APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and C. C. Ghose J.

ENGINEERING SUPPLIES, LTD.

v.

DHANDHANIA & CO.*

1930

June 24.

Jurisdiction—Cause of action, definition—Contract—Breach—Suit, place of—Supreme Court—Rules—High Court—Original Side—Leave, revocation of—Practice—Pleadings—Summons—Plaint—Particulars—Amendment—Letters Patent, 1865, cl. 12.

A defendant, who objects to the jurisdiction of the court in a case in which leave has been granted under clause 12 of the Charter, is not obliged to wait until the trial and to take the point by way of defence in his written statement, but he is entitled to apply to the Judge, who gave the leave, that the leave may be revoked.

It is now settled law that an application to revoke a leave once given is competent in such a case, but the application should be based on something better than a mere criticism of the clarity of the pleadings. If a pleading is not in order, the reasonable thing for the learned Judge to do would be to order particulars to be given or to order an amendment of the plaint, and it would be unreasonable for him to withdraw the leave and to order the plaint to be taken off the file until he has satisfied himself what the real case of the plaintiff is in respect of the matter, which is alleged to give jurisdiction to the court.

The only definition of "cause of action" that will work, if it has to be applied to cases of all kinds, is the entire set of facts that gives rise to an enforceable claim, or, in the words of Lord Justice Fry, "everything which, if not proved, gives the defendant an immediate right to judgment," "every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant could have a right to traverse."

Read v. *Brown* (1) and *Cooke* v. *Gill* (2) followed.

If the making of the contract be part of the cause of action, it follows that the act of concurrence of either party, which is essential to the contract, is itself a part of the cause of action, for without such act of concurrence the contract cannot come into existence.

Dhunjisha Nusserwanji v. *A. B. Fforde* (3) referred to.

APPEAL by the defendant from a judgment of Lort-Williams J.

The facts of the case, out of which this appeal arose, appear fully in the judgment under report herein.

W. W. K. Page for the appellant.

S. N. Banerjee for the respondent.

*Appeal from Original Order, No. 35 of 1930, in Suit No. 1478 of 1929.

(1) (1888) 58 L. J. Q. B. 120. (2) (1873) L. R. 8 C. P. 107.
(3) (1887) I. L. R. 11 Bom. 649.

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RANKIN C. J. In my opinion, this appeal should be dismissed. Mr. Page for the appellant has given a very careful and reasonable argument, but the question is what we think of the merits of the application which has been made by his client that the leave granted to the plaintiff under clause 12 of the Charter should be revoked and the plaint should be taken off the file and returned to the plaintiff. The plaint, as I have already observed in another appeal (Appeal from Original Order No. 29 of 1930), is open to the criticism in respect that its opening paragraphs are apparently intended to foreshadow a case for damages for misrepresentation of facts inducing the plaintiff company to enter into a contract for the purchase of goods. But, for the present purpose, I shall deal only with the rest which is the main portion of the plaint; and, there again, when I come to the prayers at the end of the plaint, I find that the matter is in no way made clear. It is intended to be an action for damages for breach of contract on the part of the defendant company in failing to deliver goods which were according to the description ordered by the plaintiff.

The plaintiff's case is that a number of ball valves was ordered by him to be made by the defendant and was to comply with certain conditions as regards pressure—it being made known to the defendant that they were required for the East Indian Railway Company in connection with vacuum brakes; and the plaint apparently intended to make a case that not only was this requirement a part of the indent which formed part of the contract, but that, independently of what is contained in that indent by way of description of the goods, the plaintiff made known to the defendants the purpose for which the goods were required, so as to show that he relied upon the defendant's judgment and that he relied upon the defendant's skill, with the result that there was an implied warranty by the defendants that the goods would be fit for the purpose for which they were

ordered. The case made is that the order was sent by cablegram from Calcutta to London, that it was accepted by cable from London, that the contract was C. I. F., that the goods came to Calcutta, that the goods were tendered to the East Indian Railway Company who rejected them, that before the goods were tendered to the East Indian Railway Company the plaintiff in Calcutta paid a sum of Rs. 5,765 as customs duty in Calcutta, that after the railway company had rejected the goods the plaintiff gave notice of rejection to the defendant company, and that, accordingly, the defendant company is liable to the plaintiff in damages including special damage for the sum paid as customs duty and certain other sums. As the goods were bought C. I. F., I will take it that the learned Judge was right in thinking that the fact that the goods were shipped to Calcutta did not avail the plaintiff at all. I will assume that the fact that the customs charges were paid in Calcutta is a mere incidental matter swelling the damages and is not a matter on which the plaintiff can rely.

There remain two matters on which the plaintiff can rely in contending that a part of the cause of action took place in Calcutta. One is that his offer was sent from Calcutta by cable to London, and the other is that he rejected the goods—which he did by sending the defendants a communication from Calcutta or by informing their representative in Calcutta. It is said very properly by Mr. Page that the pleading of the plaintiff is not clear on the question of his sending the notice of rejection to the defendant company from Calcutta and it is further said that the defendant had applied for certain particulars and that some of the particulars which he had applied for were refused.

It appears that there is authority for the proposition that a defendant, who objects to the jurisdiction in circumstances such as the present, is not obliged to wait until the trial and to take the point by way of defence in his written statement, but he is

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entitled to apply to the Judge who gave the leave that the leave may be revoked. I am certainly glad to see that of late years the learned Judges on the Original Side of this Court are taking trouble over this matter of granting leave, which perhaps for too many years has been treated as a matter of course and I will assume that it is now settled law that an application to revoke a leave once given is competent in such a case. I must point out that an application in such a case as the present to revoke leave once it has been given ought to be based upon something better than a mere criticism of the clarity of the pleadings. If a pleading is not quite in order, the reasonable thing for the learned Judge to do would be to order particulars to be given or to order an amendment of the plaint and it would be unreasonable for him to withdraw the leave and to order the plaint to be taken off the file until he has satisfied himself what the real case of the plaintiff is in respect of the matter which is alleged to give jurisdiction to the Court.

In granting leave or revoking leave, the learned Judge will go by the cause of action alleged. When a defence is taken at the trial, no doubt the defendant will be able to succeed, unless the plaintiff can prove the cause of action arising within the jurisdiction. I do not here say that, on the question whether leave should be granted, the learned Judge is never entitled to consider matters of evidence outside the plaint; but, as the plaint cannot be filed until the leave is given, this is perhaps an academic question.

In the present case, it seems to me that it was unreasonable to ask the learned Judge to take this plaint off the file unless the defendant could show that, even if the offer was sent from Calcutta and the notice of rejection was sent from Calcutta, the case was not within clause 12 of the Letters Patent. I believe there are decisions of this Court which say that, if a defendant takes any steps, he waives his right to object to the jurisdiction of the Court in a case of this character and it might be that, in taking

out summons and asking for an order in the form in which the defendant in this case did, he was influenced by those decisions. If so, that shows that the form of summons may have been quite well advised. But unless the two points which I have mentioned can be made good, it would be unreasonable for the learned Judge either to take the plaint off the file or to cancel the leave given. I come, therefore, to consider the two questions.

The first question has been dealt with carefully by the learned Judge and I am bound to say that, after considering what is said on the other side—and there is a good deal to consider—I am of opinion that the learned Judge has taken the right view. For many years in England there was a great deal of controversy as to what was meant by cause of action arising in a certain place and as to the things which were embraced within the expression "cause of action." When the Code of 1882 was first drawn, it contained in what now corresponds to section 20 of the present Code a statement giving the court jurisdiction when the cause of action arose within its jurisdiction; and from 1882 to 1889 there was a great deal of difference of opinion in the High Courts as to the meaning of that section. The very long judgment in the case of *Deep Narain Singh* v. *Dietert* (1) may be taken as representing the difficulty that was caused. One view was that the cause of action meant the whole cause of action and that a case did not come within the section unless, to take a simple case, the contract as well as the breach took place within the jurisdiction. But ultimately, in most cases the High Courts took the view that, if the concluding part, that is to say, in the case of contract, the breach took place within the jurisdiction, the condition was satisfied. The legislature put an end to that controversy in 1888 and enacted in addition to section 17 of the Code of 1882, Explanation III and that has been referred to by Mr. Page in his argument before us. Explanation III is as follows: "In suits arising out of contract,

(1) (1903) I. L. R. 31 Calc. 274.

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"the cause of action arises within the meaning of "this section at any of the following places, namely: "(*i*) the place where the contract was made; (*ii*) the "place where the contract was to be performed or "performance thereof completed; (*iii*) the place where, "in performance of the contract, any money to which "the suit relates was expressly or impliedly payable." From that time until the present Code of 1908, questions of jurisdiction in cases of contract were dealt with simply by enquiring whether the case came within Explanation III. In 1908, the legislature abolished Explanation III altogether and relied upon the language which had for many years found place in the Letters Patent of the High Courts—the clause running simply "the cause of action wholly or in "part arises." In the case of courts governed by the Code there is no question of leave. During the controversy as to the meaning of the phrase "cause of "action," after much difference of opinion, a working definition had been arrived at in England long before 1908—indeed a very considerable time before that year—and the learned Judge has founded his opinion upon that definition, which is I think generally recognized. The only definition that will work, if it has to be applied to cases of all kinds, is the entire set of facts that gives rise to an enforceable claim, or, in the words of Lord Justice Fry, "everything which "if not proved gives the defendant an immediate right "to judgment," "every fact which is material to be "proved to entitle the plaintiff to succeed, every fact "which the defendant could have a right to traverse." That was the result of many years' consideration as expressed in the cases of *Read* v. *Brown* (1) and *Cooke* v. *Gill* (2). Now, what is said is that, if we take that definition of "cause of action," we have still, in a case of contract, to find that the contract was made within the jurisdiction and it is further said in many of the cases that, if you want to find out where

(1) (1888) 58 L. J. Q. B. 120. (2) (1873) L. R. 8 C. P. 107.

the contract was made, that depends upon the law of contract in India—the Indian Contract Act. In my judgment, it is here that the argument of the appellant becomes open to criticism. It is quite true that for certain purposes you may have to specify one place as the place where the contract is made. For many purposes of private international law, one has to enquire whether the law to be applied to a particular case is the *lex loci contractus* or the *lex rei sitae* or some other law, and it is necessary that one of them should be applied and not two which might be inconsistent. For these purposes, you will sometimes have to fix upon a place where the contract is deemed to have been made, although, in fact, the acts of the parties indicating their assent have been made in more than one place and in more than one jurisdiction. It is to that class of case that the remarks, which have often been quoted [*Kamisetti Subbiah* v. *Katha Venkatasawmy* (1), *Sitaram Marwari* v. *Thompson* (2)] from Savigny's Conflict of Laws are addressed. He points out very clearly that, although a party in one country may write to a party in another, the contract has to be deemed to be made in one of the two places and he points out that in these cases the best rule is to deem it to be made in that place in which the acceptance or final acceptance has been given.

For the purpose of applying Explanation III to the Code of 1882, such a phrase as "where the "contract is made" has to be determined in like manner. The theory or idea is that the contract is made in one place and not more. I take it that in exactly the same way, under the rules of the Supreme Court of England, so far as jurisdiction depends upon the place where the contract is made, they would be applied by treating the contract as made in the place where it was concluded by the assent given by the person to whom the proposal was communicated. It does not seem to me when we are dealing with the

(1) (1903) I. L. R. 27 Mad. 355. (2) (1905) I. L. R. 32 Calc. 884.

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phrase "where the cause of action wholly or in part "arises," that we have necessarily to ask ourselves in what place, for the purpose of international law or otherwise, is the contract to be deemed to have taken place. We have to ask ourselves whether something, which the plaintiff is obliged to prove as a fact in order that his case may succeed, is a thing which took place within Calcutta. If it is, it seems to me to be no answer to say that what took place in Calcutta was not by itself a contract and it seems to me to be wrong to introduce notions, which depend upon the view that a contract, which was in fact made by people at different places, was made in the place where the last assent was given. Strictly a contract is not a fact but an obligation which may result from a series of facts. This question is not new and, in the judgment of the learned Judge, he has dealt with and relied upon authorities on this very matter. He refers to the judgment in *Dobson and Barlow, Limited* v. *The Bengal Spinning and Weaving Co.* (1) of Mr. Justice Fulton, and he points out that there is authority for the proposition that "if the making of the contract be "part of the cause of action, it appears to follow that "the act of concurrence of either party which is "essential to the contract is itself a part of the cause "of action, for without such act of concurrence the "contract cannot come into existence." I respectfully agree and it seems to me that we are not to be led away by considerations which are not really relevant to the particular provisions in the Letters Patent which we are bound to follow.

I would like here to observe that I think it a confusion to say that, if you want to know where a contract was made, the answer will be found in the law of contract. That is the last thing you will find in the law of contract. The law of contract will inform you what the necessary conditions are which have to be fulfilled before two parties come under a legal

(1) (1896) I. L. R. 21 Bom. 126, 134.

obligation to each other in respect of their negotiations. Thus I believe, the Indian Contract Act nowhere says anything about the place where the contract is made and it is no part of the ordinary law of contract, though it may be part of a doctrine of private international law or of some rule of procedure, to say that where persons in two different places do something out of which the contract arises, the contract is to be deemed to have been made in one place rather than in the other. We must avoid the idea that actions on contract are of a few limited types, that the causes of action can only be broken up into certain groups of facts, that it is possible to attain any more precise definition of "cause of action," which will be of general application than the definition upon which the learned Judge has proceeded. In this case, for example, it so happened that the contract was C. I. F. The plaintiff got the goods. He had, before he could recover damages claimed on the footing that the goods were bad, to show that he rejected them and he had, in order to recover certain other elements of damages, to show the same. There, again, it appears to me, that this is a material fact, which the plaintiff must prove, in order to sustain his cause of action as pleaded—and I am of opinion that there too a part of the facts, which were necessary to be proved, took place within the jurisdiction.

In these circumstances, it seems to me that the application to revoke the leave was unfounded. But in view of the fact that, apart altogether from the first three paragraphs of the plaint, the concluding parts of the plaint are certainly confusing and the question of notice of rejection is not as clear in the plaint as it should have been, it seems to me that the reasonable course would have been to apply for an order for particulars. The defendant having refused the particulars, the next step would have been to order particulars or an amendment of the plaint. In view, however, of the decisions which made it difficult for the defendant to take any steps before objecting to

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the jurisdiction of the Court, I am not prepared to say that he was not well advised in taking out summons in the way he did. In these circumstances of the case, the costs of the appeal will be made costs in the cause.

GHOSE J. I agree.

Appeal dismissed.

Attorneys for appellant: *Sanderson & Co.*

Attorneys for respondent: *Dutt & Sen.*

G. S.