

A **THE NATIONAL BANK OF NEW ZEALAND LIMITED**

v.

PAUL FREEMAN

B [SUPREME COURT—Kermode, J. 5 May, 1981]

Civil Jurisdiction

C *D. J. Williams* for the Plaintiff
H. Lateef for the Defendant

Foreign judgment not registrable in Fiji against a resident of Fiji unless defendant submitted to Foreign country or at time a resided or carried on business in the Foreign country.

D A foreign Judgment might not be registered in Fiji against a resident of Fiji unless the judgment debtor had submitted or agreed to submit to the Foreign court or at the time the plaintiff commenced action in the Foreign Court the judgment debtor carried on business or ordinarily resided in the Foreign country.

E Application to set aside registration of a judgment of the Supreme Court of New Zealand for the sum of (Fiji) \$11,622.01 dated 3 March, 1980 in favour of the plaintiff.

The application was made pursuant to the Reciprocal Enforcement of Judgments Rules. The Supreme Court can set aside a judgment so registered on grounds set out in Reciprocal Enforcement of Judgment Act Cap. 24 (the Act).

F The applicant sought to set aside the registration.

The only ground of "any substance" as the trial Judge found was set out in defendant's affidavit paragraph 2 thus—

G "I have lived and worked in Fiji since 1978 and since then have not returned to New Zealand at all. I have not carried on any business in New Zealand for the last 3 years and am not ordinarily a resident of that country. I did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the Supreme Court of New Zealand."

Section 3(2) of the Act provides—

H "No judgment shall be ordered to be registered under this section if—

(a)

(b) the judgment debtor being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court did not

voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court.....”

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An affidavit filed on behalf of the plaintiff did not refer to the defendant's affidavit—i.e. the paragraph 2 above quoted was not challenged. The affidavit in paragraph 12 stated—

“That I believe that in the light of the foregoing, particularly having regard to the fact that the Judgment Debtor is a New Zealand National and resided in New Zealand at all material times when dealing with the Bank, and whose transactions with the Bank were wholly conducted within the internal Banking System of New Zealand, that it is necessarily implicit that the Plaintiff Company and the Judgment Debtor as a customer contemplated that any litigation arising out of the dealings of the Plaintiff Company as Banker and the Judgment Debtor as customer would be litigated and dealt with in the New Zealand Courts.”

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Dicta quoted from *Sirdar Gurdyal Singh v. The Rajah of Faridkote* (1894) A.C. 670 suggested that “a plaintiff must sue in the court to which the defendant is subject at the time of the suit.”

In the same case, a passage following that quoted stated—

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“Territorial jurisdiction attaches.....upon all persons either permanently or temporarily resident within a territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are.....in another independent country.”

Further dicta indicated that, in circumstances they referred to, a decree pronounced in absentem by a foreign court to the jurisdiction of which the defendant had not in any way submitted himself, is by international law, a nullity.

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The Fiji Reciprocal Enforcement of Judgments Act, however, enabled a plaintiff who had obtained a judgment in a superior court in New Zealand to register it as a judgment of the Supreme Court if it complied with the legislation.

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Held: Facts disclosed by affidavit evidence filed on behalf of the plaintiff did not establish that while resident in Fiji defendant he had submitted himself or agreed to submit to the New Zealand Court.

The description of the defendant in the New Zealand judgment made it clear that at the time of the writ though he was formerly of Auckland he was then “of Suva, Fiji”.

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On the evidence at the time the plaintiff commenced action in New Zealand, the defendant was “neither carrying on business nor ordinarily resident within the jurisdiction” of the New Zealand Court. The judgment should not have been registered in Fiji.

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The registration of the judgement was set aside.

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Case referred to:

Sirdar Gurdyal Singh v. The Rajah of Faridkote (1894) A.C. 670.

KERMODE, J.

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Decision

On the 5th of August, 1980, this Court ordered that the judgment dated the 3rd March, 1980, of the Supreme Court of New Zealand whereby it was adjudged that the above named plaintiff do recover against the above named defendant the sum of \$NZ14,417.44 (equivalent to Fiji \$11,622.01) be registered as a judgment of the Supreme Court of Fiji pursuant to the provisions of the Reciprocal Enforcement of

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Judgments Act Cap. 24.

Notice to the defendant of registration of this New Zealand judgement in the Supreme Court of Fiji was served on him on the 26th August 1980.

Pursuant to Rule 13 of the Reciprocal Enforcement of Judgments Rules the defendant has now applied to set aside registration of the judgment.

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The defendant in his affidavit filed in support of his application states three reasons why the registration of the judgment should be set aside. Two of such reasons are of no substance.

The first is the defendant's statement that he does not recall being served with the writ of summons in the New Zealand action. He does not state positively that he was not served. I am satisfied by the affidavit of Mr Ponipate Sarai of Nasinu, Process Server, that the defendant was personally served with the writ and statement of claim on the 26th August, 1980.

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The other reason is the defendant's statement that he does not owe the plaintiff the sum stated in the judgment. The New Zealand Court gave judgment for the sum claimed by the plaintiff and if the judgment is in any way defective the defendant has his remedies and can move to set aside the judgment in New Zealand. He has in his affidavit indicated that he will be moving to have the New Zealand judgment set aside but he has not satisfied the Court that he will move to do so. Under the Act, this Court can only refuse to register a foreign judgment or set it aside, if it is registered, on one of the 6 grounds stated in subsection (2) of section 3 of the Act. The defendant's second reason does not fall within the subsection.

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The only ground of any substance advanced by the defendant is contained in paragraph 2 of his affidavit on which he states as follows:

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"I have lived and worked in Fiji since 1978 and since then have not returned to New Zealand at all. I have not carried on any business in New Zealand for the last three (3) years and am not ordinarily resident of that country. I did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the Supreme Court of New Zealand."

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Subsection (2)(b) of section 3 of the Act provides:

"(2) No judgement shall be ordered to be registered under this section if—
(a) (not relevant.)"

(b) the judgment debtor being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court; or”

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Paragraphs (c) to (f) both inclusive do not have to be considered.

At the hearing of this application an adjournment was granted to enable the plaintiff to file an affidavit. An affidavit by Mr D. J. Gubb, an officer of the plaintiff Bank, setting out the history of the transaction between the parties was duly filed.

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The affidavit does not refer to the defendant’s affidavit at all. Paragraph 2 of the defendant’s affidavit has not been answered and remains unchallenged.

Paragraph 12, however, of Mr Gubb’s affidavit endeavours to advance reasons why the registration should not be set aside. It reads as follows:

“That I believe that in the light of the foregoing, particularly having regard to the fact that the Judgment Debtor is a New Zealand National and resided in New Zealand at all material times when dealing with the Bank, and whose transactions with the Bank were wholly conducted within the internal Banking System of New Zealand, that it is necessarily implicit that the Plaintiff Company and the Judgment Debtor as customer contemplated that any litigation arising out of the dealings of the Plaintiff Company as Banker and the Judgment Debtor as customer would be litigated and dealt with in the New Zealand Courts.”

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D

In the Privy Council case of *Sirdar Gurdyal Singh v. The Rajah of Faridkote* (1894) A.C. 670 the Earl of Selbourne in delivering the judgment of their lordships quoted a statement by Blackburn J. from that learned Judge’s judgment in *Schibsby v. Westenholz* (Law Rep. 6 Q.B. 161) which in isolation would appear to support the plaintiff’s argument. He stated:

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“If, at the time when the obligation was contracted, the defendants were within the foreign country but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though before deciding this, we should like to hear the question argued”.

Their lordships considered this statement and at p.686 of their judgment stated:

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“.....Upon the question itself which was determined in *Schibsby v. Westenholz* Blackburn, J., had at the trial formed a different opinion from that at which he ultimately arrived; and their Lordships do not doubt that, if he had heard argument upon the question, whether an obligation to accept the forum loci contractus, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion, that such obligation, unless expressed, could not be implied.”

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Their lordships at page 683 (omitting the several Latin references) stated the general rule.

“.....that the plaintiff must sue in the Court to which the defendant is subject at the time of suit which is rightly stated by Sir Robert Phillimore to be at the root

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A of all international and of most domestic jurisprudence on this matter. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within a territory *while they are within it; but it does not follow them after they have withdrawn from it, and when they are being in another independent country*", (the emphasis is mine)

Their lordships in Sirdar Gurdyal Singh's case had only to consider the general rule and international law. They stated at p. 684:

B "In a personal action to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law a nullity."

C The Fiji Reciprocal Enforcement of Judgments Act, however, by statute enables a plaintiff who had obtained a judgment in a superior Court in New Zealand to register that judgment as a judgment of the Supreme Court if he complies with the provisions of the Act and the Rules made thereunder. The Act can give validity to the judgment under consideration which would otherwise be a nullity in Fiji.

The facts disclosed by Mr Gubb do not in my view establish that while resident in Fiji outside the jurisdiction of the New Zealand Court he submitted or agreed to submit to the jurisdiction of that Court.

D What has to be considered is paragraph (b) of section 3(2) of the Act.

It is clear from the description of the defendant in the New Zealand Supreme Court judgment that the defendant was at the time of the issue of the writ "formerly of Auckland, now of Suva, Fiji, Company Director".

E On the evidence before me, at the time the plaintiff commenced action in New Zealand, the defendant "was neither carrying on business nor ordinarily resident within the jurisdiction" of the original Court.

I do not consider the facts stated by Mr Gubb refute the defendant's sworn statement that he "did not voluntarily appear or otherwise submit to the jurisdiction" of the Supreme Court of New Zealand.

F The defendant has satisfied me that the judgment should not have been registered here and that the Court, had it been aware of the facts now before it, was precluded by section 3(2)(b) from registering it.

G I am not presently familiar with the New Zealand Supreme Court practice in recording a default judgment. If the judgment had been this Court's judgment the opening words of the New Zealand judgment "The Defendant not having filed a Statement of Defence herein....." could indicate that an Appearance had been filed by the defendant but not a Statement of Defence.

The plaintiff has not referred to the defendant having entered an Appearance to the writ. Had the defendant done so, and the plaintiff established that fact no clearer indication could have been given by the defendant that he had voluntarily "appeared" within the meaning of that term in the Act thereby submitting to the jurisdiction of the New Zealand Court.

H The registration of the judgment is set aside with costs to the defendant.

Judgment set aside.