there is no evidence to prove any improper motive, and if the adoption causes harm to the plaintiff, it nevertheless confers spiritual benefit upon the husband. Moreover, the rule is firmly established that in the Bombay Presidency a widow, who has no authority from her deceased husband, may adopt a son to him, and that it is not necessary for her to obtain the consent of his kinsmen. It depends entirely upon her discretion whether she should or should not make an adoption, and her choice in the matter cannot be restricted.

The result is that Mansangji is the adopted son of Chandrasangji, and that his adoption is not open to any valid objection. It is clear that in his presence the plaintiff cannot inherit the estate. In view of the insurmountable obstacle created by this adoption in the way of the plaintiff, it is unnecessary to adjudicate upon the right of Chhatrasingji to retain, after his adoption in the Bhamaria family, the estate which he had inherited in the Ahima family.

Accordingly their Lordships will humbly advise His Majesty that this appeal should be allowed, and the suit dismissed with costs throughout.

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for respondent: Messrs. *Hy. S. L. Polak & Co.*

A. M. T.

APPELLATE CIVIL.

Before Mr. Justice Tyabji.

NATHUBHAI RANCHHOD (ORIGINAL DEFENDANT), APPLICANT *v.* CHHABILDAS DHARAMCHAND (ORIGINAL PLAINTIFF), OPPONENT.*

1933
June 21

Civil Procedure Code (Act V of 1908), section 20—Place of suing—Creditor residing in British India—Debtor resident of Sachin State—No express agreement as to place of repayment—Suit on loan—Indian Contract Act (IX of 1872), section 49.

The promise to pay the creditor implies that the debtor will find the creditor to pay him and will pay where the creditor is; under section 49 of the Indian Contract Act

* Civil Revision Application No. 386 of 1931.

1933

NATHUBHAI RANCHHOD v. CHHABILDAS DHARAMCHAND

it is reasonable to suppose that if the debtor applies for a place to be appointed, the creditor will appoint the place where he himself resides,—at any rate he has the power to so appoint; if the debtor fails in his duty to apply, he cannot by his failure better his position, or deprive the creditor of his statutory powers to appoint a reasonable place.

Plaintiff, residing at Surat in British India, lent money at Surat to defendant, a resident of Sachin, a neighbouring Indian State. There was no express agreement as to the place of repayment. The plaintiff having sued the defendant at Surat,

Held, that the Court at Surat had jurisdiction to try the suit.

Soniram Jeetmull v. *R. D. Tata & Co.*,[1] followed.

Bansilal Abirchand v. *Ghulam Mahbub Khan*,[2] explained.

CIVIL REVISION APPLICATION against the decree passed by K. V. Mehta, Joint First Class Subordinate Judge, Surat, in Small Cause Civil Suit No. 960 of 1931.

Suit for money.

The material facts appear sufficiently from the judgment.

U. L. Shah, for the applicant.

H. M. Choksi, for the opponent.

TYABJI J. The suit out of which the present application arises was brought in the Small Cause Court at Surat. The plaintiff claimed Rs. 200, alleged to have been paid to the defendant through the defendant's agent, who had come to Surat for receiving payment there.

The defendant is a resident of the Sachin State. [His Lordship then dealt with the evidence in the case and continued:]

The main argument before me was that the Surat Court had no jurisdiction to try the suit. The question of jurisdiction is not specificially dealt with by the trial Judge. I have therefore to decide whether the evidence and findings justify the decree. The question depends on whether any part of the cause of action arose at Surat: Civil Procedure Code, section 20 (*c*).

The case of the plaintiff who is the respondent is that he, the creditor, resided in Surat, and the money was

[1] (1927) L. R. 54 I. A. 265, s. c. 5 Rang. 451.

[2] (1925) L. R. 53 I. A. 58, s. c. 53 Cal. 88.

advanced there, and that it followed that the money was repayable at Surat. The applicant denies both the allegations of fact and the legal implications.

The learned Judge has accepted the evidence of the plaintiff. It must, therefore, be taken that the loan was made in Surat, by a person resident there, to a resident of the Sachin State. If, from these facts, it can be inferred that the payment of the loan was to be at Surat, then part of the cause of action did arise in Surat, and the Court had jurisdiction. For the breach of a contract occurs in the place where it has to be performed. Consequently, when a suit is brought on the breach, the place of performance is a place where part of the cause of action arises: *Dhunjisha Nusserwanji* v. *A. B. Fforde*,[1] *De Souza* v. *Coles*,[2] *Ram Lal* v. *Bhola Nath*[3] and *Champaklal Mohanlal* v. *The Nector Tea Company*.[4]

For the applicant it is argued that the contract is silent as to the place of payment; that there is no evidence that payment was to be made in Surat, and that such a term cannot be inferred.

The maxim of English law on the subject is that the debtor must seek out his creditor and pay him where the creditor is. But its applicability has been questioned in India. In any case section 49 of the Indian Contract Act contains the law governing the transaction. Section 49, it has been suggested, leaves no room for the maxim of English common law or for any underlying principle leading to the same conclusion. This and cognate questions are considered in *Soniram Jeetmull* v. *R. D. Tata & Co.*[5] Lord Sumner there lays down that section 49 does not get rid of the inferences

(*a*) from the terms of the contract itself, or

(*b*) from the necessities of the case (p. 271).

[1] (1887) 11 Bom. 649.
[2] (1868) 3 Mad. H. C. 384.
[3] (1920) 42 All. 619.
[4] (1932) 57 Bom. 306.
[5] (1927) L. R. 54 I. A. 265, s. c. 5 Rang. 451.

1933

NATHUBHAI RANCHHOD v. CHHABILDAS DHARAMCHAND

Tyabji J.

Nor does it replace any rule of law with regard to the obligation of the debtor to seek out the creditor, when no place is fixed by the contract or prior to the institution of the suit, for the performance of the obligation of payment.

The decision itself was that the agreement being that payment was to be made to Tata & Co., "it follows that they must pay where that firm is" (p. 268). Making such an inference is not importing "a technical rule of English common law into the jurisprudence of India," but "on the contrary, it is a mere implication of the meaning of the parties," (pp. 268 and 269), namely, that "the obligation to pay the creditor involves the further obligation of finding the creditor so as to pay him" (p. 271).

Lord Sumner also refers to "inferences justly to be drawn from the necessities of the case". Amongst them he alludes to the considerations—

(1) whether, if an application had been made to the promisee to appoint a reasonable place for the performance of the promise (as required by the Indian Contract Act, section 49), the place appointed would have been other than the creditor's place of residence;

(2) whether the debtor has disregarded his statutory duty to apply;

(3) that ordinary rules of law prohibit a construction which enables a promisor to better his position under his contract by neglecting to perform a statutory duty imposed upon him with regard to its performance.

Shortly stated,—the promise to pay the creditor implies that the debtor will find the creditor to pay him and will pay where the creditor is; under section 49 it is reasonable to suppose that if the debtor applies for a place to be appointed, the creditor will appoint the place where he himself resides,—at any rate he has the power so to appoint; if the debtor fails in his duty to apply, he cannot by his failure

better his position, or deprive the creditor of his statutory powers to appoint a reasonable place.

These observations would appear to be decisive of the case before me, were it not for the fact that the defendant in this case resides out of British India. This fact may perhaps alter the result: see *Bansilal Abirchand* v. *Ghulam Mahbub Khan*,[1] to which I will presently refer.

The decided cases seem at times to be conflicting. But there is no conflict, it seems to me, if it is borne in mind that "the implication of the meaning of the parties" which "introduces the obligation of the debtor to seek out his creditor," is not the only consideration affecting the determination of the question where the payment has to be made. That implication may be either corroborated or rebutted by other evidence.

Thus in *Motilal* v. *Surajmal*,[2] (which was cited with approval by Lord Sumner both during argument and in the judgment) the letters of the parties corroborated the implication. In *Dhunjisha Nusserwanji* v. *A. B. Fforde*,[3] (also approved by Lord Sumner) Farran J. said "the result would have been the same if I were to hold that the rule applied under which the debtor is obliged to seek out his creditor". In *Kedarmal* v. *Surajmal*,[4] reversed in *Kedarmal* v. *Surajmal*,[5] in the first instance the implication was held sufficient (the decision seems to have been similar to that in *Soniram Jeetmull's* case,[6]) but on appeal there was a remand for a finding on the issue where the money was payable. On this issue the finding of the original Court was that by custom the money was not payable in Bombay where the plaintiff resided. That finding was reversed on appeal. So that the evidence of custom brought about the same result as the implication.

(1) (1925) L. R. 53 I. A. 58, s. c. 53 Cal. 88.
(2) (1904) 30 Bom. 167 at p. 171.
(3) (1887) 11 Bom. 649.
(4) (1907) 9 Bom. L. R. 903.
(5) (1908) 33 Bom. 364.
(6) (1927) L. R. 54 I. A. 265, s. c. 5 Rang 451.

1935

NATHUBHAI RANCHHOD v. CHHABILDAS DHARAMCHAND

Tyabji J.

On the other hand, the implication was held to be rebutted in *Puttappa* v. *Virabhadrappa*.[1] That is how the case is explained by Lord Sumner, though on p. 269, he deals adversely with the arguments underlying *Puttappa's* case.[1] In any case Lord Sumner distinguishes it by referring to some particular contract being there in question of which the precise terms do not appear, and to the nature of the transaction,—the suit being to recover with interest any balance that may be due on taking accounts.

The decision that causes some doubt in the present case is *Bansilal Abirchand* v. *Ghulam Mahbub Khan*.[2] There the contract was for instalments payable at the office of the Treasury at Hyderabad, of money lent as long ago as 1891. The borrower, the alleged surety, and their respective representatives, were all residents of Hyderabad. The lender, however, had a place of business at Secunderabad (which does not form part of the territories of the Hyderabad State). He asserted that the loans were both made and repayable there, and that consequently the Secunderabad Court had jurisdiction. In the Hyderabad Court the plaintiff's demands had long been barred by lapse of time. A promise that the borrower would repay the whole loan on default in paying any instalment was taken to be implied,—but none to repay at Secunderabad. Lord Blanesburgh says (p. 63) :—

> "Even by British law the duty of a debtor to find and pay his creditor is only imposed upon him when the creditor is within the realm. And the plaintiff has not contended that if there be any such duty at all imposed by Indian law upon a debtor it extends in this respect further than in England."

Limitation of a special kind on the duty of the debtor was sought to be placed in *Haldane* v. *Johnson*,[3] in regard to payment of rent,—that it was payable only upon the land. Parke, B., during argument observed that this would mean that the landlord in order to obtain rent was under

[1] (1905) 7 Bom. L. R. 993. [2] (1925) L. R. 53 I. A. 58, s. c. 53 Cal. 88.
[3] (1853) 8 Exch. 689.

the obligation of going upon the land for it. The contention was disallowed, and it was held that it was incumbent on the covenantor to seek out the person to be paid, and pay or tender him the money, for the simple reason that he has contracted to do so.

Are the principles enunciated by Lord Sumner in *Soniram Jeetmull's* case,[1] controlled by the remarks of Lord Blanesburgh in *Bansilal Abirchand* case[2]? Is the applicant entitled to argue that as he is not a resident of British India, there was no implication in the contract and no other evidence on which the Court could have held that the payment was to be made within British India where he was sued?

The decision must, it seems to me, be ultimately referred to section 49 of the Indian Contract Act. That section places no limitation on "the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise." Nor does the fact that the debtor resides in a place outside British India (though quite near where the creditor resides and where the suit is brought) interfere with the inference justly to be drawn from the necessities of the case,—I am quoting Lord Sumner's words,—that if the application had been made, the place appointed would have been Surat, and that "he cannot better his position by neglecting to perform his statutory duty." Moreover the restriction on the duty of a debtor to find and pay his creditor referred to in *Bansilal Abirchand's* case,[2] viz., that "it is only imposed on the debtor when the creditor is within the realm," is one of English law. Taken literally the restriction on the debtor's duty would not be adverse to the creditor here; for the creditor resides within the realm: it is the debtor who resides outside British India. It may be reasonable to take the rule referred to by Lord Blanesburgh as implying

[1] (1927) L. R. 54 I. A. 265, s. c. 5 Rang. 451.

[2] (1925) L. R. 53 I. A. 58, s. c. 53 Cal. 88.

1933

NATHUBHAI RANCHHOD v. CHHABILDAS DHARAMCHAND

Tyabji J.

that the duty of the debtor to find out his creditor cannot be stretched so as to require the debtor to travel across the seas. If the debtor need not cross the seas when he is within the realm, and the creditor beyond, is the converse to hold ? Is the creditor bound to cross over to the debtor, when the debtor is beyond the realm ? See *Haldane* v. *Johnson*.[1]

In any case the rule must be applied to India with the modifications necessitated by the altered circumstances in India, and being within or beyond the realm is a different consideration where the realm consists of an island like England and where the territories of the Native States and British India (as in this case) adjoin each other. The question that the Court has ultimately to decide is, whether the appointment by the creditor of his own residence as the place for payment, would be reasonable in cases in which the defendant resides outside British India. For this purpose obviously no hard and fast rule can be laid down.

Taking the joint effect of both decisions, the true view seems to be this. The defendant failed in his duty to apply for a place for payment ; it is reasonable to think that if he had applied, the plaintiff would have appointed Surat, where he resides ; his bringing the suit in Surat corroborates this view. The rule referred to by Lord Blanesburgh indicates one of the circumstances affecting the question whether the place appointed by the promisee for payment is a reasonable place. Though the defendant was residing outside British India, he was residing in Sachin, quite near Surat, where the suit was brought and where consequently the plaintiff by implication required payment to be made. The defendant might by way of defence have invited the Court to find that he had not failed to apply as required by section 49, ; or that another place had been appointed for payment ; or that there was a contract express, or implied by the circumstances or by custom, that the plaintiff

[1] (1853) 8 Exch. 689.

could not appoint Surat as the place for payment; or that any similar defence was open to him. In that case it would have been for the defendant to adduce evidence on his defence. Assuming that it is incumbent on the Court to record findings on these issues or some of them, I have no doubt that on the evidence, findings adverse to the defendant's contention can alone be recorded. In the absence of a finding in favour of the defendant on some such issue, the plaintiff's contention must prevail.

I come to the conclusion, therefore, that the Court at Surat had jurisdiction to try the suit.

It is admitted that interest was not claimed prior to April 1, 1931, and that the decree must be amended so as to restrict interest as from that date. Otherwise it will stand.

The applicant will pay the costs of the opponent.

Order accordingly.

Y. V. D.

ORIGINAL CIVIL.

Before Mr. Justice B. J. Wadia.

ANGLO-INDIAN DRUG AND CHEMICAL CO. *v.* SWASTIK OIL MILLS CO. LTD.*

1934
April 20

Trade-Mark—Assignability of—Combination of numerals, whether can form a trade-mark—Passing off action—Whether user of a trade-mark on toilet preparations can support a complaint against use of that mark on bar soap—Principles on which Courts act in granting injunction in "passing off" actions.

The plaintiffs were carrying on business in various names including that of the Kathiawad Trading Co., *inter alia*, in manufacturing and selling various kinds of toilet preparations and requisites such as hair oils, etc., and recently of soap bearing No. 777. They alleged that the said mark No. 777 was associated in the market with their manufacture. They further alleged that the defendants had recently begun to manufacture and sell in the market bar soap bearing the said mark "No. 777" stamped

* O. C. J. Suit No. 786 of 1933.