Mahomed Haji Hamed Vs. Jute and Gunny Brokers Ltd.

LegalCrystal Citation : legalcrystal.com/348621

Court : Mumbai

Decided On : Nov-25-1930

Reported in : AIR1932Bom42; (1931)33BOMLR1364

Judge : Wadia, J.

Appeal No. : O.C.J. Suit No. 1061 of 1929

Appellant : Mahomed Haji Hamed

Respondent : Jute and Gunny Brokers Ltd.

Judgement :

Wadia, J.

1. This suit has boon set down for the trial of the preliminary issue of jurisdiction under a Judge's order dated February 27, 1930. Plaintiff has filed this suit against the defendants as his agents praying for an account of all the dealings and transactions in jute, hessians and gunny-bags entered into by the defendants on plaintiff's behalf from about October 1927 to about June 1929. Plaintiff alleges that the defendants carry on business in Bombay and in Calcutta and a material part of the cause of action has arisen in Bombay. Leave under el. 12 of the Letters Patent has been granted to him. Defendants deny the allegations. The trial of the issue came on before Mr. Justice Mirza on October 9, and on November 11, 1930, when the plaintiff's counsel opened his case and the plaintiff was examined and partly cross-examined. Thereafter by consent of parties and with the permission of the learned Judge it was transferred to my board as Mr. Justice Mirza's board was congested, and it was difficult for him to give a continuous hearing and to have the witnesses examined from day to day.

2. Before I deal with the issue, I may mention that the defendants subsequently filed a suit against the plaintiff in the High Court of Calcutta, being suit No. 1821 of 1929, to recover a sum of Rs. 13,000 odd or in the alternative for taking of accounts between the parties. Defendants thereafter petitioned the High Court of Calcutta praying for an injunction restraining the plaintiff from proceeding with this suit in Bombay, The defendants' petition, however, was rejected, and it was ordered that the Calcutta suit should be stayed pending the disposal of the issue of jurisdiction in the Bombay suit.

3. The course of business followed by the parties was that defendants used to send rates and quotations from Calcutta to the plaintiff in Bombay, and the plaintiff sent orders by letter or telegram to . the defendants in Calcutta, and the orders were accepted by letter or telegram by the defendants from Calcutta. Defendants entered into transactions with third parties in Calcutta in pursuance of such orders and

instructions, and then sent advice notes to the plaintiff with confirmation slips attached thereto. Some of these slips have been signed by the plaintiff. In the case of some other contracts plaintiff has confirmed the same by letters, and in some other cases plaintiff sent no confirmation at all to the defendants in spite of receiving reminders from them. At times goods were also consigned from Calcutta by the defendants to the plaintiff in Bombay, and documents in respect of the goods, such as railway receipts, bills of lading, etc, were delivered to the plaintiff through a local bank in Bombay. Defendants made up statements of account in Calcutta and sent them to the plaintiff in Bombay to which admittedly plaintiff raised no objection at the time. Payments were also made to the defendants at times, but I shall deal with the question of payment later, as it is a point of dispute between the parties whether payment was made in Calcutta or in Bombay.

4. Plaintiff alleges in Para. 16 of the plaint that 'the defendants carry on business in Bombay (Calcutta)', presumably meaning thereby that they carry on business at both places, and that a material part of the cause of action has arisen in Bombay. In order to show how it has so arisen, plaintiff's counsel wants to rely on what he says are certain admissions made by the defendants in their written statement. A cause of action, however, has no relation whatever to the defence set up by the defendants. It refers entirely to the grounds set forth in the plaint, and leave granted under Clause 12 of the Letters Patent is also confined to the cause of action or causes of action set forth in the plaint. A cause of action has been defined as a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in his suit, and evidence can be led to prove those facts. Evidence was accordingly led by the plaintiff to show that the agency agreement between the plaintiff and the defendants was made in Bombay, that the defendants' acceptances of plaintiff's orders were in some cases communicated to the plaintiff by two representatives of the defendant firm, Chiranjilal Dhurka and Dayalji Nathu, in Bombay, that some statements of account were handed over to the plaintiff personally by these men in Bombay, and that payments were made by the plaintiff to the defendants in Bombay by accepting certain hundis drawn upon the plaintiff and payment there under being made in Bombay. [His Lordship after dealing with points not material to this report proceeded:]

5. I have held that the defendants do not carry on business in Bombay and that the agency agreement was not made in Bombay. But the plaintiff relies on certain other facts as making up the material part of the cause of action which I shall now deal with, and the facts are these, viz., that orders and instructions were sent from Bombay, memos or statements of account were sent to Bombay, sometimes goods were consigned to the plaintiff in Bombay, and in some cases payment was made by the plaintiff in Bombay. The orders and instructions were sent by letter or telegram from Bombay, and it is untrue that any of them were either sent or accepted through what the plaintiff calls the defendants' Bombay office as alleged by him in his affidavit of December 2, 1929, made on the argument of the defendants' petition in Calcutta to which I have been referred. I may here point out that the plaintiff himself in his evidence has stated that he employed the defendants to buy and sell goods for him in Calcutta and to consign goods to him from Calcutta, so that all the transactions were really effected in Calcutta. Plaintiff, however, alleges that in some cases the instructions were not properly carried out and that there was negligence on the part of the defendants in carrying out the same. Even so, the cause of action would arise in the place where the negligence occurred : see Salig Ram v. Chaha Mai ILR (1911) All. 49. I do not believe the plaintiff when he says that any acceptances were received

through what he calls the Bombay office of the defendants, or that any statements of account were received through that office, or that any goods consigned from Calcutta were taken delivery of by the plaintiff through any such office.

6. Plaintiff's suit is a suit for accounts, and accounts by a commission agent are to be rendered either at the place where the agreement of agency was made, or at the place where the agency agreement was to be performed, or at the place where in performance of the agreement payment has to be made. I have already held that the agency agreement was made in Calcutta. All the sales and purchases were also effected with third parties in Calcutta, goods were sent out or consigned to the plaintiff from Calcutta, and statements of account were made up in and sent from Calcutta. Plaintiff alleges that payments were made by him in Bombay, but the defendants say that the payments were made by the plaintiff to them in Calcutta. In the first place, therefore, the question arises. Where were the moneys agreed to be paid Admittedly, no place was agreed upon. All that one of the printed terms in the contract form, Ex. 6, says is that payment was to be made in cash, but it does not state as to where it was to be made. In the absence, therefore, of any provision regarding the place where moneys were to be paid, moneys could only be payable at the place where in performance of the agreement of agency they were intended to be paid. Counsel for the plaintiff has relied on the decision of Mr. Justice Tyabji in Motilal v. Surajmal ILR (1804) 30 Bom. 167, 6 Bom. L.R. 1038 is which there were certain dealings between the plaintiff in Bombay and the defendant at Phulgaon on the pakki adat system, and the learned Judge after discussing the facts which make up the cause of action came to the conclusion that as accounts were sent to Bombay and some moneys were paid to the plaintiff in Bombay, leave should be granted under Clause 2 of the Letters Patent. The learned Judge relies on the maxim that where no place is fixed for payment, the debtor must seek the creditor and pay him where he is. But on the facts of the case before him he came to the conclusion, on considering the correspondence that was put in, that it was agreed between the parties that payment was to be made to the plaintiff in Bombay, and as payment was to be made to the plaintiff in Bombay, he held that with leave granted the Court had jurisdiction. That case was not followed by Mr. Justice Batty in Kedarmal v. Surajmal : (1907)9BOMLR903 , in which there was an appeal from an order made by Mr. Justice Tyabji himself, following his own decision in Motilal v. Surajmal. The appeal Court, however, remanded the suit for hearing of the issue whether moneys due to the plaintiff as a constituent by the pakka adatia were payable by the pakka adatia in Bombay. A considerable amount of evidence was taken both in Court and on commission. Mr. Justice Batty came to the conclusion that the moneys were not so payable, there being no express or implied provision to pay in any particular place. He held that payment must be made at the place where the pakka adatia transacted the business in respect of his agency. The case of Motilal v. Surajmal is also not followed by the appeal Court of Allahabad in Tika Ram v. Daulat Ram ILR (1924) All. 465, That was no doubt a case under Section 20 of the Civil Procedure Code which does not apply to the chartered High Courts, and it was also a case in which the agent was a pakka adatia and not merely a commission agent. But the learned Judges in that case held that in the absence of a specific agreement, both the accounting and the payment by such an agent, meaning, as I take it, not merely a] pakka adatia but also a commission agent, must be made in the place where the business of the agency was transacted. The learned Judges have even gone further and stated that if a person wants to drag the agent miles away from the place where the business is transacted and to put him under an obligation either to pay or to be sued in another Court, the agreement between the parties must specifically provide for it. The

Allahabad case was followed in Nandlal v. Kisanlal(1), in which the appeal Court has not agreed with the decision in Motilal v. Surajmal. In the case before me there was no specific agreement as to where payment was to be made. I may also add here that payment to the plaintiff does not seem to have been in the contemplation of the parties, and as a matter of fact no payment was made to the plaintiff. The plaintiff himself has stated that all the business was done in Calcutta with third parties under his instructions, and payment had, therefore, either to be made or received in the place where the agency business was transacted, viz., in Calcutta. Certain hundis have been exhibited in the case, but payments by hundis were not made in accordance with any agreement or because the moneys were payable in Bombay, but only on account of the convenient and customary mode by which moneys amongst business people are transmitted from one place to another for facility of payment. In my opinion, therefore, no material part of the cause of action has arisen in Bombay and leave granted under Clause 12 is not conclusive when the jurisdiction is in issue : see Nagamoney Mudaliar v. Janakiram Mudaliar ILR (1894) Mad. 142.

7. Plaintiff, however, contends that the defendants have acquiesced in the institution and trial of the suit in Bombay, and have waived any objection that they may have taken to the jurisdiction of this Court, because after putting in the written statement they have taken further proceedings in the suit consisting of two chamber summonses, one dated September 21, 1929, which was after the date on which the written statement was declared in Calcutta, and the other dated April 12, 1930. The first was a chamber summons for further and better particulars of certain instances mentioned in para, 13 of the plaint, and the other was for amendment of the written statement by correcting certain clerical errors and also by adding a paragraph that on the balance of convenience the disputes between the parties should be adjudicated in the Calcutta suit and not in the Bombay suit. Under the order of the Court such a paragraph was not allowed to be added. Section 21 of the Civil Procedure Code says that any objection as to the place of suing must be taken in the Court of first instance at the earliest possible opportunity. That section does not apply to the Chartered High Courts in the exercise of their original jurisdiction. It does not also apply to a case where the objection is not one to the place of suing, but one which goes to the root of the whole suit, such as an objection to the jurisdiction of the Court, which can be taken at any stage of the proceedings, even at the heating of the suit and on appeal. Such an objection, even in the High Courts, can be taken at any stage of the proceedings in the suit, Defendants have objected to the jurisdiction in their written statement. The written statement has not been properly drawn, because it is the usual practice to raise the objection at the very commencement of the pleading, and put in the written statement without prejudice to that contention. The objection, however, nevertheless is raised in the written statement, and the question is whether the defendants have waived their objection because of the further proceedings by way of chamber summonses which I have referred to above. It is true that these chamber summonses do not specifically state that they are without prejudice to the defendants' contention as to jurisdiction, but I cannot say that the plea of want of jurisdiction has anywhere been abandoned. Plaintiff's counsel, however, argued that taking such proceedings without having the question of jurisdiction first decided has involved the plaintiff in further costs in the suit, but the question of costs, in my opinion, could be dealt with and adjusted at the time of passing the final decree and does not affect the point of jurisdiction. It is a well-known principle that waiver cannot confer jurisdiction on a Court when none exists or which the Court does not possess. If a Court has no jurisdiction over the subject-matter of the suit, parties cannot, by consent or waiver or acquiescence, convert it, to use Lord Watson's phrase

in Ledgard v. Bull , 'into a proper judicial process.' There are, no doubt, decisions which show that when in a case which a Judge is competent to try, parties without raising any objection as to jurisdiction join issue and go to trial upon merits, the defendant cannot subsequently dispute the Court's jurisdiction upon the ground that there were certain irregularities in the initial proceedings in the suit. Counsel for the plaintiff, however, referred me to the case of King v. Secretary of State for India ILR (1908) Cal. 394, in which the plaintiff was employed by the Government of India, presumably in Calcutta, to superintend certain tea gardens at Port Blair in the Andaman Islands. The suit was for damages for wrongful dismissal. Leave to sue under Clause 12 of the Letters Patent was granted, but it was not granted by the Court but by the Master. The defendant filed a written statement, joined issue with the plaintiff on the terms of the agreement, and pleaded that the plaint disclosed no cause of action, or in the alternative, that the suit should have been filed elsewhere. Thereafter the defendant applied for a commission to examine certain witnesses, and the Court held that where there was no want of jurisdiction, the objection that leave had not been properly obtained could be waived, and was deemed to have been waived in that case after the defendant applied for a commission. That case follows an English decision in Moore v. Gamgee (1890) 25 Q.B.D. 244 In that case also there was no want of jurisdiction, but the leave that was necessary had not been obtained. Those decisions are based on the ground that absence of leave under Clause 12 does not go to the root of the jurisdiction, and to that extent they are not consistent with the decision in Hadjee Ismail Hadjee Hubheeb v. Hadjee Mahomed Hadjee Joosub : Rohima Bye v. Hadjee Mahomed Hadjee Joosub (1874) 13 B.L.R. 91 and Mr. Justice Telang's decision in Rampurtab Samruthroy v. Premsukh Chandamal ILR (1899) 15 Bom. 93. In any event the cases cited by plaintiff's counsel were cases in which there does not seem to have been any dispute about a part of the cause of action having arisen within the jurisdiction of the Court. Under Clause 12 of the Letters Patent the High Court is empowered to try and determine suits of every description if the cause of action arises either wholly, or, with leave obtained, in part. The words 'cause of action' under the Letters Patent mean every fact essential to the maintenance of the action, and each one of such facts separately is a part of the cause of action. If, therefore, no part of the cause of action has arisen within jurisdiction, the Court cannot be said to have inherent jurisdiction over the subject-matter of the suit and cannot try that suit. In this case the defendants have raised this objection in their written statement, and if, as I have held, no part of the cause of action has arisen in Bombay, any waiver or acquiescence will not confer upon the Court the jurisdiction which it did not possess. If there is no jurisdiction over the subject-matter of the suit, acquiescence of the parties or either of them cannot create it: see Vishnu Sakharam Nagarkar v. Krishnarao Malhar(1).

8. I would, therefore, answer the issue in the negative. I order the plaintiff to pay the defendants' costs of the trial of this issue.