PRIVY COUNCIL.*

KEYMER (PLAINTIFF),

1916.
November
13 and 14.

v.

VISVANATHAM REDDI (DEFENDANT).

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

Civil Procedure Code (Act V of 1908), sec. 13 (b)—Foreign judgment, suit on—Judgment obtained by plaintiff after defence had been struck out and "defendant placed in the same position as if he had not defended"—Judgment not on "the merits of the case."

The plaintiff (appellant) sued the defendant (respondent) in the Court of King's Bench in London for a sum of money he alleged to be due to him in respect of transactions he had with the defendant as a member of a firm in Madras who under arrangements between them consigned goods to the plaintiff for sale in London. The defendant denied that he was ever a member of the firm in Madras, and also denied that there was any money due by him to the plaintiff, or that the arrangements had been made under which the plaintiff asserted that his claim arose. The defendant refused to answer interrogatories which the plaintiff was allowed to exhibit calling on the defendant to speak as to some of the material matters in dispute, and the defence was thereupon ordered to be struck out, "and the defendant to be placed in the same position as if he had not defended," and judgment was entered for the plaintiff. In a suit brought in the High Court at Madras on that judgment,

Held (upholding the decision of the appellate High Court), that it had not been given between the parties "on the merits of the case" within the meaning of section 13 (*b*) of the Code of Civil Procedure, 1908.

APPEAL No. 150 of 1915 from a judgment and decree (6th November 1914) of the High Court at Madras in its appellate jurisdiction, which reversed a judgment and decree (8th September 1914) of a Judge of the same Court in the exercise of its originial civil jurisdiction.

The question for determination on this appeal was as to whether the appellant was entitled to a decree against the respondent in a suit in India based upon a judgment obtained in England.

The facts of the case are sufficiently stated in the judgment of their Lordships of the Judicial Committee, and will also be

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* *Present*:—The Lord Chancellor (Lord BUCKMASTER), Lord SHAW, Lord WRENBURY, and Mr. AMEER ALI.

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found in the report of the case in the Appellate High Court (Sir JOHN WALLIS, C.J. and SESHAGIRI AYYAR, J.) under the name of *Viswanadha Reddi* v. *Keymer*(1), where the judgment of BAKEWELL, J., the Trial Judge, is also given.

On this appeal—

Sir R. Finlay, K.C. and *A. M. Dunn* for the appellant contended that the matters in dispute had been directly adjudicated upon and decided on "the merits of the case," within the meaning of section 13 (*b*) of the Code of Civil Procedure, that section was part of the law of *res judicata* and placed a foreign judgment in the same position as others subject to the addition of the words material. The merits of the case, it was submitted, were the facts that composed the issue on the principal question in the case which was whether the defendant owed certain money. Reference was made to *Ramchand* v. *Bartlett*(2); *Moazzim Hossein Khan* v. *Robinson*(3); *The "Delta"*(4); *Harris* v. *Quine*(5); *Emanuel* v. *Symons*(6); *Farden* v. *Richter*(7) and *Nuvion* v. *Freeman*(8). A judgment passed in accordance with Order XIX, rule 30 of the Civil Procedure Code, would be one on the merits; so also if a man makes a defence but withdraws it: in these cases judgment is given *ex parte* but it is on the merits. If then a man puts himself in the position where he is left without a defence, how can it be said the adjudication is not on the merits.

De Gruyther, K.C. and *Kenworthy Brown* for the respondent were not called upon.

The judgment of their Lordships was delivered by

LORD BUCKMASTER, L.C., LORD SHAW, LORD WRENBURY AND MR. AMEER ALI.

The LORD CHANCELLOR.—This case raises only a short question, but admittedly it is one of wide and general importance. It is for that reason that the Board departed from their usual course, and permitted Sir Robert Finlay to resume his argument after it had been concluded and his junior had addressed the Board. After having given full consideration to the arguments urged both by him and by his junior, the Board find themselves unable to accede to his contention.

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(1) (1916) I.L.R., 39 Mad., 95. (2) (1909) 44 Punj. Rec., 262 at p. 283.
(3) (1901) I.L.R., 28 Calc., 641. (4) (1876) L.R., 1 P.D., 394 at p. 401.
(5) (1869) L.R., 4 Q.B., 653 at pp. 656 and 658. (6) (1908) 1 K.B., 302.
(7) (1887) L.R., 23 Q.B.D., 124.
(8) (1889) 37 Ch.D., 244; on appeal, 15 A.C., 1.

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The history of the case is this :—The appellant was originally plaintiff in a suit brought by him in this country against the respondent. In that suit he claimed a sum of £425. 17*s*. 2*d*., which he said was due to him from the respondent in these circumstances. The plaintiff is an Indian merchant carrying on business in London. The defendant, he alleged, was a member of a certain firm of traders who traded in Madras. The plaintiff asserted that he had entered into an arrangement with the firm, of which the defendant was a member, under which the firm were to consign to him, the plaintiff, goods for sale in London; they were to be sold on a certain commission, this commission and expenses were to be deducted, and the net proceeds were to be remitted back to India. As against those proceeds, it was also arranged that the defendant should be at liberty to draw bills to the extent of 75 per cent. The plaintiff asserted that bills were so drawn; that he accepted them, and that ultimately it was found that these bills exceeded the amount of the proceeds for which he was properly accountable by the sum of £425. 17*s*. 2*d*., and for that sum he brought his suit. His statement of claim set out these facts, and to that claim a defence was delivered by the respondent, who denied that he ever was a partner in the firm with whom, and with whom alone, it was asserted that the transaction had been made. He also denied in less explicit terms that there was any money due, or that the arrangements had been made under which the plaintiff asserted that his claim arose. Upon this defence being put in the plaintiff applied for liberty to exhibit interrogatories. That liberty was granted, and interrogatories were exhibited calling upon the defendant to speak as to some of the material matters in dispute. Those interrogatories the defendant omitted to answer, and thereupon an application was made to the Court, asking that the defence might be struck out and judgment entered for the plaintiff in the action. The judgment was accordingly given on the 5th May 1913, and it is in these terms; "It is ordered upon the application of the plaintiff that the defendant's defence herein be struck out, and that the defendant be placed in the same position as if he had not defended, and that the plaintiff be at liberty to sign judgment for £ 425. 17*s*. 2*d*., the amount claimed herein, and his costs of this action to be taxed"; and then judgment goes for the £425 17*s*. 2*d*.

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Upon that judgment the appellant sued the respondent in Madras. The respondent set up by way of defence the statement that the judgment between him and the plaintiff in the English Courts had not been a judgment given upon the merits of the action, and that consequently by virtue of section 13, sub-section (*b*), of the Indian Code of Civil Procedure, 1908, the action could not be maintained on the judgment alone in the Indian Courts, and that the merits would have to be investigated.

The question as to whether that defence is well established depends upon considering what are the terms of section 13 of the Code of Civil Procedure, and what is the meaning of the phrase there contained as to a judgment given "on the merits of the case." Section 13 begins by a general provision that foreign judgments shall be conclusive as between parties to the litigation. It is in these terms: "A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title." But to that general provision there are certain definite exceptions, and one of them is as follows: "Except where such judgment has not been given on the merits of the case."

The whole question in the present appeal is whether, in the circumstances narrated, judgment was given on the 5th May 1913, between the parties on the merits of the case. Now if the merits of the case are examined, there would appear to be, first, a denial that there was a partnership between the defendant and the firm with whom the plaintiff had entered into the arrangement; secondly, a denial that the arrangement had been made; and, thirdly, and a more general denial, that even if the arrangement had been made the circumstances upon which the plaintiff alleged that his right to the money arose had never transpired. No single one of those matters was ever consider ed or was ever the subject of adjudication at all. In point of fact what happened was that, because the defendant refused to answer the interrogatories which had been submitted to him, the merits of the case were never investigated and his defence was struck out. He was treated as though he had not defended, and judgment was given upon that footing. It appears to their Lordships that no such decision as that can be regarded as a decision given on the merits of the case within the meaning of

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section 13, sub-section (*b*). It is quite plain that that sub-section must refer to some general class of case, and Sir Robert Finlay was asked to explain to what class of case in his view it did refer. In answer he pointed out to their Lordships that it would refer to a case where judgment had been given upon the question of the Statutes of Limitation, and he may be well founded in that view. But there must be other matters to which the sub-section refers, and in their Lordships' view it refers to those cases where, for one reason or another, the controversy raised in the action has not, in fact, been the subject of direct adjudication by the Court.

In the circumstances that happened here, it is in their Lordships' view impossible to hold that the merits of this case were ever the subject of adjudication, and therefore they think that this appeal must fail. They will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: *Reynolds & Son.*

Solicitor for the respondent: *John Josselyn.*

J.V.W.

PRIVY COUNCIL.*

1916. November 2, 3, 6, and December 1.

RAMANANDAN CHETTIAR (PLAINTIFF),

v.

VAVA LEVVAI MARAKAYAR AND OTHERS (DEFENDANTS).

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

Muhammadan Law—Wakf—Deed providing for charitable purposes, and also for support of grantors' family and descendants—Test whether deed is valid as a wakf or whether wakf is illusory—Property substantially given to charities, the surplus to support family—Mussalmans "Wakf" Validating Act (Act VI of 1913).

The test of whether a deed was, or was not, valid as a wakf in the cases decided before Act VI of 1913, was that if the effect of the deed was to give

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* *Present*:—The Lord Chancellor (Lord BUCKMASTER), Lord ATKINSON, Lord WRENBURY and Mr. AMEER ALI.