APPELLATE CIVIL.

Before R. C. Mitter J.

CHOR MAL BAL CHAND

v.

KASTURI CHAND SERAOGI.*

1936

Jan. 24;
Feb. 7.

Foreign Judgment—Jurisdiction of foreign Court—Enforcement of foreign judgment in British India—Personal action—Code of Civil Procedure (Act V of 1908), ss. 13, 44.

A judgment of a domestic tribunal is enforceable by execution as being sanctioned as a judicial order of the sovereign pronounced through its tribunal.

A judgment of a foreign tribunal, not being sanctioned as aforesaid, has no right to claim recognition beyond jurisdiction. The comity of nations, however, accords recognition to such judgment on one of the following principles:—(*a*) The foreign judgment may be adopted by the domestic Court as its own and admitted to execution within its jurisdiction, as under the provision of s. 44 of the Code of Civil Procedure. (*b*) The foreign judgment may be received as evidence of the creation of an obligation, a suit being brought on that obligation in the domestic Court if it has jurisdiction to entertain the suit. This principle is followed in England and is adopted in India under s. 13 of the Code of Civil Procedure. (*c*) The foreign judgment may be received as evidence of the original obligation in a suit brought on the primary cause of action.

A suit on a foreign judgment can be defeated where the foreign Court passing the judgment had no jurisdiction under Private International Law.

The question of a foreign Court being a Court of competent jurisdiction is determined by the rules of Private International Law, and not by the territorial law of the foreign State.

In a personal action a foreign Court has jurisdiction in an international sense if—

(i) The defendant is the subject of the foreign country in which the judgment has been obtained; or

(ii) he, the defendant, is a resident in that foreign country when the action began; or

(iii) where the defendant, in the character of a plaintiff, has selected the *forum* in which he is afterwards sued; or

*Appeal from Appellate Decree, No. 46 of 1934, against the decree of J. P. Barooah, Additional District Judge of Assam Valley Districts, dated June 26, 1933, affirming the decree of Mahammad Eahia Khan Chaudhuri, Munsif of Sibsagar, dated July 15, 1931.

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(iv) where he, the defendant, had voluntarily appeared in that Court and submitted to its jurisdiction; or

(v) where he, the defendant, had contracted to submit himself to the foreign *forum* in which the judgment was obtained.

Rousillon v. *Rousillon* (1) and *Schibsby* v. *Westenholz* (2) referred to.

No territorial legislation can give jurisdiction which any foreign Court ought to recognise against absent foreigners who owe no allegiance to the Power which so legislate.

Sirdar Gurdyal Singh v. *The Raja of Faridkote* (3) referred to.

Cause of action is not a general ground of jurisdiction recognised by International Law.

In the absence of an express power conferred by the British Parliament, the legislature of any British dominion cannot, by giving Courts within its territory jurisdiction to try suits against a non-resident British Indian subject where the cause of action arose within the said dominion, confer on judgments of its Courts extra-territorial operation, although the defendant is a subject of the same sovereign, and judgment passed in a suit instituted there on such a ground would be refused recognition in British India.

Shaik Atham Sahib v. *Davud Sahib* (4) followed.

If a non-resident defendant appears in a foreign Court, pleads that that Court has no jurisdiction and also pleads to the merits, he cannot be allowed to impeach the judgment of that Court on the ground of its incompetence at the time of enforcement of that judgment in another country.

Harris v. *Taylor* (5) referred to.

SECOND APPEAL by the plaintiff.

The material facts of the case and the arguments in the appeal appear in the judgment.

Bijan Kumar Mukherji and *Jay Gopal Ghosh* for the appellant.

Sanat Kumar Chatterji for the respondent.

Beereshwar Chatterji for the Deputy Registrar.

Cur. adv. vult.

R. C. MITTER J. This appeal arises out of a suit instituted to enforce a foreign judgment, namely, a judgment pronounced by the Additional *Nâib Akhilkâr* of the Court of Danhata in Cooch Behar

(1) (1880) 14 Ch. D. 351.
(2) (1870) L. R. 6 Q. B. 155.
(3) [1894] A. C. 670; L.R. 21 I. A. 171.
(4) (1909) I. L. R. 32 Mad. 469.
(5) [1915] 2 K. B. 580.

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State. The Additional *Nâib Akhilkâr* in Cooch Behar Courts exercises the same functions as a Munsif in British Indian Courts. The plaintiff has lost in both the Courts below. Hence this appeal has been preferred by him.

In the beginning of 1927, the plaintiff sued the two defendants in the Danhata Court for the recovery of the sum of Rs. 400 as damages for breach of contract. The defendants are residents of British India and they resided at the date of the suit and at all material times in the district of Gauhati in British India. The contract, however, was formed in Cooch Behar. The plaint was filed in the Danhata Court with the defendant No. 1 described as a major, and defendant No. 2 as a minor, but no guardian was proposed by the plaintiff at the time when the plaint was filed. Defendant No. 1 was later on proposed as guardian-ad-litem and was appointed as guardian-ad-litem by an order dated August 6, 1927. On July 20, 1927, defendant No. 1 filed a written statement in the suit. It was filed on his own behalf and not on behalf of defendant No. 2, and at a time when there was not even a proposal by the plaintiff to appoint him as guardian-ad-litem of defendant No. 2. In para. 1 of the said written statement defendant No. 1 stated that the Danhata Court had no jurisdiction as the defendants did not carry on business in the Cooch Behar State and had no place of residence within that State. In para. 2 he states that the allegations made in the plaint as to the manner in which and the time at which the cause of action is said to have arisen are not true. In para. 3 it is stated that the defendant No. 2 is a minor, and that the suit could not proceed till a guardian-ad-litem is appointed for him. In para. 4 he stated that "as the Court had no "jurisdiction he is not stating his defence on the "merits" and that he will plead to the merits if and when the suit is instituted in a Court having jurisdiction. Then there follows a statement to this effect: "Prayer, the plaintiffs suit be dismissed and

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"costs together with interest be awarded to the de-"fendant firm for being harassed. And all state-"ments in the plaint which have not been expressly "admitted in the written statement must be taken as "denied".

On this written statement being filed, the Danhata Court framed issues on September 9, 1927. One of the issues related to jurisdiction. These issues were settled in the presence of defendant No. 1, whose pleader appeared in the Court and assisted the Court in settling proper issues. On this date, the suit was adjourned to September 21, 1927, for hearing.

Defendant No. 2 never appeared in the Danhata Court at any stage of the suit either through his proposed guardian defendant No. 1 or through any other guardian. On the records of the Danhata Court, which have been made a part of the records of this suit, it cannot be said that defendant No. 2 ever submitted to the jurisdiction of the Danhata Court.

On September 21, 1927, the suit was heard by the Additional *Nâib Akhilkâr* of Danhata Court. There was no appearance of the defendants on that date. The Court decided the question of jurisdiction in favour of the plaintiff and then took evidence produced on his behalf and decreed the suit *ex parte* against both the defendants. This decree was sought to be *executed* by the plaintiff in a British Court, namely, the Court of the Munsif of Sibsagar. On an objection being taken to the execution, the learned Munsif of Sibsagar dismissed the application for execution on the ground that the decree passed by the Danhata Court was a nullity. He held that, though a part of the cause of action arose within the jurisdiction of that Court, that is in the Cooch Behar State, as the defendants were at all material times, including the time when the suit was instituted in the Danhata Court, residents of British India and had not submitted to the jurisdiction of the said Court, the said Court had no jurisdiction to pass the decree.

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On February 18, 1931, the present suit was instituted in the Court of the Munsif of Sibsagar to enforce the judgment of the Danhata Court under the provisions of s. 13 of the Code of Civil Procedure. Both the Courts below have dismissed the suit on the ground that the Danhata Court was not a Court of competent jurisdiction. Hence the present appeal by the plaintiff.

By the law in force in the Cooch Behar State, a civil Court in that State can entertain a suit, other than a suit for immoveable property, if the cause of action had arisen wholly or partly within the jurisdiction of the Court. That is to say, the provision akin to s. 20 of the Code of Civil Procedure is in force in that State.

Dr. Mukherji, who has appeared for the appellant, has urged before me: (i) that the Danhata Court was a Court of competent jurisdiction and (ii) that the defendants have no defence to the action as they submitted to the jurisdiction of the Danhata Court. At the time of the hearing of the appeal, I asked him to consider the effect of the order of the learned Munsif of Sibsagar by which his client's application for execution had been dismissed and I pointed out to him the notification issued by the Governor-General in Council which has authorised British Indian Courts to execute decrees of civil and revenue Courts established in Cooch Behar. On that Dr. Mukherji urged that the British Courts in such a case would be transferee Courts and would have no power to decide the question as to whether the decree so passed was passed with jurisdiction or not. He accordingly says that the finding of the Munsif of Sibsagar dealing with the application for execution that the Danhata Court was not a Court of competent jurisdiction is not binding on his client.

On the first point formulated by him he urges that the competence of a foreign Court must be judged by the law relating to jurisdiction in force in that foreign State, and, as the Danhata Court could by that law entertain the suit, as part of the cause of action

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arose within its jurisdiction, the judgment sought to be enforced in this suit was a judgment pronounced by a Court of competent jurisdiction within the meaning of cl. (*a*) of s. 13.

To support the said proposition he relies upon the cases of *Rambhat* v. *Shankar Baswant* (1); *Tadepalli Subba Rao* v. *Sayed Mir Gulam Allikhan* (2); *Smith* v. *The Indian Textile Company* (3) and *Gaekwar Baroda State Railway* v. *Habib Ullah* (4). On the said point he also urged that, even when a defendant appears under protest in a foreign Court which has not otherwise jurisdiction to entertain the personal action, the defendant must be taken to have voluntarily submitted to its jurisdiction. In support of this proposition he relies on *Harris* v. *Taylor* (5). I will deal with these two points as also the point as to the effect of the order of the Munsif of Sibsagar by which the application for execution of the decree passed by the Danhata Court has been dismissed together. Whatever observations I make in the course of this judgment has reference to *personal actions* only, as in this case I am concerned only with the judgment of a foreign Court, *e. g.*, the Danhata Court, on a personal action.

A judgment pronounced by a domestic tribunal has its force and sanction on the ground that it is a judicial order of the sovereign pronounced by the mouth of one of its tribunals and so can be enforced by processes of execution within its territories. A judgment of a foreign tribunal cannot obviously have its force and sanction on such a ground. It has no right to claim recognition beyond jurisdiction, but the comity of nations accords to such a judgment a certain recognition. Such recognitions are accorded by different countries on three distinct principles, namely :—

I. The foreign judgment may be adopted by the domestic Court as its own and admitted to execution

(1) (1901) I. L. R. 25 Bom. 528.
(2) (1905) I. L. R. 29 Mad. 69.
(3) (1927) I. L. R. 49 All. 669.
(4) [1934] A. I. R. (All.) 740.
(5) [1915] 2 K. B. 580.

within its jurisdiction. This is done in many of the countries on the continent of Europe. This is a system of *express* co-operation of the domestic Courts with the foreign Courts. Section 44 recognises this principle only with regard to particular classes of foreign Courts, namely, Courts situate within the territories of Native Princes or States in alliance with His Majesty. In the case of such Courts the Governor-General-in-Council has to issue a notification under s. 44 of the Code of Civil Procedure.

II. The foreign judgment may be received as evidence of the *creation* of an obligation. This is the footing on which English Courts proceed. The original obligation also remains, and a suit may be brought on the original obligation in England, if the English Courts have jurisdiction to entertain a suit on it, or the foreign judgment obtained on the original obligation can be enforced in England by an action. In *Smith* v. *Nicolls* (1) Tindal C. J. observed thus :—

> If, then, the judgment has not altered the nature of the rights between the parties, we want some authority to see that the plaintiff is to be deprived of the remedy which every subject has of bringing his action in the Courts here for the damages he has sustained. It appears to me that he has his option, either to resort to the original ground of action, or to bring an *assumpsit* on the judgment recovered.

It is on this principle—that a foreign judgment may be received as evidence of the *creation* of an obligation—that English Courts proceed in allowing such a judgment to be enforced by an action and this is the basis of s. 13 of the Code of Civil Procedure.

III. The foreign judgment may be received as *evidence of the original obligation* in a suit brought on the primary cause of action. This is the principle adopted in a few European States, *e. g.*, Spain, Norway and Sweden.

The second principle being the principle on which the English system, adopted in this country by s. 13 of the Code, is based, that is, the foreign judgment

(1) (1839) 5 Bing. N. C. 208 (221) : 132 E. R. 1084 (1089).

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being looked upon as *creating* a substantive legal obligation, it follows that anything which either (a) negatives the existence of that legal obligation or (b) excuses the defendant from the performance of it must be a good defence to an action on a foreign judgment. Fraud is accordingly a good defence; that the proceedings of the foreign Court were against natural justice is another defence; that such a judgment was not on the merits is another. These three defences are the grounds, which according to the principles of Private International Law excuse the defendant from performance. Absence of jurisdiction in the foreign Court is that which negatives the creation of that obligation by its judgment, for, in order that an order of a Court may create an obligation on the part of a party to a suit or proceeding before it, the Court passing judgment must be a Court competent to create it,—that is it must be a Court having jurisdiction over the subject matter. In one of the earliest cases [*Williams* v. *Jones* (1)] Baron Parke observed thus :—

> Where a Court of *competent* jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial Courts are supported and enforced.

It would follow logically that a suit on a foreign judgment may be defeated on one of two grounds, namely—

(i) either by showing that the Court which pronounced the foreign judgment exceeded its jurisdiction given by the foreign law, that is, by the law of the Court passing the judgment, or (ii) by showing that the foreign Court had no jurisdiction according to the principles of Private International Law, *e.g.*, the defendant was not subject to its jurisdiction.

If the first of the aforesaid principles is the right one, Dr. Mukherji's contention on the first point would be correct, although the cases cited by him, as

(1) (1845) 13 M. & W 628 (633) : 153 E. R. 262 (265).

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I shall show later on, have no bearing on the said point; that is, as soon as he shows that the Danhata Court had jurisdiction to entertain the suit according to the law in force in the Cooch Behar State, which, according to that law, it undoubtedly had his appeal would succeed. But my reading of the case-law leads me to the conclusion that the second principle is the correct principle. The question whether the foreign Court was a Court of competent jurisdiction must be determined not by the territorial law of the foreign State but by the rules of Private International Law. It has been held that it is not sufficient for impeaching a foreign judgment sued upon in England to show that the Court which pronounced the judgment had no jurisdiction by its *own* rules, if it had jurisdiction according to the principles of Private International Law over the person of the defendant and the subject matter of the suit. The reasons given for this principle as I gather from the cases, is that defences which could have been raised before the foreign Court where the judgment is passed ought to have been raised in that Court, and not elsewhere, where that foreign judgment is sought to be enforced by action. [*Henderson v. Henderson* (1); *Bank of Australasia* v. *Nias* (2)]. In the case of *Pemberton* v. *Hughes* (3) Lindley M. R. lays down the principle in these words:—

> There is no doubt that the Courts of this country will not enforce the decisions of foreign Courts which have no jurisdiction in the sense above explained, *i.e.*, over the subject matter or over the person brought before them [*Schibsby* v. *Westenholz* (4) ; *Rousillon* v. *Rousillon* (5) ; *Price* v. *Dewhurst* (6) ; *Buchanan* v. *Rucker* (7) and *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote* (8)]. But the jurisdiction which *alone* is important in these matters is the competence of the Court in an *international sense, i.e.*,its territorial competence over the subject matter and over the defendant. *Its competence or jurisdiction in any other sense is not regarded as material by the Courts of this country.*

(1) (1844) 6 Q. B. 288 : 115 E. R. 111.
(2) (1851) 16 Q. B. 717 ; 117 E. R. 1055.
(3) [1899] 1 Ch. 781, 791.
(4) (1870) L. R. 6 Q. B. 155.
(5) (1880) 14 Ch. D. 351.
(6) (1838) 4 My. & Cr. 76 ; 41E. R. 30.
(7) (1808) 9 East 192 ; 103 E. R. 546.
(8) [1894] A. C. 670 ; L. R. 21 I. A. 171.

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In a personal action, a foreign Court has jurisdiction in an international sense, if

(i) the defendant is the subject of the foreign country in which the judgment has been obtained; or

(ii) he, the defendant, is a resident in that foreign country when the action began; or

(iii) where the defendant in the character of a plaintiff had selected the *forum* in which he is afterwards sued; or

(iv) where he, the defendant, had voluntarily appeared in that Court and submitted to its jurisdiction; or

(v) where he, the defendant, had contracted to submit himself to the foreign *forum* in which the judgment was obtained.

This is laid down in *Rousillon* v. *Rousillon* (1), *Schibsby's* case (2) and other cases. There may possibly be a sixth case, namely, where the defendant has real estate within the foreign jurisdiction in respect of which the cause of action arose while he was within that jurisdiction [see *Emanuel* v. *Symon* (3)]. No territorial legislation can give jurisdiction, which any foreign Court ought to recognise against absent foreigners who owe no allegiance or obedience to the Power which so legislates. This is the general principle [*Sirdar Gurdyal Singh* v. *The Raja of Faridkote* (4)]. In *Mathappa Chetti* v. *Chellappa Chetti* (5), the defendant entered into a contract with the plaintiff in the Pudukotta State. The law in that State was that a Court of that State would have jurisdiction to entertain a suit if the cause of action arose within that State. The plaintiff sued in the Pudukotta State and obtained a decree which was sought to be enforced by a suit in a British Indian Court at Madura. The defendant was not a subject of that native State and at the time of the institution

(1) (1880) 14 Ch. D. 351, 371.
(2) (1870) L. R. 6 Q. B. 155.
(3) [1908] 1 K. B. 302, 309.
(4) [1894] A. C. 670 : L. R. 21 I. A. 171.
(5) (1876) I. L. R. 1 Mad. 196, 198.

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of the suit in that State was not resident there. This is exactly the case which I have before me. Mr. Justice Holloway said that the decree passed by the Pudukotta State could not be enforced in British India, as that Court was not of competent jurisdiction. The Pudukotta Court was competent to try the suit according to *its laws* in force in that State, but it had no jurisdiction in an *international* sense. In the course of the judgment that learned Judge said this :—

> If Courts, as the French and English, arrogate to themselves jurisdiction whenever on false principles of international law they may choose to regard the obligation as subject to their jurisdiction because the contract was made within their limits, the result will be that other nations will justly treat their decrees as nullities.

The rule is that *cause of action* is not a general ground of jurisdiction recognised by International Law. The case may be otherwise where the non-resident foreigner is a subject of the same Sovereign power which legislates. Thus British Parliament may confer power on a British Court to try a suit against a British subject resident in British India where the cause of action or part thereof arose in Great Britain and a decree passed by a British Court can be enforced in a British Indian Court, if it does not in other matters offend against other rules for enforcing foreign judgments. The rules of the Supreme Court of England, namely, O. 11, r. 1, made under the provisions of s. 99 of the Supreme Court of Judicature Consolidation Act (15 & 16 Geo. V. c. 49) may have contemplated such cases. But, in the absence of an express power conferred by the British Parliament, the legislature of Ceylon, say, cannot by giving Courts within its territory jurisdiction to try suits against non-resident British Indian subjects where the cause of action arose within Ceylon, confer on judgments of its Courts extra-territorial operation, although the defendant is a subject of the same sovereign, namely, the King of England, and judgment passed in a suit instituted there on such a ground would be refused recognition in British

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India. Such a case arose and was decided in the manner which I have indicated: *Shaik Atham Sahib* v. *Davud Sahib* (1).

The cases cited by Dr. Mukherji, namely, *Rambhat* v. *Shankar* (2) and other cases which I have noticed above, do not touch the point. There the question of extra-territorial effect of a foreign judgment was not considered at all. All that was laid down was that a *British Indian Court* will decide a question of jurisdiction raised in a suit instituted *in a British Indian Court* in accordance with the provisions of the law promulgated by the British Indian Legislature, *e.g.*, the Code of Civil Procedure, and a decree passed by a British Indian Court in a suit so instituted in a British Indian Court can be executed in a British Indian Court.

The defendants in the case before me are not subjects of the Cooch Behar State. They were not residing within that State when the action in that State was commenced against them. They had not appeared in the Danhata Court in their character of the plaintiffs in any suit connected with the present claim. They had not entered into a contract with the plaintiff agreeing to be sued in the Cooch Behar State and the cause of action in this suit has no reference to their immoveable property situate in the Cooch Behar State. The Danhata Court had accordingly no jurisdiction to try the suit within the meaning of s. 13 of the Code. The question remains then whether the defendants voluntarily submitted to the jurisdiction of the Danhata Court. If a non-resident defendant appears in a foreign Court, pleads that that Court has no jurisdiction and also pleads to the merits, he submits to the jurisdiction of that Court voluntarily. Having taken the chance in that Court, he cannot be allowed to turn round and impeach the judgment on the ground of incompetency of the Court passing it, when it is sought to be enforced in another

(1) (1909) I. L. R. 32 Mad. 469. (2) (1901) I. L. R. 25 Bom. 528.

country. It may be that he voluntarily submits to the jurisdiction of that Court when he appears but does not plead to the merits. Thus where a defendant residing in England was sued in the Isle of Man and he appeared in the High Court of the Isle of Man *only* to set aside the order of service of the writ outside jurisdiction made by that Court, it was held that he having appeared *conditionally* there had voluntarily submitted to the jurisdiction of that court, *e.g.*, the High Court of Isle of Man. *Harris* v. *Taylor* (1). But I need not pursue this point further because in the case before me the defendant No. 2 never appeared in the Danhata Court.

For these reasons I hold that the Danhata Court was not a Court of competent jurisdiction within the meaning of s. 13 of the Code of Civil Procedure and the suit to enforce the judgment of that Court has been rightly dismissed.

But there is a more formidable obstacle in the plaintiff's way. A notification was issued by the Governor-General-in-Council under s. 434 of the Code of Civil Procedure of 1877, which corresponds to s. 44 of the present Code, by which it was declared that British Indian Courts would execute decrees passed by civil and revenue Courts of the Cooch Behar State [Notification No. 53F., dated March 7, 1879. See General Rules and Orders of the Governor-General-in-Council made under enactments in force in Britsh India, Vol. III, p. 475, 3rd Ed.] The Munsif at Sibsagar, therefore, had jurisdiction to entertain the application for execution which the plaintiff made in that Court and which was dismissed by that Court on the grounds which I have stated in the beginning of my judgment. The analogy of transferee Courts does not apply here. A decree of a Court of a Native State does not cease to be the decree of a foreign Court simply because a notification under s. 44 of the Code has been issued. The provisions of the

(1) [1915] 2 K. B. 580.

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Civil Procedure Code relating to transfer of decrees for execution in my judgment applies only to decrees *made by British Indian Courts and transferred to other British Indian Courts.* Section 44 in my judgment *only alters the procedure* for enforcing foreign judgments of a particular class, those passed by Native States, where the necessary notification has been issued by the Governor-General-in-Council. In my judgment, therefore, the plaintiff's sole remedy was to apply for execution of the decree passed by the Danhata Court and his suit is not maintainable. Even if the plaintiff in this case had two remedies, *e.g.*, to institute a suit under s. 13 or to apply for execution under s. 44, these remedies were of the same nature and scope and are, therefore, alternative remedies, and he having elected the latter remedy and having been unsuccessful cannot *again* sue under s. 13. He is barred on the well established principles relating to election of remedies. [*Gulab Koer* v. *Badshah Bahadur* (1).] I further hold that the question as to whether the decree passed by the Danhata Court is a nullity or not is concluded by the general principles *res judicata* by reason of order passed by the Munsif of Sibsagar by which he refused execution. It is well settled that when a decree of a foreign Court is sought to be executed in a British Indian Court under the provisions of s. 44, all objections which would be open to a defendant in a suit instituted under s. 13 of the Code to enforce a foreign judgment would be open to the judgment-debtor. The Munsif of Sibsagar as an executing Court had jurisdiction to decide the question whether the Danhata Court was a Court of competent jurisdiction and his decision on this point is final between the parties.

For thse reasons I dismiss the appeal with costs.

Appeal dismissed.

A. K. D.

(1) (1909) 13 C. W. N. 1197.