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perties stand in the name of the defendant or her mother, and I understand also that no evidence was given to show from what sources these properties were acquired: that, therefore, is an additional reason for allowing the plaintiffs' claim in respect of them. Our order, therefore, in this appeal will be that the order of the lower Court, except as to the properties numbered 15, 16, and 17 will be reversed, and that the parties will pay and receive costs of the lower Court in proportion to the value of the properties decreed and disallowed; and in this Court the plaintiffs, appellants, will recover the costs of the appeal from the defendants, excepting only the costs of that portion of the property in respect of which no specific decree has been given, the respondents paying their own costs of this Court.

The decision we have come to in the previous appeals disposes also of the appeal No. 170, which arises out of a cross-suit by Mussamat Bhagabatti Deyi, who sought to recover from the Thakoors, the plaintiffs in the previous suit, the personal property derived from Mussamat Chandrabatti of which she alleged them to have dispossessed her. As under our decision she is held not to be entitled to the personal property, the suit cannot be maintained, and the appeal will be dismissed with costs both of this Court and the lower Court, the decree of that Court disallowing costs of the defendants being to that extent reversed.

Appeal allowed.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear.

HARJIBAN DAS AND OTHERS *v.* BHAGWAN DAS,

1871
May 10.

Jurisdiction—Cause of Action—Carrying on Business—Letters Patent, 1865, cl. 12—Suit on Hundi.

13 B.L.R. 96.
10 B.L.R. 123

The defendant, who resided and carried on business at Patna, was in the habit, several times in the course of the year, of sending goods to Calcutta by boat, and coming down himself by rail; he received his goods, and remained in Calcutta until he sold them. He had no place of business, nor any gomasta or agent of his own in Calcutta, but used to sell the goods himself, and put up sometimes at one *arat*, sometimes at another. His stay in Calcutta

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varied from two to four months. He used to pay commission on the goods sold to the *arat* where he put up, and he was in the habit of drawing hundis at Patna on himself at Calcutta, accepting and paying them in Calcutta. The plaintiff brought a suit on a hundi so drawn, and purporting to be so accepted by the defendant, of which payment was refused by the defendant. The defendant admitted the drawing of the note, but alleged that the acceptance was forged. The Judge found that the note had not been accepted by the defendant. The summons was served on the defendant in Calcutta. Leave to institute the suit had not been obtained under section 12 of the Letters Patent.

Held, the whole cause of action did not arise in Calcutta. *Held* also, that the defendant was not, at the commencement of the suit, carrying on business in Calcutta within clause 12 of the Letters Patent. Leave to institute the suit under clause 12 not having been obtained, the Court had no jurisdiction to entertain the suit.

THIS was a suit by the indorsees of a hundi against the acceptors to recover the sum of Rs. 2,500, the amount of the hundi. The plaint stated "that the defendants' firm at Patna, on the 15th day of the light side of the moon in Bhadra, in the Sambat year 1924 (13th September 1867) by their hundi, or bill of exchange, now overdue directed to the defendent's firm at Calcutta, required the defendant's said firm at Calcutta to pay to Sheik Syad Ali, or order, the sum of Rs 2, 500 forty-one days after date, and the defendant's said firm at Calcutta, as the plaintiffs verily believe, accepted the said hundi or bill of exchange in Calcutta, and Sheikh Syad Ali endorsed the same to the plaintffs, but the defendants did not pay the said sum of Rs. 2,500."

The hundi was in the following form:—

"This auspicious letter is written to the worthy of all comparison, Bhai Bhagwan Das, who is in Calcutta, the auspicious place of success, from Patna by Bhagwan Das whose salutation you will accept. Further, I draw on you a chitti (hundi) for Rs 2,500, in letters two thousand and five hundred, the half of which is twelve hundred and fifty, you will pay the full double (of the latter sum) here deposited by Sheikh Syad Ali Saheb, on the 15th day of the light side of the moon in Bhadra payable forty-one days after that date to the order of the Dhanni (principal) in Company's rupees; after ascertaining and adopting precautionary measures in respect of the chitti; you will pay the value. Further, it is welfare. Date the 15th day of the light side of the moon in Bhadra. Sambat 1924.

Signatre of Bhagwan Das."

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The endorsement on the hundi was in these words :—"Chitti accepted by Bhagwan Das in favour of Sheikh Syad Ali Saheb." The defendant admitted that he drew the hundi alleged; but he denied having accepted it, and stated that the acceptance purporting to be his was forged. The summons was served on the defendant in Calcutta. Leave of the Court to institute the suit had not been obtained under section 12 of the Letters Patent. The evidence material to the point of jurisdiction, which was the only one decided in the case, was as follows:—

Golapdas examined on behalf of the plaintiff :—"Bhagwan Das carries on business in Calcutta at Paturiaghatta in Mati Seal's *arat*. I went with the summons in this case, and pointed out the man in Narsing Baboo's gola. Five days before the summons was served, I saw him there."

In cross-examination he said:—"I saw no gomasta of his, but I saw him. He had not a house in Calcutta but he used to be down, and put up at the *arat*, and had his goods sold at the *arat*."

In re-examination he said :— " He constantly comes to Calcutta and lives here. He sends his goods by boat or rail, and they are sold here."

Brajanath Nandi examined on behalf of the plaintiff:—"I know Bhagwan Das. He was formerly at Mati Seal's *arat* for five or six years. He ceased to be there about a year ago when he transferred his business to Narsing Baboo. The arrangement between us was *katcha arat*. We only got 12 annas per cent. on goods sold. He used to send country produce here, and sell it himself. And when he went, we made up the account, and charged our commission. We did not guarantee payment. He used to be here two, three or four months until he sold his goods. He came back in one month or twenty days. He did not accompany the goods. He arrived here at the same time as they did. He used to remain at the *arat*, and so did the goods."

In cross-examination he said:—"He gave the commission as he paid no rent. We had to pay rent for the godowns."

Bhagwan Das (defendant);—"My business has a head office at Patna. I bring goods here, sell them, and go away. My residence is at Patna, and my kotee at Maroogunge in Patna. I come to Calcutta three, four, or five times, and sometimes twice in the year and remain three, four, or five months, or one month at a time. I put up at the gola of the *aratdar*."

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In cross-examination he said:—"I come to Calcutta for one, four, or five months at a time. I sell all the goods I bring here. I bring goods for Rs. 5,000, Rs. 10,000, or Rs. 7,000, at a time. I realize the price from the buyers in Calcutta. Some times I go immediately after selling. Sometimes I remain two or four days. I remain there (Patna) a month or two, and start when I find the boats are about to arrive here. That goes on through the year. I draw bills on myself at Calcutta, and pay them. The *arhatdars* allow me to live on the premises. I pay them 12 annas per cent., and a small allowance called *chatki*, with the proceeds of my goods. I do not take any hundis here. I meet hundis if they come from there (Patna), and if any money is left in my hands, I take it with me. I have never been here six months at a time. I draw bills at Patna on myself in Calcutta. If I am not here, I accept them when I come down. For five or six years I have been trading. I have books here, but they are not in Court. I keep account books here. When I go, I take them along with me. Those books are where I live in Calcutta."

The *Advocate General* and Mr. *Bonnerjee* for the plaintiffs.

Mr. *Marindin* and Mr. *Evans* for the defendant.

Mr. *Marindin* for the defendant contended that, as the plaintiff had not obtained leave to sue under clause 12 of the Letters Patent, the Court had no jurisdiction. The Court would have jurisdiction if the acceptance were genuine. We are prepared to show the acceptance was not genuine, and assuming that that is so, the only thing which the plaintiff alleges gives jurisdiction to the Court is the fact that the defendant carries on business in Calcutta. The evidence of the plaintiff does not disclose such a carrying on of business as would make the defendant subject to the jurisdiction of the Court. Clause 12 of the Letters Patent says that the Court shall have jurisdiction if the defendant "at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within the local limits." The business contemplated by the Act is business of a permanent nature, and not the kind of business the defendant carries on. It is clear that the defendant's principal place of business is at Patna. In *Shields* v. *The Great Northern Railway Company* (1), it was held that a Railway Com-

(1) 30 L. J. Q. B. 331

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pany does not carry on its business within the meaning of the 9 & 10 Vict., c. 95, s. 60 (The County Courts Act), at every place where it has a station, but only at the principal office. See *per* Hill, J., in that case:—"Carrying on business must receive some limitation even in the case of private individuals. A builder, whose place of business is in one County Court district, takes a contract for the erection of extensive buildings in another district, the completion of which will require a considerable time; and for the purpose of such business, he erects workshops thereat. In one sense the builder carries on business in the last-mentioned district, but he does not do so within the meaning of the enactment referred to." See *Gorselett* v. *Harris* (1). So in *Subbaraya Mudali* v. *The Government and Cunliffe* (2), it was held that the words "carry on business" in clause 12 of the Letters Patent imply a personal and regular attendance to business within the local limits; and Scotland, C. J., in *Chinnammal* v. *Tulukannatammal* (3), says that the clause in question requires that the defendant should, at the time of the commencement of the suit, carry on, within the local limits of the Court's jurisdiction, some independent regular business in person.

Evidence was produced showing that the defendant did not accept.

The Advocate-General in reply.—The defendant is subject to the jurisdiction on two grounds: first, he carries on business in Calcutta; and, secondly, the cause of action accrued in Calcutta. The case of *Shields* v. *The Great Northern Railway Company* (4) does not apply to this case. There the defendants were a railway company, and it would be very hard if the law allowed a company to be sued in any Court, however distant from the head office, within whose jurisdiction the company had a roadside station. The governing bodies of the company remained at the head office, and it would be very inconvenient for them to go a long distance to defend suits. Here the defendant regularly comes to Calcutta: as often as five times a year; and although he chooses to say he has a head office at Patna, it is

(1) 29 L. T. 75.
(2) 1 Mad. H. C. Rep., 286.
(3) 3 Mad. H. C. Rep., 146.
(4) 39 L. J., Q. B., 331.

difficult to say which is the head office, and which is the branch office, especially as the goods here are not sold by a commission agent, but by the defendant personally. The case of *Chinnammal* v. *Tulukannatammal* (1) is in favor of the plaintiffs, for there it was held, citing *Rolfe* v. *Learmonth* (2), that, if the defendant has no office, or other fixed place of business, he would be subject to the jurisdiction. Here the defendant has a fixed place of business whenever he comes to Calcutta, and not only that, but while in Calcutta he lives at his place of business. So that the defendant would be subject to the jurisdiction by reason of his dwelling in Calcutta, as in *Morris* v. *Baumgarten* (3) and *S. M. Nishadiney Dossee* v. *Kallykristo Ghose* (4). "Dwelling" implies a greater idea of permanency than "carrying on business," and since it has been held in those cases that the defendants were subject to jurisdiction by reason of their dwelling, although they were residing for temprorary purposes only in Calcutta, the defendant here ought to be subject to the jurisdiction by his carrying on business. In *Subbaraya Mudali* v. *The Government and Cunliffe* (5), the person said to be carrying on business was Cunliffe on behalf of the Government, and the Court was quite right in holding that the Government did not carry on business away from the metropolis.

On the second point, assuming that the acceptance is not genuine, it is admitted that the plaintiffs are not responsible for it, and the cause of action must still be said to have arisen in Calcutta. The only act done in Patna was the drawing of the hundi. The payment was to be in Calcutta. The plaintiff obtained the bill in Calcutta. Payment was demanded in Calcutta, and upon the authority of *Jackson* v. *Spittall* (6), the plaintiff's right to sue accrued in Calcutta; see also *DeSouza* v. *Coles*. (7).

PHEAR, J. (after stating the facts as above, continued.)—It is somewhat strange that, although the plaint affects the exact

(1) 3 Mad. H. C. Rep., 146.
(2) 14 Q. B., 196.
(3) Corytom, 152.
(4) *Ibid*, 24.
(5) 1 Mad. H. C. Rep., 286.
(6) L. R., 5 C. P., 542.
(7) 3 Mad. H. C. Rep., 384.

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formality of English pleading, no mention is made in it of presentment for payment having occurred according to the terms of the hundi sued upon. However, no objection was made to the plaint on this ground, and the matter thus omitted was supplied by the plaintiff's written statement. I may remark that the plaint is very bald in other respects.

The defendant admits that he drew the hundi as alleged.

The document runs in these terms (*reads.*)

The defendant, however, denies that he ever accepted the hundi as alleged, and he says that the endorsement which now appears upon it in these words :—"Chitti accepted by Bhagwan Das, in favor of Sheikh Syad Ali Saheb,"—is not in his handwriting, and was not made with his authority. I think I must take his testimony on this point to be true. According to the plaintiff's account, the hundi was brought to him in Calcutta, and he discounted it on the evening following the day when it was drawn by the defendant at Patna : and the plaintiff states positively that at that time the hundi bore the endorsement which purports to be the acceptance of the defendant. Now it is beyond dispute that the defendant had no gomasta or agent of any sort in Calcutta, and it is not suggested that he accepted the hundi at Patna, simultaneously with drawing it. The only possible alternative in favor of the acceptance being genuine, therefore, seems to be that the defendant came to Calcutta by the train which brought the hundi, and so was in Calcutta in time to receive presentment of the hundi, and to accept it, before it was taken to the plaintiffs to be discounted. But I think it is clear on all the evidence that this was not the case. The defendant did not come up to Calcutta for some days at least after making the hundi. And indeed, it is evident from the document itself, coupled with the nature of the defendant's business, that acceptance, in the technical sense, was not necessary to the force of the document, and probably was not contemplated at first by any one. The defendant had no kothi or establishment of any sort in Calcutta, excepting when he himself came there with his goods, and remained to sell them. And even then he took up his quarters, sometimes at one person's, and sometimes at another's. The hundi was in effect a simple promise on the part of the drawee

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that he himself would pay the money at Calcutta, forty-one days after the date of drawing. It was not an undertaking by him that some one else would accept on presentment, and pay at the expiration of some subsequent period.

In this view of the principal facts, inasmuch as the plaint was filed without special leave previously obtained in pursuance of the provisions of clause 12 of the Letters Patent of our Court, the question at once arises, did the plaintiff's cause of action arise wholly within the jurisdiction of this Court?

In the case of *DeSouza* v. *Coles* (1), two very learned and able Judges of the Madras High Court discussed at great length the meaning of the words "cause of action" as used in that clause of the Madras High Court Letters Patent which corresponds with our 12th clause; and although they were not able to arrive at unanimity of opinion with regard to the meaning, they have in their respective judgments dealt exhaustively with the materials upon which the question depends.

The remarkable power of research and the great erudition of Mr. Justice Holloway necessarily have the effect of investing his opinion with peculiar importance, and I feel the difficulty of justifying my dissent from it. He was led to the conclusion that a truly scientific conception of the term "cause of action" embraces nothing more than the right resident in the plaintiff, and the infraction of it by the defendant. And no doubt a definition in some such words as these may be resorted to with much advantage, if one's only purpose is to obtain a precise technical term for use in processes of scientific enquiry. Probably the jurists and commentators, to whom Mr. Justice Holloway refers for authority, pretty well agree in the adoption of a definition of this narrow and exact character. But it seems to me that, even if this be the fact, it helps us extremely little, for our immediate object is to discover not the sense which the words "cause of action" ought to be understood to convey when employed with close attention to the accuracy of a scientific phraseology, but the sense which they ordinarily bear in the language of English lawyers, due regard being had to their connection with the

(1) 3 Mad. H. C. Rep. 384.

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rest of the clause wherein they appear. What do the words mean in this particular situation ? is the question for our consideration ; and I am afraid that principles derivable even from so great a jurist as Doneau are scarcely calculated to afford us much in the shape of guidance.

"The first thing that occurs to me, upon looking into clause 12, is that the authors of the Letters Patent understood by "cause of action" something which might consist of parts respectively attributable to different local origins ; a part of the cause of action might arise within the local limits of the Court's jurisdiction, while another part might arise beyond those limits. But unless I greatly misunderstand Mr. Justice Holloway's meaning, "cause of action" under the definition which he accepts is necessarily indivisible ; the obligation of the defendant towards the plaintiffs, which is, I may say, the correlative of the plaintiff's right in the matter of any given suit, must, I conceive, if attributable to place at all, be almost universally single, or capable of being treated as single, in regard to locality. And the breach of the obligation does not introduce any new element of locality. It appears to me, therefore, for this reason alone, that the right and the infraction of it do not together make up the full measure of "cause of action" in clause 12.

But however this may be, it seems to me clear upon all the decisions reviewed in *DeSouza* v. *Coles* (1), that the English Courts have always included in the "cause of action" some portion at least of the "ground of orgin of the right." The inconsistencies of decision of which Mr. Justice Holloway complains do not appear to me to exhibit an oscillation between an including of the "ground of origin of the right" on the one side, and an excluding of it on the other ; but rather manifest themselves in the differing quantities of that ground, which it was thought necessary in the various cases to take in. For instance, in causes of action arising out of contract, sometimes the *factum* of the contract is, for the purpose of determining the forum, held to be an essential part of the cause of action, and sometimes not. Thus, no doubt, the decision of the Privy Council in *Luckmee Chund* v. *Zoharur Mull* (2) excluded the

(1) 3 Mad. H. C. Rep., 384. (2) 8 Moore's I. A., 291.

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contract of partnership, which was the first of the series of facts leading up to the plaintiff's right; but the decision did not, as I read it, therefore exclude everything excepting the locality of the plaintiff's right. On the contrary, the Privy Council not only did not as it seems to me, set itself to enquire whether there was any place to which the plaintiff's right was specially attributable, but it distinctly founded its judgment upon a consideration of the place of those facts which immediately gave rise to that right, and it appears to me that we here meet with the one principal which underlies and explains all the decisions of the English Courts, and accounts for their inconsistencies. Indeed it would have been reason for great suprise if Lord Chelmsford, the spokeman of the Privy Council on this occasion, had been found giving utterance to doctrines more scientific than those which commonly prevail in Westminster Hall. I venture to think that in all cases the English Courts have held that the cause of action is only complete when the facts out of which the plaintiff's right immediately arose is comprehended in it, as well as the facts which constitute its infraction. The diversities of decision are, I think, all referable to the practical difficulty which so often presents itself of determining what is the immediate proximate cause of the plaintiff's right as distinguished from that which is prior and more remote. And it should be remembered that many decisions, such as the late decision in the case of *Jackson* v. *Spittall* (1), although they at first sight seem to be in point, yet in reality depend upon particular considerations of practice and enactment which have no bearing whatever upon the general question before us.

To return to the present case, the plaintiff's right, of the infraction of which he complains, is the right to be paid money in Calcutta; and in the view of the facts which I take, that right arises immediately out of the promise which the defendant made at Patna when he wrote the hundi, and there delivered it to Syad Ali's gomasta. It appears to me that the plaintiff's cause of action, within the meaning of the words in clause 12 of the Letters Patent, is not merely the right of the plaintiff and the infraction of it, both localized at Calcutta, but also includes

(1) L. R. 5 C. P., 542.

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the *factum* of the promise made at Patna. Consequently, in my opinion, it did not wholly arise within the jurisdiction of this Court.

Assuming that the plaintiff's right to sue in this Court fails so far as it depends upon the locality of the cause of action, the Advocate-General yet contends that it can be maintained upon the ground that the defendant carries on business in Calcutta.

The facts relevant to this point are that the defendant dwells and as a kothi at Patna. At that place, as his head-quarters, he makes purchases of country produce ; from time to time he sends what he so purchases either by boat or rail to some *arhat* at Calcutta ; and then follows them himself. At Calcutta he takes lodging at the *arhat*, where his goods are, and himself sells them. He never employs the *arhatdar* or any other agent for this purpose. As soon as he has sold all his goods, he pays for his accommodation at the *arhat* a precentage on the amount they have realized, and then returns to his home at Patna. An excursion of this kind lasts one or two months, and sometimes more ; and the interval between two excursions is of about the same length.

It is not clear whether or not the defendant was in Calcutta when the plaint was filed, but he was so when the summons was served on him.

On these facts I do not think that the defendant was at the commencement of this suit carrying on business in Calcutta within the meaning of clause 12 of the Letters Patent. It appears to me that the carrying on business for the purpose of that clause must involve pretty much the same element of permanency as is necessary to convert a mere "staying" into "dwelling." Here the defendant was in Calcutta solely for the purpose of selling his goods : the moment he succeeded in getting them off his hands, he immediately returned to Patna. The time consumed in this process might be a few days, or two or three months. I think that Patna was his permanent place of business ; and that his coming to Calcutta was only a visit made in the course and for the purposes of that business.

On the whole, then, I am of opinion that this suit has been wrongly brought in this Court, and that I ought not to entertain

it. Accordingly I reject the plaint with costs on scale No. 2, and I abstain from all discussion of the merits of the case.

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Suit dismissed.

Attorneys for the plaintiff: Messrs. *Judge* and *Ganooly*.

Attorneys for the defendant: Messrs. *Gray* and *Sen*.

[PRIVY COUNCIL]

P. C.*
1871
Jan. 21.

NILKAMAL LAHURI AND OTHERS (DEFENDANTS) *v.* SRI GUNOMANI DEBI AND SRI BARODASUNDARI DEBI (PLAINTIFFS).

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

Mesne Profits—Default caused by act of other Party—Limitation in Suits for Mesne Profits—Act XIV of 1859*—Assam.*

Where a purchaser of a four-anna share was kept out of possession of a portion of the property sold, and having recovered judgment in a suit brought for possession and mesne profits against the vendor an arrangement was come to pending appeal, that within a year the parties should appoint an arbitrator to fix on the shares and make a division, and in default of such appointment an application should be made to the *hakim*, but that if no such application was made within the year, and a suit should be subsequently brought, the party suing should lose his right to mesne profits,—*Held* that, under the circumstances, the defendant having prevented the plaintiff from making the necessary application within the year, and proceedings having gone on for years to carry out the partition, the plaintiff was, on the termination of those proceedings, entitled to sue for mesne profits.

Where proceedings were going on to effect a partition, the right to particular properties being in dispute,—*Held* that the right to mesne profits accrued at the termination of those proceedings, and that the party improperly kept out of possession was entitled to sue for all mesne profits during the period of his non-possession, subject to any ground which the defendant could show which would entitle a Court of Equity to deprive the plaintiff of his rights.

* *Present*:—THE RIGHT HON'BLE LORD CAIRNS, SIR JAMES W. COLVILE, SIR JOSEPH NAPIER, AND SIR LAWRENCE PEEL.