

*Judgment of the Lords of the Judicial Committee of
the Privy Council on the Appeal of Syud Lutf
Ali Khan v. Mussumat Afzuloonissa Begum and
others from the High Court of Judicature at Fort
William in Bengal; delivered June 30th, 1871.*

Present:—

SIR JAMES W. COLVILLE.

LORD JUSTICE JAMES.

LORD JUSTICE MELLISH.

SIR LAWRENCE PEELE.

IN this case their Lordships are of opinion that the Decree of the High Court ought to be reversed and the Decree of the Zillah Judge maintained, with a variation which their Lordships will state.

The circumstances of the case are these. There was a very large bond debt, and apparently, as far as the evidence in this suit goes, that debt was a debt payable to the shareholders, the heirs of a deceased banker, according to their shares in the estate. Out of that debt a sum of Rs. 200,000 was paid, and apparently was paid in respect of some of the shares of the Defendants and not in respect of the share of the Plaintiff, the present Appellant. The sum of Rs. 200,000 having been thus paid, different shareholders were minded to bring separate actions against the debtor for their shares respectively of the balance, in each action assuming that the Rs. 200,000 had been paid in respect of the share. But the Debtor contended that he was entitled to have the Rs. 200,000 appropriated in part reduction of the whole debt. The result in all those actions was that the Court decided that the Rs. 200,000 must (against the debtor) be appropriated to the whole debt, and in consequence of their so holding that it must be so appropriated, they cut down the claim of the

Appellant very considerably, and they enlarged the claims of the Respondents, and gave them a very considerable benefit,—the result being that from that mode of dealing with the payment of the Rs. 200,000, the Plaintiff lost Rs. 25,000 of his share, and the Defendants got, as they have admitted through all the proceedings, Rs. 16,000 more than they were entitled to from the common debtor.

That being so, the Appellant filed his plaint, saying, in effect, “You received the Rs. 200,000 and it has been now decided that that Rs. 200,000 must be considered as being received on account of all of us, and must be so considered from the time when the Court so decided, and you must account to me for my full share of that sum.” In this case the Judge of the Zillah Court did not take that view, but took it as a debt arising out of the result of the suits and he came to the conclusion that the Rs. 25,000, which the Plaintiff had lost as the result of the proceedings based upon the new view taken of the original payment, was the sum which the Plaintiff was entitled to recover from his co-obligees. The defence of the Statute of Limitations was pleaded and was overruled by the Zillah Judge. That defence of the Statute of Limitations was however sustained by the High Court. That defence would certainly not be applicable if the claim were based on or arose out of the result of the suits, and not out of the original payment. Their Lordships are of opinion that it did arise out of the result of the suits, and not out of the original payment, which, as far as the Appellant and Respondent are concerned, was clearly a payment made upon the footing that it was to be taken out of the share of the Respondent; and it was not till the Respondent had got more than his share that he could be said to have received any money to the use of the Appellant so as to give any ground of action.

But the case does not stand merely upon that. There was a document which appears originally to have been very much relied upon by the Defendants themselves—the Respondents—as a document excluding this claim. They said there was a Deed of Compromise made, by which the claim of the Appellant to any share of anything which we have actually

received is barred. On the other hand, the Appellant's contention, with reference to that Deed, was, that there was a particular clause in that Deed (the 11th clause of one Deed, and the 10th of another similar Deed), the effect of which he says is this :—

“ There is an Appeal pending between me and the Debtor, in which I am trying to get back what I can upon the footing that the decision of the Court is wrong about the two lacs of rupees. That being so, the compromise is not to affect that in any way whatever, and if any claim should arise out of the result of that Appeal, any question upon that is reserved as between us.”

The Zillah Court was of opinion that that was the true effect and construction of the Deed, and in that opinion their Lordships concur. From that time it appears to their Lordships there could be no question as to the Statute of Limitations, as the thing was by contract between the parties reserved and kept open until the decision of that suit was arrived at, and very reasonably so, because if the Plaintiff had succeeded in that suit in getting the money from the Debtor, of course he would have had no manner of claim whatever against the Respondents, who were desirous that he should proceed with that claim, and should recover as much as possible from the other party and not from them. Their Lordships are of opinion that the decision of the High Court, that there was a bar under the Statute of Limitations was erroneous.

But the Judge of the Zillah Court arrived at the conclusion that the Plaintiff was entitled to recover the Rs. 25,000, that is to say, the sum which he lost. Their Lordships are of opinion that that is not the true measure of the liability of the Respondents, that they were not obliged to indemnify him from the loss which arose from the mode in which the suits against the Debtor were dealt with; but that as they had received the Rs. 200,000, and afterwards by the result of the proceedings they had received in respect of that same debt, Rs. 16,000 more than they admitted themselves to be the full amount of their claim, and as part of the same mode of dealing with them, the Rs. 25,000 loss had been incurred by the Plaintiff, their Lordships are of opinion that upon every principle of equity the Rs. 16,000 surplus so received was money had and

received to the Plaintiff's use, and that his claim to that amount was one of the things which he was entitled to make under the Deed of Compromise. Their Lordships are of opinion that there is nothing in the contention that this claim was not specifically made by the Plaintiffs in this suit. The Plaintiff clearly states the circumstances under which the claim of the Plaintiff arises. He cannot sustain his suit for the whole amount claimed, but there is nothing in his claim for the larger amount which deprives him of his right to recover the smaller amount, which, as the result of the facts pleaded and proved, their Lordships are of opinion is equitably due to him. It can only affect costs, and with those the Zillah Judge has dealt on the footing that the Plaintiff had failed for the greater part of the claim.

Their Lordships will therefore recommend to Her Majesty that the Decree of the High Court should be reversed, and that the decision of the Zillah Judge should be affirmed with this variation, that instead of the sum of Rs. 25,530 the sum of Rs. 16,556 : 6 : 9 will be the sum inserted; to carry interest from the 21st September, 1861, to the date of payment.

The Appellant will have the costs of the Appeal here, but no costs are to be allowed of either party of the Appeal in the High Court. The costs as originally given in the Zillah Court will remain.