1901
JUNE 18.

APPELLATE CIVIL.

28 C. 641.

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

MOAZZIM HOSSEIN KHAN AND ANOTHER (*Defendant*)* *v.* RAPHAEL ROBINSON (*Plaintiff.*) [18th June, 1901.]

Foreign Court, judgment of—Judgment, ex parte—Queen's Bench Division—Defendants in India—Order 11 *of* 1883, *Rule* 1, *s. E—Suit—Jurisdiction—Civil Procedure Code* (*Act XIV of* 1882), *s.* 13, *explanation* 6—*Foreign judgment, presumptive evidence of—Interest.*

[642] On a suit brought in India upon an *ex parte* judgment in England of the Queen's Bench Division, defendants (Nos. 1 and 2) *inter alia* contended (1) that the judgment upon which the suit was based was not binding on them as neither of them resided within the territorial jurisdiction of the Court, when the suit was brought, (2) the Court, which passed it, had no jurisdiction over the subject-matter of the suit, (3) the claim for interest was untenable.

Held, that as the defendants were at the time of the judgment subjects of the Sovereign, both of England and of British India, although at the date of the judgment, they were not within the territorial jurisdiction of England, but were resident in British India, the judgment was not a nullity.

Held, also, that the judgment was not binding on defendant No. 1 as he had succeeded in showing that the action at the English Court was not founded, as it purported to be, upon any breach or alleged breach of any contract made by him within the jurisdiction of the English Court.

Sirdar Gurdyal Singh v. *The Raja of Faridkote* (1) referred to.

Held, further, that, as neither the English Statute, on which the claim for interest was based, was applicable to India, nor did the case come within the scope of Act XXXII of 1889, the claim for interest was untenable.

THIS appeal arose out of a suit brought in the Court of the Subordinate Judge at Backergange, by the plaintiff, as the legal and personal representative of one Herman Robinson deceased. The allegations of the plaintiff were that Herman Robinson, before his death, brought an action against the defendants, Syed Moazzim Hossein Khan Bahadoor, and his son Syed Motaher Hossein in the Queen's Bench Division of the High Court of Justice in England; that, on the 29th of June 1895, the said Herman Robinson died, and on the 11th November 1895 letters of administration to his estate was granted to the plaintiff, and on the 9th December 1895 an order was made allowing the plaintiff to carry on the said action as his legal personal representative; that the plaintiff having been substituted on the record, a judgment was passed in his favour on the 14th August 1896. On the basis of this judgment the plaintiff brought the said suit against the defendants in the Court, within the local jurisdiction of which they were then residing. The defence of defendant No. 1 (the father) was, that the plaintiff had no cause of action against him; that he was not aware of any proceedings of the Queen's **[643]** Bench Division in London, and that no notice or summons was served on him in connection therewith; that he had never been to London or to any place within the jurisdiction of the Queen's Bench Division of the High Court in London; that no suit could be instituted against him in the said Court, and the judgment on the basis of which the plaintiff brought this suit, was without jurisdiction and *ultra vires*; that he had never entered into any contract of any kind with Mr. Herman Robinson,

* Appeal from original decree No. 346 of 1899, against the decree of Babu Chandi Charan Sen, Subordinate Judge of Backergunge, dated the 10th of July 1899.

(1) (1894) L. R. 21 I. A. 171; I. L. R. 22 Cal. 222.

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deceased, the predecessor of the plaintiff, and therefore, there was no cause of action against him in the said suit in London. The defence of defendant No. 2 (the son) was also to the same effect, though, he admitted, he had been in England for upwards of two years, but had left some time before the date of the institution of the suit. It appeared from the evidence of defendant No. 1, that he never entered into any contract with the plaintiff and so there could never have been any breach of contract by him within the jurisdiction of the English Court. The Court of First Instance, having overruled the objections of the defendants, gave the plaintiff a decree for the amount claimed and also allowed interest. Against this decision the defendants appealed to the High Court.

MAY 21, 22 & 23. Mr. *G. S. Henderson* and Babu *Basunt Kumar Bose*, and Babu *Jnanendra Mohun Das* for the appellants.

Mr. *J. G. Woodroffe* and Babu *Prosonno Gopal Roy* for the respondent.

JUNE 18. MACLEAN, C. J.—The plaintiff in this suit is the legal personal representative of one Herman Robinson, and the defendants are father and son, *viz.*, Syed Moazzim Hossein Khan Bahadur and Syed Motaher Hossein, Barrister-at-Law. I shall refer to them as the father and the son. The suit is on a foreign judgment, *viz.*, on an *ex parte* judgment of the Queen's Bench Division of the High Court of Justice of England for an amount equivalent to Rs. 6,551 and odd, a judgment recovered against both the defendants. In his defence, the father pleaded that he was not served with the writ or any copy thereof in the English action, that he had never been within the jurisdiction of the English Court, and the judgment was made without jurisdiction and **[644]** was inoperative as against him. His son's defence was substantially the same, though, he admitted he had been in England for upwards of two years, but had left some time before the date of the institution of the suit. Both defendants pleaded that, on the merits, the judgment in the English Court ought not to have been passed, and that it was a fraudulent action. Upon this latter point, I may remark at once that, even if it were competent for the defendants to go into the merits of the suit on which the English judgment was based, which I do not think they can properly do, the son has not tendered himself as a witness in this case, nor put in any evidence, whilst the father does not go beyond saying that he had had no dealings with Herman Robinson and that he never undertook to pay the boarding and lodging expenses of his son with the latter. The claim in the English Court was apparently for board, lodging and tuition. Neither of the defendants appeared in the English action or submitted to the jurisdiction of that Court.

Upon the question of whether or not the defendants were duly served and had notice of the English action, the son has not ventured to go into the box and challenge the statement as to service, told by the witness Nibaran Chundra Chattopadhya, whilst the father only ventured to say that he does not recollect that any writ from England was served upon him. On the evidence, it must be taken that both defendants were duly served.

Assuming there was jurisdiction in the English Court, and that it was properly exercised, it has not been disputed that as a general principle, the Court, in which the suit on the foreign judgment is brought, cannot properly go into the merits of the action, which resulted in the foreign judgment sued upon, but the appellants contend

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that, by virtue of the last words of explanation 6 of s. 13 of the Code of Civil Procedure, which explanation runs as follows: "Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court, which made it, had competent jurisdiction, unless the contrary appear on the record, but such presumption may be removed by proving the want of jurisdiction," they are entitled to rebut the presumption by **[645]** proving the want of jurisdiction of the English Court. It is said for the appellants that the jurisdiction of the English Court was based entirely upon the view that the case fell within Order 11 of 1883, Rule I, sub-section (*e*), and that the defendants say that they are entitled to show that that was not so, and consequently that there was a want of jurisdiction in the English Court. I think they are entitled to show this. The father says he has substantiated this by his evidence that he never wrote to Herman Robinson and had no dealings with him, and in this suit that evidence is uncontradicted and may, I think, be relied upon. This argument, however, does not assist the son, for he has put in no evidence.

I now pass to the important question of whether the English Court had jurisdiction over the defendants, and upon this point I refer to the case of *Sirdar Gurdyal Singh* v. *Raja of Faridkote* (1), where the law on the subject was very carefully considered. That no doubt was the case of a judgment obtained in a foreign country, but against one, who was not a subject of that country. In the present case the English Court is a Foreign Court within the meaning of s. 2 of the Code of Civil Procedure and the judgment is a foreign judgment. There their Lordships of the Judicial Committee say: "Under these circumstances, there was in their Lordships' opinion nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of suit ("*actor sequitur forum rei*") which is rightly stated by Sir Robert Phillimore (International Law, Volume 4, section 891) "to lie at the root of all international and of most domestic jurisprudence on this matter." All jurisdiction is properly territorial and *extra territorium jusdicenti impune non paretur*. Territorial jurisdiction attaches (with special exceptions) upon all persons, either permanently or temporarily resident within the territory, while they are within it, but it does not follow them after they have withdrawn from it and when they are living in another independent country * * * * * * * * As between different provinces under one sovereignty (*e.g.*, under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction. **[646]** But no territorial legislation can give jurisdiction, which any Foreign Court ought to recognize against foreigners, who owe no allegiance or obedience to the power which so legislates.

In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a Foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as mere nullity by the Courts of every nation, except (when authorized by special local legislation) in the country of the *forum*, by which it was pronounced.

These are doctrines laid down by all the leading authorities on International Law; among others by Story (Conflict of Laws, 2nd Edition,

(1) (1894) I. L. R. 22 Cal. 222; L. R. 1 I. A. 171.

ss. 546, 549, 553, 554, 556, 586), and by Chancellor Kent [Commentaries, Volume 1, page 284, note (c), 10th Edition] and no exception is made to them in favour of the exercise of jurisdiction against a defendant not otherwise subject to it by the Courts of the country, in which the cause of action arose, or (in cases of contract) by the Courts of the *locus solutionis*. In those cases as well as all others, when the action is personal, the Courts of the country, in which a defendant resides, have power, and they ought to be resorted to, to do justice.

I have cited from this judgment at length, as it was much relied upon by the appellants. Here the father was never permanently or even temporarily resident within the territorial jurisdiction of England, and consequently, had he been a foreigner, that jurisdiction would not have attached upon him. But then arises the question, whether the principles laid down in the Privy Council case, from which I have quoted, apply to the case of an Indian, who is a subject of the sovereign, both of England and of British India, or merely to the cases of foreigners, who owe no allegiance or obedience to the power, the Courts of which have passed the judgment sued upon.

In Dicey's Conflict of Laws, p. 369, the following rule is laid down: "In an action *in personam* in respect of any causes of action, the Courts of a foreign country have jurisdiction."

[647] Case 2: "When the defendant is at the time of the judgment in the action a subject of the sovereign of such country," and reference is made to *Schibsby* v. *Westenhoby* (1) and *Rousillon* v. *Rousillon* (2). In the former case the Court said: "We think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country, where judgment is sought to be enforced against them, we think that its laws would have bound them." In the present case the defendants were at the time of the judgment subjects of the sovereign, both of England and of British India, though at the date of the judgment they were not within the territorial jurisdiction of England. They were resident in British India.

It is, however, contended for the plaintiff that, *qua* the circumstances of this case, there exists territorial legislation of the sovereign power giving the English Courts jurisdiction over British subjects, wherever they may be, and placing them under the jurisdiction of the English Courts, or at least making it compulsory upon them to come in and submit to that jurisdiction. Upon this point I may perhaps refer to the observations of the late Lord Justice Cotton, who says in the case of *Whaley* v. *Busfield* (3), "Service out of the jurisdiction is an interference with the ordinary course of the law, for generally Courts exercise jurisdiction only over persons, who are within the territorial limits of their jurisdiction. If an Act of Parliament gives them jurisdiction over British subjects, wherever they may be, such jurisdiction is valid, but apart from Statute a Court has no power to exercise jurisdiction over any one beyond its limits." It is contended for the plaintiff that Order 11 of 1883, Rule I, sub-section (*e*), which has a statutory force, and which order was referred to by Lord Justice Fry, in the case I have just cited, as "a complete code governing service out of the jurisdiction," (I am referring to the English Courts orders), gives the English Courts jurisdiction over subjects of the British Crown, wherever they may be. The appellants say that the object of

(1) (1870) L. R. 6 Q. B. 155, 161. (2) (1880) L. R. 14 Ch. Div. 351, 371.
(3) (1886) L. R. 32 Ch. Div. 131.

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service under that order is not to give jurisdiction over the party served, but only to give [648] him a notice of a proceeding affecting his rights, so as to give him an opportunity of coming in to defend them. [*The Credits Gerundeuse, Limited* v. *Van Weede* (1)]. This, no doubt, is so in the case of a foreigner, but is it so in the case of a subject of the British Crown resident outside the territorial jurisdiction of England, but in a dependency of the British Crown? Though no doubt, British India has its own Legislative Councils, the subjects of the British Crown there are subject to the Supreme Legislative authority of the Imperial Parliament, and Order II, Rule I, sub-section (*e*) would appear to be general in its sphere of operation, excepting only Scotland and Ireland.

In my opinion, the order in question constitutes a legislative act of the sovereign power regulating the jurisdiction in the case of a British subject, resident in British India and outside the ordinary territorial jurisdiction of the English Courts, and gives the English Courts jurisdiction over such British subjects, assuming that the particular case falls within the order. I think, however, that it was open to the defendants to show and that the father has shown, that the action in the English Courts was not founded, as it purported to be, upon any breach or alleged breach within the jurisdiction of the English Court, of any contract made by him which was to be performed within such jurisdiction, and consequently that the English Court had no jurisdiction in the matter, or to order service out of its jurisdiction. The present suit, therefore, must fail as against the father, and the suit as against him be dismissed with costs, and he must have the costs of the appeal.

The case of the son is different. No evidence has been put in on his behalf to rebut the presumption that the English Court was one of competent jurisdiction, as was done by the father, and, that being so, I think, upon the grounds which I have stated, that he is liable. I do not think, however, that he is liable for interest on the amonnt of the English judgment; he cannot, I think, recover more than appears on the face of the judgment sued upon. The English Statute as to judgments carrying interest does not apply to India, nor does the Indian Statute as to interest assist the plaintiff. The decree against the son must be modified to [649] the extent. That however is a very small matter and should not affect the costs of the appeal. The decree, therefore, subject to such modification, must stand as against him, and his appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion.

This appeal arises out of a suit brought by the plaintiff respondent against the appellants. The suit is based on a judgment of the Queen's Bench Division of the High Court of Justice in England, which is a foreign judgment within the meaning of the term as defined in s. 2 of the Code of Civil Procedure, and the main question for determination in this appeal is whether that judgment is binding on the appellants.

It is contended for the defendants appellants, *first*, that the judgment, upon which the suit is based, is not binding on the defendants, as neither of them resided within the territorial jurisdiction of the Court when the suit was brought; *secondly*, that it is not binding on the defendants, as neither of them had personal notice of the suit; *thirdly*, that it is not binding on the defendants, as the Court which passed it

(1) L. R. 12 Q. B. D. 171.

had no jurisdiction over the subject matter of the suit; and, *fourthly*, that the claim for interest is untenable.

In support of the first contention it is argued that residence, permanent or temporary, within the territorial jurisdiction of the Court is necessary to make a defendant who is a foreigner subject to its jurisdiction; and Story's Conflict of Laws, ss. 539 and 546, Phillimore's International Law, Vol. IV, s. DCCCXCI, and *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (1) are relied upon. Upon principle as well as upon authority it is no doubt true, as a general rule, that a Court can exercise jurisdiction over a foreigner, only if he is resident within the limits of its territorial jurisdiction. But the reason of the rule is, as stated by Story in his Conflict of Laws (s. 539), that "no sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions," and the same reason is given by the Privy Council in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (1) in the following passage of their Lordships' judgment: "As **[650]** between different provinces under one sovereignty (*e. g.*, under the Roman Empire), the legislation of the sovereign may distribute and regulate jurisdiction, but no territorial legislation can give jurisdiction, which any foreign Court ought to recognize against foreigners, who owe no allegiance or obedience to the power which so legislates." Now can it be said that the same reason holds good, when the foreigner is a native of British India, and the Court, which passed the judgment in question, was the Queen's Bench Division of the High Court of Justice in England. Though the defendants here are foreigners, they owe allegiance to the common sovereign of England and British India, and are subject to the supreme legislative authority in the British Empire. It is true that India has a separate legislature, and an Act of Parliament does not apply to India, unless India is expressly included in its operation; but that is based upon convenience of legislation and not upon any want of authority in the Parliament to legislate for India. If therefore the supreme legislature in the British Empire authorizes an English Court in any class of cases to exercise jurisdiction over a non-resident foreigner by reason of the cause of action arising within its jurisdiction [as is the case where Order XI, rule 1 (*e*) under the Judicature Acts applies] and the foreigner is a native of British India, he cannot treat the judgment passed as a nullity, merely because he did not reside within the jurisdiction of the Court which passed it. The first contention of the appellants must, therefore, in my opinion, fail.

The second contention might upon the authorities [see *Sreehuree Bukshee* v. *Gopal Chunder* (2), *Edulji* v. *Manekji* (3), *Bangarusami* v. *Balasubramanian* (4) and *Rousillon* v. *Rousillon* (5) have succeeded, if it had been shown that the defendants had no personal notice of the suit in the English Court. But upon the evidence I do not think that that has been made out; and I agree with the Court below in holding that they had notice of the suit. The second contention therefore must also fail.

[651] It remains now to consider the third contention of the appellants. By s. 13, Explanation VI of our Code of Civil Procedure, the foreign judgment produced is presumptive evidence that the Court, which made it, had competent jurisdiction, but the presumption may be

(1) (1894) L. R. 21 I. A. 171.
(2) (1871) 15 W. R. 500.
(3) (1886) I. L. R. 11 Bom. 241.
(4) (1890) I. L. R. 13 Mad. 496.
(5) (1880) L. R. 14 Ch. D. 351

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removed by proving want of jurisdiction; and in my opinion that had been done so far as defendant No. 1 is concerned. For the only basis of the jurisdiction of the English Court in this case was that under Order XI, rule 1 (*e*), that is, by reason of the breach of contract upon which the suit was founded having occurred within the jurisdiction of that Court; and the evidence of defendant No. 1 on this point, which stands unrebutted, and which I see no reason to disbelieve, shows that he never entered into any contract with the plaintiff, and so there never could have been any breach of contract by him within the jurisdiction of the English Court.

I may add that in saying this. I am not going into the merits of the case, but am only considering the evidence, which it is open to the defendants under Explanation VI of s. 13 of the Code of Civil Procedure to adduce to shew that the foreign Court had no jurisdiction to pass the judgment in question.

The case of defendant No. 2 however stands on a different footing. There is no evidence adduced on his behalf on this point, and the judgment of the English Court, which is presumptive evidence in favour of that Court having jurisdiction, stands unrebutted in his case.

The fourth contention in appeal, namely, that relating to interest, is, I think, well founded. The foreign judgment, on which the suit is based, says nothing about interest, and neither Order 2, rule 16, nor Statute 1 and 2, Vict., c. 110, s. 17, on which the claim for interest seems to be based, is applicable to India, nor does the case come within the scope of Act XXXII of 1839.

The result then is that this appeal will be allowed and the decree of the Court below set aside with costs as regards defendant No. 1, but as regards defendant No. 2 the appeal will be dismissed and the decree of the Lower Court affirmed with costs, subject to the modification indicated above, namely, that the claim for interest is disallowed.

Decree modified.

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[652] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Hill, Mr. Justice Sale, Mr. Justice Harington and Mr. Justice Brett.

DWARKA NATH MONDUL (*Petitioner*) *v.* BENI MADHAB BANERJEE (*Opposite Party*).* [13th December, 1900 & 18th February, 1901].

Presidency Magistrate—Warrant-case—Criminal Procedure Code (Act V of 1898), Ch. XXI—Accused, discharge of—Case, re-hearing of—Whether order of discharge a judgment.

Held, by the Full Bench, (GHOSE, J. dissenting), that a Presidency Magistrate is competent to re-hear a warrant-case triable under Chapter XXI of the Code of Criminal Procedure, in which he has discharged the accused person.

Held, by GHOSE, J.—Where a Presidency Magistrate, by reason of the absence of the complainant, and without pronouncing any opinion as to the guilt or innocence of the accused, strikes off the case, his order is not a judgment within the meaning of the Code, and may be altered or reviewed by him upon application being made, but where the Magistrate after taking evidence, however incomplete that evidence may be, exercises his judgment and makes

* Criminal Reference to the Full Bench No. 599 of 1900.