the suit against the party in default; the decision has to be on the merits. It also contemplates that the act referred to in the rule must be necessary to the further progress of the suit. In the present case the amendment of the petition was hardly necessary for the further progress of the trial of the original election petition; the trial of the unamended petition could in any case proceed without the amendment. In the second place, the learned Tribunal had to decide the election petition on merits and not necessarily to dismiss it merely because the costs had not been paid. (See in this connection *Rahman* v. *Ahmad Din* (1).

I. D. Dua, J.

In view of what has been stated above, the appeal must be allowed and the order of the learned Election Tribunal dismissing the election petition set aside. The trial of the election petition as amended, will have to proceed from the stage when it was dismissed by the learned Election Tribunal. The appellant is entitled to have his costs in this Court.

The appellant is said to have deposited security for costs of this appeal under section 119-A of Act No. 43 of 1951. He is entitled to get back the security in accordance with law.

FALSHAW, J.—I agree.

B. R. T.

Falshaw, J.

APPELLATE CIVIL

Before D. Falshaw and I. D. Dua, JJ.

FIRM TIJARATI HINDU JOINT FAMILY KESAR DAS RAJAN SINGH,—*Defendants-Appellants.*

versus

SETH PARMA NAND,—*Plaintiff-Respondent.*

Regular First Appeal No. 60 of 1951.

1958

Nov., 6th

Code of Civil Procedure (V of 1908)—Section 13(b)—"Where it has not been given on merits of the case"—Interpretation of—Suit dismissed in a foreign Court for non-production of document—Whether constitutes decision on

(1) A.I.R. 1926 Lah. 571.

merits and whether a fresh suit on the same cause of action is barred.

Held, that the words "Where it has not been given on merits of the case" in sub-section 13(b) of the Code of Civil Procedure, relating to a foreign decision must be interpreted liberally and must mean that there has been some pronouncement on the merits of the respective parties' case and a decision thereon. The sub-section refers to those cases where, for one reason or another, the controversy in the action has not, in fact, been subject of direct adjudication by the Court.

Held also, that an order dismissing a suit at a preliminary stage for non-production of a document by the plaintiff, before even a written statement has been filed by the defendant and without the framing of any issues, cannot be said to be a judgment dismissing a suit on merits and a fresh suit on the same cause of action is not barred if the judgment is "foreign".

Keymer *v*. Visvanatham Reddi (1), relied upon.

First appeal from the decree of Shri Tirath Das Sehgal Senior Sub-Judge, Karnal, dated the 31st day of January, 1951, granting the plaintiff a decree for Rs. 12,280 with costs against the defendants and directing that a copy of the decree would be sent to the Collector for realising the court-fee.

D. N. AWASTHY with N. N. GOSWAMI, for Appellants.
F. C. MITTAL and S. C. MITTAL, for Respondent.

JUDGMENT

Falshaw, J. FALSHAW, J.—This is an appeal by joint Hindu family firm Kesar Das-Rajan Singh against a decree passed by a Court at Karnal for Rs. 12,280 and costs in favour of the respondent Seth Parma Nand.

The suit was instituted by Parma Nand in August, 1949 for the recovery of Rs. 10,000 as

(1) I.L.R. 40 Madras 612.

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principal and Rs. 2,280 as interest on the basis of a pronote executed by two members of the defendant firm, Rajan Singh and Kesar Das, on the 25th of January, 1947 at Bannu (N.W.F.P.) where the parties then resided and carried on business. In a statement made by Rajan Singh defendant before issues were framed, the execution of the pronote by himself and his father Kesar Das was admitted, and it has never been pleaded that the pronote was without consideration. Apart from one or two technical points which have not now been pressed, the defence was based entirely on the following facts. The plaintiff instituted a suit based on this very pronote and claiming the sum then due under it in the Court of the Senior Subordinate Judge, at Bannu on the 29th of July, 1947. This suit was dismissed by Mr. Daood Khan by his order dated the 30th of October, 1947, which reads—

> "Counsel for the plaintiff is present. Counsel for the defendants is also present.
>
> In compliance with the previous order, the plaintiff's counsel has not so far produced the original pronote for perusal of the defendants. On the other hand he has produced a telegram stating that the plaintiff cannot produce the pronote either through post or a particular messenger. The plaintiff should have handed over the pronote to his counsel or some agent. There does not exist any solid ground for further adjournment. Under Order 11, rule 15, Civil Procedure Code, the plaintiff not having now produced the pronote, he will not be allowed to produce it in this case. For this reason, as the present suit is on the basis of the said pronote, the plaintiff will not even be able to prove it in any other manner. Under these circumstances, until the original pronote is produced, we

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cannot pursue this suit any further. Hence, this suit is dismissed with costs under Order 17, rule 3, Civil Procedure Code."

The defendant's case is that this order dismissing the plaintiff's suit based on the same pronote on which the present suit is based constitutes a bar to the present suit by res judicata.

It is, however, clear that whatever the position may have been on the 29th of July, 1947, when the plaintiff instituted a suit at Bannu, Pakistan had become a separate and independent country by the 30th of October, 1947, when the suit was decided and the judgment is, therefore, a judgment of 'foreign' Court. It is, therefore, governed by the provisions of section 13, Civil Procedure Code, which reads—

> "A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties under whom they or any of them claim litigating under the same title except—
>
> (a) Where it has not been pronounced by a Court of competent jurisdiction;
>
> (b) where it has not been given on the merits of the case;
>
> (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
>
> (d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in India."

Falshaw, J.

In the present case the judgment of the Bannu Court was held not to bar the present suit on the grounds contained in clauses (b) and(d) or, in other words, because the decision of the plaintiff's suit was not on the merits of the case and because the proceedings were opposed to natural justice.

It may be stated at this stage that the plaintiff's case on the facts, which I see no reason for doubting, was that by the time the suit was heard he had fled to India on account of the communal situation and that the telegram referred to in the order of the Bannu Court was sent by him to his counsel from Hardwar pointing out that under the circumstances it was not possible for him to send the pronote in suit to his counsel either through postal channels or by the hand of any messenger.

It seems to me that on both points the decision of the lower Court was correct. Order 17, rule 3, Civil Procedure Code, is in the following terms—

"Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

There is no doubt that decisions under this rule may generally be decisions on the merits, and in

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fact the intention seems to be that on the default of a party the Court may proceed to decide the suit on the available material. It does not, however, seem to me that an order dismissing a suit at a preliminary stage for the non-production of a document by the plaintiff, before even a written statement has been filed by the defendant, and without the framing of any issues, can be said to be a judgment dismissing a suit on the merits. It is in fact clear in the present case that the defendants were temporising and were intending to file a written statement only after they had seen the pronote; and were perhaps counting on the fact that its production was going to be difficult.

Some cases have been cited on behalf of the appellant in which orders under Order 17, rule 3, have been held to be orders on the merits and a bar to subsequent suits, but these were purely domestic matters and in none of the cases was there any question of the judgment of a 'foreign' Court. To my mind the words "where it has not been given on the merits of the case" relating to a foreign decision must be interpreted liberally, and must mean that there has been some pronouncement on the merits of the respective parties' cases and a decision thereon. This view derives considerable strength from the decision of their Lordships of the Privy Council in *Keymer* v. *Visvanatham Reddi* (1). The facts in that case were that the appellant had brought suit against the respondent in the Court of King's Bench in London for the recovery of a certain sum of money alleged to be due as a result of some business transactions. The defendant contested the claim, but refused to answer certain interrogatories which the plaintiff was allowed to exhibit calling on the defendant to speak as to some of the material

(1) I.L.R. 40 Madras 112.

matters in dispute, and the defence was thereupon ordered to be struck out, and the defendant to be placed in the same position as if he had not defended. The plaintiff was then granted a decree, on the basis of which he proceeded to file a suit against the defendant in Madras. The defendant adopted the position that the judgment between him and the plaintiff in the English Courts had not been judgment given on the merits of the action and that consequently by virtue of section 13(b), Civil Procedure Code, the action could not be maintained on the judgment alone in the Indian Court and that the merits would have to be investigated. This was the question before their Lordships and it has been dealt with in the following passage at page 115:—

> "The whole question in the present appeal is whether, in the circumstances narrated; judgment was given on the 5th May, 1913, between the parties on the merits of the case. Now, if the merits of the case are examined, there would appear to be, first, a denial that there was a partnership between the defendant and the firm with whom the plaintiff had entered into the arrangement, secondly, a denial that the arrangement had been made, and, thirdly, a more general denial, that even if the arrangement had been made the circumstances upon which the plaintiff alleged that his right to the money arose had never transpired. No single one of those matters was ever considered or was ever the subject of adjudication at all. In point of fact what happened was that, because the defendant refused to answer the interrogatories which had been submitted to him,

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the merits of the case were never investigated and his defence was struck out. He was treated as though he had not defended, and judgment was given upon that footing. It appears to their Lordships that no such decision as that can be regarded as a decision given on the merits of the case within the meaning of section 13, sub-section (b). It is quite plain that that sub-section must refer to some general class of case, and Sir Robert Finlay was asked to explain to what class of case in his view it did refer. In answer he pointed out to their Lordships that it would refer to a case where judgment had been given upon the question of the Statutes of Limitation, and he may be well founded in that view. But there must be other matters to which the sub-section refers, and in their Lordships' view it refers to those cases where, for one reason or another, the controversy raised in the action has not, in fact, been the subject of direct adjudication by the Court."

In the present case, as I have said, the due execution of the pronote has been admitted by the defendants and it has not been denied that consideration was received, but these matters had not been touched on at all in the judgment of the Court at Bannu, which dismissed the suit because the plaintiff had not produced the pronote when called on to do so by the Court for the inspection of the defendants.

Apart from this it appears to me that the summary dismissal of the suit in this manner offends

the principles of natural justice in that the plaintiff had fled to India in October, 1947 it was certainly not practicable either for him to send pronote to his counsel at Bannu through the post, or to go there in person with it or to send it through any messenger from this side, and in such circumstances the refusal to allow any further adjournment for the production of the pronote appears to me to be extremely harsh and arbitrary. I thus see no reason to interfere and would accordingly dismiss the appeal with costs.

Dua, J.—I agree.

K. S. K.

APPELLATE CIVIL

Before D. Falshaw and I. D. Dua, JJ.

SHRIMATI BUI,—*Defendant-Appellant.*

versus

GANGA SINGH AND OTHERS,—*Plaintiffs-Respondents.*

Regular Second Appeal No. 247 of 1950.

1953

Nov., 6th

Custom—Amritsar District—Acquired property—Sister—Whether entitled to succeed as against collaterals— Riwaj-i-am—*Questions and answers in—Whether relate to ancestral property—Rattigan's Digest of Customary Law—Para 24—Whether applies to Hindus and Muhammandans.*

Held, that the sister under the Customary Law of Amritsar District as also under the general custom is entitled to succeed to acquired property of her brother in preference to collaterals.

Held, that the questions and answers in the *Riwaj-i-am* deal with ancestral property and are of no avail as regards the acquired property.