

(1951) 07 CAL CK 0014
In the Calcutta High Court
Case No : Civil Suit. No. 3081 of 1948

Setabganj Sugar Mills Ltd.

APPELLANT

Vs

Benozir Ahmed and Another

RESPONDENT

Date of Decision : 10-07-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13, 14

Citation : AIR 1952 Cal 116

Hon'ble Judges : Sarkar, J

Bench : Single Bench

Advocate : Subimal C. Roy and P.K. Sen, for the Appellant; Sisir K. Mukherjea and P.R. Das, for the Respondent

Judgement

Sarkar, J.—This suit involves the decision of only one point. The point is whether, when a person has obtained a judgment in a foreign Court against another person, a fresh suit by him against the same person on the same cause of action in our country is maintainable? It is contended that such a suit would not be maintainable for two reasons. First, it is said, that the foreign judgment would bar the second suit on general principles. Secondly it is said that the foreign judgment would operate as such a bar by reason of Section 13, Civil P. C.

2. The facts are simple and not in dispute. The plaintiff sold sugar to the two defendants of the value of Rs. 2,73,980-4-6. Obviously the deal was a purely commercial transaction. Of this sum the plaintiff was paid Rs. 2,40,000/-. The plaintiff filed the present suit in this Court on 8-9-1948 to recover the balance of the price amounting to Rs. 33,980-4-6 which the defendants had failed to pay. In this suit the plaintiff obtained an attachment before judgment of a sum of Rs. 10,000/- lying to the credit of the defendant Benozir Ahmed (hereinafter referred to as the defendant) with the Government of West Bengal. On 27-9-1948 the plaintiff filed another suit against the defendants in the Court of the Subordinate Judge claiming the same sum of money on the same cause of action. It does not appear why this was done but presumably because the plaintiff wanted an

attachment before judgment of the defendant's properties in East Pakistan also as he had not sufficient property in India. However that may be, it so happened that the Dacca suit came up for hearing on 15-11-1949 before this suit was ready to be heard. On that date the plaintiff asked for an adjournment which apparently was opposed by the defendant and the Dacca Court refused the request for adjournment. It appears that the defendant admitted the plaintiff's claim but prayed that he might be allowed to pay the amount in twenty annual instalments. The Court went into the question of instalments and passed a decree on admission for the amount claimed with costs and directed that the decretal amount be paid in fifteen equal annual instalments. It further directed that the attachment already levied in the suit would subsist. It does not appear what happened so far as the other defendant was concerned. The defendant duly deposited in Dacca Court the first two instalments of Rs. 2385-8-0 each payable under the decree on 12-4-1950 and 28-3-1951. The plaintiff never withdrew any of these two sums. In fact the plaintiff appealed from the decree but it is in dispute as to what, if anything, has happened to this appeal. The direction in the decree that the attachment was to continue tends to show that in the Dacca suit also the plaintiff had obtained an attachment before judgment.

3. This suit, that is the Calcutta suit, has now come up for hearing before me. The plaintiff has made up his difference with the other defendant and does not want to proceed against him. I am only concerned with the defendant Benozir Ahmed whom I have so long been referring to as the defendant. The defendant had filed a written statement raising various defences. At the hearing before me all these defences, excepting one, were abandoned. The defendant's only contention at the hearing was that this suit is incompetent because of the decree in the Dacca suit.

4. Now why should the Dacca judgment make this suit incompetent. This suit is founded on a particular cause of action. So long as that cause of action remains the suit must be maintainable. But it is said that the cause of action no longer exists as it is merged in the Dacca judgment. Does it do so? Oh this point the law is well established. It is thus stated in Cheshire's "Private International Law", (3rd Edn.) at p. 768:

"Such a judgment (i.e. a foreign judgment) does not, in the view of English Law, occasion a merger of the original cause of action, and therefore the plaintiff has his option, either to resort to the original ground of action or to sue on the judgment recovered, provided, of course, that the judgment has not been satisfied."

To a similar effect is the statement of the law on the point in Dicey's "Conflict of Laws". (See 6th Edn., page 410). The proposition so laid down in these authoritative text books is founded on judicial pronouncements made for a large number of years. This of course is English private international law. In our country this is the law that has been followed. On the particular question in hand, in "Nil Ratan v. Cooch Behar Loan Office Ltd." ILR (1941) Cal 171, Mitter

and Akram JJ. followed the principle that I have quoted from Cheshire. Mitter J. said (at page 174),

"A foreign judgment involves no merger of the original cause of action. The creditor thereupon has the option of bringing an action in a domestic tribunal on the foreign judgment which he has recovered or of bringing in a domestic tribunal a suit on the original cause of action."

In this view of the law I have to hold that the Dacca judgment does not make this suit incompetent for the reason that the cause of action on which this suit has been based no longer exists as it has been merged in the Dacca judgment.

5. Mr. Sisir Mukherji appearing for the defendant, pointed out the dissatisfaction expressed in both the text books that I have mentioned, with this state of the law. Thus in Cheshire's book it is observed (at p. 768), "The reasons upon which the doctrine is founded are obscure and evasive". But the same book also remarks (ibid) that, "The doctrine of non-merger has, however, been too often repeated by judges to justify any prospect of its abandonment". Likewise, in Dicey's book the following observations occur at p. 410:

"But, though well established by the earlier cases, the rule rests upon no sound bases of principle. It is, like the now exploded doctrine that a foreign judgment was impeachable upon the merits on the ground that such a judgment was mere evidence of a debt due from the defendant, derived from the former procedural rule that a foreign Court could not be treated as a Court of record. Whereas one branch of that rule was exploded in the latter half of the last century, the other has remained as an illogical anomaly, in conflict with the general policy of the law "ut sit finis litium". No modern English decision can however be found which supports it but it is significant that it has not been explicitly excluded in the statutory scheme of direct enforcement of foreign judgments."

All that it is necessary to say with regard to these adverse criticisms of the rule that a suit on a cause of action remains competent in a domestic tribunal even though a judgment has been passed on it by a foreign Court, is that the rule has admittedly been maintained inspite of these criticisms. To say that no recent judgment upholding the rule exists is of course not saying that the rule has been abandoned. This is sufficient answer to any argument to ignore the rule on the basis of these criticisms.

6. Mr. Mukherji then contended that the rule applies where the foreign judgment has not been satisfied. True enough, this is so. Mr. Mukherji then says that the Dacca judgment has at least been partly satisfied. He says that his client has deposited in Court two of the instalments which fell due under the Dacca decree and that decree continues the attachment which the plaintiff obtained previously in the Dacca suit. It does not seem to me that this contention is sounds The principle on which a foreign judgment which has been satisfied, prevents a suit on the original cause of action being brought in the domestic tribunal, is that, no one can be allowed to approbate and reprobate. In "Taylor v. Hollard", (1902) 1

K B 676, Jelf, J. put the matter thus (p. 681-2) :

"What he wants to do is to take from the foreign Court the judgment which that Court gave for the whole cause of action, and treat it as a part payment and sue for the residue here. To do this would be to approbate and reprobate, or, in more homely language, to blow hot and cold, which neither law nor common sense will allow. See "Barber v. Lamb" (1860 8 CB (N S) 95) where Erle, C. J. says: "It would be contrary to all principle for the party who has chosen such tribunal and got what was awarded to seek a better judgment in respect of the same matter from another tribunal"."

Now, how can it be said that in this case, the plaintiff has approbated the Dacca judgment? In order to amount to an approbation there must be some act of its own choice. In the present case the plaintiff did not want the Dacca judgment in the form in which it was passed; indeed it has appealed from it. The continuation of the attachment and the payment into Court of the instalments due under the decree are not matters of its choice but have been thrust upon it. It did not want the moneys to be deposited in Court nor has it withdrawn any portion of them; it has not enforced the attachment either. None of the two things relied upon by the defendant, therefore, amounts to an approbation of the Dacca judgment by the plaintiff. The Dacca judgment has not hence been satisfied and does not operate as a bar to the present action.

7. Then it is said that Section 13, Civil P. C., operates as a bar to this suit. That section says that,

"A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties" except in certain circumstances. Let me assume, against the contention of learned counsel for the plaintiff that the exceptions, do not apply to this case Mr. Mukherji contends that the Dacca judgment is conclusive as to his client's liability for the balance of the price and the question of that liability cannot therefore be agitated in, this suit again and hence that judgment bars this suit. I am unable to see that when a judgment is said to be conclusive on a matter what is meant is that no further suit with regard to that matter would lie. In my view what it means is that no domestic Court can come to a different finding with regard to that matter. If Section 13 was meant to have the effect of a bar "in limine" as Section 11 of the Code, it would be surprising that the language used in the two sections should be so widely divergent. The rule embodied in Section 13 is really taken from the English private international law. In Dicey the rule has been stated in these words (p. 401) :

"A valid foreign judgment is conclusive as to any matter thereby adjudicated upon...."

In spite of this rule, the other rule already stated, namely that:

"A valid foreign judgment does not of itself extinguish the original cause of action

in respect of which the judgment was given" (See Dicey ibid p. 410)

is also maintained along with it. If the rule as to the conclusiveness of the original judgment was meant to operate as a bar to an action, the two rules could not have existed side by side. This to my mind shows that the rule as to the conclusiveness of a foreign judgment means only that a matter thereby directly decided cannot be decided in a different manner by a domestic tribunal. This would leave it open to the domestic tribunal to decide the same matter in the same way. Section 13 does not therefore prevent me from hearing this suit and giving a judgment not in conflict with the judgment in the Dacca suit.

8. The result therefore is that the defence fails. There will be a decree in favour of the plaintiff against the defendant Benozir Ahmed for the sum of Rs. 33,980-4-6, interest on judgment, and costs. Certified for two counsel.