

CALCUTTA HIGH COURT

Chormal Balchand Firm

Vs

Kasturi Chand Seraoji

(R Mitter, C.J.)

07.02.1936

JUDGMENT

R.C. Mitter, J.

1. This appeal arises out of a suit instituted to enforce a foreign judgment, namely a judgment pronounced by the Additional Naib Akhilkar of the Court of Danhata in Cooch Behar State. The Additional Naib Akhilkar in Cooch Behar Courts exercises the same functions as a Munsif in a British Indian Court. The plaintiff has lost in both the Courts below. Hence this appeal has been preferred by him. In the beginning of 1927, the plaintiff sued the two defendants in the Danhata Court for the recovery of the sum of Rs. 400 as damages for breach of contract. The defendants are residents of British India and they resided at the date of the suit and at all material times in the District of Gauhati in British India. The contract however was formed in Cooch Behar. The plaint was filed in the Danhata Court with defendant 1 described as a major, and defendant 2 as a minor, but no guardian was proposed by the plaintiff at the time when the plaint was filed. Defendant 1 was later on proposed as guardian-ad-litem and was appointed as guardian-ad-litem by an order dated 6th August 1927. On 20th July 1927 defendant 1 filed a written statement in the suit. It was filed on his own behalf and not on behalf of defendant 2, and at a time when there was not even a proposal by the plaintiff to appoint him as guardian-ad-litem of defendant 2. In paragraph 1 of the said written statement, defendant 1 stated that the Danhata Court had no jurisdiction as the defendants did not carry on business in the Cooch Behar State and had no place of residence within that State. In para. 2 he states that the allegations made in the plaint as to the manner in which and the time at which the cause of action is said to have arisen are not true. In para. 3 it is stated that the defendant 2 is a minor, and that the suit could not proceed till a guardian ad litem is appointed for him. In para. 4 he states that as the Court had no jurisdiction he is not stating his defence on the "merits" and that he will plead to the merits if and when the suit is instituted in a Court having jurisdiction.

2. Then there follows a statement to this effect:

Prayer : the plaintiff's suit be dismissed and costs together with interest be awarded to the defendant firm for being harassed. And all statements in the plaint which have not been expressly admitted in the written statement must be taken as denied.

3. On this written statement being filed, the Danhata Court framed issues on 9th September 1927. One of the issues related to jurisdiction. These issues were settled in the presence of defendant 1, whose pleader appeared in the Court and assisted the Court in settling proper issues. On this date the suit was adjourned to 21st September 1927, for hearing. Defendant 2 never appeared in the Danhata Court at any stage of the suit either through his proposed guardian, defendant 1, or through any other guardian. On the records of the Danhata Court which have been made a part of the records of this suit, it cannot be said that defendant 2 ever submitted to the jurisdiction of the Danhata Court. On 21st September 1927, the suit was heard by the Additional Naib Akhilkhar of Danhata Court. There was no appearance of the defendants on that date. The Court decided the question of jurisdiction in favour of the plaintiff and then took evidence produced on his behalf and decreed the suit ex parte against both the defendants. This decree was sought to be executed by the plaintiff in a British Court, namely the Court of the Munsif of Shibsagar. On an objection being taken to the execution, the learned Munsif of Shibsagar dismissed the application for execution on the ground that the decree passed by the Danhata Court was a nullity. He held that though a part of the cause of action arose within the jurisdiction of that Court, that is in the Cooch Behar State, as the defendants were at all material times, including the time when the suit was instituted in the Danhata Court, residents of British India and had not submitted to the jurisdiction of the said Court, the said Court had no jurisdiction to pass the decree. On 18th February 1931, the present suit was instituted in the Court of the Munsif of Shibsagar to enforce the judgment of the Danhata Court under the provisions of Section 13, Civil P. C. Both the Courts below have dismissed the suit on the ground that the Danhata Court was not a Court of competent jurisdiction. Hence the present appeal by the plaintiff.

4. By the law in force in the Cooch Bahar State, a Civil Court in that State can entertain a suit, other than a suit for immovable property, if the cause of action had arisen wholly or partly within the jurisdiction of the Court. That is to say the provision akin to Section 20, Civil P. C. is in force in that State. Dr. Mukherjee who has appeared for the appellant has urged before me (i) that the Danhata Court was a Court of competent jurisdiction and (ii) that the defendants have no defence to the action as they submitted to the jurisdiction of the Danhata Court. At the time of the hearing of the appeal I asked him to consider the effect of the order of the learned Munsif of Shibsagar by which his client's application for execution had been dismissed and I pointed out to him the notification issued by the Governor-General in Council which has authorized British Indian Courts to execute decrees of Civil and Revenue Courts established in Cooch Behar. On that Dr. Mukherjee urged that the British Courts in such a case would be transferee Courts and would have no power to decide the question as to whether the decree so passed was passed with jurisdiction or not. He accordingly says that the finding of the Munsif of Shibsagar dealing with the application for execution, that the Danhata Court was not a Court of competent jurisdiction, is not binding on his client.

5. On the first point formulated by him he urges that the competence of a foreign Court must be judged by the law relating to jurisdiction in force in that foreign State, and as the Danhata Court could by that law entertain the suit, as part of the cause of action arose within its jurisdiction, the judgment sought to be enforced in this suit was a judgment pronounced by a Court of competent jurisdiction within the meaning of Clause (a) of Section 13. To support the said proposition he relies upon the cases in *Rambhat v. Shankar*¹ *Tadepalli Subbarao v. Mir Gulam Ali Khan*² *Smith v. Indian Textile Co.* and *Gaekwar Baroda State Railway v. Habibullah*. On the said point he also urges that even when a defendant appears under protest in a foreign Court which has not

otherwise jurisdiction to entertain the personal action, the defendant must be taken to have voluntarily submitted to its jurisdiction. In support of this proposition he relies on *Harris v. Taylor*³ I will deal with these two points as also the point as to the effect of the order of the Munsif of Shibsagar by which the application for execution of the decree passed by the Danhata Court has been dismissed, together. Whatever observations I make in the course of this judgment have reference to personal actions only, as in this case I am concerned only with the judgment of a foreign Court, e. g. the Danhata Court, on a personal action.

6. A judgment pronounced by a domestic tribunal has its force and sanction on the ground that it is a judicial order of the sovereign pronounced by the mouth of one of its tribunals and so can be enforced by processes of execution within its territories. A judgment of a foreign tribunal cannot obviously have its force and sanction on such a ground. It has no right to claim recognition beyond jurisdiction, but the comity of nations accords to such a judgment a certain recognition. Such recognitions are accorded by different countries on three distinct principles, namely: (1) The foreign judgment may be adopted by the domestic Court as its own, and admitted to execution within its jurisdiction. This is done in many of the countries on the continent of Europe. This is a system of express co-operation of the domestic Courts with the foreign Courts. Section 44 recognises this principle only with regard to particular classes of foreign Courts, namely Courts situate within the territories of Native Princes or States in alliance with His Majesty. In the case of such Courts the Governor-General in Council has to issue a notification under Section 44, Civil P. C. (2) The foreign judgment may be received as evidence of the creation of an obligation. This is the footing on which English Courts proceed. The original obligation also remains, and a suit may be brought on the original obligation in England, if the English Courts have jurisdiction to entertain a suit on it, or the foreign judgment obtained on the original obligation can be enforced in England by an action. In *Smith v. Nicolls*⁴ Tindal C. J. observed thus: If then the judgment has not altered the nature of the rights between the parties, it appears to me that the plaintiff has the option either to resort to this original ground of action or to bring an assumpsit on the judgment recovered.

7. It is on this principle that a foreign judgment may be received as evidence of the creation of an obligation that English Courts proceed in allowing such a judgment to be enforced by an action and this is the basis of Section 13, Civil P. C. (3) The foreign judgment may be received as evidence of the original obligation in a suit brought on the primary cause of action. This is the principle adopted in a few European States e. g. Spain, Norway and Sweden.

8. The second principle being the principle on which the English system, adopted in this country by Section 13 of the Code, is based --that is the foreign judgment being looked upon as creating a substantive legal obligation--it follows that anything which either (a) negatives the existence of that legal obligation or (b) excuses the defendant from the performance of it must be a good defence to an action on a foreign judgment. Fraud is accordingly a good defence; that the proceedings of the foreign Court were against natural justice is another defence; that such a judgment was not on the merits is another. These three defences are the grounds, which according to the principles of Private International Law, excuse the defendant from performance. Absence of jurisdiction in the foreign Court is that which negatives the creation of that obligation by its judgment, for in order that an order of a Court may create an obligation on the part of a party to a suit or proceeding before it, the Court passing judgment must be a Court competent to create it, that is it must be a Court having jurisdiction over the subject-matter. In one of the

earliest cases *Williams v. Jones*⁵, Baron Parke observed thus: Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial Courts are supported and enforced.

9. It would follow logically that a suit on a foreign judgment may be defeated on one of two grounds, namely : (1) either by showing that the Court which pronounced the foreign judgment exceeded its jurisdiction given by the foreign law, that, is by the law of the Court passing the judgment, or (2) because the foreign Court had no jurisdiction according to the principles of Private International Law, e. g. the defendant was not subject to its jurisdiction. If the first of the aforesaid principles is the right one, Dr. Mukerjee's contention on the first point would be correct, although the cases cited by him, as I shall show later on, have no bearing on the said point, that is as soon as he shows that the Danhata Court had jurisdiction to entertain the suit according to the law in force in the Cooch Behar State, which, according to that law, it undoubtedly had, his appeal would succeed. But my reading of the case law leads me to the conclusion that the second principle is the correct principle. The question whether the foreign Court was a Court of competent jurisdiction must be determined not by the territorial law of the foreign State but by the rules of Private International law. It has been held that it is not sufficient for impeaching a foreign judgment sued upon in England to show that the Court which pronounced the judgment had no jurisdiction by its own rules, if it had jurisdiction according to the principles of Private International law over the person of the defendant and the subject matter of the suit, The reason given for this principle, as I gather from the cases, is that defences which could have been raised before the foreign Court where the judgment is passed ought to have been raised in that Court, and not elsewhere, where that foreign judgment is sought to be enforced by action : *Henderson v. Henderson*⁶ and *Bank of Australasia v. Nias*⁷ In *Pemberton v. Hughes*⁸ Lindley M. E. lays down the principle at p. 791 in these words : There is no doubt that the Courts of this country will not enforce the decisions of foreign Courts which have no jurisdiction in the sense above explained, i. e. over the subject-matter or over the person brought before them, *Schibsby v. Westenholz*⁹ *Bousillon v. Rousillon*¹⁰ *Price v. Dewhurst*¹¹ *Buahanan v. Rucker*¹² and *Sirdar Gurdyal Singh v. Rajah of Faridkot*¹³. But the jurisdiction which is alone important in these matters is the competence of the Court in an international sense, i. e. its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the Courts of this country.

10. In a personal action a foreign Court has jurisdiction in an international sense if (1) the defendant is the subject of the foreign country in which the judgment has been obtained ; or (2) he, the defendant, is a resident in that foreign country when the action began ; or (3) where the defendant in the character of a plaintiff had selected the forum in which he is afterwards sued ; or (4) where he, the defendant, had voluntarily appeared in that Court and submitted to its jurisdiction ; or (5) where he, the defendant, had contracted to submit himself to the foreign forum in which the judgment was obtained.

11. This is laid down in *Rousillon v. Rousillon* (1880) L R 14 Ch D 351(Supra), *Schibsby's case* (1870) ILR 16 Q.B. 155(supra) and other cases. There may possibly be a sixth case, namely where the defendant has real estate within the foreign jurisdiction in respect of which the cause of action arose while he was within that jurisdiction: see *Emanuel v. Symon*¹⁴ No territorial legislation can give jurisdiction, which any foreign Court ought to recognise against absent

foreigners who owe no allegiance or obedience to the power which so legislates. This is the general principle: *Sirdar Gurdyal Singh v. Rajah of Faridkot*¹⁵ In *Mathappa Chhetti v. Chellappa Chetti*¹⁶ the defendant entered into a contract with the plaintiff in the Puddukotta State. The law in that State was that a Court of the State would have jurisdiction to entertain a suit if the cause of action arose within that State. The plaintiff sued in the Puddukotta State and obtained a decree which was sought to be enforced by a suit in a British Indian Court at Madura. The defendant was not a subject of that Native State and at the time of the institution of the suit in that State was not resident there. This is exactly the case which I have before me. Holloway J. said that the decree passed by the Puddukotta State could not be enforced in British India, as that Court was not of competent jurisdiction. The Puddukotta Court was competent to try the suit according to its laws in force in that State, but it had no jurisdiction in an international sense. In the course of the judgment that learned Judge said at p. 198 of the report thus : If Courts, as the French and English, arrogate to themselves jurisdiction whenever on false principles of international law they may choose to regard the obligation as subject to their jurisdiction because the contract was made within their limits, the result will be that other nations will justly treat their decrees as nullities.

12. The rule is that cause of action is not a general ground of jurisdiction recognized by International law. The case may be otherwise where the non-resident foreigner is a subject of the same sovereign power which legislates. Thus British Parliament may confer power on a British Court to try a suit against a British subject resident in British India where the cause of action or part thereof arose in Great Britain and a decree passed by a British Court can be enforced in a British Indian Court, if it does not in other matters offend against other rules for enforcing foreign judgments. The rules of the Supreme Court of England, namely Order 2, Rule 1 made under the provisions of Section 99, Supreme Court of Judicature Consolidation Act (15 & 16 Geo. V., Ch. 49), may have contemplated such cases. But in the absence of an express power conferred by the British Parliament, the Legislature of Ceylon, say, cannot by giving Courts within its territory jurisdiction to try suits against a non-resident British Indian subject where the cause of action arose within Ceylon, confer on judgments of its Courts extra-territorial operation, although the defendant is a subject of the same sovereign, namely the King of England, and judgment passed in a suit instituted there on such a ground would be refused recognition in British India. Such a case arose and was decided in the manner which I have indicated : *Shaik Atham Sahib v. Davud Sahib* (1909) 32 Mad 469(Suupra). The cases cited by Dr. Mukherjee, namely *Rambhat v. Shankar* (1901) 25 Bom 528 (supra)and other cases which I have noticed above, do not touch the point. There the question of extra-territorial effect of a foreign judgment was not considered at all. All that was laid down was that a British Indian Court will decide a question of jurisdiction raised in a suit instituted in a British Indian Court in accordance with the provisions of the law promulgated by the British Indian Legislature, e. g. the Code of Civil Procedure, and a decree passed by a British Indian Court in a suit so instituted in a British Indian Court can be executed in a British Indian Court. The defendants in the case before me are not subjects of the Cooch Behar State They were not residing within that State when the action in that State was commenced against them. They had not appeared in the Danhata Court in their character of the plaintiffs in any suit connected with the present claim. They had not entered into a contract with the plaintiff agreeing to be sued in the Cooch Behar State and the cause of action in this suit has no reference to their immovable property situate in Cooch Behar State. The Danhata Court had accordingly no jurisdiction to try the suit within the meaning of Section 13 of the Code. The question remains then whether the defendants voluntarily submitted to the jurisdiction of the Danhata Court. If a non. resident defendant appears in a foreign Court, pleads

that that Court has no jurisdiction and also pleads to the merits, he submits to the jurisdiction of that Court voluntarily. Having taken the chance in that Court he cannot be allowed to turn round and impeach the judgment on the ground of incompetency of the Court passing it when it is sought to be enforced in another country. It may be that he voluntarily submits to the jurisdiction of that Court when he appears but does not plead to the merits. Thus where a defendant residing in England was sued in the Isle of Man and he appeared in the High Court of the Isle of Man only to set aside the order of service of the writ outside jurisdiction made by that Court, it was held that he having appeared conditionally there, had voluntarily submitted to the jurisdiction of that Court, e. g. the High Court of the Isle of Man : (1915) 2 K B 580.5 But I need not pursue this point further because in the case before me defendant 2 never appeared in the Danhata Court. For these reasons I hold that the Danhata Court was not a Court of competent jurisdiction within the meaning of Section 13, Civil P. C., and the suit to enforce the judgment of that Court has been rightly dismissed.

13. But there is a more formidable obstacle in the plaintiff's way. A notification was issued by the Governor-General in Council under Section 434, Civil P. C. of 1877, which corresponds to section 44 of the present Code, by which it was declared that British Indian Courts would execute decrees passed by Civil and Revenue Courts of the Cooch Behar State (Notification No. 53-F dated 7th March 1879 : see General Rules and Orders of the Governor-General in Council made under Enactments in force in British India Vol. 3, p. 475, Edn. 3). The Munsif at Shibsagar therefore had jurisdiction to entertain the application for execution which the plaintiff made in that Court and which was dismissed by that Court on the grounds which I have stated in the beginning of my judgment. The analogy of transferee Courts does not apply here. A decree of a Court of a Native State does not cease to be the decree of a foreign Court simply because a notification under Section 44 of the Code has been issued. The provisions of the Civil Procedure Code relating to transfer of decrees for execution in my judgment apply only to decrees made by British India Courts and transferred to other British Indian Courts. Section 44 in my judgment only alters the procedure for enforcing foreign judgments of a particular class, namely those passed by Native States, where the necessary notification has been issued by the Governor-General in Council. In my judgment therefore the plaintiff's sole remedy was to apply for execution of the decree passed by the Danhata Court and his suit is not maintainable. Even if the plaintiff in this case had two remedies, e. g. to institute a suit under Section 13 or to apply for execution under Section 44, these remedies were of the same nature and scope and are therefore alternative remedies, and he having elected the latter remedy and having been unsuccessful cannot again sue under Section 13. He is barred on the well-established principles relating to election of remedies : *Mt. Gulab Koer v. Badshah Bahadur* (1909) 10 C L J 420(suupra). I further hold that the question as to whether the decree passed by the Danhata Court is a nullity or not is concluded by the general principles of *res judicata* by reason of order passed by the Munsif of Shibsagar by which he refused execution. It is well settled that when a decree of a foreign Court is sought to be executed in a British India Court under the provisions of Section 44, all objections which would be open to a defendant in a suit instituted under Section 13 of the Code to enforce a foreign judgment, would be open to the judgment debtor. The Munsif of Shibsagar as an executing Court had jurisdiction to decide the question whether the Danhata Court was a Court of competent jurisdiction and his decision on this point is final between the parties. For these reasons I dismiss the appeal with costs.

Cases Referred.

1(1901) 25 Bom 528
2(1906) 29 Mad 69
3(1915) 2K B 580
4(1839) 5 Bing N C 208
5(1845) 13 M & W 628 at p. 633
6(1843) 6 Q B 288
7(1851) 16 Q B 717
8(1899) 1 Ch 781
9(1870) L R 16 Q B 155
10(1880) L B 14Ch D 351
11(1838) 4 My & Cr 76
12(1808) 9 East 192
13(1895) 22 Cal 222
14(1908) 1 K B 302 at p. 309
15(1894) A C 670
16(1876)1 Mad 196