1927

ISHRI PRASAD v. SRI RAM.

the jurisdiction of the foreign court. "Jurisdiction over him being presumed, he must allege and establish facts from which the inference must necessarily arise that in his case the presumption is contrary to the facts;" *vide* Freeman on Judgements, 4th edition, page 1017. In the present case, as already stated, both the courts below decided the point against the plaintiff because the plaintiff adduced no evidence to show that the defendant was residing in Rampur State at the time that the suit was filed against him by the plaintiff. Inasmuch as the findings of the courts below on this point proceed on a misapprehension of the law on the subject, we consider it desirable to decide this appeal after having a finding from the lower appellate court on the following points :—

(1) Is the defendant a subject of Rampur State?

(2) Was the defendant residing in Rampur State at the time that the suit was filed by the plaintiff in that State?

Parties will be allowed to adduce further evidence. On receipt of the finding ten days will be allowed for filing objections.

Issues remitted.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Sen.

1927
June, 28.

EQUITABLE TRUST COMPANY AND OTHERS (PLAINTIFFS) v. HAFIZ MUHAMMAD HALIM AND COMPANY AND OTHERS (DEFENDANTS.)*

Civil Procedure Code, section 115—*Revision—Non-joinder of necessary party—Order refusing substitution and consequential amendments—"Case decided".*

Held that no revision would lie against an order of a Subordinate Judge refusing to substitute as plaintiffs in an original suit certain persons alleged to be interested in the

*Civil Revision No. 112 of 1927.

suit, but whose remedy as plaintiffs was already time-barred; the order was a mere interlocutory order, and did not amount to the decision of a "case" within the meaning of section 115 of the Code of Civil Procedure.

Buddhu Lal v. *Mewa Ram* (1), *Lal Chand* v. *Behari Lal* (2) and *Balkrishna* v. *Vasudeva Aiyar* (3), *Kalidas Kevaldas* v. *Nathu Bhagavan* (4), *Seshan Patter* v. *Veera Raghavan Patter* (5), and *Fatmabai* v. *Pirbhai Virji* (6), referred to. *Umed Mal* v. *Chand Mal* (7), distinguished.

THE facts of this case were as follows :—

The Deccan Trading Co., incorporated in New York, entered into a partnership with the defendant firm for the purchase and sale of hides and skins, and the agreement was that the parties were to share the profits and bear the loss in equal moieties. Originally the terms of this partnership were not reduced to writing. Skins and hides used to be purchased by the defendants in India and shipped to America, and the plaintiffs used to sell the same, and, after sale, the profits and losses used to be received or borne by the parties in equal shares. Some time in 1920 the defendants approached the plaintiffs for certain monetary accommodations on the security of the goods shipped. The plaintiffs in their turn applied for loans to these banks, The National Bank of South Africa, New York, The Philadelphia National Bank of Philadelphia, and the Equitable Trust Co. of New York. These banks agreed to lend money, but they desired that a written contract of partnership be prepared between the plaintiffs and the defendants clearly defining the terms of their respective rights and liabilities. In consequence of this, a deed of partnership was executed on the 14th of September, 1920. A second agreement was entered into between the same parties on the 18th of February, 1921, whereby the terms of the earlier document

(1) (1921) I.L.R., 43 All., 564.
(2) (1924) I.L.R., 5 Lah., 288.
(3) (1917) 44 I.A., 261.
(4) (1883) I.L.R., 7 Bom., 217.
(5) (1909) I.L.R., 32 Mad., 284.
(6) (1897) I.L.R., 21 Bom., 580.
(7) (1926) 25 A.L.J., 61.

1927

EQUITABLE TRUST COMPANY v. HAFIZ MUHAMMAD HALIM AND COMPANY.

were confirmed. Unfortunately for the parties, from February, 1920, onwards the market for hides in America seriously declined, which resulted in very heavy losses. Thereupon the Deccan Trading Co. instituted a suit in the court of the Subordinate Judge of Cawnpore, on the 16th of January, 1923, for recovery of Rs. 6,68,215 and annas 14. The suit was contested on the ground that no money was due to the plaintiffs, that the plaintiff Company had gone into voluntary liquidation in 1920, and a syndicate of creditors was formed in February, 1921, to "oversee the liquidation", and that the suit was misconceived as the plaintiffs ought to have sued for dissolution of partnership and accounts.

A few days before the institution of the present suit the plaintiffs, on the 8th of December, 1922, executed an agreement in favour of three banks, namely, The National Bank of South Africa, the Equitable Trust Co. of New York and The Philadelphia National Bank of Philadelphia. This document assigned the *choses in action* owned by the plaintiff company against the defendants to the three banks aforesaid.

Issues were framed on the 9th of April, 1923, and a large quantity of oral evidence was put in. Some of the witnesses were examined in America on commission, whose evidence began on the 29th of March, 1926. It was in the course of this evidence that it was brought out that the document, dated the 8th of December, 1922, was followed by another document between the plaintiff and his numerous creditors, including the three sets of appellants in the present appeal. This document was a confirmation of the earlier deed of assignment, dated the 8th of December, 1922. It secured to the assignees and their successors and assigns full power and authority to ask, demand, collect, receive, compound and give acquittance for all sums of money now due or hereafter to

become due by reason of the said Halim claim. But the document did not by itself create or transfer any interest in the *choses in action*.

It may be noticed that the dates of the accrual of cause of action for the plaintiffs' suit were put severally in the year 1920, or the 2nd of January, 1921, 14th of September, 1920, and the 18th of February, 1921.

On the 8th of November, 1926, an application was made to the learned Subordinate Judge of Cawnpore by the Equitable Trust Co. of New York, Gerard National Bank and the Barclays Bank (Dominion, Colonial and Overseas). It purported to be under order I, rule 10 and order VI, rule 17 of the Code of Civil Procedure. The prayers contained in the petition were : (1) that the applicants be impleaded as plaintiffs in the suit either in addition to or in substitution of the original plaintiffs, namely, the Deccan Trading Co., (2) that consequential amendments be made in a number of paragraphs and (3) that in the relief claimed a further relief for dissolution of partnership and accounts be added. It was said in this application that the Deccan Trading Co. incorporated in New York sued in January, 1923, without joining as plaintiffs the Equitable Trust Co., New York, the National Bank of South Africa, Limited, and the Philadelphia National Bank of Philadelphia, in whose favour a deed of assignment had been executed by the Deccan Trading Co. of New York in 1922, because the said deed of assignment was neither acted upon nor was it in strict conformity with the laws of America, and it was doubtful whether the Banks could be made parties on that deed, and to remedy this defect a complete "distribution agreement" was executed on the 25th of June, 1925, whereby the deed of assignment was put on sounder basis and illegal anomalies removed. Under this latter deed the Gerard National Bank became successors to the Philadelphia

1927

EQUITABLE TRUST COMPANY v. HAFIZ MUHAMMAD HALIM AND COMPANY.

National Bank, and Barclays Bank (Dominion, Colonial and Overseas) became successors to the National Bank of South Africa, and these two bodies jointly with the Equitable Trust Co., prayed to be impleaded as plaintiffs.

The defendants contested the application on the ground that the deed, dated the 8th of December, 1922, was a complete assignment by the plaintiffs of their right to sue in favour of the Equitable Trust Co. and the two other Banks, that the deed, dated the 25th of June, 1925, was only in confirmation of what was done by the deed of prior date and did not amount to a devolution or transfer of the plaintiffs' interest in favour of the appellants during the pendency of the suit, and that the applicants should not be made parties after the period of limitation on the original cause of action had expired.

While arguments were in progress in the court below, a further application was made to the Subordinate Judge under order XXII, rule 10, of the Code of Civil Procedure on the 22nd of December, 1926. The Subordinate Judge disallowed the application. He accepted the defendants' contentions in their entirety. He held that the document dated the 8th of December, 1922, was a deed of absolute assignment, that no new rights and liabilities were created by the deed dated the 25th of June, 1925, that it was not proved by the law of the United States that the document of the 8th of December, 1922, created only a charge, or at the most a security, that the deed dated the 25th of June, 1925, recognized the legal effect of the earlier deed as a deed of absolute transfer and that the suit had not been instituted through a *bonâ fidè* mistake on the part of the plaintiff within the purview of order XXII, rule 10, of the Code of Civil Procedure. He also held that no amendment of pleadings was necessary for the purpose of determining the real questions of controversy between the parties. He accordingly dismissed the application.

1927

EQUITABLE TRUST COMPANY v. HAFIZ MUHAMMAD HALIM AND COMPANY.

Not being certain whether the order of the Subordinate Judge was open to appeal, or to revision, the applicants presented to the High Court both a first appeal from order and also an application for revision.

The appeal was dismissed upon the grounds that the original application was not one which admitted of an appeal from the order passed thereon, whilst the second application could not be said to come within the terms of order XXII, rule 10 of the Code of Civil Procedure.

The Bench then proceeded to deal with the application for revision.

Sir *Tej Bahadur Sapru*, Munshi *Ambika Prasad* and Munshi *B. B. Chandra*, for the applicants.

Mr. *B. E. O'Conor*, Dr. *Kailas Nath Katju* and Munshi *Shambhu Nath Seth*, for the opposite party.

THE judgement of the Court (MEARS, C.J., and SEN, J.) after referring to the facts as set out in their judgement in the appeal, thus proceeded :—

A preliminary objection has been taken by the opposite party that the application for revision is not competent. It has been argued that the order in question is an interlocutory order, and that no "case" has been "decided" within the meaning of section 115 of the Code of Civil Procedure, and, in consequence, no application for revision lies to this Court. In answer to this contention it has been argued that the applicants were necessary parties to the action, and the court has committed material irregularity in the exercise of its jurisdiction by disallowing the petition, and thereby excluding a party whose presence was necessary in the action, and without whose presence the action could not be satisfactorily decided.

Reliance has been placed on *Umed Mal* v. *Chand Mal* (1). In this case the mortgagee decree-holder claimed possession of a certain plot of land by right of purchase

(1) (1926) 25 A.L.J., 61.

1927

EQUITABLE TRUST COMPANY v. HAFIZ MUHAMMAD HALIM AND COMPANY.

under his mortgage decree. The suit was directed against a third party, who happened to be in possession. He contended that the property belonged to the mortgagor and had not passed to the mortgagee under his auction-purchase and that the suit was bad by reason of non-joinder of the mortgagor. The first two courts decreed the plaintiff's claim, but the Chief Commissioner of Ajmer and Merwara on revision dismissed the suit on two grounds, firstly, on a proper construction of certain material documents which did not prove that the land belonged to the plaintiff, and, secondly, the court below had acted with material irregularity in the exercise of jurisdiction in trying the suit behind the back of the mortgagor. Their Lordships of the Privy Council affirmed the decision of the Chief Commissioner, but in doing so they did not lay down any broad proposition of law for the guidance of Indian courts. They affirmed the judgement of the Chief Commissioner in view of the circumstances of the case. The case was not remanded by the Privy Council for further trial after impleading the mortgagor in exercise of any powers under order I, rule 10 (clause 2) of the Code of Civil Procedure, and as a matter of fact no application was made in this case for amendment of the claim by addition of parties, or substitution of other persons in place of the plaintiff even after the period of limitation on the original cause of action expired. In view of these facts the case does not appear to be of any great assistance to us. It is not desirable to add or substitute as parties to an action persons whose right to sue has already become time-barred. See *Kali Das Kevaldas* v. *Nathu Bhagavan* (1), *Seshan Patter* v. *Veera Raghavan Patter* (2), *Fatmabai* v. *Pirbhai Virji* (3).

The word "case" in section 115 is more comprehensive than the word "suit". But the word "case" has

(1) (1883) I.L.R., 7 Bom., 217. (2) (1909) I.L.R., 32 Mad., 284.
(3) (1897) I.L.R., 21 Bom., 580.

order has not been held by the majority of this Court to amount to a "case decided" within the meaning of section 115 of the Code of Civil Procedure. See *Buddhu Lal* v. *Mewa Ram* (1). The same view was taken by a Full Bench of the Lahore High Court in *Lal Chand* v. *Behari Lal* (2). It is settled law that a finding on an issue or part of an issue not going to the root of the case cannot be revised by the High Court under section 115 of the Code of Civil Procedure. In the case of *Balkrishna Udayar* v. *Vasudeva Aiyar* (3) their Lordships of the Privy Council are reported to have said :

"It will be observed that the section 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

We hold that there was no wrong assumption or irregular exercise of jurisdiction by the court below in dealing with the application dated the 8th of November, 1926.

The result is that we sustain the preliminary objection and dismiss this application with costs.

Application dismissed.

(1) (1921) I.L.R., 43 All., 564. (2) (1924) I.L.R., 5 Lah., 288.
(3) (1917) 44 I.A., 261.