It appears, however, that the fourth issue was recorded and the question was thereby distinctly raised. The Subordinate Judge must be requested to submit a finding on the fourth issue.

Another objection is that as tenants of the zamindar, respondents are not entitled to set up a right of easement by custom. The Subordinate Judge has dealt with this objection in paragraph 11 of his judgment, and we consider that he has properly disallowed it.

There is nothing in the Easements Act to invalidate customary easements, and we are of opinion that the decision of the Subordinate Judge is right except as regards the fourth issue.

Before finally disposing of this second appeal, we shall call upon him to submit a finding on the fourth issue upon the evidence on record within six weeks from the date of receipt of this order, and seven days will be allowed for filing objections after the finding is posted in this Court.

[In compliance with the above order the Subordinate Judge submitted a finding, which was not accepted. On his submitting a revised finding, the High Court passed a decree dismissing the suit with costs throughout.]

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Best.

SIVARAMAN CHETTI (PLAINTIFF), APPELLANT,

1895. April 1, 25.

v.

IBURAM SAHEB (DEFENDANT), RESPONDENT.*

Foreign judgment—Decree "in absentem"—*Submission to jurisdiction.*

The plaintiff brought a suit in the French Court at Karikal against the defendant, a British subject, resident in British India. The defendant employed a Vakil to defend the suit, but on the case coming on for hearing the Vakil stated he had no instructions, and an *ex-parte* decree was passed. An application by the defendant

* Second Appeal No. 1730 of 1894.

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to have the decree set aside was held to be time-barred. The plaintiff now brought a suit on the judgment of the French Court to recover the amount decreed to him:

Held, that the suit was not maintainable for the reason that the decree had been passed against the defendant *in absentem* by a foreign court, to which he had not submitted himself.

Semble: even if the foreign judgment had not been entirely invalid as against the defendant, the British Court would have had jurisdiction to disallow an item of claim allowed by the foreign court on account of prospective damages which was unsupported by evidence.

SECOND APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in appeal suit No. 485 of 1893, modifying the decree of A. Kuppusami Ayyangar, District Munsif of Negapatam, in original suit No. 77 of 1893.

The plaintiff sued to recover the sum of Rs. 1,262-15-9 upon the judgments of the French Court at Karikal affirmed by the Court of Appeal at Pondicherry.

The Subordinate Judge stated the facts giving rise to this suit, as follows :—

"On the 12th August 1887, the plaintiff and another living "and trading in Karikal, a French port, chartered a native brig "belonging to the defendant living at Nagore, a British Indian "port, for carrying certain goods from Karikal to Moulmein. "The vessel was, however, attached by the French Court at Karikal "at the instance of a third party after plaintiff shipped his goods, "and it could not, therefore, leave Karikal for Moulmein. The "plaintiff then chartered another vessel at Karikal to which his "goods from the other vessel were removed. After all this was "done, he sued the defendant, a British subject, in the Karikal "Court for recovery of (i) loss sustained by him by reason of some "of his goods being missing from the first vessel at the time of "re-loading, and some damaged and broken while they were tran-"shipped, (ii) the charge of transhipping goods from one vessel to "the other, and (iii) loss sustained by him by the defendant not "carrying his goods to the port of destination within the time "appointed by the charter-party. He complained to the French "Court that the defendant broke his contract and that he sustained "the damages he sought to recover by that breach and obtained a "decree *ex-parte* for all the sums sued for by him. The defendant "appealing to the appeal tribunal in Pondicherry, that Court "refused to interfere and confirmed the judgment of the Lower "Court. He sued now in the District Munsif's Court of Nega-

"patam upon these foreign judgments to recover from defendant "Rs. 1,262-15-9, being the aggregate of sums awarded by the "French Court and all costs incurred in the two courts of Karikal "and Pondicherry."

The further facts of the case are stated sufficiently for the purpose of this report in the judgment of the High Court.

The District Munsif passed a decree as prayed. On appeal the Subordinate Judge held (i) that the Court of Karikal had jurisdiction over the suit, (ii) that the defendant was entitled to plead that the judgment pronounced by the foreign court was wrong on the merits, (iii) that the foreign court had passed a decree for Rs. 700 more than the defendant was liable to pay, and he modified the decree of the District Munsif accordingly.

The plaintiff preferred this second appeal, and the defendant took objection to the decree under Civil Procedure Code, section 561.

Venkataramayya Chetti for appellant.

Pattabhirama Ayyar for respondent.

JUDGMENT.—Appellant sued the respondent in the District Munsif's Court at Negapatam for the recovery of Rs. 1,031-13-10 as due to him from respondent under a decree obtained by appellant in the French Court at Karikal. The District Munsif gave appellant a decree for the whole amount, but on the defendant's appeal the Subordinate Judge modified the decree by disallowing the present appellant's claim to a sum of Rs. 700, which had been awarded as damages.

Hence the present appeal with regard to this sum of Rs. 700, while respondent has objected under section 561 to the rest of the decree on the ground that the decree of Karikal Court was a nullity in consequence of its being passed against one who was a British subject over whom the French Court had no jurisdiction.

First, as to the appeal, there can be no doubt that the Subordinate Judge was right in disallowing the Rs. 700 claimed as damages, which were altogether prospective at the time when the suit was instituted in the Karikal Court and as to which no evidence was adduced as to their having been actually incurred. The appeal must, therefore, be dismissed with costs in any case.

The objection filed by respondent questions the validity of the entire decree as passed without jurisdiction against a foreigner, non-resident in French territory.

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As observed in the recent judgment of the Privy Council in *Gurdyal Singh* v. *Rajah of Faridkote*(1) "Territorial jurisdiction "attaches (with special exceptions) upon all persons either perma- "nently or temporarily resident within the territory, while they "are within it; but it does not follow them after they have with- "drawn from it, and when they are living in another independent "country. It exists always as to land within the territory and it "may be exercised over movables within the territory; and, in "questions of *status* or succession governed by domicil, it may "exist as to persons domiciled, or who, when living, were domiciled "within the territory. . . . No territorial legislation can give "jurisdiction which any foreign court ought to recognize against "foreigners, who owe no allegiance or obedience to the Power which "so legislates." Consequently, "in a personal action. . . . a "decree pronounced *in absentem* by a foreign court, to the jurisdic- "tion of which the defendant has not in any way submitted "himself, is by International Law an absolute nullity."

The question for consideration in the present case is, therefore, did the defendant submit himself to the jurisdiction of the French Courts? It appears that he employed a Vakil to defend the suit in the Court of First Instance, but on the case coming on for hearing the Vakil stated he had no instructions, and consequently a decree was passed as prayed for by plaintiff apparently without any evidence being taken. Subsequently, defendant applied to the French Courts to have the *ex-parte* decree set aside and a decree to be given on the merits. This application appears to have been acceded to, but, on the case coming on for hearing, the order so passed in defendant's favour was set aside on the ground that the application was barred as not having been made within eight days "of the notice of the decision."

The result is that the defendant had no hearing in the French Courts, and the mere fact of his having employed a Vakil is not sufficient to justify our holding that the decree was not passed *in absentem*.

Had defendant been allowed a hearing and the case then decided against him, we should have held—following *Kandoth Mammi* v. *Abdu Kalandan*(2) and *Fazal Shau Khan* v. *Gafar*

(1) L.R., 21 I.A., 171; s.c. I.L.R., 22 Calc., 222. (2) 8 M.H.C.R., 14.

Khan(1)—that having taken the chance of a judgment in his favour, he could not now, when an action is brought against him on the judgment, take exception to the jurisdiction; but on the facts of the present case we find that the defendant is not precluded from pleading want of jurisdiction in the French Court which passed the decree.

Allowing this objection of the respondent, we direct in supersession of the decree of both the courts below that plaintiff's suit be dismissed and that he do pay defendant's (respondent's) costs throughout including the costs both of the appeal to this court and of the objections filed under section 561 of the Code.

APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

THAYAR AMMAL AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

LAKSHMI AMMAL AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1895. March 28. April 18.

Mortgage—Interest 'post diem'—*Limitation Act—Act XV of* 1877, *sched. II, art.* 116.

The plaintiff sued in 1893 to recover principal together with interest due up to date on a mortgage which provided for the repayment of principal and interest in December 1882, but contained no covenant for the payment of interest *post diem*; *Held*, that the claim for interest *post diem* was barred by limitation.

APPEAL against the decree of S. Russell, District Judge of Chingleput, in original suit No. 2 of 1893.

Suit to recover principal and interest due on a mortgage, dated the 16th February 1880. The instrument sued on contained a covenant for the payment of principal and interest "within December 1882," but there was no covenant for the payment of interest *post diem*.

The District Judge passed a decree for the principal together with interest up to the 31st December 1882. As to the claim for further interest he treated it as a claim for damages for the breach of contract, and held that it was barred by limitation on

(1) I.L.R., 15 Mad., 82.

* Appeal No. 81 of 1894.