
(1941) 10 BOM CK 0009
In the Bombay High Court
Case No : (O.C.J.) Suit No. 81 of 1938-39

Vithalbhai Shivabha Patel

APPELLANT

Vs

Lalbhai Bhimbhai

RESPONDENT

Date of Decision : 15-10-1941

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 14

Citation : (1942) 44 BOMLR 380

Hon'ble Judges : Kania, J

Bench : Single Bench

Judgement

Kania, J.—[After stating facts his Lordship continued.] These being the facts the first question for consideration is whether the Kathore Mahal Court was a Court of competent jurisdiction within the meaning of Section 13 of the Civil Procedure Code, 1908. In this connection it is material to bear in mind that the jurisdiction of the Kathore Mahal Court for the purpose of passing a decree enforceable in the territory of H. H. the Gaekwar of Baroda is different from the jurisdiction contemplated by Section 13 of the Civil Procedure Code. That Court may have jurisdiction, if a part of the cause of action arose within its jurisdiction to pass a decree. But when the defendant did not owe any allegiance to H. H. the Gaekwar of Baroda and was not a resident within the jurisdiction of the local Court on the date of the suit, different considerations arise in respect of the enforceability of the decree in a foreign territory. Section 14 of the CPC provides :

The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record ; but such presumption may be displaced by proving want of jurisdiction.

2. On production of a certified copy of a foreign judgment it is obligatory on the Court therefore to presume that the Court passing the decree was of competent jurisdiction. It is open to the opponent however to show, either by following the record itself, that there was want of jurisdiction, or that the presumption might

be displaced by evidence led on the point. Both sides have led evidence. In my opinion the relevant facts proved are as follows :?

1. That the defendant is a British Indian subject.
2. That at no time material to the litigation he had resided within the territories of H. H. the Gaekwar.
3. That although Ranchhodji held a power of attorney and lived within the jurisdiction of the Kathore Mahal Court when the transactions took place, the power of attorney was revoked before the suit and Ranchhodji (on the admission of Rambhai) had gone to live at Amalsad (in British India) and lived there for many months before the date of the suit.
4. That Bhuljibhai did not hold any power of attorney in terms of exhibit No. 1 although he may have been described as " Kul Mukhtyar " and may have acted as a recognised agent of the defendant. He had ceased to do so and was living in Builsar at the date of the suit, having left Kosumba and Umarpada soon after 1936.
5. That at the date of the suit therefore there was no agent of the defendant living within the jurisdiction of the local Court.
6. That the business of the defendant had ceased in October, 1936.
7. That the summons in the suit was served on the defendant in Bombay. In Dicey's Conflict of Laws it is stated as follows (Rule 95) :

In an action in personam in respect of any cause of action, the Courts of a foreign country have jurisdiction in the following cases :

First Case.?Where at the time of the commencement of the action the defendant was resident or present in such country, so as to have the benefit, and be under the protection, of the laws thereof.

[On the facts proved in my opinion this does not apply.]

Second Case.?Where the defendant is, at the time of the judgment in the action, a subject or citizen of such country.

On proved facts this also does not apply.]

Third Case.?Where the party objecting to the jurisdiction of the Courts of such country has, by his own conduct, submitted to such jurisdiction, i.e., has precluded himself from objecting thereto?

(a) by appearing as plaintiff in the action ; or

(b) by voluntarily appearing as defendant in such action ; or

(c) by having expressly or impliedly" contracted to submit to the jurisdiction of such Courts.

8. On proved facts it is clear that (a) and (b) do not apply. The question remains to be considered only in respect of (c), namely, whether by his conduct the defendant had expressly or impliedly contracted to submit to the jurisdiction of the Kathore Mahal Court. Rule 96 in Dicey's Conflict of Laws runs as follows :?

In an action in personam the Courts of a foreign country do not acquire jurisdiction either....

(1) from the mere possession by the defendant at the commencement of the action of property locally situate in that country ; or

(2) from the presence of the defendant in such country at the time when the obligation in respect of which the action is brought was incurred in that country ;. or

(3) from the fact that the defendant was carrying on, business in such country through a manager or agent at the time when the obligation in respect of which the action is brought was incurred.

9. These rules have been accepted generally by Courts as correctly stating the law on the question of enforcement of a foreign judgment. It is, therefore, clear that the fact that the defendant carried on business within the jurisdiction of the Kathore Mahal Court through an agent at the time of the obligation in respect of which the action was brought does not give jurisdiction to the Kathore Mahal Court in respect of a foreigner. Sub-rule (2) quoted above further emphasizes that even the presence of the defendant in such a country at the time does not impart jurisdiction to the local Courts over a foreigner. *Gurdayal Singh v. Raja of Farikot* I. L. R. (1894) Cal. 222 is the leading case in India on this question.

10. On behalf of the plaintiff it was urged that although the defendant did not reside within the jurisdiction of the Kathore Mahal Court, inasmuch as he had given a power of attorney in favour of Ranchhodji and because under similar representations Bhuljibhai later on acted on his behalf, the defendant had agreed to submit to the jurisdiction of the Court. It was urged that because in the power of attorney the agent was authorised to file suits and the word " vivad " (which is officially translated, as appeal) is used, there was also power to defend suits. In view of the official translation I am unable to consider that " vivad " means " to defend ". Therefore the plaintiff's contention must rest on the words used in the power of attorney which authorises the agent to file suits. In this respect the plaintiff strongly relies on *Ramanathan Chettiar v. Kalimuthu Pillai* I. L. R. (1912) Mad. 163. In that case a power of attorney in the English form was given to the agent who at the date of the suit continued to be the authorised agent of the defendant and resided within the local jurisdiction of the Court. It was held that on the facts; therein found there was a submission to jurisdiction and the foreign judgment was held enforceable. I shall, deal with the facts therein in detail hereafter. In support of the propositions formulated in *Dicey Copin v. Adamson* (1875) 1 Ex. D. 17 *The Bank of Australasia v. Harding* (1850) 9 C.B. 661 *Bank of Australasia v. Nias* (1851) 16 Q.B. 717 and *Emanuel v. Symon* [1908] 1 K. B.

302 are principally relied upon.

11. In *Copin v. Adamson* the defendant was the holder of shares in a French company, having a local domicile in Paris, and thereby became subject to all the liabilities, rights and privileges attaching or belonging to shareholders and in particular to the conditions contained in the statutes or articles of association. By those statutes or articles it was provided and agreed that all disputes arising during the liquidation of the company should be submitted to the jurisdiction of the French Court; that every shareholder provoking a contest must elect a domicile at Paris, and in default election might, be made for him at the office of the Imperial Procurator of the Civil Tribunal of the department in which the office of the company was situated, and that all summonses etcetera should be validly served at the domicile formally or impliedly chosen. The company became bankrupt and by the laws of France the defendant's unpaid calls became payable. The defendant made default and provoked a contest. He never elected a domicile. Thereupon the plaintiff caused the summons etcetera to be served at the office of the company aforesaid. It was held that the judgment so obtained was enforceable in a foreign Court. That decision clearly shows an agreement contained in the statute founding the company between the shareholders and the company by which the shareholders agreed to be bound by the decision of the French Court as to their liability under the shares. It was a clear case of express agreement and within the statement of law found in Dicey.

12. In *The Bank of Australasia v. Harding* it was held that a statute authorising an incorporated company to sue or be sued in the name of its chairman constituted the chairman when so suing or sued an agent for the members of the company in the affairs of the company. The members of a company, formed for the purpose of carrying on business in a colony, are not discharged from liability on judgment obtained in the colony against the chairman, by reason of their having been resident in England, not being served with process, and having received no intimation of the proceedings. That decision is also based on an express contract because by the statute authorising the incorporated company to do business, it was provided that the chairman was the party named therein to sue or be sued in the matter as an agent of the member in the affairs of the company. The individual members agreed to make the chairman their statutory agent. They had therefore in terms agreed to submit to the jurisdiction of the Court and that decision is also clearly based on an agreement between the parties. *Bank of Australasia v. Nias* was also decided on a statute similarly worded.

13. *Emanuel v. Symon* lays down the general proposition that merely because the defendant had entered into a partnership, which worked within the jurisdiction of the local Court, that Court did not acquire jurisdiction over him personally if he was residing outside and was a foreigner. No decision of the English Courts had gone to the length of saying that by reason of a power of attorney being executed in favour of an agent there resulted an agreement to

submit to jurisdiction. The only Indian case on the point cited to me is *Ramanathan Chettiar v. Kalimuthu Pillai*. The terms of the power of attorney in that case, as pointed out in the judgment, were very wide. It conferred the widest powers and authorised the agent on behalf of the firm to demand, sue for, collect and receive, etc., the rents and profits of any tenancies, to take and use all lawful proceedings and means by distress or action or otherwise for recovering such rents and for enforcing the performance of any covenants or for evicting, ejecting or recovering damages from tenants ; to demand, sue for, enforce payment of all moneys, securities or personal estate and to prove in any bankruptcy for any property due, to adjust, settle, compromise or submit to arbitration any debt; to commence, prosecute or enforce or defend, answer or oppose all actions and other legal proceedings and demands touching any of the matters aforesaid or any other matters in which the defendant may be held interested and generally to act as his attorney in relation to all matters in which he may be interested. It was pointed out that the agent at the date of the suit was in fact within the jurisdiction and the power of attorney was in existence and operative To put it in other words if a party is doing business within the local limits of the Court through an agent who has the widest powers and who has effected transactions, it is difficult for the Court to hold that the defendant had not submitted to the jurisdiction of the Court if that agent, at the date of the suit, was continuing to hold that same authority, and was continuing to carry on business and to file suits, defend suits and in fact receive the process of the Courts. To hold otherwise appears to be somewhat astounding. That position was strongly pressed on the Court in that case. I should point out that in the course of his judgment Napier J. expressly stated that he did not hold that by reason of the existence of such a power of attorney there was an agreement to submit to jurisdiction. After noticing the two Bank of Australasia cases Napier J. remarked (p. 174) :?

They are treated by Mr. Dicey as examples of submission and it is clear that they are not cases where the defendant's liability is based on the fact that he was the plaintiff in the lower Court, or appeared in the suit or contracted with the other party to the suit to submit the matter of the suit to the jurisdiction of the Court.

14. He has thereby emphasised that the existence of an agent empowered in that way within jurisdiction of the Court, even when the power of attorney was operative at the date of the suit, did not amount to a contract between the creditor and the debtor to submit the matter of the suit to the jurisdiction of the Court. Within the meaning of the general word "conduct" used in the rule stated in Dicey the Court held that by his conduct the defendant had submitted to such jurisdiction. That is entirely a different proposition from stating that by reason of the power of attorney there arose a contract to submit to jurisdiction., If there was such a contract once in existence it was not open to either of the parties to resile from the same. On the other hand "conduct amounting to submission to jurisdiction" raises considerations in respect of the action of the parties at the date of the suit. In that view the fact that the power of attorney was operative,

that the agent in fact lived within jurisdiction and was served within the limits of the jurisdiction of the local Court are very material to be considered. I am unable to treat that decision as going to the length of holding that after the power of attorney had come to an end and the agent had ceased to live within the jurisdiction, there still subsisted a contract between the parties to submit to the jurisdiction of the! local Courts all disputes arising in respect of the transactions effected under the power of attorney granted by the defendant. In my opinion the plaintiff's argument is against the principle that the mere fact that the defendant at the date of the transaction lived within the jurisdiction amounted to an agreement to submit to jurisdiction or give a foreign Court jurisdiction over a foreigner resident outside. *Ramanathan Chelliar v. Kalimuthu Pillai*, therefore, does not help the plaintiff.

15. Reverting to the question raised by Section 14 of the Civil Procedure Code, I have therefore to find whether on the evidence the defendant had shown that the foreign Court was not a Court of competent jurisdiction to pronounce judgment against him. Excepting the fact that there, was a. power of attorney given in favour of Ranchhodji at the time of the! transactions, there is nothing more on which the plaintiff can rely. In my opinion the defendant had discharged the burden which lay on him to establish that the foreign Court was not of competent jurisdiction, and that issue must be found in favour of the defendant.

16. By his affidavit the defendant raised the question of fraud. A very halting statement was made in the course of his evidence which does not show that there was any fraud on the Court. To put it at its highest, it was distantly suggested that in obtaining the judgment the plaintiff had included certain items for which the defendant was not liable because they were paid to Bhuljibhai or spent on behalf of Bhuljibhai. In law that does not amount to any fraud on the Court, and having regard to the evidence, that contention was given up in the course of argument.

17. The last contention that the decision was not on merits has no substance and was not even argued. It is clear that the Kathore Mahal Court had taken evidence and examined witnesses. After taking all the oral evidence and considering the same together with the documents, the Court had decreed the claim. It is clear, therefore, that the decision given was on merits and the fact that the defendant did not appear did not make it otherwise. The result is that the present proceedings must fail.

18. On the question of costs I have heard counsel on both sides. When the matter came in chambers all the three points raised in the three issues were pressed. Having regard to the fact that fraud! was alleged, it was obvious that the matter could not be decided on affidavits and oral evidence was necessary. It was, therefore, adjourned into Court. The plaintiff came to Court to meet the charge of fraud and to meet the contention that the decision was not given on merits. Considerable inspection was given and taken and the books of account were carefully looked into by the attorneys to meet the defendant's contention.

As the evidence was very flimsy on the question of fraud, the learned counsel for the defendant very wisely did not press the second and the third issues, but that did not in any way diminish the costs thrown away by the contentions having been raised by the defendant in his affidavit. It is true that a very large portion of the argument in Court was on the question of the alleged agreement to submit to jurisdiction. But the prior preparation was mostly if not wholly confined to the question of facts raised in the second and the third issues. Taking everything into consideration, I think that there should be no order as to costs throughout these proceedings.

19. The result is that the notice is discharged ; no order as to costs throughout.