

*Suit No. 375 of 1871.*

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Sept. 11.

RATANSI PANCHAM.....*Plaintiff.*CHARLES SAUNDERS.....*Defendant.*

*Service of Summons—Recognised Agent—Carrying on business for and in the name of Principal—Ship's Agents—Civ. Proc. Code, Sec. xvii., cl. 2.*

Messrs. R., S., & Co., European merchants, carrying on business in Bombay, received a letter from the owner of the ship "Rialto" by which Messrs. R., S., & Co. were constituted agents to obtain freight for the "Rialto" on a voyage from Bombay to Liverpool, the ship being placed in their hands for that purpose. Acting on this letter, Messrs. R., S., & Co. obtained freight for the "Rialto," signing the shipping orders in their own name as agents for the Master of the "Rialto," Messrs. R., S., & Co. held no other authority from the owner of the "Rialto" than that contained in the above letter.

*Held* that Messrs. R., S., & Co. did not carry on business for and *in the name of* the owner of the "Rialto," and were not, therefore, his recognised agents within the meaning of Sec. xvii., cl. 2, of the Code of Civil Procedure, to accept service of a summons on his behalf in respect of a cause of action that arose out of the "Rialto"

Whether, in order to constitute a recognised agent within the meaning of the above section, the business carried on by him must be continuous, and not an occasional or desultory business—*Quære.*

*Semble.* A Bombay firm simply employed by the owners of a ship visiting Bombay to procure freight for her for a particular voyage cannot, under ordinary circumstances, be regarded as carrying on business in the name of the owners of such ship.

**T**HIS was an application on behalf of Messrs. Ritchie Stuart, and Co. to have the service of the summons in the above suit, and the notices to file a written statement, that had been served upon them as the recognised agents of the defendant, set aside.

The application was made by way of summons taken out in Judge's chamber. The summons so taken out was by the sitting Judge referred into court to be heard before two Judges. The circumstances under which the application was made are fully detailed in the judgment of the Court.

The question involved in the summons came on for argument before WESTROPP, C.J., and BAYLEY, J., on the 20th of July 1871.

*Atkinson*, Serjeant, showed cause against the summons, and contended that Messrs. Ritchie, Stuart, and Co. were

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the recognised agents of the owners of the "Rialto," within the meaning of Sec. xvii., cl. 2, of the Code of Civil Procedure, and that, therefore, the summons in the suit had been properly served upon them. He relied upon the case of *Rajaram Govindram v. Brown* (a).

*Ferran*, in support of the summons, contended (I.) that the recognised agency of Messrs. Ritchie, Steuart, and Co. (if it ever existed) ceased upon the sailing of the "Rialto" from Bombay; and (II.) that Messrs. Ritchie, Steuart, and Co. never were the recognised agents of the owner of the "Rialto," as they never carried on business for him and in his name.

*Cur. adv. vult.*

WESTROFF, C. J.:—The plaint, which was filed on the 9th of April last, describes the plaintiff in this suit as a Hindu merchant residing in Bombay, and the defendant as a European merchant residing at Liverpool, but employing in Bombay, as the plaintiff is informed, and believes to be true, Messrs. Ritchie, Steuart, and Co., European merchants, carrying on business within the Fort, as his duly recognised agents." The plaint states that "the suit is instituted by the plaintiff for the recovery of the goods, hereinafter mentioned, in specie, or their value, if not returnable in specie, together with such compensation in damages as the Court may award to him for the wrongful acts of the defendant, hereinafter more particularly mentioned;" that in March last the plaintiff was the owner of 112 bales of cotton which he was desirous of shipping to Liverpool. At that time the defendant was owner of a ship called "the Rialto," then lying in Bombay harbour, and taking in a general cargo for Liverpool;" that "on the 24th of March 1871 the plaintiff, at the request of the defendant's agents, and for hire and reward to the defendant in that behalf, shipped on board of the said vessel, for the purpose of being conveyed to Liverpool," 48 bales, part of the said cotton, and on the 4th of April the residue thereof, 64 bales, which two shipments the commanding

officer, Thomas Cooper, duly had and received on board for the purpose aforesaid, and undertook on behalf and defendant to convey from Bombay to Liverpool, and gave receipts for them. That "on or about the 11th of April 1871 it was communicated to the plaintiff in effect that the said 64 bales were in a condition unsafe and unfit to be sent on to their destination. The communication was accompanied with a request to remove them. Thereupon a survey was held, and they were found to be in the condition described, of which the plaintiff up to the time of which communication was wholly and entirely ignorant, and which he would not, nor did, believe until such state was confirmed by the surveyor's report." The plaintiff next averred his willingness, on the 17th of April, to receive back the 112 bales, but that the defendants insisted on carrying the 48 bales to Liverpool and on relanding the 64 bales in Bombay. The plaint, passing over several letters which are annexed to it, sets forth a letter dated 18th April 1871, from Messrs. Manisty and Fletcher, solicitors, written to the plaintiff's solicitors on behalf of the master of the "Rialto," informing the former that the 64 bales would be delivered to the plaintiff upon his handing over the receipts for the same and paying Rs. 197—expense incurred, as shown by a bill annexed to the letter, in taking the 64 bales on board and in stowing them, and afterwards in removing 540 other bales in order to reach the 64 bales, and restoring the 540 bales and discharging the 64 bales into boats, and to employing surveyor and in law expenses. The same letter also stated that if the plaintiff failed to remove the 64 bales by noon on the next day, they would be larded in the afternoon of that day at the plaintiff's expense and risk, and placed in Messrs. Ritchie, Stuart, and Co's godowns, where they would be sold on the 20th of April then instant to defray expenses (likewise at the plaintiff's risk), as the "Rialto" would sail on the following day. As to the 48 bales, the letter stated that they were of a quality differing from that of the 64 bales, and the Master was prepared to keep them on board. The plaint next alleged that on the 20th of April 1871 the plaintiff was ready and willing, and by his agent requested the mate of the "Rialto" to deliver to the

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plaintiff the 64 bales, "but this also was positively refused unless on payment in cash of Rs. 500," which, by advice that the demand was "unjust and illegal," the plaintiff refused to do. Lastly the plaint averred that on the 20th of April the 64 bales were, as the plaintiff is informed and believes "relanded by the defendant's agents, and advertised for sale by public auction as unmerchantable cotton and the same were afterwards about 4 P.M. on the 24th of April 1871, without the leave and license and against the will and consent of the plaintiff, sold by them by public auction as unmerchantable cotton;" that the sale was conducted with so much negligence that the cotton produced but little; that no account-sale has been rendered to the plaintiff, and that the proceeds of sale remain "in the hands of the defendant or his agents." The plaint prays a return in specie of the 64 bales (unsold) and if sold, payment of their value, and a decree that the proceeds of the sale belong to the plaintiff, compensation for the wrongful detention of the 48 bales, and, for negligence in the sale of the 64 bales, an account-sale and payment over of the proceeds and costs.

The summons, and notice to file a written statement in defence, were, on the 2nd of June, served upon Messrs. Ritchie, Steuart, and Co., of Bombay, at their office, alleged agents of the defendant. Upon the 3rd of July 1871 a summons was obtained by Messrs. Ritchie, Steuart, and Co., from my brother Bayley in chamber, calling upon the plaintiff to show cause why the service of the original summons in the suit, and the notice to file written statement, should not be set aside. The summons in chamber was obtained upon an affidavit sworn on the 30th of June last by Mr. J. L. Smith, partner in the firm of Messrs. Ritchie, Steuart, and Co., in which, after mentioning the service of process upon his firm he stated as follows:— "The circumstances under which the plaintiff makes his claim are set forth in the plaint filed herein. I submit that my firm [are not recognised agents of the defendant within the meaning of the Civil Procedure Code. They have not any authority from the defendant to accept service of summonses on his behalf, nor do they

carry on business in Bombay for or in the name of the defendant, nor have they had any authority to act for the defendant, save and except that contained in a letter of advice, hereunto annexed and marked C, whereby the ship 'Rialto' was consigned to their care, and all authority under the said letter ceased upon the sailing of the said ship on the 26th day of April last, and before the service of the summons in this suit." Whether that authority did, for all purposes, cease at the time supposed by Mr. Smith, is a question of law rather than a question of fact. The material part of the letter of Messrs. Charles Saunders and Co., the defendant's firm, dated Liverpool 5th January 1871, and addressed to Messrs. Ritchie, Stuart, and Co., is as follows:—

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"Our ship 'Rialto' sailed hence for your port 26th October last with a cargo of coals for the P. & O. Company, and, in accordance with the arrangement made here with your friends Messrs. Finlay Campbell, and Co., We send to your care a letter for Captain Babot directing him to place the ship in your hands. Please see that the letter is delivered to him immediately on his arrival. We look for good freights ruling at your port to this, and hope that you will secure a cargo for her at 50s. per ton at least, with dispatch. But consult with Captain Babot on the subject. Don't consider this as a limit, but do the best you can, and if you are in doubt, telegraph and we will reply. Advise us of her arrival by wire, and also employment offering, for our guidance."

The rest of the letter related to a consignment of cotton to Messrs. Charles Saunders and Co. on their own account, and had not any bearing upon this suit.

The plaintiff in reply to the affidavit of Mr. Smith, filed an affidavit which (*inter alia*) stated that he (plaintiff) was informed and believed that "the whole management of the 'Rialto' was in the hands of Messrs. Ritchie, Stuart, and Co. during the time that she was in Bombay harbour, and the shipping orders for the said ship were issued by Messrs. Ritchie, Stuart, and Co. as agents for the owners."

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and that, before she sailed from Bombay, he (the plaintiff) transacted business at the office of Messrs, Ritchie, Stuart, and Co, as agents of the owners of the "Rialto," with respect to the cotton shipped by the plaintiff in her, and that he was then informed that Messrs, Ritchie, Stuart, and Co. "had the General management of the said ship 'Rialto,' on behalf of its owners," and that when he was at that office a few days before the "Rialto" sailed, a European clerk in the office informed him that the 64 bales had been landed at Carnac Bandar by his masters' orders and would be delivered to the plaintiff on payment of certain charges which he denied his liability to pay, but which Ritchie, Stuart, and Co. Required him to pay; and that he was informed and believed that the auction-sales of the 64 bales were conducted by Crawford and Co. by the direction of Ritchie, Stuart, and Co. as agents for the owners of the "Rialto;" and that the bales sold were delivered to the purchasers, and the proceeds of sale were received by Ritchie, Stuart, and Co. as such agents for the owners of the "Rialto."

The letters annexed to the plaint and to the affidavits were read and commented upon by counsel at both sides. It is not material for the purposes of the present application to state their contents; it is sufficient to say that the letters of the 11th, 14th, and 18th of April were addressed to the plaintiff, or his solicitors, by Messrs. Manisty and Fletcher, and purported to be written on the instructions of the Captain of the "Rialto." All these letters required the plaintiff to remove the 64 bales, and informed him that if he did not they would be landed at his risk and expense. The two last of those letters also menaced him with a sale of the bales if he did not pay the expenses connected with them; and the last of them stated that they would be placed in Messrs. Ritchie, Stuart, and Co.'s godown for that purpose. There were also two letters, respectively dated the 11th and 24th of May, addressed to the plaintiff by Ritchie, Stuart and Co., of which the former notified to him that 53 of the 64 bales were then lying at Carnac Bandar at his risk and expense, and that the other 11 had been sold to defray

expenses, &c. "up to the 'Rialto's' departure;" and that the 53 bales would be delivered to him on application at their office and on payment of all expenses incurred. The letter of the 24th of May was much to the same effect, and contained a menace of sale of the 53 bales if delivery were not taken within eight days. This letter the plaintiff said he did not receive, but a duplicate of it was forwarded to, and reached, him on the 1st of June, together with a letter from Messrs, Manisty and Fletcher, on behalf of Ritchie, Steuart, and Co, calling on him to take delivery within four days, or that the 53 bales would be sold by public auction within four days.

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In a second affidavit made by Mr. Smith on the 14th of July last, he stated that "the unsold bales were left lying on the Carnac Bandar, where they were landed, but as they were not removed by the plaintiff, the Government Inspector removed them into a godown and gave notice that he would hold my firm Ritchie, Steuart, and Co.) responsible for the rent;" and therefore it was that the letters of the 11th and 24th of May and 1st of June were written to the plaintiff.

It has been denied that Messrs. Ritchie, Steuart, and Co. are the recognised agents in Bombay of the defendant in Liverpool within the meaning of Sec. 17 of the Civil Procedure Code. While it is admitted that the cause of action (if any) arose in Bombay, and, therefore, that there is jurisdiction in this court to entertain this suit, yet it is contended that there is not any person in Bombay on whom service of process can be had, and that Messrs. Ritchie, Steuart, and Co., who do not hold any general power of attorney from the defendant authorising them, within Cl. 1 of Sec. xvii. of the Civil Procedure Code to apply or appear on his behalf, did not at the time of the institution of this suit, and within the meaning of Cl. 2 of the same section, carry "on trade or business for that in the name of" the defendant, who is not personally within the jurisdiction: My brother Bayley, deeming the question of importance, adjourned it from chamber into court for arguments before two Judges, and it has, accordingly, been argued before him and myself.

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We have examined the following cases as to the meaning of the words "carry on business" in the 12th clause of the Letters Patent relating to jurisdiction. *Framji Kavasji Marker v. Hormasji Kavasji Marker (a)*, in which the mere purchase of goods by the defendant's agent in Bombay for sale by the defendant, a retail dealer up country, was held not to confer jurisdiction on this court. That decision turned upon the circumstance that the sale was not to take, and did not take, place in Bombay, the court being of opinion that in the instance of a retail dealer, the place of sale must be considered as the place of carrying on business. In *Subharaya Mudali v. Cunliffe (b)* it was held that the words "carry on business" in cl. 12 imply a personal and regular attendance to business within the local limits of the Letters Patent; and in *Chinnammal v. Tulakannatammal (c)* occasional sales of grain by the defendant, a Mofussil trader, though a general broker in Madras for commission received from the purchasers, it was ruled, did not give the High Court jurisdiction over the defendant, Scotland, C. J. being of opinion that in order to give such jurisdiction "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, as in the case of *Mitchell v. Hender (d)*, or at an office or other fixed place of business (see *Kolfe v. Learmouth (e)*) either personally, or by clerks or servants employed by the defendant, and conducting the business under his control and *in his individual or partnership name*"—observations which ascribe a wider scope to the words "carry on business" than the previous remarks in 1 Mad. H. C. Rep. 286 requiring a personal and regular attendance to business. Perhaps the strongest case against the jurisdiction is *Hurjiban Das v. Bhagwan Das (f)*. It seems to require that there should be an element of permanency in the business, and to go far beyond the Bombay case which we have first mentioned. In consequence of the view which we take of the present case,

(a) 1 Bom. H. C. Rep. 220. (b) 1 Mad. H. C. Rep. 205.  
(c) 3 *Ibid.* 146. (d) 23 L. J., N. S., Q. B. 273.  
(e) 14 Q. B. 196. (f) 7 Beng. L. Rep. 103.



it is unnecessary for us to say whether we should follow that Calcutta case.

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Cl. 2 of Sec. xvii. of the Civil Procedure Code requires not only that the agent should carry on business for his principal, but that the agent should carry on such business "in the name of" the principal.

We are quite satisfied that Messrs. Ritchie, Steuart, and Co. were by the letter of Messrs. Charles Saunders and Co. (marked C and annexed to Mr. Smith's affidavit) fully constituted their agents to obtain freight for the "Rialto," and we think that it was while acting as such agents Messrs. Ritchie, Steuart, and Co. claimed, in that capacity, a lien on the 64 bales for the expenses incidental to and consequent upon the discharge of those bales from the ship, and for putting and keeping them on shore; and we are not satisfied that the agency ceased upon the sailing of the ship from Bombay, or that it does not continue, as regards the 64 bales or the unsold portion of them detained by Ritchie, Steuart, and Co., and perhaps as to the proceeds of those which were sold, until the present moment; if so, this case would not fall within *Mokha Harukraj Joshi v. Biseswar Doss* (g), in which it was held that the *gumasta* of a firm ceases to be a recognised agent, within cl. 2 of Sec. xvii., when the business of the firm has ceased before the institution of the suit. But, even assuming this to be so, we find ourselves quite unable to hold, that Ritchie, Steuart, and Co. have been or are carrying on business, in respect of the matters the subject of this suit, *in the name of* the defendant, Charles Saunders, or of Charles Saunders and Co., although they (Ritchie, Steuart, and Co.) have been carrying on business for Charles Saunders and Co. Putting aside the question as to whether the business carried on by the agent must be a continuous, and not an occasional or desultory business, in order to render the agent a recognised agent within cl. 2 of Sec. xvii. of the Civil Procedure Code, we cannot find any evidence, that Ritchie, Steuart, and Co. carried on business in the name of Charles Saunders and Co. In the three shipping orders produced at our desire they sign their firm

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names as "Agents for the Captain," and do not disclose the name or names of the owners—a circumstance which distinguishes this case from that mentioned in the note at page 111 of 7 Bom. H. C. Rep. O. C. J., and which, therefore, renders it unnecessary for us to discuss that decision. We are inclined to think that a Bombay firm simply employed by the owners, resident in England, of a ship visiting Bombay, to procure freight for her for a particular voyage, cannot, under ordinary circumstances, be regarded as carrying on business in the name of the owners, and, therefore, cannot be deemed recognised agents of the owners within cl. 2 of Sec. xvii. of the Civil Procedure Code.

The cause shown by the plaintiff must, accordingly, be disallowed, and the service upon Messrs. Ritchie, Steuart, and Co. of the original summons in this suit, and of the notice to file a written statement, must be set aside with costs.

As to the case, *Lutchmeput Dogare v. Sibnarain Mundle*, cited to us from 1 Hyde 97, where it was held that a partner could not be treated as the recognised agent of his copartner (*l.*), we do not wish to express any opinion at present.

As to how far the captain of a foreign vessel trading to an Indian port can be said to dwell, carry on business, or work for gain within the meaning of the Small Cause Court Act, a reference to *The Queen v. The Judges of the Small Cause Court in re Williams v. Smith* (*i*) may be useful.

Attorneys for the plaintiff: *Shapurji and Thakurdas*.

Attorneys for Messrs. Ritchie, Steuart, and Co.: *Manisty and Fletcher*.

(*g*) 5 Beng. L. Rep., Appx. 11 S. C.; 13 Calc. W. Rep., Civ. R. 345.

(*h*) Vide contra *Ramchundra Bose v. Snead*, 7 Beng. L. Rep., Appx.

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(*i*) 2 Taylor & Bell 4.