

ORIGINAL CIVIL.

Before Mr. Justice Scott.

1885.
March 31.

THE LONDON, BOMBAY AND MEDITERRANEAN BANK, PLAINTIFFS,
v. BURJORJI SORA'BJI LYWA'LLA, DEFENDANT.*

Company—Winding up—Suit against contributory on the B list—Notice—Plea of discharge in insolvency—Foreign judgment—Plea in suit on a foreign judgment—Balance order—English Companies' Act, 1862—Practice—Permission to withdraw suit with liberty to bring a fresh suit—Fresh suit filed upon a different order—Civil Procedure Code (XIV of 1882), Sec. 373.

The plaintiffs, who were an English joint stock company registered under the English Companies' Act of 1862, sued the defendant as a past member of the bank, upon a balance order of the High Court of Justice in England dated 24th February, 1881, to recover the sum of £678-3. The balance order recited that it was made upon the application of the official liquidator of the bank, and that there had been no appearance on behalf of the contributories. The defendant pleaded that he had not received notice that his name was about to be placed on the list of contributories, or notice of the application of the official liquidator recited in the balance order, and he contended that he was not bound by, or liable under, that order. He further pleaded (and it was admitted) that the order for winding up the plaintiffs' bank was in July, 1866; that he had filed his petition in insolvency on 19th November, 1866, and had obtained his discharge under section 60 of the Indian Insolvent Act (Stat. 11 and 12 Vic., cap. 21) on the 30th September, 1867; and he contended that by that order he was discharged from liability.

Held, upon the evidence, that service upon the defendant of the various notices was sufficiently proved.

Held, also, that, although the defendant's insolvency and his discharge under section 60 of the Indian Insolvent Act, which was subsequent to the order for the winding up of the bank, might have absolved him from further liability to the plaintiffs, and, if pleaded in the Court in England, might have prevented his being placed on the list of contributories, yet that the Court could not, in this suit, give effect to the defendant's discharge. The present suit was a suit upon a foreign judgment, and the defendant could not now be permitted to plead a defence which he had an opportunity of pleading in the foreign Court.

In August, 1882, the plaintiffs had filed a previous suit against the defendant to recover the said sum of £678-3. That suit was based upon a call order, dated 11th November, 1880, which it sought to enforce. By an order made in that suit on 7th April, 1883, the plaintiffs were permitted to withdraw it, with liberty to bring a fresh suit for the same cause of action. The present suit to enforce a balance order dated the 24th February, 1881, was filed on 11th February, 1885.

*Suit No. 59 of 1885.

It was contended on behalf of the defendant that the present suit being based upon an order which was in existence at the date of the previous suit, the plaintiffs could not now sue upon it; that the plaintiffs could not abandon the title upon which they claimed in the first suit, and set up a different title in the second.

Held, that the plaintiffs were not precluded from bringing the second suit upon the balance order, and that the suit was properly framed.

SUIT by the Liquidator of the London, Bombay and Mediterranean Bank to enforce against the defendant, as a past member of the bank, a balance order of the High Court of Justice in England of the 24th February, 1881.

The balance order recited that it was made upon *the application of James Cooper*, the official liquidator of the bank, and upon hearing the solicitors of the applicant, and *no person appearing on behalf of the contributories being past members of the said bank, although duly summoned, &c.*; and it directed that the several persons named in the schedule, being contributories as past members of the said bank, should, "within four days after service of this order upon them, respectively pay to the said James Cooper at his office, No. 3, Coleman Street buildings in the city of London, the sums set opposite to their respective names, such sums being the amounts due from the said several persons in respect of the call made by the order dated the 11th November, 1880, together with interest, &c."

The sum alleged to be due under the said order was £678-3. This suit was filed on the 11th February, 1885, and claimed the said sum and interest thereon, amounting to £137-9-6, from the 17th January, 1881, to the 10th February, 1885. In Indian currency the amount claimed was Rs. 10,302-9-11.

On the 8th August, 1882, the plaintiff had filed a previous suit (No. 303 of 1882) to recover the said sum of £678-3 from the defendant. That suit was based upon the call order of the 11th November, 1880, which it sought to enforce. By an order made in that suit on the 7th April, 1883, the plaintiffs were permitted to withdraw it, with liberty to bring a fresh suit for the same cause of action. The plaintiffs accordingly filed the present suit on the 11th February, 1885.

In his written statement the defendant pleaded that he had not received notice that his name was about to be placed on the list

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of contributories, or notice of the application of Mr. Cooper, referred to in the balance order of the 24th February, 1881; and he contended that he was not bound by, or liable under, that order.

He further pleaded (and the fact was admitted by the plaintiffs) that he had filed his petition in the Insolvent Court at Bombay on the 19th November, 1866, and had obtained his discharge under section 60 of the Indian Insolvent Act (Stat. 11 and 12 Vic., cap. 21) on the 30th September, 1867, and he contended that by that order he was discharged from all liability to the plaintiffs.

The plaintiffs' bank was an English joint stock company registered under the English Companies' Act, 1862. The order for winding up was made on the 26th July, 1866.

The present suit was heard as a short cause.

In his evidence the agent of the liquidator (Mr. Stead) stated that he had himself posted the various notices addressed to the defendant at Surat, where he had a "family house" in which his wife and children, sisters and mother permanently resided, and where he (Mr. Stead) had an interview with him in 1878.

The defendant swore that he had not received the notices referred to in his written statement; that he lived for the greater part of the year in Bombay, but that he was in the habit of visiting Surat every year, staying there for a week, a month, or two months at a time. On these occasions he resided with his family at the family house in Surat.

Macpherson for the plaintiffs.—The defendant has been duly served with notice of the orders made in this matter. By an order of the Court in England, dated 4th August, 1877, service by post was made sufficient. The defendant's discharge in insolvency might probably have been good cause against placing his name on the list of contributories—*Punnett v. Venáyak Pándurang*⁽¹⁾ but see, *contra*, *Furdoonjee's Case*⁽²⁾; but he is too late to raise it as a defendant to this suit. This is a suit on a foreign judgment—*The London, Bombay and Mediterranean Bank v. Hormasji Pestanji*⁽³⁾

Kirkpatrick for the defendant.—The plaintiffs are not entitled to bring this suit. The previous suit (No. 303 of 1882) was to

(1) 9 Fom. H. C. Rep., 27.

(2) 3 Ch. Div., 264.

(3) 8 Bom. H. C. Rep., O. C. J. 200.

recover the same debt, but was based on the call order of the 11th November, 1880. The present suit is to recover precisely the same debt, but is based on a different order, viz., that of the 24th February, 1881. They seek to recover the same property, but on a different title. They ought to have claimed to enforce both orders in the former suit, as both were then in existence. The liberty to bring a fresh suit, given under the Civil Procedure Code (XIV of 1882), section 373, is not a liberty to abandon the title put forward in the first suit and set up a different title in the second. Leave to withdraw is given only for the purpose of supplying formal defects—*Watson v. The Collector of Rajshahye*⁽¹⁾. The plaintiffs ought to have sued on both orders—*Bheeka Lál v. Bhuggo Lál*⁽²⁾; *Denobundhoo v. Kristomonee*⁽³⁾. The balance order requires the defendant to pay in London within four days of the service. Notice is not proved—*The London, Bombay and Mediterranean Bank v. Govind Rámchandra*⁽⁴⁾; *Buckley on Companies* (3rd ed.), pp. 484-492; *General International Agency Company*⁽⁵⁾; *Land Credit Company of Ireland*⁽⁶⁾. The decision in *The London, Bombay and Mediterranean Bank v. Hormasji Pestanji*⁽⁷⁾ was based on the fact that the defendant had entered an appearance in the Court in England. Here the defendant did not appear.

SCOTT, J.—In this case I think I am bound to decide in favour of the plaintiffs, upon the authority of the case of *The London, Bombay and Mediterranean Bank v. Hormasji Pestanji*⁽⁸⁾. The defence is, first, want of sufficient notice and, second, discharge from all liabilities under the Indian Insolvent Act. The only evidence that has been given has been with reference to the service, upon the defendant, of notice that his name would be included in the B list of contributories in case he should not appear and show sufficient cause to the contrary, and of the further notice of the making of the call order of the 11th November, 1880, on the contributories whose names were included in the B list. As to the balance order of the 24th February, 1881, it has been proved—indeed, it is admitted by the defendant—that it was personally

(1) 12 Calc. W. R. P. C., 43.

(4) I. L. R., 5 Bom., 223.

(2) I. L. R., 3 Calc., 23.

(5) 15 W. R., 973.

(3) I. L. R., 2 Calc., 152.

(6) 39 L. J. (Ch.), 389.

(7) 8 Bom. H. C. Rep., O. C. J., 200.

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served upon him in Bombay. The previous notices, however, were sent to him by post. Mr. Stead, the plaintiffs' agent in Bombay, has told us that these notices, like all other similar notices issued in connexion with this winding up, came to Bombay from England in envelopes already addressed; and he, on reference to his books, swears that he posted them himself in the post office in Bombay after comparing the addresses on the envelopes with those entered in the list appended to the Chief Clerk's certificate. The notices to the defendant were addressed to "Burjorji Sorábjí Lywálla, Broker, Surat"; and Mr. Stead gives us the dates on which they were posted by him, viz., the 30th September, 1879, the 21st September, 1880, and the 28th January, 1881.

Now the defendant's case is, that he never received these notices. He denies that he resides at Surat. He says he carries on the business of a broker in Bombay; that he lives in Bombay for the greater part of the year. He admits, however, that since his insolvency in 1867 he has been in the habit of going to Surat every year, and of residing there with his family for periods varying from a few days to one or two months. It appears that members of his family live in Surat in what he calls his "family house". His wife and children, his sisters, and his mother all permanently live there, and on the occasions of his annual visits to Surat the defendant resides with them.

From a letter written by him to Mr. Stead in 1876 it appears that the defendant was then in Surat, and Mr. Stead has sworn that he went himself to Surat in 1878 on business connected with the claims of the bank upon contributories there, and that he then had an interview with the defendant at his family house. Accordingly, the notices which I have mentioned, and which were, subsequently to that interview, addressed to the defendant, were sent to Surat, being also endorsed with the defendant's Bombay address as given by him, for registration, to the company as the place where he had previously resided. None of those notices were ever returned through the post office: so it is clear that they were delivered, and were retained by somebody; and I am satisfied that they were delivered at the defendant's family house; and as the defendant had left his registered Bombay

address, I think delivery at Surat under the circumstances was sufficient. I think under these circumstances service upon the defendant has been sufficiently proved.

It must be borne in mind on this point that, by the order (exhibit D) made by the Court of Chancery in England in the matter of the winding up of the plaintiffs' bank on the 4th August, 1877, it was expressly ordered that service of any notice, order, or other proceeding in this matter, not requiring personal service upon contributories in any part of India might be effected by post, "to the last known address or place of abode", and that personal service was not necessary. It may be added that on the 13th November, 1881, the defendant wrote, claiming exemption from liability on the ground of his discharge in the Insolvency Court, but in no way setting up the want of notice as a defence. The defendant, therefore, had notice of the proceedings in England, and his name was placed on the B list of contributories. Subsequently, the call order of the 11th November, 1880, upon these contributories was made, and on the 24th February, 1881, the balance order was made on which this suit is brought. Had the defendant appeared in the Court in England, and pleaded his discharge as an insolvent, it seems probable, from the authorities, that he could not have been placed on the list of contributories. The order for winding up the plaintiffs' bank was in 1866; the defendant's insolvency was in 1867; and his liability to the company was a debt which might then have been proved against him. That being so, his discharge under section 60 of the Insolvent Act would have been a good defence, and would have absolved him from further liability. But the defendant did not appear before the Courts in England and plead his discharge, and the orders I have mentioned have been made against him as a contributory; and the question is, whether this Court can now give effect to that discharge. I do not think it can. The present suit is equivalent to a suit upon a foreign judgment, as appears from the case of *The London, Bombay and Mediterranean Bank v. Hormasji Pestanji*⁽¹⁾, which is an authority binding upon me. In that case it was laid down that the Courts in India must treat a call order made by the Court in Chancery upon

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a contributory of a company registered in England as a foreign judgment; and it is clear that in a suit upon a foreign judgment a defendant cannot be permitted to urge a defence which he had an opportunity of pleading in the foreign Court.

It does, no doubt, appear a hardship upon the defendant that he should be required to go to the trouble and expense of appearing before a Court in England, and putting forward his defence there. That, however, is the result of his having joined an English company subject to the jurisdiction of the English Courts. The local law and the *forum* of the company's head office was accepted by the defendant on becoming a shareholder⁽¹⁾. The apparent hardship is not a matter which can affect the decision of this case.

As to the point raised by Mr. Kirkpatrick with reference to the effect of the order giving the plaintiffs liberty to bring a fresh suit, I am of opinion that the plaintiffs were not precluded from bringing the fresh action in its present form, and that the suit is properly framed.

Judgment for plaintiffs.

Attorneys for the plaintiffs.—Messrs. *Tobin and Roughton*.

Attorneys for the defendant.—Messrs. *Ardesir and Hormasji*.

(1) L. R., 1 Ex. Div., 17.

REVISIONAL CRIMINAL.

Before Mr. Justice Nánábhái Haridás and Sir W. Wedderburn, Justice.

REFERENCE BY THE SESSIONS JUDGE OF SURAT.

1885
February 12.

Joint Judges—Criminal Procedure Code Act X of 1882, Sec. 193, Cl. 2—Applications under Chapter XXXII—Sessions Judge, power of, to direct disposal, by Joint Sessions Judge, of such applications as cases transferred.

Applications under Chapter XXXII of the Code of Criminal Procedure (Act X of 1882) cannot be referred to a Joint Sessions Judge under section 193, clause 2, of the Criminal Procedure Code so as to make it competent for a Joint Sessions Judge to dispose of them—a Joint Sessions Judge being strictly precluded from exercising any of the powers under Chapter XXXII of the Criminal Procedure Code, and section 193, clause 2, contemplating only cases for trial.

THIS was a case stated for the opinion and orders of the High Court by A. H. Unwin, Acting Sessions Judge at Surat.