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urged that the whole cause of action had arisen within jurisdiction, and there was no occasion for the Court to consider that aspect of the case. The facts further do not show whether the hundi was delivered to the payee at Mirzapur or Calcutta. The facts only show that the payee, who was carrying on business at both places, made the endorsement in favour of the plaintiff at Calcutta. I am unable to consider that decision as going against the principles summarised above.

Under the circumstances in the present case, as the note was delivered by the defendant firm to the payees in Bombay, and the endorsements in favour of the plaintiff having taken place in Bombay, the whole cause of action arose in Bombay. The issue must, therefore, be answered in the affirmative.

There will, therefore, be a decree for the plaintiff against the defendants for Rs. 27,000 with interest thereon at six per cent. from March 18, 1938, till judgment. Costs and interest on judgment at six per cent.

Attorneys for plaintiff: Messrs. *Dharamsey, Dinkarrao & Nandlal.*

Attorneys for defendants: Messrs. *Aibara & Co.*

Suit decreed.

N. K. A.

ORIGINAL CIVIL.

Before Mr. Justice Kania.

GIRNARA JAISUKHLAL, PLAINTIFF *v.* MAHOMEDHUSEIN KARWA AND ANOTHER, DEFENDANTS.*

1939
February 15
and March 10

Limitation Act (IX of 1908), Art. 117—Suit on a foreign judgment—Starting point for limitation—Decree time barred under the foreign law—Whether a suit would lie in British India.

In 1928 the plaintiff obtained a money decree against the defendants at Junagadh. Successive appeals of the defendants against the decree were dismissed first by the

* O. C. J. Suit No. 1733 of 1938.

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Sadar Court in 1929 and finally by the Huzur Court in October 1932. By the law obtaining in Junagadh the time prescribed for the execution of the decree was three years. In 1938 the plaintiff sued the defendants in Bombay to enforce the decree of the Huzur Court of Junagadh. Upon objection taken that the suit was barred by the law of limitation:

Held, (1) that the term "Judgment" in Art. 117 of the Indian Limitation Act was not limited to the judgment of the trial Court alone. It meant the decree and if there was a decree of the appeal Court it was that decree which was the starting point for counting the period of limitation and the suit was in time;

(2) that a foreign judgment itself forms a good cause of action and the period of limitation in British India for a suit on a foreign judgment under Art. 117 of the Indian Limitation Act was six years. The fact that the foreign decree was enforceable or not enforceable in the foreign Court was not relevant in considering whether the suit was barred under Art. 117 of the Indian Limitation Act.

SUIT to enforce a foreign judgment.

The material facts and arguments appear sufficiently in the Judgment.

F. B. Vachha, for the plaintiff.

S. T. Desai, for defendant No. 1.

KANIA J. The plaintiff has filed the suit to recover from the defendants Rs. 3,699-14-6 together with interest on Rs. 2,251-5-3 at six per cent. The plaintiff had money dealings with the defendants at Junagadh, and it is alleged that the plaintiff lent Rs. 2,500 to the defendants who carried on business in the firm name of M. D. Karwa & Co. at Junagadh. The plaintiff filed suit No. 460 of Samvat Year 1981 in the Diwani Adalat at Junagadh, and obtained a decree for Rs. 2,009-13-3 on March 18, 1928. Defendant No. 1 being dissatisfied with the decision filed appeal No. 100 of Samvat Year 1984-85 in the Sadar Adalat Court of the Junagadh State; but the appeal was dismissed on February 9, 1929. Defendant No. 1 being still dissatisfied with the decision filed a second appeal in the Huzur Adalat at Junagadh; but the same was also dismissed on October 16, 1932. The plaintiff has filed the suit on the foreign judgment seeking to enforce the decree of the Huzur Adalat of Junagadh dated October 16, 1932. Defendant No. 1

has filed his written statement in which he raised several contentions. At the hearing Mr. Desai gave up all except that the suit was barred by the law of limitation.

On behalf of defendant No. 1 it is urged that Art. 117 of the Indian Limitation Act applies to the suit and that in computing the period of limitation the starting point is March 18, 1928, i.e., the date on which the judgment of the trial Court was given. In support of this contention defendant No. 1 relies on the proviso to r. 114 in Dicey's Conflict of Laws, 5th Edition, which runs in these terms :—

"Provided that a foreign judgment may be final and conclusive, though it is subject to an appeal and though an appeal against it is actually pending in the foreign country where it was given."

He further relies on the decision in *Hari Singh* v. *Muhammad Said*[1] where at p. 77 the passage from the proviso in Dicey's Conflict of Laws is quoted with approval as applicable to India. In my opinion, this contention of defendant No. 1 is unsound. The words used in Art. 117 of the Indian Limitation Act are " the date of the judgment ". It does not say ' the judgment of the trial Court '. As pointed out in numerous cases by their Lordships of the Privy Council, it is useful to rely on the strict grammatical construction of the words used in an Act in preference to interpretations given to words under different sets of laws even by the Courts in England. I do not see any justification for holding that the words used in Art. 117 should mean judgment of the trial Court alone. The proviso to rule 114, as stated in Dicey's Conflict of Laws, in my opinion, only means that the plaintiff who had obtained judgment in a foreign Court was not bound to wait either to see that the defendant filed an appeal, or, if an appeal was filed, till it was decided. Immediately a judgment is pronounced in his favour, he has a right to bring a suit on the same in a foreign Court. The only qualification which may be

[1] (1926) 8 Lah. 54 at p. 77.

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stated to exist is that the judgment must not be an interlocutory judgment as pointed out in Dicey's Conflict of Laws. It should be a judgment which becomes *res judicata* between the parties on the matters covered by the litigation. I am unable to interpret the words used in the proviso as confining the successful plaintiff to bring a suit on the original decree, and if he did not file a suit on that, to mean that he lost his right altogether. In this connection, it is material to bear in mind that when an appeal is filed and dismissed, according to the Civil Procedure Code, 1908, the form of the decree of the appeal Court is that the appeal is dismissed and the judgment of the trial Court is confirmed. As pointed out by Sir Lawrence Jenkins in *Kailash Chandra Bose* v. *Girija Sundari Debi*,[1] a decree on appeal supersedes the decree passed under appeal, and the decree of the Court of first instance could not in the circumstances be pleaded as *res judicata*. In the same way, in *Sheosagar Singh* v. *Sitaram Singh*,[2] Lord Macnaghten, in delivering the judgment of the Privy Council, stated as follows (pp. 626–627) :—

> "If there had been no appeal in the first suit the decision of the Subordinate Judge would no doubt have given rise to the plea [of *res judicata*]. But the appeal destroyed the finality of the decision. The judgment of the lower Court was superseded by the judgment of the Court of Appeal."

Thus, as soon as the Huzur Diwani Adalat of Junagadh passed decree in the second appeal on October 16, 1932, the decree of the trial Court and the first appeal Court were superseded and as between the parties the only decree which remained *res judicata* was the decree passed by the Huzur Diwani Adalat. The decision of the Lahore High Court, relied upon by defendant No. 1 does not discuss this aspect of the case at all. On going through the judgment, it is clear that the learned Judges considered various alternative grounds on which the suit was bound to fail. It was held by the Court that

[1] (1912) 39 Cal. 925 at p. 929. [2] (1897) 24 Cal. 616, P. C.

the foreign Court has no jurisdiction to try the suit, and that it had not followed the principles of natural justice in coming to its decision, and that, even if the time permitted in appeal was excluded, the suit filed on the foreign judgment was barred by the law of limitation. On the other hand *Baijnath Karnani* v. *Vallabhdas Damani*[1] completely supports the plaintiff's contentions in this suit. After a review of all the authorities the learned Judges came to the conclusion that the term 'judgment' in Art. 117 of the Indian Limitation Act meant a decree and if there is the decree of the appeal Court it is that decree which is the starting point for counting the period of limitation. I respectfully agree with the conclusion arrived at in that decision and hold that this contention of defendant No. 1 is unsound.

It was next contended that this Court is not bound to accept a foreign judgment as a cause of action and it has a discretion to allow a plaintiff to file a suit or to refuse to do so. In support of that contention, the following observations of Blackburn J. in *Schibsby* v. *Westenholz*[2] were relied on (p. 159) :—

"We think that, for the reasons there [*Godard* v. *Gray*,[3]] given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B., in *Russell* v. *Smyth*,[4] and again repeated by him in *Williams* v. *Jones*,[5] that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which the judgment is given, which the Courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action."

This particular passage is cited with approval in *Nallatambi Mudaliar* v. *Ponnusami Pillai*.[6] Those principles therefore are urged to be applicable to British India when a suit is filed here on a foreign judgment. Accepting that as the correct view, in my opinion, defendant No. 1's contention is not supported by those observations. There

(1) (1933) 56 Mad. 951.
(2) (1870) L. R. 6 Q. B. 155.
(3) (1870) L. R. 6 Q. B. 139 at p. 147.
(4) (1842) 9 M. & W. 810 at p. 819.
(5) (1845) 13 M. & W. 628 at p. 633.
(6) (1879) 2 Mad. 400 at p. 403.

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is nothing inherently wrong in the judgment on which this suit is filed. The only contention urged on behalf of defendant No. 1 is that execution of the decree passed by the Huzur Diwani Adalat in Junagadh is time-barred. It was contended that if the plaintiff attempted to execute the decree in Junagadh, he would be faced with the plea of limitation, and, therefore he should not be allowed to achieve his object by filing a substantive suit in British India. The last words used in the above observations of Blackburn J. are relied upon in this connection. The law of limitation is a law of procedure and has to be strictly construed. It may bar the remedy but does not extinguish the right. There is no proof that the execution of the decree is barred in Junagadh. In considering whether a particular remedy is open to a party, the law applicable to the place where the suit is brought is applicable. The law of limitation prevailing in the place where the obligation arose has not to be considered. On that ground where decrees are capable of being transmitted from any Native State in alliance with His Majesty to British India for execution, the law prevailing in British India is considered the law governing the right of execution. It is not open to the parties to contend that the law prevailing in the Native State would have enabled them to execute the decree there, and therefore, the same should be in force in British India, although according to the law of limitation in British India execution be time-barred. (See *Nabibhai Vazirbhai* v. *Dayabhai Amulakh*[1]). The contention that there exists a legal excuse for not performing the obligation imposed by the judgment of the Junagadh Court results from a misreading of the above quoted observations of Blackburn J. Legal excuse may exist in Junagadh, but it does not exist here. According to the law prevailing in British India, the period of limitation is prescribed as six years, and it is not open to this Court to go behind Art. 117 of the Indian Limitation Act.

[1] (1916) 40 Bom. 504.

A different view would give rise to complicated questions of procedure prevailing in a foreign Court, and whether a decree is kept alive or could be revived under certain circumstances. The fact that the decree is enforceable in Junagadh Court is not relevant in considering whether the suit is time-barred or not under Art. 117 of the Indian Limitation Act. In the same way whether the decree is not enforceable because it is barred by the law of limitation prevailing in Junagadh is equally not relevant to be considered in the present suit. In my opinion, therefore, as the suit which is filed within the period of limitation prescribed in Art. 117 is within time, defendant No. 1's contention must fail.

The plaintiff filed the suit and annexed to the plaint certified copies of the decrees of the trial Court and the two Courts of Appeal in Junagadh. In the written statement of defendant No. 1 the accuracy of the copies filed has not been challenged. When the plaintiff tendered certain copies it was pointed out that proof as required by s. 79 of the Indian Evidence Act was not forthcoming to show that the certified copies were genuine. The matter has, therefore, to be adjourned to enable the plaintiff to obtain the necessary endorsement or certificate to comply with the provisions of s. 79 of the Indian Evidence Act. If the plaintiff succeeds in proving that the genuine certified copies are in accordance with the copies annexed to the plaint, the suit will be decreed as the defence of limitation fails. In order to enable the plaintiff to obtain the necessary certificate, the suit is adjourned for three weeks to be on board that day as part heard.

1939 March 10

Since the last hearing I came across the decision in *Jatindra Nath Basu* v. *Peyer Deye Debi*.[1] In that there is a sentence which states (p. 112):

" . . . the decree, as a decree capable of being executed, could not by reason of the bar of limitation be assigned.....It had become a dead decree."

[1] (1916) L. R. 43 I. A. 108, s. c. 43 Cal. 990, P. C.

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I invited counsel to argue the point of limitation again having regard to this sentence. In order to make the point clear, an additional issue was permitted to be raised and the question of fact, whether the decree of the Junagadh Court had become time-barred, is covered by that issue.

On behalf of the plaintiff properly certified copies of the decrees of the Junagadh Court were tendered and have been admitted in evidence. They show that the Huzur Adalat Court of Junagadh passed a decree in the plaintiff's favour on October 16, 1932, for the amount claimed in this suit. On behalf of defendant No. 1, Mr. Desai tendered the relevant portion of the Indian Limitation Act of the Junagadh State, being Art. 145 of Act I of S. 1954 (1898) and the amending Act of S. 1990 (1934). Under the first Act six years' period was prescribed for execution of a decree. Under the amending Act that period was curtailed to three years. In order to prevent hardship the proviso in the amending Act gives six months' time in respect of decrees for which the period of limitation was thus curtailed. On the proper construction of both the Acts the execution of this decree would be barred, according to the law of Junagadh, after three years. There is no evidence on record to show that a further extension of time was available to the plaintiff.

Assuming, therefore, that the decree of the Huzur Adalat Court of the Junagadh State was not capable of being executed in Junagadh when this suit was filed, the question re-argued was whether a suit founded on such a decree is barred by limitation. Art. 117 of the Indian Limitation Act deals only with the period of limitation. It does not create a right to sue. It is, however, recognised in India that a foreign judgment itself forms a cause of action and a suit can therefore be based on it. In Halsbury's Laws of England, Vol. VI (2nd Ed.), Art. 380, p. 324, it is stated:—

" . . . the judgment *in personam* of a foreign Court of competent jurisdiction condemning one of the parties to the payment of a sum of money constitutes a good cause of action in England."

Having regard to the clear terms of Article 117 the period of limitation, for a suit on such a foreign judgment, is six years. I have already discussed previously the reasons why this Court should not consider the question whether the execution of this decree is barred by the law of limitation in Junagadh. Having heard counsel again, I adhere to the view which I had previously expressed in the interlocutary judgment.

In *Jatindra Nath Basu* v. *Peyer Deye Debi*,[1] the plaintiff had brought the suit for specific performance of an agreement to sell a mortgage decree and which decree was to be duly transferred to the defendant. Before assignment the decree however became time barred and the defendant refused to take it. Their Lordships of the Privy Council came to the conclusion, as a question of fact, that the plaintiff had agreed to assign to the defendant a decree which was capable of execution, and that until assignment there was an obligation on the plaintiff as vendor to keep the decree alive. Therefore, when execution of the decree became barred by limitation, the plaintiff was asking for specific performance by the defendant of an agreement which he was himself unable to perform and no such relief could be granted. In considering the effect of an observation in a decision it is always necessary to bear in mind the facts in connection with which the judgment was delivered. Having regard to the facts of that case it is clear that their Lordships were not considering at all the question whether a time-barred decree could form a cause of action in a foreign Court. Giving all the weight which the observation is entitled to, in my opinion, it only means that in the particular case the defendant had agreed to buy an article which was alive, i.e., was capable of giving him money when it was transferred to him. In the interval, by reason of the plaintiff's omission it had ceased to retain that character, and, therefore, the relief of specific performance could not be

[1] (1916) L. R. 43 I. A. 108, s. c. 43 Cal. 990, P.C.

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granted. I am unable to read the sentence quoted above as meaning anything beyond what I have just summarised. In my opinion that observation in the judgment does not affect the considerations which made me hold that the Court is not concerned with the question whether the execution of the decree in Junagadh is time barred.

Issue No. 1 will be found in the negative, and issue No. 2 in the affirmative. There will, ther. fore, be a decree for the plaintiff against defendant No. 1 as prayed.

Attorneys for plaintiff : Messrs. *Bhatt & Co.*

Attorneys for defendant No. 1 : Messrs. *Gulamali, Noorani & Co.*

Attorneys for defendant No. 2 : Messrs. *Choksey & Co.*

Suit decreed.

N. K. A.

APPELLATE CRIMINAL.

Before Mr. Justice B. J. Wadia and Mr. Justice Kania.

1939
May 9

EMPEROR *v.* JHINA SOMA AND OTHERS (ORIGINAL ACCUSED NOS. 1 TO 3).*

Criminal Procedure Code (Act V of 1898), ss. 297, 537—Judge to explain law to jury—Provision imperative—Omission to explain—Effect—Verdict of jury—No reason to interfere unless perverse—Indian Penal Code (Act XLV of 1860), ss. 299, 300, 302.

The provision contained in s. 297 of the Criminal Procedure Code, 1898, is imperative and in cases tried with the help of a jury it is the clear duty of the judge to explain what in law are the essential requisites of an offence and what must be proved to constitute that offence. The explanation is necessary in all cases and it is certainly very important in a case where the charge is one of murder.

At a jury trial of three persons accused of an offence of murder the Sessions Judge omitted to explain the law to the jury. The trial ended in the acquittal of the accused. The Government having appealed :—

Held, that although it was the bounden duty of the judge to explain the law to the jury before dealing with the evidence, the omission to explain the provisions contained in ss. 299 and 300 of the Indian Penal Code had not been such as could be said to have occasioned a failure of justice.

* Criminal Appeal No. 493 of 1938.