APPELLATE CIVIL.

Before Tek Chand and Abdul Rashid JJ.

1934

Dec. 18.

KULWANT (PLAINTIFF) Appellant

versus

DHAN RAJ DUTT (DEFENDANT) Respondent.

Civil Appeal No. 865 of 1934.

Civil Procedure Code, Act V of 1908, section 13 (b) : Suit on judgment of High Court in England — given ex parte *in default of appearance by defendant — whether competent — " Judgment on the merits " — explained.*

Held, that a judgment of the High Court of Justice in England against a defendant in India, who had been duly served with a writ of summons but who did not enter appearance or deliver a defence, must be regarded as a judgment passed on the merits of the case when the proceedings had been strictly in accordance with the rules of the Supreme Court.

Ram Chand v. *Bartlett* (1), *Janoo Hassan Sait* v. *Mohamad Ohuthu* (2), and *Nagoor Meera* v. *Mahadu Meera* (3), followed.

Keymer v. *Visvanatham Reddi* (4), distinguished.

Mohammad Kasim v. *Seeni Pakir bin Ahmad* (5), not followed.

Other cases, discussed.

The words " Judgment on the merits " have been used in the Civil Procedure Code in contra-distinction to a decision on a matter of form or by way of penalty and a case must be taken to have been decided on the merits, where the defendant had ample opportunity to raise a defence and voluntarily refrained from raising such a defence, and the judgment was passed *ex parte*.

First Appeal from the decree of Pandit *Onkar Nath Zutshi, Senior Subordinate Judge, Lahore, dated 19th February, 1934, dismissing the plaintiff's suit.*

(1) 75 P. R. 1909.
(2) (1924) I. L. R. 47 Mad. 877.
(3) (1926) 92 I. C. 491.
(4) (1917) I. L. R. 40 Mad. 112 (P.C.).
(5) (1927) I. L. R. 50 Mad. 261 (F.B.).

1934

KULWANT
v.
DHAN RAJ
DUTT.

MUKAND LAL PURI and AMAR NATH CHOPRA, for Appellant.

ACHHRU RAM, J. N. TALWAR and M. ASLAM KHAN, for Respondent.

ABDUL RASHID J.

ABDUL RASHID J.—This appeal arises out of an action brought by Dr. Kulwant against Mr. Dhan Raj Dutt for recovery of Rs.21,616-0-7 on the basis of a judgment of the High Court of Justice in London, dated the 19th February, 1929. The allegations of the plaintiff were that about 10 or 12 years before the institution of the present suit the defendant went to England to receive education, and in order to meet his expenses asked for a loan from the plaintiff. The plaintiff advanced loans to the defendant on various occasions, and on the 27th July, 1925, the amount due from the defendant was £1,365-9-2. The plaintiff demanded this amount from the defendant, and the latter raised a loan from the Westminster Bank and paid the said amount to the former. The plaintiff had become a guarantor to the Westminster Bank to the extent of £1,600, and it was only because of this guarantee that the Westminster Bank advanced the loan to the defendant. The defendant did not repay the loan to the Westminster Bank and the plaintiff as guarantor for the defendant was obliged to pay £1,596-7-3 to the Bank on the 31st January, 1928. The plaintiff demanded this sum from the defendant, and on his refusal instituted a suit in the High Court of Justice in London, and obtained a decree for £1,596-7-3, with £18-19-8 as costs, on the 19th February, 1929. According to the plaintiff at the time of the passing of the decree the rate of exchange was 1*s*-5 $\frac{15}{16}$ to a rupee and thus the plaintiff was entitled to Rs.21,616-0-7 on the 19th July, 1932.

1934

KULWANT v. DHAN RAJ DUTT.

ABDUL RASHID J.

The defendant pleaded, *inter alia*, that he had not borrowed any sum from the Westminster Bank, that he was not even present in England when the alleged guarantee was given by the plaintiff to the Bank, that a demand was wrongly made by the Bank from him, that the writ issued by the High Court of Justice in England was served on him but that he had no knowledge of any decree being passed against him and that, in any case, the judgment of the English Court was not binding on him, as it had not been given on the merits, was not pronounced by a Court of competent jurisdiction, and had been obtained by fraud. On the pleadings of the parties the trial Court framed the following issues :—

(1) Whether the judgment of the High Court of Justice in England was pronounced without jurisdiction?

(2) Whether the aforesaid judgment had not been given on the merits of the case?

(3) Whether the said judgment had been obtained by means of fraud?

(4) If issues 1 to 3 go against the defendant, what is the amount in Indian money equivalent to the judgment debt?

The trial Court held that the defendant borrowed £1,365-9-2 from the plaintiff, and paid off the loan by drawing a cheque on the Westminster Bank on plaintiff becoming liable as the guarantor, and that, in these circumstances, the High Court of Justice in London had jurisdiction in the suit instituted by the plaintiff against the defendant. On the 3rd and 4th issues the trial Court found that the judgment referred to above had not been obtained by means of fraud, and that the amount due to the plaintiff was Rs.21,616-0-7.

On the 2nd issue, it held that the judgment and the decree of the King's Bench Division, dated the 19th February, 1929, could not be regarded as a judgment on the merits within the purview of section 13 of the Code of Civil Procedure. As the plaintiff's suit was based on the foreign judgment only, it was dismissed in view of the finding on issue No.2. The plaintiff has preferred an appeal to this Court.

The sole question for determination in this appeal is whether a suit lies on the basis of a judgment of the High Court of Justice in England given in default of appearance by the defendant. Section 13 of the Code of Civil Procedure 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 was strenuously contended on behalf of the appellant that the judgment, dated the 19th February, 1929, was a judgment on the merits as it was pronounced after proceedings had been taken in the English Court strictly in accordance with the procedure as laid down in the Rules of the Supreme Court. It appears that a writ for the appearance of the defendant was issued under the orders of Mr. Justice Talbot, dated the 8th June, 1928. Order 11, rule 4 of the Rules of the Supreme Court provides that every application for leave to serve a writ of summons or notice on a defendant out of jurisdiction shall be supported by affidavit, or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted

1934

KULWANT v. DHAN RAJ DUTT.

ABDUL RASHID J.

unless it shall be made sufficiently to appear to the Court or Judge that the case is a proper one for service out of the jurisdiction under this order. With the application for leave to serve the writ, an affidavit of Dr. Kulwant was filed which gave full details of the cause of action and the claim against the defendant. The order of Mr. Justice Talbot, dated the 8th June, 1928, was passed after the reading of the affidavit and the statement of the claim of the plaintiff. It is common ground between the parties that this writ was duly served on the defendant. The defendant did not put in an appearance within the period allowed, and, in consequence, judgment in default of appearance was entered in favour of the plaintiff for £1,596-7-3 and costs on the 19th February, 1929, under the rules governing the procedure of the Supreme Court.

Reliance was placed by the learned counsel for the appellant on the case of *Ram Chand* v. *Mr. John Bartlett* (1), the facts of which were very similar to the facts of the present case. It was held in that case " that a judgment passed in England against a defendant in India who has been duly served with a writ of summons, but who did not enter appearance or deliver a defence, when the proceedings have been strictly in accordance with the existing rules, must be considered as one passed on the merits." The following observations from the judgment of Mr. Justice Shah Din may be quoted *in extenso* :—

" In short, the proceedings held in the High Court of England appear to have been strictly in accordance with the existing rules of procedure, which are not shown to be in any way contrary to the fundamental principles of justice and fair play: and the

(1) 75 P. R. 1909.

judgment passed against the defendant on the facts of the case must be considered as one passed on the merits. It does not proceed on any preliminary point, *i.e.* a point collateral to the merits of the case, but is based on the merits as disclosed by the pleadings before the Court. If the defendant did not, in spite of notice of action, choose to appear and defend it, the judgment passed by the Court in plaintiff's favour was not the less a judgment on the merits, because it was not founded upon detailed evidence which the plaintiff might have produced had the defendant entered an appearance and contested the claim. The position to my mind is the same as if the defendant had appeared and confessed judgment. * * * * *. The affidavit filed by the present plaintiff-respondent in pursuance of the above rule, would, in my opinion, constitute *evidence in support of the claim.* * * * * *. And the judgment obtained after service of the writ on the defendant as required by the rules of the Supreme Court would, I think, be a judgment on the merits."

The position taken up on behalf of the respondent was that the ruling alluded to above had been virtually over-ruled by their Lordships of the Privy Council in the case of *Keymer* v. *Visvanatham Reddi* (1). In *Keymer's* case the plaintiff sued the defendant in the Court of King's Bench in London for a sum of money alleged to be due to him in respect of transactions which 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

(1) (1917) I. L. R. 40 Mad. 112 (P.C.).

1934

KULWANT v. DHAN RAJ DUTT.

ABDUL RASHID J.

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 judgment was entered for the plaintiff. The following observations from that case may be reproduced *in extenso* :—

" 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 section 13, subsection (*b*). * * * *. In their Lordships' view it (section 13 (*b*), Civil Procedure Code), 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."

This ruling does not appear to me to be applicable to the facts of the present case. In *Keymer's* case, the defendant actually appeared and filed a written statement denying the claim of the plaintiff. A defence was raised in the action and in spite of the denial of the claim of the plaintiff by the defendant, there was no adjudication on the merits because the defendant refused to answer interrogatories, and, in consequence, his defence was ordered to be struck out as a penalty. In the present case the defendant never appeared and never denied the claim of the plaintiff.

Therefore, no controversy had been raised in the English Courts by the defendant in the present case. The defendant having been duly served had the opportunity to raise a defence, but he did not avail himself of that opportunity and allowed the judgment to be entered in default of appearance. The ruling of their Lordships of the Privy Council in *Keymer's* case, was referred to by a Division Bench of the Madras High Court in *Janoo Hassan Sait* v. *M. S. N. Mohamad Ohuthu* (1), and it was observed 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, 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." *Janno Hassan Sait* v. *M. S. N. Mohamad Ohuthu* (1) was followed in *Nagoor Meera* v. *Mahadu Meera* (2), where it was held that " an *ex parte* decree obtained in a foreign Court must be deemed to be a decree passed upon the merits when there has been no appearance by the defendant."

A discordant note was, however, struck in the case of *R. E. Mohammad Kasim* v. *Seeni Pakir bin Ahmad*, (3), in which various rulings, including the one in *Keymer's* case, were discussed in great detail and it was held that " a foreign judgment passed on default of appearance of the defendant duly served with summons, on the plaint allegations without any trial on evidence, is not one passed on the merits of the case within the meaning of section 13 (*b*) of the Civil Procedure Code; and a suit cannot be brought

(1) (1924) I. L. R. 47 Mad. 877. (2) (1926) 92 I. C. 491.
(3) (1927) I. L. R. 50 Mad. 261 (F.B.).

1934

KULWANT v. DHAN RAJ DUTT.

ABDUL RASHID J.

on such a judgment in any Court in British India." Mr. Justice Venkatasubba Rao in his order of reference referred to *Keymer's* case, and observed that in *Keymer's* case, the remarks of their Lordships of the Privy Council to the effect, that he (the defendant) was treated as though he had not defended and judgment was given upon that footing, were in the nature of an *obiter dictum*. The learned Judge also referred to the case of *Oppenheim* v. *Mahomed Haneef* (1), and remarked that the point whether a judgment in default of appearance can be regarded as a judgment on merits came up for decision before the Privy Council in that case, but was not decided. The plaintiff based his suit on a foreign judgment as well as on the antecedent cause of action. Coutts Trotter J. assumed on the authority of *Keymer's* case, that a suit did not lie in an Indian Court on a foreign judgment by default, but held that on the alternative cause of action the plaintiff was entitled to a decree. Before the Judicial Committee the view of Coutts Trotter J. on the first point was not challenged and their Lordships were invited to deal with the second point only. In *Mohammad Kasim's* case, the suit was brought on a foreign judgment, namely, a judgment of the Supreme Court of Penang. The defendants did not appear though the summons had been duly served, and the judgment was given without trial and without taking any evidence. It does not appear that any affidavit had been filed in the Penang Court before the summons were issued to the defendants. There was, therefore, absolutely no evidence in support of the claim of the plaintiff. The Full Bench of the Madras High Court held that the decision

(1) (1922) I. L. R. 45 Mad. 496 (P.C.).

of the Privy Council in *Keymer's* case (1), was fully applicable to the case that was under consideration. I am of the opinion, with all respect, that the learned Judges of the Madras High Court gave too wide an interpretation to the observations made by the Judicial Committee in *Keymer's* case.

The Allahabad High Court has consistently taken the view that the observations of the Judicial Committee in *Keymer's* case (1) are applicable, only to those cases where the judgment follows as a penalty upon the defendant not complying with the orders of the Court, and where in consequence the defence raised in the action has not been adjudicated upon. Reference may be made in this connection to *Durga Das* v. *Jai Narain* (2) and *Ishri Prasad* v. *Sri Ram* (3). In the latter case the plaintiff obtained a decree in Rampur State for recovery of Rs.979-6-0 and on the basis of this judgment sued the defendant in the Court of the Munsif, Saharanpur. The decree obtained by the plaintiff in the Rampur Court was an *ex parte* decree and the judgment of the Court ran in the following terms :—

" The defendant notwithstanding due service of summons has not contested the suit. The document is registered. The failure of the defendant to contest the suit amounts to an admission of the plaintiff's claim. Accordingly the plaintiff's suit is decreed."

It was held by the Allahabad High Court that the above-mentioned judgment was a judgment given on the merits of the case within the purview of section 13 (*b*) of the Code of Civil Procedure. It was remarked in the judgment that the observations of the Privy Council in *Keymer* v. *Visvanatham Reddi* (1)

(1) (1917) I. L. R. 40 Mad. 112 (P. C.). (2) (1919) I. L. R. 41 All. 512.
(3) (1928) I. L. R. 50 All. 270.

1934

KULWANT v. DHAN RAJ DUTT.

ABDUL RASHID J.

were applicable only where the judgment followed as a penalty upon the defendant not complying with the order of the Court. In *Ephrayim H. Ephrayim* v. *Turner Morrison & Co.* (1) it was held that "where a pleader holds a power of attorney outside India, but does not receive any instructions to defend the case on the merits and appears in it, the mere fact of his being without such instructions, does not prevent the decision from being one on the merits." With respect to *Keymer's* case (2), it was remarked that "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 on merits." *R. E. Mohammad Kassim & Co.* v. *Seeni Pakir bin Ahmad & others* (3) does not appear to have been brought to the notice of the Judges of the Bombay High Court in this case.

I find myself in respectful agreement with the restricted interpretation given to the *dictum* of the Privy Council in *Keymer's* case by the Allahabad and Bombay High Courts. In my opinion if the procedure laid down by the Rules of the Supreme Court is strictly followed and the defendant is given an opportunity to appear and contest the claim of the plaintiff and he voluntarily refrains from doing so, the decision of the High Court of Justice in England must be regarded as a judgment on the merits. This principle has been alluded to by Lord Herschell in the case of *Nouvion* v. *Freeman* (4) in the following words :—

"The principle upon which I think our enforcement of foreign judgments must proceed is this : that in a Court of competent jurisdiction, where according

(1) 1930 A. I. R. (Bom.) 511.
(2) (1917) I. L. R. 40 Mad. 112 (P. C.).
(3) (1927) I. L. R. 50 Mad. 261.
(4) (1890) L. R. 15 A. C. 1.

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 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. In such a case it may well be said that giving credit to the Courts of another country we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation. But where, as in the present case, the adjudication is consistent with the non-existence of the debt or obligation which it is sought to enforce, and it may thereafter be declared by the tribunal which pronounced it that there is no obligation and no debt, it appears to me that the very foundation upon which the Courts of this country would proceed in enforcing a foreign judgment altogether fails."

Reference may also be made to a ruling of the Lower Burma Chief Court reported as *C. Burn* v. *D. T. Keymer* (1) where it was held that " a defendant cannot avoid the application of the principle of *res judicata* by saying that he did not appear at the trial of the suit and the plaintiff who has got an *ex parte* decree on proof of his title or on failure of the defendant to prove a defence, the onus of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not appear in Court to protect his own interest."

It was contended on behalf of the respondent that in the English Courts an action really commences

(1) (1913) 20 I. C. 971.

1934

KULWANT v. DHAN RAJ DUTT.

ABDUL RASHID J.

with the issue of a writ and that an affidavit which is filed in order to obtain a writ cannot be regarded as evidence in the case. According to the learned counsel, a Judge allows an action to be commenced by the issue of a writ only if it is a presentable claim and not a frivolous one. When the affidavit is read to the Judge for the purpose of obtaining a writ the Judge merely determines whether a *primâ facie* case for the issue of a writ has been made out. At that time he does not exercise his mind as to whether the claim is a good and true one. It was further suggested that under Order XIII, rule 3 of the Rules of the Supreme Court, a final judgment is automatically entered for the plaintiff if the defendant fails to appear and that, in these circumstances, the judgment must be regarded as a penalty for default. In my opinion this contention has no force. The affidavit filed by the plaintiff is considered by the Judge when ordering the issue of a writ, and it is open to the Judge not to grant leave for the issue of the writ unless a *primâ facie* case has been made out. If the defendant does not appear, his default after due service is taken to be tantamount to an admission of the claim, and the judgment is entered in favour of the plaintiff as if the defendant had confessed judgment. It cannot be said that if a decree were passed in favour of the plaintiff on an admission of the defendant it would not be an adjudication of the suit on the merits. Reliance was placed on behalf of the respondent on *Abdul Rahiman* v. *Mohammad Ali Rowther* (1) and *Isidore Fernando* v. *Thommai Antoni Michael Fernando* (2). These rulings merely follow *R. E. Mohammad Kassim & Co.* v. *Seeni Pakir bin Ahmad, etc.* (3), which has been

(1) (1928) I. L. R. 6 Rang. 552. (2) 1933 A. I. R. (Mad.) 544.
(3) (1927) I. L. R. 50 Mad. 261.

already dealt with in an earlier part of this judgment.

Reference was also made during the course of the arguments to a Single Bench ruling of this Court reported as *Mehr Singh* v. *Ishar Singh* (1), where it was held " that the true test whether a foreign judgment has been passed on the merits within the meaning of section 13 (*b*) of the Civil Procedure Code, is whether the judgment has been given as a penalty for any conduct of the defendant or whether it is based on a consideration of the truth or otherwise of the plaintiff's claim." This ruling is not of much assistance as the facts of that case were very different from the facts of the present case.

It appears to me that the words " judgment on the merits " have been used in the Civil Procedure Code in contra-distinction to a decision on a matter of form or by way of penalty and a case must be taken to have been decided on the merits where the defendant had ample opportunity to raise a defence and voluntarily refrained from raising such a defence and the judgment was, therefore, passed *ex parte*. Were any other interpretation to be placed on the words " where the judgment has not been given on the merits of the case " the defendant would gain a great advantage by merely refraining from appearance after a writ had been duly served on him. I, therefore, hold that the Allahabad and the Bombay High Courts have taken a correct view of the observations of their Lordships of the Privy Council in *Keymer's* case, and I respectfully dissent from the view expressed in *R. E. Mohammad Kassim & Co.* v. *Seeni Pakir bin Ahmaa* (2) in this respect.

(1) (1933) I. L. R. 14 Lah. 53. (2) (1927) I. L. R. 50 Mad. 261.

1934

KULWANT v. DHAN RAJ DUTT.

ABDUL RASHID J.

For the reasons given above I would accept the appeal and pass a decree for Rs.21,616-0-7 in favour of the plaintiff against the defendant with costs throughout.

TEK CHAND J.—I agree.

A. N. C.

Appeal accepted.

APPELLATE CIVIL.

Before Jai Lal and Skemp JJ.

1935

Jan. 14.

BADRUL ISLAM ALI KHAN AND OTHERS (PLAINTIFFS) Appellants

versus

MST. ALI BEGUM AND OTHERS (DEFENDANTS) AND *MIRZA* BAIZA KHAN (PLAINTIFF) } Respondents.

Civil Appeal No. 994 of 1929.

Civil Procedure Code, Act V of 1908, section 92 : Persons who obtain leave of the Collector — whether appeal filed by some only of those persons competent — Indian Evidence Act, I of 1872, section 65 : Copy of document filed without objection — whether open to objection in appeal — Muhammadan Law — Wakf — *created by will — whether valid — Mussalman Waqf Validating Act, VI of 1913 (as amended in 1930), sections 3 (a) and 4 : Family — whether includes brother and his descendants — providing residence for brother and his descendants in the* wakf *property — whether renders the* wakf *invalid or illusory.*

Held, per Jai Lal J., that the several persons who have obtained the leave of the Collector under section 92, Civil Procedure Code, and have consequently instituted a suit, must be deemed to be *one* plaintiff and all must join in instituting the suit and in presenting an appeal if they are alive at the time.