1879

PUTALI MEHETI v. TULJA.

His suit failed through a defect of jurisdiction of the Court which had not really judicial cognizance of the cause until the preliminary condition, overlooked for so long, had been satisfied.

The judgment of the Subordinate Judge must, accordingly, be set aside, and the case be heard and disposed of an its merits.

Costs of the application to be borne by the opponent.

PINHEY, J.—I concur in the judgment just delivered by may brother West, except as to the order in respect of costs. I am of opinion that costs of this application should be costs in the cause, because if plaintiff's claim eventually fails on the merits, it seems to me improper that the defendant should have to pay any costs of litigation, whether in respect of this application or otherwise. It is not, however, worth referring so minute a point to a third Judge for decision, and I will, therefore, say that I defer as to costs and concur as to the rest of the judgment.

*Order reversed with costs.*

## ORIGINAL CIVIL.

( 56 )

*Before Sir C. Sargent, Justice.*

MAHOMEDSHUFFLI, PLAINTIFF, *v.* LALDIN ABDULA, DEFENDANT.*

1878

*July* 30.

*Practice—Security for costs—Residence—Civil Procdure Code (Act X) of* 1877, *Section* 380.

The meaning to be given to the word "residence" in legislative enactments depends upon the intention of the Legislature in framing the particular provision in which the word is used. The '*residence*' intended in section 380 of the Civil Procedure Code (Act) X of 1877 is residence under such circumstances as will afford a reasonable probablity that the plaintiff will be forthcoming when the suit is decided.

THE plaint in this case described the plaintiff as "of Cabul, Mahomedan inhabitant, but now residing and carrying on business in Bombay as a general merchant." The defendant issued a Judge's summons calling upon the plaintiff, under section 380 of the Civil Procedure Code (Act X) of 1877, to show cause why he should not give security for the defendant's costs in the suit, and in support of the summons he filed an affidavit, alleging that the

*Suit No. 241 of 1878.

1878

MAHOMED SHUFFLI v. LALDIN ABDULA.

plaintiff was not a resident in British India ; that he resident permanently an Cabul, and that the did not possess any immoveable or moveable property within British India independent of the money claimed in this suit.

The plaintiff filed an affidavit in reply, stating that he was a native of Cabul ; that he had been for many years residing in different parts of British India, and had been carrying on business at Calcutta, Benares, Amritsir, Multan, and Bombay ; that he was possessed of considerable stock in trade and outstanding debts of a large amount in those places ; that his business in Bombay had been for one year conducted by his *munim*, but that, about five months previously to the institution of this suit, he had come to Bombay partly for the purpose of suing the defendant, but principally in order to take sole charge of his said business ; that he was possessed of assets in Bombay of the value of Rs. 1,500 : that he was residing at his place of business in Bombay, and intended to reside there permanently ; and that he would not leave Bombay, even temporarily, unless his presence should be required at his branch firms above mentioned.

*Inverarity* showed cause.—Section 380 of the Code is bases on the English rule and practice. Permanent residence is not necessary : *Dowling* v. *Harman*,(1) *Ciragno* v. *Hassam*.(2) By section 17 of the Civil Procedure Code, a temporary lodging is a "residence" for the purpose of giving jurisdiction.

*Macpherson, contra.*—The Court is bound to see that the residence of a plaintiff is not merely colourable. The residence requiry by section 380 is such a residence as will give the defendant some security for his costs. The object of section 17 is quite different. He cited *Alexander* v. *Jones*.(3)

SARGENT, J.—The question here is as to the meaning of the word "residing" in section 380 of the Civil Procedure Code. The English authorities, which are all cited in *Westenbery* v. *Mortimore*,(4) show that there is no well-settled practice as to requiring security for costs, and they afford but little assistance in ascertain-

(1) 6 M.& W. 131, and see *Anonymous Case*, 3 Moore 78, S. C. 8 Taunt. 737.
(2) 6 Taunt. 20. (3) L. R. 1 Ex. 133.
(4) 10 L. R. C. P. 438.

ing the true meaning of the word "residing" as used in the above section of the Code ; but it is impossible to hold that the Legislature in adopting this term intended it to be satisfied by mere presence in the country at the time of suit, as was contended for the defendant on the authority of an *Anonymous Case*(1) and *Tambisco* v. *Pacifico.*(2) An attempt has occasionally been made to draw a distinction between the meaning of the words "dwell" and "reside"; but they appear to me to express the same idea, the only difference being that they are perhaps, in ordinary usage, applied to different classes of society. Neither expression, however, necessarily implies a permanent state of things.

The question is not a new one as to the length of time requisite to constitute statutory '*residence.*' Sir J. Arnould in this Court declined to hold that a residence for a period of only ten days was a "residence" such as was intended in the twelfth clause of the Letters Patent—*Kavasji Framji* v. *Wallace* ;(3) while, on the other hands, a very short residence has been held sufficient to satisfy the provisions of the County Courts Act in England, and to give jurisdiction to the Courts establish by that statute : *Massey* v. *Burton.*(4) These cases show that the word "residence" may receive a larger or more restricted meaning according to what the Court believes the intention of the Legislature to have been in framing the particular provision in which word is used. Now section 382 shows the intention of the Legislautre in the present case to have been that "residence" should be residence under such circumstances as will afford reasonably probability that the plaintiff will be forthcoming when the suit is decided.

Each case, therefore, must depend on its own particular circumstances. In the present case the plaintiff never was in Bombay before, and only came here four months ago. He says he has residence in various parts of British India for many years past, but he does not say where or for how long he has so resided. He may have carried or business in different places in British India by a *munim* as he says he has done in Bombay, but he has not stated

(1) 3 Moore 78 ; S. C. 8 Taunt. 737.
(2) 7 Exch. 816.
(3) 1 Bom. H. C. Rep. 113, O. C. J.
(4) 27 L. J. Ex, 101.

1878
MAHOMED SHUFELI v. LALDIN ABDULA.

anything which can lead the Court to infer that his residence in British India has been anything but of the most temporary character. He says, indeed, that he intends to reside here permanently; but since his arrival he has been living at the shop where his business is carried on, and there are no circumstances which make it probable that his stay in Bombay is intended to be otherwise that temporary. The summons must be made absolute with costs.

*Summons made absolute.*

Attorneys for the plaintiff.—Messrs. *Crawford & Boevey*

Attorney for the defendant.—Mr. *Khanderao Moroji.*

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## APPELLATE CIVIL.

( 57 )

*Before Mr. Justice West and Mr. Justice Pinhey.*

1879
*January 6.*

GANPATGIR GURU BHOLA GIR (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANPATGIR (ORIGINAL DEFENDANT), RESPONDENT.*

*Declaratory decrees—Specific Relief Act (I of 1877), Section 42.*

The defendant was in possession of the estate of a deceased *gosavi* as his *shishya* (spiritual son.) The plaintiff sued upon a stamp of Rs. 10 for a declaration that he was the true *shishya* of the *gosavi* by a previous adoption, his real object being to establish a title to the estate in the hands of the defendant.—*Held* that under the circumstances the Court would not exercise, in the plaintiff's favour, the discretionary power to grant a declaratory decree vested in it by section 42 of the Specific Relief Act (I of 1877), inasmuch as to do so would enable the plaintiff to obtain a relief on a stamp of Rs. 10 which the Legislature intended should be chargeable with a higher fee, and thus would have the effect of giving countenance to an evasion of the stamp law.

THIS was an appeal from the decision of Chintaman Sakharam Chitniss, First Class Subordinate Judge at Poona, who rejected the plaintiff's claim on the groun d, among others, that it was not proper to allow the suit, as it asked for a simple declaratory decree.

The principal question argued in the case was whether the Subordinate Judge was right in throwing out the plaintiff's suit for a declaratory decree.

* Appeal No. 33 of 1878.