chaprasis did not attempt to arrest him. I therefore accept the reference, set aside the conviction and sentence of the accused and direct his immediate release.

1916

EMPEROR v. AJAZ HUSAIN.

Conviction set aside.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Muhammad Rafiq.

1916 *May*, 26.

DHANRAJ SINGH AND OTHERS (DEFENDANTS) *v.* LAKHRANI KUNWAR (PLAINTIFF.)*

Decree for possession—Decree-holder obtaining possession of the property without executing the decree—Subsequent dispossession—Maintainability of a fresh suit—Doctrine of merger where applicable.

The doctrine of merger does not apply to a decree for ejectment. If a party obtains a decree for a debt or for damages for tort, the original cause of action merges in the decree, but a decree in ejectment differs very much from other decrees.

Plaintiff obtained a decree for possession of certain immovable property which she did not put into execution for over three years, but had obtained actual physical possession over the property. She was subsequently dispossessed and brought a suit for possession.

Held, that as she had been in actual possession of the property, a fresh cause of action had accrued and her suit was maintainable being within twelve years of such dispossession.

Quaere, whether a suit is maintainable upon a decree when the execution of it has become time-barred.

THIS was an appeal under section 10 of the Letters Patent from the following judgement of a single Judge of this Court in which the facts of the case are fully set forth :—

"This appeal raises at least one very interesting question of law, about which I feel considerable doubt, but I do not think I should gain anything by taking time to consider my judgement. I am glad to think that my decision can be reviewed, if so desired, under the Letters Patent.

"The action is brought by the plaintiff for possession of certain property which belonged to her husband as a separated Hindu. Her husband died in 1904. She brought a suit for possession against the defendant in 1907 and succeeded in the first court. That judgement was affirmed by the appellate court in November, 1907. The defence had been that the land had been given orally to the defendant by the plaintiff's husband. That defence failed. It was also alleged that the defendant had been in continuous possession since 1896, but of course that would have given the defendant no right in itself. The judgement

* Appeal No. 7 of 1916, under section 10 of the Letters Patent.

1916

DHANRAJ SINGH v. LAKHRANI KUNWAR.

of the appellate court was appealable to the High Court, but was not appealed against. That is a decision between the present plaintiff and the present defendant that the plaintiff was entitled to the property in question and was also entitled to immediate possession in 1907. The question of title, therefore, between the parties is *res judicata*. The plaintiff applied for execution of the decree which had been given in her favour in the court of first instance, in September, 1913. That application was not unnaturally rejected by the Munsif on the 10th of January, 1914, on the ground that it was made more than three years after the decree and was therefore time-barred. Between 1907 and 1913 something appears to have happened to which I will refer later in my judgement. Upon her application being thus rejected, the plaintiff brought this suit on the 26th of February, 1914, and obtained a decree for possession in her favour on the 28th of April, 1914, in the Munsif's court. That decision was reversed in appeal by the District Judge on the 8th of June, 1914, and from that latter decision this appeal is brought.

"Now the plaint in this suit undoubtedly alleged a cause of action founded upon the decree of 1907. It also alleged, for some reason or another, a right of action accruing in 1905. That was clearly wrong because any cause of action anterior to the judgement of 1907 was merged in the judgement. It also alleged in paragraph 2 that the plaintiff could not obtain possession within three years of the decree, and it did not allege that the plaintiff had in fact been in possession at any time between 1907 and the commencement of this suit. So that when the case came before the court of first instance, the sole cause of action alleged, which the defendants had any reason to anticipate would be urged against them, was the previous decree. However, as appears from the judgement of the learned Munsif and from the extracts of evidence read by the respondent's counsel to me, it happened that during the hearing of the suit, five days prior to the decision, a witness gave evidence that the plaintiff had been in possession of the land in dispute a year after the decree, viz. in 1908. It is perfectly true, as I have pointed out, that no reliance had originally been placed by the plaintiff upon that fact. It must have taken the defendants and their pleaders by surprise, and it was clearly a matter in which in justice to the defendants (if the defendants and their pleaders had desired it) they ought to have been given any further opportunity which they reasonably asked to meet that further allegation. They do not appear to have done so, but one of the defendants Dharam Singh himself went into the witness-box and contradicted the witness. The learned Munsif was unable to accept the evidence of this defendant and gave excellent reasons for accepting the evidence given by the witness to whom I have referred, and he held as a fact, after hearing the evidence on both sides on a point, which, as I have said, had not been raised in the plaint, that the plaintiff had been in possession of the land within twelve years, viz. in 1908. In my opinion if that happened it was a satisfaction of the decree and a fresh cause of action would accrue to the plaintiff, if at any time, subsequent to that, the defendants retook possession. It was alleged by the same witness to whom I have referred, called by the plaintiff, that the defendants did retake possession, although that statement does not

appear in the learned Munsif's judgement, but was read to me by the respondent's counsel. Now there are cases, no doubt, in which parties are taken by surprise and in which it is unjust to allow their rights to be defeated by proof of matters which are not alleged and which they have no opportunity of meeting. On the other hand, it is undesirable in the interests of justice, where no injustice will otherwise be done to anybody, that a court should wilfully shut its eyes to relevant facts which are proved in the course of the hearing, raising cognate, though different, cause of action to that originally relied upon by the plaintiff. Everybody knows that it may occur that in the early stages of a case, the facts are not known to the pleader who draws out the plaint, and every risk of injustice can be avoided by allowing an adjournment, by raising the point on appeal, or by penalizing the successful party in costs. In this particular case the defendants appealed. Upon the hearing of the appeal it was open to them to raise any question of law or to point out to the appellate court any unjust consequences which had ensued to them arising out of the admission of the evidence to which I have referred and the finding at which the learned Munsif arrived. They advanced six grounds of appeal, but they took no point about this alleged injustice. The finding of fact to which I have referred is not dealt with at all in the judgement of the lower appellate court and must be taken, therefore, not to have been overruled. It, therefore, stands as a finding of fact by which I am bound, as to which it would be a great misfortune, in my opinion, if I were not entitled to take notice of it, and which, in my opinion, entitled the plaintiff to succeed. I do not think that, under the circumstances of the case, I should be doing right if I sent the case back or referred any further issue on this point. On that single ground therefore I allow this appeal and give judgement for the plaintiff. To put the matter in right form. I re-settle an issue under order XLI, rule 24, to the following effect:—"The plaintiff while in possession of the land in question in 1908, was wrongfully dispossessed by the defendant," and I hold that the plaintiff is entitled to succeed on that ground.

"There is, however, another point to which I have already referred which is raised by this appeal, namely, even if the plaintiff was not entitled to have the fact of physical possession in 1908, found in her favour in this suit and to recover judgement upon her dispossession, whether she is not entitled to sue as she originally did, and to succeed, upon the decree of 1907. That is a question which is by no means free from difficulty. There has been a considerable amount of discussion upon it in one form or another and some divergence of judicial opinion, but I do not think it desirable to go at length through all the decisions on the point. I would first refer to a decision by WILSON, J. in *Attermoney Dossee* v. *Hurry Doss Dutt* (1) which commends itself to my judgement and to certain observations contained in a recent judgement of two Judges of the Calcutta High Court, *viz.*, *Kali Charan Nath* v *Sukhoda* (2). Most, if not all, of the cases are set out in that judgement. The passage in *Sundari Debi* to which I would refer is at the end of the judgement on page 62 being a passage cited from the judgement Baron Parke in *Williams* v. *Jones* (3):—"The

(1) (1881) I. L. R., 7 Calc., 74. (2) (1915) 20 C. W. N., 58.

(3) (1845) 13 M. and W., 628.

1916

DHANRAJ SINGH v. LAKHRANI KUNWAR.

principle is that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgement may be maintained." The Calcutta High Court goes on to say:—"No mischief can result from the acceptance of this principle, if it is adopted, subject to the qualification recognized in modern English Law, *viz.* that an action is permissible only where the judgement cannot be enforced in some other way." The only other case I need refer to is a decision of the Chief Justice of Bombay in *Manchharam Kalliandas* v. *Bakshe Saheb* (1). In that case the Chief Justice appears to me to have recognized the principle that judgements and decrees may be sued upon when it is the only practicable remedy open. Now I take my stand upon the broad principle that a judgement, certainly in a contract case, I think in all cases, is a contract of record By the comity of nations most countries recognize the judgements of foreign countries and give effect to them by allowing suits to be brought upon them provided they are delivered by courts of competent jurisdiction acting within that jurisdiction and lay down no principle repugnant to the policy of what I may call the domestic country. It would appear that domestic judgements ought to have at least the same force as foreign judgements. It would also appear from a decision which was much relied upon by the respondent's counsel, *viz.* *Fakirapa* v. *Pandurangapa* (2) that countless actions have been brought at any rate in Bombay on Small Cause Court judgements or decrees. It is, therefore, as it seems to me, difficult to hold that a suit, upon domestic judgement of some kind or another, is not cognizable under the Code in this country. Some limit of course there must be and it is obvious that whichever way this case is decided there must be some conflict of what I may call equitable doctrines.

The period for enforcing a decree by article 182 of Act IX of 1908 is three years and it is urged with great force that to give effect to a suit upon a decree which is brought within 12 years under article 122 is directly in conflict with article 182. On the other hand to refuse to give effect to a suit upon a decree for the recovery of possession of land after the expiration of three years would be in conflict with article 122 and also, as was pointed out by the appellant's counsel, with section 28 of the Limitation Act. It is not immaterial that the Limitation Act itself in article 122 recognizes—of course it does not enact—the admissibility of judgements obtained in British India as a cause of action under the Code. Mr. *Agarwala* for the respondents argued with great force that there was a wide distinction between a judgement and a decree. So there, of course, is. I am of opinion that the word judgements contained in article 122, means 'decrees.' The word "obtained" is not really applicable to the reasons which a judge gives in his judgement; it is more applicable to the decree which a successful party gets in his favour and it appears that in two places in section 5 of the Limitation Act the word 'judgement' is used in the sense in which decree is defined by the Civil Procedure Code. Now the question still remains whether there is anything in the Code itself which indicates that such suits are not admissible in this country. Before I refer to the sections

(1) (1869) 6 Bom., H. C. R., 231 (234). (2) (1888) I. L. R., 6 Bom., 7.

which are relied upon I would observe, what I have already pointed out, that if the Code did contain anything expressly or impliedly excluding from the consideration of the courts in this country suits upon decrees then for many years past, some, if not all, of the High Courts in this country, have been decreeing suits upon decrees without any jurisdiction at all. The first section relied upon is section 11 and at first sight it would seem clearly to prohibit the relitigation of any question which had already been determined in any suit, that is to say, it seems to me to go further than the principles of *res judicata* founded upon the *Duchess of Kingston's* case, and reads as if no party not even a plaintiff can sue upon any matter which has been determined. I think the answer is that the plaintiff in such a case as this is not suing upon the same cause of action, he is alleging that he has obtained a decree and that defendant is under a legal obligation to him under that decree and that obligation arises out of matters subsequent to those litigated in the original suit. A decree determines questions between parties in litigation at the commencement of the suit, the plaintiff here is relying upon something in his favour at the end of the suit and independent of the question originally litigated. Indeed questions orginally litigated cannot be reconsidered in the suit upon the decree and that is all that section 11 provides.

"Section 12 was also relied upon and I therefore refer to it, but it is obvious that it relates only to cases where the plaintiff is in default under the rules contained in the schedule, or has brought a suit and has been non-suited, and it does not bear upon the question now before me.

"Lastly, section 47 has been relied upon, and indeed it has been in many judgements dealing with this matter a prominent subject of discussion under the name of section 244 of the old Code. As the section now stands it reads:—"All questions arising between the parties to the suit in which the decree was passed and relating to execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit." To my mind the question whether a judgement can be sued upon in a court of co-ordinate jurisdiction or not, is a totally different question to those which are dealt with by this section. Such a suit does not and could not relate to the execution, discharge, or satisfaction of a decree and with great respect to the Judges who have dealt with this question, this section in my opinion, has nothing whatever to do with a suit of the present nature. Finding therefore nothing in the Code which prohibits the entertainment of such a suit, and finding that suits have been entertained over and again in one form or another, and finding that the period for enforcing this decree has expired and that therefore the plaintiff has no other practicable remedy, I think the plaintiff was entitled to bring the present suit on the second ground as well. I therefore allow this appeal, set aside the decree of the lower appellate court and restore that of the court of first instance. The plaintiff will get her costs in all courts."

Babu *Girdhari Lal Agarwala*, for the appellants.

Dr *Surendro Nath Sen*, for the respondent.

1916

DHANRAJ SINGH v. LAKHRANI KUNWAR.

RICHARDS, C.J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit for possession of certain immovable property. The plaintiff obtained a decree for possession of this very land in 1906. On appeal this decree was confirmed. Admittedly the plaintiff did not obtain possession through the court, and when she made an application for execution of the decree, her application was rejected on the ground that the decree was more than three years old. She then instituted the present suit. In the court of first instance she succeeded in obtaining a decree. On appeal the learned District Judge held that, not having executed the decree within three years, her suit was barred by the provisions of section 11 of the Code of Civil Procedure, and also by the provisions of section 47 of the Code of Civil Procedure. In second appeal to this Court, the learned Judge reversed the decree of the lower appellate court and restored the decree of the court of first instance. An issue was framed in the court of first instance as to whether or not the plaintiff had been in possession within twelve years. It was of course necessary from every possible aspect of the case for the plaintiff to prove that she had been in possession within twelve years of the institution of the present suit. The mere fact that she had obtained a decree for possession of the land would not, in our opinion, entitle her to get possession in the present suit if she had never been in possession within twelve years. Two witnesses were produced who deposed for and against the alleged possession of the plaintiff, one witness for the plaintiff and the defendant for himself. The plaintiff's witness was Ram Dawan Singh. He deposed that a year after the decree had been obtained the plaintiff got possession and that she was subsequently put out of possession by the defendant. He mentioned that she had cultivated the land. The defendant stated that he has been for eighteen years in possession and that he had cultivated the land himself and by tenants. His evidence was somewhat vague. The learned Munsif says, in dealing with the witness Ram Dawan Singh, that no connection of this witness with the plaintiff and no enmity with the defendant is shown or proved. He then points out that the defendant is an interested witness and that he places no reliance on his statement and then he says he believes the witness

for the plaintiff. In the memorandum of appeal no specific ground was taken against the finding of the Munsif that the plaintiff had been in possession within twelve years. Now the only evidence of her possession was the evidence of this witness and the possession he proved was possession after the decree; therefore when finding that she was in possession within twelve years the Munsif must have found that she was in possession after the decree. The learned District Judge arrived at no finding on this point. He decided the case against the plaintiff purely on the question of law. The learned Judge of this Court considered that he was bound by the finding of the Munsif on the question of fact. This, we think, was wrong. He was entitled either to refer an issue on this question of fact or he might have exercised the powers conferred on the High Court under section 103 and decided the issue himself. We consider that this is an important issue. We consider that it is a fit case for this Court to exercise the jurisdiction it has under section 103. The evidence is on the record and is sufficient to enable us to decide the issue. The learned Munsif had the advantage of hearing and seeing the witnesses on this point. He believed the witnesses for the plaintiff and has given reasons for believing them. Furthermore there is considerable probability that the evidence is true. After the plaintiff had finally got a decree for possession in 1907, it is improbable that she would have remained absolutely quiet for three years unless she had got into possession of the property. It is also probable that the defendants would not have resisted her in getting possession at first, though it is quite likely that, finding her a defenceless woman, they would have gradually attempted again to dispossess her. This is really what we believe actually happened. We find upon the evidence that the plaintiff did get into possession after the decree. On this finding of fact it seems to us that the plaintiff had a cause of action irrespective of the previous decree. The previous decree would no doubt be part of her title. We do not think that the mere fact that she obtained a decree for possession in 1907, would prevent her again suing for possession if her possession was again interfered with, nor do we think that the doctrine of merger applies to decrees for ejectment. No doubt, if a party obtains a decree for

1915

DHANRAJ SINGH v. LAKHRANI KUNWAR.

a debt or for damages for tort, the original cause of action merges in the decree, but a decree in ejectment differs very much from other decrees. In Broom's Legal Maxims, second Edition, page 251, in dealing with ejectment under Maxims "*Nemo debet bis vexari pro una et eddem causâ*" the learned author says:— "With respect to the action of ejectment, we may further specially remark that by the judgement in this action the lessor of the plaintiff obtains possession of the lands recovered by the verdict, but does not acquire any title thereto, except such as he previously had; if therefore he had previously a freehold interest in them, he is in as a freeholder; if he had a chattel interest, he is in as a termor; and if he had no title at all, he is in as a trespasser, and will be liable to account for the profits to the legal owner, without any re-entry on his part. Moreover, although it has recently been decided that a judgement in ejectment is admissible in evidence in another ejectment suit between the same parties, yet it is not conclusive evidence, because a party may have a title to possession and to grant a lease at one time, and not at another. Neither can a judgement in ejectment be pleaded by way of estoppel, because the defendant is bound by the terms of the consent rule, to plead not guilty, hence there is a remarkable difference between ejectment and other action with regard to the application of the maxim under consideration." It seems to us that if the plaintiff had got formal possession in execution of her decree and her possession was again interfered with by the defendants she has a right to bring a fresh suit. If she succeeded in getting possession without applying to the court, we see no reason why she should not be in as good a position as if she had got formal possession through the court. What we have said above is sufficient to dispose of the appeal. The learned Judge of this Court, however, seems to have held that the plaintiff's cause of action merged in the decree and then to have considered that it is always open to a decree-holder to bring a suit on the decree at any time within twelve years, notwithstanding that the decree has become incapable of execution by lapse of time. This dictum, if correct, would mean that suit after suit could be brought upon barred decrees. If this is correct law, it is very alarming situation. It is difficult to understand why the

1916

DHANRAJ SINGH v. LAKHRANI KUNWAR.

Legislature should have expressly limited the time within which a decree can be executed and at the same time allow decree-holders to bring suits upon decrees thereby putting the parties to extra expense and vastly extending limitation. With regard to ordinary decrees we think that section 47, which provides that no separate suit shall be brought in respect of matters relating to the discharge of decrees, prevents a fresh suit being brought upon a decree. We do not think it necessary to say anything further on the point, first, because it is not necessary for the decision of the present case, and, secondly, because the question has not been fully argued before us. In view of our finding on the issue as to possession and our view of the law we dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Sundar Lal.

EMPEROR *v.* GAYA BHAR.*

1916
May, 26.

Act No. XLV of 1860 *(Indian Penal Code), section* 456—*Lurking house trespass—Entering a house with intent to have illicit intercourse with a widow of full age no offence.*

An accused person, though he may have known that, if discovered, his act would be likely to cause annoyance to the owner of a house, cannot be said to have intended either actually or constructively to cause such annoyance.

Where, therefore, it was proved that a person entered a house with intent to have illicit intercourse with a woman who was a widow and of age, *held* that he was guilty of no offence. *Jiwan Singh* v. *King-Emperor* (1) dissented from. *Emperor* v. *Mulla* (2) referred to. *Queen-Empress* v. *Rayapadayachi* (3) followed.

THE parties were not represented.

The facts of this case are fully set forth in the judgement of the Court.

SUNDAR LAL, J.—This is a reference made by the Sessions Judge of Gorakhpur. It appears that the accused went to the place of one Sarju to have illicit connection with Sarju's sister. He was arrested and on prosecution was convicted by Pandit

* Criminal Reference No. 326 of 1916.

(1) Punj. Rec., 1908, Cr. J., 54. (2) (1915) I. L. R., 37 All., 395.

(3) (1896) I. L. R., 19 Mad., 240.