

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramadā
Chā an Banerji.*

G. S. O. COLE, (DEFENDANT) v. C. A. HARPER (PLAINTIFF).*

Civil Procedure Code (1908), section 13—Suit on foreign judgment—Judgment whether “given on the merits of the case”—Writ of summons accepted by solicitor on behalf of defendant, but defendant unable to be present in person at the hearing.

1919
March, 10.

A suit for damages on account of personal injuries alleged to have been sustained owing to the negligence of the defendant in the management of a motor car was filed in England. The writ of summons was accepted by a solicitor, who entered an appearance on behalf of the defendant, and the case was set down for hearing before a Judge of the Court of King's Bench and a special jury. Meanwhile the defendant was suddenly and unexpectedly recalled to India; but the case proceeded and resulted in a judgment for the plaintiff.

Held, on suit by the plaintiff in India, based on this judgment, that the judgment of the Court of King's Bench could not be said not to have been given on the merits of the case within the meaning of section 13(b) of the Code of Civil Procedure, 1908. *Keymer v. Visvanatham Reddi* (1) distinguished.

THE plaintiff in this case filed a suit in England against the defendant asking for damages on account of personal injuries sustained by her owing to the negligent conduct of the defendant in the management of a motor car. The writ of summons in the suit was accepted by a solicitor and an appearance was entered by him on behalf of the defendant, and thereafter the case was set down for hearing before Mr. Justice DARLING and a special jury. Before the hearing the defendant was recalled to India, and the case proceeded in his absence and resulted in a judgment for the plaintiff with £250 damages. The plaintiff then brought a suit in India against the defendant on the basis of this judgment, in reply to which the defendant pleaded that the judgment was not one given upon the merits of the case within the meaning of section 13(b) of the Code of Civil Procedure. The court of first instance overruled this plea and gave a decree in favour of the plaintiff.

The defendant appealed to the High Court.

Mr. W. Wallach and Mr. Sham Nath Mushran, for the appellant.

* First Appeal No. 157 of 1917, from a decree of Hari Har Lal Bhargava, Subordinate Judge of Shahjahanpur, dated the 1st of February, 1917.

(1) (1916) I. L. R., 40 Mad., 112.

1919

G. S. C. COLE

v.

O.A. HARPER.

Mr. B. E. O'Connor and Munshi Lakshmi Narain, for the respondent.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of a suit which was brought on foot of a judgment of the High Court of Justice in England. It appears that the plaintiff brought an action in England against the defendant for personal injuries alleged to have been caused by the negligence of the defendant in the management of his motor car. It appears that the action was tried in England in the year 1913 before Mr. Justice DARLING and a special jury, when judgment was given for £250 and costs. In the present suit, which was based upon that judgment, the defendant was examined as a witness, and deposed to the fact that he was called away from England rather suddenly after the outbreak of war and that consequently he was unable to appear and defend the suit in London. It is accordingly contended on his behalf that the judgment was not a judgment “on the merits” within the meaning of section 13 of the Code of Civil Procedure. That section provides that a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties except in certain cases, one of which is where the judgment has not been given “on the merits.” It is quite clear that a solicitor accepted service of the writ of summons and entered appearance on behalf of the defendant and that the case came regularly before a Judge and jury. We will assume in the defendant's favour that his absence was due to his being required to return at very short notice to India. The only question which we have to decide is whether the judgment was given “on the merits.” In support of the defendant's contention that it was not on the merits, the case of *Keymer v. Visvanatham Reddi* (1) has been cited. In that case the defendant was sued in England and interrogatories were administered to him on behalf of the plaintiff. The defendant refused or neglected to answer the interrogatories, whereupon an application was made on behalf of the plaintiff under order XXXI, rule 21, of the English Judicature Act, which provides that where a defendant fails to comply with an order to answer interrogatories he shall be liable to have his defence struck out

(1) (1916) I. L. R., 40 Mad., 112.

and to be placed in the same position as if he had not defended. The application of the plaintiff was granted and judgment was entered against the defendant under the provisions of this rule. Their Lordships of the Privy Council held that under the circumstances of that case the judgment had not been given "on the merits." In the present case the circumstances, we need hardly say, are quite different. In the case quoted the judgment followed as a penalty upon the defendant not complying with the order of the court and the facts and circumstances of the case were never gone into at all. In the present case the evidence of the plaintiff herself, or some other evidence, had to be given before the jury could find a verdict in her favour. We think that the judgment in the present case was a judgment given "on the merits" within the meaning of that expression in section 13 of the Code of Civil Procedure, and consequently the judgment was conclusive between the parties. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.
BHIKHI SAHU (PLAINTIFF) v. KODAI PANDE AND OTHERS
(DEFENDANTS.)*

1919
March, 11.

Hindu law—Mitakshara—Joint Hindu family—Money borrowed by father at high rate of interest—Legal necessity—Burden of proof—Act No IX of 1872 (Indian Contract Act), section 16.

When money is borrowed by the father of a joint Hindu family on the security of the family property at a very high rate of interest, it is for the lender seeking to enforce his claim to prove not only that there was necessity for borrowing the money, but that there was necessity for borrowing it at an exorbitant rate of interest. *Nand Ram v. Bhupal Singh* (1), *Gaya Prasad Tewari v. Ram Phal Misir* (2) and *Rao Raghunath Singh v. Nazir Begam* (3), followed.

The argument that a court has no power to reduce the contract rate of interest otherwise than in cases which fall within the provisions of section 16 of the Contract Act applies to cases where the parties to the suit are the parties to the contract.

*Second Appeal No. 300 of 1917, from a decree of E. Bennett, Additional Judge of Gorakhpur, dated the 7th of December, 1916, modifying a decree of Jotindro Mohan Basu, Subordinate Judge of Gorakhpur, dated the 31st of August, 1916.

(1) (1911), I. L. R., 34 All., 126. (2) (1915) 13 A. L. J., 246,

(3) (1913) 19 Indian Cases, 639.