Clause B, Section 6, of Act XVI of 1875 enables the Governor-General from time to time, by notification in the *Gazette of India*, to exempt any goods imported or exported into or from any specified port or places therein from the whole or any part of the duties of customs to which they are liable under this Act, or any other law for the time being in force, and to cancel any such exemption.

In pursuance of this power the Governor-General by notification has exempted salt which has paid excise duty in Bombay from paying more than the difference between what is so paid and the duty leviable. In the case of the plaintiffs, when did the liability to pay duty attach? Did it attach at the date of payment of what was paid at Bombay or at the dates of import at the Madras ports? To determine this it is desirable to inquire what it was that was paid at Bombay, was it a payment of import duty in anticipation? Distinctly not. It was excise duty, and the only engagement of the Government of India was that on the salt which had paid such excise duty being brought to the port of import, only the difference would be charged between such excise duty and the import duty leviable.

[358] No import duty had been paid; but in consideration of the levy of the excise duty, the Government excused so much of the import duty as was covered by the excise duty.

It seems to me that plaintiffs were still liable to the contingency of the tariff rates being raised between the interval of their paying the excise duty in Bombay and the levy of the import duty at the port of import.

That contingency actually happened, and plaintiffs were liable to pay the extra duty. The plaintiffs' suit therefore must be dismissed, but as they succeeded on the issue as to the jurisdiction, each party will bear his own costs.

Solicitors for the Plaintiff, *Tasker* and *Wilson*.

The Government Solicitor (*Barclay*) for the Defendant.

NOTES.

[There was an appeal from this case which is reported in (1882) 5 Mad. 273. The judgment in this case on the point of jurisdiction was affirmed.

For Notes *see* the notes to 5 Mad. 273, in the '**Law Reports' Reprints.**]

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[359] APPELLATE CIVIL

The 9th February, 1880 and 8th December, 1881.

PRESENT:

MR. JUSTICE INNES AND MR. JUSTICE MUTTUSAMI AYYAR.

Hinde and Co.....(Plaintiffs), Appellants

and

Ponnath Brayan and others..... (Defendants), Respondents.*

Res judicata—*Foreign judgment—Civil Procedure Code, Section 14 (b), (c)—"International"—"Natural Justice."*

An *ex parte* judgment of a French Court against a native of British India not residing in French territory upon a cause of action which arose in British India, imposes no duty on the defendant to pay the amount decreed so as to bar a suit in British India.

* Second Appeal No. 143 of 1879 against the decree of J. W. Reid, District Judge of North Malabar, reversing the decree of E. K. Krishnen, District Munsif of Tellicherry, dated 26th August, 1878.

THIS was a suit to recover from the defendants the principal and interest due on a registered bond for Rs. 1,000, dated March 1872. The bond was executed by the first and second defendants and Moidin Kutti, deceased, in favour of one Bavachi Kunhi Pakki.

The third defendant, who was made a party to the suit as the representative of Moidin Kutti, was the Karnavan of the tarwad of which the three obligors were Anandravans.

The plaintiffs, a company of merchants trading on the Malabar Coast, had, in execution of a decree against Bavachi, attached the bond now sued upon and purchased it at the Court-sale in November 1874.

The defendants pleaded—

(1) that nothing was due by them to Bavachi, inasmuch as the first defendant had delivered to Bavachi's agent at Mahe (a French port near Tellicherry) pepper valued at Rs. 1,545-2-0 in 1873;

(2) that on a settlement of accounts between the first defendant and Bavachi at Tellicherry a balance was struck in favour of the first defendant, which Bavachi promised to pay, and that, after Bavachi's flight to Arabia (*see* I. L. R., 2 Mad., 221), the first defendant sued Bavachi in the French Court at Mahe and recovered judgment against him for Rs. 170, and that this judgment was a bar to the present suit.

[360] The third defendant pleaded further that he was not liable for this debt at all.

The Munsif held that the foreign judgment did not operate as a bar as it was obtained fraudulently. He was of opinion that the first defendant was guilty of fraud, because on 3rd July 1874 he objected to the attachment of this bond by two other judgment-creditors of Bavachi in other suits, and informed the Court that he had then brought his suit at Mahe to recover the 400 rupees, alleged to be due on settlement of accounts, whereas the first step in the French Court was not taken till 11th July, and because, instead of filing his suit at Tellicherry(in the Court of the same Judge) to recover the balance due on a settlement which was made at Tellichery, the first defendant proceeded to the Mahe Court " which *primâ facie*, had no jurisdiction to hear a claim against a merchant of Tellicherry." The Munsif, disbelieving the evidence of the discharge of the debt by delivery of the pepper at Mahe, and of the settlement of accounts between the first defendant and Bavachi, decreed for the plaintiffs, holding the third defendant liable only to the extent of the assets of the deceased, if any taken by him.

The first and second defendants appealed, and the third defendant also appealed.

The District Judge found that there was no fraud in the first defendant's conduct, and held that, as the judgment of the French Court declared that the defendant " regulierment assigne, et prevenu par un bulletin d'audience, fait defaut," Bavachi had notice of the proceedings and should have appeard and made his defence. The District Judge considered that even under the Code of Civil Procedure the Mahe Court had jurisdiction as the pepper was to be delivered there: "and," he proceeded, "as to jurisdiction, no allegation is made or proof offered that the Mahe Court had not jurisdiction."

The following authority and cases were cited by the District Judge in support of his judgment that the suit was *res judicata*—Story's Conflict of Laws (7th edition), p. 742; *Burrows* v. *Jemimo*; (Str., 733) *Tarleton* v. *Tarleton* (4 M. & S., 21) *Boucher*; v. *Lowson* · (2 Smith's L. C., p. 822); and *Martin* v. *Nicholls* (3 Sim., 458).

[361] The District Judge accordingly dismissed the suit with costs.

The plaintiffs appealed to the High Court on the ground that the Mahe judgment was not an estoppel to their suit.

Mr. *Ross Johnson* for Appellants.

Ramachandrayyar for Respondents.

The Court (INNES and MUTTUSAMI AYYAR, JJ.) delivered the following

Judgment.—It appears to us that the Mahe judgment is not impeached on any of the grounds mentioned in Section 14* of the Civil Procedure Code. The Court of First Instance was evidently in error in concluding that the facts raised a presumption of fraud on the part of the first defendant in the present suit in regard to his suit in the Court of Mahe. The suit was commenced by him two months prior to the attachment by plaintiff. No doubt the statement made by defendant in his Petition 698 on the occasion of the previous attachment by Ramanna and Abdulla was false in alleging that he had actually commenced an action, but it does not follow that his action, instituted only eight days afterwards, was false and fraudulent.

The District Judge is wrong in founding his view of the jurisdiction of the Court of Mahe on a supposed duty of Bavachi to deliver pepper there. The action was on a settlement of accounts not on a breach of contract to deliver pepper, and in British India the *forum* of the action would be the place of the settlement or the place of business or residence of the defendant at the time of the commencement of suit. The place of settlement as the defendant alleged was Tellicherry; the place of business of Bavachi was also there; but where at the commencement of the suit his place of residence was does not appear. If it was Mahe, which it may have been, the French Court of course may have had jurisdiction. No objection was taken on the score that the French Court had not jurisdiction until the appeal to the District Court and unless it appeared clearly that it had not juisdiction, the judgment could not have been impeached on that ground.

Bavachi, in regard to his rights on the bonds, is now represented by the plaintiffs or one of them, and though there may be reasonable doubts whether there was not fraud, in the absence of positive proof that there was, the judgment of the Court of Mahe must be **[362]** accepted as conclusive evidence that at the date of it Bavachi owed first defendant 170 rupees, and that the obligation on the bond now sued on had ceased to exist. We shall dismiss the appeal with costs.

The plaintiffs applied for a review of judgment on the ground that in appeared on the face of the record that the French Court had no jurisdiction.

The application for review was granted.

Mr. *Wedderburn* for the plaintiffs.

Act X 1877 does not govern this suit which was instituted in January 1877, but, notwithstanding, the French Court's judgment contravenes clauses

When foreign judgment no bar to suit in British India.

* [Sec. 14:—No foreign judgment shall operate as a bar to a suit in British India—

(*a*) If it has not been given on the merits of the case:

(*b*) If it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India:

(*c*) If it is in the opinion of the Court before which it is produced contrary to natural justice:

(*d*) If it has been obtained by fraud:

(*e*) If it sustains a claim founded on a breach of any law in force in British India.]

(*b*) and (*c*) of Section 14. This Court was mistaken in supposing that "it does not appear where at the commencement of suit Bavachi's residence was," for in the written statement the defendants admit that the suit at Mahe was not brought till Bavachi had absconded to Arabia, and that the suit was for the balance of 400 rupees which Bavachi promised to pay; and the French judgment describes the plaintiff as a resident of Chalacara, French territory, the defendant as a resident of Tellicherry, British territory. An alien residing in France has the privilege of a Frenchman (See *Schibsby* v. *Westenholz*, L., R. 6 Q. B., 157).

The cause of action clearly arose at Tellicherry and the defendant resided at Tellicherry, if not in Arabia, when the suit was brought.

The French law does not require a stranger defendant to be personally served with a summons, service on the Procureur Imperial is enough (See *Schibsby* v. *Westenholz*, L. R. 6 Q. B., 157.). It is very improebale that the summons was forwarded to Arabia—possibly it was sent to Tellibehrry. If Bavachi had no notice of the suit, the French judgment is only valid in French territory and can be no bar to this suit [2 Smith's Leading Cases, p. 318 (ed. VII) and I. L. R., 2 Mad., 403]. But even if Bavachi was summoned or had notice of suit, the judgment is no bar. Admitting that the French judgment is quite regular according to French law (just as the summons was regularly served according to French law), the question arises "Is there any duty on the defendant to obey the order of the French Court?" The rule is clearly stated by BLACKBURN, J., in *Schibsby* v. *Westen-*[363]*holz* p. 159: "The judgment of a Court of competent jurisdiction imposes a duty or obligation on the defendant to pay the sum for which the judgment is given, which the Courts in this country are bound to enforce, and consequently anything which negatives that duty or forms a legal excuse for not perfoming it is a defence to this action." It is not found, as a fact, that Bavachi had notice, as was the case in *Schibsby* v. *Westenholz* and this would be a legal excuse for not performing the duty, if it existed; but this duty never arose owing to the incompetency of the French Court to entertain the case on principles of "natural justice," *i.e.*,, principles of law universally recognized by civilized nations, sometimes called "Private International Law."

The rule of law laid down in Article 14 of the Code Civil that a stranger not residing in France can be sued before French Tribunals on account of obligations entered into with a Frenchman in a foreign country, is not a rule of law which can possibly commend itself for acceptation to any one but the plaintiff Frenchman.

The case is a stronger case than *Schibsby* v. *Westenholz* (in which it was held that no duty was imposed on the defendant to obey the judgment of a French Court), for in that case the defendant was served with notice of the action, and the goods alleged to be short-delivered were delivered at a French port.

Ramachandrayyar for the Defendants.

The Court delivered the following

Judgment:—In our judgment delivered on the 9th February 1880 in this suit we held that the judgment of the French Court was not impeachable upon any of the grounds mentioned in Section 14 of the Code of Civil Procedure, that it must be held that it had jurisdiction over the suit brought by the first defendant against Bavachi, and that, according to the judgment given by the French Court in that suit, Bavachi owed defendant 170 rupees and that plaintiffs could recover nothing against defendant on the bond formerly

executed by defendant in favour of Bavachi and by him assigned to plaintiffs. We dismissed the second appeal.

In Civil Miscellaneous Petition 783 of 1880 we were asked to review our judgment on the ground that the Court was mistaken in supposing that the French Court had jurisdiction, and that it clearly appeared on the record that it had not.

[364] Plaintiffs sued on a bond executed by defendant in favour for Bavachi and assigned by Bavachi to plaintiffs. Defendant set up discharge and a debt due by Bavachi. He set up also the decree by the Mahe Court showing a debt due by Bavachi to him of 170 rupees.

The question for present consideration is whether it has been made out that the Court was under a mistake in supposing that the Mahe Court had jurisdiction.

We were certainly under the impression that there was nothing on the record to show the place of residence of Bavachi at the date of the suit in the French Court. What we said was "the action was upon a settlement of accounts, not a breach of the contract to deliver pepper, and in British India the *forum* of the action would be the place of the settlement, or the business-place or res idence of the defendant at the time of the commencement of the suit. The place of settlement, as the defendant alleged, was Tellicherry; the place of business of Bavachi was also there; but where, at the commencement of the suit, his place of residence was, does not appear."

It is, however, now pointed out to us that the judgment of the French Court states that the residence of Bavachi was Tellicherry, his place of business was also there, and that was, further, the place of the settlement. The pepper was delivered by the plaintiff in the suit in the French Court (the present defendant) at Mahe, and it was, in consequence of the amount delivered exceeding in value the amount due, that the settlement at Tellicherry was come to repay the overplus. Now there is nothing on record to indicate that Mahe was fixed upon as the place for the fulfilment of the obligation. The settlement having been made at Tellicherry, that is just as likely as Mahe to have been the place contemplated for fulfilment of the obligation; and, in the absence of express evidence as to the intention of the parties that the amount payable should be paid at Mahe, the proper presumption would be that it was to be paid at Tellicherry. It therefore appears that the cause of action did not arise at Mahe, and that the defendant Bavachi did not reside or carry on business there.

The arrogation of jurisdiction by the French Court must therefore, have proceeded upon Article 14 of the Code Napoleon: **[365]** "A foreigner, though not resident in France, may be cited before the French Courts to enforce the execution of engagements contracted by him in France by a Frenchman; he may be summoned before the tribunals of France on account of engagements entered into by him with Frenchmen in a foreign country."

The judgment cannot be impeached on any of the grounds set forth in clauses "*a*," "*d*," and "*e*" of Section 14 of the Civil Procedure Code.

The question remains whether it has proceeded upon an incorrect view of International Law, or is contrary to natural justice.

The words "contrary to natural justice" we should have understood to relate to the character of the award and not to the procedure by which the result was arrived at, were it not that, if the meaning of the language be so restricted, there is no provision enabling the Court to disregard a foreign judgment in cases in which, by a faulty or irregular procedure, the defendant had not

been allowed the opportunity of fairly defending the suit. In the present case, however, the defendant is said to have been served regularly, and the question upon that part of the clause does not arise.

Then, has the judgment proceeded upon an incorrect view of International Law?

It has proceeded upon the view that there was a duty in the defendant to attend the Court of Mahe and defend the suit, and it is contended, upon various cases that we were referred to by Mr. Wedderburn, that no duty lay upon the defendant to attend the Court of Mahe or consequently to obey the judgment passed by it.

In *Schibsby* v. *Westenholz* (L. R., 6 Q. B., 155), in which the defendant, as in this case, was not resident or domiciled in France, the principle is laid down in page 159 on which foreign judgments are enforced, *viz.*, that such a judgment imposes a duty on the defendant to comply with the judgment, and that anything which negatives that duty or forms a legal excuse for not performing it is a defence to the action.

BLACKBURN, J., in the course of the judgment, says, "The question we have now to answer is, Can the Empire of France pass a **[366]** law to bind the whole world? (p. 160). We admit with perfect candour that, in the supposed case of a judgment obtained in this country against a foreigner, under the provisions of the Common Law Procedure Act, being sued on in a Court of the United States, the question for the Court of the United States would be, Can the Isle of Great Britain, pass a law to bind the whole world? We think in each case the answer should be No, but every country can pass laws to bind a great many persons; and, therefore, the further question has to be determined whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce." He then goes on to consider the circumstances which might render the judgment binding on the defendant.

In the present case the cause of action in the suit in the Mahe Court did not arise at Mahe, the defendant in the French Court did not reside at Mahe, and there appears no circumstance in the case which in a proper view of International Law could give the French Court jurisdiction or impose upon the defendant a duty to obey the judgment.

The question, therefore, whether the defendant was still under the obligation to discharge the bond on which the plaintiffs sue, must be decided independently of the considerations arising out of the judgment of the Mahe Court.

The case, therefore, depends on the evidence of defendant's witnesses to the discharge of the bond, and upon that evidence the District Judge has not pronounced an opinion. We must set aside our judgment and decree in second appeal, but before disposing of the second appeal on this application for review we must refer to the Judge the issue "Was the obligation of the first defendant on the bond relied on by the plaintiffs still undischarged at the date of the institution of the suit?"

The District Court is directed to try the foregoing issue upon the evidence already recorded, and to return its finding thereon to this Court, within three weeks from the date of receiving this order, when ten days will be allowed for filing objections.

Ordered accordingly.

NOTES.

[The decision in this case is in accordance with modern principles of International Law. *See* the Notes to (1876) 1 Mad. 196 in the 'Law Reports' Reprints]