ORIGINAL SIDE.

Before Mr. Justice Chari.

1928

May 16.

A. N. ABDUL RAHIMAN

v.

J. M. MAHOMED ALI ROWTHER.*

Civil Procedure Code (Act V of 1908), s. 13 (b)—Suit based on a foreign judgment—'Judgment on the merits,' meaning of—Due service of summons—Ex parte judgment without evidence.

Plaintiff obtained an *ex parte* judgment against the defendant, a British Indian subject, on his promissory-note in the Supreme Court at Singapore. Defendant at the time of executing the note was residing and carrying on business in Singapore, but at the date of the institution of the suit he had ceased to be a resident of Singapore and was residing in Rangoon where he was tendered the summons which he refused. Defendant did not at any time appear in the Singapore suit. The Supreme Court can entertain suits irrespective of the status and residence of the defendant if the cause of action arose wholly within its jurisdiction. According to its rules, defendant was held duly served, and judgment was entered as a matter of course in favour of the plaintiff on the pleadings, without the plaintiff being called upon to prove his case. Plaintiff filed his suit in Rangoon on this foreign judgment against the defendant.

Held, that such an *ex parte* decision passed without evidence is not a judgment on the merits within the meaning of s. 13 (*b*) of the Civil Procedure Code, and therefore the plaintiff's suit failed.

Mahomed Kassim and Company v. *Seeni Pakir*, 50 Mad. 261—*followed.*

C. Burn v. *Keymer*, 7 L.B.R. 56; *Ishri Prasad* v. *Sri Ram*, 25 A.L.J.R. 887—*distinguished.*

Keymer v. *Visvanatham Reddi*, 40 Mad. 112—*referred to.*

Shanmugam for the plaintiff.

Dadachanji for the defendant.

CHARI, J.—This suit is based on a foreign judgment obtained by the plaintiff in the Supreme Court at Singapore on a promissory-note alleged to have been executed by the defendant. The plaintiff obtained his judgment *ex parte*. He files the present suit basing his cause of action on the Singapore judgment.

The defendant denies that he executed any promissory-note in favour of the plaintiff and that

* Civil Regular Suit No. 67 of 1928.

the summons in the Singapore suit was tendered to and refused by him as alleged. He also contends that the Singapore judgment being an *ex parte* foreign judgment, the plaintiff's suit based on that judgment must fail. I heard arguments on the legal points involved and they proceeded on the following admitted facts and assumptions :—

(*a*) It is admitted that the defendant was residing and carrying on business in Singapore at the time he is alleged to have executed the promissory-note ;

(*b*) It is assumed that he did execute the note;

(*c*) It is assumed that the summons in the Singapore suit was tendered to and refused by the defendant and that the Singapore Court was right according to the rules of that Court in holding that the defendant was duly served ;

(*d*) It is admitted that at the time of the institution of the suit the defendant had ceased to be a resident of Singapore and was residing in Rangoon ;

(*e*) It is admitted that there was no appearance by or on behalf of the defendant in the Singapore suit at any stage ; and

(*f*) It is assumed that the jurisdiction of the Supreme Court of Singapore in respect of suits is the same as that of the Original Side of the Rangoon High Court, that is, that the Supreme Court can entertain suits irrespective of the status and residence of the defendant if the cause of action arose wholly within the jurisdiction of that Court.

The plaintiff has based this suit entirely on the judgment of the Singapore Court. He has not claimed

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alternatively on the original cause of action. He can succeed only if on the rulings cited he is entitled to a decree on that judgment.

It is contended on behalf of the defendant that the plaintiff is not so entitled on the ground that the judgment relied upon is one obtained against a foreigner, who was not resident within the jurisdiction at the time of the institution of the suit and who had not in any way submitted himself to the jurisdiction of the Singapore Court and that the judgment being an *ex parte* one was not a judgment on the merits which would entitle the plaintiff to a conclusive presumption in favour of the judgment and to a decree thereon.

The law on the subject is contained in section 13 of the Civil Procedure Code. That section, as it now stands, applies not only to cases where a foreign judgment is set up as defence, but also to cases in which the plaintiff seeks to obtain a decree in a British Indian Court on a foreign judgment. "Foreign Court" and "Foreign judgment" are defined in section 2 of the Civil Procedure Code and according to those definitions the judgment of the Supreme Court of Singapore is undoubtedly a foreign judgment. Section 13 of the Code makes a foreign judgment conclusive as to matters adjudicated thereby with six specified exceptions. The last four do not apply to the case before me, and the question for consideration is whether the judgment of the Singapore Court comes within the exceptions contained in sub-section (*a*) or (*b*) of section 13. Section 14 enacts that the Court shall presume on the production of a certified copy of a foreign judgment that the judgment was pronounced by a Court of competent jurisdiction; but the presumption may be displaced by proof of want of jurisdiction.

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I shall first deal with the second contention raised, namely, that the judgment not being a judgment on the merits, the plaintiff is not entitled to a decree thereon. The first point is to see what the Legislature means by the words "where it has not been given on the merits of the case." They may mean that the judgment was on a matter of form and not on the merits or they may mean that the judgment fails to determine and decide the matters in controversy between the parties to the suit. It is unnecessary to deal at any great length with the earlier cases on the subject. The law was discussed in two cases by the Madras High Court in the first of which a Bench of that Court took the view that an *ex parte* judgment was a judgment on the merits which in the latter case was overruled by a Full Bench of the same Court. These two judgments therefore give all the *pros* and *cons* and I shall deal with them first.

The first of these two cases is *A. Janoo Hassan Sait* v. *M. S. N. Mahomed Ohuthu* (1). In that case the suit was on a judgment obtained in the Colombo Court. It was held in that case that the defendant had submitted himself to the jurisdiction of the Colombo Court and the sole point which remained for consideration therefore was whether an *ex parte* judgment obtained in the Colombo Court could be said to be a judgment on the merits. The learned Judges held that an *ex parte* decree is not necessarily a decree not passed on the merits. They discussed some of the English cases and distinguished the case of *Keymer* v. *Viswanatham Reddi* (2) on the ground that there a controversy was raised by the defendant and that his defence was struck out on a technical plea. They seem to think that it is only where a defence is raised and that defence fails not after a

(1) (1924) 47 Mad. 877. (2) (1917) 40 Mad. 112.

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judicial decision but on account of some defect in form that the judgment could not be said to be a judgment on the merits.

The ruling of Mr. Justice Parlett in *C. Burn* v. *D. T. Keymer* (1) contains some arguments in favour of holding that, an *ex parte* judgment is a decision on the merits But it cannot be said to be an authority for what it actually decides in view of the Privy Council ruling in *Keymer* v. *Visvanatham Reddi* (2).

In a later case referred to in 50 Madras and which is reported in an unauthorised report [*Asanali Nagoor Meera* v. *M. K. Mahadu Meera and others* (3)], a Bench of the same Court consisting of one of the Judges who decided the previous case, adhered to the view taken in the earlier case. In the Full Bench case of the Madras High Court *Mahomed Kassim and Company* v. *Seeni Pakir Bin Ahmed and others* (4), the point came up for decision again and was referred to a Full Bench. It was the considered opinion, not only of the referring Judges but also of the Judges composing the Full Bench, that an *ex parte* decree is not a decree on the merits and that therefore a British Indian Court cannot give a decree on a foreign judgment obtained *ex parte*. As most of the authorities are discussed in the referring judgment, it is unnecessary for me to deal with them and I will content myself with expressing my concurrence in the judgment of the Full Bench of the Madras High Court.

It will be noticed that the procedure followed in the Supreme High Court of the Straits Settlement, which sits both at Singapore and at Penang is given in the Full Bench judgment which deals with a judgment of that Court at Penang. The procedure is the same and, I have no doubt, was the procedure

(1) (1913) 7 L.B.R. 56.
(2) (1917) 40 Mad. 112.
(3) 92 I.C. 491.
(4) (1926) 50 Mad. 261.

followed in this case as is quite clear from the order itself and, that is that a judgment is entered as a matter of course in favour of the plaintiff on the pleadings without the plaintiff being called upon to prove his case. It seems to me that a decision on the merits involves the application of the mind of the Court to the truth or falsity of the plaintiff's case and therefore though a judgment passed after a judicial consideration of the matter by taking evidence may be a decision on the merits even though passed *ex parte*, a decision passed without evidence of any kind cannot be held to be a decision on the merits. This distinguishes the case of *Ishri Prasad* v. *Sri Ram* (1) where the Court, though it took no evidence, directed its mind to the truth or falsity of the plaintiff's case. The plaintiff's suit must fail on this ground and it is unnecessary to consider the other point raised, namely, whether a British Indian subject is a foreigner, as that word is used in this connection, over whom the Singapore Court has no jurisdiction after he had left Singapore and ceased to reside therein. I have come to this conclusion not without a great deal of reluctance, because it seems to me that the utility of a foreign judgment will be considerably impaired by the view I am compelled to take. It seems to me absurd that a British subject who is allowed free ingress into a part of the British Empire and carries on a trade there and contracts liabilities in respect of the trade so carried on by him should be allowed to escape the jurisdiction of the Courts of that country by the simple act of absconding when his business fails. I have, however, got to administer the law as I find it.

The suit will therefore be dismissed with costs in favour of the defendant.

(1) (1927) 25 A.L.J.R. 887.