APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Madhavan Nayar.

A. JANOO HASSAN SAIT, BY HIS AUTHORIZED AGENT DADA BEG MUHAMMAD (PLAINTIFF), APPELLANT,

1924, April 16.

v.

M. S. N. MAHAMAD OHUTHU (FIRST DEFENDANT), RESPONDENT.*

*Civil Procedure Code (Act V of 1908), sec. 13 (d)—Foreign judgment—Suit on, in British Indian Court—*Ex-parte *decree against defendant in a Ceylon Court—Agent appointed by defendant under a power-of-attorney, empowering latter to sue and defend suits on his behalf in all Courts in Ceylon—Submission to jurisdiction—Notice of suit served on agent—Agent putting in no appearance at all in Court—*Ex-parte *decree, whether on the merits—Sufficiency of notice, whether can be raised in the suit in British Indian Court.*

In a suit in a British Indian Court, on a foreign judgment of a Court in Ceylon, it appeared that the notice of suit to the defendant in the Ceylon Court was served on a person who was conducting business on the defendant's behalf in Ceylon and had been given by him a power-of-attorney under which the agent was empowered to sue in the Courts of Ceylon and to appear in any Court of Justice in Ceylon either as plaintiff or defendant; the agent did not put in any appearance at all in the suit in the Ceylon Court and the case was allowed to proceed *ex-parte* and judgment was passed *ex-parte* against the defendant.

Held, that the defendant must be deemed to have submitted himself to the jurisdiction of the foreign Court by reason of the execution of the power-of-attorney ;

Ramanathan Chettiar v. *Kalimuthu Pillai*, (1914) I.L.R., 37 Mad., 163, referred to ;

that ordinarily a judgment delivered *ex-parte* is deemed to be on the merits, and it is only when a defence has been raised and for some reason or another has not been adjudicated upon,

* Second Appeal No. 1146 of 1921.

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that the decision can be said to be not upon the merits; and that the *ex-parte* judgment in this case must be deemed to be one passed on the merits, as the defendant did not at all appear in the case. *Keymer* v. *Visvanatham Reddi*, (1917) I.L.R., 40 Mad., 112 (P.C.), followed;

that where a foreign Court had held service of notice of a suit sufficient, it must be taken to be correct in the absence of any evidence to the contrary;

that if there was any irregularity in the service of notice, that point cannot be raised in the Courts in British India as a ground for questioning the validity of the foreign decree; *Pemberton* v. *Hughes*, [1899] 1 Ch., 781, followed;

but if it was distinctly proved that the person who was served was in no sense the defendant's agent at the time of the service and that consequently the defendant was unaware of the proceedings in the foreign Court, it might be an answer to the validity of the foreign judgment.

SECOND APPEAL against the decree of R. NARAYANA AYYAR, District Judge of Tanjore, in A.S. No. 579 of 1920, preferred against the decree of V. KRISHNA AYYAR, Second Additional Subordinate Judge of Tanjore, in O.S. No. 9 of 1919 (O.S. No. 25 of 1918 on the file of the Court of the Subordinate Judge of Tanjore).

The material facts appear from the judgment.

B. Sitarama Rao (with *K. Sundara Rao*) for appellant.—The service on the sub-agent is sufficient, as the power-of-attorney had given authority to the agent to appoint a sub-agent. The sub-agent could act only when the agent was absent from Ceylon. In the absence of any evidence whether the agent was present or absent, it must be presumed that he was absent at the time of service of summons on the sub-agent. The burden of proving the presence of the agent is on the respondent. The Ceylon Court had declared service sufficient. The point cannot be raised in the British Indian Court to impeach the foreign judgment, *Pemberton* v. *Hughes*(1).

(1) [1899] 1 Ch., 781.

T. L. Venkatarama Ayyar for respondent.—This is not a case of irregular service but of non-service of summons on the defendant. The rule in *Pemberton* v. *Hughes*(1) does not apply to such a case. The agent had returned and no summons could validly be served on the sub-agent when the agent was present in Ceylon. See *Dan by* v. *Coutts & Co.* (2); Halsbury, Vol. I, page 232. One of the two principals who had given the power-of-attorney had died before suit; the power was at an end: see *Tasker* v. *Shepherd*(3) and *Friend* v. *Young*(4). The foreign judgment was passed *ex-parte* and was obtained under the summary procedure for default of appearance and so it was not passed on the merits: see *Keymer* v. *Visvanatham Reddi*(5), *Oppenheim & Co.* v. *Mahommad Haneef*(6), *The Delta*(7), *The Challenge*(8), *Nouvion* v. *Freeman*(9). No submission to jurisdiction can be inferred from the execution of the power-of-attorney, because submission must be express and not implied: *Ramanathan Chetty* v. *Kalimuthu*(10) is not rightly decided.

JUDGMENT.

PHILLIPS, J.

PHILLIPS, J.—This is a suit upon a foreign judgment of the Colombo Court against the first defendant. The first defendant and his brother who were trading in partnership executed a power-of-attorney to one Sheik Abdul Rahiman under which he was empowered to sue in the Courts of Ceylon and to appear before any Court or Courts of Justice either as plaintiff or defendant, etc. The power is a very wide one and gives the agent very full powers to represent the principals. Under the

(1) [1899] 1 Ch., 781. (2) (1885) 29 Ch. D., 500.
(3) (1861) 6 H. & N., 575. (4) [1897] 2 Ch., 421.
(5) (1917) I.L.R., 40 Mad., 112 (P.C.). (6) (1922) I.L.R., 45 Mad., 496.
(7) (1876) 1 P.D., 393. (8) [1904] P. 41.
(9) (1890) 15 App. Cas., 1. (10) (1914) I.L.R., 37 Mad., 163.

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provisions of that power, Abdul Rahiman appointed one Abdul Guddus as his sub-agent during his absence from Ceylon. A suit was filed in 1915 on four promissory-notes against Abdul Rahiman and Abdul Guddus, but upon their pleading that they were merely agents of first defendant's firm, another suit was brought against the first defendant. Notice of the suit was served on Abdul Guddus as first defendant's agent and the judgment on which the present suit is based was passed in his absence.

The first question for consideration is whether the first defendant had submitted to the jurisdiction of the foreign Court, and on this point I must agree with the learned District Judge that he did so by executing the power-of-attorney in favour of Abdul Rahiman empowering the latter to conduct litigation in the Ceylon Courts, namely, in a place where the agent was conducting business for his principals, and it is clearly a contract binding him to appear in those Courts and amounts to submission to the jurisdiction of those Courts. In this connexion I would refer to the case reported in *Ramanathan Chettiar* v. *Kalimuthu Pillai*(1).

The next question raised for the respondent is that the foreign judgment sued on was not one obtained on the merits. Ordinarily, a judgment delivered *ex-parte* is deemed to be one on the merits, but it is contended here that in summary suits similar to those provided for by Order XXXVII of the Civil Procedure Code, an *ex-parte* judgment cannot be deemed to be one passed on the merits. Reliance is placed on the case reported in *Viswanatham Reddi* v. *Keymer*(2) the decision in which was confirmed by the Privy Council in *Keymer* v. *Visvanatham Reddi*(3). In that case a defence had been put in, but it

(1) (1914) I.L.R., 37 Mad., 163. (2) (1916) I.L.R., 39 Mad., 95.
(3) (1917) I.L.R., 40 Mad., 112 (P.C.).

was ordered to be struck out because of defendant's failure to answer interrogatories. The decision given in these circumstances was held to be one not on the merits. There are no doubt some observations in the judgment of this Court which would go to show that a foreign judgment passed in default of appearance is not a decree on the merits, and two cases are therein referred to as supporting this proposition. One of these is The *Delta*(1) and the other is *The Challenge and Duc D'Aumale*(2). In the first of these cases, the foreign judgments had not been delivered when the suit was filed in England and also it was held that the evidence of the French and Italian advocates examined left it doubtful whether the foreign judgment in that case would have, even in France or Italy, the force of *res judicata*. In the second case it appears that the defendants had not submitted to the jurisdiction. In the judgment of the Privy Council which is reported in *Keymer* v. *Visvanatham Reddi*(3) their Lordships in referring to the question under section 13 (*b*), Civil Procedure Code state that that section 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." From this it would appear that it is necessary in the first place that some controversy should be raised in the action and in the second place that after it has been raised it should not have been finally decided. This principle is the same as that enunciated by Lord HERSCHELL in *Nouvion* v. *Freeman*(4),

"in a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of

(1) (1876) 1 P.D., 393.
(2) [1904] P.D., 41.
(3) (1917) I.L.R., 40 Mad., 112 (P.C.)
(4) (1890) 15 App. Cas., 1.

their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court be disputed, and can only be questioned in an appeal to a higher tribunal."

It will be seen that in accordance with this principle, *ex parte* decrees are by no means necessarily decrees not passed upon the merits. It is only when a defence has been raised and for some reason or another has not been adjudicated upon that the decision can be said to be not upon the merits. In other instances of *ex parte* decrees, they must be deemed to be decrees passed upon the merits. In the present case no appearance at all was put in on behalf of the first defendant, and the case was allowed to proceed *ex parte* and consequently it must be deemed to have been passed upon the merits.

A further question is raised, namely, that the first defendant had no notice at all of the suit and that consequently the whole decree is a nullity as coming under section 13 (*d*), namely, "where the proceedings in which the judgment was obtained are opposed to natural justice." A good deal of argument has been addressed to the question as to whether at the time that the notice was served upon him Abdul Guddus was the agent of the first defendant. It appears that he was appointed as first defendant's agent and had acted as such and there is no evidence to show that that agency had ceased at the time when the notice was served upon him. The foreign Court held that the notice was sufficient, and that decision must be taken to be correct in the absence of any evidence to the contrary. If there was any irregularity in the service of the notice, that point cannot be raised in the Courts of this country as a ground for questioning the validity of

the foreign decree, as was held in *Pemberton* v. *Hughes*(1) where it was remarked by LINDLEY, M.R., at page 790:

"If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice."

If first defendant had definitely proved that Abdul Guddus was in no sense his agent at the time of the service of the notice and that consequently he was totally unaware of the proceedings in the Colombo Court, this might be an answer to the validity of the judgment; but this has not been shown and consequently I must hold that the judgment is valid.

In this view, I think it is unnecessary to discuss the further questions raised as to whether the death of first defendant's brother terminated Abdul Rahiman's agency and consequently the sub-agency of Abdul Guddus. They were at one time admittedly first defendant's agents and it is not shown that they had ceased to be so at the time the notice was served on the latter.

The appeal is accordingly allowed and the decree of the Court of first instance restored with costs both here and in the lower Appellate Court.

MADHAVAN NAYAR, J.

MADHAVAN NAYAR, J.—I agree.

K.R.

(1) [1899] 1 Ch., 781.