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THE GOCULDÁS BULABDÁS MANUFACTURING COMPANY, LIMITED, *v.* JAMES SCOTT.

party will bear their own costs of one day's (the first) hearing and of hearing judgment. The plaintiffs must pay the defendants their costs of the hearing of the summons on the other two days.

Attorneys for the plaintiffs, :—Messrs. *Ardasir, Hormusji and Dinshá.*

Attorneys for the defendants :—Messrs. *Craigie, Lynch and Owen.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1890. *December* 18, 22.

HA'JI MUSA' HA'JI AHMED, (PLAINTIFF), *v.* PURMA'NAND NURSEY, (DEFENDANT).

Decree—Execution—Civil Procedure Code (Act XIV of 1882), *Secs.* 229 *A and B—Foreign judgment—Execution in British India of foreign judgment—Decree of Native State—Execution of such decree in British India—Decree obtained without jurisdiction and by fraud—Civil Procedure Code (Act XIV of* 1882), *Secs.* 229 B, 245 B—*Foreign judgment—Jurisdiction.*

The plaintiff obtained a decree against the defendant in the Zillá Court of Angi kármal, in the State of Cochin. The defendant was a resident in Bombay, and the plaintiff sought to execute the decree against him in Bombay. Notice under section 245 B of the Civil Procedure Code (Act XIV of 1882) was served upon the defendant, calling upon him to show cause why he should not be committed to jail in execution. The plaintiff relied upon section 229 B of the Civil Procedure Code (Act XIV of 1882). The defendant, as cause against the execution of the decree, alleged that the decree was passed by the Cochin Court without jurisdiction, and that it had been fraudulently obtained by the plaintiff. The Court refused to commit the defendant ;

Held, on the facts as presented in the affidavit, that the Court in Cochin had no jurisdiction over the defendant, and that the plaintiff obtained the decree by misrepresentation and concealment of essential facts ;

Held, also, that the Court was entitle to exercise a judicial discretion as to whether it would put into force the provisions of section 229 B of the Civil Procedure Code (Act XIV of 1882). No duty is cast upon the Court to execute a decree which can be shown to have been passed without jurisdiction or obtained by fraud.

Section 229B of the Civil Procedure Code (Act XIV of 1882) does not remove the decree of a Native State falling within its purview from the category of foreign judgments. It merely alters the procedure by which such a judgment can have

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effect given to it in British India. Notwithstanding the section, such a decree still remains a foreign judgment, and its effect is removed by showing want of jurisdiction in the Court which passed it.

The Court is not bound to execute the decree of a foreign Court which has been obtained by the fraud of the plaintiff. Where execution of such a decree is sought, relief can only be obtained by pointing out the fraud to the executing Court and asking that Court to refrain from executing the decree. The Court will not send British subjects subject to its territorial jurisdiction into a foreign country to seek to be relieved from a fraudulently obtained decree, but will itself refuse to give effect to such a decree.

IN chambers. On the 14th November, 1889, the plaintiff obtained a decree against the defendant for Rs. 2,420 in the Zillá Court of Angikármal, in the State of Cochin. The defendant being a resident in Bombay, the plaintiff sought to execute the decree against him in Bombay. A notice, dated the 3rd October 1890, issued under section 245B of the Civil Procedure Code (Act XIV of 1882), was served upon the defendant, calling upon him to show cause why he should not be committed to jail in execution. The defendant filed affidavits, in which he alleged that the decree sought to be executed was passed by the Cochin Court without jurisdiction, and that it had been fraudulently obtained by the plaintiff.

Macpherson for the defendant showed cause :—The plaintiff seeks to enforce a foreign judgment. We impeach that judgment on good and sufficient grounds. This Court has a discretion to refuse in such a case to execute the decree of a foreign Court—sections 229, 229A and 229B of the Civil Procedure Code (Act XIV of 1882). Counsel referred also to sections 2 and 13, clauses vi and 14 ; *Government of India Gazette*, 1885, No. 4035, p. 665 ; *Bombay Government Gazette*, 1876, p. 494 ; *Vadála* v. *Lawes*[1].

Lang for plaintiff, *contra* :—When once a notification under section 229B of the Civil Procedure Code (Act XIV of 1882) has been issued, the decree of the Court mentioned in the notification is no longer a foreign judgment. The decree stands on the same footing as a decree of one of the Courts of British India. This Court, therefore, has no jurisdiction to refuse to execute the decree. Counsel referred to Bullen and Leake, p. 194.

(1) L. R., 25 Q. B. D., 310.

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FARRAN, J.:—The plaintiff applies for execution of the decree of the Zillá Judge of Angikármal, in the Cochin State. The application is made under section 229B of the Civil Procedure Code, which enacts that "the Governor-General in Council may from time to time declare that the decrees of any Civil and Revenue Courts situate in the territories of any Native Prince or State in alliance with Her Majesty * * * * may be executed in British India, as if they had been made by the Courts of British India * * * *. So long as such declaration remains in force the said decrees may be executed accordingly." The defendant has been called upon by notice to show cause why he should not be committed to jail in execution. The cause he alleges is that the decree sought to be enforced was passed without jurisdiction, and that, in effect, it is a decree fraudulently obtained by the plaintiff.

Two questions arise—(1) whether the Court has a discrection in the matter of executing decrees under the above section; (2) whether the circumstances in the case warrant it in refusing the application.

I consider that the Court is entitled to exercise a judicial discretion as to whether it will put into force the provisions of this section. The word "may" in the statute "merely makes that legal and possible which there would otherwise be no right or authority to do." Its natural meaning is permissive and enabling only—*Julius* v. *Lord Bishop of Oxford*[1]. The words there were "it shall be lawful," but there is no substantial difference between the two expressions. "There may, however, be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so"[2]. The power conferred on this Court by the section under consideration is of this character, and in a proper case a plaintiff in the position of the present plaintiff has the right to call upon the Court to execute the decree

(1) L. R., 5 App. Cas., 214. (2) L. R., 5 App. Cas., at pp. 222, 223.

which he has obtained. There is, however, I apprehend, no duty cast upon this Court to execute a decree which can be shown to have been passed without jurisdiction, or obtained by the fraud of the plaintiff. Even in the case of our own Courts the Code recognizes in section 225 the right of the executing Court to enquire into the jurisdiction of the Court which passed the decree. If this Court were asked to execute a decree of a Mofussil Court directing land in Bombay to be delivered by the defendant to the plaintiff, or of a Mofussil Small Cause Court ordering the payment of such a sum as Rupees one *lákh*, it would rightfully, I consider, refuse the application. If objection to the jurisdiction were raised on the ground that the cause of action did not arise within the jurisdiction of the trying Court, the executing Court would decline to consider such an objection, because it would be bound by the provisions of section 13 of the Code to refuse to re-try an issue already determined by a competent Court.

Section 229B does not remove the decree of a Native State falling within its purview from the category of foreign judgments. It merely alters the procedure by which such a judgment can have effect given to it in British India. Notwithstanding the section, such a decree still remains a foreign judgment, and its effect is removed by showing want of jurisdiction in the Court which passed it. This Court is, therefore, not precluded from ascertaining whether a foreign Court had jurisdiction merely because that Court has itself decided an issue upon that point in its own favour.

That this Court is not bound to execute a decree of a foreign Court which has been obtained by the fraud of the plaintiff, appears from section 44 of the Evidence Act I of 1872, which enacts that a party to a suit or other proceeding may show that any judgment or decree, (which would otherwise be enforceable against him), was obtained by fraud. How relief in the case of a decree of a British Indian Court, which is sought to be executed in another British Indian Court to which it has been transmitted can be obtained from its effect on the ground of fraud, I need not consider. In the case of a foreign decree obtained by fraud, relief can be obtained, it appears to me, by pointing out

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the fraud to the executing Court and asking that Court to refrain from executing the decree. This Court will not, I apprehend, send British subjects, subject to its territorial jurisdiction, into a foreign country to seek there to be relieved from a fraudulently obtained decree, but will itself refuse to give effect to such a decree.

The facts of this case may be briefly stated as gathered from the judgment of the Cochin Court and the affidavits filed in this matter. The defendant is a permanent resident of Bombay. He received in Bombay certain bundles of coir to be shipped on defendant's account for sale in England. These he shipped through Messrs. Wallace & Co., and he or they insured them *free of particular average*. The goods were damaged on the voyage by sea water. They were sold in England, and the shipments resulted in loss. For the deficiency, redrafts were drawn on the defendant. The plaintiff, (his principal), on seeing the accounts considered that overcharges had been made in London to the extent of £ 61-17 by the corresponding firm of Wallace & Co., and that the amount requisite to cover the damage caused to his coir by sea water ought to have been recovered from the underwriters—£ 86-19. He instructed the defendant not to accept or pay the redrafts. The defendant accordingly refused to do so.

Wallace & Co. then sued the defendant as the agent, and the plaintiff as the principal, in the Court of Small Causes to recover the amount of the redrafts, about Rs. 1,500. The plaintiff defended that suit on the ground that he ought to be allowed credit for the alleged overcharge of £ 61-17 and for the amount of the damage to his coir, which ought to have been recovered from the underwriters. It is difficult to see with the above memo. in the policy, how any claim could have been made for damaged cargo against the underwriters.

His defence was overruled, and a decree was passed against the present plaintiff and the present defendant for the amount of the redrafts. The defendant paid the amount of the decree, and subsequently sued the present plaintiff in the Small Cause Court to recover from him what he had so paid, or rather for the balance of his account, which included that sum. That suit also the pre-

sent plaintiff defended on the same grounds upon which he had defended Wallace & Co.'s suit, seeking to be allowed, in account, the alleged damage to his coir and the overcharges made in London. The defence was overruled, and a decree was passed against the present plaintiff. That decree was sent to British Cochin for execution, and its amount was levied from the present plaintiff. The accounts between the plaintiff and defendant were thus cleared. The plaintiff then filed a suit in a Native Court in Cochin to recover from the defendant the amount of the alleged damage to the coir and of the alleged overcharge made in London. He alleged in his plaint a contract or promise to pay these sums in Cochin.

The defendant sent down a man and engaged a pleader to defend that suit. The issues, I think, must have been raised by the pleaders on both sides. The plaintiff then had the suit postponed from time to time, and the defendant, tired of the expense and delay, instructed his pleader to withdraw from the defence, placing on record a protest against the jurisdiction, and a plea, that the question at issue had been adjudicated on by the Court of Small Causes at Bombay. I gather that this was done, and that the defendant was not represented at the actual hearing, which proceeded *ex parte*. The trial, on the defendant's agent being withdrawn from Cochin, at once came on, and a decree was passed in favour of the plaintiff for Rs. 2,420-14-8.

It is difficult to see how the alleged cause of action arose in Cochin. The real claim of the plaintiff was for damages in not recovering the amount of damage to the coir from the Insurance Companies and for employing a sub-agent who made the alleged overcharges. It is difficult to conceive how the defendant could have contracted or promised to pay in Cochin sums which it is not alleged that he received.

As the facts present themselves to my mind upon the materials now before me I think that the Court in Cochin had no jurisdiction over the defendant, and that the plaintiff obtained the decree by misrepresentation and concealment of essential facts, and I decline to commit the defendant to jail for not paying its amount. This will not preclude the plaintiff from suing on the decree of

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the Cochin Court. The facts when they are brought out at the trial may bear a different aspect. The merits can then be gone into.

Dismissed with costs.

Attorney for the plaintiff:—Mr. *T. A. Bland.*

Attorneys for the defendant:—Messrs. *Craigie, Lynch and Owen.*

PRIVY COUNCIL.

DOSIBA'I, APPELLANT, AND ISHVARDA'S JAGJIVANDAS AND ANOTHER, RESPONDENTS.

P. C.*
1891.
January 23;
February 7.

On appeal from the High Court at Bombay.

Construction of grant of villages "as jághir"—Attachment in execution of decree—Sale under attachment in previous proceedings.

When a *jághir* is granted in indefinite terms, it is taken to be for the life only of the *jághirdár*; but when it is to the grantee "and his heirs," and there is nothing to control the ordinary meaning of the words, he takes an absolute interest.

That jághirs are to be considered life tenures only, unless otherwise expressed in the grant, is laid down in Bengal Regulation XXXVIII of 1793, section 15. It is the law also in Bombay and other parts of India.

Property already under attachment at the suit of the creditor to enforce part of a debt accrued due in a mortgage transaction at an earlier period, was sold in satisfaction of his decree for instalment subsequently due by the same debtor. A second attachment would have been a mere formality, and was not material to the validity of the sale.

APPEAL from two orders (9th May, 1884, and 7th July, 1885[1]), whereby an order (5th November, 1883), issued in execution of a decree by the Subordinate Judge of Surat was affirmed.

This appeal questioned the legality of the orders of the Courts below for the sale of property in execution of a decree against the appellant, as the representative of Ardasir Dhanjisháh Bahádur. The appellant was the widow of Jehángirsháh, deceased, in 1859, the son of Ardasir, deceased, in 1856; and the respondents were the successors in title of creditors of Ardasir

* *Present*: LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK, SIR R. COUCH and MR. SHAND.

(1) I. L. R., 9 Bom. 561.