

APPELLATE CIVIL.

PARRY AND CO. (DEFENDANTS), APPELLANTS, v. APPASÁMI PILLAI
AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1880.
November 17.

Foreign judgment, suit on—Appeal to foreign appellate tribunal against decision of foreign tribunal whose jurisdiction was objected to—Involuntary submission to jurisdiction, effect of—Limitation Act, Section 14—Defect of jurisdiction, meaning of.

If a party sued in a foreign tribunal, which has no jurisdiction except by virtue of its own peculiar laws, protests against the assumption of jurisdiction by that tribunal, but defends the suit to escape the inconvenience of being made liable to arrest and attachment of property in foreign territory, and appeals from the adverse decision of such tribunal to a foreign appellate tribunal without repeating his objection to the jurisdiction, his submission to the jurisdiction is not voluntary, and the judgment of the foreign tribunal does not constitute a valid cause of action in a Court of British India.

The provision of the Indian Limitation Act, 1877, Section 14, which excepts such time as is spent in litigating in a Court of defective jurisdiction in favor of a plaintiff does not apply where the plaintiff brought his suit in a foreign Court which, according to its own laws, had ample jurisdiction, but according to the law of British India had no jurisdiction whatever.

THIS was an appeal from a decree of the High Court on its Original Side. The facts of the case are fully set out in the following Judgment of *Muttusámi Ayyar*, J., who tried the case :—

“This is a suit to recover the price of indigo sold and delivered by the first and second plaintiffs to the defendants on the 5th and 6th February 1875, and the payment of which was decreed by the Tribunal of First Instance at *Pondicherry* on the 13th November 1875. The ground of action as set forth in the amended plaint is, first, the judgment of the foreign Court; and, secondly, the alleged sale and delivery of indigo. The defendants contend that the *French* Court is not a Court of competent jurisdiction, that, though they bought the indigo, it was not from the plaintiffs, and that the second count is barred by the *Act of Limitation*.

* Appeal No. 10 of 1880 from a decree of the High Court in Original Suit No. 479 of 1878, dated 24th February 1880.

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"I do not think that the action can be sustained on the foreign judgment for the Tribunal at *Pondicherry* is not a Court of competent jurisdiction and, as stated by Baron *Parke* in *Russell v. Smith*, (1) a foreign judgment is enforced because the decree of a Court of competent jurisdiction over the defendant imposes on him an obligation to pay the sum for which judgment is given.

"The defendants are merchants residing and carrying on business at *Madras*, and the Court at *Pondicherry* is not their *forum domicilii*. On plaintiffs' own showing the indigo was sold and its price was to have been paid at *Cuddalore*, which is thus both the seat of the obligation and the place of its performance. Adopting *Savigny's* theory of voluntary submission and the presumption recognized in *Lloyd v. Guibert*, (2) viz., that the *locus contractus* is also the *locus solutionis* in the absence of an express agreement, I fail to find a special *forum* at *Pondicherry*. Again, it is not even alleged that the defendants ever resided in *French* territory, or in any other manner enjoyed or enjoy the protection of the law of *France*. In *Schibbsby v. Westenholz*, (3) *Blackburn, J.*, observes that jurisdiction may be presumed on the ground of temporary allegiance—1st, if the defendants had been at the time of judgment subjects of the country whose judgment is sought to be enforced; 2ndly, if the defendants had been at the time when the suit was commenced resident in the country so as to have the benefit of its laws protecting them; 3rdly, if at the time when the obligation was contracted the defendants were within the foreign country. *Copin v. Adamson* (4) in which the defendant was a member of a joint stock company established and protected by the law of the foreign country, and the obligation sought to be enforced arose out of the business carried on under such protection, is an addition to the cases mentioned by *Blackburn, J.* I can find no place in this category for the case before me, and I conclude, therefore, that the Tribunal of First Instance at *Pondicherry* is not a Court having jurisdiction either over the defendants or over the object-matter of the suit. It is then urged that the Court at *Pondicherry* relied on clause 14 of the *French Civil Code* under which any foreigner may be sued before the Courts

(1) 9 M. & W., 810.

(3) L.R. 6 Q.B. 159. s.c. 40, L.J.Q.B., 73.

(2) 35 L.J.Q.B. 74. s.c. 6 B. & S., p. 100.

(4) L.R. 9 Ex., 345.

of *France* for obligations contracted by him with the *French* either in the *French* or *British* territory. There can be no doubt that the *French* judgment is in conformity to the law of *France*, and that it may have force in *French* territory, but it is to be observed that, as stated by *Blackburn, J.*, in the case already cited, the *French Republic* cannot make laws to bind the whole world. I may add that the test of jurisdiction is not the law of *France* which is only territorial in its operation, but some recognized principle of international law which has extra territorial operation. Another matter which remains to be considered is whether *bona fides* requires that the defendants should be estopped from pleading now to the jurisdiction of the *French Court* by reason of their conduct in connection with the proceedings at *Pondicherry*. It is admitted that the defendants appeared before the Tribunal of First Instance at *Pondicherry*; that they first denied its jurisdiction; that, when their plea as to jurisdiction was disallowed, they went into the merits of the case; that, after they failed in the Court of First Instance, they preferred an appeal, and that, in doing so, they did not again raise the question of jurisdiction. Upon these facts it is argued for the plaintiffs that the defendants took the chance of a judgment in their favor, and that, having elected to do so, they are bound by the judgment, though it is adverse to them. But it must be remembered that the *French Tribunal* was not a Court of their choice as observed by *Baron Parke* in *General Steam Navigation Company v. Guillon*; (1) that there was no submission to jurisdiction as in *Kandoth Mammi's* case; (2) and that there was nothing in their conduct calculated to deceive the plaintiffs into a belief that the objection to jurisdiction was not intended to be insisted upon. I do not think that the defendants ought to suffer either because they appeared before the Court at *Pondicherry* or because they did not withdraw from it directly after their objection to jurisdiction was overruled. There is no breach of faith with the plaintiffs, and if the defendants went into the merits and failed to press the question of jurisdiction or appeal, they did so probably to prevent their arrest in execution whenever they should visit *Pondicherry*, and that after they knew what the *Civil Code of France* was, they believed

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(1) 11 M. & W., 877.

(2) 8 M.H.C.R., 14.

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that the objection to jurisdiction could not be successfully maintained in appeal. In the case of *Schibsby and Westenholts, Blackburn, J.*, remarked that appearance in a foreign Court to save some property which a defendant may happen to possess is no bar to pleading to jurisdiction, and I think it makes no difference in principle that the defendant appears to prevent his arrest in execution whenever by accident or on business he should chance to visit the foreign territory. The true test seems to be something in the conduct of the defendant which amounts to a voluntary submission to jurisdiction and which might amount to a breach of faith if the defendants were allowed to question the jurisdiction of the foreign Court. I am therefore of opinion that the judgment of the Courts at *Pondicherry* in this case is not binding on the defendants.

“The next question for decision is whether the claim, as based on the original cause of action, is barred. The indigo was to have been paid for in February 1875, while the suit was instituted on the 10th December 1878. It is clear that the claim would be barred if the time during which the plaintiffs were occupied in prosecuting it at *Pondicherry* were not deducted. It is also admitted that it would not be barred if the deduction might be made. I see nothing in the language of Section 14, Act XV of 1877, which renders it inapplicable to proceedings instituted in a foreign Court, while this suit seems to be within its reason. The learned Advocate-General relies on the expressions, “in a Court of First Instance or in a Court of Appeal,” but they do not, in my opinion, necessarily exclude the Tribunal of First Instance in a foreign territory. The plaintiffs first instituted the suit at *Pondicherry* in the belief that a judgment valid under the *French Civil Code* would be valid in *British India*, and, it has now failed for want of jurisdiction in so far as that judgment is inoperative outside the *French* territory. Though I find no decided case which is on all fours with this, pre-requisites of the indulgence conceded by the section exist in it and the section seems to apply alike to foreigners and *British* subjects who may sue in our Courts.”

His Lordship then proceeded to consider the question whether the indigo was sold by the plaintiffs to the defendants.

Upon the evidence His Lordship found for plaintiffs and entered judgment for the amount claimed, Rupees 8,809, but disallowed their claim for interest.

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The defendants appealed on the ground that the suit was barred by limitation, and the plaintiffs objected to the decree so far as it disallowed their claim for interest, and contended that the foreign judgment was binding on the plaintiffs.

The Advocate-General (Hon. P. O'Sullivan) and Mr. Shephard for the Appellants.

• Mr. Spring Branson for the Respondents.

The Court (Turner, C.J., and Forbes, J.) delivered the following

JUDGMENT :—The respondents alleged in their plaint that they had sold and delivered to the appellants at Cuddalore in South Arcot on 5th and 6th February 1875 indigo for the sum of Rupees 8,809, and that on the 13th November 1876 they had recovered judgment for that amount in the Tribunal of First Instance of Pondicherry with interest at 9 per cent. and costs; that the appellants had failed to procure the reversal of the decree on appeal; that the debt and decree were unsatisfied, and in respect of them they claimed to recover Rupees 12,228-1-8 and future interest at 9 per cent. on the principal sum due. We have to consider whether the respondents are entitled to recover this amount either in virtue of the decree they have obtained or of the contract.

Under the *Civil Code* the *French Courts* are empowered to entertain suits brought by *French subjects* on contracts made and to be performed outside *French territory*, although the party against whom relief is sought owes no allegiance to *France* and is not resident in *French territory* either when the contract is made or the cause of action arises or the proceedings are instituted.

In *Nullathumby Mudelliar v. Ponnusámi Pillai*(1) this Court considered the question whether it was the duty of *British Courts* to enforce a judgment obtained under such circumstances, and in accordance with the ruling in *Kandoth Mammi's case*(2) held that it should be enforced if the defendant had voluntarily sub-

(1) I.L.R., 2 Mad., 400.

(2) 8 M.H.C.R., 14.

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mitted to the jurisdiction of the *French* Court and had taken the chance of a verdict in his favor. The grounds on which those decisions proceeded were that the defendant, by appearing in the foreign Court and taking no objection to its jurisdiction, had for the time put himself under the jurisdiction of the Court and had led the plaintiff to believe that the proceedings were allowed by him to be effectual, and encouraged the plaintiff to proceed on them instead of withdrawing from them and instituting proceedings elsewhere.

In the case now before the Court the appellants appeared in the *French* Court and protested against the jurisdiction, and, when their protest was overruled, defended the suit on the merits. The decision being adverse to them, they instituted and prosecuted an appeal, and on appeal did not renew their protest. Under the circumstances, the learned Judge by whom this suit was tried held that the appellants did not voluntarily submit to the jurisdiction of the *French* Courts, and that this Court ought not to enforce the judgment. In this ruling we concur. The tribunal was not the Court of the appellants' choice; by their protest they warned the respondents that they would not allow that the proceedings were everywhere effectual. To escape the inconveniences which would attend a judgment against them if at any time they or their property might be found in *French* territory, they defended the suit and sought a reversal of the decision. It would have been idle to repeat an objection which they were aware the *French* Courts would not entertain, but there is nothing to show they abandoned their right to insist on it should the necessity for doing so arise elsewhere. For the reasons we have stated we consider the case before us is distinguishable from the cases above cited, and hold that the claim on the judgment of the *French* Court has properly been dismissed.

It is admitted that the claim on the contract is barred by limitation unless the respondents are entitled to the benefit of the provisions of Section 14 of the *Limitation Act*.

We desire to be understood as expressing no opinion whether under any circumstances those provisions allow the deduction of the period occupied by litigation in foreign Courts, for on another ground we hold them inapplicable in this case.

The *French* Courts were not, from defect of jurisdiction or otherwise, unable to entertain the claim. In the proper exercise of a jurisdiction conferred on them by the law of *France*, they have entertained the claim and passed decrees which are effectual in *French* territory. The respondents elected the *forum*, and although under the circumstances the *British* Courts may refuse to enforce the decree they have obtained, this circumstance does not bring the case within the provisions of Section 14 of the *Limitation Act*. The claim on the contract is then barred by limitation.

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As the respondents cannot rely on the decree of the *French* Court, and have by lapse of time lost their right to sue on the contract, we must reverse the decree of the Lower Court and dismiss the suit, but, under the circumstances, without costs.

Attorneys for the Appellants, Messrs. *Tasker* and *Wilson*.

Attorneys for the Respondents, Messrs. *Branson* and *Branson*.

