

1900.
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The question of the rival claims of the parties who profess to be adopted by Bai Dahi cannot be disposed of in an inquiry under this Act, and must be reserved for future litigation by the persons interested. Fortunately in this case Moti Chatraji, the petitioner, is admittedly the natural heir of the deceased. Karma had two sons, Chatra and Gamna, and Moti is Chatra's son; he is thus the nephew of Gamna and Bai Dahi. Independently of the alleged adoptions he would be the heir. The opponent admitted that Moti was nephew and he himself was a more distant relation. The certificate application was made by Moti, and under the circumstances the District Judge might have treated him as applicant in his own right and granted him the certificate as the nearest natural heir. We now make that order by varying the decision of the District Court, and grant the certificate to Moti Chatraji, and under the circumstances remand the case to the District Court to fix the security to be required to be taken from Moti Chatraji for rendering account of the debts &c. received by him. The costs in the lower Court should be borne by each party, and in this Court the appellant should recover his costs from the respondent.

Decree varied.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Whitworth.

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 January 14.

RAMBHAT (ORIGINAL PLAINTIFF), v. SHANKAR BASWANT
 (ORIGINAL DEFENDANT).*

Jurisdiction—Defendants non-resident foreigners—Cause of action arising within jurisdiction—Civil Procedure Code (Act XIV of 1882), section 17, explanation III—Letters Patent, clause 12—Small Cause Courts Act (IX of 1887), section 18.

Under the Civil Procedure Code (Act XIV of 1882) British Courts are empowered to pass judgment against a non-resident foreigner provided that the cause of action has arisen within the jurisdiction of the Court pronouncing the judgment.

* Reference No. 21 of 1900.

REFERENCE by Ráo Bahádur Gangadhar V. Limaye, First Class Subordinate Judge of Belgaum, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The question referred was whether the Court at Belgaum had jurisdiction to try this suit, the cause of action having arisen at Belgaum, but the defendants being residents and subjects of a foreign State, namely the State of Sánгли.

The suit was brought to recover Rs. 500 due on a promissory note admittedly executed by the defendants' father at Belgaum, and in respect of which several payments had been made at Belgaum.

The opinion of the referring Judge was that he had no jurisdiction, but he referred the point to the High Court.

N. P. Patankar (amicus curiæ) for the plaintiff:—

Under section 17 of the Civil Procedure Code, the Court at Belgaum had jurisdiction to entertain the suit as the cause of action arose there. We are bound by the Civil Procedure Code, and if, under its provisions, a Court can take cognizance of a suit, it must do so, even though in doing so it may violate the rules of international law.

The defendants having submitted to the jurisdiction by appearing before the Court, it is not open to them to plead that a decree cannot be passed against them as they are subjects of a foreign State—*cf.* Presidency Small Cause Courts Act (XV of 1882), section 18, *Girdhar v. Kassigar*,⁽¹⁾ *Ram Raji v. Pralhad-das*,⁽²⁾ *Bhawrao v. Lakshmi Bai*.⁽³⁾

N. A. Shiveshwarkar (amicus curiæ) for the defendants:—

It is not disputed that Sánгли is a foreign State and that it has an independent civil jurisdiction. The question is whether a British Court has jurisdiction to entertain an action *in personam* against the subject of a foreign State? The answer to this question depends upon the consideration of two points, namely, whether the Court is judicially competent to entertain the action and how far its judgment would be effective. Its competence is to be determined by section 17 of the Civil Procedure Code and

(1) (1893) 17 Bom. 662.

(2) (1895) 20 Bom. 133.

(3) (1895) 20 Bom. 607.

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the effectiveness of the judgment by reference to the rules of Private International Law. An effective judgment is a decree which gives to the person who obtains rights under it an actual and not merely a nominal right, that is, a right which, if aided by the sovereign whose Court has delivered judgment, he can enforce. (Dicey on Conflict of Laws, pages 37-39.) The State of Sāngli being admittedly a recognized foreign State, the decree which a British Court might pass would be treated a nullity, creating no obligation and entitled to no respect. One of the essentials thus being wanting, the British Court has no jurisdiction.

Section 17 of the Civil Procedure Code should be interpreted and acted upon consistently with the rules of International Law. The plaintiff must sue in the Court to which the defendant is subject at the time of the suit. *Gardyal Singh v. Rāja of Faridkot*,⁽¹⁾ *Christien v. Delanney*,⁽²⁾ *Kessowji v. Khimji*,⁽³⁾ International Law by Sir Robert Phillimore, vol. IV, section 891. Merely appearing before the Court and protesting against the jurisdiction does not amount to submission to jurisdiction—*Parry and Co. v. Appasami*.⁽⁴⁾

CANDY, J. :—The facts which have given rise to this reference are these :—

Shankar, a resident in Marihal, a village of the Sāngli State, borrowed a sum of money from the plaintiff, a resident of Belgaum, and passed a document (Exhibit A), which has been termed a promissory note. It is, strictly speaking, merely a receipt. No doubt there is an implied promise to pay the debt, and it has been found as a fact by the Subordinate Judge that the document was passed and part of the debt has been repaid at Belgaum, and that the cause of action arose within his jurisdiction.

Having regard to explanation III of section 17 of the Civil Procedure Code, it must be taken that in the present suit brought by the plaintiff against the sons of the deceased Shankar to recover the balance of the debt, the cause of action arose within the local limits of the jurisdiction of the Subordinate Judge of Belgaum.

(1) (1894) 22 Cal. 222.

(3) (1888) 12 Bom. 507.

(2) (1899) 26 Cal. 921.

(4) (1880) 2 Mad. 407.

Defendants were summoned through the Sánгли authorities, and one of the defendants appeared by pleader and contested the jurisdiction of the Subordinate Judge to try the suit. This is the question which has been referred to us under section 617 of the Civil Procedure Code (XIV of 1882).

If we are to be guided by the current decisions of the Bombay High Court, then, no doubt, the question must be answered in favour of the Subordinate Judge's jurisdiction. In *Kessowji v. Khimji* ⁽¹⁾ the point decided had reference to clause 12 of the Letters Patent, which empowered the High Court in the exercise of its ordinary original civil jurisdiction to try suits (not being suits for land, &c.) —

(a) if the cause of action shall have arisen within the local limits of such jurisdiction; or

(b) if the defendant at the time of the commencement of the suit shall dwell, or (2) carry on business, or (3) personally work for gain within such limits.

Clause (a) did not require consideration, as it was admitted that the cause of action arose wholly without the jurisdiction. It was also admitted that the defendant did not dwell or personally carry on business (work) for gain within its limits. Scott, J., held that he was bound to give the word "defendant" in the above clause a double meaning, *i. e.* a limited sense as regards jurisdiction over those who carry on trade (b [clause 2])—and a general sense, inclusive of foreigners and British subjects, in its application to those who personally work for gain or dwell (b [3] and [1]). It was clearly admitted throughout the judgment that if the cause of action arose within the local limits of the jurisdiction, then the Court would have jurisdiction even though the defendant might be a non-resident foreigner. This had been the view taken by Bayley, J., in 1872 in *Hargopal v. Abdul* ⁽²⁾ in which the amount sued for was the balance alleged to be due in respect of moneys lent in Bombay by the plaintiffs to the deceased Haji Mahomed Khan, a resident of Ajmere. Bayley, J., said: "An action might unquestionably have been brought against him in this Court in his lifetime, and his death by the act of God does not deprive his creditors of the right which by his contract with

(1) (1888) 12 Bom. 507.

(2) (1872) 9 Bom. H. C. R. 429.

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them in Bombay they had acquired to have their claims against him or his estate wherever it might be situated, adjudicated upon in the High Court of Bombay."

The decision of Scott, J., above noted regarding the words "carrying on business," given in 1888, was virtually overruled by Sargent, C.J., and Starling, J., in 1893 in the case of *Girdhar v. Kassigar*,⁽¹⁾ with reference to section 18 of the Small Cause Courts Act (XV of 1882), which provided that the Small Cause Court should have jurisdiction '(a) when the cause of action has arisen within the local limits of the jurisdiction of the Small Cause Court (with the leave of the Court), or (b) when all the defendants at the time of the institution of the suit (1) actually and voluntarily reside, or (2) carry on business, or (3) personally work for gain within such local limits.' Sargent, C.J., held that the limited sense of the word "defendant" as regards (b [clause 2]) was not justified, and that it was a proper inference that the Legislature had directed the Courts to exercise jurisdiction over defendants who carry on business within the jurisdiction, even though they are non-resident foreigners. It would appear also from the whole tenor of the judgment that Sir C. Sargent treated it as clear that if the cause of action arose within the local limits of the jurisdiction of the Court, then there could be no doubt as to the power of the Court to try the suit.

This was the view taken by Farran, C.J., and Tyabji, J., in 1895 in the subsequent case of *Ram Ravji v. Prahladdas*,⁽²⁾ in which it was said that the part of the cause of action arose within the local limits of the jurisdiction of the High Court. Sir C. Farran, C.J., said (pages 142-3):

It has been, however, argued upon the authority of *Gurdial Singh v. Raja of Faridkot*⁽³⁾ that, admitting that part of the cause of action arose in Bombay, the Court has no jurisdiction over the defendant who is a subject of the Baroda State and a foreigner, inasmuch as before suit filed he had ceased to carry on business in Bombay and to be amenable to the jurisdiction of the High Court. The answer to this contention appears to us to be found in a passage of the judgment of the Privy Council itself. 'In a personal action . . . a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, it is by International Law an

(1) (1893) 17 Bom. 662.

(2) (1895) 20 Bom. 133.

(3) (1894) 23 Cal. 222; 21 I. A. 171.

absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation except (when authorised by special local legislation) in the country of the *forum* by which it was pronounced. Except in the case of *Kessowji v. Khimji*,⁽¹⁾ where to escape from grave anomaly, one of the heads of the jurisdiction conferred on the High Court by clause 12 of its Letters Patent were read as though the words 'being a British subject' were inserted in it, it has been considered since the establishment of the High Court, that the several heads of jurisdiction specified in the clause were applicable to actions where a foreigner was a defendant. The number of suits which have been brought and without question decided upon that view of the law must have been very great. The judgment of the Court of appeal in *Girdhar v. Kassigar*⁽²⁾ virtually overrules *Kessowji v. Khimji*,⁽³⁾ and decides that the case of foreigners resident out of the jurisdiction but carrying on business within it, is not to be excluded impliedly from the purview of clause 12 of the Letters Patent. The reasoning upon which the decision is founded is directly applicable to the case before us. Thus we feel that we should be virtually overruling that decision if we were to accept the contention of the Counsel for the appellant. We do not, however, doubt its correctness, and willingly follow it. The plea to the jurisdiction therefore fails.

It is thus clear that Farran, C.J., having due regard to the decision of the Privy Council in the *Paridkot* case, held that the several heads of jurisdiction above noted (both [a] and [b]) specified in clause 12 of the Letters Patent are applicable to actions where a non-resident foreigner is a defendant. If that be so, then it is obvious that the same principle will hold good in regard to the corresponding heads of jurisdiction specified in section 17 of the Civil Procedure Code, 1882. To apply the words of Sir C. Farran, it has been considered, at least since the Civil Procedure Code of 1859 was enacted, that the several heads of jurisdiction specified in the section or sections relating to the jurisdiction of the Courts were applicable to actions where a foreigner is a defendant. The number of suits which have been brought, and without question decided upon that view of the law, must have been very great. Having regard to the nature of the numerous suits which are tried on the original side of the Bombay High Court, and in the Presidency Small Cause Court at Bombay, it is no exaggerated language to say that if the proposition now put forward on behalf of the defendants in the present case is correct, a large portion of the business of those Courts will be

(1) (1888) 12 Bom. 507.

(2) (1893) 17 Bom. 662.

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taken away. Every one conversant with the litigation in the city and island of Bombay knows how numerous are the suits in which the defendants are residents of Kutch or Káthiáwár, and jurisdiction is assumed over them simply on the ground that in the suits in which they are defendants the cause of action has arisen in Bombay.

As was stated by Lord Esher, M.R., in *Companhia de Mocambique v. British South Africa Company*,⁽¹⁾ and by James, L.J., in *ex parte Blain*,⁽²⁾ quoted by Sir C. Sargent at page 666 of Indian Law Report 17 Bom., if there is a "proper inference to the effect that the Courts are directed to exercise jurisdiction over non-resident foreigners, or if this is plainly implied," then the Courts must obey. Moreover (to again apply the language of Sir C. Sargent, idem, page 667,) in considering what was the true intention of the Legislature, it is right to bear in mind the special circumstances of many of the mofussil Civil Courts in this country, as regards the great number of non-British subjects who are constantly having transactions with British subjects, giving rise to causes of action within the jurisdiction of those Courts. In his referring judgment in the present case the Subordinate Judge remarks that a good deal of the litigation in his Court is connected with the residents of certain villages situate in the neighbourhood of Belgaum, belonging to the Native States of Sánгли and Kurundvád, and in particular with the residents of the mercantile town of Sháhápúr of the Sánгли State. If the causes of action arising out of those transactions within the jurisdiction of the Belgaum Civil Courts cannot be adjudicated upon by the Belgaum Court, there can be no doubt that those mercantile transactions will be practically crippled.

It may well be doubted whether it would be correct in such a case as this to say that the assertion of jurisdiction by the British Legislature is inconsistent with the comity of nations, or with the established rules of private international law. Is Sánгли State a nation within the meaning of those rules? A reference to Aitchison's *Treaties* (3rd Ed.), vol. VII, page 186 *et seq.* shows that the Sánгли Chief is one of the Southern Máraṭha Jaghirdárs. He is a first class Sardár under the British Govern-

(1) (1892) 2 Q. B. 358.

(2) (1879) 12 Ch. D. 522.

ment. He is a descendant of Hari Bhat, the founder of the Patwardhan family, a Bráhmín who became the family priest of the Ghorpades of Ichalkaranji, and whose three sons rose to military commands under the first Peshwa and received grants of land on condition of military service. At the time of the Peshwa's overthrow Chintamanrao was the Chief of Sánгли. An engagement was entered into with him (Aitchison, page 229) which bound him to dependence on the British Government, to whom all quarrels were to be referred. From 1873 to 1887, in consequence of the Chief's mismanagement, the affairs of the State were jointly administered by the Chief and a British officer appointed by Government. In 1888 the Chief was restored to full management on condition that (1) that he agreed to follow in all important matters the advice of the Political Agent for the Southern Marátha Country; (2) that he maintained the efficiency of the administration at its present high standard to the satisfaction of the Governor in Council; (3) that he exercised his power of appointing and dismissing the State Kárbhári only with the sanction of the Government, and that he gave a written agreement to the Political Agent to abide by these conditions.

Is it reasonable to apply to the territories of such a dependent Chief the comity of nations or the rules of private international law such as would be applicable between England and, say, France or Germany? It must be remembered that in one aspect the present case is the converse of the *Faridkot* case—*Gurdyal Singh v. Rája of Faridkot*.⁽¹⁾ Suppose the defendants in this case resided in Belgaum, but the contract giving rise to the cause of action had been made in Sánгли territory, and the Sánгли Court had assumed jurisdiction and passed a decree against the defendants, then the question would arise, if plaintiff brought a suit in Belgaum against the defendants on the foreign judgment, whether the British Courts could recognise such assumption of jurisdiction, and would treat the foreign judgment as a nullity. So too if the Subordinate should pass judgment in the present case against defendants, and plaintiff should bring a suit on that judgment in the Sánгли Court, it

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(1) (1894) 22 Cal. 223; 21 I. A. 171.

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may be said that the question would arise in the Sāngli Court, whether such judgment should not be treated as a nullity. The question for our consideration is not whether the Belgaum Subordinate Judge can recognise a certain judgment of a foreign Court, or whether a foreign Court would recognise the judgment of the Belgaum Subordinate Judge if delivered against the defendants in the present case. So conversely in the *Faridkot* case the question was not whether the Faridkot Court had jurisdiction to pass the judgment it did, and not whether that judgment was valid within the Faridkot territory. The answer to both those questions were apparently in the affirmative. The sovereign of Faridkot, who combines in his own person both the executive and legislative functions of government, had specially authorised the Judge to try the case in question, and, it may be added, had of his own authority directed the adoption of the Indian Code of Civil Procedure, so far as they were applicable to his territory. But the question decided by the Privy Council in the *Faridkot* case was, whether the judgment though valid in the country of the *forum* by which it was pronounced, could be regarded as anything but a mere nullity in the Courts of another nation. That question was answered in the negative. It does not arise here.

The question for our consideration is whether the proper inference from the Code of Civil Procedure is that our Courts are empowered to pass judgment against a non-resident foreigner, provided that the cause of action has arisen within the jurisdiction of the Court pronouncing judgment. Sir C. Farran answered this question in the affirmative. We are not prepared to dissent from that authority. To answer the question in the negative would be to cause a cataclysm in the civil litigation of the Empire of British India, which could only be remedied by immediate legislation, and that only possibly in Parliament. The difficulties pointed out above in regard to Bombay and Belgaum do not exist in those places only. If the Civil Procedure Code must be taken as not empowering our Courts to pronounce judgment in cases where the cause of action arose within the limits of the jurisdiction of the Court pronouncing judgment, but the defendant is a subject of and resides in one

of the numerous Native States, which are throughout the length and breadth of this great continent to be found in more or less dependence on the British Government, then it is not in one or two isolated places that this view of the present law will have the most important consequences. In this view we are of opinion that it would be a serious thing to dissent from so strong a body of judicial authority as is shown by the current of decisions of this Court, and we accordingly answer the question put to us in the affirmative.

Order accordingly.

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APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

KRISHNA (ORIGINAL PLAINTIFF), APPELLANT, v. PARAMSHRI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1901.

January 8.

Hindu Law—Adoption—Dwyamushyayana adoption—Power of a Hindu widow to give away an only son in adoption.

A Hindu widow can make a valid gift of her only son in adoption. The power of giving and taking an only son in adoption in the *Dwyamushyayana* form is not confined to brothers, but may also be exercised by their widows.

Lakshmappa v. Ramava⁽¹⁾ explained and distinguished.

SECOND appeal from the decision of H. L. Hervey, District Judge of Kánara, confirming the decree of Ráo Sáheb V. D. Joglekar, Second Class Subordinate Judge at Kumta.

Devappa and Bomaya were separated Hindu brothers of the Sudra class.

Bomaya died, leaving a widow Shivamma and an only son, Krishna (the plaintiff).

Devappa died without issue, but leaving a widow Parmashri (defendant).

In 1894 Parmashri sold part of the property left by Devappa to the second defendant for Rs. 200. The plaintiff was about to

* Second Appeal, No. 416 of 1900.

(1) (1875) 12 Bom. H. C. R. 364.