## APPELLATE CIVIL.

*Before R. C. Mitter J.*

# TASLIMAN BIBI

*v.*

# ABDUL LATIF MIYA.*

1935

*Nov.* 28;
*Dec.* 6.

*Dower—Cause of action—Jurisdiction—Residence of plaintiff—Indian Contract Act (IX of 1872), s. 49—Code of Civil Procedure (XIV of 1882), s. 17, Expl. III, cl.* (iii) *and s. 20, cl.* (c).

The court where the plaintiff resides has jurisdiction to entertain a suit for recovery of prompt dower.

A suit on a contract can be instituted in the court which has territorial jurisdiction over the place where the contract has to be performed.

*De Souza* v. *Coles* (1) relied on.

The place of performance must be taken to be the place where the plaintiff is residing on the principle that when the creditor is residing in the realm, the debtor must follow the creditor and pay him, unless there is a different contract between them.

*Gokul Das* v. *Nathu* (2); *Soniram Jeetmull* v. *R. D. Tata and Co., Ltd.* (3) and *The Eider* (4) followed.

Section 49 of the Indian Contract Act does not get rid of inferences that should justly be drawn from the terms of the contract itself and the necessities of the case involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him.

*Soniram Jeetmull* v. *R. T. Tata and Co., Ltd.* (3) and *Champaklal Mohanlal* v. *The Nector Tea Company* (5) followed.

*Puttappa Manjaya* v. *Virabhadrappa* (6) dissented from.

SECOND APPEAL by the plaintiff.

The facts of the case and the arguments in the appeal appear sufficiently in the judgment.

*Akram* for the appellant.

*Radhika Ranjan Guha* for the respondent.

*Cur. adv. vult.*

(1) (1868) 3 Mad. H. C. R. 384.
(2) (1925) I. L. R. 48 All. 310.
(3) (1927) I. L. R. 5 Ran. 451; L. R. 54 I. A. 265.
(4) [1893] P. 119.
(5) (1932) I. L. R. 57 Bom. 306.
(6) (1905) 7 Bom. L. R. 993.

*Appeal from Appellate Decree, No. 1638 of 1933, against the decree of S. K. Sen, Additional District Judge of 24-*Parganas*, dated April 24, 1933, confirming the decree of Sateesh Chandra Sen, Second Munsif of Baraset, dated Aug. 18, 1932.

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R. C. MITTER J. The plaintiff, whose suit has been dismissed by the learned Additional District Judge of 24-*Parganâs* on the ground that the Munsif of Baraset, in whose court it was instituted, had no territorial jurisdiction to entertain it, has preferred this appeal. Her claim is for prompt dower money from her husband.

The plaint as originally filed on August 24, 1931, gave the place of residence of the defendant as Bishanpura in the district of Balia. By an amendment, dated December 1, 1931, the defendant's present place of residence was stated to be Shibpur in the district of Howrah.

After reciting her claim in para. 3 of the plaint, as originally filed, the plaintiff stated that she was residing in Bijpur within the jurisdiction of the Baraset court, and it is on this fact alone, she stated, that that court had jurisdiction to entertain her suit. By an amendment allowed by the court certain additions were made in para. 3 of the plaint. The substance of these additions is that the defendant came to Bijpur, where the plaintiff was residing with her father, and on a demand being made for the prompt dower the defendant promised at Bijpur to pay up shortly, but he thereafter failed to keep his promise even after repeated demands. The plaintiff, accordingly, has stated in her plaint, as finally amended, that the Baraset court had jurisdiction to entertain the suit, as the plaintiff resided within the jurisdiction and also because of the said promise by the defendant.

Both the courts below have held that the plaintiff's story that the defendant went to Bijpur and made a promise there to pay up is false. This finding is binding on me in Second Appeal and, accordingly, one of the grounds, on which the plaintiff attempted to give jurisdiction to the Baraset court, can no longer be invoked by her.

There remains the other ground, namely, whether the Baraset court had jurisdiction to entertain the

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suit on the ground that the plaintiff is residing permanently within its jurisdiction. Mr. Akram has urged before me that he comes under s. 20, cl. (*c*) of the Code of Civil Procedure, as a part of the cause of action must be taken to have arisen at Bijpur, as that place must be taken as the place of performance, *i.e.*, the money due to the plaintiff ought to have been paid there. There cannot be any doubt that a suit on a contract can be instituted in the court, which has territorial jurisdiction over the place, where the contract has to be performed. This is the accepted law in India since the decision of Holloway J. in the case of *De Souza* v. *Coles* (1) where the said learned Judge after going into the matter in great detail made the following observations:—

> The place at which an obligation is to be performed is its seat, and the place of jurisdiction.

The matter was also examined exhaustively by Markby J. from the jurist's point of view in the case of *Gopikrishna Gossami* v. *Nilkomul Banerjee* (2), who also came to the same conclusion. Mr. Akram's next contention is that the place of performance must be taken to be Bijpur, the place where the plaintiff is residing, on the principle that when the creditor is residing in the realm, the debtor must follow the creditor and pay him, unless there is a different contract between them. For supporting his argument he has cited two cases only, namely, *Gokul Das* v. *Nathu* (3) and *Soniram Jeetmull* v. *R. D. Tata and Co., Ltd.* (4). This argument has to be considered carefully.

The facts established are the following:—

(i) the marriage between the plaintiff and the defendant was celebrated at Bishanpura in the district of Balia, in the United Provinces of Agra and Oudh;

(1) (1868) 3 Mad. H. C. R. 384, 413.
(2) (1874) 13 B. L. R. 461.
(3) (1925) I. L. R. 48 All. 310.
(4) (1927) I. L. R. 5 Ran. 451; L. R. 54 I.A. 265.

(ii) that the dower, whatever its amount may be, was settled at the time and place of marriage;

(iii) that the defendant is at present residing within the jurisdiction of the Howrah court;

(iv) that there was no express promise to pay the prompt dower at Bishanpura or at any other place, nor can a promise to pay at a particular place be inferred from the circumstances; and

(v) that the plaintiff at the date of the suit was residing at Bijpur, which is within the jurisdiction of the Baraset court.

There cannot be any doubt according to the principles of English law that, under these circumstances, the obligation of the debtor is to seek out the creditor and pay him, that is to say, the place of residence of the plaintiff is to be taken as the place of performance. In the case of *The Eider* (1), Bowen L. J. observed thus:—

> The general rule is that where no place of payment is specified, either expressly, or by implication, the debtor must seek his creditor. In *Haldane* v. *Johnson* (2) it was held that a covenant for payment of rent, when no particular place of payment is mentioned, is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent upon the covenantor to seek out the person to be paid, and pay or tender him the money. In the judgment, in that case, the conclusion to the same effect, arrived at, on the authorities, by Parke B. in *Poole* v. *Tumbridge* (3) is relied upon. Most of the cases are collected in *Fessard* v. *Mugnier* (4), which is very instructive on the subject.

The only limitation to this principle of English law is that the creditor must reside within the realm. *Bansilal Abirchand* v. *Ghulam Mahbub Khan* (5).

The question is whether this principle is applicable in India.

So far as I am aware, the courts of this country from early times have considered the said principle to

(1) [1893] P. 119, 136-7.

(2) (1853) 8 Exch. 689: 155 E. R. 1529

(3) (1837) 2 M. & W. 223; 150 E. R. 738.

(4) (1865) 18 C. B. (N. S.) 286; 144 E. R. 453.

(5) (1925) I. L. R. 53 Cal. 88; L. R. 53 I. A. 58.

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be so applicable and there are decisions or observations of Judges of nearly all the High Courts. Birch J. recognised the applicability of the said rule in Bengal: *Gopikrishna Gossami* v. *Nilkomul Banerjee* (1). Tyabji J. recognised its applicability in Bombay: *Motilal Pratabchand* v. *Surajmal Joharmal* (2). Mukerji J. applied it in the case of *Gokul Das* v. *Nathu* (3). White C. J. and Miller J. would have applied it in Madras, but for clause (*iii*) of explanation III to s. 17 of the Code of Civil Procedure of 1882. That explanation reads as follows:—

> In suits arising out of contract, 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.

It was held in that case that clause (*iii*) of the explanation meant that the money was payable according to the terms of the contract, which "are expressed "or can be *inferred* on a construction of the language "or from the circumstances", and the presumption of law that the payment is to be made at the creditor's residence, on which the cases proceed, in the absence of a contract, cannot be invoked. Explanation III has, however, been omitted from the Civil Procedure Code of 1908.

The obsrvations of Sir Lawrence Jenkins C. J. in a later case, which came up in Bombay, however, tend to show that s. 49 of the Indian Contract Act is exhaustive and has modified the aforesaid rule of English Common law [*Puttappa Manjaya* v. *Virabhadrappa* (4)]. In the case of *Soniram Jeetmull & R. D. Tata and Co., Ltd.* (5) Lord Sumner, however, threw great doubts on the observations of Sir Lawrence Jenkins C. J. and pointed out that if these

(1) (1874) 13 B. L. R. 461.
(2) (1904) I. L. R. 30 Bom. 167, 170-1
(3) (1925) I. L. R. 48 All. 310.
(4) (1905) 7 Bom. L. R. 993.
(5) (1927) I. L. R. 5 Ran. 451 (457); L. R. 54 I. A. 265 (271).

observations were right in the case, where there is no place of performance fixed by agreement and the debtor does not apply to the creditor to fix a reasonable place for performance, there would be no place for performance at all and the debtor would be enabled to better his position by himself being in default, that is, by omitting to apply to the creditor for fixing the place of performance, whereas, if he had so applied, the reasonable certainty is that the place of performance would have been fixed at the creditor's place of residence. Lord Sumner finally said at page 271 of the report that in this state of the authorities [he noticed Tyabji J's judgment in *Motilal Pratabchand* v. *Surajmal Joharmal* (1)] it is not "possible to accede to the present contention that "s. 49 of the Indian Contract Act gets rid of "inferences, that should justly be drawn from the "terms of the contract itself or from the *necessities of "the case, involving in the obligation to pay the "creditor the further obligation of finding the "creditor so as to pay him*". As I understand the judgment of Lord Sumner he has disapproved of the observations of Sir Lawrence Jenkins C. J. in *Puttappa's* case (2) and has approved of Tyabji's J. observations at pages 170-171 in *Motilal's* case (1). Lord Sumner's judgment was considered by the Bombay High Court in the case of *Champaklal Mohanlal* v. *The Nector Tea Company* (3) where Rangnerkar J. has put the same interpretation on it as I am putting upon it. In my judgment, the point I have to consider has been settled by the judgment pronounced in *Soniram Jeetmull's* case (4) and I am bound to give effect to Mr. Akram's contention. I hold that the Baraset court has jurisdiction to entertain the plaintiff's suit.

The learned Munsif considered the merits of the plaintiff's case and had held that her claim for prompt dower had been satisfied before the institution of the

(1) (1904) I. L. R. 30 Bom. 167.
(2) (1905) 7 Bom. L. R. 993.
(3) (1932) I. L. R. 57 Bom. 306.
(4) (1927) I. L. R. 5 Ran. 451 (457); L. R. 54 I. A. 265 (271).

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suit, but the lower appellate court has not considered it. For that purpose there must be a remand.

The appeal is accordingly, allowed, the decree of the lower appellate court is hereby set aside and the case remanded to that court for a decision on the merits. As the plaintiff has succeeded on the point of jurisdiction, which was the only point fought out here and in the lower appellate court, she must have her costs of the lower appellate court (except pleader's fee) as also costs of this Court. Further costs to abide the final result of the suit.

The prayer for leave to appeal under s. 15 of the Letters Patent is refused.

*Appeal allowed.*

G. S.