
(1874) 03 CAL CK 0008

Calcutta High Court

Case No: None

Hadjee Mahomed
Hadjee Joosub

APPELLANT

Vs

Hadjee Ismail Hadjee
Hubbeeb

RESPONDENT

Date of Decision: March 6, 1874

Judgement

Sir R. Couch, Kt., C.J.

Now, in considering what conclusion we ought to come to in these appeals, we must look at the case as a whole. Mr. Kennedy, who appeared for the respondent, intimated that, if he were not allowed to take any other course, he would be glad to have the suit treated as a suit against the first defendant to set aside the release. But that cannot be allowed, because merely to set aside the release in a suit against the first defendant would leave all the material questions to be decided in another suit. The real object of the suit is that an account may be taken of the property left by the deceased, and the share of the plaintiff ascertained, and provision made for his receiving it. The first defendant might fairly claim that the other three persons who are interested in the property, and who would be entitled to be heard as to the amount of the plaintiff's share, and to be present at the taking of the accounts, should be parties to the suit. The plaintiff cannot be allowed when the case comes here on an appeal from the order of Macpherson, J., to say that he would prefer to put his suit in another form. He filed his plaint against the four defendants and prayed for relief against all, and in the order by which he was at liberty to bring his suit in this Court, the object of it was expressly stated. We must therefore treat it as a suit which has been brought against all four defendants, and properly brought against them. The decision of this case depends upon the construction which is to be put on the 12th clause of the Charter of the High Court of 1865. It provides that, in the case of suits for land or immoveable property, the High Court shall have jurisdiction when the land or property is situated within the limits of the ordinary original jurisdiction of the Court, and in all other cases if the cause of action shall have arisen either wholly, or, in case the leave of the Court shall have been first obtained, in part, within such limits, or if the defendant at the

time of the commencement of the suit shall dwell or carry on business, or personally work for gain within them.

2. Here the cause of action cannot be said to have arisen wholly in Calcutta. We do not propose to enter into what might be a difficult discussion of the various decisions as to the meaning of cause of action. The conflict of decisions in the Courts in England appears still to continue, for, in one of the latest cases on the subject, *Durham v. Spence* L.R., 6 Ex., 46, the learned Judges were divided in opinion. Here the cause of action, whatever may be the true meaning of the expression, cannot be said to have arisen wholly in Calcutta. The fraudulent representations which led to the execution of the release may have been made, and the release may have been executed here, but the cause of action in this case consists of more than that. It includes the effect of the release upon the plaintiff's share of the property. If there had been no property, the execution of the release would not have injured the plaintiff in any way. In order to constitute a cause of action, there must be an injury to him from the operation of the release. Then where did the release take effect; where was it operative? The property was in Bombay. It might be said that, as regards the moveable property, the plaintiff's share of it would follow him, and if he dwelt in Calcutta, the moveable property to which he was entitled would be there. It would perhaps be a somewhat far-fetched application of the doctrine to hold that the release operated in Calcutta in regard to the plaintiff's share of the moveable property. It certainly could not do so in regard to the share in the immoveable property which apparently formed the greater portion of what the plaintiff claimed to be entitled to. That was in Bombay, and that part of the cause of action arose there. In such a case as the present, I think the cause of action in respect of the immoveable property arose in the place where the release took effect, and the suit comes within that part of the clause which provides that the leave of the Court must be obtained. I shall speak presently of the other part of it which gives jurisdiction in the case of the defendant dwelling or carrying on business within the limits of the ordinary original jurisdiction.

3. Again the suit asks for an account to be taken. The proper place for taking the account would certainly be where the property is situated, and as regards a cause of action for not accounting, it may well be said also to arise in Bombay. Further, the Court is asked in the suit to appoint a receiver. Without deciding that whether this Court might or not appoint a receiver of the property in Bombay, it would certainly be a most inconvenient course to adopt. And I am not prepared to say that this Court could appoint a receiver for the property which is within the jurisdiction of the Bombay Court. All this shows that the plaintiff cannot bring his case within the part of the clause which says that the cause of action shall have arisen wholly within the jurisdiction of this Court.

4. Then we have to consider what is the effect of the other part of the clause:--"If the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain within such limits." The principal defendant (I should rather say the first defendant, for the other defendants are as much interested in the result of the suit as he can be), it is admitted, carries on business in Calcutta, and if it be sufficient for one

defendant in the suit to dwell or carry on business within the limits of the jurisdiction of the Court, the plaintiff is entitled to bring his suit here, as he has done, and he need not have applied for the leave of the Court. Now the words, if read literally, will not apply to a case of several defendants at all. They are:--"If the defendant at the time of the commencement of the suit shall dwell." But that would not be a reasonable construction by which the great number of suits with more than one defendant would be left unprovided for; and so, we may and ought to read the expression "the defendant" as meaning "defendants." But then if we are to read it as for one purpose as including the plural, and so as to bring suits against several defendants, within the clause, it seems to me but reasonable that we should read it in the same way for the other purpose. In fact to say, that it is sufficient for one defendant to dwell or carry on business within the jurisdiction would be to insert something into this clause which is not there. It would be saying if any of the defendants or any defendant dwells or carries on business within the limits. It being necessary to give to the word "defendant" such a meaning as to include more than one, for the purpose of applying it to suits where there are several defendants, I think we ought also to hold that the dwelling or carrying on business must be of all the defendants. The expression is used not as indicating an individual defendant in a suit, but the party to the suit defendant, which may be one person or several. This mode of construction has been adopted by the Courts in England upon the Statute 9 and 10 Vict., c. 95, s. 128, which uses similar words, and provides for the concurrent jurisdiction of the superior Courts with the County Courts where the plaintiff dwells more than 20 miles from the defendant, or where the cause of action did not arise wholly, or in some material point, within the jurisdiction of the Court within which the defendant dwells or carries on his business at the time of the action brought. Upon that section it has been held that defendant means all the defendants in the suit. *Hickie v. Salamo* (sic) Ex., 59 was a case on the construction of the word "plaintiff," but in it the previous cases of *Parry v. Davies* 1 L.M. & P., 379 and *Doyle v. Lawrence* 2 L.M. & P., 368 were recognised as authorities. Platt, B., who gave the judgment, refers to those cases and says:--"The Court of Common Pleas adopted Lord Cranworth's decision in *Parry v. Davies* 1 L.M. & P., 379, and held that the residence of one of the defendants more than 20 miles from the plaintiff, made that case one of concurrent jurisdiction within the same section. The same principle must apply to a plurality of plaintiffs." There the question was whether the plaintiff dwelt more than 20 miles from the defendant, because by the words of the Statute, if he did, the superior Court had jurisdiction, and the Court held that, if one of the plaintiffs lived more than 20 miles from the defendant, there was concurrent jurisdiction.

5. The result then of a consideration of the clause in the Charter is that this was a case in which it was necessary that the leave of the Court should be obtained to bring the suit in Calcutta.

6. It was held by the High Court at Madras in *De Souza v. Coles* 3 Mad. H.C. Rep., 384 that an order made under this clause of the Charter was subject to appeal. We may not agree in all the reasons which the learned Judges of that Court gave for their decision,

but we do agree in the conclusion that this is an appealable order. It is of great importance to the parties. It is not a mere formal order, or an order merely regulating the procedure in the suit, but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have. And it may fairly be said to determine some right between them, viz., the right to sue in a particular Court, and to compel the defendants who are not within its jurisdiction to come in and defend the suit, or if they do not, to make them liable to have a decree passed against them in their absence.

7. Where the order of the learned Judge is founded upon matters within his discretion, the Court on appeal would be reluctant to reverse his order. And there might be cases where the decision was founded so entirely on a matter within his discretion that we should not do so. Here Macpherson, J., appears to have proceeded not so much in the exercise of any discretion which he considered he had, but rather to have thought that he was bound by law, and to have decided more on legal grounds than according to his discretion. His judgment shows that in his opinion it would be more convenient that the suit should be tried in the Bombay Court. There is, however, a difficulty which might have arisen in the suit being brought in the High Court at Bombay. The plaintiff is not residing within the jurisdiction of that Court, and if he had brought the suit there, the defendants might have applied to the Court to compel him to give security for costs. The suit may have been brought here to avoid his being placed in that position. This being a possible hardship on the plaintiff, we thought we ought to enquire whether the defendants, in case a suit was brought in the High Court at Bombay, would undertake not to ask for security for costs, and Mr. Ingram, who appeared for them, at once said they were willing to undertake not to ask for security. That being the case, it seems to us that all the circumstances show that this is a suit which ought to be brought in the High Court at Bombay, and not in this Court. This Court, the whole case being before it, and exercising the powers which it has of deciding whether it is fit that the suit should be brought here or not, decides that it ought not to be brought here, and that leave to do so ought not to be given. We therefore reverse the order by which the leave has been granted, and the orders dismissing the applications by the appellants to take the plaint off the file, and we direct that the plaint be taken off the file. But before the order of this Court is drawn up, we must secure the plaintiff by requiring that the solicitors for the defendants give an undertaking on their behalf, not to ask for security for costs if the plaintiff should bring a suit against those defendants in the High Court at Bombay substantially for the same purpose as the present suit is brought for. We think that the parties should bear their own costs both of this appeal and of the proceedings before Macpherson, J. The costs will be taxed as between attorney and client on scale No. 2.