

1914.

SUNDRA

v.

SAKHARAM
GOPALSHET.

costs. In these circumstances we feel that it would be impossible to say that these minors who were not parties to that suit, and are judicially declared not to have been adequately represented at the trial, are bound by its result. They are, therefore, at liberty to proceed with the present litigation, and since plaintiff 1 was no more than a *pro forma* defendant in the former suit, and appears to have taken no active part in it, and the decree speaking generally appears to have been in his favour as one of the defendants, we feel some doubt in holding that he is bound by the result either, to the extent of being precluded from prosecuting this litigation. We must, therefore, confirm the decree of the Court below upon this preliminary point and remand the case to be dealt with upon the merits. Costs costs in the cause.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.

1914.

July 20.

HARCHAND PANAJI (ORIGINAL APPLICANT), APPELLANT, v. GULAB-
CHAND KANJI (ORIGINAL OPPONENT), RESPONDENT.*

Suit in a Baroda Court—Defendant's objection to jurisdiction and other pleas—Defendant's contentions overruled—Decree against defendant—Transfer of decree to a British Court for execution—Refusal to execute the decree on the ground of nullity—Voluntary submission to the jurisdiction of the Baroda Court—Execution by British Court.

In a suit brought in a Baroda Court, the defendant objected to the jurisdiction of the Court to try the suit and also raised other pleas. The Court overruled the defendant's contentions and passed a decree against him. The decree having been subsequently transferred to a British Court for execution that Court refused to execute it on the ground of its being a nullity as the defendant had not voluntarily submitted to the jurisdiction of the Baroda Court, he having

* Second Appeal No. 640 of 1913.

protested against the right of that Court to entertain the suit at the earliest opportunity.

Held that, having regard to circumstances, the case was one of voluntary submission to the jurisdiction of the Baroda Court as the defendant had raised other pleas along with his objection to the jurisdiction of the Court to entertain the suit and that the decree passed by that Court could be executed by a British Court.

Parry & Co. v. Appasami Pillai⁽¹⁾, distinguished.

SECOND appeal against the decision of N. R. Majmudar, First Class Subordinate Judge of Surat with appellate powers, confirming the order passed by Beram N. Sanjana, Second Class Subordinate Judge of Surat, in an execution proceeding.

The facts were these :—

The plaintiff Harchand Panaji brought a suit to recover a sum of money due on a khata against the defendant Kanji Kapura in the Court of the Munsiff of Vyara in Baroda. Kanji appeared by a pleader to defend the suit and contended *inter alia* that the suit was defective for want of parties, that it was time-barred and that the Court had no jurisdiction to entertain the suit for two reasons, namely, (1) because he was a non-resident foreigner and (2) because he had no property in Baroda territory and the khata sued on had been passed at Pal in British India, the cause of action had not, therefore, arisen within the local limits of the jurisdiction of the Court. The Court found that the suit was not defective for want of parties, that it was not time-barred and that the debt had originally been contracted at Pal but the last khata had been passed at Vyara, therefore, the Court had jurisdiction to entertain the suit although the defendant was a non-resident foreigner under Baroda Law. A decree was, therefore, passed in plaintiff's favour and it was subsequently transferred to the Court of the Second Class Subordinate

1914.

HARCHAND
PANAJI
v.
GULABCHAND,
KANJI.

(1) (1880) 2 Mad. 407.

1914.

HARCHAND

PANAJI

v.

GULABCHAND

KANJI.

Judge of Surat for execution against the estate of the deceased defendant Kanji Kapura whose legal representative Gulabchand Kanji was brought on the record. Gulabchand opposed the execution on several grounds, the principal among them was that the decree was a nullity so far as British Courts were concerned under the International Laws.

The Subordinate Judge allowed the defendant's contention and following the ruling in *Gurdyal Singh v. Raja of Faridkot*⁽¹⁾ refused to execute the decree.

On appeal by the plaintiff the appellate Court confirmed the order observing :—

It is admitted Kanji Kapura was a non-resident foreigner and owed no allegiance to the Baroda Durbar. It is also conceded that on the principles of International Law, as laid down in the leading case of *Gurdyal v. Raja of Faridkot*, I. L. R., 22 Cal. 222, the decree would have been a nullity, had the defendant not appeared and defended the suit. But it is urged that the conduct of the defendant in employing a pleader amounted to submission to jurisdiction of the Vyara Court and that therefore the decree is binding on him and his estate. It has, no doubt, been laid down in *Shah Atham Sahib v. Davud Sahib*, I. L. R., 32 Mad. 469, that a person who appears in obedience to the process of the foreign Court and defends, or applies for leave to defend the action without objecting to the jurisdiction of the Court, when he is not compellable by law to do either, must be held to have voluntarily submitted to the jurisdiction of such Court, and that it would be clear bad faith on his part having once elected to submit to the forum chosen by his opponent and taken the chance of a decision in his favour in that forum to turn round and say afterwards, when the decision has gone against him that the judgment was without jurisdiction. But in the present case the defendant protested against the right of the Vyara Court to entertain the suit at the earliest opportunity. Not only that but he did not make any other defence to the claim. It is manifest, therefore, that he did not voluntarily submit to the jurisdiction of the Vyara Court and that the decree is a nullity. See *Parry & Co. v. Appasami Pillai*, I. L. R., 2 Mad. 407

The applicant-plaintiff preferred a second appeal.

T. R. Desai for the appellant (applicant-plaintiff) :—
The order refusing to execute the decree of the Baroda

(1) (1894) 22 Cal. 222.

Court against the estate of the deceased judgment-debtor is wrong on two grounds:—First, the lower Court had no jurisdiction in execution proceedings to question the jurisdiction of the Baroda Court which passed the decree. No doubt under the old Code of 1882 it could do so: *Haji Musa Haji Ahmed v. Purmanand Nursey*⁽¹⁾, but under the present Code of 1908 that power is taken away by the omission of the words in Order XXI, Rule 7: *Hari Govind v. Narsingrao Konherra*⁽²⁾. Section 44 of the Code should be read with Order XXI, Rule 7. The decree of the Baroda Court was validly transferred to the Surat Court and the latter Court was bound under the said Order and Rule to proceed with execution without entering into the question of the jurisdiction of the Baroda Court.

[SCOTT, C. J.:—But Order XXI, Rule 7, applies to execution of decrees passed by British Courts; decrees of foreign Courts are still regulated by section 13 of the Civil Procedure Code.]

We submit that the defendant's remedy was to apply to higher tribunal of the Baroda State if he was not satisfied with the decree. Section 13 of the Code applies where the record shows on the face of it that the foreign Court had no jurisdiction, and not where the question of jurisdiction is expressly raised and decided. There is nothing in the Baroda law which is opposed to natural justice. The khata in suit having been passed within Baroda limits, the Baroda Court had territorial jurisdiction under the Civil Procedure Code of Baroda. The provisions of the Baroda Code are similar to section 17 of the Civil Procedure Code of 1882.

Secondly, even if the Surat Court could enter into the question, the defendant must be deemed to have voluntarily submitted to the jurisdiction of the Baroda

1914.

HARCHAND
PANAJI
v.
GULABCHAND
KANJI.

(1) (1890) 15 Bom. 216.

(2) (1913) 38 Bom. 194.

HARCHAND
PANAJI
v.
GULABCHAND
KANJI.

Court and it is not now open to him to contend that the decree is not binding against the estate. See the observations of Napier, J., in *Ramanathan Chettiar v. Kalimuthu Pillai*⁽¹⁾ where the decree was not *ex parte*. The defendant not only put in his appearance in the Baroda Court but filed a written statement and contested the suit on various grounds. This is not a case of merely protesting against jurisdiction. He did not withdraw after the protest but took the chance of a decision on the merits. This distinguishes the present case from the cases relied on by the lower Court: *Parry & Co. v. Appasami Pillai*⁽²⁾, *Sivaraman Chetti v. Iburam Saheb*⁽³⁾, *Shaik Atham Sahib v. David Sahib*⁽⁴⁾. The order dismissing the darkhast is thus bad in law and execution should be directed to proceed.

G. N. Thakore for the respondent (legal representative of the defendant):—The Surat Court had jurisdiction to consider the question whether the Baroda Court had jurisdiction to pass the decree. Section 13 (1) of the Code is clear. There could be no bar; otherwise there would be an anomaly, for it would mean that when a suit is brought on a foreign judgment, the question of jurisdiction can be gone into, and not when the decree on the same foreign judgment is sent for execution to a British Court. Such an anomaly could not have been intended by the Legislature. Then again the decree of the Baroda Court was without jurisdiction because the judgment-debtor admittedly resided within British India. The Baroda Court could not claim jurisdiction over a non-resident foreigner. The observations of the Privy Council in *Gurdial Singh v. Raja of Faridkot*⁽⁵⁾ cover the case. The deceased defendant having from the beginning protested against the jurisdiction of the

(1) (1912) 37 Mad. 163 at p. 167.

(3) (1895) 18 Mad. 327.

(2) (1880) 2 Mad. 407.

(4) (1909) 32 Mad. 469.

(5) (1894) 22 Cal. 222 at p. 233.

Baroda Court could not be deemed to have voluntarily submitted to it, so that the decree has not the same effect against him as if pronounced *in absentia*. It cannot be said that the lower Courts were wrong in applying the test laid down in the Madras case referred to by them. The present case is governed by the decision in *Haji Musa Haji Ahmed v. Purmanand Nursey*⁽¹⁾. The English cases show that the defendant would not be barred by a decree passed under such circumstances; *Rousillon v. Rousillon*⁽²⁾, *Schibsby v. Westenholz*⁽³⁾, *Emanuel v. Symon*⁽⁴⁾, *Copin v. Adamson*⁽⁵⁾.

1914.
HARCHAND
PANAJI
v.
GULABCHAND
KANJI.

Desai, in reply :—There was a voluntary submission to the jurisdiction of the Baroda Court. There was no coercion or pressure put upon the defendant as in *Parry & Co. v. Appasami Pillai*⁽⁶⁾. The ruling in *Companhia De Mocambique v. British South Africa Company*⁽⁷⁾ applies and disposes of the defendant's contention.

SCOTT, C. J. :—The lower Courts have declined to execute a decree of a Baroda Court against the respondent's father Kanji Kapura which had been transferred for execution against his estate to the Court of the Second Class Subordinate Judge of Surat.

The learned Judge of the lower appellate Court states that it was conceded that on the principles of International Law as laid down in *Gurdyal Singh v. Raja of Faridkot*⁽⁸⁾, the decree would have been a nullity had the defendant not appeared and defended the suit in the Baroda Court, and that it was argued before him that the defendant had voluntarily submitted to the

(1) (1890) 15 Bom. 216.

(2) (1880) 14 Ch. D. 351.

(3) (1870) L. R. 6 Q. B. 155.

(4) [1907] 1 K. B. 235.

(5) (1874) L. R. 9 Ex. 345.

(6) (1880) 2 Mad. 407.

(7) (1892) 66 L. T. 773.

(8) (1894) 22 Cal. 222.

1914.

HARCHAND
PANAJI
v.
GULABCHAND
KANJI.

jurisdiction by employing a pleader to defend the suits. As to this the learned Judge of the lower appellate Court says that the defendant protested against the right of the Baroda Court to entertain the suit at the earliest opportunity and did not make any other defence.

We have referred to the statement of the pleadings and issues in the Baroda Court and find that the statement of the lower appellate Court is incorrect.

The defendant pleaded, first, that the plaintiff had no right to sue as the sum claimed was vested in him by inheritance as the brother of the plaintiff's father's deceased brother's widow. Secondly, that, if not, the suit was defective for want of parties as the other brothers of the plaintiff's father were not joined. Thirdly, that the plaintiff's suit could not be entertained as the money dealings relied on took place outside the jurisdiction of the Court. Fourthly, that the plaintiff's suit would not lie in that Court as the defendant had no property and did not reside or carry on business in Baroda territory. Fifthly, that the suit was time-barred.

Upon this defence four issues were raised :—

1. Is the suit defective for want of parties ?
2. Is the suit barred by time ?
3. Does the suit lie in this Court ?
4. What relief should be granted to the plaintiff ?

All the issues were decided in the plaintiff's favour after evidence had been adduced by both sides.

The case appears to us to be clearly one of voluntary submission to the jurisdiction, the defendant taking his chance of getting a decree in his favour : see *Boissiere & Co. v. Brockner & Co.*⁽¹⁾ and *Voinet v. Barrett*⁽²⁾. The case is a stronger one in favour of the appellant than

⁽¹⁾ (1889) 6 T. L. R. 85.

⁽²⁾ (1885) 55 L. J. Q. B. 39.

that of *Parry & Co. v. Appasami Pillai*⁽¹⁾, relied on in the lower Courts, for there was not preliminary decision of the question of jurisdiction on the protest of the defendant and no circumstance of pressure such as the Madras Court thought existed in *Parry & Co.'s* case⁽¹⁾.

We set aside the decree of the lower appellate Court and return the darkhast for execution of the Baroda Court's decree in the Court of the Second Class Subordinate Judge of Surat.

The respondent must pay the costs of his opposition to the darkhast up to date.

Decree set aside.

G. B. R.

⁽¹⁾ (1880) 2 Mad. 407.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Beaman.

RAMA VALAD TULSA MAHAR (ORIGINAL PLAINTIFF), APPELLANT,
v. BHAGCHAND MOTIRAM AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

1914.

July 31.

Civil Procedure Code (Act V of 1908), sections 11 and 47—Mortgage debt—Suit for recovery by sale of mortgaged property—Decree for payment within six months and in default sale—No further action taken under the decree—Continuance of the relation of mortgagor and mortgagee—Suit by mortgagor for redemption—No bar of sections 11 and 47 of the Civil Procedure Code (Act V of 1908).

The defendant in a suit for sale under a mortgage-decree, who is given six months' time to pay the decretal debt and in default the plaintiff to recover the decretal debt by sale of the mortgaged property, is not in a position of a decree-holder who has a decree to execute. His right of payment within six months is a right which he has in mitigation of his liabilities under the decree. If he does not pay within six months and the mortgagee does not apply for decree absolute, the latter does not get rid of the relationship of mortgagor and

* Second appeal No. 261 of 1913.