
(1960) 10 RAJ CK 0009
In the Rajasthan High Court
Case No : First Appeal No. 31 of 1954

O.P. Verma

APPELLANT

Vs

Lala Gehrilal and Another

RESPONDENT

Date of Decision : 12-10-1960

Acts Referred:

Arbitration Act, 1940 — Section 14
Civil Procedure Code, 1908 (CPC) — Section 13
Evidence Act, 1872 — Section 101, 102, 103, 114

Citation : AIR 1962 Raj 231

Hon'ble Judges : L.N. Chhangani, J; I.N. Modi, J

Bench : Division Bench

Advocate : Party in person, for the Appellant; Hastimal, for the Respondent

Final Decision : Partly Allowed

Judgement

Modi, J.—This is a regular civil first appeal by the plaintiff O. P. Verma against the judgment of the learned District Judge Kotah dated the 9th February, 1954, dismissing the plaintiff's suit with costs.

2. The material facts leading up to this appeal may be shortly stated as follows. There was a partnership business between the plaintiff's wife and the defendants (who are father and son) at Bikaner in December, 1941. The plaintiff was looking after this business, on behalf of his wife, which was carried on in the name of Chand Bros. under which firm name the defendants were already carrying on business. Although the nature of this business is not disclosed in the plaint, there is evidence to show that the parties had taken a sub-contract from Messrs. Green Bus Co. Delhi, in connection with the supply of lorries for training drivers for the Second World War. This partnership is alleged to have continued until May 1942.

The plaintiffs case was that in order to settle the accounts of this partnership business, an arbitrator named S. P. Singh, who is admittedly a brother of the plaintiff, was appointed by the parties on the 29th July, 1942. The arbitrator allegedly gave his award some time in the first week of February, 1943. This

award turns out to be an oral one though the plaintiff under a mistaken notion stated in his replication that it was in writing. It is further alleged that, in accordance with the award of the arbitrator, the defendant Chandmal who was one of the proprietors of Messrs. Chand Bros., gave the plaintiff a post-dated cheque No. D 70180 dated 24-2-1943 for Rs. 17500/- on the Palai Central Bank Ltd., Delhi, in full settlement of the account of this partnership business. This cheque was presented by the plaintiff to the said bank on the 1st March, 1943, but it was dishonoured by the bank as they had no funds to the credit of the defendant Chandmal in their bank.

The plaintiff's case further was that thereafter he sent a notice to the defendants to pay the aforesaid amount as the cheque had been dishonoured by the bank. To this, a reply came from the defendants that the cheque in question had never in fact been passed in favour of the plaintiff and that the Bikaner account still remained unsettled, and, therefore, the defendants were under no liability to pay the amount asked for. Thereupon on the 26th April, 1943, the plaintiff O. P. Verma filed a suit for the recovery of Rs. 17500/- from the defendants in the court of the Commercial Sub-Judge Delhi on the basis of the dishonoured cheque. This suit was brought under Order 37 of the Code of Civil Procedure.

The defendants through their counsel Mr. Ranjit Singh put in an application for leave to defend the suit on the ground that the cheque was a forged one. It seems that it was the case of the plaintiff before the Sub-Judge that the plaintiff had given a receipt on the back of the counter-foil of the cheque in question in the defendants' cheque book. The case was, therefore, adjourned by the Sub-Judge to the 27th July, 1943, in order to enable the defendants to file the counter-foil of the dishonoured cheque. On the 27th July, 1943, the defendants did not put in appearance in the court of the Sub-Judge, and they appear to have sent a telegram to say that they were ill. The court naturally took no notice of the telegram. The defendants' counsel does not seem to have appeared at this hearing, or if he appeared, he probably said that he had no instructions. Thereupon the learned Judge dismissed the application for leave to defend and granted an ex parte decree for Rs. 17500/- in favour of the plaintiff with costs and future interest at 6 per cent. per annum from the date of the institution till the date of realisation.

The case of the plaintiff further was that, after obtaining this decree, he was able to realise a sum of Rs. 20/- only from the defendants by execution in the Delhi Court, and the balance of Rs. 17480/- together with costs and interest were still due to him. Thereafter, the plaintiff filed the present suit in the court of the District Judge of the former State of Kotah where the defendants were living. This suit was filed on the 7th November, 1944, on the basis of the foreign judgment for the recovery of a sum of Rs. 17480/- as principal plus a sum of Rs. 1052/4/- as costs plus a sum of Rs. 1487/8/- as interest upto the 4th November, 1944, in all amounting to Rs. 20,019/12/-. The plaintiff averred that the defendants had their immovable property in the State of Kotah and were also

living and carrying on business there and consequently that court had the jurisdiction to entertain the suit. The plaintiff also claimed interest on the amount of the decree at the rate of eight annas per cent. per mensem.

3. The defendants filed their written statement on the 7th December, 1944, wherein they pleaded ignorance of the decree obtained by the plaintiff from the court at Delhi. It was, however, admitted that a sum of Rs. 20/- had been got attached and recovered by the plaintiff from the defendants. Furthermore, the defendants stoutly resisted the suit on the plea that the court at Delhi which was a foreign court qua the defendants, who were resident, If the Kotah State, had no jurisdiction to pass a decree against them, nor had they ever submitted to the jurisdiction of that court. It was further contended that the judgment of the aforesaid foreign Court was not given on the merits of the case, and, therefore, it was not binding on the defendants.

4. The plaintiff, apparently in order to steer clear of the difficulties with which he might be confronted on the ground of the judgment of the foreign court at Delhi not being held conclusive, filed an amended plaint on the 9th February, 1945, which is at pages 1 to 3 of the paper-book. In this plaint, he based his suit alternatively on the original cause of action namely the cheque dated the 24th February, 1943. In paragraph nine of the plaint, therefore, it was stated that the cause of action against the defendant accrued on the 24th February, 1943, and also on the 27th July, 1943, which is the date of the judgment of the court at Delhi. In paragraph seven of the plaint, the plaintiff made the following averment :

"That the defendant led evidence before the Delhi court to the effect that the cheque was forged, but, failed to prove the said allegations regarding the genuineness of the said cheque, hence the judgment of Delhi Court which declared the cheque as genuine, relying on the evidence of the plaintiff, is on merits and binding on the parties. It is binding upon the defendants on law as well as on facts."

5. In answer to this plaint, the defendants filed their written statement on the 29th March, 1945. The partnership business was admitted between the parties though we may point out that, according to the evidence led by the parties, this business really was between the defendants on the one hand and the plaintiff's wife on the other. The defendants also admitted that they had received a notice from the plaintiff after the cheque had been dishonoured, and they further admitted that a reply was given by them to the plaintiff as mentioned in paragraph three of the plaint. This reply was that no cheque had been given to the plaintiff by the defendants and that the account of the partnership had not been settled at all.

The defendants also admitted that the plaintiff had filed a suit in the Delhi court but denied the rest of the allegations made by the plaintiff in paragraph four of his plaint. They, however, admitted that they had asked for an adjournment

telegraphically and that the same had not been allowed. It was further contended by the defendants in their additional pleas that defendant Gehrilal was the sole proprietor of Messrs. Chand Bros. and that his son Chandmal was not a proprietor of this business, and all that he did or could do was to help his father in the business, from time to time, in the routine work of the partnership. It was, therefore, hotly denied that Chandmal had any right to admit any claim outstanding against the firm or to issue a cheque in settlement of the accounts of the firm and thereby fasten any liability on defendant Gehrilal, and it was maintained that Gehrilal himself had never given any cheque to the plaintiff in connection with the settlement of this partnership business. The case of the defendants was that the accounts of the partnership had never been settled, and, therefore, there was no occasion for their giving a cheque for Rs. 17500/- to the plaintiff, nor was any such amount due from the defendants to the plaintiff.

6. This brings us to the most important part of the defendants' case as to how the cheque in question came to be given to the plaintiff. Paragraph five of the written statement contains the defendants' version on this aspect of the case. This version is that the defendants' firm Messrs. Chand Bros. had received a crossed cheque for a big amount from the Alwar State. This cheque could not be encashed but could only be credited into an account of Messrs. Chand Bros. Defendant Chandmal, therefore, went to Delhi with this cheque. He already knew the plaintiff who had an account with the Palai Central Bank, Delhi. The plaintiff helped Chandmal to get his account opened in the said bank. According to the defendants, a balance of Rs. 20/- only was outstanding in their favour in this account and the account had to be closed. It is further stated that Chandmal had purchased ten seers of Niwar worth Rs. 20/- from the factory of the plaintiff and gave him a cheque for Rs. 20/- in lieu of the purchase. The defendants also say that they had asked the plaintiff to close the account after having drawn the amount of Rs. 20/- from the bank. This cheque, however, was not encashed.

Thereafter the plaintiff came to Kotah and disclosed that the cheque had not been encashed, and, strangely enough, he is also reported to have said that the amount outstanding in the bank in favour of the plaintiff was really twenty rupees and a few annas, and, therefore, the account could not be closed. The suggestion obviously is that the plaintiff asked for a blank cheque which the defendant Chandmal gave him after signing the same, and that he did so completely relying on the good faith of the plaintiff. The plaintiff, however, abused this faith and filled the cheque for Rs. 17500/-. It may be mentioned here that the cheque, apart of course from the signature, was type-written, and this is not disputed at this stage. As the original cheque was not on this record, it having been filed in the Delhi court, we thought it fit to send for the same on an application presented to us by the defendants at the close of the arguments but we have not received it up to this time, and we do not feel disposed to postpone our judgment any further.

We may make it clear, however, that the identity of the cheque in suit was really

never in dispute between the parties, nor was it disputed that the cheque in question bears the signature of defendant Chandmal. It may also be pointed out here that this cheque in original was produced by C P W 1 Hukamchand, a Record-keeper of judicial records. Delhi, before the Commissioner who was appointed to record the evidence of certain witnesses living in Delhi and then it was taken back by him. Resuming the defendants' story, his further version is that when defendant Gehrilal went to Delhi he had stayed with the plaintiff at the latter's house from the 7th June, 1942, to the 24th June, 1942, and it was during this period that the plaintiff had spirited away his cheque-book which was lying in his (defendant's) trunk and the said defendant came to know of this on the 27th July 1943, when the plaintiff who had Stated in the Delhi Court that he had given a receipt for the cheque on the counter-foil thereof openly boasted having come out of the court that the defendant's attempt to produce the counter-foil would be altogether vain as it was in the plaintiff's possession.

In short, therefore, the defendants' case was that Chandmal had given a blank cheque to the plaintiff in the circumstances mentioned above, and with a view to have their account in the bank closed, that the plaintiff had fabricated this cheque and further that the counter-foil of this cheque was not available with him as the plaintiff had stolen it away some time in June, 1942, when the defendant stayed at his house in Delhi. In paragraph nine of the written statement, the defendants stated that they had in their possession a paper Ex. D-6 (this is not signed by any body) containing an abstract of the partnership account, which was prepared by the plaintiff himself and which he had passed on to Khema Singh, a director of Messrs. Green Bus Company, and that according to this account, there was a net profit of Rs. 3678/9/- only in the partnership business and that half of this profit amounting to Rs. 1839/4/6 fell to the plaintiff's share. According to this account, the plaintiff's investment in the partnership business was to the tune of Rs. 3426/-/6 only. In other words, all that the plaintiff would have been entitled to on this accounting was a sum of Rs. 3426/-/6 plus Rs. 1839/5/6 total Rs. 5265/6/-. It was, therefore, contended that the allegation of the plaintiff that he was entitled to Rs. 17500/- as a result of this partnership business was quite baseless.

The defendants' case is that when this account was submitted to the said Khema Singh, the latter replied that the papers of the Green Bus Co. had been sent to the Income Tax office, and until and unless they were received back, nothing further could be done. The Green Bus Co. had, however, received back these books on the 6th August, 1943, and a telegram to that effect was received from Khema Singh. Thereupon defendant Geharilal went to Delhi in October, 1943. The defendants' case further is that at that time they and the plaintiff had appointed Khema Singh as an arbitrator to settle the accounts of the partnership business. The case of the defendants is that Khemasingh had decided that Messrs. Chand Bros. do pay to the plaintiff a round sum of Rs. 9000/- as profits of the Bikaner business subject to the condition that the plaintiff would clear the accounts in connection with the partnership business at Fatehgarh and Kanpur

and pay off the due to the defendants. The contention of the defendants is that the plaintiff had not cleared the Kanpur and Fatehgarh accounts, and, therefore, the defendants were not liable to pay anything to him. A point was made by the defendants in paragraph eleven of their written statement that in the plaint in his litigation at Delhi the case of the plaintiff was that the defendants had given a post-dated cheque to the plaintiff whereas in his amended plaint he had mentioned that the cheque had been given to him on the 24th February, 1943.

We may mention at once that the plaintiff cleared this point in his replication and admitted that he had received a post-dated cheque dated the 24th February, 1943, and that in fact this cheque had not been received on the 24th February, 1943, and that the alleged discrepancy was due to a trifling clerical error; inasmuch as the Hindi word [^][^]दक[^][^] was mentioned for [^][^]दक[^][^] after the date 24-2-43 in para two of the plaint. We think that nothing serious turns on this point.

Another point made by the defendants in their written statement was that the plaintiff had failed to mention in his plaint who was the arbitrator appointed by the parties and whether his appointment was oral or written and that it had also not been mentioned on what date he gave the award and whether the award was oral or written and, therefore, the defendants were unable to give any reply on this point. Yet another point which is of some importance is that the defendants now denied that a sum of Rs. 20/- had been attached and recovered from them in execution of the judgment of the Delhi Court, although they had clearly admitted this in their earlier written statement dated the 7th December, 1944. Lastly, the question of the binding nature of the judgment of the court at Delhi was again raised as in the previous written statement. We need not repeat this objection as we have already indicated it above.

7. The plaintiff filed a replication on the 10th April, 1945, in which he clearly admitted that the partnership in question had taken place with his wife and not with himself, and that it had been mentioned by sheer mistake in paragraph one of the plaint that the partnership had taken place between him and the defendants. As already stated, the plaintiff also admitted that the cheque that he had received from the defendants was a post-dated one. As regards the award, it was averred that S. P. Singh was appointed an arbitrator on the 29th July, 1942, and that a reference to him was made by both Gehrilal and O. P. Verma vide Ex. P-3. It was further stated that as decided by the aforesaid arbitrator the defendants were to pay Rs. 17500/- by cheque to O. P. Verma on behalf of Mrs. Verma and that a cheque had been given by the defendants under the signature of Chandmal on behalf of Messrs. Chand Bros. in pursuance of this award. It was also mentioned that the award was made in writing although this turns out to be incorrect, and the plaintiff's explanation is that he had somehow thought that the award had been made in writing. In fact, it had not been so made as it eventually turned out. The plaintiff also produced two letters Exs. P-2 and P-4 dated 16th June 1942 and 17th February, 1943, respectively (alleged to proceed

from defendant Gehrilal) in support of his version.

As regards the authority of Chandmal to give a cheque on behalf of Messrs. Chand Bros., the plaintiff's contention was that both Gehrilal and Chandmal, being father and son, were the owners of this business, and that Chandmal was the person who usually operated the accounts of the firm in the various banks. The plaintiff further emphatically denied the allegation made by the defendants that a blank cheque had been given to him and that he had later manipulated, it to foist a false liability on the defendants. The plaintiff also denied that the defendant Gehrilal had stayed with him during the month of June, 1942, as alleged by the latter, or that the former had ever pilfered the defendants' cheque book. As to the question of jurisdiction, the plaintiff's case was that the court at Delhi had jurisdiction, and that in any case the defendants had submitted to the jurisdiction of that court. It was further contended that the judgment of that court was given on merits and was, therefore, binding on the defendants.

8. On the 23rd April, 1945, defendant Gehrilal filed a further written statement in which he admitted that the letter Ex. P-3 had been written by him. His contention, however, was that although this letter had been written, S. P. Singh was never made an arbitrator and he could not be made one as he was the plaintiff's own brother. Explaining the circumstances under which this letter came to be written, the defendant went on to state that they (defendants) had some trouble with the Green Bus Co. as regards the dues that they had to receive from them. S. P. Singh, however, told them that he had a relative of his who was a big contractor and that he had plenty of influence with Messrs. Green Bus Co. and that he would get their money paid to them. In these circumstances, S. P. Singh further asked them to execute a document appointing him as an arbitrator and assured them that if they executed the same, he would get their monies paid to them.

This defendant's case further was that he thus wrote the document but he had kept it with himself and that he (Gehrilal) and S. P. Singh then went to that relative of S. P. Singh but they were not able to meet him. They also went to Messrs. Green Bus Co. asking for the payment, but they, expressed their inability as their books were not with them having been sent to the Income Tax department. According to the defendant, this document Ex. P-3 was in his papers when he was staying at the house of the plaintiff. This defendant, it will be recollected, states to have stayed with the plaintiff for a number of days in June, 1942. The grievance of the defendant in effect is that this paper had also been pilfered from his possession then. As regards the documents Exs. P-2 and P-4, his case is that they did bear his signatures but they were not written by him and were forged by tearing off certain papers which had been signed by him and which had some blank space above the signatures. He further stated that the plaintiff must have taken out certain papers which had been signed by him from his files when he was staying with the plaintiff.

9. On these pleadings, the following issues were framed by the trial court :

- (1) Whether the court of Sub-Judge Delhi had no jurisdiction to hear this suit?
- (2) Whether the foreign judgment dated 27th July, 1943, is final and binding?
- (3) Whether the parties appointed an arbitrator on 29th July, 1942, for the decision of the partnership accounts and the arbitrator found Rs. 17500/- due to the plaintiff from the defendants?
- (4) Whether the defendants gave a cheque to the plaintiff on the 24th February, 1943, for the said amount after accepting the award?
- (5) Whether the defendant Chandmal passed a blank cheque to the plaintiff in payment of the price of Niwar purchased from the plaintiff's factory and for clearing the Bank account but the plaintiff forged it for Rs. 17500/-?
- (6) Whether Chandmal is not a proprietor of Chand Brothers and he had no authority to pass a cheque and accept the liability on behalf of the firm?

10. We may now briefly summarize the findings of the trial court on the aforesaid issues. As to issue No. 1 it was held that assuming that the court at Delhi, being a foreign court, had no jurisdiction to take cognizance of any suit against the defendants who were subjects of the Kotah State at the relevant time, the defendants had submitted to the jurisdiction of that court, and, therefore, they could not deny the jurisdiction of that court now. Issue No. 2 was decided against the plaintiff, and it was held that the judgment of the court at Delhi was not given on the merits, and, therefore, it could not be accepted as binding on the defendants. As to issue No. 3, the court held that S. P. Singh was appointed as an arbitrator between the parties and that he gave an oral award to the effect that the defendants do pay a sum of Rs. 17500/- to the plaintiff. On the fifth issue, the trial court found that the defendants had miserably failed to prove that they had passed a blank cheque to the plaintiff or that the latter had filled it for Rs. 17500/- and thus this issue was decided against the defendants. As to the fourth issue, the court found that the execution of the document by Chandmal would be presumed under the circumstances, but it was further held that his action did not bind Gehrilal, and, therefore, it was concluded that Gehrilal was not bound by the act of his son. Having decided issue No. 4, as stated above, the learned Judge also decided issue No. 6 against the plaintiff and held that Chandmal had no authority to pass a cheque for Rs. 17500/- and bind down the firm.

11. Having answered the issues that had been framed in this case as mentioned above, the learned Judge then posed a further question as to whether the award in this case was a legal and a valid award, and he held that being an oral award it was invalid, illegal and ineffectual and that it could not form a consideration for the cheque of Rs. 17500/-, and that being so, the cheque was without consideration and, therefore, the plaintiff's suit could not be decreed on the basis of this cheque. According to the learned Judge, the suit was based on the award and "if the award goes away the cheque automatically remains without

consideration." In this view of the matter, the learned District Judge dismissed the suit. The plaintiff has now come up in appeal against the aforesaid judgment and decree.

12. This appeal was argued before us by the plaintiff O.P. Verma himself. He has levelled an all-round attack against the judgment of the court below, and we shall deal with his points one by one.

13. The point which we wish to take up first of all is whether the decree of the Delhi Court dated the 27th July, 1943, is binding on the defendants or on the courts in this State, that decree having not been appealed from by the defendants and having become final.

14. Now it is well settled, so far as the decisions of this Court are concerned, that the Delhi Court at the time it awarded its decree was a foreign court qua the defendants who were subjects of the princely State of Kotah and that the advent of the constitution does not and cannot make any difference to that position, although the courts of this State and the Delhi Courts are the courts of the same country at this date. See in this connection *Shah Premchand Vs. Shah Danmal, and Laxmichand and Others Vs. Mst. Tipuri and Others*, to both of which decisions one of us was a party. u/s 14 of the Code of Civil Procedure, it is laid down that when a document purporting to be a certified copy of a foreign judgment is produced before a court, it must presume that such judgment was pronounced by a Court of competent jurisdiction though this presumption is a rebuttable one. Earlier, Section 13 lays down that a foreign judgment must be held to be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except in those cases mentioned in the section.

The defendants seek to attack this judgment on two grounds within the meaning of Section 13. The first ground is that it was not pronounced by a court of competent jurisdiction. The second is that it was not given on the merits of the case. Now we consider it unnecessary to go into the question whether the Sub-Judge Delhi had jurisdiction to take cognizance of this case on the footing of his having jurisdiction in the international sense over the defendants or not, because we have no doubt that the defendants when they appeared through counsel in the court of the learned Judge and sought leave to defend the suit had undoubtedly submitted to the jurisdiction of the court. The principle is well established that one of the bases on which foreign courts are recognized to be internationally of competent jurisdiction is voluntary submission of the party to the jurisdiction of the foreign court. This principle is grounded on the foundation that a party having taken a chance of a judgment in his favour by submitting to the jurisdiction of the court should not be allowed to turn round when the judgment goes against him to say that the court had no jurisdiction. We, therefore, hold that the Delhi Court was competent to decide this suit within the meaning of Section 13 irrespective altogether of the consideration that the defendants were subjects of the former Kotah State which was an independent

princely State and which now, forms part of the State of Rajasthan.

15. The next ground on which the foreign judgment in this case is attacked is that the judgment was not given on the merits of the case, and, therefore, also it is not conclusive within the meaning of Section 13 of the Civil Procedure Code. The question to decide, therefore, is whether the decree of the Delhi Court having been given under Order 37, Rule 2, C. P. C. was a decision on the merits within the meaning of Section 13.

16. Unfortunately we have no decision of our court or of any other High Court directly governing this point. Our attention has, in this connection, been invited to a number of cases which have some bearing on the decision of the question before us. But before we consider these cases, we desire to point out that the expression "on the merits" has not been defined by the Civil Procedure Code. Now, the leading case on the meaning of this, expression is *Keymer v. Visvamatham*, AIR 1916 PC 121. In this case, a suit for money was brought in the English Courts against the defendant as partner of a certain firm. The defendant denied that he was a partner and also that any money was due from him. Thereupon the defendant was served with certain interrogatories which he omitted to answer. His defence was, therefore, struck off and a judgment entered for the plaintiff. In a subsequent suit instituted in Madras against the defendant on the basis of the judgment given by the English Court, the question arose whether the judgment was not one given on the merits within the meaning of exceptions in Section 13(b), C. P. C. of 1908. Their Lordships of the Privy Council held that it was not. It was observed that no single one of the matters in controversy was considered by the English Court and that what had in fact happened was that because the defendant refused to answer the, interrogatories which had been submitted to him, the merits of the case were never investigated and his defence was struck out and he was treated as though he was not defended and the judgment was given on that footing. In these circumstances, their Lordships held that such a decision could not be regarded as one given on the merits of the case within the meaning of Section 13(b).

17. We should like to point out in passing that the present case is somewhat different inasmuch as the judgment of the Delhi Court in this case was not given as a matter of penalty as in the case before the Privy Council.

18. The same principle seems to us to have been approved in *Oppenheim and Co. v. Mahomed Haneef*, AIR 1922 PC 120 where the judgment of Mr. Justice Coutts Trotter holding that the decision of the English Court had been entered in default of appearance, and, therefore, could not be taken to be a decision on the merits, was allowed to go unchallenged before the Privy Council.

19. The next decision to which we wish to refer is a bench decision of the Madras High Court in *A. Janno Hassan Sait Vs. S.N. Mahamad Ohuthu*, The facts in this case were that a suit was brought upon a foreign judgment of the Colombo Court against the defendant. A procedure was in force in the Colombo Court that the

court was entitled to give a decree for the plaintiff without any trial if the defendants on having been served did not appear, though the court under the procedure had also power to take evidence if it thought fit, but no evidence was taken in this case. It was held that where no appearance at all was put in on behalf of the first respondent and the case was allowed to proceed ex parte, the decision must be deemed to have been based on the merits.

20. The above decision was over-ruled, and it we may say so, with all respect, rightly, by a Full Bench of the same High Court in *R.E. Mahomed Kassim and Co. Vs. Seenii Pakir Bin Ahmed and Others*, The facts in this case were these. The plaintiff had obtained a judgment from the Supreme Court of Penang against the defendants who were British Indian subjects but were residents at the time of the suit at Penang. They did not appeal to contest the suit in the court at Penang. They were declared to have been properly served; and then there was a procedure in that court, according to which where defendants having been properly served did not appear and contest, judgment would be given for the plaintiff without any trial and so a judgment was given in favour of the plaintiff as a matter of course. A subsequent suit was brought in the Madras Court on that judgment. It was contended that the judgment of the Penang Court was not given on the merits of the case and, therefore, was not binding on the defendants. The decision in *A. Janno Hassan Sait Vs. S.N. Mahamad Ohuthu*, was brought to the notice of the learned Judges of the Full Bench and it was held that it was wrongly decided and that the view taken therein was inconsistent with the decisions of their Lordships in AIR 1916 PC 121 and AIR 1922 PC 120.

21. In *Ishri Prasad Vs. Sri Ram*, the plaintiff sued the defendant on the basis of a foreign decree obtained by the plaintiff in the Rampur State. The decree was an ex parte one. The judgment of the Rampur Court held that, notwithstanding due service of summons on the defendant, he had not contested the suit. It further went on to observe that the document was registered and that the failure of the defendant to contest the suit amounted to an admission of the plaintiff's claim, and, therefore, the suit was decreed. In these circumstances, the question arose whether the judgment was given on the merits of the case. The learned Judges of the Allahabad High Court held that it was. With all respect, the decision is not free from difficulty because no evidence whatsoever was recorded in the case on behalf of the plaintiff in the court at Rampur and its decision appears to us to have been really given because the defendant had failed to appear in the court and this was presumed to amount to an admission of the plaintiff's case by the defendant.

22. In *Abdul Rahman v. Md. Ali Rowther*, AIR 1928 Ran 319 it was held that a decision on the merits involved the application of the mind of the court to the truth or falsity of the plaintiff's case, and, therefore, an ex parte decision which was given after a judicial consideration of the evidence of the plaintiff, though the defendant did not appear, would be a decision on the merits even if ex parte, but a decision passed without evidence of any kind could not be held to be a

decision on the merits.

23. The next decision to which reference may be made is *Isidore Fernando Vs. Thommai Antoni Michael Fernand*, This case appears to us to be somewhat parallel to the case in hand. The defendant in this case was sued by the plaintiff, the latter being an assignee of a foreign judgment passed by the District Court of Colombo on a promissory note. The suit was filed under the summary procedure laid down in Chapter 52, Ceylon Ordinance No. 2 of 1889 which was applicable to the trial of suits based on negotiable instruments. The defendant did not appear to obtain leave to defend the suit in time and so an ex parte decree was passed. He then appeared, asked for the matter to be re-opened and prayed for leave to defend the suit. Leave to defend the suit was granted conditionally on furnishing security for the amount of the promissory-note. Security was not furnished and judgment was entered for the plaintiff. Thereafter a subsequent suit was instituted on the foreign judgment in a court in Madras. The question arose whether the ex parte decree obtained by the plaintiff from the court of Ceylon under the summary procedure was given on the merits. It may be stated that the procedure laid down for summary trial in Colombo was not exactly identical with the procedure which is laid down by our CPC under Order 37. But, that, in our opinion, hardly matters. The point to note is that it was held that the judgment of the Ceylon Court was not one on the merits. A distinction was also brought out in this case that whereas a "judgment" was required to dispose of a case finally according to the usual procedure, what Order 37 lays down is that any suits based upon promissory notes etc. where the plaintiff desires to proceed under this Order can be instituted by presenting a plaint in the form prescribed and special forms of summons shall issue, and where the defendant does not obtain leave to appear and defend, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a "decree" in accordance with Clauses (a) (b) and (c) of Sub-rule (2). It is significant that this rule while it lays down that a decree shall be passed does not speak of a judgment which has been defined u/s 2 Clause (9), C. P. C. as :

" "Judgment" means the statement given by the Judge of the grounds of a decree or order."

With all respect, even if a narrow distinction like this may not be drawn as to the meaning of the word "judgment", it could hardly be said that the judgment given according to the summary procedure was a judgment on the merits.

24. In *Wazir Sahu and Another Vs. Munshi Das*, it was held that the true test whether an ex parte decision is or is not on the merits is whether the decision was given as a matter of penalty or of form or it was based upon a consideration of the truth or otherwise of the plaintiff's claim.

25. in *Sheikh Abdul Rahim alias S.A. Rahim Vs. Mohamed Din and Another*, it was held that the mere absence of the defendant would not prevent a judgment given in his absence from being one on the merits of the case, and that the court

was entitled to presume that the court which originally dealt with the matter must have dealt with it in accordance with law, and that a presumption to that effect arose u/s 114 of the Evidence Act, and that that presumption fully applied to the facts of the case. The facts of this case are peculiar and do not furnish any parallel to the facts of the case before us.

26. In *Govindan v. Sankaran*, AIR 1958 Kerala 203, it has been laid down that it cannot be said that a decision on the merits can be possible only in cases where the defendant enters appearance and contests the plaintiff's claim, and it should be perfectly possible even where the defendant chooses to remain *ex parte* and keep out inasmuch as in such a case it would still be possible for the plaintiff to adduce evidence in support of his claim so that the court may give a decision on the merits of the case after a due consideration of such evidence, instead of dispensing with such consideration and giving a decree merely on account of the default of appearance of the defendant. It was further laid down that in the former case, the judgment will be on the merits, while in the latter, the judgment will not be on the merits.

27. At this stage, we would refer to a bench decision of the Lahore High Court in *Dr. Kulwant v. Dhan Raj*, AIR 1935 Lah 396 upon which the plaintiff laid very great stress. The facts in this case were that the plaintiff brought a suit for recovery of a certain amount of money on the basis of a judgment of the High Court of Justice in England. Among other pleas, the defendant raised the contention that the judgment of the court in England was not given on the merits of the case. It was common ground between the parties that a writ for the appearance of the defendant had been issued and duly served but the defendant did not put in appearance within the period allowed and in consequence a judgment in default of appearance was entered in favour of the plaintiff under the rules governing the procedure of the Supreme Court. It was also accepted that, under the rules of the Supreme Court, if the defendant failed to appear on the date fixed, a final judgment was automatically entered. In these circumstances, the question arose for decision whether the judgment of the High Court in England was given on the merits.

The learned Judges dissented from the decision of the Madras High Court in *R.E. Mahomed Kassim and Co. Vs. Seeni Pakir Bin Ahmed and Others*, and held that, according to the procedure in force, the plaintiff was required to file an affidavit and that this affidavit was considered by the Judge when ordering the issue of a writ, and it was open to the Judge not to grant leave for the issue of the writ unless a *prima facie* case had been made out. Where, therefore, such a writ had been issued and the defendant failed to appear, his default, after due service, would be taken to be tantamount to an admission of the claim and the judgment entered in favour of the plaintiff would be a judgment as if on confession. It was further observed that if a decree was passed in favour of the plaintiff on an admission of the defendant, it could not but be an adjudication of the suit on the merits. With very great respect, this case seems to us to run counter to the

principle underlying the decisions of their Lordships of the Privy Council in AIR 1916 PC 121 and AIR 1922 PC 120. According to the broad principles approved by their Lordships in these cases, a decision which is given without investigating or considering any of the matters raised in controversy cannot be held to be given on the merits of the case, and to hold that although the court had not so acted, its decision is nevertheless on merits seems to us to be self-contradictory. It may be that the judgment given is in full accord with the law in force in the foreign country, as indeed most of the cases to which we have referred were, and so it would be binding on the courts of that country passing it; but that is a very different thing from saying that simply because that is so, it must, therefore, be held to be binding on the courts in the foreign country. Section 13 of the Code contains a clear mandate on the point that if the decision is not on the merits, it would not be binding on the foreign courts where the judgment is sought to be enforced, and this mandate is and would be a clear warrant for the latter courts to satisfy themselves, whether the judgment was given on the merits as explained above, and if the answer to this question be in the negative, they would be fully justified to refuse to enforce it.

28. From a review of the case-law made above, we are clearly of opinion that in order that a judgment of a foreign court may successfully pass the test of having been given on the merits, such a judgment must not have been given either as a matter of penalty or as a matter of mere form based on special or summary procedure inasmuch as such a trial does not offer any real or substantial opportunity to the defendant to contest the suit as a matter of right as he receives it under a regular procedure. This is, however, not to say that an ex parte judgment per se may not be a judgment on the merits. It may very well be. It is not the presence or the absence of the defendant which can really condition the quality of a judgment as to its having been given on the merits or not. . What really matters is whether the procedure according to which the suit has been decreed requires the court to determine the truth or falsity of the contentions raised or which may be raised. It seems to us that where it so requires and the court applies its mind to the contentions raised on either side, there cannot but be a judgment on merits. Where the procedure, however, does not so require and a decree can be entered in favour of the plaintiff merely because the defendant has failed to appear and the judgment is given in default, or where he has failed to apply for leave to defend, or where he has applied for leave to defend and such leave is refused, then we are disposed to hold the view that such a judgment cannot be held to have been given on the merits within the meaning of Section 13(b), C. P. C. We say nothing here about that class of suits where leave to defend having been given under a summary procedure the court applies its mind to the truth or falsity of the case and then decides the suit. We hold accordingly.

29. Let us now see whether the procedure, according to which the plaintiff filed his earlier suit in the court at Delhi and the suit was decreed, satisfies the test which we have laid down above.

30. This brings us to a consideration of the procedure laid down under Order 37 C. P. C. The order bears the heading "summary procedure on negotiable instruments". Rule (1) defines the courts to which the Order applies. The most important rule is the next following one. That rule lays down an enabling procedure which it is open to a plaintiff to resort to if he so chooses, and it is provided that he should present the plaint in the usual form, but a special form of summons is laid down which is form No. 4 in Appendix B. By this special kind of summons, the defendant is asked to obtain leave from the court within ten days from the service thereof to appear and defend the suit and a copy of the negotiable instrument is also annexed to the summons. The defendant is further told that if he fails to appear within the time specified, the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree. It may also be pointed out that such a suit can be brought within one year from the date of the debt becoming due under Article 5 of the Limitation Act. The effect of the rule, therefore, is that where leave is not applied for within the time specified or is applied for and refused, the plaintiff gets a decree without adducing any evidence whatsoever but on mere proof of service of summons. Rule 3 then provides that leave to appear and defend the suit may be granted upon affidavits which should disclose such facts as would make it incumbent upon the holder to prove consideration or such other fact as the court may in its discretion think sufficient to support the application. It is also provided that leave to defend may be given unconditionally or subject to such conditions as to payment into court or giving security or otherwise as the court thinks fit. Then follows Rule (4) which lays down that if the court has passed a decree in accordance with the provisions of Rule (2), the defendant having not entered appearance within the time allowed, the court may under special circumstances set aside the decree and if necessary stay or set aside execution and may give leave to the defendant to defend the suit on such terms as the court may think fit. The rest of the rules under this Order are not of any importance for our present purposes.

31. On an earnest and careful consideration of the provisions contained in this Order, we find it difficult to hold that a decree passed in a suit brought under these provisions without going into the merits of the case and because the defendant failed to appear or because he was not given leave to defend can be held to be a judgment on the merits of the case. The crucial consideration which persuades us to incline to this conclusion is that, in such a case, there is hardly any consideration of the contentions raised on behalf of the defendant and the judgment happens to be given more as a matter of form or technicality rather than after an investigation of the points involved. We may also draw attention to the fact that this rule does not require a judgment to be delivered but simply lays down that, on the happening of certain events which are mentioned in the rule, the plaintiff, shall be entitled to a decree specified thereunder. We have already referred to the facts and circumstances of this case in so far as they bear on the present question, but we may again emphasize here that the defendants put in their appearance through counsel and asked for leave to defend in the court of

the learned Sub-Judge, Delhi. Defendant Gehrilal filed an affidavit in support of his case. The contention of the defendant was that the plaintiff's case was based on forgery. It was also contended that a blank cheque was given to the plaintiff under certain circumstances which were mentioned in the affidavit. It was further alleged that the cheque was without consideration. This affidavit was filed on the 15th July, 1943. The court thereupon adjourned the case to the 27th July, 1943 calling upon the plaintiff to file a counter-affidavit and the defendants to produce the counter-foil of the cheque alleged to have been forged. On the 27th the defendants did not appear and had sent a telegraphic request for the adjournment of the case. The court took no notice of the request for adjournment and decreed the suit. It is perfectly clear therefore that the court did not apply its mind to the truth or falsity of the plaintiff's case, nor did it decide any of the matters raised by the defendants in their affidavit. On the other hand, the court dismissed the application for leave to defend, and we shall assume that it did so for sound reasons, and so no defence was allowed to be raised. Applying the principles of law which we have enunciated above to the facts and circumstances of this case, we are afraid we are not prepared to hold that the decision of the Delhi court was a decision on the merits of the case. We would therefore hold that the present suit cannot be maintained on the basis of that decision and the plaintiff in order to succeed must establish the alternative of the original cause of action pleaded by him.

31a. The next question to consider is whether the version of the defendants that Chandmal had given a blank cheque to the plaintiff in the circumstances already referred to above is well-founded.

32. But before we deal with this question of fact, we should first like to dispose of an argument which was addressed to us to the effect that as the cheque in suit which was alleged by the defendants to have been given to the plaintiff was a blank one, the burden of proving that the cheque had been executed by the defendant Chandmal lay on the plaintiff. Learned counsel for the defendants placed his reliance in support of his contention on *Pirbhu Dayal Vs. Tula Ram*, ; *Devidas v. Mamooji*, AIR 1924 Nag 103 and *Mirza Gorgam v. Bhola Mal*, AIR 1934 Lah 293 . On the other hand, the plaintiff placed his reliance on *Sahdeo Mauar Vs. Pulesar Nonia*, ; *Jagmohan Misir Vs. Mendhai Dube and Another*, AIR 1930 152 (Nagpur) *J. K. Shaha v. Dulah Meah*, AIR 1939 Ran 334 and *Lakshmamma v. Jayaram*, AIR 1952 Mys 114 in support of the submission that when a signature appearing on a document by a person is admitted to be his, there arises a presumption that he must have executed the document, and that if it is his case that he affixed his signature on a blank paper, then he has to prove that fact. It would be obvious, from a perusal of the rulings cited above that there is a conflict of opinion between the various High Courts on this point. We do not consider it necessary however to examine these cases in detail and would content ourselves by saying that the initial burden of proving the execution of a document when it is denied must rest upon the person alleging its execution. But where a document is admitted to bear a certain signature and it

comes from proper custody, that would, in our opinion, be enough to raise an inference that it was signed with the intention of execution. It seems to us that when a person signs a document, he ordinarily does so with a view to execute it. That is the common course of human conduct in public or private business and such an inference arises u/s 114 of the Evidence Act. Where, therefore, a person having signed a document wants to show that he signed it blank, it is he who relies on an exceptional circumstance, and, therefore, the burden of proving that exceptional circumstance must rest upon him. In any case, we are of opinion that the question of burden of proof in the present case is hardly of any materiality inasmuch as both parties led their full evidence, and the only question for the court to determine is which of the two versions, namely, that put forward by the plaintiff, or the other one by the defendants, is correct. The trial court's finding on issue No. 5 is that the defendants "have miserably failed to prove that they passed a blank cheque and the plaintiff filled in an amount of Rs. 17500/-. It cannot be expected of a shrewd business-man of the type of Shri Chandmal that he would pass a blank cheque to the plaintiff when already a dispute had arisen between his father and the plaintiff regarding the settlement of the accounts. The issue is decided against him". Having been carefully taken through the entire evidence on this point, and having regard to the surrounding circumstances of the case, we are in entire agreement with the opinion of the trial court in this respect. We would now briefly indicate our reasons for the conclusion to which we have come.

33-42. (After stating the reasons and disposing certain factual points his Lordship proceeded.) The next point which arises for determination is whether the finding of the learned trial Judge that the present suit was not maintainable because it was based on an oral award which was an illegal one and therefore the cheque in suit was bad for want of consideration is correct. At the very outset we wish to point out that this plea was not raised by the defendants in their written statement, and the main controversy between the parties was focussed around the question that the cheque given to the plaintiff was not filled for any particular amount and had merely been signed by the defendant Chandmal and passed on to the plaintiff in the circumstances already set out and discussed above, and the only further questions raised were that Section P. Singh had never been appointed as arbitrator to settle the Bikaner partnership account and that in any case Chandmal had no authority to bind his father Gehrilal by anything that he did, and this aspect of the case was not raised at all. Naturally enough therefore there was no issue on this point; but it appears to us that the point was allowed to be raised by the learned trial Judge as it was perhaps considered a question of pure law. The reasoning of the learned Judge is that it was perfectly clear from the evidence of Section P. Singh and O. P. Verma that the award in the present case was in fact an oral one and not in writing, that such an award before it could be enforced must have been in writing according to Section 14 of the Arbitration Act and, therefore, it was invalid and ineffectual and could not form any consideration for the cheque of Rs. 17500/- and consequently

the cheque was without consideration and the present suit could not be decreed on the basis of the cheque so given. We have carefully examined this aspect of the case and we do not find ourselves in agreement with the opinion formed by the learned trial Judge with respect to it.

43. It is true that an oral award is not capable of being enforced according to the scheme and provisions of the Arbitration Act, for the said Act contemplates only a written award, and we consider it unnecessary to cite any authority for this proposition of law which flows directly from the language of Section 14 itself. We should, however, like to point out at this place that there is nothing inherently illegal about a verbal award, but for the statutory requirement that it should be made in writing, and we have not only Indian but English and American cases cited in the books where an oral or a parole award has been held to be good particularly where it has been acted upon. Thus in *Savilappa v. Devchand*, ILR 26 Born 132 Jenkins C. J. observed that an oral award, though undesirable, was perfectly valid. It was again held in *Ram Bilas Singh and Another Vs. Birich Singh and Others*, that where a reference to arbitration is made without the intervention of a court and where writing was not required by the terms of the submission, a parole or oral award is good and will bind the parties. This last-mentioned case, it may be pointed out, arose under para 10 of the Second Schedule of the Code of Civil Procedure. The same view appears to have been adopted in *Tara Prasad Singh and Another Vs. Raja Singh and Others*, and *Thottan Veetan Unni Muhammad Vs. Malayilthoti Mammatheesa's son Marakkarutti and Another*, Again, the same view appears to have been taken in some English cases among which may be mentioned *Judith Hanson v. Liversedge*, (1690) 2 Ven 242 and *Rawling v. Wood*, (1735) Bar 54. As to an instance of an American case illustrating the same view, the case of *Phelps v. Dolan*, 75 III 90 is in point. There is, therefore, nothing inherently illegal about an oral award though standing by itself it may not be enforceable according to the statute law.

44. Besides, where we find it difficult to agree with the learned Judge is that the present suit was brought merely to enforce an oral award as such. The correct position in point of fact seems to us to be that this suit was instituted on the basis of a promissory note which had been given by the defendants to the plaintiff and which was dishonoured by the bank on which it had been made. It is true before the cheque was given, the parties had resorted to arbitration and that arbitration had resulted in what must now be accepted as an oral award. But the matter had not stopped at that and proceeded further, and the defendants had in pursuance of this award given a cheque in favour of the plaintiff. It would be an over-simplification of the entire factual position under such circumstances to postulate of a case like the present that it was brought merely to enforce an award.

That this is the correct position also appears from paragraph (9) of the amended plaint wherein it was said that the cause of action against the defendants

accrued on the 24th February, 1943, this being the date of the cheque in suit, and it was further stated that it also arose on the 27th July, 1943, which was the date of the foreign judgment of the court at Delhi on which the present suit was also based. We might have felt disposed to agree with the learned trial Judge if the present suit had been brought to enforce the oral award which, as we have shown above, has not been so brought, or if the happenings between the parties should have stopped short at the stage the award was given, and nothing further had happened between them in the sense that a cheque for the amount found due by the arbitrator should have fallen to be given by one party to the other. Once the cheque however came to be given by the defendants to the plaintiff, the nature of their liability was substantially changed, and as if a new basis of relationship arose between them, and if we may say so, something in the nature of a novation had taken place which could reasonably serve as a good foundation for a suit by itself.

45. We may point out here that it is admitted between the parties that there was a partnership between them relating to the Bikaner business. It is also admitted that this partnership was dissolved some time in May, 1942. It is further clear that a dispute arose between the parties as to the settlement of the accounts of this partnership business. It also admits of no dispute that the defendants joined the plaintiff in referring this dispute to the arbitration of a single arbitrator. It further appears to us to be beyond the range of any reasonable controversy that so far as this particular partnership business was concerned, the defendants did owe money to the plaintiff, though the exact amount may be in dispute.

46. Then there is a serious controversy between the parties as to the subsequent happenings. The plaintiff's case is that the reference having been made, the arbitrator gave an award in favour of the plaintiff that the defendants should pay him a sum of Rs. 17500/- in complete settlement of the partnership account in question and that the defendants accepted this award and defendant Chandmal gave a cheque for the aforesaid amount to the plaintiff. The defendants dispute the reference and the award and the giving of the cheque, and on all these matters, our finding in concurrence with the trial court is in favour of the plaintiff. The point on which we have disagreed with the trial court is as to the authority of Chandmal to bind his father, and we have held, in disagreement with the finding of that court that Chandmal had such authority. Now in these circumstances it seems to us that it will be going too far to hold, even if the question as to the consideration of the cheque could be raised, that the cheque was not supported by lawful consideration or that the consideration was illegal.

We also wish to point out that, as we look at the matter, it may be one thing to say that an oral award as such is not capable of enforcement in a court of law; but it would be quite a different thing from this to go further and contend that such an award cannot form a good consideration for a negotiable instrument, and particularly where there is independent evidence to show that there was an outstanding account between the parties and it was in settlement of this account

that the award was made and/or the negotiable instrument was given. We should also like to emphasize, even at the risk of some repetition, that we find it extremely difficult to hold in this connection that though it may be correct that an oral award may not be capable of enforcement having regard to the scheme of the Arbitration Act, such an award is illegal and therefore it cannot possibly serve as a good foundation for a promissory-note or a like instrument. No precedent has been cited before us on behalf of the defendants in support of the extreme proposition relied upon by them, and we are not prepared to accept it as correct in the absence of any authoritative decision, particularly because the acceptance of such a view would, in our opinion, be opposed to all considerations of equity, justice and good conscience and in fact the actings of the parties themselves.

Reference may be made in support of this proposition to a decision of their Lordships of the Privy Council in *Mahomed Musa v. Aghore Kumar Ganguli*, AIR 1914 PC 27 where their Lordships upheld the principle that though the Razinama and the decree taken together in that case were defective or inchoate to conclude a valid agreement for the extinction of the equity of redemption, the subsequent actings of the parties may be such as to supply all such defects on the principle that justice, equity and good conscience will support a transaction even though it may be clothed imperfectly after the bargain has been acted upon. The principle of this case, in our opinion, squarely applies to the case before us and we respectfully adopt it. Learned Counsel invited our attention to some cases relating to minors wherein it was held that an agreement with a minor was void and that it could not possibly be revived and constitute a valid consideration for a subsequent contract even after the minor had come of age. See for example, *Firm Bhola Ram v. Bhagat Ram*, AIR 1927 Lah 24. We are clearly of opinion that these cases have no relevance to decide the point which falls for consideration before us. In this state of the law, we are definitely inclined to think that the present suit was and is maintainable on the foundation on which it has been brought and that the mere circumstance that the award in the present case was an oral one, even though it had culminated in the passing of the promissory note in suit, is not an adequate circumstance to non-suit the plaintiff. We hold accordingly.

47. Learned counsel for the defendants in the last resort raised a further contention for the first time in this Court that the plaintiffs suit deserves to be dismissed inasmuch as he had obtained a judgment on the basis of the promissory-note in the foreign court at Delhi and had even proceeded to execute it against the defendants, and, that having elected to do so, he could have no further cause of action on which he could found a fresh suit in the court of the State to which the latter owed their allegiance and which now forms part of this State. The submission was that the plaintiff should not be allowed to approbate and reprobate, and reliance was placed in support of this submission on *Taylor v. Holland* 1902-1 KB 676.

The facts in this case were that the plaintiff obtained a decree against the defendant in 1884 from an English Court for a certain sum of money. Thereafter he instituted an action upon this judgment in a South African Court where the defendant was domiciled. The foreign court declined to enforce the judgment in full but gave a decree for a lesser sum including interest on the original cause of action. The plaintiff then proceeded to sequestration and ultimately obtained the last-mentioned amount in full. Thereafter in 1900, the plaintiff brought an action in England to recover the balance from the defendant which had remained due under the original judgment. This action was dismissed, *inter alia*, on the ground that the plaintiff having elected to take the foreign judgment in discharge of his whole cause of action, he could not afterwards sue for the residue of the original debt in England, and Jelf, J. observed that to allow him to do so "would be to approbate and reprobate, or, in more homely language, to blow hot and cold, which neither law nor common sense will allow." Reliance was placed in arriving at this conclusion on the dictum of Erle, C. J. in *Barber v. Lamb*, (1860) 29 LJ CP 234 that

"it would be contrary to all principle for the party who has chosen such tribunal and got what was awarded to seek a better judgment in respect of the same matter from another tribunal".

With all respect, the case of 1902-1 KB 676 appears to us to be clearly distinguishable on facts inasmuch as the plaintiff had not only taken sequestration proceedings against the defendant in the South African Court but the sum decreed by the court in that country was paid to the plaintiff in full by the curators under the defendant's sequestration and insolvency, and the defendant was released from all debts claimable against his estate. In other words, the plaintiff had elected to take the judgment of the foreign court whose jurisdiction he had invoked in discharge of his whole cause of action and, therefore, it was held that he could not afterwards sue for the residue of the debt in England and that he could not be allowed to treat the judgment which the foreign court had given for the whole cause of action as a part payment and sue for the residue in the courts in England. In the case before us, it is true that the plaintiff did obtain a decree against the defendants in the foreign court for Rs. 17500/- with costs and future interest; but he had only been able to recover a sum of Rs. 20/- from the defendants, and it is nobody's case that the rest of the amount was recovered from them. In these circumstances, we are unable to see any valid reason why the plaintiff should be debarred from recovering it by a fresh suit either based on the foreign judgment or on the original cause of action as the case may be, and of such a case it can hardly be postulated with any justification that the plaintiff was approbating as well as reprobating and he could not be allowed to do so. Again, the principle is well settled that a valid foreign judgment does not by itself extinguish the original cause of action in respect of which the judgment was given; but such a judgment is, according to the principles of Private International Law, treated as enforceable on the doctrine that where a court of competent jurisdiction has adjudicated that a certain sum

is due from one person to another, a legal obligation arises to pay that sum on which the action to enforce the foreign judgment can be maintained. That being so, we see no valid reason why the present suit for the balance of the unrecovered amount could not be brought in the courts in this State in spite of the foreign judgment. The principle is too firmly established by the decisions of the courts to admit of any doubt or dispute that a foreign judgment does not extinguish the original cause of action, and, therefore, a plaintiff who has recovered a judgment against a defendant for a debt may either bring an action on the judgment or he may, if he chooses, bring an action based on the original debt, and we are aware of the criticism of some jurists that this rule is an illogical anomaly. See Dicey's Conflict of Laws (Sixth Edition) page 410. But where the foreign judgment has not been fully satisfied and the entire cause of action which the plaintiff had does not become extinguished, we see no valid reason why we should not give effect to the rule, which, as I have pointed out above, is firmly established by the decisions of the various courts in this country and the courts in England. Consequently, we hold that the present suit for the balance of the unrecovered amount can certainly be maintained and we overrule the defendants' contention on this score also.

48. For the reasons mentioned above, we, therefore, partly allow this appeal, set aside the judgment and decree of the trial court and decree the plaintiff's suit for Rs. 17480/-. We also allow interest on this amount from the date of the promissory note, that is the 24th February, 1943, up to the date of realisation at six per cent per annum simple. The rest of the plaintiffs claim will stand dismissed. As to costs, we think that the interests of justice would be fully satisfied if we allow the plaintiff three-fourths of the costs incurred by him in this Court as well as the court below and that the defendants should bear their own costs throughout. We order accordingly.