

BOMBAY HIGH COURT

East India Trading Co

Vs.

Badat and Co

Appeal No. 13 of 1958

(Chagla, C.J. and S.T. Desai, J.)

12.09.1958

JUDGMENT

Chagla, C.J.

1. This is an appeal against a judgment of Mr. Justice Mody and the learned Judge begins his judgment by stating : "This is a normal case wherein abnormal developments have taken place". We wholly subscribed to that proposition. We might add that this is not only a normal case but a very simple case where every conceivable technical defense has been taken in order to put off the evil day when judgment will be passed against the respondents, who are the defendants in the suit. Mr. Thakore, who has done his best for his client, realizing how dishonest the defense was and arguing before what he might have felt a very hostile Bench, did not omit to put before us every possible circumstance which could help his clients. But the more he argued the more we felt that the attempt was, as Mr. Thakore frankly conceded, to see that the judgment was delayed as far as possible and Mr. Thakore also told us that as his clients were not in a position to pay any amount at all it did not matter to them whether heavy costs were incurred and the litigation became as protracted as possible. According to Mr. Thakore, his clients might as well be adjudicated insolvent for a larger amount as for smaller amount and perhaps they prefer to be adjudicated later for a larger amount than for a smaller amount at present.

2. Now, the suit out of which this appeal arises is substantially based on a foreign judgment and in the alternative on an award given by a domestic tribunal functioning in New York and the judgment and the award came to be given under the following circumstances. The plaintiff company was incorporated in the State of New York and the defendant company, it is alleged, was at the relevant time carrying on business in Bombay and the case of the plaintiffs was that by two letters dated 7-9-1948 and 13-9-1948, the first written by the plaintiffs and the second by the defendants, the terms of business were agreed upon between the parties. The terms with which we are concerned were that the business was to be done on the terms of the American Spice

Trade Association contract with a letter of credit to the extent of 95 per cent to be opened by the plaintiffs. Pursuant to these terms of business, according to the plaintiffs, two contracts were entered into. By these contracts it is alleged by the plaintiffs that the defendants agreed to sell certain number of tons of spices to the plaintiffs. The plaintiffs opened the letter of credit as required by the terms of business, but ultimately the defendants failed to so apply the goods and committed a breach of the contract. Thereupon, pursuant to the American Spice Trade Association contract the plaintiffs required that the dispute between the parties should be referred to arbitration. It was so referred, although the defendants did not nominate their own arbitrator or appear before the arbitrators who ultimately entered upon the arbitration. An award was made and a decree was obtained on this award from the Supreme Court of the State of New York. The plaintiffs then came to this Court to enforce that foreign judgment and in the alternative they asked for relief on the basis of the award itself. The learned Judge raised various issues and ultimately dismissed the plaintiff's suit.

3. The first issue that we have to consider is the issue of jurisdiction. Now, it is normal, to look to the jurisdiction clause in the plaint in order to ascertain what are the various facts on which the plaintiff is relying as conferring jurisdiction upon the Court and when we turn to para 10 of the plaint it is averred :

"The defendants used to carry on business and reside in Bombay. Their present whereabouts are not known. But the terms of business were accepted by the defendants in Bombay and the proposal of acceptance of the said contracts by the defendants took place in Bombay. The defendants' refusal to pay the said sum also took place in Bombay. A material part of the cause of action took place in Bombay and with leave granted under clause 12 of the Letters Patent this Hon'ble Court has jurisdiction to try this suit."

In fact leave was granted under clause 12. Considering this paragraph it is clear that the averments with regard to the carrying on of business and residence in Bombay cannot confer jurisdiction upon the Court. The defendants must carry on business or reside within jurisdiction at the date when the plaint is presented to the Court and the fact that the defendants used to carry on business or used to reside in Bombay cannot help the plaintiff to invoke the jurisdiction of this Court. Mr. Thakore may be right that to the extent that the suit is based on a foreign judgment, there is no necessary averment which would confer jurisdiction upon the Court. The foreign judgment was passed in New York and the defendants did not reside and carry on business within jurisdiction at the relevant date. The only way that jurisdiction could possibly have been attracted was by an averment that there was an obligation under the judgment on the part of the defendants to pay the amount in Bombay or that the defendants had undertaken the obligation to pay the judgment amount in Bombay. There is no such averment in the plaint and in the absence of any such averment if the plaint had been based only on the foreign judgment then we might have agreed with the learned Judge and held that the Court had no jurisdiction. But it is unnecessary finally to decide this matter.

4. We must now turn and consider whether the Court has jurisdiction if the suit is based on the award given by the domestic tribunal in New York. For that purpose the necessary averment is to be found in para 10 of the plaint and that averment is that the terms of business were accepted by the defendants in Bombay and the proposal or acceptance of the said contracts by the defendants took place in Bombay. The learned Judge has taken the view that this averment is not an averment of fact but it is a submission of law. Although the latter part of this sentence may be characterized as a submission of law, it is difficult with great respect to the learned Judge, to take the view that the statement that the terms of business were accepted by the defendants in Bombay is a submission of law and not an averment of fact. When we turn to the written statement, para. 15, which deals with this para, of the plaint, states :

"With reference to paragraph 10 of the plaint the defendants deny that any of the partners of the defendants reside and/or carry on business in Bombay. The defendants submit that no part of the cause of action has arisen in Bombay. The defendants therefore submit that leave granted to the plaintiffs under clause 12 of the Letters Patent should be revoked."

It is clear that the only averment of fact in para. 10 of the plaint which is denied by the draftsman is the averment that the defendants or any of the partners of the defendants reside or carry on business in Bombay. The averment that the terms of business were accepted by the defendants in Bombay has not been denied and accepting that averment the draftsman goes on to say : "The defendants submit that no part of the cause of action has arisen in Bombay". Mr. Thakore sought to argue that in the submission that no part of the cause of action has arisen in Bombay was implicit in the denial that the terms of business were accepted by the defendants in Bombay. We refuse to put that interpretation upon para. 15. The written statement has been drafted by a senior and experienced counsel and Mr. Thakore found himself in this difficulty from stage to stage that the counsel not only was experienced and able but was also extremely conscientious because having the correspondence before him, as we shall point out later, it was impossible for him to allege that the terms of business had not been accepted by the defendants. Therefore, if there is no denial of the specific averment in para. 10, then we must by the rules of pleadings come to the conclusion that this averment has been accepted in the written statement. Therefore we find ourselves in this position that the defendants accepted the terms of business in Bombay, which terms of business included a submission to arbitration. If, therefore, a suit can lie on an award, then we have here pleaded a necessary ingredient of the cause of action on the award, viz., that the agreement to submit disputes to arbitration was arrived at in Bombay. Whether the averment is proved or not is a different matter, but if that averment is established it is difficult to contend that in a suit on an award the agreement to go to arbitration does not constitute an important material and necessary part of the cause of action and if that part of the cause of action has arisen in Bombay the Court has undoubtedly jurisdiction.

5. It was then sought to be argued by Mr. Thakore that it is not competent to the plaintiffs to file

this suit on the award because the award has become merged in the foreign judgment and Mr. Thakore urged before us that once a foreign judgment is passed on the award, the only suit that can be filed is the suit on the foreign judgment and not on the award. Now, it is clear and well-established law that it is open to a party who has obtained a foreign judgment to sue in the alternative on the original cause of action which resulted in his obtaining the foreign judgment, Mr. Thakore does not dispute that principle of law, but he says that whatever may be the law with regard to a foreign judgment obtained on a contract or any other cause of action, that principle does not apply when a party obtains an adjudication from a domestic tribunal and then goes to a competent Court and obtains a decree or a judgment on the award. Apart from authorities, it is difficult to understand how the two positions can be distinguished on principle. If it is open to a party suing on a foreign judgment to rely in the alternative on the original cause of action, we should have thought that it would be equally competent to a party who has obtained a foreign judgment on the award to rely on the original cause of action which in this case happens to be the award. Therefore, the award is as much a cause of action quae the foreign judgment as a contract or any other right which the party has litigated and which has resulted in a foreign judgment. Instead of going to Court on the contracts which were entered into between the parties and obtaining a decree, the parties here first went to the domestic tribunal, obtained the award and then proceeded to complete the award and make it enforceable by obtaining a judgment. Therefore, in this case, the cause of action was constituted by the award and the judgment was obtained because the plaintiffs had the award in their favour. Therefore, it would seem to us that on principle there is no reason why the plaintiffs should be debarred from relying on the award as the original cause of action which resulted in the foreign judgment being obtained.

6. The next contention of Mr. Thakore is that even so the only award on which a suit can be filed is an award which is enforceable by itself and which does not require in any way to be completed in order that it should become enforceable and what is said is that in this case the award of the domestic tribunal in New York could not have been enforced as such. The parties had to go to the New York Supreme Court and obtain a judgment on it before it became enforceable and it is said on authorities that such an award cannot be the subject matter of a suit. Again, first looking to the principle of the matter, it may well be said that an award which is incomplete and unenforceable cannot be made a subject matter of a suit and that before a party can file a suit on the award he must make the award enforceable. In this case, if that be the true principle, that objection cannot survive because by obtaining a foreign judgment the plaintiffs have made the award enforceable and they are suing on an award which is not unenforceable but which has been made enforceable and which has been completed in every legal manner. But we fail to understand the principle of the submission made by Mr. Thakore that even though the award has been made enforceable and has been completed, still the party cannot sue on it because this award was not enforceable as such; that it could not be enforced without the aid of a competent Court in New York.

7. In our opinion, the matter is really concluded by a decision of the Privy Council which though

not directly deciding these two questions indirectly has decided these questions, because it is patent from that decision That ii these were good submissions in law they would have been urged before the Privy Council and the Privy Council would not have decided the matter as it did. There are cases where it can be said that a Court or a tribunal has not considered the point and therefore the decision, in the absence of such consideration, is not a decision on a particular matter. But there are also cases where the point is so obvious that it would have been taken if it was a good point and then it is open to the Court to say that indirectly the matter has been decided by that Court because the decision was not based upon the acceptance of that particular submission. Turning to the Privy Council case, it is *Oppenheim and Co. v. Mahomed Haneef*¹, In that case, as the facts at p. 501 (of ILR Mad); show, the appellants filed a suit against the respondent in the High Court of Judicature at Madras claiming a certain amount under a foreign judgment or in the alternative being the amount of the award. The respondent pleaded that the judgment of the High Court of Justice in London was not binding upon him as it was

¹ ILR 45 Mad 496

not given on the merits, that the claim under the contract was barred by limitation and as to the award, it was not binding upon him as no notice was given to him by the arbitrator that he was proceeding to arbitrate. The suit was heard by Mr. Justice Coutts. Trotter and he decide, in favor of the plaintiffs on the award. There was an appeal to the Division Bench of the Madras High Court and the Division Bench reversed that decision and the appellants came before the Privy Council and it is to be noted that the respondent did not appear and the appeal was heard ex parte. We are specially mentioning this fact in order to emphasis that the Privy Council would have been even more careful in considering every possible defense that was open to the respondent as he was not represented before them. The Privy Council upheld the decision of the trial Court, thereby, as we said, indirectly spelling both the contentions of Mr. Thakore. The Privy Council had before it an award which according to Mr. Thakore was merged in the foreign judgment and still the judgment was given on the award. The Privy Council had before it an award which was not enforceable as such because a decree on the award had been taken before the High Court of Justice in London. Both the features on which emphasis has been placed by Mr. Thakore were present in the case of the Privy Council. Notwithstanding these features, the Privy Council gave to the plaintiffs a decree on the award.

8. Strong reliance has been placed by Mr. Thakore on a statement of the law appearing in Russell on Arbitration. The two propositions of law are :

"An award made by foreign arbitrators, which requires on enforcement order to render it enforceable by the local law, is not a judgment of a foreign tribunal which can be enforced by action in English Courts."

This is A proposition with respect, which is perfectly correct. Therefore, the learned author is dealing with an award which is unenforceable. Then comes the next proposition :

"But an award which is complete and could be enforced in the country where it was made is enforceable in England at common law, quite apart from any rights given by Part II of the Act."

Mr. Thakore wants to read into this statement the words which do not appear there and the words are :

"But an award which is complete and could be enforced as such in the country where it was made."

Now, there is no warrant for leading these words into the statement of the law. As it stands, the statement, again with respect, is perfectly correct. If you have an award which is complete and could be enforced in the country where it was made, then it is enforceable in England. We have here an award which could be enforced in the State of New York and was made enforceable and complete and it is on that award that the plaintiffs are suing in this Court. We have had a look at the judgment on which reliance is placed by the learned author for these two statements of the law and that is the case of *Merrifield, Ziegler and Co. v. Liverpool Cotton Association, Ltd.*², and Mr. Thakore concedes that

²(1911) 105 LT 97

that authority is not a proposition for the submission for which he is contending.

9. Therefore, in our opinion, the plaintiffs' suit on the award was maintainable and the Court had jurisdiction to hear the suit on this award.

10. Now, we must deal with a series of technical objections which were taken in the Court below with regard to the admission of certain documents. The first objection was to admitting the judgment given by the Supreme Court of New York on the award and the view taken by the learned Judge was that the record of the Supreme Court was not certified as required by the provisions of the Evidence Act. Turning to the provisions of the Evidence Act, Section 74 defines "public documents" and the one with which we are concerned is clause (1)(iii), documents forming the acts or records of the acts of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country. We are here concerned with the acts or records of the acts of judicial public officers of a foreign country. Turning now to Section 78, it deals with the proof of official documents and it provides –

"The following public documents may be proved as follows : (and we are concerned with Clause 6) :

6. public documents of any other class in a foreign country - by the original, or by a copy certified by the legal keeper thereof with a certificate under the seal of a notary public, or of an Indian Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original and upon proof of the character of the document

according to the law of the foreign country."

Now, the appellants submitted the record of the Supreme Court with the certificate obtained from our Consul General in New York. That certificate was found to be unsatisfactory and not in compliance with the requirements of Section 78(6) and so a fresh certificate was obtained. This certificate was to the following effect :

"This is to certify (a) that the annexed proceedings have been duly had in accordance with the laws of the State of New York.

(b) that the annexed proceedings are duly certified by the officer having the legal custody of the originals thereof at the time such annexed proceedings were issued by the Supreme Court of New York.

(c) that the several persons named in the annexed proceedings as holding the respective offices stated therein in respect of each of them did in fact hold such respective office at the time the same took place."

We have the certificate of the County Clerk and Clerk of the Supreme Court of the New York County who has annexed the seal of the Supreme Court and which has been attested by one of the Justice of the Supreme Court and who certifies that the seal is in proper form affixed by the County Clerk and then there is a further attestation by the County Clerk who certifies that the Hon. John E. Me. Gheenan who is the Justice who testified to the fixing of the seal by the County Clerk is a Justice of the New York Supreme Court. It is difficult to imagine a certificate given with more elaboration or more thoroughness or completeness than the certificate that was produced by the appellants. But even so, the production of the record of the Supreme Court was objected on the ground that although the certificate of the Consul General might be in proper form, Section 78(6) further required proof of the character of the document according to the law of the foreign country and the appellants not having led any evidence as to the character of the document according to the law of the foreign country the document was not proved as required by Section 78(6). The appellants wanted to rely on an affidavit produced by a citizen of the United States to prove the character of this document and that affidavit was also not allowed to be used.

11. Now, the Evidence Act is a very technical Act and a party is undoubtedly entitled to insist on every technicality being complied with. Fortunately for this Court, large amount of commercial litigation has gone on for years on the Original Side where solicitors and counsel have never insisted on any technical defence being pressed when the document on the face of it is a genuine document. It is very rare that a party objects to the record of the Supreme Court of a State in the United States being produced, although bearing all the insignia of genuineness and a certificate by the Consul General, on the technical ground that there is no proof as to the character of this document. In our opinion, work would become impossible on the Original Side if a little element of commonsense was not introduced into the application of the Evidence Act. Of course, the

learned Judge is helpless if parties insist on the technicalities, but the question of mode of proof is entirely left to the good sense of the parties. No one suggests that if a document is inadmissible the parties by their consent can make it admissible. But if a document is admissible and when it is clearly genuine to insist on technical proof is really to forget the substance for the letter of the law. We do not blame Mr. Thakore for having insisted upon every technicality in the conduct of this appeal because he told us that the instructions given to him were that he must resist the plaintiffs' suit on every available defense open to him. But let us see whether even this strict technicality of the Evidence Act has not been complied with.

12. It is clear that the proof required by Section 78(6) is for the purpose of the Court being in a position to decide whether a document is a document which falls within the definition of "public documents" in Section 74, because unless the character of the document is that it is an act of a public officer, legislative, judicial or executive, it would not be a public document. Can there be any doubt in this case that the document sought to be tendered was a public document within the meaning of Section 74 ? It is difficult to understand why the Court should insist upon proof of a matter which is so clearly self-evident. However technical the Evidence Act may be fortunately it has a section which should often be resorted to by Courts and that is Section 114, because the Legislature realized that there are many matters which are so obvious, so clear, so demonstrably true, that formal proof would be sheer waste of time. In our opinion, this is a clear case where proof should not have been insisted upon as to the character of this document, If the necessary presumption could have been drawn under Section 114, there is no reason why on the failure on the part of the plaintiffs to tender formal evidence as to the nature of this document, the document should have been rejected. We do not accept Mr. Thakore's contention that the presumption arising under Section 114 does not arise with regard to documents. The presumption which Section 114 speaks of is the existence of any fact which the Court thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The section is wide enough to permit the Court to raise a presumption not only with regard to oral evidence, but also with regard to documentary evidence. Therefore, in our opinion with great respect to the learned Judge, he was in error when he was persuaded by the respondents to insist upon formal proof being given of the character of this document by the appellant. We must therefore admit this document into evidence.

13. A question has been raised as to whether even so the petition which was presented by the appellants to the Supreme Court for a decree on the award can be considered to be a public document. The documents which the learned Judge rightly held would be public documents which would be admissible in evidence if the necessary formality of Section 78(6) had been complied with are :

1. An order dated 14th February 1956 calling upon the defendants to show cause on 7th March 1950 against the said petition.

2. An order dated 8th March 1950 granting on default the plaintiffs' motion to confirm the award of the arbitrator and for judgment in accordance therewith and directing that the order be settled.

3. An order dated 21st March 1950 passing judgment on the said awards in the sum of \$ 18748 together with interest and costs as mentioned in the order.

The learned Judge has taken the view that the petition dated 10th February, 1950, which as we have just stated was filed by the appellants for obtaining the award, was not a public document. The question is whether the learned Judge is right. We agree with Mr. Thakore that the authorities lay down and in our opinion rightly lay down, that a petition is not the record of a judicial authority. It is neither the act nor the record of the act of a judicial authority. It is really the act of a private party. It is the party who moves the Court by his petition to obtain a certain order and therefore the petition as such would not come within the definition of a public document under Section 74. On the same principle, the affidavits, except formal affidavits of service, would not come within the purview of a public document and therefore the learned Judge was right in including only the two affidavits which are merely formal affidavits proving service. Now, if these documents are admitted into evidence, they establish that a foreign judgment was passed by the Supreme Court of the New York State on an award.

14. The question now is whether the award which is annexed to the petition can be admitted into evidence as a public document. In our opinion it cannot. Mr. Parpia's contention was that the Court has acted on this award, it has perused the award, it has considered its contents and has then passed judgment and therefore if the judgment is evidence then the various documents which led up to that judgment and resulted in the judgment should equally constitute public documents. In our opinion, that contention cannot be accepted. All that can be said is that the particular award of copy of the award which is annexed to the petition was before the Court and it was on that award that the Court gave judgment. But there is nothing in the Evidence Act which gives any sanctity to the copy of the award annexed by the appellants to their petition. There is nothing to suggest by reason of the certificate given by the Consul General or by the Justice of the Supreme Court that the award on which the Supreme Court acted was the genuine award given by the arbitrators. It often happens that a Court may pass a decree on a forged or fabricated document; the document is before the Court, but there is nothing to testify to its genuineness. Therefore what Mr. Parpia wants us to do is to bring within the purview of the certificate given under Section 78 not only the official acts of the Supreme Court but also the documents annexed by the parties to their own petition or affidavits which they bring before the Court. In our opinion, that is not the purpose of Section 78(6). We must consider whether, apart from proof of the award in the manner suggested by Mr. Parpia, there is anything on the record which would justify us in holding that the document was admitted by the defendants. Turning to the plaint, in para 5 it is expressly averred by the plaintiffs that-

"On the 12th July 1949 the said arbitrators and Umpire duly made, signed, acknowledged

and published their awards whereby they unanimously held that the defendants had committed a breach of the said two contracts and awarded that the defendants should pay to the plaintiffs a sum of \$ 9,538.64 in respect of the said contract dated 3rd March 1949 and a sum of \$ 9-209.36 in respect of the said contract dated 7th March 1949 as and by way of damages."

And in para 10 of their written statement all that the defendants say "is-

"With reference to paragraph 5 of the plaint, the defendants say that they are not bound by or concerned with any of the statements contained in the said paragraph. The defendants say that the awards alleged to have been passed by the said arbitrators and Umpire are not binding on them."

Therefore, there is no denial of the award or its contents and what is more, in para 17 of the written statement the defendants, as is usual, averred that they will rely on documents a list whereof is hereto annexed and one of the documents is a copy of the petition and order to show cause issued by the Supreme Court, New York County. Therefore, the defendants received the petition to which was annexed the award. The learned Judge has taken the view a strictly correct view in law that even if there is implied admission, the Court has a discretion to compel a party to prove a particular fact notwithstanding an implied admission on the part of the Defendant. But with respect, we do not think that this is a case where the Court should have availed itself of that discretion. There is an award passed, it is part of the record of the Supreme Court, it is sent by the Court to the defendants, the defendants are in possession of that document and nowhere in the pleadings is it suggested that such an award was not passed or that the copy of the award is not a genuine document. Surely, this is hardly a case where the plaintiffs who are in New York should be compelled to prove the original award by means of a commission or by some other means which would constitute a very expensive procedure. Therefore, in our opinion, the copy of the award relied upon by the plaintiffs should have been admitted into evidence and we will admit it into evidence.

15. A further difficulty still remains and that is with regard to the agreement to refer matters in dispute to arbitration. Now, this agreement is to be found in the two letters to which reference has been made, the letters of the 7th September 1948 and 13th September 1948. These two letters have been referred to in para 2 of the plaint and their contents are set out and all that the written statement has to say with regard to this paragraph is :

"With reference to paragraph 2 of the plaint the defendants deny that they at any time entered into any contract with the plaintiffs as alleged in the said paragraph or otherwise."

Therefore, there is no denial of this correspondence. Indeed, there could not be, because before the written statement was filed inspection was given by the plaintiffs of this correspondence and again the conscientious draftsman of the written statement could not possibly have controverted

the statement that these letters passed between the parties. Therefore, in our opinion, these two letters of the 7th September 1948 and 13th September 1948 are admissible in evidence and we will formally admit them in evidence.

16. The same is true of the letters and telegrams which constitute the two contracts which were entered into according to the plaintiffs pursuant to the terms of business contained in these two letters of the 7th September 1943 and 13th September 1948. These letters and telegrams are also referred to in para 2 of the plaint, inspection was given of this correspondence to the defendants before the written statement was filed and the denial in para 7 is that the defendants at any time entered into any contract with the plaintiffs as alleged in the said paragraph. Now, we read this denial to mean not a denial of the exchange of letters and telegrams, not a denial of the correctness of the copies of the documents of which the defendants have taken inspection, but a submission in law that no contract emerges from the exchange of these letters and telegrams. That is something very different from denying the correctness or genuineness of the copies relied upon by the plaintiffs. Therefore, in our opinion, these letters and telegrams which constitute in the record exhibits X to X-7 marked for identification, should have been admitted into evidence and we will admit them into evidence.

17. Now with the admission of this evidence we must consider whether it is necessary to remand this suit or to pass any other order, or we could ourselves dispose of the suit and pass the necessary decree in favour of the plaintiffs. Turning to the issues for this purpose, the first issue - whether this Hon'ble Court has jurisdiction to entertain and try this suit - we have already answered. We will therefore reverse the finding of the learned Judge on this issue and answer that issue in the affirmative.

18. Issue No. 2 is - whether the arbitrators and umpire had jurisdiction to make the said awards - and issue No. 3 is - Whether the Supreme Court of New York had jurisdiction to pass the judgment and order. Issue No. 3 has been answered in the negative and issue No. 2 in the affirmative. With regard to issue No. 3 there is a presumption which arises under Section 14 of the Civil Procedure Code that the Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction. There is nothing on the record to show that the defendants even attempted to displace the presumption raised by Section 14. With regard to the jurisdiction of the arbitrators and umpires, we agree with the learned Judge that they had jurisdiction. On this point what is urged by Mr. Thakore is that inasmuch as the contracts on which the award was based are denied by the defendants, the arbitrators had no jurisdiction. Now, the principle of the matter is this that when a party denies the arbitration agreement, the very basis on which the arbitrator can act is challenged and therefore the Courts have taken the view that in such a case the arbitrator has no jurisdiction to decide whether he himself has jurisdiction to adjudicate upon the dispute. The real principle is this and not what is sometimes loosely stated, that if the factum of a contract is denied, the arbitrators have no jurisdiction to

adjudicate in respect of that. If the arbitration agreement is part and parcel of the contract itself, by denying the factum of the contract the party is denying the submission clause and denying the jurisdiction of the arbitrators. But in this case the position is different. We have an independent agreement by which the parties agreed to refer the disputes to arbitration. Pursuant to this agreement, contracts were entered into and when the plaintiffs made a claim against the defendants, the defendants denied their liability. Therefore, what was denied was not the jurisdiction of the arbitrators, not the submission clause, but business done pursuant to the submission clause and to which the submission clause applied. We are unable to accede to Mr. Thakore's contention that there was no binding agreement with regard to arbitration till a contract actually was entered into and according to Mr. Thakore it was only then that the terms of business contained in the two letters of the 7th September 1948 and 13th September 1948 became incorporated in the contract. The true position here is that there is an antecedent independent arbitration agreement and this agreement would apply to every business done between the parties and every contract entered into between the parties. Therefore, in denying the contracts and in denying that any business was done, the defendants were not challenging the jurisdiction of the arbitrators, nor denying the agreement to go to arbitration, but were merely denying the fact that pursuant to that agreement any business was done between the parties. In our opinion, therefore, the learned Judge was right in the view that he took that the arbitrators and umpire had jurisdiction to make the award.

19. Issue No. 4 is - Whether the said judgment and order of the said Supreme Court were given on the merits of the case - and the learned Judge has answered that issue in favour of the appellants.

20. The next issue was - Whether the said awards were given on the merits of the case-and that issue has not been answered. It was unnecessary to answer that issue because the learned Judge took the view that the suit was on the foreign judgment and he considered the rights of the plaintiffs from the point of view of the suit being based on the foreign judgment. Mr. Thakore says that not only the finding of the learned Judge on issue No. 4 is erroneous, but that we must permit him to argue issue No. 5 which becomes material in view of our decision that the suit is based on the award and not on the foreign judgment. Now, in the first place, it is difficult to accept Mr. Thakore's contention that the principles laid down in Section 13 apply to what he calls a foreign award. In Section 13 there are safeguards laid down to protect a defendant in our Municipal Courts from being sued on a judgment given by a foreign Court and undoubtedly those safeguards must be strictly complied with. But could the same principle apply where the judgment is given not by a Court of a foreign State but by a tribunal selected by the parties and when the tribunal is a domestic tribunal and not a tribunal set up by the laws of a foreign country ? We are inclined to agree with the learned Judge that it is not open to a party, who is a party to the award, to contend that the award was not given on the merits of the case. We do agree that if the award was given against the rules of natural justice or it was fraudulently obtained, the party may not be prevented from putting forward those contentions. But it is difficult to accept the

view that because on a foreign judgment it is open to a party to contend that it was not given on the merits of the case, it is equally open to a party who is resisting the suit on the award to contend that the award was not given on the merits of the case. But even if it were open, in our opinion in this case the award was given on the merits of the case. It is true that the award was ex parte and the defendants did not appear before the arbitrators, but in our opinion the true interpretation to give to the expression "given on the merits" is that the tribunal giving the award considered the merits of the matter and came to a decision. The expression does not mean that every decision given ex parte is necessarily a decision not on merits. This view is clearly borne out by the judgment of the Privy Council in *Keymer v. Visvanatham Roddi*³. That was a suit on a foreign judgment and the judgment was given as a penalty because the defendant refused to answer the interrogatories which had been submitted to him and the Privy Council points out that the merits of the case were never investigated and his defense, struck out. Therefore, it is only in those cases where the Court for some reason or other passes a judgment against a party without investigating into the merits of the matter that it could be said that the decision is not given on merits. The mere fact that the decision is ex parte, the mere fact that the defendant after being served does not choose to appear, does not make an ex parte decision a decision not on merits. Not only there is no evidence here that the award was not given on the merits in the sense we have indicated but on the evidence it is clear that it was given on the merits. We must therefore answer issue No. 5 if necessary, in the affirmative.

21. Issue No. 6 was not pressed.

22. Issue No. 7 is - Whether defendants entered into any contract with the plaintiffs as alleged in para 2 of the plaint - and the answer is in the negative. We have already pointed out that the correspondence dealing with the contract has been admitted by the defendants and the only submission made by the defendants is a submission of law that this correspondence does not amount to a contract in law. One has only to look at these letters and telegrams to come to the conclusion that if these letters and telegrams were admitted in evidence they clearly resulted in a contract being arrived at between the parties as alleged by the plaintiffs in para 2 of the plaint. In our opinion, the learned Judge answered this issue in the negative because the view he took was that the documents which we have admitted were not admissible in evidence. We will therefore answer this issue in the affirmative.

23. Issue No. 8 is - Whether the said awards are binding upon the defendants. In view of what we have stated in the judgment, it is clear that the awards are binding upon the defendants and we will give a finding on this issue as in the affirmative and set aside the finding of the learned Judge which was in the negative.

24. The result therefore is that on the record and on the evidence that we have now admitted, there is no answer to the claim made by the plaintiffs. The claim consists of the actual amount mentioned in the awards on which the Supreme Court has passed judgment. Therefore, the relief

sought is in respect of an award which has been made enforceable by the law of the country in which it was passed. With regard to interest the interest claimed is from the 21st March 1950, that is, the date on which the Supreme Court passed its judgment. Mr. Parpia agrees that interest should be allowed only from the date of the filing of this suit, which is the 14th January 1954.

³ ILR 40 Mad 112

25. The result therefore will be that there will be a decree, equivalent in rupees for \$ 18,748 and at the same rate of exchange as the amount is calculated in prayer (a) of the plaint with interest thereon at 4 per cent, from the 14th January 1954 till judgment and costs of the suit and interest on Judgment, except costs, at 4 per cent.

26. The appeal will therefore be allowed and the decree passed by the trial Court set aside. The appellants will be entitled to the costs of the appeal.

27. Undertaking given by Mr. Parpia vacated. Undertaking given by Mr. Thakore also vacated.

28. Liberty to the appellants' attorneys to withdraw the sum of Rs. 500/- deposited in Court.

Appeal allowed.