APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., *Chief Justice, and Mr. Justice King.*

1936, January 31.

OOMER HAJEE AYOOB SAIT (PETITIONER), APPELLANT,

v.

THIRUNAVUKKARASU PANDARAM AND ANOTHER (RESPONDENTS), RESPONDENTS.*

Foreign Court—Jurisdiction of—Submission to—Attachment before judgment in suit in foreign Court—Letter written by or on behalf of defendant requesting plaintiff to allow payment of portion of attached amount to defendant and stating that the balance might be collected by him—Refusal of request of defendant and defendant allowing suit to be decreed ex parte*—Submission to jurisdiction, if—Filing of suits by defendant in foreign Court in cases within its jurisdiction—Inference of submission to jurisdiction from—Permissibility of.*

The appellant instituted a suit in a Court in Cochin State for the recovery of money from two minors. At the date of the suit the minors were not residents of Cochin State but were residents of Tinnevelly. Pending the suit the appellant attached before judgment an amount due to the minors by a third party. Thereupon the executor of the estate in which the minors had an interest wrote a letter to the appellant which, after referring to the suit and the attachment before judgment, requested the appellant to allow a month's amount of the attached amount to be paid to the minors and stated that the balance could be collected by the appellant. The concession asked for was refused, nevertheless the minors did not appear in the suit and an *ex parte* decree was passed against them.

Held that the said letter amounted to a submission by the minors to the jurisdiction of the Cochin Court and that the Tinnevelly Court to which the decree was transferred for execution was wrong in refusing execution on the ground that the Cochin Court had no jurisdiction to pass the decree.

* Appeal Against Order No. 358 of 1931.

The letter in question is evidence bearing upon the intention of the minors to remain *ex parte* because the appellant's claim was a just one and there was no objection to the attachment by the foreign Court.

Sheo Tahal Ram v. *Binaik Shukul*, (1931) I.L.R. 53 All. 747, 757, relied upon.

A person who has filed suits in a Court having jurisdiction to try them cannot thereby by implication be taken to submit himself to the jurisdiction of the same Court in cases where that Court has no jurisdiction.

Sirdar Gurdyal Singh v. *Rajah of Faridkote*, [1894] A.C. 670, relied upon.

Rousillon v. *Rousillon*, (1880) 14 Ch.D. 351, *Nagoor Meera* v. *Mahadu Meera*, (1925) 22 L.W. 820, and *Ramanathan Chettiar* v. *Kalimuthu Pillai*, (1912) I.L.R. 37 Mad. 163, considered.

APPEAL against the order of the District Court of Tinnevelly dated 22nd January 1931 in Execution Petition No. 21 of 1930 (Original Suit No. 152 of 1103 M.E. on the file of the District Court of Anjikkaimal, Cochin State).

[On the appeal coming on for hearing the Court made an order remanding the case for a finding on the genuineness of the letter, Exhibit H, dated 11th May 1928. The District Judge of Tinnevelly submitted a finding to the effect that Exhibit H was a genuine document.]

The appeal then came on for final hearing.

Ch. Raghava Rao and *K. Venkateswaran* for appellant.

C. S. Venkatachari and *P. N. Appuswami Ayyar* for respondents.

JUDGMENT.

BEASLEY C.J.—The appellant, a merchant residing in Cochin State, obtained in September 1928 an *ex parte* money decree against two minor

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defendants (the respondents). The Cochin Court, namely, the Court of the District Judge of Anjikkaimal, a foreign Court, clearly had no jurisdiction to pass this decree because the defendants at the date of the suit were not residents of Cochin State at all but of Tinnevelly. The minor defendants did not at any time appear in the suit. The appellant, the decree-holder, sought to execute the decree which was transferred to the District Court of Tinnevelly for execution. The minor defendants, the respondents, opposed execution, the main ground of opposition being that the Cochin Court had no jurisdiction to pass the decree in question. The learned District Judge refused execution upon that ground. The appellant contended that the respondents had submitted to the jurisdiction of the Cochin Court because in some other cases they had done so. This contention was not accepted by the learned District Judge who says :

> "This surely is irrelevant. It is the person who is not resident in a Native State who must determine in each case whether he shall submit to the jurisdiction of the foreign Court or not. If he does so in one case, it does not follow that he is bound to do so in all future cases. No question of estoppel arises."

The learned District Judge therefore refused execution. The appellant, the petitioner in execution proceedings, produced a letter, Exhibit H, which, he states in an affidavit which is before us, the learned District Judge failed to consider. When this matter was before us on a previous occasion, we were of the opinion that the appellant was entitled to rely upon the letter here but, since its genuineness was disputed, a finding on that question by the District Court was called for.

That finding is before us now and it is that the letter is genuine ; and, having regard to the strong reasons given by the learned District Judge in support of this finding, we accept it. The letter is dated 11th May 1928. It is addressed to the appellant, the petitioner in the District Court and the plaintiff in the Cochin Court, and is signed by M. A. Arunachalam Pandaram, the executor of the estate in which the minor defendants had an interest. On the date of this letter, the appellant had attached before judgment in the suit an amount due by one Ruthulsi Kalyanji Sait to the minors. The letter refers to that amount and reads as follows :

"You know that the right in respect of the amount due by Ruthulsi Kalyanji Sait, carrying on business in the Mattancheri bazaar has been attached before judgment in the suit, Original Suit No. 152 of 1103 M.E. (1927–28) filed by you in the District Court, Anjengo, against the deceased Sundaralinga Pandaram's minor children, Thirunavukkarasu and others. The said minors require a month's amount out of the said amount. I, therefore, request you to send letter through my agent Venkatrama Ayyar, the bearer of this letter, to the effect that you have no objection to the said minors being paid only a month's amount. The balance amount after deducting this one month's amount can be collected by you. Dated 11th May 1928.

(Sd.) M. A. ARUNACHALAM PANDARAM,
Executor of C.V.I.C. estate."

The appellant contends that this letter amounts to a submission to the jurisdiction of the Cochin Court ; and he also contends that, by reason of some previous suits against other parties in which the respondents were plaintiffs filed in the Cochin Court, an inference is to be drawn that in the present suit the respondents submitted to the jurisdiction of the foreign Court although they did

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not appear in the suit and the decree was passed against them *ex parte*. This argument is based upon a judgment of FRY J. in *Rousillon* v. *Rousillon*(1), in which he considers a number of English cases in which were considered the principles upon which foreign judgments are enforced by the Courts of England and, after referring to *Schibsby* v. *Westenholz*(2), observes :

"What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign Court? Having regard to that case and to *Copin* v. *Adamson*. *Copin* v. *Strachan*(3), they may, I think, be stated thus. The Courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued."

It is the last-named position upon which reliance is placed by Mr. Raghava Rao who also relies upon the decision of this Court in *Nagoor Meera* v. *Mahadu Meera*(4), a judgment of PHILLIPS and RAMESAM JJ. In the course of the judgment on page 822 it is stated:

"There is also an additional circumstance which would possibly give the Ceylon Court jurisdiction and that is the fact that the defendants' firm actually filed a suit in the Ceylon Court and having come in as plaintiffs can hardly be allowed as defendants to deny the jurisdiction which they themselves invoked and in this connection I would refer to the judgment in Second Appeal No. 1492 of 1920 (not reported)."

That was a judgment of AYLING O.C.J. and ODGERS J. in which reference is made to *Rousillon* v. *Rousillon*(1), already referred to, and it is stated :

"Now here the first defendant swears that he filed and defended suits in the Courts of Trincomali on behalf of the second defendant under his power of attorney (Exhibit I). If then

(1) (1880) 14 Ch. D. 351.
(2) (1870) L.R. 6 Q.B. 155.
(3) (1874) L.R. 9 Ex. 345.
(4) (1925) 22 L.W. 820.

the second defendant has through her agent selected the Trincomali Court as the forum in which to bring suits, it stands to natural justice that she cannot object to the jurisdiction of the same Court when she is afterwards sued in it. It has been argued that the words of FRY J. quoted above, which, as far as we know, have never been questioned, must be restricted to the same action or cause of action, e.g., *A* brings a suit in a foreign Court against *B* a resident in the foreign country, the Court dismisses *A's* suit and has therefore jurisdiction over him for recovery of costs, etc. The words are certainly wider than this and in our opinion the expression 'in which he is afterwards sued' must be taken as conclusive against such a contention."

Reference is also made in the judgment to *Ramanathan Chettiar* v. *Kalimuthu Pillai*(1). In the case before AYLING O.C.J. and ODGERS J., the second defendant had given a power of attorney to her agent to transact business on her behalf in Ceylon and had adopted the Ceylon Court as her forum for the trial of suits arising out of those transactions. That, in my opinion, is an important circumstance which does not exist in the present case and I agree with the contention of Mr. C. S. Venkatachari on behalf of the respondents that, as it would appear that the previous suits filed by the present respondents in the Cochin Court were againt residents of Cochin State, the Cochin Court had jurisdiction to try those suits. This is an all-important distinction because there was in those cases no submission to the jurisdiction; and a person who has filed suits in a Court having jurisdiction to try them cannot thereby by implication be taken to submit himself to the jurisdiction of the same Court in cases where that Court has no jurisdiction, and

(1) (1912) I.L.R. 37 Mad. 163.

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the decision of the Privy Council in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*(1) is in point here. There, it was held that an obligation to accept the forum *loci contractus* could not, unless expressed, be implied to found a conditional jurisdiction against the parties in a suit founded on that contract for all future time. In my view, therefore, the earlier suits in which the present respondents were plaintiffs in the Cochin Court have no bearing upon this question.

With regard to Exhibit H, however, the appellant's case rests upon stronger foundation because it is contended that this was a submission to the jurisdiction of the Cochin Court, because it shows that the respondents had knowledge that the suit had been filed against them and also that an amount owing to them had in that suit been attached by that Court and did not dispute the attachment but on the contrary merely asked for a concession and on its refusal did not further contest the matter, and that they must therefore be held to have waived any question of jurisdiction. Mr. Venkatachari, however, contends that, as the respondents were not residents of Cochin State, they can only be bound by the decree passed by that Court without jurisdiction by being brought under the third case, clause (*c*), stated in Dicey's Conflict of Laws, Fifth Edition, page 399, namely, "by having expressly or impliedly contracted to submit to the jurisdiction of such Courts", and argues that Exhibit H was merely an offer to the appellant (the plaintiff) which offer was rejected by him and therefore there cannot have been any implied contract and that

(1) [1894] A.C. 670.

it is only in such cases that the decree would be binding on the defendants, they having remained *ex parte* throughout. This argument excludes any case of waiver by conduct. It is clear of course that a defendant against whom a suit has been filed in a Court which has no jurisdiction is not bound to appear and raise a plea as to the jurisdiction. He can, if he chooses, remain inactive and can thereafter raise that plea. Nevertheless, his conduct, both before the decree is passed and after, may afford evidence as to the defendant's intention in remaining *ex parte*. This aspect of the question has been discussed in *Sheo Tahal Ram* v. *Binaik Shukul*(1). There a decree had been passed by a Court having no jurisdiction to pass it. The decree was transferred from that Court which was a foreign Court to a Court in British India, namely, the Mirzapur Court, and the judgment-debtor appeared there and deposited Rs. 100 in part-payment and asked for three months time to pay up the balance. No objection as to the want of jurisdiction of the foreign Court to pass the decree was then raised. Later on, when an application was made for attachment of a fresh property, objection was taken that the foreign Court had no jurisdiction to pass the decree, which was a valid objection, and it was held by SULAIMAN A.C.J. that the mere fact that the defendant allowed the suit to be decreed *ex parte* would not amount to his submitting to the jurisdiction of the foreign Court nor would his subsequent conduct in making part-payment and obtaining time in the executing Court be

(1) (1931) I.L.R. 53 All. 747.

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any evidence to show that he had submitted to the jurisdiction of the trial Court before the decree was passed and that the submission to jurisdiction must be to the foreign Court itself and probably prior to the pronouncement of the judgment in order to make the decree a valid one. NIAMAT-ULLAH J., however, was of the opinion that the subsequent payment made by the judgment-debtor might be an important circumstance indicative of his intention to submit to the jurisdiction of the Court at the time when the suit was pending, that it was only a piece of evidence to be taken into consideration in arriving at a finding on the question of submission and that there is nothing in law which makes it necessary that the submission to jurisdiction can only be by some overt act. On page 757, he observes :

"What amounts to a submission to the jurisdiction of a foreign Court is a question of some nicety in many cases. Where in answer to a summons issued by a foreign Court the defendant appears and contests the suit, without raising any question as to jurisdiction, there is no doubt that he submits to the jurisdiction of that Court. Again, where he so appears and repudiates the jurisdiction of a Court without entering into his defence, it is clear that he does not submit to the jurisdiction of that Court. Between these two extremes is the case where on receipt of the summons he puts in no appearance and an *ex parte* decree, otherwise open to no objection, is passed against him. His conduct in such circumstances is accountable on two hypotheses. He might have refrained from putting in an appearance because he was sanguine that the decree, if passed, would be ineffective for want of jurisdiction of the Court passing it; or he might have submitted to the jurisdiction of the Court in the belief that the plaintiff's claim was a just one and he did not object to the decree being passed by the foreign Court. I find nothing in law which makes it necessary that the submission to the jurisdiction can only be by some overt act in Court. If his attitude as regards the

jurisdiction of the Court in which a suit is brought against him can be established by evidence to have been one of submission to the jurisdiction of the Court, the decree will be binding. Subsequent payment towards part satisfaction of the decree is, in my opinion, an important circumstance from which submission on his part to the jurisdiction of the Court may be inferred. Much, however, will depend on the circumstances under which the payment of the decretal amount is made. In each case it is a piece of evidence entitled to more or less weight. I should not be understood as implying that payment of the decretal amount in part is itself a submission and acts retrospectively. If the decree when passed was a nullity for want of jurisdiction in the Court which passed it, no subsequent act of the defendant can make it otherwise. Subsequent conduct of the defendant may however be an indication of his intention to submit to the jurisdiction of the Court at the time when the suit was pending."

In the present case, the facts are, in my opinion, stronger. The conduct relied upon as indicating the intention of the respondents is conduct during the pendency of the suit and no question of giving retrospective effect to it arises. That conduct, I agree with NIAMAT-ULLAH J., is evidence to be considered. What does Exhibit H, upon a fair construction of it, mean? It seems to me that it is an acknowledgment of the attachment before judgment by that Court and a request merely for some concession. There is nothing conditional about the request such as Mr. Venkatachari contends there is. The letter does not say that, if the offer is refused, the respondents will contest the matter; and further, when the offer was rejected, they did not contest the matter. In my view, Exhibit H is evidence bearing upon the intention of the respondents to remain *ex parte* because the appellant's claim was a just one and there was no objection to the attachment by the foreign Court. For these reasons, I am satisfied

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that there was a submission to the jurisdiction of the foreign Court and that the learned District Judge was wrong in refusing execution. This appeal must, therefore, be allowed with costs here and in the District Court and execution allowed to proceed.

KING J.—I agree.

A.S.V.

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Before Mr. Justice Venkatasubba Rao and Mr. Justice Cornish.

1936, March 25.

MUTHAN CHETTIAR AND ANOTHER (PETITIONERS), PETITIONERS,

v.

VENKITUSWAMI NAICKEN (RESPONDENT-DECREE-HOLDER), RESPONDENT.*

Provincial Insolvency Act (V of 1920), ss. 51 (3) and 52—Executing Court—Interim receiver's application to—Duty of executing Court, in case of—Defiance of provisions of sec. 52 by it—Sale a nullity, if, in case of—Purchaser in good faith at sale—Good title, if acquired by—Effect of sec. 51 (3).

On an application made to it by the interim receiver the executing Court is, under section 52 of the Provincial Insolvency Act, bound to direct the property of the debtor in the custody of the Court to be delivered to the receiver and to stay the execution sale.

The executing Court's defiance of section 52 has not, however, the effect of making the sale in execution a nullity. Section 51 (3) provides that "a person who in good faith purchases the property of a debtor under a sale in execution shall

* Appeal Against Order No. 37 of 1935 converted into Civil Revision Petition No. 380 of 1936, and Appeal Against Order No. 201 of 1935.