plaintiffs will now be thrown back on their alternative claim on the merits. They will be forced to prove before me, what they were not required to prove in London, owing to the defendants' default and the defendants are in the enviable position of being able to take advantage of their own default by reason of the peculiar provisions of the Code.

I shall make no order as to costs.

Attorney for plaintiffs: *S. C. Newgie.*

Attorneys for defendants: *P. C. Mitter & Co.*

G. K. D.