ORIGINAL CIVIL.

Before Mr. Justice Fulton.

1896. *June* 18.

DOPSON AND BARLOW, LIMITED, PLAINTIFFS, *v.* THE BENGAL SPINNING AND WEAVING COMPANY, DEFENDANTS.*

Contract—Jurisdiction—Cause of action—Counter claim—Set-off—Civil Procedure Code (Act XIV of 1882), Sec. 111—Practice—Procedure—Costs of preparing a deed—Stamp duty.

In December, 1892, the plaintiffs agreed to supply the defendants with machinery for their mill near Calcutta. The defendants being unable to pay for it in accordance with that agreement entered into a supplementary agreement with the plaintiffs on the 10th August, 1894, whereby it was arranged that the plaintiffs should accept shares in the defendants' company and debentures charged on the property in satisfaction of their claim. The agreement provided that the defendant company should forthwith execute an indenture of trust in favour of trustees to be named by the plaintiffs for the purpose of securing the said debentures, such indenture to be prepared by the plaintiffs' solicitors together with the debentures at the expense of the company and should be approved by the company's solicitors. It was lastly provided that this agreement should be treated as forming part of and supplemental to the agreement of December, 1892. This agreement was signed in Bombay by J. Marshall on behalf of the plaintiffs. The indenture and debentures were duly prepared by the plaintiffs and approved by the defendants' solicitors in Bombay. The plaintiffs having paid in Bombay the solicitors' bill of costs in respect of the preparation of the indenture and debentures now sued to recover the amount from the defendants under the terms of the above agreement of 1894.

The defendants contended that the Court had no jurisdiction, on the ground that they did not reside or carry on business in Bombay, and that no part of the cause of action arose in Bombay. They also alleged that the plaintiffs had failed to carry out their part of the agreement of 1892, and contended that they were entitled in this suit to claim damages against the plaintiffs and to set them off against the plaintiffs' claim.

Held, that the Court had jurisdiction. The agreement of August, 1894, was signed in Bombay by the plaintiffs' agent on their behalf, and, therefore, part of the cause of action arose within the jurisdiction. Further, it appeared that it was intended that the payment to be made by the plaintiffs should be made in Bombay, where both the plaintiffs' agent and solicitors resided.

Held, also, that the defendants should not be permitted in this suit to claim damages against the plaintiffs for their alleged failure to carry out their part of the contract of 1892. Their counter claim or set-off did not fall under section 111 of the Civil Procedure Code (Act XIV of 1882), as it was not a claim for an ascertained sum of money, and that being so they could not claim as of right to have it investigated in this suit. Nor was there any equitable ground for admitting the

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counter claim, as it could not be doubted that there would be considerable delay in investigating it, and there was no reason why the plaintiffs should have to wait so long for the money to which they were now legally entitled.

Held, also, that the plaintiffs were entitled to include in their claim the stamp duty paid on the trust-deed. The agreement contemplated that the defendants should pay all the costs incidental to the execution of the deed.

THE plaintiffs sued to recover Rs. 3,073-8-0 with interest from the defendants, being the amount due for the preparation of a certain trust-deed and debentures.

The plaint alleged that by an agreement dated the 10th August, 1894, the defendants had (by their agent) agreed to execute an indenture of trust and to issue debentures in payment to the plaintiffs of the amount due to them for machinery to be supplied by them to the defendants. The said indenture and the debentures were to be prepared by the plaintiffs' solicitor at the expense of the defendants, and to be approved by the defendants' solicitors. The plaint further stated that the said indenture and debentures were duly prepared and approved and were executed by the defendants on the 7th December, 1895, and the plaintiffs paid the bill, *viz.*, Rs. 1,573-8-0, for the preparation of the said documents and Rs. 1,500 for stamp duty. They now sued the defendants to recover this amount.

It appeared that by a previous agreement of the 28th December, 1892, the plaintiffs had agreed to supply the defendants with machinery for their mill near Calcutta. Under this agreement certain machinery had been supplied and partly paid for, but the defendants being unable to continue to pay for it in accordance with the agreement of December, 1892, entered into the above agreement of 10th August, 1894, which substituted certain new terms with regard to the payment of the balance of the money due. Under this agreement the plaintiffs were to take shares in the defendant company as payment. The agreement contained the following clauses :—

"3rd. In respect of the balance of the purchase-money of £ 38,500, referred to in the hereinbefore recited agreement, namely, the sum of £ 30,000, the company shall issue and hand over to the contractors three hundred debentures of pounds one hundred each, bearing interest at the rate of seven per cent. per annum, payable half-yearly, and chargeable upon the lands hereditaments and premises of the company,

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and also on all and singular the boilers, engines, machinery, tools, fixtures, implements, utensils and plant belonging to or which may hereafter become the property of the said company.

"4th. The said debentures shall be payable at the expiration of three years from 1st day of September, 1894, and shall be issued to the contractors on or before such last mentioned date.

"5th. The company shall forthwith execute an indenture of trust in favour of two trustees to be named by the said contractors for the purpose of securing the said debentures, such indenture to be prepared by the solicitors for the contractors, together with the debentures before referred to at the expense of the company, and shall be approved by the company's solicitors. The said indentures shall contain all usual conditions and stipulations for the better securing the repayment of the said debentures."

The agreement of 10th August, 1894, was signed in Bombay by Mr. John Marshall on behalf of the plaintiffs.

In the first instance there were two plaintiffs to the suit, *viz.*, (1) Dobson and Barlow by their agent Clarence St. Paul, and (2) John Marshall. A new power of attorney was subsequently sent to Marshall, and St. Paul's name was struck out under a Judge's order, and Marshall's was substituted as duly constituted agent of the plaintiffs. The plaint was then verified by Mr. Marshall.

The defendants in their written statement stated that the suit was defective; that it was filed and the plaint affirmed by St. Paul, who had no authority to act for the plaintiffs; and that Mr. John Marshall, who was originally a plaintiff, had not affirmed the plaint on his own behalf, and was not duly authorized to act for the plaintiffs.

The defendants also submitted that the Court had no jurisdiction to try the suit, as they did not carry on business in Bombay, and the agreements were executed in Calcutta. They also pleaded that the agreement of the 10th August, 1894, was part of and supplemental to the agreement of the 28th December, 1892, that with reference to these agreements there were many unsettled questions between them and the plaintiffs, that they had a claim for damages against the plaintiffs under the agreement of December, 1892, for non-delivery of certain machinery within a fixed time, and that their claim in respect thereof far exceeded the plaintiffs' claim in this suit, and they craved leave to formulate

their claim by way of set-off. The written statement also contained the following clauses :—

"The defendants further say that under the said agreement of the 10th of August, 1894, the costs of the preparation of the indenture securing debentures and the debentures themselves was the only expense agreed to be paid by the defendants. The defendants say that the sum of Rs. 1,573-8-0, claimed by the plaintiffs in this suit, is made up of various legal charges besides the costs aforesaid which the defendants are not bound to pay. The defendants are and always have been willing that the bill of costs, if any, for the preparation of the said indenture and debentures should be taxed and that the amount found due on such taxation should be set off against the moneys claimable by the defendants from the plaintiffs as aforesaid.

"5. The defendants also say that the sum of Rs. 1,500 for stamp is not payable by them under the said agreement, and the plaintiffs are not entitled by virtue of the said agreement to demand it of them."

The suit came on as a short cause, and the following issues were raised :—

1. Whether the suit as originally filed was defective by reason of the terms of Mr. St. Paul's power of attorney.

2. Whether their power of attorney to Mr. Marshall is sufficient to entitle him to maintain this suit.

3. If the second issue is found in the affirmative and the first in the negative, whether the substitution of Mr. Marshall for Mr. St. Paul covers the original defect in the suit.

4. Whether the Court has jurisdiction to try this suit.

5. Whether the defendants are not entitled in this suit to claim damages against the plaintiffs for their failure to carry out their part of the agreement of 1892.

6. Whether under clause 5 of the agreement of 1894 the defendants are liable to pay Rs. 1,500 claimed for stamp.

7. Whether under the said clause 5 the plaintiffs are entitled to recover the sum claimed, or any, and what part thereof.

Russell for plaintiffs :—The plaint was originally filed by St. Paul on behalf of Dobson and Barlow (Civil Procedure Code (Act XIV of 1882), section 37), with Marshall as second plaintiff (Contract Act, section 230). He held a power of attorney to act for them in Bombay during Marshall's absence. But a new power of attorney was on the 26th March, 1896, sent to Marshall. We then struck out his name as second plaintiff and substituted him for St. Paul as plaintiffs' agent. This was done under a Judge's order. If not rightly done already, it can be done now —Civil Procedure Code (Act XIV of 1882,) section 53.

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As to jurisdiction we have got leave to sue under clause 12 of the Letters Patent, 1865. Under the agreement the payment of the costs under clause 5 was to be made in Bombay where the solicitors reside. The defendants' agents are in Bombay.

As to the third issue, the defendants are not entitled to raise it. Their claim under the deed of 1892 is quite independent of our claim under the deed of 1894. They cannot raise the question by way of set-off. They must file a separate suit. Besides, they have not yet formulated their claim; so we do not know what it is.

Macpherson for defendants:—We say the suit as originally constituted was not maintainable and the power of attorney held by Marshall is not sufficient. This Court has no jurisdiction. The defendants do not reside or carry on business in Bombay, and no part of the cause of action arose here. The plaintiffs' claim is founded on clause 5 of the agreement of 1894 which was executed at Calcutta. It does not mention any particular firm of solicitors. The fact that the solicitors who have done the work live in Bombay is accidental and quite immaterial. The defendants were not to pay the money directly to the solicitors. They were only bound to recoup the plaintiffs what they might pay, and that is to be done at Calcutta, where the agreement was made.

As to our counter-claim we have a right to make it in this suit. The plaintiffs' claim against us and our claim against them are merely parts of one transaction, the whole of which is provided for by the agreement. The plaintiffs cannot single out one item in that transaction and sue in respect of it alone. We claim that the whole matter shall be dealt with. We have prepared a written statement setting forth our claim.

The claim of the plaintiffs in respect of the stamp is bad. It does not come under clause 5 of the agreement. The stamping of the documents is no part of the preparation. We say the whole claim of the plaintiffs is an over-charge, and the bill in respect of this must be taxed.

Russell in reply:—We are quite willing that the bill should be taxed. This has never before been suggested.

FULTON, J.:—This is a suit brought by the plaintiffs to recover from the defendants the costs of the preparation of a certain indenture and certain debentures referred to in the fifth clause of an agreement between the parties, dated the 10th August, 1894.

The defendants in their written statement made various objections to the suit which sufficiently appear in the following issues raised by Mr. Macpherson. (His Lordship read the issues as above set forth and continued.)

By an agreement dated the 28th December, 1892, the plaintiffs, Messrs. Dobson and Barlow, entered into a contract with the Bengal Spinning and Weaving Company for the supply of machinery, which was to be delivered subject to certain conditions, and to be paid for in the manner agreed on. Owing to difficulties arising about payment, a supplementary agreement was entered into between the parties on the 10th August, 1894, by which it was arranged that the plaintiffs should accept shares in the company and debentures charged on its property in satisfaction of their claim. The fifth clause then provided as follows:—

"The company shall forthwith execute an indenture of trust in favour of the trustees to be named by the said contractors for the purpose of securing the said debentures, such indenture to be prepared by the solicitors for the contractors together with the debentures before referred to at the expense of the company, and shall be approved by the company's solicitors. The said indenture shall contain all usual conditions and stipulations for the better securing the repayment of the said debentures."

The last clause provided that this agreement should be treated as forming part of, and supplemental to, the agreement of 28th December, 1892.

In due course the indenture and debentures were prepared by the plaintiffs' solicitors and approved by the defendants' solicitors in Bombay. The plaintiffs' agent, Mr. Marshall, then wrote to the company's agent asking for the payment of the bill of costs. On the 10th February the company's agent wrote to point out that the bill had not been sent, and to say that if it were in order the plaintiffs might treat the same as a set-off to the defendants' claim against them. On the same day Mr. Marshall wrote back to say

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that the bill had been sent, and that he could not allow it to be set off against any claim the company might have against his principals, who had much larger claims against the company.

Mr. Marshall on the 15th April paid the solicitors' bill of costs, the suit having been previously instituted.

In the first instance, the suit was instituted in the name of Messrs. Dobson and Barlow by their agent Mr. Clarence St. Paul and also in the name of Mr. Marshall. Subsequently doubts having arisen as to the validity of Mr. St. Paul's power of attorney, a Judge's order was obtained to strike out the name of Mr. St. Paul and to substitute that of Mr. Marshall as duly constituted attorney of Messrs. Dobson and Barlow, and to make the necessary amendment consequent thereupon in the body of the plaint. The plaint was then re-verified by Mr. Marshall, and his name substituted for that of Mr. St. Paul as attorney for Messrs. Dobson and Barlow, and also erased from its position as second plaintiff.

On the first issue as to the sufficiency of Mr. St. Paul's power of attorney, I do not think it necessary to express any opinion, because in argument it was conceded by Mr. Macpherson that if Mr. Marshall's power of attorney was sufficient, the substitution was authorized by section 53 of the Civil Procedure Code, and I entirely concur in this view. The object of section 53 is clearly to prevent suits being defeated on a merely technical ground.

As to the sufficiency of Mr. Marshall's power of attorney, I cannot see in what way it is defective. There is no prescribed form. The power authorizes him to act for his principals in all matters legal or otherwise, and, therefore, appears to entitle him to sue for them under section 37 (*a*). Accordingly I find on the 2nd and 3rd issues in the affirmative.

A subsidiary question arose in argument whether the Judge's order justified the removal of Mr. Marshall's name as second plaintiff. Doubtless in one way that amendment seemed to be a natural consequence of the insertion of his name as attorney for Messrs. Dobson and Barlow; but I do not think it was a necessary consequence, for it is conceivable that an agent, doubtful whether the right of suit belonged to himself or to his principal, might think proper to sue in the alternative in both names.

However, as Mr. Russell, at the first hearing on the 9th June, while contending that the withdrawal of Mr. Marshall's name was in accordance with the order also applied alternatively for its removal under section 32, I direct that it be struck out as on that date, the previous erasure being treated as invalid. I do not understand how the addition of Mr. Marshall's name as co-plaintiff can have increased the defendants' costs or affected them in any way whatever, but as the point was pressed in argument I direct that if on taxation it be found that the addition of his name as co-plaintiff really and properly caused any increase in the defendants' costs (over and above those incurred by them in defending the suit of Dobson and Barlow), the same be paid by him.

Turning now to the more material issues, I find on the 4th issue that this Court has jurisdiction, leave having been given under clause 12 of the Letters Patent. The agreement of August, 1894, was signed in Bombay by Mr. Marshall on behalf of Messrs. Dobson and Barlow.

In *Read* v. *Brown*[1], a case under the Mayor's Court Procedure Act (20 and 21 Vict., c. 157) the matter is very succinctly dealt with by Lord Justice Fry as follows:—"Everything which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause of action." Similarly when discussing the jurisdiction of the same Court apart from the Act, Mr. Justice Brett in *Cooke* v. *Gill*[2] said: "Cause of action has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed—every fact which the defendant would have a right to traverse." Now, if the definition contained in these decisions can properly be applied to the term "cause of action" in clause 12 of the Letters Patent, it seems impossible to resist the conclusion that where one of the parties assents to the contract in Bombay, part of the cause of action arises in Bombay; for, if his assent to the contract can be disproved, the whole contract falls to the ground, and with it the right of suit. In Mr. Justice Green's learned judgment in *Mulchand* v. *Suganchand*[3], confirmed on appeal by Sir M. West-

(1) 22 Q. B. D., 128 at p. 132. (2) L. R., 8 C. P., 107.

(3) I. L. R., 1 Bom., 23.

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ropp, C.J., and Sargent, J., the weight to be attached to the English interpretation of the term "cause of action" in determining the meaning of the same phrase in clause 12 of the Letters Patent is very fully considered, and there seems to be no reason for holding that in the Letters Patent the term has a different meaning from that put on it in the two cases above referred to. In *Dhunjishah* v. *A. B. Fforde*[1] Mr. Justice Farran pointed out that it was now settled that in the case of an action on a contract, the cause of action within the meaning of clause 12 of the Letters Patent meant the whole cause of action and consisted of the making of the contract and of its breach in the place where it ought to be performed. But 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. See the extract from the judgment in *Sichel* v. *Borch*[2] referred to by Mr. Justice Bittleston in *DeSouza* v. *Coles*[3] and Mr. Justice Telang in *Rámpartáb* v. *Premsukh*[4].

The above remarks, if correct, are sufficient to show that part of the cause of action arose in Bombay; but the same conclusion may be arrived at on another ground. For under the circumstances of this case I think it must have been intended that the documents should be prepared in Bombay and paid for there. It has not been suggested that the plaintiffs had any other Indian solicitors than the Bombay solicitors, and the preparation of the documents in Bombay and their approval by the defendants' Bombay solicitors seem to have been accepted as matters of course. The fair inference, then, appears to be that payment was intended to be made in Bombay, where both the plaintiffs' agent and the solicitors resided. Consequently, part of the cause of action arose within the jurisdiction.

On the 5th issue whether the defendants are not entitled in this suit to claim damages against the plaintiffs for their failure to carry out their part of the contract of 1892, I am of opinion

(1) I. L. R., 11 Bom., 649.
(2) L. J. Ex. (N. S.,) 179.
(3) 3 Mad. H.C. R., 384 at p. 395.
(4) I. L. R., 15 Bom., 93 at p. 101.

that the answer must be in the negative. The defendants' claim, so far as I understand, is not one arising under section 111 of the Civil Procedure Code, for it does not seem to be one for an ascertained sum of money legally recoverable from the plaintiffs. Whether a claim for an ascertained sum could, notwithstanding the provisions of section 74 of the Contract Act (IX of 1872) have been made under clause 14 of the agreement of 1892, is a matter on which I need express no opinion; but if it could have been made, there could, I think, be no valid reason for not formulating at the first hearing such a simple claim, considering that the defendants' agents were warned of the probability of this action as long ago as the 10th February.

But what I understand is that the defendants asked for time to formulate a counter claim for damages of which their bill sent to Mr. Marshall on the 18th January was a part. Now I do not doubt that the Court would have jurisdiction to entertain the counter claim. Though not expressly provided for in the Civil Procedure Code it has frequently been held that the Courts can entertain counter claims where it would be inequitable to compel the defendant to have recourse to a separate suit (*Clark* v. *Ruthnavaloo*[1]; *Kishorchand* v. *Madhowji*[2]; *Bhagbat* v. *Bámdeb*[3]; *Chisholm* v. *Gopál Chunder*[4].) So long, however, as the counter claim or set-off does not fall under section 111, the defendant cannot claim as of right to have it investigated in the same suit. The question whether it is inequitable to compel him to resort to a separate suit, cannot be determined by any general rule, but depends on the facts of each case. In England the discretionary power is recognized by orders XIX and XXII. In this country, though not conferred by Act, the discretion is exercised on general principles of equity. *Bhagbat* v. *Bámdeb*[3] may be referred to as a case where the Calcutta High Court refused to entertain part of a counter claim which it considered too remote to be mixed up with the original claim. *Gray* v. *Webb*[5] is an instance where the Court in England, exercising its discretion under the orders,

(1) 2 Mad H. C. R., 296.
(2) I. L. R., 4 Bom., 407.
(3) I. L. R., 11 Cal., 557.
(4) I. L. R., 16 Cal., 711.
(5) 21 Ch. D., 802.

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rejected a counter claim. The discretion, it is true, is not an arbitrary power, but must be judicially exercised—*Huggins* v. *Tweed*[1].

The question, then, comes to this. Is it inequitable in the present case to refer the defendants to a separate suit? Mr. Macpherson contended that the claim for the costs of the deed was part of the whole contract, and must be treated as one transaction with the rest of the contract. But I think the substance of the arrangement must be looked to rather than the form; for the preparation of the documents was a matter quite distinct from the supply of machinery. The agreement about them was a subsidiary one embodied merely for convenience in the same deed. It was clearly intended that the costs should be provided forthwith, and the plaintiffs, who are entitled to recover them, should be repaid without delay. For convenience they advanced the money, and there seems no reason of expediency or equity which makes it desirable to keep them waiting for repayment until the whole accounts of the contract have been settled. The settlements of these accounts depends on evidence unconnected with the evidence in this case, the collection of which must necessarily be a work of time, as part of it, I presume, will come from Calcutta. If a claim by the defendants is made, it will, according to Mr. Russell's contention, be met by a counter claim of the plaintiffs, and the possibility of their putting in such a replication in the present suit is open to argument. At any rate it cannot be doubted that there will be considerable delay in settling the claims for damages, and in the absence of any suggestion that the plaintiffs will not be in a position to pay any damages awarded against them, I do not see why they should have to wait for the money to which they are now legally entitled.

On the 6th issue I find that the defendants must pay the item of Rs. 1,500 for stamp duty. The term "prepared" must have been intended to include the stamping of the document without which it could not be executed. I think the only reasonable construction to put on the agreement is that the company were liable to pay all the costs incidental to the execution of the trust-deed;

(1) 10 Ch. D., 359 at p. 363.

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and this must certainly have been the intention, as the supplementary agreement was made for their relief on account of their inability to carry out the terms of the agreement of 1892.

On the 7th issue I find that the plaintiffs are entitled to recover Rs. 1,500 plus the solicitors' costs for preparing the trust-deed and debentures to be ascertained on taxation, and costs, and interest at 6 per cent. per annum on the judgment from the date of final order which will be made as soon as the costs are duly reported.

The defendants must pay their own costs, except in so far as they may be entitled to recover any from Mr. Marshall.

Attorneys for plaintiffs:—Messrs. *Crawford, Burder and Co.*

Attorneys for defendants:—Messrs. *Thákurdás, Dharamsi and Cáma.*

ORIGINAL CIVIL.

Before Mr. Justice B. Tyabji

IN RE THE ESTATE OF H. G. MEAKIN, DECEASED.

ALICE MEAKIN (PETITIONER).

1896.
July 25.

Minor—Guardian—Minor residing in England—Jurisdiction of High Court.

Where a mother residing at Poona, the widow of a deceased European inhabitant of Poona, applied to be appointed guardian of her three minor children (two of whom were residing with her and the third, a girl of the age of sixteen years, was residing in England) and to have certain payments made to her out of the estate of their deceased father on their account, and to have certain powers over their persons given to her and to have the costs of the application paid out of the shares of the said three minor children in the hands of the Administrator General of Bombay, the Court made the order applied for.

IN chambers. This was a petition by Alice Meakin, residing at Poona, the widow of Henry George Meakin, European inhabitant of Poona, who died intestate (see I. L. R., 20 Bom., 370) at Carlsbad on 1st June, 1895. Letters of administration to his estate were, by the consent of all parties interested, granted to the Administrator General of Bombay.

The petitioner now applied to be appointed guardian of her three minor children and to have certain payments made to her