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MUSAMMAT AMINA BIBI v. SHAIKH MUHAMMAD IBRAHIM.

Committee in the case of *Musahar Sahu* v. *Hakim Lal* (1) :—

> "As a matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts."

The result is that the appeal is allowed, the decrees of the courts below are discharged and the plaintiff's claim is decreed with costs in all the three courts.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Wazir Hasan, Acting Chief Judge and Mr. Justice A. G. P. Pullan.

LALA MANOHAR LAL (APPLICANT) *v.* MOHRE LAL AND OTHERS (OPPOSITE-PARTIES).*

1928 *November*, 22.

Civil Procedure Code (Act V of 1908), section 115—Revision —Only one appeal to a court not a High Court—Order of appellate court, whether open to revision—Jurisdiction —Primary transaction of sale and purchase at one place —Promissory note subsequently executed at another place —Cause of action for balance of sale price, whether arises at the place where promissory note executed or where transaction made.

The fact that the law allows a first and only appeal in a case to a court which is not a High Court and that appeal has been preferred and decided is clearly not a ground for

* Section 115, Application No. 14 of 1928, against the order of K. G. Harper, District Judge of Sitapur, dated the 16th of January, 1928, upholding the order of M. Mahmood Hasan Khan, Subordinate Judge of Sitapur, dated the 30th of December, 1927.

(1) (1916) L. R., 43 I. A., 104.

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ousting the High Court from jurisdiction with which it is invested under the provisions of section 115 of the Code of Civil Procedure of calling for the record of any case which has been decided by any court subordinate to the High Court.

Prima facie the question of jurisdiction must be decided on the averments contained in the plaint. Where according to the allegations made in the plaint the primary transaction of sale and purchase of articles between two firms takes place at one place, the liability for the price of the articles purchased naturally arises out of that transaction and the cause of action for a suit to recover the balance of the amount due arises to the selling firm at that place and is not extinguished by the execution of promissory notes at a subsequent date and at another place, inasmuch as there is no fresh contract between the parties, the evidence for which might have been intended to be created by the execution of the promissory notes, and the old liability for the price of the articles is the real and indeed the sole consideration supporting the promissory notes. *Jwala Prasad* v. *East Indian Railway Company* (1), distinguished. *Balakrishna Udayar* v. *Vasudeva Aiyar* (2), referred to.

Messrs. *A. P. Sen* and *S. C. Das*, for the applicant.

Mr. *Har Dhian Chandra*, for the opposite party.

HASAN, A.C.J. and PULLAN, J. :—This is an application in revision under section 115 of the Code of Civil Procedure by a plaintiff whose plaint has been returned by the Court of the Subordinate Judge of Sitapur for presentation to another court on the ground that the former court had no jurisdiction to entertain it. The order of the Subordinate Judge has been affirmed on appeal by the District Judge of Sitapur.

At the hearing of the application a preliminary objection was taken by the opposite party that no revision lay in a case of this nature. In support of this objection reliance was placed upon a decision of a Bench of the High Court of Allahabad in the case of *Jwala Prasad* v. *East Indian Railway Company* (1). In that case it was

(1) (1918) 16 A. L. J., 535. (2) (1917) L. R., 44 I. A., 261.

admitted that the District Judge, who had affirmed the decision of the court of first instance on appeal, had jurisdiction to entertain the appeal before him. This being so, the learned Judges proceeded to say:—"If in the exercise of his jurisdiction he committed an error (we do not hold that he did so) that does not give the applicants a right to apply in revision under section 115 of the Code of Civil Procedure." It will be seen from what we have quoted just now that the *ratio decidendi* of the decision was that the District Judge had jurisdiction to entertain the appeal. It does not appear that the learned Judges were invited to entertain the application in revision as against the order of the court of first instance. What would have been their decision had they been so invited we need not pause to conjecture. The fact that the law allows a first and only appeal in a case of this nature to a court which is not a High Court and that appeal has been preferred and decided is clearly not a ground for ousting the High Court from jurisdiction with which it is invested under the provision of section 115 of the Code of Civil Procedure of calling for the record of any case which has been decided by any court subordinate to the High Court. An appeal is a bar only in a case in which it lies to the High Court: the words being "and in which no appeal lies thereto (that is, the High Court)."

Every court must be deemed to be possessed of jurisdiction to decide the question whether it has jurisdiction to entertain a certain suit or appeal or not and to that extent it may be conceded that the District Judge had jurisdiction. The question of jurisdiction is primarily a question of law but if a court appears to have exercised a jurisdiction not vested in it by law or to have failed to exercise a jurisdiction so vested or to have acted in the exercise of its jurisdiction illegally or with material irregularity then it becomes a question of law in which the question of jurisdiction is involved and falls within the

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purview of section 115 of the Code of Civil Procedure. "The section is", to use the words of Lord ATKINSON in the case of *Balakrishna Udayar* v. *Vasudeva Aiyar* (1) "not directed against conclusions of law or fact in which the question of jurisdiction is not involved." In the preceding sentence his Lordship said : "It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it." In the present case the learned District Judge has affirmed the order of the court of first instance which court had arrived at a conclusion of law which involves the question of jurisdiction. We are, therefore, of opinion that the application before us is maintainable and we overrule the preliminary objection.

The circumstances bearing on the merits of the case are as follows :—

There were four defendants to the suit out of which only one appeared in the court of first instance and raised a plea of absence of jurisdiction in the court of the Subordinate Judge of Sitapur. The plea has been upheld by both the lower courts, as we have already stated. *Prima facie* the question of jurisdiction must be decided on the averments contained in the plaint and in the present case nothing has appeared in the evidence so far as it was admitted on this question to displace that view. In paragraph 1 of the plaint the plaintiffs stated that they were the owners of a firm in Biswan in the district of Sitapur carrying on a business of brokerage in grain and molasses. In paragraph 2 it was said that the defendants were the owners of a firm in the cantonments of Nimach within the territory of Gwalior. In paragraph 3 it was alleged that the defendants' firm purchased molasses from the plaintiffs' firm of the value of Rs. 11,578 odd between the 13th of December, 1923, and the 27th of January, 1924; that the price of other

(1) (1917) L. R., 44 I. A., 261.

purchases made by the defendants amounted to Rs. 93 and that the defendants' firm paid in from time to time the sum of Rs. 7,699 to the plaintiffs' firm. In paragraph 4 it was stated that accounts were adjusted between the parties on the 24th of March, 1924, and the sum of Rs. 4,000 was found due to the plaintiffs from the defendants which the defendants' firm promised to pay in four equal instalments, viz., 16th of October, 1924, 14th of April, 1925, 11th of October, 1925, and the 9th of May, 1926. In paragraph 8 the cause of action for the present suit laid for the recovery of the above-mentioned instalments together with interest was stated to have accrued on the 24th of March, 1924, the date on which the accounts were adjusted, and also on the four dates on which the instalments became due. It further appears that the defendants executed four promissory notes every one of the value of Rs. 1,000 corresponding to the instalments mentioned above in favour of the plaintiffs. These notes were produced by the plaintiffs. They also produced two letters written by the defendants of dates subsequent to the dates of the instalments whereby they promised to send the money due to the plaintiffs to their firm at Biswan. These letters have been duly proved and accepted in evidence.

In the above-stated circumstances and on those facts we are of opinion that the learned Subordinate Judge by returning the plaint has failed to exercise the jurisdiction vested in him by law. It was agreed in the court of first instance that the accounts which were adjusted on the 24th of March, 1924, were adjusted at Nimach. It was not argued before us that that fact alone divested the Sitapur court of the jurisdiction which it had otherwise possessed. The plaintiffs had further pleaded that there was an oral agreement subsequent to the execution of the promissory notes under which the

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defendants had undertaken to repay the money at Biswan. This plea has failed on evidence and was not re-opened before us.

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The primary transaction of the sale and purchase of molasses must be assumed on the allegations made in the plaint to have taken place at Biswan and the defendants' liability for the price of the articles purchased by them naturally arose out of that transaction. This being so it is clear that the cause of action for the present suit arose at Biswan. The execution of the promissory notes at a subsequent date and at Nimach cannot in our opinion extinguish the cause of action just now mentioned. There was no fresh contract between the parties, the evidence for which might have been intended to be created by the execution of the promissory notes. The old liability for the price of the articles was the real and indeed the sole consideration supporting the promissory notes. In this view of the case it is not necessary to enter into the discussion as to whether the English rule that it is the duty of a debtor to find and pay his creditor would be applicable or not had this suit been founded on the promissory notes alone and not on any antecedent, independent and completed transaction.

We accordingly allow this application, set aside the orders passed by the lower courts and remand this case to the court of first instance with directions that the suit be reinstated in its original number in the register of suits in that court and tried according to law. Having regard to the fact that the plaint was not carefully worded we make no order as to costs in favour of the plaintiffs. The parties will bear their own costs in all the three courts up to this stage.

Case remanded.