APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Hill and Mr. Justice Stevens.

1903
Dec. 2.

DEEP NARAIN SINGH
v.
DIETERT.*

Cause of Action—Jurisdiction—Foreign Judgment—Award, suit on—Arbitration Act (52 and 53 Vict. C. 49) s. 12.

An award was made against the defendant in England for payment of a certain sum of money to the plaintiffs, and an order under s. 12 of the Arbitration Act (52 and 53 Vict. C. 49) was made thereon. The defendant, who at the time of the commencement of the suit was not dwelling, or carrying on business, or personally working for gain, within the limits of the ordinary Original Jurisdiction of this Court, in consideration of the plaintiff's agent (in Calcutta) undertaking not to institute any suit for a certain time, made a promise to pay in part £ 500 within a certain period and the balance of the amount of the award in time.

The plaintiffs instituted, with leave under cl. 12 of the Letters Patent, this suit for the amount of the award:—

Held, That under the above circumstances the consideration for the promise on the part of the plaintiffs' agent was illusory, amounting only to a promise on the defendant's part to do what he was already legally bound to do, and the transaction formed no part of the cause of action, and this Court had no jurisdiction to try the suit.

"Cause of action" defined. *Read* v. *Brown* (1) referred to.

Semble: An order under s. 12 of the Arbitration Act (52 and 53 Vict. C. 49) enforcing an award made in England is not such a judgment that a suit in a Court in this country can be instituted on it as on a foreign judgment. But on the facts as stated above, the Court was at liberty to make the decree it did, on the footing that the suit was one based on the award and not on the order made under s. 12 of the Arbitration Act.

APPEAL by the defendant, Deep Narain Singh.

Up to the time of his death, which occurred in the year 1898, Tej Narain Singh carried on business in the city of London under the name, style, and firm of T. N. Singh & Co., and after his death his son, the defendant, carried on the said business in

* Appeal from Original Civil, No. 8 of 1903, in Suit No. 814 of 1902.

(1) (1883) L. R. 22 Q. B. D. 128.

London under the same name and style. Certain disputes and differences having arisen in England between the plaintiffs, Madame Minnie Dietert and another, and the firm of T. N. Singh & Co., it was agreed that the differences should be submitted to the arbitration of Mr. English Harrison, K.C., and Mr. Henry Tindal Atkinson, Barrister-at-Law, as arbitrators, and in case they were unable to agree, an Umpire should be appointed by the arbitrators.

On the 29th March 1899, the said arbitrators appointed A. T. Laurence, Esq., K.C., as Umpire in relation to the disputes and differences. By his award, dated the 11th December 1899, the Umpire awarded and determined, *inter alia*, (*a*) that the firm of T. N. Singh & Co. should pay to the plaintiffs the sum of £2,898-9 in full satisfaction of all claims between the parties; (*b*) that the firm of T. N. Singh & Co. should pay to the plaintiffs as rent for the fleet in the said award mentioned and fully described at the rate of £25 per ship per annum, from the 1st January 1900 until such time as the said fleet shall be delivered in good order and condition by the firm of T. N. Singh & Co. to the plaintiffs; (*c*) that the firm of T. N. Sing & Co. should pay the first-named plaintiff the costs of the said reference to arbitration and of the award.

By an order made under s. 12 of the English Arbitration Act (52 & 53 Vict. C. 49) on the 1st of March 1900 by the High Court of Justice, Queen's Bench Division of England, it was ordered that the said award, dated the 11th December 1899, should be enforced in the same manner as a judgment or order, and that the costs of the application upon which the said order was made should be taxed and paid by the firm of T. N. Singh & Co.

The plaintiffs submitted that they were entitled to receive from the defendant interest at the rate of six per cent. per annum on the sum and the costs awarded from the 1st March 1900.

In the 8th paragraph of the plaint, the plaintiffs alleged that they had claimed from the defendant the amount that was due to them as aforesaid and had threatened and were about to take legal proceedings against the defendant to enforce payment of the same, and thereupon and on the 19th of September 1902, and

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in the town of Calcutta, the defendant had an interview with the solicitor and constituted attorney of the plaintiffs' and to him the defendant promised that he would pay the plaintiffs' claim, and said further that he was ready and willing to sign a bond in favour of the plaintiffs for the amount that was due to them, and the defendant requested the plaintiffs' said solicitor and constituted attorney to give him some little time, so that he, the defendant, might pay the plaintiffs' claim by instalments. The plaintiffs' solicitor and constituted attorney asked the defendant to make an immediate payment of a sum of five hundred pounds in part payment of the plaintiffs' claim, and the defendant expressing his inability to do so, immediately promised and agreed to pay to the plaintiffs' solicitor and constituted attorney the sum of five hundred pounds in time to enable the plaintiffs' solicitor and constituted attorney to forward this sum to the plaintiffs by the mail of the 9th October 1902. The plaintiffs' solicitor and constituted attorney informed the defendant that he would not bind the plaintiffs to anything, but that he would refer all that had passed between him and the defendant to the plaintiffs, and also told the defendant, that if he would pay the sum of five hundred pounds within the period he had promised, he the said solicitor and constituted attorney would not proceed with the proposed suit, until he heard from the plaintiffs, and thereupon in consideration that the plaintiffs' solicitor and constituted attorney would forbear from taking such proceedings for the recovery of the plaintiffs' claim, until he heard from the plaintiffs, the defendant promised to pay to the plaintiffs' solicitor and constituted attorney the said sum of £500 within the period mentioned, and further promised to pay to him the balance in Calcutta. He accordingly forbore to take any proceedings against the defendant during the agreed period, but the defendant did not within that period, or at all, pay the said sum of £500 or any part of the claim. The plaintiffs' claim amounted to £3,105-12-4, or in Indian money Rs. 46,584-4. The plaintiffs obtained leave under cl. 12 of the Letters Patent.

The order of the Queen's Bench Division was as follows:—

"Upon hearing the solicitors for Madame Minnie Dietert, for T. N. Singh & Co., and upon reading the affidavit of Alfred Robert Warren filed the 1st day of March

1900:—It is ordered that the said Madame Minnie Dietert be at liberty to enforce the award dated the 11th day of December 1899 in the above arbitration in the same manner as a judgment or order to the same effect.

And that the costs of this application be taxed and paid by the abovenamed T. N. Singh & Co. to the said Madame Minnie Dietert or her solicitors.

Dated the 1st day of March 1900."

The defendant did not enter appearance and defend the suit when it was tried originally by AMEER ALI J., who made the following decree *ex-parte*:—

"Suit to recover Rupees forty-six thousand five hundred and eighty-four and four annas on a judgment of the High Court of Justice, Queen's Bench Division, England, with interest.

"This cause coming on this day for final disposal before the Hon'ble Ameer Ali, C.I.E., one of the Judges of this Court, in the presence of counsel for the plaintiffs (the defendant not appearing either in person or by counsel):—It is ordered and decreed that the defendant do pay to the plaintiffs the sum of Rupees fifty-two thousand and eighty-seven and nine annas and one pie with interest thereon at the rate of six per cent. per annum from the date hereof until realization, and do also pay to the plaintiffs their costs of this suit (to be taxed by the Taxing Officer of this Court under the heading "Class 1, short causes") with interest thereon at the rate aforesaid from the date of taxation, until realization."

The Advocate-General (Hon'ble Mr. J. T. Woodroffe) (Mr. Pugh and *Mr. Asghur* with him) for the appellant. The order of the Queen's Bench Division of the High Court in England under s. 12 of the English Arbitration Act (52 and 53 Vict. C. 49) is in favour of one of the plaintiffs only; the other plaintiff did not join with her in making the application for the order. The lower Court has dealt with the suit as one on a foreign judgment. No interest can be allowed in a suit on a foreign judgment: *Moazzim Hossein Khan* v. *Raphael Robinson*(1). An order obtained in the High Court in England enforcing an award under s. 12 of the Arbitration Act is a summary order made under a discretionary statutory jurisdiction, and does not operate as a judgment on which an action can be brought as on a foreign judgment; and if it is not a foreign judgment then the courts here would have no jurisdiction: *Kassim Mamoojee* v. *Isuf Mahomed Sulliman*(2). The Judgments Extension Act (31 and 32 Vict. C. 54) deals with judgments obtained in Court and not with summary orders made under a statutory jurisdiction, which may be enforced as a judgment

(1) (1901) I. L. R. 28 Calc. 641. (2) (1902) I. L. R. 29 Calc. 509.

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In *Westmoreland Green and Blue Slate Co.* v. *Feilden*(1), it has been held that a balance order under the Companies Act, 1862, which is similar to the order in this case is not a "judgment." It cannot be said that the suit is one for enforcing the award. The right to bring an action on an award has not been taken away by the English Arbitration Act, though under s. 12 of the Act an award may be enforced as a judgment: Russell on Arbitration, 8th ed., p. 309 and *seq.* The plaintiffs might enforce the award as a judgment, but unless the proper procedure be followed and the judgment obtained upon the award, no suit can be instituted as on a foreign judgment. In cases under the Public Demands Recovery Act in this country it has been held that, unless the proper procedure be followed, a certificate made under the provisions of the Act shall not have the force and effect of a decree: *Mahomed Abdul Hai* v. *Gujraj Sahai*(2), *Baijnath Sahai* v. *Ramgut Singh*(3), and *Chunder Kumar Mukerjee* v. *The Secretary of State for India*(4).

[MACLEAN C.J. Assuming it is not a foreign judgment, may not the suit be considered on the pleadings as one on the award?]

Reading the decree with the pleadings it is clear that it is not a suit on the award. The award has not been proved.

Whether it be a suit on a foreign judgment or on an award, the lower Court had no jurisdiction to entertain it. It has not been suggested that the defendant at the time of the commencement of the suit dwelt, or carried on business, or personally worked for gain within the limits of the jurisdiction of this Court. It has been attempted to make out that a part of the cause of action arose within such limits, and it will be contended that leave having been obtained under cl. 12 of the Letters Patent, no objection on the ground of jurisdiction could be raised: see paragraph 8 of the plaint. But the plaintiffs' right to the remedy asked for is independent of what has been put forward in that paragraph. As to what is the true definition of "Cause of action," see *Read* v. *Brown*(5), *Doya Narain Tewary* v. *Secretary of State for India*(6), *Kellie* v. *Fraser*(7).

(1) [1891] 3 Ch. 15.
(2) (1893) I. L. R. 20 Calc. 826; L. R. 20 I. A. 70.
(3) (1896) I. L. R. 23 Calc. 775.
(4) (1900) I. L. R. 27 Calc. 698.
(5) (1883) L. R. 22 Q. B. D. 128.
(6) (1886) I. L. R. 14 Calc. 256.
(7) (1877) I. L. R. 2 Calc. 445.

Mr. Dunne (*Mr. Knight* with him) for the respondent. The parties did not consider it a suit on a foreign judgment. The fact that the learned Judge gave interest, shows that he treated the suit as on the award. The preamble in a decree does not prove anything. The inference would be that the suit was on the award.

[HILL J. That leave was given under cl. 12 of the Letters Patent also shows that the suit was not on a foreign judgment.]

The award was put in as evidence which would not be necessary if the suit was on a foreign judgment. The award having been filed in the Court in England became a record of that Court, and no proof of the award was necessary. The suit is a suit on the award on which an order under s. 12 of the English Arbitration Act has been made. What the effect of that order is, is a different question.

In paragraph 8 of the plaint we state, which statement remains unchallenged because the defendant allowed judgment to go by default, how a part of our cause of action arose within the limits of the Original Jurisdiction of this Court and then leave under cl. 12 has been obtained. A demand followed by a promise to pay the amount of the award in Calcutta, is a cause of action in Calcutta.

I rely upon the cases cited by the learned Advocate-General for the definition of "Cause of action" and also on *Roghoonath Misser* v. *Gobindnarain*(1).

[MACLEAN C.J. If you had not said a word of what you have stated in paragraph 8 of your plaint, you had a right to get a decree upon the award for the whole amount. You did not require any fresh promise to pay.]

The question of jurisdiction goes to the root of the case, and if your Lordships are against me on the point of jurisdiction, I need not argue the point of foreign judgment. I am out of Court whether the suit be taken as one on the award or on a foreign judgment.

(1) (1895) I. L. R. 22 Calc. 451.

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MACLEAN C.J. The undisputed facts in this case are as follows:—

Up to the time of his death, which occurred in 1898, one Tejnarain Singh Bahadur carried on business in the City of London under the name of T. N. Singh & Co., and after his death the defendant carried on the same business under the same title. Disputes arose between the present plaintiffs and the firm of T. N. Singh & Co.; those disputes were referred to the arbitration of certain well-known members of the English Bar, and on the 29th of March 1899, Mr. Laurence, K.C., a well-known member of the Bar, was appointed Umpire, and he by his award dated the 11th of December 1899, directed that a large sum should be paid by the defendant to the plaintiffs with certain costs. By an order of the 1st March 1900 made by the High Court of Justice, Queen's Bench Division of England, it was ordered that the award dated the 11th of December 1899 should be enforced in the same manner as a judgment or order, and that the costs of the application upon which the order was made should be taxed and paid by the firm of T. N. Singh & Co. The award is annexed to the schedule to the plaint. The money was not paid, and the plaintiffs have sued on the Original Side of this Court to recover the sum mentioned in the award, with interest at the rate of six per cent. per annum, and also asked that the defendant should pay the costs of the suit.

The matter came before Mr. Justice Ameer Ali as an undefended action: and the learned Judge made a decree on the 12th February 1903 in favour of the plaintiffs for the sum which they asked for. The defendant has appealed. It is hardly necessary for me to dwell upon the inconvenience, to say the least, of this method of procedure. We have not the advantage of the views of the Court below, nor has the Judge of the Court below had an opportunity of expressing his opinion upon the legal points now raised. However, the appellant is within his rights, and I will say no more about it.

There are three points upon which it is urged that the judgment of the Court below is not sustainable and the suit ought to have been dismissed,—*first*, that the order of the 1st of March 1900 of the High Court of Justice is not a foreign judgment

within the meaning of that term; *secondly*, that the suit is not a suit upon the award; and, *thirdly*, whether it was a suit upon the judgment or whether it was a suit upon the award, the Court below had no jurisdiction to entertain it.

If the latter point be well founded, the two earlier points become immaterial. The inclination of my opinion is that the order of the 1st March 1900 is not such a judgment as to entitle the plaintiffs to sue upon it in this Court to recover the monies awarded to them by the award: but it is unnecessary to finally decide this. Again, looking at the frame of the pleadings, I should be disposed to say that it was open to the Court to make the decree it did, on the footing that the suit was one based upon the award rather than upon the order of the 1st of March 1900. But as I have already pointed out these matters are immaterial, if we are of opinion that the Court below had no jurisdiction to entertain the suit. The jurisdiction of the Court is given by section 12 of the Letters Patent of 1865, and the real question we have to consider is whether "the cause of action has arisen either wholly or, in case the leave of the Court shall have been first obtained, in part within the local limits of the Ordinary Original Jurisdiction of the High Court." It has not been suggested that the defendant at the time of the commencement of the suit dwelt or carried on business or personally worked for gain within such limits.

The contention of the plaintiffs is that the cause of action in part arose within the local limits of the Ordinary Original Jurisdiction of the High Court, and that, as the leave of the Court was obtained, the Court had jurisdiction to entertain it. The question then is, "Did the cause of action, in part, arise within the local limits of the Ordinary Original Jurisdiction of the High Court?"

If we regard the suit either as one upon the judgment or upon the award, the cause of action did not arise within the limits I have referred to. But it has been ingeniously argued that, having regard to the allegations in paragraph 8 of the plaint and taking them to be proved, the cause of action, in part, arose within the local limits of the Ordinary Original Jurisdiction of the Court.

What the true definition of the cause of action is has been the subject of many decisions, and one of the most recent upon

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the point, which in England has, I believe, been generally accepted and, which I think, we may safely follow in India, is that of *Read* v. *Brown* (1). There Lord Esher, then Master of the Rolls, says: "It has been defined in *Cooke* v. *Gill* (2) to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact, which is necessary to be proved." Lord Justice Fry says: "Everything which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause of action." Lord Justice Lopes says: "It includes every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to sustain his action."

Applying that definition to the present case, whether we regard this suit as one upon the order of the 1st March 1900 or as one upon the award, would it have been necessary for the plaintiffs to prove the allegations in the 8th paragraph of the plaint before they could have recovered? I think not. When the plaintiffs had proved the judgment, if the suit can properly be regarded as one upon a judgment, or the award, if as one upon the award, they had proved all that was necessary for them to prove. Applying Lord Justice Fry's test, if the plaintiffs had not proved the facts alleged in paragraph 8, would the defendant have been immediately entitled to judgment? I should say not.

If the facts stated in paragraph 8 amount to anything, they would appear to suggest some new bargain, the consideration for which moving from the defendant is not very apparent. But the plaintiffs are not suing independently upon this new bargain; they are suing either on the judgment or on the award, no part of which cause of action arose within the local limits of the Original Civil Jurisdiction of the Court. On this ground, it seems to me that the lower Court had no jurisdiction to pass the decree under appeal.

It is unfortunate that this point was not discussed in the lower Court, but, as I have said, it is open to the plaintiff to raise it here. The appeal therefore must succeed on this point.

(1) (1888) L. R. 22 Q. B. D. 128. (2) (1873) L. R. 8 C. P. 107.

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Under the circumstances, I do not think that this is a case in which we ought to allow any costs.

HILL J. I am of the same opinion, and I only wish to add with respect to the question whether any part of the plaintiffs' cause of action arose in Calcutta, that it appears to me that what is asserted in the 8th paragraph in the plaint to have taken place between the solicitor for the plaintiffs and the defendant in the month of September 1902 did not alter the legal relations of the parties. It seems to me that the undertaking on the part of Mr. Leslie, (the plaintiffs' solicitor) to forbear from instituting their suit, until he had heard from his clients in consideration of the defendant agreeing to pay immediately the sum of five hundred pounds was not an undertaking which under the circumstances of the case was enforceable in law, or which had any effect upon the legal position of the parties. If Mr. Leslie had instituted the suit within that period, and the defendant on the footing of his undertaking objected that it was premature, the objection would not have been, I think, maintainable; for the consideration upon which Mr. Leslie's promise was founded was illusory, amounting as it did only to an undertaking on the part of the defendant to do that which he was already legally bound to do. I do not think that an event, to which no legal effect attaches, can enter as an element into the creation of a cause of action, and for that reason the argument which was advanced here on behalf of the plaintiffs that, by reason of what took place between their attorney and the defendant in September 1902, part of the cause of action arose in Calcutta, cannot, I think, be maintained. That transaction to my mind formed no part of the cause of action.

I quite agree in what has fallen from my Lord, and I merely wish to add what I have now said as it appears to me to have its bearing upon the question of jurisdiction.

STEVENS J. I concur.

Appeal allowed.

S. C. B.

Attorneys for the appellant: *Pugh & Co.*

Attorney for the respondents: *A. Hinds.*