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GANPAT v. ANNA.

In our opinion the learned District Judge has placed too narrow a meaning on sections 35, 36 and 37 of the Act, when he spells out of them anything which prevents the District Judge assigning the bond after the happening of the events which have occurred in this case, and we at present think that the District Judge has power to assign the bond, though by so saying we do not intend to prejudge any defence that may be raised in any suit hereafter brought. As to whether he should or should not assign it is a matter for his consideration; all we can do now is to set aside the order passed, and remit the case in order that the District Judge may determine whether in the circumstances he should assign the bond.

No order as to costs.

G. B. R.

ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

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September 27.

MOTILAL PRATABCHAND, PLAINTIFF, *v.* SURAJMAL JOHARMAL AND ANOTHER, DEFENDANTS.*

Letters Patent, clause 12—Contract Act (IX of 1872), sections 46-49, 94—Commission agent—Place of payment of debt—Cause of action—Jurisdiction.

The plaintiff, a commission agent and merchant carrying on business in Bombay, gave instructions to the defendants, also commission agents and merchants carrying on business at Phulgaon in the Birda Zilla, to enter into certain transactions on behalf of the plaintiff, and the defendants entered into those transactions as commission agents on behalf of the plaintiff. Accounts were sent and advices were transmitted from Phulgaon to the plaintiff in Bombay and from Bombay by the plaintiff to the defendants at Phulgaon. Subsequently the plaintiff having applied for leave under clause 12 of the Letters Patent brought a suit in the High Court at Bombay to recover the amount due from the defendants at the foot of the accounts between himself as principal and the defendants as commission agents at Phulgaon: the defendants pleaded want of jurisdiction.

Held that as (1) instructions were sent to the defendants from Bombay, (2) accounts were rendered to the plaintiff (at Bombay) and (3) demand was made from Bombay to the defendants at Phulgaon, the payment of money therefore was clearly to be in Bombay.

* Original Suit No. 492 of 1904.

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PER CURIAM:—The expression cause of action means the bundle of facts, which it is necessary for the plaintiff to prove before he can succeed in his suit. Not irrelevant, immaterial facts, but material facts without which the plaintiff must fail.....If any of these material facts have taken place within the jurisdiction of the Court, then leave can be given under clause 12 of the Letters Patent. But if no such material facts have taken place within the jurisdiction of the Court and leave is given, then it is open to the defendant to contend at the hearing that the Court has no jurisdiction.....Where no specific contract exists as to the place where the payment of the debt is to be made, it is clear, it is the duty of the debtor to make the payment where the creditor is.

THE plaintiff sued to recover from the defendants Rs. 3,860-4-6 together with interest at 6 per cent. from the 1st June, 1904, till payment, together with costs and further and other relief; alleging that he carried on business at Bombay as merchant in cotton and other articles, that the defendants were also merchants and commission agents carrying on business in cotton at Phulgaon in the Birda Zilla, that during the year 1903-1904 the plaintiff employed the defendants and the defendants agreed to act as *del credere* agents of the plaintiff for the purchase and sale of cotton on plaintiff's behalf at Phulgaon, that under the instructions and orders of the plaintiff sent from Bombay, the defendants as such agents entered into a number of transactions for the purchase and sale of cotton at Phulgaon on plaintiff's behalf, and on account of those transactions the defendants had become liable to account and to pay to the plaintiff in Bombay the aforesaid sum as per statement of account annexed to the plaint, that the plaintiff called upon the defendants to pay to him the said amount but they put off payment under various pretexts and that though the defendants resided at Phulgaon in the Birda Zilla, as the money was payable at Bombay, a part of the cause of action arose at Bombay and the High Court at Bombay had jurisdiction to try the suit on leave to sue being granted under clause 12 of the Letters Patent.

The defendants answered that the Court had no jurisdiction to entertain the suit inasmuch as the cause of action arose at Phulgaon where the defendants resided and carried on business and where the transactions in suit took place and that the suit was premature as the rates of the produce for the due date were to be settled by the Panch at Phulgaon and they were still unsettled.

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V. S. Bhandarkar, for the plaintiff.

F. S. Talyarkhan, for the defendants.

TYABJI, J.:—In this suit the plaintiff prays that the defendant may be ordered to pay to the plaintiff the sum of Rs. 3,860-4-6 with interest at 6 per cent. per annum from 1st June, 1904, till payment and prays for costs: and further and other relief.

The case is shortly this.

The plaintiff is a commission agent and merchant carrying on business in Bombay and the defendant is commission agent and merchant carrying on business at Phulgaon in the Birda Zilla. In the years 1903 and 1904 certain instructions were given by the plaintiff to the defendant at Phulgaon to enter into certain transactions on behalf of the plaintiff, and the defendant entered into those transactions as commission agent on behalf of the plaintiff. The terms were on the footing of *pakki adat*: a sort of *del credere* agency. Accounts were sent and advices were transmitted from Phulgaon to the plaintiff in Bombay and from Bombay by the plaintiff to the defendant at Phulgaon. The previous transactions were such that the plaintiff had acted as agent of the defendant and the accounts were settled, it appears, at Phulgaon, and money paid there.

The plaintiff now says that at the foot of the accounts between himself as principal and defendant as commission agent at Phulgaon, there is this amount to which I have above referred to still due and he claims to recover it.

The defendant has put forward two defences. The first is want of jurisdiction in this Court, and the second is, that it was a condition precedent between the parties that before the plaintiff could recover anything from the defendant, the rates of the produce for the due date should be settled by the Panch at Phulgaon. The defendant alleges that the rates have not yet been fixed by the Panch at Phulgaon, and accordingly this suit is premature and must be dismissed.

Now as to the question of jurisdiction of this Court, this suit has been admitted in this Court and leave granted under clause 12, Letters Patent, on the supposition that a material part of the cause of action had occurred within its jurisdiction. The defendant alleges that no material part of the cause of action has occurred within the jurisdiction of this Court. The expression

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cause of action means the bundle of facts, which it is necessary for the plaintiff to prove before he can succeed in his suit. Not irrelevant, immaterial facts, but material facts without which the plaintiff must fail. The authorities show that if any of these material facts have taken place within the jurisdiction of the Court, then leave can be given under clause 12 of the Letters Patent. But if no such material facts have taken place within the jurisdiction of the Court and leave is given, then it is open to the defendant to contend at the hearing that the Court has no jurisdiction. The question, therefore, before me is, whether a material part of the cause of action has occurred within the jurisdiction of this Court? In order to ascertain that point, I must first inquire, what is it that the plaintiff must prove before he can succeed and then inquire whether any of the material facts which he must prove have occurred within the jurisdiction of the Court. What then has the plaintiff to establish? He has to establish, that he gave certain instructions to the defendant as his commission agent. He has to establish that these instructions duly reached the defendant as his commission agent, and that the defendant executed the commission with which he was charged. That the defendant was bound to render an account to the plaintiff: and that if there was any balance due by the defendant to the plaintiff, the defendant was bound to send it to the plaintiff. And if there was anything due by the plaintiff to the defendant, then the plaintiff was bound to send it to the defendant. He would have further to prove that in this case although there was a balance due by the defendant to the plaintiff, and although demand was made, yet defendant failed to render him an account or pay the amount due at the foot of the account. These are facts which must be established before he can succeed in this suit.

Now looking to the facts of this case, I find, first, that instructions were sent out from Bombay, and secondly, accounts had to be rendered to the plaintiff—plaintiff was in Bombay—therefore accounts had to be sent to Bombay: and thirdly, payment was to be made to the plaintiff, and that payment, unless the plaintiff went to Phulgaon, would necessarily be made in Bombay or remitted by means of *hundis* from Phulgaon to Bombay. Demand was made from Bombay to the defendant at Phulgaon. The

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payment of the money therefore was clearly to be in Bombay, because the ordinary principle and maxim of law is, that where no specific contract exists as to the place where the payment of the debt is to be made, it is clear that it is the duty of the debtor to make the payment where the creditor is.

Here the correspondence between the parties clearly leads me to the conclusion that the payment was to be made in Bombay and that the defendant in his letters promised to send *hundis* to the plaintiff in Bombay and to render accounts to the plaintiff in Bombay. Therefore the express contract so far as it can be gathered from these letters tends to show that the payment was to be in Bombay.

[His Lordship after reading the letters that passed between the parties, said :]

From these letters it is quite clear, that both the parties understood, that the accounts were to be rendered to the plaintiff where he was, *viz.*, Bombay.

Apart from these letters I think the law is clear, that the payment would have to be made by the defendant to the plaintiff in Bombay. In *Robey* v. *Snaefell Mining Company*[1], the head note runs as follows :—

"In an application for service out of the jurisdiction it appeared that the action was brought by the plaintiffs, engine makers in England, for the price of machinery erected by them in the Isle of Man for the defendants, a company carrying on business in the Island. There was no agreement as to the place of payment. *Held*, that it must be taken to be part of the contract that the plaintiffs should receive payment in England, that the action was therefore founded on a breach within the jurisdiction, according to order XI, R. 1 (*e*), and that service out of the jurisdiction might be allowed."

At page 153 Stephen, J., observed :—

"The first question is whether the Court has jurisdiction to grant leave to serve the writ in the Isle of Man; that depends on the mode in which the contract was to be executed. The plaintiffs were to deliver the machinery in the Isle of Man, and the defendants were to pay for it upon delivery, and upon the receipt of a certificate from their engineer that the machine was in good working order. There was no definite agreement as to where the money was to be paid. We think that so far as regards the question of jurisdiction the contract was to be executed within the jurisdiction, and that the debtors having to pay for the goods it was their duty to send or bring the money to the

(1) (1878) 20 Q. B. D. 152.

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creditors. Some authority for that is to be found in Coke upon Littleton to the effect that the obligor of a bond must go to the obligee in order to pay it. This in practice would impose little inconvenience on the defendant, and therefore there is not likely to be much authority on the subject at the present day. The question can only become material in some such case as this. The ordinary course of business would be for the defendants to send a cheque to the plaintiffs at Lincoln, and payment would no doubt take place there when the cheque was received at Lincoln, or was cashed, or at any rate accepted in payment. Suppose that, according to a primitive mode of dealing the defendants had to pay in coin, they would have to carry it to Lincoln, and the plaintiffs would not be under the necessity of going over to the Isle of Man to get it. Light is thrown on order XI, R. 1 (e), enabling the Court to allow service of a writ out of the jurisdiction when the action is founded on a breach within the jurisdiction of a contract 'which ought to be performed within the jurisdiction'—by the exception, 'unless the defendant is domiciled or ordinarily resident in Scotland or Ireland.' But there is no such exception as to defendants in the Isle of Man. The Scotch and Irish having their own Courts secured practically the privilege of being sued in Scotland or Ireland respectively, the Manxmen did not. We think therefore there is jurisdiction to allow service of the writ. The second question is whether in the exercise of our discretion we should allow it to be served in the Isle of Man. The plaintiff must of course go to a Court with jurisdiction over his case, but subject to that he may choose his forum. He has chosen to sue in the High Court. It is said that there is a cheaper Court in the Isle of Man. There may be, and I have no reason to doubt that the Courts there are perfectly competent, but the plaintiff may choose, and he prefers the English Court. As to the balance of convenience, one or other of the parties with the respective witnesses must cross the sea, and I do not think it unreasonable to say that the party who chooses the Court should, if he likes, spare himself, his witnesses and advocates, the possibility of a disagreeable voyage."

In *Bell & Co.* v. *Antwerp, London and Brazil Line*(1) and *Reynolds* v. *Coleman*(2) and *Pragdas* v. *Dowlatram*(3) the question of jurisdiction is fully discussed. I do not think it necessary to refer to them in detail.

The sections of the Contract Act bearing on this point are 46, 47, 48, 49 and 94, which I have duly considered.

I come to the conclusion, therefore, that part of the cause of action which necessitated the defendant's rendering the accounts to the plaintiff and his sending money to the plaintiff are material parts of the cause of action and occurred within the

(1) [1891] 1 Q. B. 103 at p. 107. (2) (1887) 36 Ch. D. 453 at p. 454.
(3) (1886) 11 Bom. 157.

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jurisdiction of this Court. Therefore the Judge in Chambers was justified in giving leave to file this suit in this Court.

Then the next point to consider is, whether it was a condition precedent that the Panch at Phulgaon should settle the question of rates before payment can be demanded by the plaintiff. No evidence has been produced except that of the defendant himself. Against that I have the evidence of Pardhan Ramdhan and Devikissen Jethmal and of the plaintiff's *moonim* Keshrichand. They all deny such a custom. It is curious that this alleged custom did not prevent the defendant himself from suing his own constituents at Phulgaon in spite of the rate not having been fixed by the Panch. I hold that the alleged custom is not proved.

The result is that there must be a decree for the plaintiff.

I pass a decree for Rs. 3,860-4-6 with interest at 6 per cent. per annum from the 21st July, 1904, the date on which the plaint was admitted till this day. Further interest at 6 per cent. per annum till payment, with costs.

Suit decreed.

Attorneys for the plaintiff: *Messrs. Mulla and Mulla.*

Attorneys for the defendants: *Messrs. Tyabji and Company.*

G. B. R.

ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

THE AHMEDABAD ADVANCE SPINNING AND WEAVING COMPANY (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* LAKSHMISHANKER DEOSHANKER AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1904. *August* 26, *September* 16, & *February* 3, 1905.

Practice—Ex parte *order*—*False representation*—*Suit for relief inconsistent with order*—*Set off claimed in Written Statement*—*Omission to frame issue*—*Civil Procedure Code* (*Act XIV of 1882*), *sections 111, 146, 561, 566*—*Company*—*Liquidation*—*Indian Companies Act* (*VI of 1882*), *sections 149, 214*—*Meaning of "legally recoverable."*

The Ahmedabad Advance Spinning and Weaving Company, Limited (the plaintiff Company), was registered as a Limited Company on April 19, 1895.

* Suit No. 607 of 1900; Appeal No. 1293.