(1874) 05 CAL CK 0002

Calcutta High Court

Case No: Regular Appeal No. 129 of 1873

Gopikrishnagossami		APPELLANT
	Vs	
Nilkomul Banerjee and Others		RESPONDENT

Date of Decision: May 6, 1874

Judgement

Birch, J.

It appears to me that, in a case of this nature when no place of performance is prescribed by the agreement, or exacted by the necessities of the case, what we have to look to, is the intention of the parties. If, from the surrounding facts and the acts of the parties, we can ascertain what place was in their contemplation the place of performance, the Courts of that place have jurisdiction. Three places of jurisdiction seem to be recognized,--the place of domicile of the defendant or debtor, the place of origin, and the place of fulfillment. Savigny, in discussing the forum of the obligation in the numerous class of cases in which no place of fulfillment is specified, gives the preference to the place of fulfillment thought of and expected by the parties as determining the forum. Since that expectation implies a tacit appointment of the place of fulfillment, and a tacit submission of the defendant to the jurisdiction of that place. In the case of Luckmee Chund and Others vs. Zorawur Mull and Others , the Judicial Committee held that the central place of business of the contracting firm, being the place where the books were kept, the accounts would have to be balanced, and the payment of the balance, if any, made, was the place where the plaintiff"s action lay. In that case, the defendant resided in an independent state. The Sudder Court, North-Western Provinces, had held that jurisdiction was to be determined by the place of the origin of the obligation, and this finding was reversed;--the contemplated place of fulfillment being held to determine the forum. I do not treat this case as laying down a rule of universal application, each case has to be decided upon the facts elicited therein; but it is useful as a guide in determining the test of jurisdiction.

2. The ground of the special jurisdiction for obligations seems to favor the plaintiff, to facilitate for him proof and execution enabling him to sue, not merely at the domicile of the defendant, but at his own. In the present case, assuming at this stage, the statements

in the plaint to be correct, the agreement was entered into at Serampore, there payments were made and meetings held between the contracting parties, and there it was intended that accounts should be finally adjusted. This being so, the Hooghly Court has jurisdiction.

3. We have had the English case of Jackson v. Spittall L.R., 5 C.P., 542 much discussed. I am not at all disposed on the appellate side of this Court to refer to discussions in the English Courts upon the construction of the words "cause of action," which have been on our Indian Regulations since the enactment of Regulation III of 1793,--the wording of s. 5 of our present Code is taken from that Regulation;--and I am the less inclined to do so when I find that in the most recent case in which the meaning of these words has been discussed--Cherry v. Thompson 7 L.R., Q.B., 573; see p. 576--the Court of Queen"s Bench dissented from Jackson v. Spittall L.R., 5 C.P., 542. In that case Blackburn, J., after stating that he arrived at a different conclusion from that arrived at by the Court of Common Pleas, and quoting the cases in which the Court of Common Pleas, the Court of Exchequer, and the Court of Queen"s Bench had arrived at different conclusions as to the interpretation to be put upon the words "cause of action," remarks "as far therefore as the weight of authority goes, it may be considered nearly equal."

4. The ordinary rule is that the obligor is bound to seek the obligor, and tender the money due at the place where the engagement was entered into, or at the residence of the creditor; and failure to fulfill this obligation is a cause of action.

Markby, J.

5. In this case we directed the District Judge to draw up a decree in accordance with the provisions of s. 189 of the Code of Civil Procedure, and he has now done so. We did this in order that the matter might be properly before us on appeal. Had the case been one in which no appeal was necessary, the course taken by the District Judge, though in my opinion of doubtful legality, might not perhaps have called for our interference; but as the plaintiff, into whatever Court he went, was pretty sure to be met by an objection to the jurisdiction, it was obviously necessary to assist him, as far as possible, in getting a final decision upon this preliminary point.

6. The District Judge has not given any fresh reasons for his decision, and we may assume that his reasons are those stated in the order of 9th December 1873.

7. The case, at its present stage, must be decided upon the facts as found by that order. The District Judge says, that "accepting the plaintiff"s account of the agreement on which the money was advanced to the defendant, that is, that it was a loan, it is clear to me that the cause of action arose in Calcutta, where plaintiff"s money came into defendant"s hands, and where the repayments with the two exceptions noted (if repayments they may be called) had always been made." The District Judge states, however, that in his opinion, the two so-called repayments also took place, not at Serampore, but at Calcutta.

8. Now the plaintiff''s account of the agreement which the District Judge provisionally accepts, is given at p. 17 of our printed book, and it is in substance this:--That defendant came to him at Serampore, and proposed to start a banian''s business in conjunction with the plaintiff''s son, whereupon an arrangement was made, that whatever money the plaintiff should pay to the defendant, the defendant would repay to him with interest at 9 per cent, and that the defendant would give a 4-anna share of the profits to the plaintiff''s son Krishna Lal. No arrangement appears to have been made as to the manner, or time, either of advance or of repayment. Nor does it appear where, at that time, the defendant lived; it only appears that he has now retired within the French territory of Chandernagore.

9. Assuming for the present that these facts are correct, I consider that the Subordinate Judge of Hooghly, in whose Court the suit was brought, had jurisdiction to try it. The District Judge thinks the cause of action arose in Calcutta. Whether or no that could be truly said in any sense is a question I do not feel called upon to consider. I confine myself entirely to the above question, whether the Subordinate Judge of Hooghly had jurisdiction to try the case.

10. The ordinary jurisdiction of a Subordinate Judge is declared by s. 19 of Act VI of 1871, to extend to all original suits cognizable by the Civil Courts, subject only to the provisions of the Code of Civil Procedure, s. 6, which have no application to the present case. Whether, notwithstanding the special reference here made to s. 6, and the omission of any reference to s. 5, we must still consider that the Subordinate Judge''s jurisdiction is subject to the limitations contained in both these sections is a question upon which I need not now enter. This case has been argued on both sides on the assumption that s. 5 still applies; and as I consider that even upon this view, which is that least favorable to the plaintiff, the Subordinate Judge had jurisdiction, I may decide this case upon the same assumption. Upon this assumption the question to be decided is what limits are placed upon the jurisdiction of the Court by the requirement that the cause of action shall have arisen within the district. The words "cause of action" have received a variety of interpretations. Most of these interpretations were, however, given upon the English County Courts Act; some were given upon the rules of English Procedure as to changing the venue; some upon the English Common Law Procedure Act of 1852, s. 18; and some upon the Charter of the High Court established since 1860.

11. The only decision distinctly applicable to this very provision of the law which was referred to on the argument is the case of Luckmee Chund and Others vs. Zorawur Mull and Others , and except some decisions of the Sudder Dewanny Adawlut which I will notice hereafter, I am not aware of any other.

12. Holloway, J., in a very learned judgment, delivered in De Souza v. Coles 3 Mad. H.C. Rep., 384, at p. 413 says that it follows from the decision of the Privy Council that "the making of the contract is a matter perfectly indifferent and is no part of the cause of action." Lord Chelmsford, however, who delivered the judgment of the Privy Council,

certainly does not say so in so many words, nor can I bring myself to think it a necessary conclusion from that decision that he thought so. All I think that that learned Judge says is that, though the contract was made at Rutlan, yet the central place of business, the partnership books, and the place of payment being all at Muttra, for the purpose of giving jurisdiction, "the cause of action" arose in Muttra.

13. With regard to the elaborate discussion in De Souza v. Coles 3 Mad. H.C. Rep., 384, at p. 413, as to what was the strict rule of Roman law,--namely, whether under it every obligation could be enforced at the place at which it had its origin, or whether the very numerous cases in which it could be there enforced were either applications of a different principle, which was the real principle, or exceptional cases,--I must say that I think it has no bearing upon the present enquiry. A great German jurist, in opposition to most lawyers who preceded him, has maintained the first of these views. He has maintained that, under the Roman law, in order to discover the forum, you must ascertain what he calls the "seat of the obligation," and that generally, when the place of the origin of the obligation is referred to, it is because it is also the seat of the obligation, and that unless it were so, the forum was not established: and having laid down this as the true principle, he of course maintains that the acknowledged departures of the Roman law from this principle are to be treated as exceptions; and he will not allow that the place where the contract is made is the seat of the obligation.

14. But I think it is quite clear that this discussion is not now of any practical importance. Even in countries which have avowedly adopted the Roman law as the basis of their system, the principle is firmly established that a contract may generally be enforced at the place where it was entered into. This is the law of Prussia, of Bavaria, of Hanover, and, I believe, of other German States. I may quote the law of Hanover: it declares that a contract may be enforced either in the district where it was concluded, or where it is to be fulfilled. The law of Italy (Pro. Civ., s. 90) is precisely to the same effect. Even in France where, as is well known, jurisdiction has been made to depend chiefly upon domicile, the exception is allowed that, in matters of commerce, the suit may be brought where the promise is made and the goods are delivered, although this may not be the place where the money is to be paid. The English law on the question of jurisdiction in cases of contract is the very opposite of the French, allowing a defendant to be sued anywhere, if he can only be brought into Court: yet when restriction was put upon this latitude, it was the place where the contract was made that was fixed upon as the proper place in which to bring the suit The Statute of Richard II prescribes that in actions of debt, and account, and all other such actions, the writs should be issued to the sheriffs of the counties where the contracts of the same actions did arise, and that if from thenceforth in pleas upon the same writs, it should be declared that the contract thereof was made in another county than was contained in the original writ, then the same writ should be utterly abated 6 Ric. II, st. 1, c. 2. And the Common Law Procedure Act of 1852 also recognizes the principle that a Court may always enforce any contract made within its jurisdiction, wherever it may have to be fulfilled.

15. It seems to me, therefore, that the strict rule of the Roman law has not been anywhere accepted as the practical rule of modern jurisprudence. And this may well be. The matter in hand is one of a purely practical character. In what Court shall a man bring his suit? The answer must depend entirely upon reasons of convenience, which, though to some extent applicable to all countries alike, may also vary according to differences in the constitution of the Courts, the means of communication, the manners of the people, and the state of commerce.

16. The practical rule as to jurisdiction (independently of the domicile of the defendant), which has gained the most general acceptance, is that which allows the plaintiff to bring his suit, either in the Court of the place where the contract was made, or in that of the place where it was to be performed. And if we turn from the law of other countries to that with which we are now especially concerned, we find a remarkable coincidence between the law adopted in India, and that recognized elsewhere. The words of the Procedure Code, now under consideration, are identical with those of Regulation III of 1793, s. 8, and have long been the subject of judicial construction. A great deal of light is thrown upon the view taken of these words in the Courts of this country by a letter of the Judge of Furruckabad, to the Court of Sudder Dewanny Adawlut, written on the 17th January 1834, in which it is stated that cases such as the following frequently arise:--

"A, an indigo planter, resident in the Mynpooree district, makes an advance of cash to B, a zemindar, resident of Khanpore district, taking a bond and an agreement to deliver a certain portion of produce at C, another factory belonging to A, situated in the Furruckabad district, the bond being written, and the advance made at his permanent residence. B fails in his contract, either by not delivering any plant, or by delivering less than the stipulated quantity, or of an inferior quality at factory C." In this case says the Judge:--"Plaintiff A may sue B, either in Mynpooree or Khanpore; but the question is, can he do so in Furruckabad? Can the cause of action be construed to have arisen in that district?" The Court of Sudder Dewanny Adawlut replied:--"The Court concur with you with regard to the case in question in which the plaintiff A may sue B either in Mynpooree, where the cause of action arose, or Khan-pore, where the defendant B resided at the time of instituting the suit. The failure of delivery at Furruckabad is not a circumstance which, under the Regulation, would give jurisdiction to the Court in that district." The Court of Sudder Dewanny Adawlut did not, however, consistently adhere to the opinion that the Court of the place of intended performance had no jurisdiction to try the suit, and the case in the Privy Council is in favor of that Court having jurisdiction. But as far as I am able to discover, there was never any doubt whatever that, (as the Judge of Furruckabad assumed, and as the Sudder Dewanny Adawlut agreed), under the Regulation, the Court would have jurisdiction, if the contract which regulated the rights of the parties was made within its local limits. And Mr. William Macpherson, summing up the law upon this point, says:--"Probably, the more convenient and the more liberal doctrine, and that which harmonizes best with the decisions of the Courts, is that which permits an action to be brought either in the forum of the place where the contract was made, or in that where the

performance was to have taken place," Macpherson''s Civil Pro. Code, Ed. 1860, p. 160.

17. I think this is a correct statement of the law under the Regulation, and I think that I ought to put upon s. 5 of the CPC the same construction as had been put upon the same words, under the previously existing law. I do not pretend that the rule so arrived at is a scientific one; or that it is applicable to other Courts governed by other Statutes. But as applied to the Courts whose jurisdiction I am considering, I think it is a sensible and convenient rule, and I think there is ample authority to justify me in adopting it. I think that, looking to the construction which has long prevailed, the Subordinate Judge of Hooghly had jurisdiction in this case, either if the contract was made within that district, or the contract was there to be performed.

18. It remains to consider the facts of this case. That the agreement which regulates all the subsequent rights of the parties so far as they are in consideration in this suit was made at Serampore, there is not the least doubt; and, therefore, I think the contract on which this suit is brought was made there. For the present purpose I do not consider that it is necessary to take any notice of the fact that, until the money was paid to the defendant, the particular right which the plaintiff now seeks to enforce did not accrue, and that this payment took place in Calcutta. I think the practice has been, in applying the rule I have above laid down, to look to the place where the contract was made, which regulates all the subsequent rights of the parties in respect of the matters contemplated by the contract. Out of almost every such contract numberless obligations may arise, as the several events which the contract contemplates successively occur, and there is a sense in which some of these events at any rate--such, for instance, as the handing over the money to the defendant in this case,--may be said to be part of the cause of action. But the contract now sued on was none the less made at Serampore in this case, because all the events contemplated by it did not happen there also: and in my opinion the cause of action arose where the contract was made.

19. I am indeed disposed to think that, in this case, both the conditions of the above rule are fulfilled, and that Serampore was both the place where this contract was made, and the place where the part of the performance which it is now sought to enforce was to take place, that is, that it is the place where the money was to be paid. But it was certainly the former; and, therefore, in my opinion, the suit was brought in the proper Court, and ought to have been tried.

20. I wish to add that the rule I have adopted may possibly be held not to apply if both parties to the contract were, at the time when it was made, in a district in which neither of them had either a dwelling or any place of business:--I express no opinion on this. I merely point out that it is a matter of consideration.

21. It is also, perhaps, right that I should state why I have made no reference to the English authorities in which the meaning of the words "cause of action" has been so frequently discussed. It is for this reason:--The learned persons who have participated in

that discussion have not arrived at any definition of the words "cause of action," which they can agree upon as applicable to all provisions of the law in which that expression occurs. And, in my opinion, it is hopeless to attempt to do so. The widest and the narrowest constructions that can be put upon these words only differ in this,--that of all the events which precede an action, some persons insist on contemplating more, and some less, as the "cause" of that final event. The selection is an arbitrary one, and the purposes for which the selection has to be made are too various to admit of an agreement upon this point, which could only, indeed, be attained at a great sacrifice of convenience. The case must be remanded to the District Judge of Hooghly to be heard and determined. Costs of this appeal and of the rule obtained by the plaintiff, which we assess at Rs. 160, to abide the result.