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EBRÁHIM PIR MAHOMED v. CURSETJI SORÁBJI DE VITRE.

The right of the plaintiff, who is a tenant-in-common, appears to me stronger than that of a joint-tenant, as the former has a several estate: see the authorities in note K to Thomas' Systematic Arrangement of Coke, Vol. I, p. 779.

For these reasons I find on all the issues for the plaintiff, and decree for the plaintiff, with costs to be paid by the defendant. The rent to be Rs. 352-8-0 *per* month, the decree to relate to the undivided moiety only.

Attorneys for the plaintiff:—Messrs. *Tobin and Roughton.*

Attorney for the defendant:—Mr. *Khanderáv Moroji.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

DHUNJISHA NUSSERWA'NJI, (PLAINTIFF), *v.* A. B. FFORDE, (DEFENDANT).*

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Jurisdiction—Cause of action—Whole cause of action—Contract—Place of performance of contract where no stipulation in contract—Breach of contract—Leave to sue under Clause 12 *of Letters Patent.*

By a contract executed in Bombay on the 19th December, 1885, the defendant promised to pay the plaintiff Rs. 9,152, of which amount the sum of Rs. 4,752 was to be paid by monthly instalments of Rs. 132 extending over a period of three years, and the remainder, *viz.*, Rs. 4,400, in a lump sum at the end of the three years. It was provided, that in case of default being made in payment of any of the instalments, the whole of the amount then due should be paid forthwith. The plaintiff, alleging that the defendant had only paid eight of the instalments, brought this suit for the balance. The defendant, who did not dwell or carry on business in Bombay, pleaded *(inter alia)* that the High Court of Bombay had no jurisdiction, as the whole cause of action had not arisen in Bombay, and no leave to sue had been obtained by the plaintiff under clause 12 of the Letters Patent The written contract, which was admittedly executed in Bombay, contained no stipulation as to where the instalments or the final balance was to be paid.

Held, that, in the absence of stipulation in the contract itself, the intention of the parties to it was to guide the Court in determining the place of its performance. From the facts and acts of the parties it appeared that their intention was that payments under the contract should be made at Surat. The breach of contract consequently took place at Surat, and not in Bombay, and the High Court of Bombay had no jurisdiction to try the suit, the plaintiff having omitted to obtain leave to sue under clause 12 of the Letters Patent.

* Suit No. 163 of 1887.

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In the case of an action on a contract, the "cause of action" within the meaning of clause 12 of the Letters Patent means the whole cause of action, and consists of the making of the contract and of its breach in the place where it ought to be performed. To give jurisdiction to the High Court of Bombay the plaintiff must show that the contract was made in Bombay; that Bombay was the place where the contract was to be performed, and that its breach took place there.

SUIT to recover the sum of Rs. 8,096.

The plaint stated that on the 19th December, 1885, in Bombay, the defendant had executed a writing, whereby he promised to pay to the plaintiff Rs. 9,152 in Bombay, of which the sum of Rs. 4,752 was to be paid by monthly instalments of Rs. 132 extending over a period of three years commencing on the 1st January, 1886, and the remainder, *viz.*, Rs. 4,400, in a lump sum at the end of the said three years. The document also provided that, on default being made in payment of any of the instalments, the whole of the amount then remaining due should be paid forthwith. The plaintiff alleged that the defendant had only paid eight of the said instalments, amounting to Rs. 1,056, and he now sued for the balance due.

The defendant *(inter alia)* pleaded that the High Court of Bombay had no jurisdiction to try the suit. No leave to sue had been obtained under clause 12 of the Letters Patent. The writing above mentioned described the plaintiff as "of Surat." In the title to the plaint he was described as "temporarily residing at Byculla without the Fort of Bombay," and the defendant was stated to be "an Assistant Superintendent in the Revenue Survey residing at Ahmedabad."

At the hearing it was proved that the plaintiff was a contractor, who had his principal place of residence at Surat, but whose business occasionally required him to visit Bombay; and that on such occasions he resided at a house rented by his son. It further appeared that the defendant had paid eight instalments by cheque, drawn by him in favour of the plaintiff on Watson & Co., of Bombay. These cheques were either posted or (if the defendant happened to be in Surat) sent by hand to the plaintiff in Surat.

On the 25th November, 1886, and again on the 11th February, 1887, the plaintiff wrote letters, dated from Surat, to the defendant;

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who was then at Ahmedabad, demanding payment of the instalments due.

The document of the 19th December, 1885, had been executed in Bombay while the defendant was on temporary leave. It did not mention the place where payment was to be made.

Vicáji for the plaintiff:—The Court has jurisdiction. No leave to sue was required, as the whole cause of action arose in Bombay. The contract was made here, and the breach took place here. The parties intended that payment should be made at Bombay, where the contract was made—*Winter* v. *Round*(1); *Bishunáth* v. *Ilahi Bakhsh*(2).

Russell for the defendant:—Although the contract was executed in Bombay, the intention was that payments should be made at Surat, where both resided. The whole cause of action has not arisen in Bombay; and as no leave to sue has been obtained under clause 12 of the Letters Patent, this Court has no jurisdiction —*Doya Narain Tewary* v. *The Secretary of State for India in Council*(3).

16*th June* 1887. FARRAN, J.:—In this suit the plaintiff claims to recover from the defendant the sum of Rs. 8,096 with interest alleged to be due under a bond bearing date the 19th of December, 1885. The execution of the bond by the defendant is admitted. It provides for the payment, by the defendant, of monthly instalments of Rs. 132 for three years commencing from the 1st of January, 1886, and for the payment of the balance, namely, Rs. 4,400, on the expiration of that period; and it contains a proviso as follows:—"In default of payment of instalments the whole amount to be paid." It is alleged that default has been made by the defendant within the meaning of the proviso, and that the whole amount payable under the terms of the bond is now due. The defendant, who is not a resident of Bombay, has pleaded to the jurisdiction of the Court, and an issue has accordingly been raised, "whether the Court has jurisdiction to try this suit."

As the defendant does not dwell or carry on business or personally work for gain within the local limits of the High Court's

(1) 1 Mad. H. C. Rep., 202. (2) I. L. R., 5 All., 277.
(3) I. L. R., 14 Calc., 256.

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original jurisdiction, and as no leave to file the suit has been obtained, it must be shown, in order to found the Court's jurisdiction, that the "cause of action" has arisen within the local limits. It is now settled by authoritative rulings of this Court and of the High Court of Calcutta that, in the case of an action on a contract, "the cause of action," within the meaning of clause 12 of the Letters Patent, means the whole cause of action, and consists of the making of the contract and of its breach in the place where it ought to be performed. To give jurisdiction to the High Court the plaintiff must show that the contract was made in Bombay; that Bombay was the place in which the contract was to be performed, and that its breach there took place —*Mulchand* v. *Suganchand*[1]; *Daya Náráin* v. *Secretary of State*[2] None of the Courts have doubted that the breach of a contract, occurring in the place where its performance has been stipulated for, constitutes part of the cause of action. The question has rather been whether such breach does not constitute the cause of action, or the whole cause of action, within the meaning of clause 12 of the Letters Patent—*DeSouza* v. *Coles*[3]. In *Narasayya Chitty* v. *Guruappa Chetti*[4], Kernan, J., indeed ruled upon the Letters Patent that an action might be brought either in the place of the making of the contract, or in the place of its performance, and that in either place a cause of action arises wholly. The contract there had been made in Cawnpore, to be performed in Madras and the breach occurred in Madras. His ruling, therefore, was but an *obiter dictum* as regards the place where the contract was made; and it was founded upon the case of *Gopikrishnagossami* v. *Nilkomul Banerjee*[5], decided not upon the charter, but upon the Code. That ruling of Kernan, J., has not been followed in either of its branches in the Court in Calcutta. The case of *Bishunáth* v. *Iláhi*[6], relied on by Mr. Vicáji, was decided with reference to the expression "cause of action" as used in section 17 of the Code, and has no application to this case.

I have, therefore, to determine where the contract, evidenced by the instrument of the 19th December, 1885, ought to have been

(1) I. L. R., 1 Bom., 23.
(2) I. L. R., 14 Calc., 256.
(3) 3 Mad. H. C. Rep., 384.
(4) I. L. R., 1 Mad., 375.
(5) 13 Beng. L. R., 461.
(6) I. L. R., 5 All., 277.

performed by the defendant. It was admittedly executed by him in Bombay, where it is, in fact, dated "Bombay, December 19th, 1885;" but it contains no stipulation as to where the several instalments, including the final balance, were to be paid. Mr. Vicáji relies upon the fact of the contract being made in Bombay, as indicating that the parties to it intended that it should be there performed, and cites *Winter* v. *Round*(1) in support of his contention; and no doubt as a general proposition it is true that, in the absence of special circumstances or contrary indications, the place where a contract is made is *primâ facie* the place where its performance is due: see *Danagli and Company* v. *Purshotam*(2). In the present case, however, but little weight can be attached to the making of the contract in Bombay, for in it the plaintiff is described as "of Surat," and the description appended to the signature of the defendant is "Assistant Superintendent, Revenue Survey, Surat." The defendant was, when the contract was made, on temporary leave for a few days only in Bombay; and the plaintiff's principal place of residence was, I consider, for reasons presently to be noticed, at Surat. It would be a fair inference to draw from these facts and from the wording of the instrument that the parties intended that the payments under it should be made at Surat. In the absence of stipulation in the contract itself, the intention of the parties to it must guide the Court in determining the place of its performance. See *Llewhellan* v. *Chunni Lall*(3); *Lallji Lall* v. *Hurdey Nárdin*(4); *Luckmeechund* v. *Zorawur Mull*(5). In *Gopikrishnagossami* v. *Nilkomul Banerjee*(6), Birch, J., says: "It appears to me that, in a case of this nature, when no place of performance is prescribed by the agreement, what we have to look to, is the intention of the parties. If, from the surrounding facts and acts of the parties, we can ascertain what place was in their contemplation the place of performance, the Courts of that place have jurisdiction."

Payments of instalments under the bond were made by cheques drawn by the defendant in favour of the plaintiff on Watson &

(1) 1 Mad. H. C. Rep., 202.
(2) I. L. R., 4 Mad., 372.
(3) I. L. R., 4 All., 423.
(4) I. L. R., 9 Calc., 105.
(5) 8 Moo. Ind. Ap., 291 at p. 307.
(6) 13 Beng. L. R., 461 at p. 465.

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Co., Bombay. These cheques, eight in number, were, the defendant says, either posted, or sent by hand, when the defendant was in Surat, to the plaintiff in Surat; and, the plaintiff says, were sent to him wherever he happened to be for the time being. He is a contractor, and his business takes him to various places, Násik, Sátára, &c. The defendant's statement on this point, which was not cross-examined, I consider, to be substantially correct, though possibly one or two cheques may at the request of the plaintiff have been sent elsewhere. Mr. Vicáji contends that as the cheques were all eventually honoured in Bombay, it must be taken that the payments thus made by the defendant were all made in Bombay, no matter where the plaintiffs received the cheques. I do not consider this contention to be well founded. "Payment by cheque is a conditional payment of the money due, the condition being that the debt revives if the security is not realised. This doctrine is applicable to one species of negotiable security as to another; to a cheque payable on demand, as to a running bill or a promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person" *per* Lush, J., delivering the judgment of the Exchequer Chamber in *Currie* v. *Misa*[1]; and see Bullen and Leake, p. 661, and the cases there cited. The plaintiff, having received and accepted the defendant's cheques for the several instalments, was, in fact, paid when he received them, and could not sue for the instalments, unless by the dishonour of such cheques the right to sue revived.

Default having been made by the defendant in paying, or sending such cheques to, the plaintiff in September and October and November, 1886, the plaintiff on the 15th November, 1886, wrote to the defendant heading his letter "Surat," and calling upon the defendant once more to remit the amount of the three instalments due before the 25th then instant. This letter must mean that the defendant was to remit to Surat. The defendant was then at Ahmedabad. By his letter of the 11th February, dated Surat, 11th February, 1887, the plaintiff called upon the defendant to pay him at once Rs. 9,152 under the bond. Coupling

[1] L. R., 10 Exch., 153 at p. 163 and 164.

the letter of the 25th November with the other circumstances of the case, and having regard to the description of the parties to the contract set forth in it, I should probably have come to the conclusion, if no oral evidence had been given, that the intention of the parties was that the moneys were to be paid at Surat. Notwithstanding the plaintiff's allegation, that he lives for the most part in Bombay, I consider that his residence is properly described as being at Surat. He there occupies a house of his own, and possesses four or five other houses. In the bond sued upon, he is described as "of Surat." The letters he wrote to the defendant are dated from Surat. His wife when ill was taken back to Surat from Bombay, and died there, and in his plaint he describes himself as temporarily residing in a house at Byculla. The only connection which the plaintiff has, in fact, with Bombay is that his business no doubt takes him to Bombay, as it does elsewhere, and that he has a son, Ardesar, a medical student, who rents three rooms near the J. J. Hospital at Rs. 14 *per mensem*, in which he lives. The plaintiff I suppose supplies his son with funds to pay for them, and he puts up in them when he comes to Bombay, as do the other members of his family when they come. The answer of the plaintiff, that he kept a house in Bombay and lived for the most part there, is decidedly misleading.

Turning to the oral evidence, it will be found that the plaintiff alleges that the written agreement was supplemented by an oral stipulation that payment of the instalments was to be made in Bombay. The defendant, on the other hand, alleges that it was agreed that such payments were to be made in Surat. The defendant's account is corroborated by his witness, Shápurji Hormasji, who attested the bond, but his evidence is on material points contradicted by the plaintiff's son, Jamsetji. On the whole, I am inclined to believe the defendant's statement upon this point in preference to that of the plaintiff. I certainly do not think that an arrangement was come to, that the instalments were to be paid in Bombay. The plaintiff had no agent here to receive the instalments or cheques for him. He had no place of business here, and unless when he was actually in Bombay, it would have been inconvenient for him to receive the money on the cheques here. This is manifest from the fact that, with per-

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haps one or two exceptions, he never cashed the cheques himself, but endorsed them over to some third person for cash. Why, then, should he stipulate that he should be paid in Bombay? To the defendant it did not particularly matter where he paid, as he always sent the instalments by cheque, and usually through the post. The plaintiff, as to the arrangement for payment in Bombay, is not corroborated. His son gives no evidence on that point. He is not a satisfactory witness. His account of his place of residence I have already commented on. He contradicted himself, or altered his answers in two material particulars; and interested as he is, I do not consider his evidence reliable. The manner in which he brings the attesting witness, Shápurji, on and off the stage, to get rid of his evidence, is not, I think, at all creditable. Shápurji procured the stamp paper for the bond, and evidently took a considerable interest in the matter. The terms of paragraph 1 of the plaint, moreover, do not point to any such express stipulation as the plaintiff now asserts. I must hold that no such stipulation, as the plaintiff deposes to, has been proved. The defendant's account is more probable. It is in fact likely. I should accept it more readily if his memory about the other details of the transaction had not been so hazy. He is, of course, interested; Shápurji corroborates him; but the circumstances under which Shápurji received a certain payment from the defendant after he had filed his petition in insolvency are open to suspicion, and I entertain much doubt whether he, or the plaintiff and his son, is or are speaking the truth as to the place from which the plaintiff came to Hamilton's Hotel, where the bond was executed. On the whole, however, I think that the defendant's account is substantially correct. So thinking I must hold that it was the expressed intention of the parties to the contract that payments under it should be made at Surat, where, in fact, with possibly one or two exceptions, they were made.

The result would be the same if I were to hold that the rule applied under which the debtor is obliged to seek out his creditor and pay him. There is no evidence that the plaintiff was in Bombay when the unpaid instalments fell due, and his letters (exhibits 2 and 3) are demands to remit to him or pay him

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in Surat. I must hold the first issue in the negative and in favour of the defendant; and taking no evidence on the remaining issues dismiss the plaintiff's suit with costs.

Attorneys for the plaintiff:—Messrs. *Ardesar, Hormasji and Dinshá.*

Attorney for the defendant:—Mr. *T. H. Pearse.*

APPELLATE CRIMINAL.

Before Mr. Justice West and Mr Justice Birdwood.

QUEEN-EMPRESS *v.* SITA'RA'M VITHAL.*

1887. *March* 24.

Criminal Procedure Code (Act X of 1882), Sec. 162—Statement taken down by a police officer under Section 162—Evidence—Evidence Act (I of 1872), Secs. 155 and 159.

A statement reduced to writing by a police officer under section 162 of the Code of Criminal Procedure (Act X of 1882) cannot be used as evidence for the accused. But though it is not evidence, the police officer, to whom it was made, may use it to refresh his memory under section 159 of the Evidence Act (I of 1872), and may be cross-examined upon it by the party against whom the testimony aided by it is given.

The person making the statement may also be questioned about it; and, with a view to impeach his credit, the police officer, or any other person in whose hearing the statement was made, can be examined on the point under section 155 of the Evidence Act.

Reg. v. *Uttamchand*(1) followed.

THE accused, Sitárám Vithal, and nine other persons were charged before the Assistant Sessions Judge of Ratnágiri with the offences of dacoity and of dishonestly retaining property stolen in the commission of dacoity. Sitárám was convicted of the aforesaid offences, and sentenced to undergo five years' rigorous imprisonment for the first offence, and two years' rigorous imprisonment for the second; the punishments were to commence one after the expiration of the other. The Sessions Judge confirmed these sentences.

The accused Sitárám appealed to the High Court. One of the questions raised on behalf of the accused, both at the original

* Criminal Appeal, No. 235 of 1886.

(1) 11 Bom. H. C. Rep., 120.