

FRA'MJI KA'VASJI MARKER..... *Appellant.*
 HORMASJI KA'VASJI MARKER..... *Respondent.*

1865.
 Feb. 6.

Jurisdiction—Carrying on Business—Letters Patent of High Court, cl. 12.

A defendant does not “carry on business” so as to come within cl. 12 of the Letters Patent of the High Court of Bombay, and render himself subject to the ordinary original civil jurisdiction of that Court, though he may have an agent at Bombay for certain purposes connected with his business, where that which is the essential ingredient in his business does not take place within the local limits of the jurisdiction of the Court.

A retail dealer in European goods residing and carrying on business at an upcountry station is not within the jurisdiction of the High Court of Bombay on the ground that he has an agent in Bombay for the purpose of purchasing and forwarding goods to be used in his trade.

THE defendant was described in the plaint as a Pársi “residing at present at Peshawur, but carrying on trade in Bombay by means of his agent, Ruttonjee Cursetjee, residing at Modi Khana Street in Bombay.” The plaint stated that previously to the year 1836 one Kávasji Frámji Marker (the father of the plaintiff and the defendant) was carrying on business as a general merchant at Bombay, and at Sealkote, Nausará, Gwálior, Delhi, Pesháwar, and Ferozpur; that in the year 1857 Kávasji, the father, died, having by his Will bequeathed his said several businesses, and the goods, assets, and effects thereunto belonging, to the plaintiff and the defendant in equal shares, and that after his decease the plaintiff and defendant carried on the said several businesses in copartnership till the year 1862; and that in that year the plaintiff went to Ferozpur, where the defendant was residing, and the plaintiff and defendant at that place executed a Gujaráti instrument, dated the 19th of June 1862, dissolving the partnership. According to one of the terms of the agreement of dissolution, the defendant was to take, as part of his share, the shops at Sealkote, Nausará, Gwálior, and Delhi, and the stock in trade and outstandings of the same, and to pay certain sums to the plaintiff for the stock in trade of the shops at Pesháwar and Ferozpur (which he was also to take as part of his share). By a subsequent instrument executed also at Ferozpur, about seven days after the execution of the firstmentioned instrument, the defendant agreed to pay and the plaintiff to

1865.

FRA' MJI
KA'VASJI
MARKER
v.
HORMASJI
KA'VASJI
MARKER.

take a smaller sum than the sum mentioned in such instrument for the stock in trade of the Pesháwar and Ferozpur shops. The objects of the suit were to have the second agreement set aside, as having been obtained by fraud and misrepresentation, and to obtain a decree for the payment by the defendant of certain sums of money claimed by the plaintiff, as due under the firstmentioned instrument, or as damages for its breach by the defendant.

Before the hearing, an application was made by the plaintiff to COUCH, J., in chambers, for a commission to examine witnesses. The learned Judge, feeling doubts as to the jurisdiction of the Court in the case, declined to make the order for a commission till the opinion of a Court of two Judges should be obtained on the point: and the case accordingly came before such Court, consisting of SAUSSE, C. J., and ARNOULD, J., on the 19th, 20th, and 21st of January 1865, to be heard and argued on the point of jurisdiction.

Austey and Marriott for the plaintiff.

White and Dunbar for the defendant.

The following judgment was delivered by the Chief Justice on the 6th of February 1865:—

The question in this case has been brought before the Full Court by direction of Mr. Justice Couch, before whom it was raised by the defendant upon an application by the plaintiff for a commission to examine witnesses.

It arises upon the jurisdiction clause in the Letters Patent, which empowers the Court to receive and determine suits, "if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain, within the local limits of the ordinary original jurisdiction of the High Court."

The point for consideration is whether the defendant did or did not, at the commencement of the suit, "carry on business" within the territorial limits of the jurisdiction of this Court.

To determine whether a defendant is carrying on business, it must first be ascertained what his particular trade, calling, or occupation is, and then we can examine whether the facts

proved amount to a carrying on of that particular trade, calling, or occupation within the jurisdiction. The present defendant is admittedly a retail dealer in European goods, and obtains his livelihood by the profit which he makes upon his sales—without “sale” he could not make profit, or in other words, he would not carry on business for the purpose of gaining a livelihood. “Sale” is an essential ingredient in carrying on this defendant’s business, and in the present case, to give this Court cognisance of suit upon that ground, it must be shown that “sale” by the defendant in the way of a retail dealer has taken place within our territorial limits. The place of sale in the present case is the true place of the defendant’s “carrying on business.”

Now it appeared that the plaintiff and defendant are brothers, who inherited a retail business carried on in various parts of India; that in 1862 they separated, and, by deed executed in the north of India, divided the property and business, the plaintiff taking over, amongst others, the town of Bombay, which had been the former head-place of business, and the defendant taking over Ferozpur, Pesháwar, &c., where the latter traded as “Hormusjee Cowasjee and Sons.” It is in respect of that deed that this suit is instituted. In June 1863 the defendant sent to Bombay a confidential assistant upon a considerable salary, and allowance for storehouse rent and for clerks. By the defendant’s order, regular books were kept by his assistant in Bombay, and in the defendant’s trade name, headed “Bombay Firm.” The assistant, in addition to some small permissive trading on his own account, received the defendant’s goods from Europe, made purchases in Bombay on his behalf, and forwarded goods to him upcountry. This servant was in the habit of signing the name of the firm, adding “by the hands of their servant Ruttonjee.” In order to show the complexion of the business originally established through this assistant in Bombay, it was proved that the defendant, some months after suit commenced, drew *hundis* or bills upon his firm here. These were, however, protested for non-acceptance by his servant, who was indicated upon the bills as the person to whom they were to be presented for acceptance in the name of the defendant’s firm. They appeared to have been the first bills which were so drawn. The plaintiff endeavoured to show that sales had been made by their assistant in

1865.

 FRA'MJI
 KAVASJI
 MARKER

 v.
 HORMASJI
 KAVASJI
 MARKER.

1865.

FRA'MJI
KA'VASJI
MARKERHORMASJI
KA'VASJI
MARKER.

Bombay for the benefit of the defendant between June 1863 and the 6th of July 1864, when this suit was commenced; but we think that the evidence, which was confined to two instances, was not sufficient for that purpose, and it must, therefore, be taken that no sale was effected by the defendant, or on his behalf by his agent in Bombay, before the commencement of this suit.

The branch or agency established within the jurisdiction appears to have been limited to purposes other than those of sale or profit.

Under those circumstances, we think that the defendant, as a retail dealer, gaining his livelihood by the profit upon sales of his goods, did not "carry on business" in Bombay, so as to render him in that respect liable to the jurisdiction of this Court.

Although there must always be a wide distinction between the cases of railways and of private persons, in respect of the mode and place of carrying on their respective business, yet much of the reasoning of the Judges in the cases of *Adams v. Great Western Railway (a)* and *Shiels v. Great Northern Railway (b)* applies to the present case. In the *Keynsham Co. v. Baker (c)* Chief Baron Pollock lays down that distinction very clearly, and treats railway business as being in some respects "*sui generis*," as it undoubtedly is. That case was relied upon as an authority for the plaintiff, but upon examination it does not appear to conflict with the decision we have arrived at. There the business of the company was to manufacture and make sale of their goods. The directors met in London, but the sales were made at the place of manufacture, and that was held to be the real place of business. Pollock, C. B., says: "The Company had one place of business, and one only; there they got the material, and did what was necessary to it; there they sold it, and there only:" and Channel, B., says: "'the Company' must be understood to be where they 'carry on their business.'"

In the present case "sale" is made the test of carrying on the business of a retail dealer, and the place of sale is treated as the place of carrying on that business.

(a) 30 L. J., N. S., Ex. 124. (b) Same vol., Q B., 331. (c) 9 L. T. 18

The case of *Subbaraya Mudali v. The Government and Cunliffe (d)* was relied upon as an authority, that the words "carry on business" import a personal attendance on business, and that as the defendant was admittedly not present in Bombay at the carrying on of any business upon his behalf, then the Court was ousted of any jurisdiction in the suit. That case probably followed *Mitchell v. Hender (e)*, where Coleridge, J., sitting alone in the Bail Court, expressed an opinion to that effect.

1865.
FRAMJI
KA'VASJI
MARKER
v.
HORMASJI
KA'VASJI
MARKER.

We decide this case upon wholly independent grounds, and do not feel called upon to express any opinion upon either of those cases.

Each party must abide his costs upon this application.

(d) 1 Mad. H. C. Rep., 286. (e) 23 L. T., 83.

Suit No. 782 of 1864.

JAVA' RA'MJI Plaintiff. Jan. 20.
JA'DAVJI NA'THA' * Defendant.

Attachment before Judgment—Official Assignee—Insolvency—Vesting Order.

The title of the Official Assignee of an insolvent debtor under Act 11 & 12 Vict., c. 21 (the Indian Insolvent Act), is preferable to that of a creditor of the insolvent who before the vesting order has obtained an order for attachment before judgment, under Secs. 83 and 84 of the Civil Procedure Code, in respect of the property comprised in such attachment.

The effect of attachment before judgment is to secure that the property attached shall be forthcoming at the time of pronouncing the decree, to abide whatever order the Court shall make upon it.

ON the 24th of November 1864, Westropp, J., made an order in this suit, under Secs. 83 and 84 of the Civil Procedure Code, requiring the defendant to furnish security in the sum of Rs. 3,000 to replace sixty bales of wool, or to show cause why he should not do so, and in the mean time the Sheriff was to attach property of the defendant sufficient to fulfil the decree

* The same case is reported, 2 Bom. H. C. Rep. 142, 2nd ed., under the name *Savá Rámji v. Jádárji Náthu*.