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Sept. 8.

Suit No. 548 *of* 1871.

THE LONDON, BOMBAY, AND MEDITERRANEAN BANK, LIMITED.....*Plaintiffs.*
HORMASJI PESTANJI FRÁMJI.....*Defendant.*

Foreign Judgment—Notice—Finality—Call-Order—Balance-Order—English Companies' Act, 1862.

The Courts in India treat a call-order made by the Court of Chancery in England upon a contributory of a company registered in England, and being wound up and the authority of the Court of Chancery, as a foreign judgment, and will not allow the liability of a defendant sued upon such order to be disputed, unless to be shown that the Court had no jurisdiction to make the order, or that the defendant had no notice of it, or that it is not in its nature a final order.

THIS was a suit brought by the Liquidators of the London, Bombay, and Mediterranean Bank to enforce against the defendant an order of the High Court of Chancery in England, of the 26th of January 1871. The order recited that it was made upon the application of the Liquidators of the bank, and upon hearing the solicitors for J. R., one of the contributories of the bank, *and no person appearing on behalf of the several other contributories named in the schedule to the order* and directed the several persons named in the schedule (being contributories of the bank), on or before the 5th of July 1871, or within four days after the service of the order upon them, to pay to the Official Liquidators of the bank the sums set opposite their respective names in the schedule (being the amounts due from them in respect of a call of £10 per share made by an order of the 28th of July 1870), with interest on the amount of the said several sums from the 8th of October 1870 until payment.

The defendant's name was inserted in the schedule as a debtor to the bank in the sum of £525.

The London, Bombay, and Mediterranean Bank (Limited) was a joint stock company registered under the English Companies' Act of 1862, and had an office in London and a branch office in Bombay. On the 20th of July 1866 an

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order was made in the Court of Chancery for the winding up of the company by the Court. The defendant's name was placed on the list of contributories on the 25th of April 1868. The defendant and several other Bombay shareholders had formed a committee in Bombay, who appointed solicitors in London to appear for them and endeavour to prevent the names of the Bombay shareholders from being placed upon the list of contributories. The committee was, however, unsuccessful, and the names of the Bombay shareholders were placed upon the lists. On the 28th of July 1870 an order for a call of £10 per share was made by the Court of Chancery upon the contributories of the Company. The order RECITED that it was made upon the application of the Official Liquidators, and after hearing the solicitors for certain shareholders named in the order, and Messrs. S., M., & E., solicitors for Ádarji Kávasji and the other contributories of the said bank for whom they had entered appearance as set forth in a schedule annexed to the order, and none of the other contributories of the said bank appearing either in person or by their solicitors, although duly summoned (as appeared upon affidavit); AND DIRECTED that a certain order, dated the 25th of May 1869 should be discharged, and that, in lieu of the call thereby directed to be made upon the contributories, a call of £10 per share should be made upon all the contributories of the bank who had been settled upon the list of contributories but that as against the amount of such call the Official Liquidators should give credit for any sum or sums of money paid by any contributory, either under the order of the 25th of May 1869 or otherwise, in respect of each share in the bank held by him; AND IT WAS FURTHER ORDERED that each of the contributories of the Bank should, on or before the 24th of October 1870, or within four days of the service of the order upon them respectively, pay to the Official Liquidators of the bank the amount which should be found due from him in respect of the call.

The defendant not having paid the amount of the call on

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the day mentioned in the above call-order, the balance-order of the 26th of January 1871 was made, and upon the same day leave was granted by the Court of Chancery to the Liquidators to take proceedings against the persons mentioned in the schedule of the balance-order.

The plaint averred that a copy of the last-mentioned order had been served upon the defendant, but that he had not paid the amount therein mentioned, or any part thereof.

The plaint did not, however, aver that notice of the making of the balance-order had been served upon the defendant, nor did it appear from the proceedings that such notice had been given to him.

The defendant by his written statement alleged that he had been induced to apply for an allotment of shares in the London and Bombay Bank and General Financial and Insurance Agency Corporation (Limited) by a gross fraud on the part of the promoters and directors of that company; that endeavours had been made on behalf of the Bombay allottees of that company to have their names removed from the register, and steps (which were eventually abandoned) taken in the High Court with the same view; and that the London and Bombay Bank and General Financial and Insurance Agency (Limited) had been amalgamated with the Mediterranean Bank (Limited) without the knowledge or consent of the Bombay shareholders, and had thereupon changed its name to the name of the plaintiffs' company; and that the defendant had, therefore, never been a shareholder in the plaintiffs' company, and that his name, therefore, had been wrongly placed upon the list of the contributories of the plaintiffs' company; and that the call-order and balance-order were not, therefore, binding upon him as he had never been a shareholder in the plaintiffs' company.

The cause was in the first instance set down as a short cause, but (the case being a representative one) was, by BAYLEY, J. adjourned for hearing before two Judges. It was, accordingly, heard, on the 7th of September 1871, before WESTROPP, C.J., and BAYLEY, J.

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Green (with him *Macpherson*), for the plaintiffs, but in evidence certified copies of the several orders and documents upon which the plaintiffs relied:—(I.) the order to wind up the plaintiffs' company (20th July 1866); (II.) affidavit, dated the 8th of August 1868, showing that notices of the settling of the list of contributories had been duly served; (III.) certified copy of the list of contributories; (IV.) order of the appointment of the plaintiffs as Liquidators (27th July 1869); (V.) the call order of the 28th of July 1870; (VI.) original balance-order of the 26th of January 1871, signed "H. F. CHURCH, chief Clerk." The admission in evidence of this order was objected to by *Scoble*, on the ground that it ought to have been proved, as it did not come within the purview of the Indian Evidence Act (XV. of 1852). *Green* relied upon the 14th & 15th Vict., c. 99, ss. 11 and 19, Sec. 125 of the English Companies' Act, and Taylor on Evidence, Sec. 1400. (VII.) Order allowing the Liquidators to take proceedings against the defendant (26th January 1871) Personal service of the balance-order on the defendant on the 10th July 1871 was admitted. The plaint was filed on the 3rd of August 1871. *Green* stated that the suit was technically brought on the balance-order, which was in effect a foreign judgment, but that the suit was really upon both the balance and the call order, and asked for a decree for the amount claimed.

The Honorable A. R. Scoble (Acting Advocate General) with him *Farran*, for the defendant):—As The courts in India are not subject or ancillary to the High Court of Chancery in England, this call cannot be enforced under the provisions of the English Companies' Act of 1862. The orders must, if relied upon, be treated as foreign judgments, and sued upon as such, It must, therefore, appear that they conform to the requirements of the Common Law. I admit that, as a General rule, in a suit to enforce a foreign judgment, the merits of the cause of action upon which that judgment is founded cannot be entered into; *Bank of Australasia* v. *Nias* (*a*); *Ellis* v. *M'Henry* (*b*); but though that is

(*a*) 26 Q. B. 717, (*b*) L. Rep. 6. C. P. 228.

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so, yet where the defendant has as here, a *bona fide* defence upon the merits the court will minutely examine the foreign judgment to ascertain whether the requirements of the common Law have been complied with, and, if it finds that they have not been complied with will compel the plaintiff to sue upon his original cause of action, and he will then be entitled to use the foreign judgment as evidence only. The cases show that a foreign judgment can be impeached on any of the four following grounds:—

(I.) That the court passing it had no jurisdiction.

(II.) That the defendant had no notice to appear and defend the suit.

(III.) That the judgment has been obtained by fraud.

(IV.) That the judgment is not a final judgment.

We cannot contend here that the judgment has been obtained by fraud, but as to the jurisdiction we say that, as the defendant is an inhabitant of Bombay, the only ground that gives the Court of Chancery jurisdiction over him is the fact that he has consented to become a member of an English company, but in the eye of the law he never has so consented, as his consent was brought about by fraud. He cited on the question of jurisdiction *Henderson* v. *Henderson* (*c*); Story's Conflict of Laws, Pl. 529, 544-549. [WESTROPP, C.J. referred to *Vallee* v. *Damergue* (*d*).] [BAYLEY, J., referred to *Barber* v. *Lamb* (*e*).] If the court had no jurisdiction, there is nothing on the face of the proceedings to show that the defendant attorned to it and so gave it jurisdiction: *Taylor* v. *Best* (*f*).

The plaintiffs must take their stand either upon the call-order or the balance-order. If they rely upon the former, I contend that it is not a final judgment, inasmuch as it contemplates something further being done, namely, the

(*c*) 6 Q. B. 288. (*d*) 4, Exch. 299. (*e*) 29 L. J., C. P. 234
(*f*) 23 L. J., C. P. 89.

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making of a balance-order. It cannot, therefore, be enforced as a conclusive judgment: *Patrick* v. *Shedden* (*g*); *Carpenter* v. *Thornton* (*h*); *Henderson* v. *Henderson* (*i*); *Paul* v. *Roy* (*j*); *Bonaker* v. *Evans* (*k*); *Fry* v. *Malcoln* (*l*): Lindley on Partnership, p. 1393, (2nd edn.) As to the balance-order, it does not appear, nor is it alleged, that the defendant had notice of it, nor is it so recited in the order itself. If such notice has not been given, it would be contrary to natural justice to enforce the judgment here without giving the defendant an opportunity of showing that he has a defence upon the merits: *Buchanan* v. *Rucker* (*m*). He also cited Scott v. *Pilkington* (*n*).

The defendant was then called and examined. He stated that he was not aware whether his solicitors had entered an appearance for him in the Court of Chancery at the time when the call-order was made, but that he was a member of a committee in Bombay which had instructed solicitors in London to oppose the making of the call. It also appeared that when he received notice of the call-order having been made, there was an indorsement upon the notice to the effect that in default of payment of the amount due from him the Liquidators would apply (on a day named) to the court for a balance-order against him.

Green was heard in reply.

WESTROPP, C. J.:—We have no doubt as to how this case should be disposed of. We think that there is no valid defence to the suit. The plaintiffs sue for Rs. 5,250, the equivalent for £525 due to them as the Liquidators of the London, Bombay, and Mediterranean Bank, which seems to have been composed of two existing companies which were amalgamated, and it may three years ago have been a question whether or not the defendant was a person who ought to be placed on the list of contributories of the London

(*g*) 2 Ell. & B. 14. (*h*) 3 B. & Ald. 52. (*i*) 6 Q. B. 288.
(*j*) 15 Beav. 433. (*k*) 16 Q. B. 163. (*l*) 4 Taunt. 705.
(*m*) 1 Camp. 63. (*n*) 2 B & S. 11.

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Bombay, and Mediterranean Bank when the order for winding up the bank was made. The bank was formed in London, subjects to the provisions of the English Companies' Act. Its head office and local habitation, so far as a banking company can have a local habitation, must be deemed to have been in London, and it was liable to be wound up under that Act if its condition were such as to justify an order to that effect. Such an order was made, and the propriety of it has not been contested. The shareholders were liable to be placed on the list of contributories, and the Court of Chancery had undoubtedly the jurisdiction to decide whether or not a person should be placed on the list of contributories. The Court of Chancery on the 25th of April 1868 decided that the defendant, Hormasji Pestanji Frámji, should be placed on the list of contributories for 75 shares. It now, from the admissions of the defendant, appears that, for the purpose of resisting being placed on that list, he and others with him instructed a gentleman, Mr. Dádábhái Nowroji, to employ, and who did employ, for them a solicitor in London, and the defendant says he believes that in appearance must have been entered on his behalf as a resisting shareholder. He, therefore, had his opportunity of contending that he ought not to be placed on the list, and he admits having had notice that the list of contributories was about to be settled, and that it was sought to place his name upon it. When the £10 call was made in July 1870, the order then made recited that certain contributories appeared by solicitors, and that the others, though duly summoned, did not appear. There is no evidence to show that the defendant had no notice of the application to make that call. He had at that time his solicitor in London, and in all probability that solicitor received a notice. At all events the burden lies upon the defendant to show that he did not. The order must be assumed to have been regularly made until the contrary be shown.

It has, however, been said that the order of July 1870 was not a final order, and we are inclined to be of that opinion:

for it provides that certain credits should be given to the defendant in respect of such calls as he may have previously paid, and there is nothing on the face of that order to show what the amount of those calls was, and it would be open to him to make his claim for the reduction of the £10 call by the amount of those calls; but that question is not now material, for when he was served with a copy of that order by the Official Liquidator, which he admits was the case in October 1870, he also received a notice at foot of that copy, which notice was signed by the Official Liquidators, stating that the amount claimed was Rs. 5,250, and giving him full credit for the two sums for which alone he himself claims credit in his written statement; and in that notice it was stated that if he did not pay within a given time, application would be made to the Court of Chancery for a positive order for the payment of that sum. The time having elapsed, an order was applied for and made, and that is the one directing him to pay the money—Rs. 5,250—the balance, on the £10 call per share, left after deducting the two previous calls which he had paid. We think he has had ample notice of the application for that order, and we think also that the court had jurisdiction to make it. It is not alleged that there was any fraud in obtaining the orders of the Court of Chancery, and, whatever fraud, if any, there may have been used in inducing the defendant to join the company, such latter fraud might have been put forward as a defence in that Court—if it were a good defence under such circumstances as the defendant was placed in—when the application was made in 1868 to put his name on the list of contributories. This court cannot, in an action on the balance-order of January 1871, inquire into the propriety of the defendant's being placed on the list, or of the order of July 1870, or of the balance-order itself, if, as we are satisfied was the fact, the defendant had opportunities in the Court of Chancery of opposing those proceedings and of making his defence, and if, as we also think, that court had jurisdiction over him as a member of this English registered company.

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It was for a long time strenuously argued by the Advocate General that, as the defendant had received no notice of the intention of the Liquidators to apply for the balance-order, it was not binding upon him; but the defendant himself has produced the notice. It is to be regretted that the Advocate General was not supplied with the indorsement at the foot of the copy of the order of July 1870, as it would have saved him much trouble, as also the court much time, by at once showing that the defendant had ample notice. An order to have the force of a foreign judgment to which this court can give effect must be final; but the balance-order is clearly final. The company having its habitation and head-quarters in a particular place is liable to the court having jurisdiction in that place, and those who become members of that company submit themselves as such to the jurisdiction of the court where the company's head office is. There must be a decree for the amount claimed, Rs. 5,250 with five per cent. interest from the 24th of October 1870 to judgment, six per cent. on judgment till payment, and costs as in a long cause.

BAYLEY, J., concurred.

Decree accordingly.