APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C.J., Mookerjee and Fletcher JJ.

RAMCHANDER GAURISHANKAR

v.

GANAPATRAM BISWANATH.*

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Dec. 11.

Contract—Jurisdiction—Cause of action—Hundi—Acceptance for accommodation—Payment—Breach of Contract—Suit by acceptor against accommodation party—Letters Patent, 1865, cl. 12.

X and Y, who were carrying on business in Cawnpore and Calcutta agreed to accept for accommodation of Z's firm in Cawnpore a *hundi* for Rs. 2,500 drawn on X and Y in Calcutta by one A in Delhi in favour of B in Delhi and in the case of payment by the acceptors of the amount of the said *hundi*, to debit the same to the accommodation party Z's firm. In a suit brought by the acceptors against the accommodation party to recover the amount of the said *hundi* which was duly accepted and the amount of which was paid to B in Calcutta :—

Held, that the plaintiffs' cause of action would not be complete unless they proved the fact that they had accepted the *hundi* in Calcutta in accordance with their undertaking to the drawers of the *hundi* and paid the bill in Calcutta in due date, in accordance with their acceptance.

Held, also, that part of the cause of action arose within the local limits of the ordinary Original Jurisdiction of the High Court and the said Court had jurisdiction to hear the case.

APPEAL by Ramchander Gaurishankar, the defendant firm, from the judgment of Walmsley J.

The plaintiffs were the proprietors of the firm of Ganapatram Biswanath, carrying on business as merchants at, among other places, Cawnpore and Calcutta. On the 19th December, 1916, they instituted a suit for the recovery of Rs. 2,500 and interest against the

* Appeal from Original Civil, No. 72 of 1918, in suit No. 1278 of 1916.

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proprietors of the firm of Ramchander Gaurishankar of Cawnpore. In their plaint they alleged as follows :—

1. On or about the 11th October, 1916, one Jankidas Murlidhar of Delhi drew a *hundi* in favour of the Bank of Bengal in its Delhi Branch on the plaintiff firm in Calcutta for the sum of Rs. 2,500 payable 54 days after the said date. The said *hundi* was to be accepted by the plaintiff firm in Calcutta for the accommodation of, and was to be debited to the defendant firm in case of payment by the plaintiff firm.

2. The said Bank in its Delhi Branch endorsed the said *hundi* to its Calcutta Branch who presented the said *hundi* to the plaintiff firm for acceptance.

3. The plaintiff firm accepted the said *hundi* in Calcutta.

4. The plaintiff firm agreed to the aforesaid terms for the defendant firm's accommodation, without receiving any value therefor at the repeated requests of the defendant firm, and the defendant firm agreed to indemnify the plaintiff firm against any loss or damage by reason of the plaintiff firm's agreeing to the aforsaid terms.

5. The said *hundi* became payable on the 7th day of December, 1916, and the plaintiff firm did on the 7th December, 1916, pay in Calcutta to the said Calcutta Branch of the said Bank, the holder of the said *hundi*, the amount thereof.

6. The plaintiff firm has thus sustained a loss and damage to the extent of the said sum of Rs. 2,500 and interest thereon being Rs. 4-12 calculated at the customary rate of 6¾ per cent. per annum up to the 18th December, 1916.

7. The defendant firm in spite of repeated demands has not paid the plaintiff firm the said amount.

8. The cause of action arose in Calcutta on the 7th December, 1916. Inasmuch as it may be contended that a part of the said cause of action arose outside Calcutta, the plaintiff firm prays for leave under clause 12 of the Charter to institute this suit in this Honourable Court. The plaintiff firm further prays for leave to institute this suit under Order XXXVII of the Civil Procedure Code.

On the 19th January, 1917, the defendants filed an affidavit submitting that the Court had no jurisdiction to entertain this suit and stating that the amount claimed by the plaintiffs was duly paid to them at Cawnpore by the defendants on the 13th October, 1916. The Court, thereupon, made an order that upon the defendants on or before the 23rd January, 1917

"depositing with the Registrar of this Court the sum "of Rs. 2,500 as security for the claim of the plaintiff "firm in this suit and the commission of the said "Registrar on the said sum of Rs. 2,500 they be at "liberty to appear in and defend this suit and "that the said affidavit be treated as their written "statement filed in this suit."

The suit came on for trial on the 18th July, 1918, before Mr. Justice Walmsley and on the 24th July, 1918, his Lordship decreed the suit with costs.

The material portions of his Lordship's judgment, after reciting the facts of the case, were as follows:—

"On the second day, Mr. Pugh for the defendant raised the objection that the suit is not maintainable, and that it is not of such a character that it can be brought under Order XXXVII of the Civil Procedure Code.

It appears to me that a clear cause of action is disclosed in the plaint: the fourth paragraph sets out the agreement between the plaintiffs and the defendant, and the fifth, sixth and seventh paragraphs that the plaintiffs have incurred loss by paying the money due under the *hundi* and that the defendant has not re-imbursed them in accordance with his agreement. The only form in which it is necessary to consider the objection is that the suit is not one which should have been instituted under the provisions of Order XXXVII. I think the agreement is correct: the suit is not upon the *hundi*, but on a separate oral agreement relating to the liability created by the *hundi*: the defendant is not the drawer or the drawee of the *hundi*, and the fact that the drawer wrote "debit to Ramchander Gaurishankar" at the head of the *hundi* cannot saddle him with liability. If the objection had been taken when the defendant asked for leave to file his written statement I imagine that it would have been upheld, and the plaintiffs would have been allowed to issue a fresh process under the general provisions of the Code. But what has happened is this. The written statement was filed eighteen months ago: the case has been adjourned again and again: a commission was taken out by the defendant for the examination of a witness at Cawnpore, last month. The case was opened on July 17th and no objection was taken; the defendant was examined at considerable length, and on 18th at the close of the defendant's examination Mr. Pugh said that he should raise the objection. It is not suggested that the defendant has been in any way prejudiced in the presentation of his case. The most that can be said is that he was ordered

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to deposit the sum of Rs. 2,500 as a condition of being allowed to file a written statement.

In my opinion the objection cannot be entertained at such a late stage, when the mistake is only one of procedure, and no prejudice has been caused to the defendant.

Before going to the evidence it will be convenient to refer to another matter. The defendant took out a commission to examine a witness named Rameswar. The order of the Court related to Rameswar alone; this is admitted; but by accident, the name of another man, Gulzari Mull, was included, and his evidence was taken. I have refused to look at Gulzari's evidence, as I am satisfied that the Court intended that no one but Rameswar should be examined on commission. Regarding Rameswar's evidence on commission, the defendant has declined to tender it; the plaintiffs, however, wished to refer to it without tendering it as his evidence. For my own part I should have thought that he could not do so under the provisions of Order XXVI, rule 7, and there are very clear rulings to the effect that that practice obtains in the Mofussil Courts, but the case of *Kusum Kumari Roy* v. *Satya Ranjan Das* (1) is a very distinct authority for holding that the practice on the Original Side is different. I am told, however, that there is an unreported decision by the Appellate Bench to the effect that under such circumstances as these the plaintiff may refer to the evidence on commission as part of the record without tendering it as his evidence. The decision has not been found, but my learned brother Chaudhuri, J., confirms the statement and tells me that the practice of the Court has been altered accordingly."

His Lordship then proceeded to deal with the evidence and concluded as follows:—

"Considering all the evidence adduced in the case my conclusion is that the defendant did not pay the sum of Rs. 2,500 to the plaintiffs, and I therefore decree the suit for Rs. 2,500 with interest at the rate of 6 per cent. from date of institution to date of decree with costs and reserved costs and costs of the commission on scale No. 2."

The defendants, thereupon, appealed.

Mr. N Sarkar (with him *Mr. B. K. Ghose*), for the appellants. This suit was originally brought under Order XXXVII of the Civil Procedure Code—under the summary procedure in the case of negotiable instruments. Mr. Justice Walmsley refused to treat

(1) (1903) I. L. R. 30 Calc. 999, 1003.

the suit as falling under that Order and dealt with it as one on a separate agreement relating to the liability created by the *hundi*. This Court, therefore, had no jurisdiction to try this suit as neither the whole of the cause of action, nor any part of it, took place within the local limits of the ordinary Original Jurisdiction of this Court. The place of agreement was Cawnpore where the money had to be paid by the defendants and where the breach took place: see *Dhunjisha Nusserwanji* v. *A. B. Fforde* (1) and *Dobson and Barlow, Ld.* v. *The Bengal Spinning and Weaving Company* (2).

Mr. S. R. Das (with him *Mr. K. P. Khaitan*), for the respondents. The agreement on which the plaintiffs were indemnified was contained in paragraph 1 of the plaint, where it was stated that the *hundi* was drawn on the plaintiff firm in Calcutta and that it was to be accepted by the latter in Calcutta. In order to succeed in their suit the plaintiffs must prove that they accepted the *hundi* in Calcutta in terms of the agreement. Part of the cause of action was the acceptance and it arose in Calcutta and leave was obtained under clause 12 of the Letters Patent. This Court, therefore, had jurisdiction.

SANDERSON C.J. This is an appeal from the judgment of my learned brother, Mr. Justice Walmsley, whereby he gave judgment for the plaintiff.

The learned counsel for the appellant has raised a point going to the jurisdiction of the learned Judge and he first of all drew our attention to the fact that although this plaint had been treated in the first instance as being a plaint under Order XXXVII of the Civil Procedure Code, the learned Judge had not so treated it, but had held that there was a clear cause of

(1) (1887) I. L. R. 11 Bom. 649. (2) (1896) I. L. R. 21 Bom. 126.

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action disclosed in the plaint by reason of paragraphs 4, 5, 6 and 7. The learned counsel then proceeded to argue that that being so the learned Judge had no jurisdiction to try the case, because neither the whole of the cause of action nor any part of it arose within the local limits of the ordinary Original Jurisdiction of this Court. I think the learned counsel's argument cannot be supported because, in my judgment, a part of the cause of action did arise within the local limits of the ordinary Original Jurisdiction of the High Court; and, inasmuch as leave was given by the Court, the Court had jurisdiction to hear the case. The agreement, which it was sought to enforce against the defendant, is alleged in paragraph 4 of the plaint, and it is there alleged "the plaintiff firm agreed to "the aforesaid terms for the defendant firm's accom-"modation, without receiving any value therefor "at the repeated requests of the defendant firm, and "the defendant firm agreed to indemnify the "plaintiff firm against any loss or damage by "reason of the plaintiff firm's agreeing to the afore-"said terms,". In order to see what were "the afore-"said terms," we must turn to the first paragraph of the plaint. There it is stated, "on the 11th October, "1916, one Jankidas Murlidhur of Delhi drew a "*hundi* in favour of the Bank of Bengal in its Delhi "Branch on the plaintiff firm in Calcutta for the "sum of Rs. 2,500 payable 54 days after the said date. "The said *hundi* was to be accepted by the plaintiff "firm in Calcutta for the accommodation of, and was "to be debited to, the defendant firm in case of "payment by the plaintiff firm". Those are "the aforesaid terms" which, the plaintiffs alleged, they had undertaken to be bound by, and in respect of which they alleged, that the defendants had agreed to indemnify the plaintiffs against any loss or damage

by reason of the plaintiff firm's agreeing to the aforesaid terms. It, therefore, appears that by the arrangement between the plaintiffs and the drawers of the *hundi*, the plaintiffs were under a liability to accept the *hundi* in Calcutta for the accommodation of the defendants and the defendants had agreed to indemnify the plaintiffs against any loss or damage which they might incur by accepting the *hundi* in Calcutta. There is an allegation in the plaint that the plaintiff firm did accept the *hundi* in Calcutta, that the *hundi* became payable on the 7th of December, 1916, and that on that day they in fact paid the amount of the *hundi* in Calcutta and that the defendants, although called on to perform their part of the agreement, had failed to reimburse the plaintiffs.

Our attention was drawn to what was said by Lord Justice Fry, when he was dealing with the meaning of the words "cause of action" in *Read* v. *Brown* (1), namely, "everything which, if not proved, gives "the defendant an immediate right to judgment, must "be part of the cause of action" and again, Mr. Justice Brett, in *Cooke* v. *Gill* (2), was reported to have said: "cause of action has been held from the earliest time "to mean every fact which is material to be proved "to entitle the plaintiff to succeed,—every fact which "the defendant would have a right to traverse." In my judgment, in this case the plaintiffs' cause of action would not be complete unless they proved the fact that they had accepted the *hundi* in Calcutta in accordance with their undertaking to the drawers of the *hundi*—the plaintiffs' cause of action would not be complete unless they had proved that they had paid the bill in Calcutta on the due date, in accordance with their acceptance. For these reasons, in my judgment, part of the cause of action did arise within

(1) (1888) 22 Q. B. D. 128. (2) (1873) L. R. 8 C. P. 107.

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the local limits of the ordinary Original Jurisdiction of this Court and, consequently, the learned counsel's point with regard to jurisdiction cannot be sustained.

The only other argument which the learned counsel presented to us was with regard to the learned Judge's decision not to read or look at the evidence of a man called Gulzari Mull, whose evidence was taken on commission. It is clear from the terms of the order for the commission that the evidence of a man called Ramesswar alone was to be taken, but by some means or other in the writ the words "Gulzari Mull" appeared before the word "Ramesswar." It looks to me as if the person who had inserted those words regarded "Gulzari Mull" as being one of the names owned by the man Ramesswar. But the defendants insisted upon Gulzari Mull being examined upon commission, and his evidence was taken on commission on the 7th of July, 1918, in spite of the protest of the plaintiffs. From the letters which appear at pages 155 and 156 of the paper-book, it is clear that Messrs. Leslie and Hinds were informed by Mr. Khaitan, who was then acting as solicitor for the plaintiffs, that the order had been made for the examination of Ramesswar alone, and Messrs. Leslie and Hinds were pressed to wire that Ramesswar alone should be examined; so that the defendants' solicitors clearly had notice either on the 6th or the 7th of July that the order did not provide for the evidence of Gulzari Mull being taken upon commission, and if the defendants had desired to have his evidence taken on commission, they should have made a further application to the Court either before the trial or at the trial. As far as I know, no such application was made. The trial did not take place until the 17th of July and there was ample opportunity, as far as I can see, for the defendants to make an application to the Court if they

wished to do so. In my judgment, the learned Judge was right in refusing to read the evidence of Gulzari Mull taken on commission. For these reasons, we refused the application made by the learned counsel for the appellant to be allowed to read the evidence of Gulzari Mull or to call him as a witness in this Court. The learned counsel frankly said that if Gulzari Mull's evidence was not to be read or if he was not allowed an opportunity of calling Gulzari as a witness in the Appeal Court, it was hopeless for him to attempt to contest the findings of fact of the learned Judge, which accordingly must stand.

For these reasons, the appeal must be dismissed with costs.

MOOKERJEE J. I agree.

FLETCHER J. I agree.

Appeal dismissed.

O. M.

Attorney for the appellants: *Pares Chandra Ghose.*

Attorney for the respondents: *Debi Prasad Khaitan.*