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ORIGINAL CIVIL.

Before Mr. Justice Kindersley.

OAKES & COMPANY (PLAINTIFFS) *v.* JACKSON AND ANOTHER (DEFENDANTS).*

Agreement in restraint of trade—Application of law of place of performance, not lex loci contractûs—*Act IX of* 1872, *s.* 27.—*English law. Breach of covenant not entitling to damages.*

Agreement executed and stamped in England, afterwards executed in India.—Liability to Indian stamp-duty.

D and E, being in England, entered into a written agreement with A, B, and C, the partners of a firm carrying on trade in Madras, to go to Madras, and there enter into the service of the firm; the service to last for five years, or to be determined at any time by certain notice being given; and covenanted that on the expiry of the five years, or sooner determination of the service, they would not carry on within 800 miles from Madras any business carried on by the firm; and also covenanted that on such expiry, or sooner determination, they would, whenever requested by the firm so to do, return to England. In pursuance of the agreement D and E went to Madras, and entered into the service of the firm. After it had continued for about 2½ years, the service was determined, by notice from the firm. D and E then, in violation of their said covenants, refused to return to England, though requested to do so by the firm, and proceeded to set up and carry on, on their own account, business of the same kind as that carried on by the firm.

Held, in a suit by the firm against D and E for damages for breaches of the said covenants, and for a perpetual injunction restraining D and E from carrying on in Madras, or within 800 miles from Madras, any business carried on by the firm, that, treating the covenant in restraint of trade as one entered into in England, it could not, even if valid by the law of England, be enforced in India, inasmuch as its object was to contravene the law of India (Section 27 of Act IX of 1872). *Held* further that that covenant would have been void by the law of England because the limit of the restriction was unreasonable, and, as no narrower limit had been mentioned in the agreement, this was not a case where the covenant could have been enforced within a narrower, and reasonable, limits.

Held also that the covenant to return to England, except so far as it operated improperly in restraint of trade, was a covenant the breach of which did not in any way cause damage to the firm, and therefore such breach did not entitle them to any damages.

The agreement was first executed in England by D and E and by A, the senior partner in the firm, and stamped with the stamp required by English law for agreements executed in England, and it was subsequently executed in India by B and C, the other two partners, but not stamped with an Indian stamp. *Held* that the agreement was liable to Indian stamp-duty, and was not admissible in evidence unless and until the proper stamp-duty and penalty under Act XVIII of 1869 were paid.

* Original Suit No. 127 of 1876.

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THIS suit was brought by William T. S. Oakes and Dawson, as the partners constituting the firm of Oakes and Company, carrying on business at Madras as tailors, out-fitters, dress-makers, milliners, general merchants and agents under that style, against the 1st defendant and his wife (the 2nd defendant) under the following circumstances.

By an agreement in writing, dated the 19th of February 1873, the defendants covenanted with the plaintiffs and their then partner James Oakes (since deceased) for the considerations mentioned below, to proceed to Madras when requested, and immediately on their arrival there to enter into the service of plaintiffs and the said James Oakes; the 1st defendant as their cutter-out and manager of the tailoring and clothing department and general assistant, and to do all other matters connected with the general business as directed or desired, and the 2nd defendant as milliner, dress and mantle maker, and to do and assist in all other matters in her department and in the business generally as directed or desired. A period of five years' service was agreed upon, but it was to be determinable at any time, and for any cause or for none, by the parties on either side, by giving four months' notice in writing to the parties on the other side, or by payment on the one hand, or foregoing on the other, of three months' salary; the defendants covenanted that at the end of the five years, or on the sooner determination of the service, they "would not, within the compass or distance of 800 miles from Madras, directly or indirectly by himself or herself, or jointly together, carry on or take service or enter into copartnership with any person or persons carrying on any business then being carried on or at any time thereafter to be carried on by the said W. J. S. Oakes, J. Oakes, and H. R. Dawson, or any of them, and would not then or at any time thereafter do or procure or cause to be done any act, deed, matter or thing whatsoever whereby or wherewith or by reason or means whereof the said W. J. S. Oakes, J. Oakes, and H. R. Dawson or any of them should or might be injured or damaged in their trade as general merchants and agents in any wise or manner howsoever."

It was further stipulated in the agreement that at the end of the five years, or on other sooner determination of the service, defendants were to return to England whenever called upon to do so by their employers, and that any balance due to defendants for salaries or otherwise should be discharged by draft at ten days'

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sight par exchange, to be presented by, and payable to, the 1st defendant personally in England.

The employers covenanted on their parts to pay defendants' passage money to Madras, and on the expiry of the term of the service, or its sooner determination, their passage money from Madras to London, and during their service salaries on a progressive scale as well as a commission on sales.

The agreement further provided that defendants were not to be entitled to receive the passage moneys, but that the intention of the parties was that the employers should provide the passages and should pay for such passages to the owners or agents from whom they took them.

The last clause of the agreement was to the effect that if defendants, or either of them, committed a breach of any stipulation on either of their parts in the agreement contained, the 1st defendant should forfeit and pay for every such breach Rupees 5,000 as liquidated damages.

The following were the other material facts of the case as alleged by plaintiff, and admitted by defendants:—Defendants, having proceeded to India, entered the service of plaintiffs and their late partner under the said agreement on the 19th April 1873. On the 28th August 1875 plaintiffs and their late partner gave 1st defendant notice in writing that the services of the latter would not be required at the expiration of four months from that date; and on the next day they gave a similar notice to 2nd defendant. James Oakes died on the 29th September 1875. The 1st defendant left plaintiffs' service on the 1st November 1875. On the 21st December 1875 plaintiffs gave notice in writing to 1st defendant that, in accordance with the agreement, they intended taking passages for both the defendants in the steamship *Chyebassa*, advertized to sail for England about the 1st January 1876, and that passage tickets would be ready for defendants in due course; in reply to which notice defendant sent a letter to plaintiffs stating that it would be impossible for defendants to go by that steamer, the 2nd defendant's health being such as not to admit of her landing in England in February or March. On the 23rd December 1875 plaintiffs wrote to 1st defendant that they had learnt that the said steamer *Chyebassa* would not leave Madras until the 12th January 1876, and that they expected defendants to go by her according to the terms of the agreement. The 2nd defendant left

plaintiffs' service on the 28th December 1875. On the 11th February 1876 defendants advertized in the Madras newspaper called *The Athenæum and Daily News* that they would shortly commence business in the Mount Road, Madras, in tailoring, out-fitting, dress-making, and millinery; and they had commenced, and were carrying on, in the said Mount Road, business as Milliners and Dressmakers, and were also endeavouring to commence business as tailors and out-fitters, and had refused to return to England.

The agreement was first executed in England by both the defendants and by William Oakes, the senior partner of the firm, and who was described in the agreement as "of No. 26, Nicholas Lane, London," and was afterwards executed by the remaining two partners, James Oakes and Dawson, at Madras.

Plaintiffs prayed for a decree adjudging 1st defendant to pay them Rupees 10,000 as damages for breaches by defendants of the agreement, *viz.*, in refusing to return to England, and in carrying on business in Madras, in violation of the covenants entered into by them in that agreement; and also for a perpetual injunction restraining defendants from carrying on in Madras, or within 800 miles from Madras, any business carried on by plaintiffs.

The defence was that that part of the agreement whereby the defendants had themselves not to carry on trade within 800 miles of Madras was void as being in restraint of trade; and that the plaintiffs had suffered no damage by the defendants' failure to proceed to England.

The *Advocate-General* and Mr. *Miller* for the plaintiffs:—It is of great importance to the interests of the mercantile community here, and in fact to the whole community, that agreements such as this should be upheld. On the decision, whether they are valid agreements or not, depends the question whether employers of labour here will be able to bring out skilled artificers from England. If an artificer, brought out at the expense of his employers, cannot be tied down by an agreement such as this, then the employer is exposed to a practical robbery of his customers by the employé whom he has so brought out. The rule of English law countenancing, to the extent that it does, agreements in restraint of trade, rests on the ground of public expediency; it is for the interest of the community that persons possessed of a goodwill in a business should be entitled to provide certain restraints on

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others against usurpation of that goodwill. [KINDERSLEY, J.—But within reasonable limits, such as where the restraint was not to carry on a certain business within London and Westminster.] All the cases, on this point, show that the question as to the reasonableness of the restriction must be decided with reference to the circumstances of each case. *Allsopp* v. *Wheatcroft* (1); *Leather Cloth Co.* v. *Lorsont* (2); *Bunn* v. *Guy* (3). Eight hundred miles seems an enormous distance at first sight; but it is nothing to people in India, who are accustomed to send home to Europe, or to a Presidency Town hundreds of miles off, to get articles of dress of a fashionable cut. The plaintiffs, as we show by our evidence, have customers at as great a distance as 800 miles.

If, however, this restriction should be held to be too large, then, we contend, plaintiffs are entitled to fall back upon the narrower restriction, that the defendants shall not carry on the trade in Madras; the contract being regarded as a divisible one, enforceable to this extent, though not to the larger extent. *Mallan* v. *May* (4); *Green* v. *Price* (5).

[KINDERSLEY, J.—In those cases the contracts seem to have been worded so as to be divisible, the wider restriction being introduced after the narrower one by the word "or." But the agreement does not say "at Madras, or within 800 miles Madras," but simply "within 800 miles from Madras." So, there is no express prohibition at all against trading at Madras itself.]

Though the agreement is not in so many words a divisible one, yet it is so, we submit, according to the reasonable and proper construction of it. As to trading at Madras not being expressly mentioned, it would be quite absurd to construe the restrictive words of the agreement as not by implication including Madras itself; the obvious intention of the restriction would be rendered nugatory by such a construction, and we do not suppose it will be seriously put forward on the defendants' part.

This contract ought to be governed by English law, for the contract was made in England; it was signed by both the defendants and by William Oakes, the senior partner of the firm, in

1. L. R. 15 Eq. 59; 42 L. J. Ch. 12.
2. L. R. 9 Eq. 355; 39 L. J. Ch. 86.
3. 4 East 190.
4. 1 M. and W. 653.
5. 13 M and W. 695.

England, and there was part performance there, by the advance of the passage by William Oakes and by defendants accepting it and setting out on their journey, and there was thus a complete contract before the defendants left England; it ought, therefore, to be governed by the *lex loci contractûs*, that is by the law of England. *P. and O. S. N. Co.* v. *Shand* (1).

[KINDERSLEY, J.—Your argument would lead to enabling parties, by making a contract in England, to break the Indian law with impunity.]

If the law of the country in which the contract is sought to be enforced happens to differ from the law of the country where it was made as to its validity, the contract is not to be considered invalid on that ground. In the *P. and O. S. N. Co.* v. *Shand* (2), Lord Justice Turner said "The general rule is, that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or, as temporary residents, owe it a temporary allegiance: in either case equally they must be understood to submit to the law there prevailing, and to agree to its sanction upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations." That case is, we submit, similar to the present case. It is evident from the whole tenor of the agreement in the present case that the parties intended when they made the contract that it should be governed by the English law. See also *Trimbey* v. *Vignier* (3), where it was held by Tindal, C. J., that a contract must be governed by the *lex loci contractûs*, and not by the *lex fori*; and the principle on which the decision in that case went, was upheld in *Bradlaugh* v. *De Rin* (4). This principle is not invalidated, but only confirmed by the exception to the enforceability of such contracts which exists where the contract is immoral according to the *lex fori*, as in *Robinson* v. *Bland* (5). The principle is also upheld in

1. 3 Moo. P. C. C. (N.S.) 272.
2. 3 Moo. P. C. C. (N. S.) at p. 290.
3. 1 Bing. N. C. 151.
4. L. R. 5 C. P. 473.
5. 2 Burrow, 1084.

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Cammell v. *Sewell* (1), and *Quarrier* v. *Colston* (2), and other cases. The cases we have referred to establish, we submit, our right to have this contract governed by English law.

It will no doubt be contended on behalf of the defendants that the contract must be governed by the law of the place where it was intended to be carried out. But the rule, relied on in such contention, does not, we contend, help them; for the contract could not be said to be one to be carried out in India, for it had to be completed in England. The contract was not carried out until the defendants returned to England, and it was in England that any final balance due to defendants was to be paid to them.

[KINDERSLEY, J.—Surely it cannot be maintained that the main part of the contract was not to be carried out in India.]

That part which related to the defendants returning to England was not an important part to the defendants, no doubt; but it was a very important and essential part to plaintiffs.

[KINDERSLEY, J.—There still remains this in the case, that the part of the contract which was in restraint of trade was to be performed in the country to the laws of which it was contrary.]

The real question is what, on the contract looked at as a whole, and the circumstances under which it was made, appears to have been the law which the parties entering into that contract contemplated and intended themselves to be governed by, and if, as we contend was the fact, it appears to have been the English law, by that law the case must be governed.

Then, as to the covenant to return to England. This is a separate covenant, and quite distinct from the covenant in restraint of trade, and no valid objection can be taken to this covenant on the score of being in restraint of trade. It does not restrain defendants from trading wherever they like when once they have got to England; they are perfectly at liberty to come to India again if they choose. All it does is to replace the parties in the position they were in at the time of making the contract. It merely says "You shall not take an unfair advantage of our having paid your passage out." Defendants could not have come out without plaintiffs' help, and this covenant affords plaintiffs this safeguard, that it requires some expense, and some courage and enterprise for a man to come out again, and he would most probably settle

1. 5 H. & N. 728.

2. 1 Phil. Ch. Rep. 147.

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down in business at home. Defendants, therefore, are not restrained from trading, except as an incidental result, by this obligation to return to England, by which it was only fair that they should be bound. It might have been, moreover, that this covenant was of great importance to the defendants. It might have been that they were in difficulties, and very glad to avail themselves of the advantage of having their passage home paid for them. As it happens, the covenant is important to the other party to the contract, *viz.*, the plaintiffs. Whatever may be objected to the other covenant in restraint of trade, there is no defence for the breach of this covenant to return to England.

If it should be held that the covenant in restraint of trade in this case must be governed by the Indian law, we submit that even then such covenant must be taken as coming within the spirit and meaning of the exceptions in s. 27 of the Contract Act (IX of 1872), and ought, therefore, to be enforced either *in toto*, or to the extent that it is considered reasonable. It could not have been intended by the Legislature not to include among the exceptions to the general rule prohibiting agreements in restraint of trade, in that section, a case which falls so eminently under the principle of those exceptions as the present case does; and a liberal construction ought to be put on the exceptions in that section, so as to include cases like the present.

Mr. *Johnstone*, for the defendants, objected to the admission of the agreement sued on, because it bore only an English stamp, but no Indian one, although two of the executants of it, *viz.*, the 2nd plaintiff, Dawson, and the late James Oakes, executed it in India.

The *Advocate-General* contended that the agreement, by being executed by W. Oakes, the senior partner, and by the defendants in England, was legally a fully executed agreement before it left England, and that the mere fact that the two junior partners added their signatures to it in India after it had been so executed, and after there had been part performance by defendants having accepted payment for them of their passage money and having entered on their journey to Madras, ought not to render an Indian stamp necessary.

MR. JUSTICE KINDERSLEY held that the agreement ought to bear an Indian stamp, but allowed it to be admitted on payment of the penalty.

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The penalty was paid by plaintiffs, and the document admitted.

Mr. *Johnstone*.—A contract ought to be governed by the law of the country wherein it was intended to be performed. Story's Conflict of Laws, Section 280; and the cases cited at Tudor's Leading Cases on Merc. Law, p. 263 (2nd Ed.) in the Notes to *Don* v. *Lippmann*. Here the substantial part of the contract, *viz.*, the service, was to be performed in India. Moreover, the contract was not a fully complete one until the signatures of the two partners in Madras were added to the agreement. They might have refused to put their signatures to the agreement, and repudiated the contract. The cases cited on plaintiffs' behalf do not apply, because none of those were cases in which the performance of the contract was intended to take place in a country other than that wherein it was made. The law of India, therefore, is the law by which this contract must be governed; and an agreement in restraint of trade such as this is manifestly void *in toto* under the rule in s. 27 of the Contract Act (IX of 1872), and cannot be brought under any of the exceptions to the general rule in that section, by any legitimate construction, however liberal, to be put on the words of those exceptions. In *Madhub Chunder Poramanick* v. *Rajcoomar Doss*' (1) Couch, C. J., said: "The use of this word ("absolutely") in s. 28 supports the view that in s. 27 it was intended to prevent not merely a total restraint from carrying on trade or business, but a partial one. We have nothing to do with the policy of such a law. All we have to do is to take the words of the Contract Act, and put upon them the meaning which they appear plainly to bear."

Even, however, if English law were applicable to this case, the limit (800 miles) imposed by this agreement is unreasonable and could not be upheld; nor are the terms of the covenant here such that the restraint could be divided and upheld within the limits of Madras, though held void beyond those limits. The words are not "within Madras or 800 miles from Madras," and consequently the English cases in which covenants in restraint of trade were held valid as to the smaller limit mentioned in them, but void as to the larger, do not apply to the present case.

As to the breach of the other covenant sued on, the covenant to return to England, either that covenant must be held to have had

(1) 14 B.L.R. 86.

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for its object the restraining of defendants from trading in India, and to be therefore void, or if held not to be in restraint of trade, its breach cannot have caused any damage to plaintiffs. The mere fact of defendants not returning to England, or the mere fact of their continuing to reside in Madras, could in no way injure or damnify plaintiffs, and therefore there is no basis on which damages could be awarded for breach of such a stipulation.

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The learned Judge reserved judgment, which he delivered on the third day afterwards. After stating the facts he continued as follows:—

"It is admitted that if the Indian Contract Act, s. 27, is to govern the enforcement of this agreement, it is void so far as it is in restraint of trade. But it is argued that the validity of the contract must be determined by the *lex loci contractûs*, and that this contract was executed in England. In point of fact two of the plaintiffs' firm signed the contract at Madras; but as their partner signed in London, and the defendants signed in London, I will consider the agreement as one executed in London. I think there is no question as to the general rule, that the validity of a contract is to be determined by the law of the place at which the contract was made. But it is a rule subject to some exceptions; and one of those exceptions is, as I apprehend, that a contract made in one country for the purpose of contravening the laws of another country within that other country cannot be enforced in the Courts of that other country. It is hardly conceivable that the assistance of the Courts can be given for the purpose of enforcing a breach of the laws.

I think that the cases to which I have been referred by the learned Advocate-General have been beside the question, because they were not cases in which the contract was to be performed in a country in which it would be void. In the case of the *P. & O. Company* v. *Shand* (1) the contract was made in England, and the consideration paid in England for a voyage to commence in England, and to be continued on board of a British ship, to which a national character was held to attach. In the present case the contract was essentially one of service to be performed in India, and the voyage was only ancillary to that purpose; and the

1. 11 N. S. 771; 13 W. R. 1049; 12 L. T., N. S. 808.

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breaches complained of could only have taken place in India, or in the neighbourhood of India. So in the case of *Quarrier* v. *Colston* quoted in Tudor's Notes to *Don* v. *Lippmann*, the contract was not for the purpose of gambling in England.

But in *Robinson* v. *Bland*, 2 Burr. 1084 (1), Lord Mansfield said that a courtesan could not in England recover the price of her prostitution, even upon a contract entered into in a foreign country where such a contract would be valid. And it is admitted that a foreign contract for slavery would not be enforced in England. But it is pointed out that there is nothing immoral in the present agreement in restraint of trade, although it may be in contravention of the policy of the law of this country. I think, however, that the same may be said of the breach of laws for the levy of customs at a sea port. The revenue laws are *positivi juris;* and in *Holman* v. *Johnson* (Cowper 341) Lord Mansfield pointed out that the contract was not an immoral one; but he added that if the goods had been sold to be delivered in England, where they were prohibited, the contract would be invalid, and the buyer could not bring an action for the price, because it would be an inconvenience and prejudice to the state if such an action could be maintained. And Mr. Tudor in his note on this case says "It is clear that if the goods had been smuggled into England in pursuance of a contract, or of any act done by the vendors to enable the plaintiffs to smuggle such goods, the plaintiffs would have been unsuccessful in their action; because, although such contract would have been valid by the law of France, yet as it would have been prejudicial to this country, and made in fraud of its laws, our courts would not have lent their assistance to enforce it," and Mr. Tudor quotes *Waymell* v. *Reed*, 5 T.R. 599, where the plaintiff, a foreigner at Lisle, sold to the defendant some lace which he knew was to be smuggled into England, and packed it with a view to elude discovery, and Lord Kenyon held that he could not recover in England. Now it is very true that a violation of a revenue law may amount to a penal offence, whereas there is, generally speaking, no penalty for entering into a contract which is void by reason of its being in restraint of trade. But I think that the same rule will apply to both cases, and that the courts of this country will not enforce a contract made abroad to be per-

1. S. C. 1 W. Bl. 234, 256.

formed in this country, contrary to the policy of the law of this country. It is expressly laid down by section 27 of the Indian Contract Act that "every agreement by which any one is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void," and the only exceptions are cases of partnership, and the case of selling the good-will of a business. The present case does not come within those exceptions, and it is admitted that, if the case is to be governed by this section, the restriction against defendants setting up in business within 800 miles of Madras cannot be enforced.

For the reasons which I have just given I am of opinion that the case must be governed by the Contract Act of this country. And I am by no means satisfied that the omission to except such a case as this from the operation of the general rule was unintentional. Trade in India is in its infancy; and the Legislature may have wished to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained. If I had found that the validity of the contract depended on the law of England, I should also find that the limit of 800 miles was unreasonable, as being much in excess of that which the protection of the plaintiffs' interests required. And this is not one of those cases in which a narrower limit also has been mentioned, which might so far hold good.

I have allowed the stamp penalty to be paid on the agreement, and there is no doubt that it was in other respects duly executed by the parties. As to the second issue, I find that the agreement not to carry on business within 800 miles of Madras is void, and cannot be enforced in this country.

And as to the third issue I find that the defendants were bound to go to England when required by the plaintiffs to do so. But I find that the plaintiffs suffered no damage by the defendants' breach of this part of their agreement. If defendants had not set up in business, the plaintiffs would have suffered no damage by their remaining in India. And it would be only by its operation improperly in restraint of trade that the agreement to proceed to England could benefit the plaintiffs. I am told by the learned Advocate-General that the decision which I am about to pass will not be acceptable to the mercantile community. But I must take

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the law as I find it, without bending it to suit any class of persons.

For the reasons already given I am of opinion that this suit ought to be dismissed with costs.

Suit dismissed.

APPELLATE CIVIL.

Before Sir W. Morgan, C.J., and Mr. Justice Kindersley.

SESHA'DRI A'YYANGA'R *v.* SANDANAM AND OTHERS (1).

Landlord and Tenant.—Madras Act VIII *of* 1865—*Exchange of pattás and muchalkás.*

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The pattás and muchalkás required by Madras Act VIII of 1865 should be made and exchanged during the existence but not necessarily at the commencement of the tenancy, the terms of which they are meant to express.

The 4th Section of the Act requires no more than that the pattás should mention the rate and proportion of the produce to be given and not the specific quantity or number of measures.

This was a case referred for the opinion of the High Court by P. Vengu A'yyan, the District Munsiff of Shívaganga, in Suits Nos. 1065 to 1095 and 1098 to 1109 of 1871, under the provisions of Act XI of 1865, section 21.

The suits were brought for the recovery of the mélwáram rents for Faslis 1279 and 1280 (A.D. 1869 and 1870) of lands cultivated by the defendants and belonging to the plaintiff, and the Munsiff found as a fact that pattás were tendered to and refused by the defendants for these Faslis.

The pattás had not, however, been tendered at the commencement of the Faslis for which the rent was claimed, as the Munsiff was of opinion they should have been. The Munsiff, considering the practice that had hitherto been observed throughout the zamindárí of Shívaganga (where the terms of the tenancy are precisely the same as in the village in question) of exchanging pattás and muchalkas after the revenue settlement is made, and the impossibility of specifying in the pattás and muchalkas the amount of rent, as required by the Rent Recovery Act, before the crops are reaped and threshed out, referred the following question for the decision of the

(1) Referred Case No. 4 of 1872.