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INSOLVENCY JURISDICTION.

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v. *Ghosal* (1), we wanted to appear, but the Court held that, though we could do so, we could not take part in any proceedings.

STEPHEN, J. The question now raised is whether witnesses appearing in accordance with an order made under s. 36 of the Insolvent Debtors, Act, 1848, are entitled to be represented by Counsel. In an ordinary case a witness has, of course, no right to be represented. The differences however, between the position of witnesses appearing in an ordinary cause, and the position of those appearing in the present proceedings, seem to me too weak for any sound argument to be based on the analogy between them. Here witnesses have, with perfect propriety, been cross-examined by Counsel to show that they have been guilty of serious fraud and conspiracy. I cannot think that the law intends that they should not have any chance of professional assistance to make an answer to such charges: the more so as it is much harder for the Court to protect their interests than it would be in an ordinary case. I am therefore glad to find that the matter has been already dealt with in the case of *In re Nursey Kessowji* (2), where it is laid down that in proceedings such as these under special circumstances Counsel may properly be allowed to attend on behalf of witnesses.

The charges mentioned above, to my mind, constitute special circumstances within the meaing of this rule and I take the attending of Counsel to include acting as Counsel in the oridinary way. I therefore hold that the witnesses in the present case may be represented by Counsel with all the powers of Counsel ordinarily appearing in an ordinary case.

Attorney for opposing creditor: *A. N. Ghose.*

Attorneys for insolvents: *Rutter & Co.*

Attorneys for Amluk Chand Parruck and Guloke Chand: *Orr, Robertson and Burton.*

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29 C 509.

[509] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Prinsep and Mr. Justice Hill.

KASSIM MAMOOJEE *v.* ISUF MAHOMED SULLIMAN.* [14th May, 1902.]

Foreign judgment, action on—Domicile—Defendant not resident or domiciled in foreign country—No appearance by defendant or submission to jurisdiction—Jurisdiction—"Foreigner"—Subject of the Sovereign both of British India and of a British colony.

Courts generally exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction, and, apart from some statutory power, cannot exercise jurisdiction over any one beyond its limits.

Whaley v. *Busfield* (3) referred to.

A judgment of a foreign Court obtained in default of appearance against a defendant cannot be enforced in a Court in British India, where the defendant at the time the suit commenced was not a subject of, nor resident in, the country in which the judgment was obtained.

Gurdyal Singh v. *Raja of Faridkote* (4), *Schibsby* v. *Westenholz* (5), *Rousillon* v. *Rousillon* (6) referred to.

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* Appeal from Original Civil No. 16 of 1901 in suit No. 504 of 1899.

(1) (1901) Unreported case, dated 21st May 1901.
(2) (1879) I. L. R. 3 Bom. 270.
(3) (1886) L. R. 32 Ch. D. 131.
(4) (1894) I. L. R. 22 Cal. 222.
(5) (1870) L. R. 6 Q. B. 155.
(6) (1880) L. R. 14 Ch. D. 351.

A person does not cease to be a "foreigner" within the meaning of the rule laid down, in the above cases because he is the subject of a sovereign who is the sovereign of the country where the judgment was obtained and the country where it is sought to be enforced.

Turnbull v. *Walker* (1) referred to.

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THE defendant Kassim Mamoojee appealed.

The plaintiff Isuf Mahomed Sulliman sued to recover the amount due under nine several judgments obtained by him against the defendant and others in the Supreme Court of Mauritius. The judgments were of various dates from the 8th February to the 29th March 1898. The plaintiff alleged that the judgments were still unsatisfied and in force.

The defendant some twenty years or so ago resided in that colony and carried on business as a merchant there, but left the [510] colony in 1878 and did not return to it afterwards; when he left he was carrying on business there in co-partnership with two persons named Allam and Mahomed Baboo in the name of Hajee Kassim Mamoojee, which business was carried on down to the month of August 1896 by those two persons under a power of attorney from the defendant, when the partnership was dissolved and the defendant ceased to carry on and since that time has not carried on any business whatever in the colony. The defendant was not served with any process or summons in the suits, and he did not appear in any of them, and he denied that the sum claimed by the plaintiff or any part thereof was due.

The defendant took several grounds of objection to the claim as based on these judgments:—(1) that the High Court had no jurisdiction to entertain this suit because it was alleged that the defendant was not either dwelling or carrying on business or personally working for gain within the limits of its ordinary original civil jurisdiction; (2) that the Mauritius Court had no jurisdiction to pass these judgments, inasmuch as he was not domiciled in Mauritius nor resident there at the time when the suits were instituted or at any time during their pendency or at the time of their determination; that in June or July 1898 the defendant was, at the instance of the plaintiff, who was the petitioning creditor, adjudicated a bankrupt, and such bankruptcy proceedings were a bar to the present suit; (3) that the plaintiff had failed to prove that there was anything due from the defendant to the plaintiff.

The case was originally tried by Sale, J., who, in disposing of the several grounds of objection taken by the defendant, observed as follows in his judgment dated the 17th April 1901:—

SALE, J. The plaintiff sues to recover the amount due under nine several judgments obtained by him against the defendant and others in the Supreme Court of Mauritius.

The judgments are of various dates, from the 8th February 1898 to the 29th March of the same year.

It is, I think, clear that these judgments are foreign judgments within the meaning of the Civil Procedure Code, and that the Supreme Court of Mauritius is a Court which is established by an order of Her Majesty in Council, and, as appears [511] on the face of the judgments, that the defendant did not appear and that judgment was entered up against him in his absence. It appears further that the Court was satisfied that for the purposes of these suits the defendant was properly represented by one Allam, who was found to be carrying on business in Mauritius in partnership with the defendant, and I think that I must take it that the Court was satisfied that there was sufficient authority in Allam, as the representative of the defendant, to accept process on his behalf, and that Allam was properly served with processes in all the suits and had the opportunity of appearing and defending them on behalf of the defendant, if he had thought proper so to do.

(1) (1892) 67 L. T. Rep. 767.

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The defendant takes several grounds of objection to the claim as based on these judgments. First, it is said that this Court has no jurisdiction to entertain this suit.

It is alleged that the defendant at the date of the institution of the suit was not either dwelling or carrying on business or personally working for gain within the ordinary original civil jurisdiction of this Court.

* * * * * * *

I think the evidence shows that the defendant was carrying on business as share-dealer in Calcutta at the date of the institution of this suit, and that the plea to the jurisdiction of this Court must therefore fail.

The next ground of defence the defendant takes is that the Mauritius Court had no jurisdiction to pass these judgments against him which the plaintiff relies on, inasmuch as he was not domiciled in Mauritius nor resident there at the date at which the suits were instituted or at any time during their pendency. I think it is quite clear from the cases of *Schibsby* v. *Westenholz* (1) and *Rousillon* v. *Rousillon* (2) that the Courts in England enforce foreign judgments where the circumstances show that an obligation is cast on the defendant to obey the order of the foreign Court; and that on the other hand where it appears that no such obligation exists or where the defendant can show he had legal excuse for not obeying the decree of the foreign Court, then there would be a good defence to an action for enforcing such judgments.

In the case of *Nalla Karuppa Settiar* v. *Mahomed Iburam Saheb* (3), it was held that the fact that the defendant, who was domiciled in British India, was carrying on business through a partner in Kandy was not a circumstance which rendered him subject to the Court at Kandy, and the ground on which that conclusion was arrived at was that the fact of his carrying on business through a partner in Kandy did not amount to constructive residence within the jurisdiction of that Court, and the Madras High Court, under the circumstances, declined to enforce the decrees of the Kandy Court against the defendant.

The facts in this case are very different from the facts in the case in the Madras Court, but at the same time with great deference to the learned Judges in that Court, it seems to me that the principle laid down by them is somewhat too narrow in respect of the enforceability of foreign judgments against a person who, though not resident within the jurisdiction of the foreign [512] Court, carries on a business within that jurisdiction through an agent, for, although there may be no constructive residence within the jurisdiction of the foreign Court, yet the fact that a person carries on business within the jurisdiction of that Court must be one of the circumstances which should be taken into consideration in determining whether he had not submitted to the jurisdiction of the foreign Court.

It seems to me the observations on this question of Sir Charles Sargent, KT., C. J., in the case of *Girdhar Damodar* v. *Kassigar Hiragar* (4), are well founded. The passage I refer to is to be found at page 667 :—

"It may be true that non-British subjects who do not reside in British India do not make themselves personally subject to the General Municipal Law of British India; still by establishing their business in British India from which business they expect to derive profit, they accept the protection of the territorial authority for their business and their property resulting from it, and may be fairly regarded by so doing as submitting to the jurisdiction of the Court of the country."

The enunciation of this principle was made no doubt in a case dealing with the proper construction of s. 18 of the Small Cause Court Act, but it seems to me it is a principle equally applicable to the question as to how far a foreign judgment is enforceable against a person carrying on business within the jurisdiction of the foreign Court.

The circumstances which, in my opinion, are material to the question whether or not the defendant has submitted himself to the jurisdiction of the Mauritius Court are as follows :—

He is a British subject, a native of Surat. He went to Mauritius so far back as 1858, where he started the business which, up to the date of the institution of the suits in the Mauritius Court, were carried on by his partners, who were acting as his agents under a power-of-attorney.

(1) (1870) L. R. 6 Q. B. 155.
(2) (1880) L. R. 14 Ch. D. 351.
(3) (1896) I. L. R. 20 Mad. 112.
(4) (1893) I. L. R. 17 Bom. 662.

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The defendant personally carried on this business in Mauritius for twenty years, that is to say, from 1858 to 1878, with only one break.

He left Mauritius in 1878, but not apparently with the object of permanently remaining away. He says he had a mind to return there. He went first to Bombay and subsequently came to Calcutta and carried on business here in the name of Mamoojee Kasimjee.

The business he carried on in Mauritius was in his own name, Hajee Kassim Mamoojee, and, I think, it must be taken that the power-of-attorney under which he admits the business was carried on in Mauritius, was one which authorised his agents there to accept service and defend suits instituted against him in that country, and I say so, because I think I must take it that the Mauritius Court satisfied itself that the defendant's agent was authorised to defend the suits on his behalf.

Another circumstance which, I think, may be considered in this connection is this. The defendant was adjudicated bankrupt by the Mauritius Court in June 1898, and this is relied on by the defendant as forming a bar to this suit.

[513] It would seem from certain letters put in evidence that in the bankruptcy proceedings he appeared through his agents, and no objection was taken to the jurisdiction of the Mauritius Court, and the defendant further alleges that in course of those proceedings certain assets have been collected by the Receiver. These seem to me to be circumstances which may properly and fairly be taken into consideration on the question whether or not there is any obligation on the defendant to obey any decree the Mauritius Court might make against him.

This long course of dealings which the defendant had within the jurisdiction of the Mauritius Court seems to me to amount to a representation on his part that so long as he was enjoying the protection of the Mauritius Court disputes or differences between himself and those resident within the jurisdiction of the Court would be adjudicated upon and determined by the Mauritius Court.

It is not unfair to say that people dealt with him on that footing. That being so, it seems to me that the Mauritius Court had full jurisdiction to deal with the suits, the decrees in which form the basis of the present suit, and that those decrees placed on the defendant the duty to pay to the plaintiff the amount thereby awarded. No exception is taken to the jurisdiction of the Mauritius Court on any of the special grounds mentioned in s. 14 of the Civil Procedure Code, and, inasmuch as I think the Mauritius Court had jurisdiction to make the decrees now proved, it seems to me they form a good ground of action against the defendant in this suit.

It is next said that the plaintiff has failed to prove that there is anything now due from the defendant to the plaintiff in respect of the decrees in question, and that it is consistent with the evidence that the judgments have been satisfied. I do not think this is so on the evidence. The plaintiff has in his plaint alleged that the judgments are unsatisfied. The defendant in neither of his written statements alleges that they have been satisfied. What he says is that he does not admit that they are still unsatisfied, and he says that "the plaintiff is, in any event, not entitled to recover in this suit the amounts already received by him under the said bankruptcy.

I think, under the circumstances, it is for the defendant to show that the judgments have been satisfied. At all events the evidence is not such as would justify me in dismissing the suit. It is sufficient for the protection of the defendant that the plaintiff, at the time of apylying for execution, should be required to show whether any and what sums have been realised in the course of the bankruptcy proceedings in respect of the judgments in suit and what the amount now due is.

The last ground of defence is that the adjudication of the defendant as a bankrupt in the Mauritius Court operates as a bar to this suit. No authority is cited for this proposition, nor do I see how in principle the bankruptcy of the defendant in Mauritius, who is admittedly not domiciled there, can operate as a bar to a suit against him in this Court.

In this country the insolvency of a person so far as it bars a suit by or against him has that operation by statutory enactment. I have not been referred to any enactment which constitutes the bankruptcy proceedings in Mauritius a bar to the present suit.

[514] It may be that this Court would, at the instance of the Receiver in the bankruptcy proceedings in Mauritius, stay the execution of the decree of

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this Court, but that of course would depend upon the facts proved in the application.

For all these reasons, I think, the plaintiff is entitled to a decree for the amount claimed with costs, and interest on decree, but no execution is to issue until the plaintiff is prepared to show on affidavit what sums, if any, have been realised by the Receiver in bankruptcy in Mauritius in respect of the judgments now sued upon.

The Advocate-General (Mr. *J. T. Woodroffe*) and Mr. *Sinha* on behalf of the appellant.

Mr. *Pugh* and Mr. *Knight* on behalf of the respondent.

MACLEAN, C. J. This is a suit to recover the amount due under nine judgments, which the plaintiff has obtained against the defendant and others in the Supreme Court of Mauritius. The judgments are of various dates from the 8th February to the 29th March of the same year. The plaintiff alleges that the judgments are still in force and unsatisfied, and that there is an aggregate sum of about forty-six thousand rupees due thereunder. The defendant's case is that the Supreme Court of Mauritius was not a Court of competent jurisdiction to try the matter; that some twenty years or so ago he resided in that colony and carried on business as a merchant there, but that he left the colony in 1878 and did not return to it afterwards; that when he left he was carrying on business there in co-partnership with two persons, named Allam and Mahomed Baboo, under the firm of Hajee Kassim Mamoojee; and that down to the month of August 1896 that co-partnership or business was carried on by Allam and Mahomed Baboo under a power-of-attorney from the defendant; that the co-partnership was dissolved in the month of August 1896, and on that date the defendant ceased to carry on and that he has not since carried on any business whatever in the colony; that neither at the dates of the institution of the suits nor of their determination nor at any time during that period was he domiciled in the colony, or bound by its laws, and that he was not subject to the jurisdiction of the said Supreme Court; that he was served with no process or summons in the suits; that he did not appear in any of them; that before the recovery of the judgments he had not any notice or knowledge of any process or summons or of any proceedings in the suits or any opportunity of defending [515] himself therein; that he was not subject to the laws of the said colony at any time during the pendency of the suits; that he was not then, nor is he now, under any obligation to submit to the jurisdiction of the Supreme Court of that colony; and the defendant denies that the sum or any part of the sum is due. Mr. Justice Sale has given judgment in the plaintiff's favour, hence the present appeal.

I think it is open to the defendant, under explanation (6) of s. 13 of the Code of Civil Procedure, to show that the Court, which passed the foregin judgments, was not a Court of competent jurisdiction. The plaintiff put in the judgments, but he has not shown that they are unsatisfied; there were several other defendants to these suits who might or might not have satisfied them. The defendant has been called. He has sworn to the facts which I have mentioned above, and he has not been cross-examined upon that part of his case except as to his revocation of the power-of-attorney on the dissolution of the partnership. I think we may accept his statements as correct. Apparently the defendant was adjudicated a bankrupt in Mauritius in June or July 1898; a Receiver was appointed of his estate; and he submits that such

bankruptcy proceedings, which were at the instance of the present plaintiff, who was the petitioning creditor, are a bar to the present suit.

Upon these facts I feel a difficulty in saying that the Supreme Court of Mauritius had jurisdiction to entertain the suit. The defendant ceased to be either premanently or temporarily resident there after 1878, and according to his evidence he did not carry on any business there after August 1896. I do not think that the plaintiff has substantiated that the defendant was carrying on business there at the date of the suits in 1898. The plaintiff suggests rather than proves that Allam was managing his business and carrying it on under a regular power-of-attorney from the defendant, but the defendant has sworn that this power-of-attorney was revoked. In support of this part of the case, the plaintiff sought to put in evidence the letters of the 3rd and 4th November 1899 from Messrs. Pitter and Fraser in Mauritius respectively as evidence of the fact there stated, *viz.*, that Allam Khan represented the defendant **[516]** and managed his business under regular powers-of-attorney. He has sought to put them in under s. 20 of the Evidence Act, but I do not think they are admissible under that section.

The law on the subject is laid down in (amongst others) the cases of *Gurdyal Singh* v. *Raja of Faridkote* (1), *Schibsby* v. *Westenholz* (2), *Rousillon* v. *Rousillon* (3). The Supreme Court of Mauritius is a foreign Court within the meaning of s. 2 of the Code and the judgments are foreign judgments; and the judgments must be taken to have been pronounced against the defendant *in absentem*. No doubt, in the recital in the judgment as to the issue of the writ against the defendant, it is stated that he was duly represented by Allam, but it is equally clear on the face of the judgments that there was no appearance entered by the present defendant, nor is there anything to show that the writ was ever served on Allam as representing the defendant. Mr. Justice Sale on this head considers he must take it that the Mauritius Court satisfied itself that the defendant's agent was authorized to defend the suits on the defendant's behalf. This, I take it, is a presumption only, see *Molony* v. *Gibbons* (4), which is rebutted by the evidence that the power-of-attorney was revoked in 1896. It is contended, however, for the plaintiff that without contesting the principles laid down in the cases I have referred to and conceding that the judgments here are foreign judgments of a foreign Court, the defendant is not a *foreigner* within the meaning of the rule laid down in these cases, inasmuch as he is a native of British India, a subject of the Sovereign both of the colony of Mauritius and of British India, and that the rule only applies to the case of foreigners, who own neither allegiance nor obedience to the power, the Courts of which have passed the judgment sued upon. There is, however, in this case nothing to show that any legislation exists of the sovereign power giving the Courts of Mauritius jurisdiction over a British subject, wherever he may be, and placing him under the jurisdiction of the Courts of Mauritius, or at least making it compulsory for him to come and to submit to that jurisdiction. Courts generally exercise jurisdiction only over **[517]** persons who are within the territorial limits of their jurisdiction and, apart from some statutory power, there is nothing to show that such exists in the present case. The Court has no power to exercise jurisdiction

(1) (1894) I. L. R. 22 Cal. 222.
(2) (1870) L. R. 6 Q. B. 155.
(3) (1888) L. R. 14 Ch. D. 351.
(4) 1810) 2 Campbell 502.

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over any one beyond its limits (see *Whaley* v. *Busfield* (1).) I think the defendant here was a foreigner within the meaning of that term as used in the cases I have mentioned, otherwise the result would be that, upon a judgment obtained in a Court of any colony of the British Crown against an absent person, who was not a native of or either permanently or temporarily resident or domiciled within that colony at the time of the suit or of the judgment passed against him *in absentem*, he might be successfully sued upon that judgment in any other Court within the British dominions. This view appears inconsistent with the decision in the case of *Turnbull* v. *Walker* (2). When Mr. Dicey in his work on "Conflict of Law" speaks of "Foreign" he means "not English."

Upon the best consideration I can give to the case, the defendant in my opinion was not subject to the jurisdiction of the Supreme Court of Mauritius when the judgments sued upon were passed, and it is open to him to show in defence of the present suit, and he has shown successfully, that the Supreme Court of Mauritius was not a Court of competent jurisdiction in the matter.

In my opinion the appeal must succeed and the suit must be dismissed with costs, including the costs of the appeal.

PRINSEP, J. I am of the same opinion.

HILL, J. I am of the same opinion.

Attorney for the appellant: *Ganendro Narain Dutt.*

Attorneys for the respondent: *Pugh & Co.*

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[518] PRIVY COUNCIL.

PRESENT:

Lords Macnaghten, Davey, Robertson and Lindley.

SECRETARY OF STATE FOR INDIA *v.* KRISHNAMONI GUPTA AND THE CROSS-APPEAL.

[12th and 19th March and 18th April, 1902.]

[*On appeal from the High Court at Fort William in Bengal.*]

Limitation—Adverse Possession—Landlord and Tenant—Alluvial land, suit for—Land diluviated and afterwards re-formed—Effect of acquiescence in title of Government—Discontinuance of possession by submersion of land by river—Limitation Act (XV of 1877), title under.

The possession of the tenant is the possession of the landlord, and it can make no difference whether or not the tenant be one who might claim adversely to his landlord.

In a suit for alluvial land, at one time part of the plaintiff's permanently-settled estate, but subsequently in 1854, after diluvion and reformation, adjudged to be an accretion to Government land, where the plaintiffs had taken from the Government *ijaras* of such land and accretion, the possession of the Government was held to be adverse to the plaintiffs during the period they were, as *ijaradars*, estopped from denying their landlord's title; and the Government being found to have held part of the land continuously for more than twelve years, the suit as to that was barred by limitation.

The fact that the land had been permanently settled with the plaintiffs by the Government, and that the plaintiffs had always paid to the Government the full amount of revenue assessed upon it could make no difference. The plaintiffs had acquiesced in the decision of 1859, by which the land was adjudged to the Government, and no ground had been shown for relieving them from the consequences of their acquiescence.

(1) (1886) L. R. 32 Ch. D. 131. (2) (1892) 67 L. T. Rep. 767.