required for the full and unimpaired use of the house." On the evidence in the present case, we are of opinion that the Municipality failed to discharge this onus. We allow the appeal and set aside the award with costs throughout.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and Mr. Justice Bhashyam Ayyangar.

KAMISETTI SUBBIAH AND OTHERS (DEFENDANTS), APPELLANTS,

v.

KATHA VENKATASAWMY (PLAINTIFF), RESPONDENT.*

1903. October 23, 26, 27.

Contract Act—IX of 1872, ss. 4, 5—Place where contract is made—Proposal and acceptance by letter—Jurisdiction—Civil Procedure Code—Act XIV of 1882 s. 17—"Place where the contract was made."

Plaintiff, who resided at Kurnool, filed a suit in the District Court of Kurnool against the defendants, who resided in Madras, for damages. Plaintiff had been consigning goods for sale to the defendants as commission agents and he now complained that they had sold his goods at rates unnecessarily low. The contract of agency had been concluded by postal communications between plaintiff and defendants:

Held, that the suit was one arising out of contract within the meaning of section 17 of the Code of Civil Procedure, that, within the meaning of explanation III to that section, the cause of action arose at the place where the contract was made, *i.e.*, at Madras and that clause iii of the explanation was inapplicable to the suit inasmuch as the amount claimed was one payable not in performance of the contract, but as damages for its breach.

Under the Indian Contract Act, where the proposal and acceptance are made by letters, the contract is made at the time when and at the place where the letter of acceptance is posted, though the contract is voidable at the instance of the acceptor by communication of his revocation before the acceptance has come to the knowledge of the proposer.

SUIT for damages. Plaintiff, in his plaint, described himself as residing at Kurnool, and the defendants as residing at Madras. He alleged that the defendants were commission agents; that there

* Appeal No. 232 of 1901 presented against the decree of W. M. Thorburn, District Judge of Kurnool, in Original Suit No. 2 of 1900.

KAMISETTI SUBBIAH v. KATHA VENKATA-SAWMY.

had been dealings between him and the defendants in the course of which he had been sending goods to the defendants at Madras and the defendants had made advances or lent money or honoured his hundies drawn on them at Madras on the security of the goods, which were sold by the defendants in Madras as plaintiff's commission agents, at a commission, the sale-proceeds being appropriated by the defendants to the amount due to them. Plaintiff alleged that defendants had sold his goods at rates much below their value, and claimed that they were answerable for the damages sustained by him in consequence of their unwarranted action in selling the goods at rates at which they ought not to have sold them without the knowledge, consent and instructions of the plaintiff and contrary to the course of business which had always been followed. He laid the damages at Rs. 2,520-13-9, and brought the suit in the District Court of Kurnool. The written statement of the defendants, besides traversing the claim on the merits, raised the question of jurisdiction in paragraphs 13 and 14 as follows :—

"That there was neither an express nor implied contract between the plaintiff and the defendant's firm that the amount of damages to which this suit relates was payable at Kurnool within the jurisdiction of this Honourable Court. That the damages claimed by the plaintiff being those arising in consequence of the alleged unwarranted action of the defendants in selling his goods in Madras, the third defendant is advised and he therefore avers that the High Court of Judicature at Madras is the Court which has jurisdiction to entertain this suit and not this Honourable Court, under clause II, section 17, Civil Procedure Code."

The first issue raised the question of jurisdiction. The District Judge was of opinion that the suit might have been instituted either at Madras or at Kurnool, and held that the District Court at Kurnool had jurisdiction. He dealt with the claim on its merits and gave plaintiff a decree for Rs. 1,556-14-5. It appeared that the proposal had been sent by plaintiff by post to Madras, where it came to the knowledge of the defendants, and that the defendants had posted their acceptance of it at Madras.

Defendants preferred this appeal.

P. S. Sivaswami Ayyar, *P. R. Sundara Ayyar*, *Sundara Sastri* and *Kumarasamy* for appellants.

T. V. Seshagiri Ayyar and *Balamukunda Ayyar* for respondents.

JUDGMENT.—The respondent, a resident of Kurnool, sues the defendants, who are commission agents carrying on business in Madras, for damages alleged to have been caused to the plaintiff in consequence of "the unwarranted action of the defendants in selling the plaintiff's goods at rates at which they ought not to have sold, without the knowledge, consent and instructions of the plaintiff and contrary to the course of business always followed." The contract of agency was concluded by postal communications between the plaintiff and the defendants and the dealings consisted "in the plaintiff sending goods to the defendants (at Madras) from time to time and the defendants making advances or lending moneys or honouring and paying plaintiff's hundies drawn on them in Madras, on the security of the said goods and selling the same in Madras as plaintiff's commission agents," and appropriating the balance of sale-proceeds (after deducting the commission due to them) towards the amounts due to them.

The suit was brought in the District Court of Kurnool, and the first issue framed in the case was whether the District Court of Kurnool had jurisdiction to entertain the suit. The District Judge held that he had jurisdiction inasmuch as the dealings of the parties were begun and carried on by letters written from Kurnool to Madras and from Madras to Kurnool and therefore the suit could be instituted at either place, and gave a decree in favour of the plaintiff on the merits. The only point argued in the appeal is the question of jurisdiction. We are unable to concur in the view taken by the District Judge and must hold that the District Court of Kurnool had no jurisdiction to entertain the suit. If the suit is regarded as one founded on tort, by reason of the defendants' neglect or misconduct in selling the plaintiff's goods at an undervalue, it is clear that the cause of action arose (*vide* section 17 (*a*), Civil Procedure Code) in Madras and not in Kurnool. But viewing the suit as one arising out of contract, within the meaning of explanation III to section 17, Civil Procedure Code, and this, we think, is the character of the suit for purposes of determining the forum—the question is whether it can be held upon the admitted facts that Kurnool was (I) "the place where the contract was made" or (II) "the place where the contract was to be performed" or its performance completed or (iii) "the place where in performance of the contract" the amount sued for was expressly or impliedly payable. Clause (ii) of explanation (iii) is clearly

KAMISETTI SUBBIAH v. KATHA VENKATA-SAWMY.

inapplicable to the case and the respondent's pleader did not rely upon it; but he relied upon both clause (i) and clause (iii). We are clearly of opinion that clause (iii) is also inapplicable to this suit, inasmuch as the amount sued for is really, as it purports to be, in the nature of damages for alleged breach of contract and not an amount payable in performance of the contract. The respondent's pleader argued as if the amount which the plaintiff seeks to recover in this action were a sum which the agent was bound, under section 218 of the Contract Act, to pay to his principal; and on this footing he contended that the agent was bound to seek the principal and pay or tender the money and that therefore the money was payable at Kurnool, in performance of the contract of agency. But a reference to sections 217 and 218 of the Contract Act will clearly show that the sum referred to in section 218 is the balance remaining with the agent out of the sums "received on account of the principal in the business of the agency" (after deducting therefrom all moneys due to the agent in respect of advances made or expenses incurred by him in conducting the agency business and also such remuneration as may be payable to him for acting as agent). The present suit is one brought really under section 212 of the Contract Act for compensation which the agent is bound to make to his principal "in respect of the direct consequences of his own neglect or want of skill or misconduct." It is therefore unnecessary to consider the various cases cited on both sides and decide in this appeal whether an agent is bound to render on demand proper accounts to his principal at the place of residence of the latter and seek his principal and pay at his residence, the sums payable to him under section 218 of the Contract Act. There is no authority whatever for the position that a party committing a breach of contract should seek the other party to the contract and pay him, at his residence, compensation or damages for such breach of contract—which of course is an unliquidated amount, not to say that clause (iii) of section 17, Civil Procedure Code, refers only to an amount payable in "performance of the contract." The only question that has to be decided therefore is whether the "contract was made" in Madras or in Kurnool; and this depends principally upon sections 4, 5 and 6 of the Contract Act. In our opinion the contract was made in Madras, where the plaintiff's proposal—sent by post—came to the knowledge of the defendants and where the defendants'

acceptance was posted and was thus put in a course of transmission to the plaintiff so as to be out of the power of the defendants. Under the Indian Contract Act, it is true that the contract is not complete in the sense that neither party can recede therefrom, until the acceptance comes to the knowledge of the proposer. But at the time when the acceptance is posted, the contract becomes complete as against the proposer and any communication (from the proposer) which reaches the acceptor after this moment, revoking the proposal, is altogether inoperative. As against the acceptor, however, the contract is not complete at that moment and can be avoided by him by communicating to the proposer, a revocation of the acceptance, before the acceptance reaches him. Under the English law, this seems to remain still an open question (see Pollock on 'Contracts,' seventh edition, page 35), though in all probability, English Courts may now be bound to hold that an unqualified acceptance once posted cannot be revoked even by a telegram or special messenger outstripping its arrival (*ibid.*, page 36). The learned pleader, for the respondents, argues that the contract could not be held to have taken place at the moment of the posting of the acceptance inasmuch as the acceptor could have receded from it before the acceptance reached the proposer. There is, however, the anomaly—if it be an anomaly—that the other party could not recede from it. If a contract be not concluded, it should, of course, be open to either party to recede from it; and this being so it cannot successfully be contended that the contract is not concluded when the letter of acceptance is posted for admittedly the proposer is no longer at liberty to recede. The conclusion, we come to is that the contract is made at the time and at the place when and where the letter of acceptance is posted, but that, under the Indian Contract Act, at any rate, the contract is voidable at the instance of the acceptor by communication of his revocation before the acceptance has come to the knowledge of the proposer. In *Newcomb* v. *DeRoos*(1), the offer was made by the defendant from London by letter addressed to the plaintiffs at Stamford. It was received by the plaintiff at Stamford and the letter of acceptance also posted there. It was held that the contract was made at Stamford; and it was further held in that case that the whole cause of action, *i.e.*, the contract

(1) 2 E. & E., 271.

KAMISETTI SUBBIAH v. KATHA VENKATA-SAWMY.

as well as the work to be done thereunder, arose at Stamford. In *Taylor* v. *Jones*(1), the converse of this case, where an offer to buy goods was made by letter posted in the City of London and was accepted not by a letter but by sending the goods to the proposer's place of business in the city, it was held that the contract was made and the whole cause of action arose in the City of London. The question as to where a contract is made is fully considered and discussed by Savigny in his treatise on the Conflict of Laws—Guthrie's 'Translation,' second edition, pages 214 and 215, etc., and he answers it without hesitation, as follows:—

"The contract is concluded where the first letter is received and the assenting answer is dispatched by the receiver for at this place a concurrent declaration of intention has been arrived at The sender of the first letter is therefore to be regarded as if he had gone to meet the other, and had received his consent. This opinion has been adopted by several. But many have suggested the following doubts. The assenting letter, they think, may be recovered before its arrival, or annulled by a revocation; therefore the contract is first completed at the place where the sender of the first letter has received the answer, and has thus become aware of the other's agreement. But it is quite wrong to reject the true principle in consideration of such very rare cases. In far the greater number of instances both intentions will be declared without such a wavering of resolution; but where that does happen, the question can only be decided by taking into account a multitude of particular circumstances, so that, even then, the arbitrary rule proposed by our opponents is by no means sufficient" (*vide* also footnote (*c*) at page 215 in which all the authorities bearing on the question are summarised and collected).

We, therefore, allow this appeal with costs throughout, and setting aside the decree appealed against, direct the plaint to be returned to be presented to the proper Court.

---

(1) L.R. I., C.P.D., 87.