PRIVY COUNCIL.

P.C.*
1903.
May 5, 6, 7,
25.

ANNAMALAI CHETTY (PLAINTIFF),

v.

MURUGASA CHETTY AND ANOTHER (DEFENDANTS).

[On appeal from the High Court of Judicature at Madras.]

Jurisdiction—Foreigner carrying on business by agent—Civil Procedure Code (Act XIV of 1882), s. 17—Suit in Court in British India on judgment of French Court—Effect of order in insolvency of French Court—Business carried on by managing member of joint family.

Quære, whether a non-resident foreigner can, by carrying on business within the jurisdiction of a British Court in India by an agent, subject himself to the jurisdiction of the Court under section 17 of the Code of Civil Procedure (Act XIV of 1882).

Girdhar Damodar v. *Kassigar Hiragar*, (I.L.R., 17 Bom., 662), distinguished.

In this case it was found by the Judicial Committee on the evidence that the agency was not proved, the alleged agent being merely the manager of joint family property, of which the defendant owned a share; and they held that such a person is not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such persons resembles that of trustee and *cestui que trust*, rather than that of principal and agent, or of partners.

The defendant was a French subject and had been adjudicated an insolvent by the Court at Pondicherry.

Quære, whether a suit brought against him in a British Court in India on a judgment of the Pondicherry Court obtained after the order of adjudication in insolvency took effect was barred by the proceedings in insolvency, as held in *Quelin* v. *Moisson* ((1827) 1 Knapp. P.C., 265). The High Court held that the suit was so barred; but in the view of the case taken by the Judicial Committee it was not necessary to decide the point.

APPEAL from a judgment and decree (26th January 1900) of the High Court at Madras which reversed a decree (8th November 1898) of the District Court of South Arcot, and dismissed the appellant's suit with costs.

The suit was brought to recover a sum of money due on a decree of the French Court at Pondicherry. The facts of the case are sufficiently set out in the report of the appeal to the High Court in I.L.R., 23 Mad., 458.

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* *Present:* Lord MACNAGHTEN, Lord LINDLEY, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

The questions which arose in the case are shown by the issues settled by the District Judge which were as follows :—

1. "Is this Court prevented from entertaining the suit by reason of the cause of action not having arisen, and defendant not being resident or carrying on business within its jurisdiction?

2. Did or did not the defendant reside or carry on business within the jurisdiction of this Court on the date when the cause of action arose?

3. Was the French judgment, on which the suit has been brought, according to French law null and void on the date of suit, and is the present claim based on the French judgment, therefore, not sustainable in this Court?

4. Is it open to the defendant to raise the contention in this suit that the promissory note, on which the French judgment was passed, was obtained from the defendant by the plaintiff fraudulently?

5. And, if so, was the promissory note obtained by the plaintiff from the defendant fraudulently?

6. What is the relief, if any, that the plaintiff is entitled to?"

On these issues the District Judge held as to (1) and (2) that the first defendant was carrying on business at Cuddalore, within the meaning of section 17 of the Civil Procedure Code (Act XIV of 1882), at the date of the suit, and was therefore subject to the jurisdiction of the Court in which the suit had been filed. On issue (3) he held that "at the date of suit the French judgment was not null and void." On issues (4) and (5) he held that it was not competent for him to go behind the French judgment and investigate the questions involved in those issues, and he would not allow evidence on them to be gone into. The District Judge gave a decree for the full amount claimed with costs against the first defendant.

From this decision the first defendant appealed to the High Court. The appeal was heard by a Division Bench of that Court (SUBRAHMANIA AYYAR and DAVIES, JJ.) who reversed the decision of the District Judge and dismissed the suit. The judgment will be found reported in I.L.R., 23 Mad., at p. 470.

On this appeal, *Cohen*, *K. C.*, and *J. M. Parikh*, for the appellant, contended that, under section 17 of the Code of Civil Procedure (Act XIV of 1882), the District Court had rightly decided that it had jurisdiction to entertain the suit. There

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was sufficient evidence of the respondent's residence and carrying on business within the jurisdiction of the Court to satisfy the District Judge as to his jurisdiction. To bring the respondent within section 17, it was not necessary for him to carry on business personally; that he did so by an agent was sufficient. Kandasami was shown to be the manager of a business in which the respondent had a share and which was carried on by Kandasami within the jurisdiction of the Court in which the suit was brought. These circumstances, combined with the fact that neither the respondent nor Kandasami had been called as a witness, were, it was submitted, sufficient to justify the District Judge in holding that he had jurisdiction. The respondent should have come forward and denied on oath that he carried on business within the jurisdiction. Reference was made to *Girdhar Damodar* v. *Kassiyar Hiragar*(1), *Muthaya Chetti* v. *Allan*(2), section 17 of the Civil Procedure Code of 1882, and clause 12 of the Letters Patent of the High Court. The respondent moreover had acquiesced in the jurisdiction of the Court, and by the proceedings he himself had taken in the District Court he was estopped from now setting up any objection as to its jurisdiction. *Venkata Viraraguva Ayyangar* v. *Krishnasami Ayyangar*(3), and section 20 of the Civil Procedure Code were referred to.

It was also contended that the adjudication of insolvency in the French Court at Pondicherry only temporarily suspended the creditors' right of action against the debtor, but did not operate as a discharge of the insolvent's debts. Such a discharge was only created and the remedies of the creditor taken away, where a concordat or composition was agreed upon by the creditors and confirmed by the Court, which was not the case here. Reference was made to Dicey's 'Conflict of Laws,' page 451; Story's 'Conflict of Laws,' pages 337, 338, 339; *Ellis* v. *McHenry*(4); *Phillips* v. *Eyre*(5); the Code Français de Commerce of 1838, as amended by the law of 1889, article 443; Dalloz's 'Jurisprudence Generale,' Supplement, Vol. VIII, page 254, section 8, page 327, verse 398 and page 498, verse 1073; Massi's 'Droit Commercial,' Vol. II, pages 347, 392, 395, 396; and Goviand's 'French Commercial Law,' pages 399, 400, 416, 424, 668, 670.

(1) I.L.R., 17 Bom., 662 at p. 666.
(2) I.L.R., 4 Mad., 209.
(3) I.L.R., 6 Mad., 344.
(4) (1871) L.R., 6 C.P., 228 at p. 234.
(5) (1870) L.R., 6 Q.B., 1 at pp. 28, 29, 30.

A party to a contract made and to be performed in England is not discharged from liability under the contract by an order in bankruptcy under the law of a foreign country in which he is domiciled: *Gibbs* v. *La Société Industrielle et Commerciale des metaux*(1). The case of *Quelin* v. *Moisson*(2) was relied on by the respondent as deciding the effect of the order in insolvency in his favour. But that case, it was submitted, was not an authority for the proposition that by French law bankruptcy discharges or extinguishes the insolvent's debts. It stated the opinion of two French advocates that if, by the order in bankruptcy, such debts were extinguished, and not merely the creditors' remedies suspended, then no action would lie for them. At most, that case only decided that, under the French law then (in 1827) prevailing, insolvency effected a discharge of the insolvent's debts. The onus of showing that such was the law now was on the respondent, and there was no evidence in which it could be found that that was the effect of the insolvency. A question of foreign law was a question of fact to be decided by evidence in each case. The law should have been shown by the evidence of experts (*Colville* v. *Gordon*(3)). As to the admissibility and relevancy of French law books as showing what the law is, sections 38 and 57 of the Evidence Act (I of 1872) were referred to and it was contended they were not relevant. The question as to the effect of the order in insolvency was raised for the first time in the High Court, and under the Civil Procedure Code the case should have been sent back to the First Court for the decision of that question before it was determined by the Appellate Court.

Dicey, *K. C.*, and *W. C. Bonnerjee*, for the respondent Murugasa Chetty, contended that the District Court had entertained the suit wrongly and without jurisdiction. There was no evidence to show that the respondent was at the time of the institution of the suit subject to the jurisdiction of the Court in which it was brought. The onus of proving this was on the appellant. The respondent was a French subject domiciled in Pondicherry, and section 17 of the Civil Procedure Code was not intended to, and did not, apply to, such a person. Even assuming there was a joint business in which the respondent had a share, he could not at the date of suit

(1) (1890) L.R., 25 Q.B.D., 399 at p. 411. (2) (1827) 1 Knapp. P.C., 265.
(3) (1854) 5 De. G.M. & G., 278.

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have been considered as carrying it on within the meaning of section 17 of the Civil Procedure Code; it must have been carried on by the syndics in bankruptcy at the time the plaint was filed. Section 20 of the Civil Procedure Code has no reference to this case: acquiescence cannot give jurisdiction to a Court, if it has not jurisdiction to entertain a suit. *Ledgard* v. *Bull*(1) was referred to. By his appearance to the summons the appellant did not consent to the jurisdiction: he objected to it in his written statement following the procedure laid down in the Civil Procedure Code. The case of *Girdhar Damodar* v. *Kassigar Hiragar*(2), though it may be correctly decided as to a British subject, did not apply in this case where the respondent was a foreigner, and not carrying on business personally. A person other than a British subject cannot, by carrying on business by an agent, subject himself to the jurisdiction of the Court in the district where such business was carried on (*Kessowji Damodar Jairam* v. *Khimji Jairam*(3)). To show that the respondent was not a person subject to the jurisdiction of the District Court, reference was also made to Westlake's 'International Law,' 3rd edition, page 152, section 134; *Holliott* v. *Ogden*(4); *Solomons* v. *Ross*(5); *Jollet* v. *Deponthieu*(6); *Russell* v. *Cambefort*(7); and *St. Gobain Chauny and Cirey Co.* v. *Hoyermann's Agency*(8). The word "debtor" must not be construed in such a sense as to foreigners as to give jurisdiction more than ordinarily extensive, whatever might be the interpretation if the respondent were a British subject. Maxwell on 'the Interpretation of Statutes,' 3rd edition, page 204; *Ex-parte Blain*(9); *Ex-parte Pearson*(10); and *Cooke* v. *Vogeler Company*(11) per Lord Halsbury, L. C., were referred to.

As to proof of French law and procedure in such cases *Alivon* v. *Furnival*(12) was referred to. As to the power of the Government of India to legislate for foreigners, reference was made to Ilbert's 'Government of India,' page 451; Civil Procedure Code

(1) (1886) L.R., 13 I.A., 134; I.L.R., 9 All., 191.
(2) I.L.R., 17 Bom., 662 at p. 666. (3) I.L.R., 12 Bom., 507.
(4) (1789) 1 H. Blackstone, 124 at p. 131. (5) (1764) 1 H. Blackstone, 131 note.
(6) (1769) 1 H. Blackstone, 132 note. (7) (1889) L.R., 23 Q.B.D., 526 at p. 528.
(8) L.R., (1893), 2 Q.B., 96 at p. 101.
(9) (1879) L.R., 12 Ch.D., 522 at pp. 526, 528.
(10) L.R., (1892), 2 Q.B., 263 at p. 268. (11) L.R., (1901), A.C., 102 at p. 110.
(12) (1834) 1 Cr. M. & R., 277.

(Act XIV of 1882), section 1; and the General Clauses Consolidation Acts (I of 1868 and X of 1897).

It was also contended that the order in insolvency operated by French law as a discharge of all the respondent's liabilities, and the appellant was not entitled to maintain a suit against him, but must come in under the insolvency proceedings as in fact he had done. In this view the French judgment sued upon was at the date of the suit void under French law. The case of *Quelin* v. *Moisson*(1) decided by the Privy Council in 1827 was relied upon, as deciding this point on the French Bankruptcy Law in favour of the respondent. That law was founded on three enactments, one of 1807, another amending the law in 1838, and a rule of 24th March 1889; and reference was made to the Code Français Commercial, 1838, chapter I, sections 443, 446. To show what was the French law on the subject, French Statutes and Law Books were, it was submitted, relevant, and they could be taken judicial notice of by the Court. Sections 38, 57 and 84 of the Evidence Act (I of 1872) were referred to.

Cohen, K. C., in reply contended that foreigners were not excluded from the jurisdiction of the Courts of a country, when they actually subjected themselves to the jurisdiction by carrying on business within it, as it was submitted the respondent in this case had done. Section 10 of the Civil Procedure Code (Act XIV of 1882) enacting that no person shall by reason of birth be exempted from the jurisdiction of the Courts, was referred to. And as to the power of the Government of India to legislate for foreigners, reference was made to Ilbert's 'Government of India,' page 301; and the Indian Councils Act, 21 and 22 Vict., c. 67, section 22.

On the 25th May 1903 the judgment of their Lordships was delivered by LORD LINDLEY.

JUDGMENT.—The plaintiff and the defendant in the action which has given rise to this appeal are French subjects living and trading in Pondicherry. The plaintiff sued the defendant Murugasa Chetty in Pondicherry on a promissory note, and on the 20th March 1896 the plaintiff obtained judgment by default for Rs. 13,968 with interest and costs. Execution proceedings were taken

(1) (1827) 1 Knapp. P.C., 265.

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in Pondicherry on this judgment, but nothing was recovered. On the 20th July 1896 the defendant's firm was declared insolvent, at the instance of other creditors, by the Pondicherry Court; and on the 23rd September the insolvency was declared to have effect retrospectively from the 8th January 1896, which was anterior to the plaintiff's judgment and indeed to the commencement of the action in which it was obtained. In the insolvency proceedings Syndics were appointed as usual, and the plaintiff applied for payment out of the estate; but it does not appear that he obtained payment of any dividend.

On the 8th October 1896 this action was commenced in the District Court of South Arcot, which is in the Madras Presidency, and near Pondicherry. The action was by the same plaintiff against the same defendant, Murugasa Chetty, and was based on the judgment already obtained against him in Pondicherry. The Receiver appointed by the Court in Pondicherry was also made a defendant to represent the Syndics.

In order to get over any difficulty which might arise as to the jurisdiction of the Arcot Court to entertain the action, the plaintiff described the defendant Murugasa Chetty as residing in British Indian Territory, *i.e.*, Cuddalore and other places, and as having houses of business and carrying on business there. The defendant put in an appearance to this action and a statement and supplemental statement of defence, denying these allegations and denying the jurisdiction of the Court to entertain the action. He also impeached the validity of the promissory note and judgment by default, and, lastly, he relied on the insolvency proceedings as a defence to the action even if the Court had jurisdiction to entertain it.

The Receiver was also allowed to appear and put in a defence, which he did. He denied the jurisdiction of the Court to entertain the action; and he further relied on the insolvency proceedings as invalidating the judgment, and also as furnishing a defence to the action upon it, if still in force, and if the Arcot Court had any jurisdiction to entertain the action.

The following issues were settled:—

I. Is this Court prevented from entertaining the suit by reason of the cause of action not having arisen and defendant not being resident or carrying on business within its jurisdiction?

II. Did or did not the defendant reside or carry on business within the jurisdiction of this Court on the date when cause of action arose?

III. Was the French judgment on which the suit has been brought according to French law null and void on the date of suit and is the present claim based on the French judgment, therefore, not sustainable in this Court?

IV. Is it open to the defendant to raise the contention in this suit that the promissory note on which the French judgment was passed was obtained from the defendant by the plaintiff fraudulently?

V. And, if so, was the promissory note obtained by the plaintiff from the defendant fraudulently?

VI. What is the relief, if any, that the plaintiff is entitled to?

The parties were directed to file all the documents they relied on; and French law books might be filed at the hearing.

Considerable evidence was adduced on both sides upon the question of carrying on business in British Indian territory, but there was no evidence worth mentioning that the defendant ever resided in British India; nor was there any evidence that the cause of action arose from any transaction which took place therein. It was proved that the defendant had relatives and a share of property in British India, and that a cousin named Kandasami Chetty managed this property and paid money to the defendant. On the other hand, there was no evidence worth mentioning to support the defendant's charges of fraud by which he sought to impeach the promissory note and judgment sued upon, and this part of the case was subsequently abandoned by the defendant's counsel.

The insolvency proceedings in Pondicherry were all put in evidence, but no opinion appears to have been obtained from any expert in French law as to the legal effect of those proceedings either on the judgment recovered by the plaintiff in Pondicherry before they in fact commenced, or on the discharge of the defendant from liability to pay the judgment debt.

The District Judge states that the only issues really contested before him were the first and second; no argument was put forward on the third, but he looked up the French law as best he could in the Code Napoleon and he came to the conclusion that the judgment sued upon was not null and void when the action in the

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Arcot Court was commenced, and he therefore found the third issue for the plaintiff. He decided that it was not competent for him to go behind the French judgment, and this disposed of the fourth and fifth issues. He found however as a fact that the defendant did carry on business in British India, viz., in Cuddalore, where the action was commenced, and he accordingly gave judgment for the plaintiff with costs.

The defendant appealed from this decision to the High Court at Madras which reversed the judgment and dismissed the action with costs, on the ground, first, that it was not proved that the defendant did in fact carry on business in British India when the action was commenced; and on the further ground that the insolvency proceedings were a bar to the action. They came to this conclusion on the authority of a decision of this Board in 1827, viz., *Quelin* v. *Moisson*(1).

In both Courts in India it was apparently assumed that the question of jurisdiction turned on section 17 of the Code of Civil Procedure, and that although the defendant was a foreigner, and although the cause of action arose in a foreign country, and although the defendant did not personally reside within the local limits of the jurisdiction of any Court in British India, and was not even temporarily in Arcot when sued there, yet he could be sued in the Arcot Court if he carried on business through an agent in the local limits of that Court's jurisdiction.

This assumption appears to their Lordships to require more attention than it has received.

Their Lordships see no reason for doubting the correctness of the decision of the case of *Girdhar Damodar* v. *Kassigar Hiragar*(2) where the defendant was a native of Cutch and the cause of action arose within the local limits of the jurisdiction of the British Indian Court in which the action was brought. But that case does not cover the present one.

It is not, however, necessary to pursue this matter, for it is admitted by all parties and it is plain that this appeal must fail unless their Lordships agree with the District Judge in coming to the conclusion that at the time of the commencement of this suit, viz., on the 8th October 1896, the defendant was by his agent carrying on business in Cuddalore or some other place within the

(1) (1827) 1 Knapp. P.C., 265. (2) (1893) I.L.R., 17 Bom., 662 at p. 666.

jurisdiction of the Court. The burden of proving this is clearly on the plaintiff; he has given evidence himself and called witnesses, and his and their evidence, until carefully examined, seems sufficient to establish such trading, especially as the defendant was within reach and was not called to deny or explain their statements. This omission was naturally made the most of by the appellant's counsel. But it must be remembered that the defendant was a bankrupt and in great difficulties, and was naturally very reluctant to expose himself to a long and hostile cross-examination. After carefully considering the evidence their Lordships have come to the conclusion that the District Judge fell into the error of treating Kandasami Chetty as the agent of the defendant. This mistake is clearly pointed out by the High Court. Kandasami Chetty's acts and his payments to the defendant are all attributable to his being the manager of joint family property, of which the defendant had a share; and their Lordships entirely concur with the High Court in holding that such a person is not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such persons is not that of principal or agent, or of partners; it is much more like that of trustee and *cestui que trust*. Those witnesses who say they saw the defendant trading in Cuddalore do not speak of the critical time. An attempt was made to show that the joint property was divided long ago, and that Kandasami Chetty was not acting as manager of family property in which the defendant had an interest. But this attempt failed, for although some money was divided, the rest of the joint property was not decreed to be partitioned until 1897.

In short, the moment the error of treating Kandasami Chetty as the defendant's agent is corrected, the rest of the evidence all crumbles away.

This conclusion renders it unnecessary to consider the effect of the defendant's insolvency either on the validity of the judgment sued on or on the insolvency affording a defence to the action if the judgment is still in force. *Quelin* v. *Moisson*(1) goes far to show that the insolvency would afford a defence; but their Lordships might have thought it right not to decide this point in the absence of evidence of persons skilled in French law.

(1) (1827) 1 Knapp. P.C., 265.

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Their Lordships will humbly advise His Majesty to dismiss the appeal and the appellant must pay the costs of the respondent Murugasa Chetty, the other respondent not having appeared.

Appeal dismissed.

Solicitor for the appellant: Mr. *R. T. Tasker.*

Solicitors for the respondent: Messrs. *Lawford, Waterhouse and Lawford.*

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Subrahmania Ayyar, Mr. Justice Davies and Mr. Justice Benson.

1902. November 6. December 9. 1903. February 20.

VIJIARAGHAVA CHARIAR (THIRD ACCUSED), PETITIONER,

v.

EMPEROR (COMPLAINANT), COUNTER-PETITIONER.*

Indian Penal Code—Act XLV of 1860, ss. 153, 296—Wantonly giving provocation with intent to cause riot—Disturbing a religious assembly—Religious procession on highway—Legality—Chanting hymns by ordinary worshippers.

By a decree in a civil suit, the Tengalai sect in a certain district were declared entitled to hold certain offices connected with a temple, and as such office-holders it was in their duty to recite certain hymns in processions. The rights of the Vadagalai sect as ordinary worshippers were not affected by the decree, but the Vadagalais were ordered not to interfere with the Tengalais in the recital of the hymns otherwise than as ordinary worshippers. Subsequently to this decree, a religious procession was being conducted along a public highway. The Tengalais walked in front, chanting the hymns. In the rear, at such a distance that the Tengalais were not likely to hear them, the Vadagalais followed, also chanting hymns. A complaint was in consequence laid by a member of the Tengalai sect, charging the Vadagalais (1) with wantonly giving provocation with intent to cause riot and (2) with voluntarily disturbing an assembly lawfully engaged in religious worship:

Held, that neither offence had been committed.

Per DAVIES, J. (without deciding whether religious processions in public streets in India are "lawful" or not).—The Vadagalais had not exceeded their rights as ordinary worshippers and had not intended to provoke a breach of the peace, and were consequently not guilty of an offence under section 153. Moreover, no "disturbance" had been proved within the meaning of section 296.

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* Criminal Revision Case No. 292 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the judgment of A. C. Tate, Sessions Judge of Chingleput, in Criminal Appeals Nos. 22 to 24 of 1902, presented against the conviction and sentence passed by S. Russell, Joint Magistrate of Chingleput, in Criminal Case No. 253 of 1901.