(1956) 08 MAD CK 0031

Madras High Court

Case No: A.A.O. No. 409 of 1954

G. Venkatesha Bhat and Others		APPELLANT
	Vs	
Kamlapat Motilal and Others		RESPONDENT

Date of Decision: Aug. 31, 1956

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 20
- Contract Act, 1872 - Section 49, 91
- Sales of Goods Act, 1930 - Section 32, 36, 39

Citation: AIR 1957 Mad 201

Hon'ble Judges: Ramaswami, J

Bench: Single Bench

Advocate: A. Narayana Pai, for the Appellant; K. Rajah Aiyar, V. Seshadri and K.S. Ramamurthy, for the Respondent

Final Decision: Dismissed

Judgement

Ramaswami, J.
This is an appeal preferred against the decree and judgment of the learned Subordinate Judge of South Kanara in O. S.

No. 83 of 1952.

2. The facts of this case have been fully set out in the judgment of the lower court and need not be recapitulated.

3. The controversy between the parties in the lower court and here relates to the question of jurisdiction viz., whether the suit should be instituted in

Mangalore as the plaintiffs contend or in Cawnpur as the defendants contend it should have been done.

4. In order to understand this controversy the following relevant facts may be borne in mind. The plaintiffs are four merchants of whom two are

conducting business at Mangalore, one is carrying on business at Cannanore and one is carrying on business at Tellicherry. The defendants consist

of two partnership firms carrying on business at Cawnpur in the United Provinces dealing in sugar.

5. On 5-1-1951 under Ex. B-1 the first plaintiff approached the first defendant requesting the latter to give him a firm selling offer for 6000 bags or

available quantity of free market sugar for April 1951 or suitable delivery indicating the rate, grade and time of delivery and at the same time

expressing his readiness to abide by any terms and conditions imposed on him. In Ex. B-2 dated 12-1-1951 the first defendant acknowledged Ex.

B-l and informed the first plaintiff that sugar had not yet been released for open market sale but that the first plaintiff''s name was however being

registered for future reference.

In Ex. B-3 dated 9-2-1951, the first plaintiff again renewed his original request. It is evident that no reply was sent to Ex. B-3. Then on 10-3-

1951, the first plaintiff again wrote to the first defendant mentioning that a radio announcement had been made regarding the release order given to

sugar mills and asking for a selling offer for 5000 bags on commission basis. That letter followed the telegram Ex. B-5 sent by the first plaintiff on

the same day. On 12-3-1951 the first defendant sent the telegram Ex. A-1 to the first plaintiff to the following effect: ""Received. Market rate 66

subject to confirmation. Lal Moti"". the next telegram which was sent by the first plaintiff himself is Ex. B-6 dated -13-3-1951. Ex. B-6

acknowledged Ex. A-1 and then proceeded to mention that the first plaintiff wanted 800 bags of D27 or better grade sugar subject to immediate

despatch, that he wanted a commission of l per cent to be allowed, that he wanted confirmation and that he was willing to send an advance of Rs.

10/- per bag.

The further recitals in Ex. B-6 that he pro-posed to send further orders and that others were offering to sell at Rs. 55/- per maund are not relevant

for the purpose of this case. On receipt of Ex. B-6 the first defendant sent back the telegram Ex. A-2 dated 14-3-1951 followed up by the letter

Ex. B-3 dated 15-3-1951. Therein the first defendant accepted the offer of the first plaintiff, asked him to send the advance to the second

defendant, asked him to wire destination details and informed him that commission would be allowed to him at 1% only in respect of this particular

consignment. The first plaintiff was also invited to make further offers subject to the first defendant''s acceptance.

The subsequent correspondence between the parties only throws light upon the manner in which the parties understood the different terms of the

contract. It is important to emphasise here that during the course of the subsequent correspondence the first plaintiff has been consistently

mentioning the date of the suit contract as 14-3-1951. The total cost of the 800 bags of D-27 grade at Rs. 66/- per maund amounted to Rs.

1,23,200.

Towards that price the first plaintiff admittedly sent an advance of Rs. 8000/- by telegraphic transfer to the second defendant on 19-3-1951. But

the goods, however, were not despatched and there has been subsequent correspondence and finally on 27-3-1951 Messrs. Sugar Dealers

Cawn-pur, Intimated that the contract had been cancelled.

The ground put forward was that the despatches could not be effected due to restrictions imposed by the Railway authorities at that moment and

later on deliveries against free sale quota were stopped by the Central Government and that the Central Excise Department have received

instruction from the Central Government not to issue any quantity for free market sales from Majhaulia Factory and that as the contract was for

free market sugar, it was subject to release order by the Central Government and that as Central Government had cancelled and the Factory was

unable to despatch the sugar, there was no option but to cancel the contract The advance amount, sent was returned and refused.

In the lawyer''s notice Ex. B-20 dated 15-9-1851 the plaintiffs'' firm stated to the defendants that the only honourable ,and proper way which was

most reasonable and business like was a set-tlement of the bargain in the manner for by the plaintiffs viz., to remit the advance paid together with

price difference etc., due and that this offer was made without prejudice to the plaintiffs'' right to claim damages for loss of profit in the transaction.

Then this suit had been filed for the recovery of Rs. 39,133-9-5, representing damages in respect of alleged breach of contract, the advance

amount sent by the first defendant towards the price of the goods ordered by him, the claim for interest and costs of demand. The cause of action

is stated in paragraph 4 of the plaint to have arisen since 15-3-1951, the date of confirmation letter, and subsequently at Mangalore, where part of

the cause of action arose.

6. The question of Jurisdiction was raised and on that the following issues were framed:

II. Where was the contract concluded -- in Mangalore on 13-3-1951 as alleged by the plaintiff or in Cawnpur on 14-3-1861 as contended by the

defendant?

III. If the contract was concluded by acceptance on 14-3-1951 at Cawnpur, has this Court jurisdiction to try the suit?

IV. Has any part of the cause of action arisen within the Jurisdiction of this court?

7. In order to determine the question of jurisdiction in this case the following five points have got to be decided from the averments of the plaint and

the written statement and the correspondence filed in the case viz., (1) The place where the contract was made; (2) the place where the contract

was to be performed; (3) the place where in performance of the contract any money to which the suit relates was expressly or im-pliediy payable

and in addition; (4) Was there a cancellation or revocation in this case and if so what was its legal effect?; and (5) Is the rule that the debtor must

find the creditor applicable here.

8. The place of suing in this suit, arising out of contract, is governed by Section 20, Cl. (3), C. P. C. viz., where the cause of action wholly or in

part arises.

9. The expression ""cause of action"" has been compendiously defined to mean every fact which it would be necessary for the plaintiff to prove, if

traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove

each fact, but every fact which is necessary to be proved. It is, in other words, a bundle of essential facts which are necessary for the plaintiff; to

prove before he can succeed in the suit.

It has no relation whatever to the defence which might be set up by the defendant nor does it depend upon the character of the relief prayed for by

the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action or in other words, to the media upon which the plaintiff asks

the Court to arrive at a conclusion in his favour. Dhanraj Mills limited Co. Vs. Narsingh Prasad Boobna and Others, Muzaffar Ali Khan and

Another Vs. L. Jawanda Mal Lala Ditmal and Another, .

10. Clause (c) of Section 20, C. P. C. makes it clear that in all cases covered by this section, a suit may be instituted where a part of the cause of

action arises. In the Code of 1883 the corresponding section merely referred to the place, where the cause of action arose. It was not clear

whether this meant the whole cause of action or any part of the cause of action. The section was amended and the Code of 1888 added

Explanation in which ran as follows:

In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places; namely,

(1) the place where the contract was made;

(2) the place where the contract was to be performed or performance thereof completed;

(3) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.

But this gave rise to doubts whether classes of suits other than suits arising out of contract could be instituted in a Court within the local limits of

whose jurisdiction part only of the cause of action arises. To put an end to these doubts in Clause (c) the words ""wholly or in part"" have been

inserted after the words ""cause of action"" and Explanation III has been omitted as no longer necessary. Thus, it is now plain that all suits may be

instituted where the cause of action arises wholly or in part and though Explanation III has been omitted as no longer necessary, it is now well

settled that it is a correct statement and what is still the law. The cases decided thereunder are still good law in cases arising out of contracts;

Peoples Insurance Co., Ltd. Vs. Benoy Bhusan Bhowmik and Others, .

11. POINT 1: PLACE OP MAKING THE CONTRACT: The making of the contract itself is part of the cause of action and the determination of

the place where the contract was made is part of the law of contract. A contract is made when an offer of one party is accepted by the other party.

An offer, however, must be distinguished from an invitation to offer. Where the parties personally meet at any place and the proposal of one is

accepted by the other that place will naturally be the place of making the contract. But if the proposal and acceptance thereof are made in different

places, the place of acceptance will be the place where the contract is made.

A contract by correspondence is made at the place where the letter of acceptance is posted; and it is repudiated at the place where the letter is

received. The communication of the acceptance of the proposal only affects the coming into force of the contract and not the place of making the

contract. These principles- mentioned above apply both to express as well as implied contracts Dhanraj Mills limited Co. Vs. Narsingh Prasad

Boobna and Others, p>

12. Bearing these principles in mind, if we examine the facts of this case, we find that Ex. A-1 was only an invitation to offer and that the

acceptance was in Cawnpur as can be seen from the facts set out above. In order to get over this the plaintiffs made an attempt to suggest that the

initiative in the matter of the suit sugar came from the defendants and that it was the first plaintiff who accepted the offer at Mangalore, by relying

upon the word ""accepted"" in the telegram Ex. B-6. This term ""accepted"" in the telegram has got to be viewed in the light of the following

observations in Mylappa Chettiar v. Aga Mirza Muhammad Shirazi, 37 MLJ 712: AIR 1920 Mad 177 (U):

We might at once say that having regard to the apparent educational qualifications of the draftsmen of the letters and of the telegrams between the

parties and to the imperfect knowledge which these men possessed of the value of technical and legal language, no importance should be attached

to the words ''offer and acceptance'' which are to be found in the various letters and telegrams which passed between the parties. We are clear

that what we have to see is not the use of these words but who in substance made the offer who accepted the offer.

The facts of the present case are on all fours. Therefore, it is clear from the entire correspondence that the acceptance of the contract in this case

was in Cawnpur and therefore that place of acceptance will be the place where the contract was made.

13. POINT 2: The performance of the contract is part of the cause of action and a suit in respect of breach can always be filed at the place where

the contract should have been performed or its performance completed. The usual case is that of a contract for sale of goods and a suit on such a

contract will be filed at the place where the goods are deliverable or the price payable. The place of performance is generally expressed in the

contract and if it is not so expressed it may be inferred from the nature of the contract.

If the contract is to be performed at the place where it is made, the suit on the contract must be filed there and nowhere else. In eases of contract

of sale of goods the place where the goods have to be delivered is the place of performance and the Court of that place will have jurisdiction to

entertain the suit in respect of non-delivery in accordance with the contract. A delivery to a common carrier is, u/s 91 of the Contract Act and now

Section 39 of the Sale of Goods Act, a delivery to the buyer. If they are sent by a common-carrier at seller''s risk, the contract is performed at the

place where they are delivered to the buyer or at buyer''s risk where they are delivered to the carrier. In the case of a contract ""free on rails"" the

place of performance is the place where the goods are delivered to the common carrier viz., railways.

It is only where the contract does not stipulate the place of performance, Section 49 of the Contract Act will come into play and where it has not

been invoked, the place of performance has got to be determined with reference to the intention of the parties as gathered from their acts, the

terms of the contract and the surrounding circumstances, the course of business and the nature of the act to be done and where no actual intention

can be inferred, recourse may be had to presumptions. Champaklal Mohanlal Vs. The Nectar Tea Company, p>

14. In this case the place of performance as is evident from the correspondence, is the Railway Siding of the Majhulla Sugar Factory. The frequent

reference, including Ex. A-8, to the purchase of 800 bags of sugar for Majhulla Factory, shows that the first plaintiff was fully aware that the

responsibility of the defendants in the matter of despatching the sugar purchased by him did not extend beyond the railway siding or the Majhulia

Sugar Factory and that the transport of the sugar from that point to its destination was entirely the responsibility of the plaintiffs, whatever might be

the assistance given by the defendants in that connection. ""It is late in the day"" as concluded by the learned Subordinate Judge, ""for the plaintiffs

now to contend that impliedly the defendants had undertaken to see that the suit sugar was delivered to the plaintiffs either at Mangalore or Canna-

nore or Tellicherry.

15. POINT 3: Part of the cause of action, arises where money is expressly or impliedly payable under the contract. If the place of payment is not

indicated in the contract, it has to be ascer-tained with reference to the intention of the parties and the circumstances of the case, Recourse then

will have to be had to the relevant provisions of the Sale of Goods Act and particularly to Section 36 of that Act which lays down that in the

absence of any contract to the contrary goods sold are to be delivered at the place at which they are at the time of the sale and Section 32 of the

same Act which lays down that unless otherwise agreed, delivery of the goods and the payment of the price are concurrent conditions: Lalsingh v.

Firm Haji Kadir Baksh, 69 Ind Cas 424; AIR 1922 Lah 36 (2)0 (Z3); James Darragh and Co. v. Pur-shotam, 4 Mad 312 (Z4); Luchmee Chund

v. Zora-wurmull, 8 Moo Ind App 291 (Z5); Venkatachalam v. Rajaballi, AIR 1935 Mad 683 (Z6); V. Lakshmipathi Naidu, sole proprietor of the

Nilgiri Potato Supply Co. Vs. M.E. Mohamed Ghani, J. N. Sahni v. State of Madhya Bharat, AIR 1954 Madh-B 184 (Z8); Galley and Co. v.

Appalaswami Naidu, AIR 1946 Mad 300 (Z9).

16. In this case as there is nothing to show that the defendants agreed at any stage to sell the sugar on credit to the plaintiffs and considering that

the suit contract was the first one entered into between the parties It is most unlikely that the defendants would have let to their control over the

800 bags of sugar until and unless they received full payment before the sugar bags left the factory or by means of the device of the R.R. by VP.P.

or banker''s facilities for payment at Cawn-pur, as against taking over of the sugar bags at the point of destination. The place of payment in this

case was certainly at Cawnpur and not at Mangalore.

17. Point 4: Revocation of contract is also part of the cause of action in a suit for breach of contract. u/s 4 of the Contract Act, communication of

revocation of the contract is com-plete as against the person to whom it is made when it comes to his knowledge. Therefore, the Court at the place

where the revocation is communicated to such person will have jurisdiction to try the suit. AIR 1947 Pat 134: 231 Ind Cas 10 (E).

18. In this case it is urged that in view of Section 4 of the Contract Act which lays down that the communication of a revocation Is complete as

against the person to whom it is made only when it comes to his knowledge, and since Ex. A-7 reached the first plaintiff at Mangalore, that fact

amounted to a part of the cause of action arising in Mangalore within the meaning of Section 20(c), C. P. C. In this connection the decision in

Arthur Butler and Co., Ltd. Vs. District Board of Gaya, are relied upon. The proposition of law was not disputed either in the lower Court or here.

But the point to be considered here is whether such a plea is open to the plaintiffs at all.

The plaintiffs have not relied upon the cancellation or revocation as giving a cause of action to sue the defendants. The correspondence shows that

notwithstanding the receipt of Ex. A-7 the first plaintiff thereafter addressed several letters to the defendants repudiating the right of the defendants

to cancel the contract, insisting upon their delivering what he described as his sugar and calling upon them to account to him for the sale of that

identical sugar to others for the purpose of assessing the damages payable to him by way of settlement. But even at the time of the filing of the

plaint, apart from making a casual reference to the cancellation in para 3, that fact was not treated as having given a right of suit to the plaintiffs nor

was the date of cancellation taken as the stage at which the difference between the market price and the contract price was to be ascertained.

This means that the plaintiffs have chosen to ignore the cancellation purporting to have been done under Ex. A-7 and treated the contract as

capable of performance thereafter. Under such circumstances it is pointed out in the decision in Narasimha Mudali v. Narayanaswamy Chetti, 49

Mad LJ 720: AIR 1926 Mad 118 (Z11) that while it is open to a promisee under a contract to either accept or reject a repudiation by the other

side, it is not open to him to both sue upon the breach and also keep the contract open. Besides, there are several passages in the correspondence

as well as averments in the plaint showing that it was not the communication of the cancellation which has been considered as the cause of action

for filing this suit in the form set out above. To give two examples. In the notice given by the first plaintiff on 31-8-1951 (Ex. B-18) the first plaintiff

writes:

I am sorry that you were insincere In your dealings with me and have committed breach of the contract in April, May in having not despatched my

purchased sugar....."" In Ex. B-20 the first plaintiff mentions:

Since you have already committed a breach) of the contract in April/May....."" In Ex. A-8 it is stated:

The terms of the contract indicated that the delivery was immediate. Hence you should have despatched the goods immediately on receipt of the

despatching instructions and the requisite advance.

In the plaint the cause of action is shown as 16-3-1951, the date of confirmation, letter The first plaintiff in short has not relied upon the revocation

or cancellation communicated to him in Ex. A-7 dated 27-6-1951. Therefore Ex. A-7 cannot be pleaded for filing the suit in the Mangalore Court.

19. POINT 5: Under the Common Law in England, the general rule, in the absence of a contract to the contrary, is that the debtor is bound to find

the creditor for making the payment i.e., the place of payment Is the place where the creditor resides. In Raman Chettiyar v. Gopala-chari, ILR 31

Mad 223 (Z12) this Court held that the said Common Law rule did not control the express provisions in Explanation III to Section 20, C. P. C.

and that the place of payment in order to give jurisdiction must be where the money is payable expressly or impliedly under the contract itself and

not under any general rule of law.

Though this decision was under the old Code, this Court has again expressed the same view in AIR 1946 Mad 300 (Z9); wherein it has been

point-ed out that there has been a pronounced disinclination, on the part of the Indian Courts to apply to this country unreservedly the English

Common Law that a debtor should find and pay his creditor and that generally speaking the place of payment has to be determined independently

of any such general maxim with reference to the terms of the contract, the circumstances attending on it, the necessities of the case and having

regard also to the statutory provision contained in the CPC and in Section 49 of the Contract Act. Therefore, this maxim has to be applied only

subject to the qualifications pointed out in the decisions, of this Court and other Courts Mahaluxmi Bank Ltd. Vs. Chotanagpur Industrial and

Commercial Association, ; Sunder Lal and Another Vs. Jai Narain and Others, Ja-wala Das v. Nandlal, AIR 1951 Punj 138 (Z15); Piyara Singh

v. Bhagwan Das, AIR 1951 Punj 33 (Z16).

20. In addition, on the facts of this case it is difficult to contend that the relationship between the Cawnpur firm of suppliers and the Man-galore

firm of buyers was that a debtor and creditor as soon as there was a breach of the contract. The relationship which continued was that of only a

defaulting promisor and an aggrieved promisee. Refund of the advance is only part of the adjustment which has got to be made between them and

would not certainly Import the relationship of debtor and creditor. Where the plaintiff is suing on the basis of a contract and the breach thereof the

question of jurisdiction has to be decided on the determination of the question of the breach of contract and not on the relationship of debtor and

creditor and hence the Common Law rule does not apply Rampal v. Firm Girdharilal Gyanchandi, AIR 1955 Ajmer 49 (217).

21. But even assuming that in regard to the recovery of the amount of deposit or advance upon breach of contract the principle of law is that unless

the right is excluded by the terms of the contract, money paid for consideration which falls becomes money received by one party to the use oE the

other party and is recoverable as a debt, the rule that the debtor must find his creditor would apply only if the suit is confined to a return of the

advance and nothing more and then the forum would be the place where the plaintiff resides; Gappulal Chandra Lal v. Khanderwal Brothers Metal

Depot, (8) AIR 1955 Mad 96 (Z18). This is on the equitable principle that the moment the agreement was broken there was either failure of the

consideration or there was an equity in favour of the plaintiff which impliedly made the retention of the amount of the deposit or advance, a debt

due by the defendant to the plaintiff. This is not the case here because the suit is not for the return of the advance amount alone but for Rs. 39,133-

9-5, inclusive of this advance amount.

22. The Common Law Rule incidentally does not apply for determining the forum where the suit is to be instituted: S. Niranjan Singh Vs. Jagjit

Singh and Another, .

23. Therefore, the plaintiffs merely by including this advance amount which in fact was refused by them in their computation for damages cannot

convert the suit into one which would attract the maxim of the debtor finding the creditor and seek to prosecute the suit in Mangalore.

24. The learned Subordinate Judge having correctly decided the question of jurisdiction, this appeal is dismissed with costs.

25. Return original plaint to the appellants.