4 B. 416.

1880
JUNE 22.

ORIGINAL CIVIL.

4 B. 416.

[416] ORIGINAL CIVIL.

Before Mr. Justice West.

GOCULDAS DWARKADAS OF HYDERABAD, CARRYING ON BUSINESS AT BOMBAY UNDER NAME OF GIRDHARLAL FUTTECHAND BY HIS MUNIM, MOTILAL BUNACHAND, (*Plaintiffs*) *v.* GANESHLAL HALASROY AND OTHERS, CARRYING ON BUSINESS AT BOMBAY UNDER THE FIRM OF GANESHLAL SUNDERLAL (*Defendants*).*
[22nd June, 1880.]

Service of summons on agent—Civil Procedure Code (Act X of 1877), s. 76; and s. 37, cl. (c)—Carrying on business.

To satisfy the conditions of s. 76 of the Civil Procedure Code (Act X of 1877) as to service of summons on the agent, there must be a person residing without the local jurisdiction, but carrying on business or work within those limits by a manager, or agent, and sued on account of such works,—that is, business either actually itself carried on by the agent or manager, or forming part of the business in the sense of a connected course of transaction to the management of which he has been duly appointed.

Sections 76 and 37, cl. (*c*), are to be construed together, and are intended to carry out the same scheme of relief, which rests upon the idea that where an agent has been put forward substantially to take the place of his principal within a particular jurisdiction, he should take the place of such principal (at the option of any person who has dealt with him) in any legal proceedings that may arise out of the business or work in which the agent has been virtually a local principal. The manager or agent contemplated by the Code, is one who has an initiative and independent discretion, albeit subject possibly to principles and general orders prescribed for his guidance. A mere servant employed to carry out orders or to execute a particular commission or a factor or common agent who is not identified with the firm for which he acts, is not such an agent.

The firm of Ganeshlal Sunderlal carried on business at Agra. It had no place of business in Bombay, but it employed G. as its agent in Bombay in certain dealings which it had with the plaintiff. The letters and telegrams of the firm to G. were sent to the plaintiff's place of business, or addressed to G. as an individual, not in the name of the firm. G. did not himself initiate any business or in any way stand between his employers' firm and the plaintiff. *Held*, that G. was not the defendants' manager or agent within the meaning of the Civil Procedure Code, s. 76, and that in an action against the defendants, service of summons upon him was not due service.

G. in particular instances drew *hundis* on the firm of Ganeshlal Sunderlal which that firm duly accepted and paid. *Held*, that he might reasonably be deemed their agent or manager for this particular kind of business, if for no other, and service on him might probably suffice in the case of a plaintiff suing on *hundi* transactions as with the firm through him.

[417] Service unduly made under s. 76 does not become effectual by reason of the fact of such service being subsequently notified to the parties really interested as defendants.

Semble.—Service duly effected under s. 76 is effectual without reference to the circumstance of its being or not being communicated to the real defendants.

[F., 11 C.W.N. 809; R., 37 C. 377=11 C.L.J. 401=5 Ind. Cas. 500.]

THE question in this case was whether there had been good service of summons on the defendants.

The defendants who were seven in number, resided at Agra, and the plaintiff alleged that they were all in partnership, and carried on business at Agra under the name of Ganeshlal Sunderlal and Pitmal Gulabchand.

* Suit No. 3 of 1880.

1880
JUNE 22.
ORIGINAL
CIVIL.
4 B. 416.

It appeared that their business in Bombay was transacted with the assistance of one Gulabchand Lalla, who acted as their agent in purchasing and selling goods, and to whom the plaintiffs advanced money on account for the purpose of such business.

The summons in this suit was served, on 15th January, 1880, upon Gulabchand Lalla in Bombay under s. 75 of the Civil Procedure Code (Act X of 1877), and an *ex-parte* decree against the defendants was obtained by the plaintiffs on 3rd February, 1880.

The defendants alleged that until the plaintiffs proceeded, on the 29th March, 1880, to execute the decree, they were not aware that any suit had been filed against them by the plaintiffs, and on the 13th April, 1880, they obtained a rule *nisi*, calling on the plaintiff to show cause why the decree should not be set aside.

Only two of the defendants admitted partnership, and they alleged that they were the sole proprietors of the firm. The other defendants in their affidavits denied connexion with the firm of Ganeshlal Sunderlal.

Gulabchand Lalla, on whom the summons had been served, made an affidavit in which he alleged that all the defendants were members of an undivided Hindu family, and that the trade carried on by them, or any of them, was for the benefit of the family. He also stated that the plaintiff had demanded payment from him of the money due by the defendants, and that he was threatened with a suit; that this was communicated by him to the defendants at Agra. His affidavit continued: "I came to know of [418] this suit having been filed against the defendants when I was served with the summons in this suit as munim or gumasta of the said defendants' firm in Bombay. At the time when I was served with the summons on the 15th day of January, 1880, I received letters, telegrams, and orders from the said defendants for business, trade and with reference to this suit. I still consider myself in the service of the said defendants' firm.

"On the said summonses being served on me I immediately wrote a letter to the said defendants, informing them of this suit having been filed, and of the service of summonses on me, and that the date of the hearing of the suit was fixed for the 3rd February 1880. I also, at the same time, forwarded the summons, and the translation thereof, served on me, to the said defendants. I also wrote another letter to the same effect, and informing the said defendants that the plaintiff refused to wait. I also wrote letters to the said defendants after the decree was passed in this suit against them, and received from them letters in reply, requesting me to wait up to 15th of *Vaishak Sud* (24th May 1880), and prevail upon the plaintiff to wait. The plaintiff's munim at my entreaties waited for some time, but refused to wait any longer. I further say that I always kept the said defendants well informed of what was going on in this suit, and I say that the allegations made by the said Ganeshlal Halasroy and Sunderlal Lalchand, stating that, prior to the 29th March, 1880, they were not aware that a suit had been filed against them conjointly with the other defendants, and the allegations made by the other defendants that they had no knowledge of issue of the summons, are entirely false allegations.

"I further say that as munim of gumasta of the said defendants' firm I drew *hundis* on them at Agra to the extent of Rupees one lakh, which the said defendants honoured and paid. I also purchased and sold goods on their account from time to time, which the said defendants have

confirmed. I further say that I forwarded to the said defendants copies of the plaintiff's account as adjusted by me every year."

1880
JUNE 22.

ORIGINAL CIVIL.

4 B. 416.

He annexed to this affidavit vernacular letters received from the firm of Ganeshlal Sunderlal at Agra, the latest of which was [419] dated the 26th March, 1880, in which instructions were given to him with regard to the sale of goods, drawing of *hundis*, and other matters connected with the business of the firm. A letter of the 18th January 1880, contained the following passage:—

"And your letter arrived. I have noted the intelligence written therein. Having made an arrangement with regard to the settlement as you may deem proper, do you be good enough to communicate it in writing to me. Should I be able to pay off (the money), I will pay the same. If I be not able to pay it off, I will send a reply in writing."

In a letter, dated the 26th January, 1880, the firm wrote to Gulabchand Lalla: "and you know about my reputation and about my house (position), and I have already written to you to write to me on your having made an arrangement (settlement) as you may deem proper. But you should make an arrangement in such a way as I may be able to carry it out, and that my reputation also may be saved." And on the 2nd March, 1880, the firm wrote: "Do you be good enough to cause the matter to be finally settled somehow or other."

In none of the letters, however, was there any specific mention of the suit, or the nature of the "matter" or "arrangement" to which allusion was made.

The plaintiff made affidavits in which he stated that he had transacted business with Gulabchand Lalla as the defendants' munim or gumasta, and that he had frequent interviews with him with reference to the plaintiff's claim on the defendants, and that he acted on the defendants' behalf. He annexed a copy of a letter, dated 29th November, 1879, sent by him to the defendants, enclosing his account, and referring to "the transactions in grain had at this place by your gumasta, Gulabchand. The amount in respect thereof remaining due to us, has been debited to you * * * The account, having been all settled with your gumasta, Gulabchand, is sent to you. Do you be pleased to send the amount of the balance forthwith."

In their affidavits, the defendants denied that Gulabchand Lalla was their munim. They alleged that they had no firm in Bombay; that "the said Gulabchand Lallachand, as a gumasta of the [420] firm of Ganeshlal Sunderlal, looked after the business of the said firm transacted by the plaintiff as the commission agent of the said firm; but, as such, the said Gulabchand Lallachand was possessed of no power or authority to act as munim, or to accept service of the writ of summons, or to bind the defendants in the suit."

Starling, for the plaintiffs, showed cause.

Lang, *contra*.

JUDGMENT.

WEST, J.—The questions that arise in this application are:—

(1) Was Gulabchand so related to the firm of Ganeshlal Sunderlal, in relation to the transactions out of which the suit arose, that service on him was effectual as against that firm, according to the provisions of s. 76 of the Code of Civil Procedure?

(2) Could a service on him, if ineffectual in itself, become effectual as against the firm by its being brought to their knowledge?

1880
JUNE 22.
ORIGINAL CIVIL.
4 B. 416.

(3) Would such service, if in itself effectual, be rendered ineffectual by its not being communicated to the firm—(*a*) without the connivance and (*b*) by the connivance of the plaintiff?

(4) Was such service, as contemplated in issue (3), kept from the knowledge of the defendants' firm, and under what circumstances?

(5) Who are the members of the firm responsible to the plaintiff for its debts to him?

Section 108 of the Code of Civil Procedure says that, on the application of a defendant against whom a decree has been passed *ex parte*, the decree shall be set aside if the summons was not duly served. Here the service was made on one Gulabchand, the gumasta, in Bombay, of a firm at Agra. Such service, the defendants say, was insufficient, while the plaintiff contends for its sufficiency. The question has to be decided on the construction of s. 76 of the Code. That section says: "In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons issues, service on any manager or agent, who [421] at the time of service personally carries on such business or work for such person within such limits, shall be deemed good service." To satisfy the conditions here laid down there must be a person residing without the local jurisdiction, but carrying on business or work within those limits by a manager or agent, and sued on account of such business or work—that is, as I understand, business or work either actually itself carried on by the agent or manager, or forming part of the business in the sense of a connected course of transactions, to the management of which he has been duly appointed.

Section 76 was thus, as it seems to me intended to be, in a general way, complementary to s. 37, cl. (*c*), and the two, forming part of the same Code, ought to be construed together. Now by s. 37, cl. (*c*), provision is made for the appearance of a party "carrying on trade or business" within the local jurisdiction, through another, "for and in the name" of such party "in matters connected with such trade or business only" where there has not been an express appointment of another person for this purpose. Thus, if the agent contemplated in s. 76 is in general identical with the agent intended in s. 37, cl. (*c*), the person served as agent with a summons will be able to appear and answer for the firm that he represents. If, on the other hand, the agent under s. 76 is, owing to a wide construction being given to that enactment, held to include persons not falling within s. 37, cl. (*c*), the service will, in some instances, be made upon persons who are not in a position and have not the information necessary for an effectual defence where one can be made.

Without saying that the agent meant in s. 76 is, for all purposes, to be deemed absolutely identical with the agent in s. 37, cl. (*c*), and allowing the possibility that the later section was framed as it stands, in order to prevent the evasion which might be covered by a more rigid form of expression, I am of opinion that the two are intended to work congruously together, and to carry out the same scheme of relief. This rests on the idea, that where an agent has been put forward substantially to take the place of his principal within a particular jurisdiction, he [422] should take his place at the option of a person who has dealt with him, in any legal proceedings that may arise out of the business or work, such, for instance, as the building of a mansion or other contract in which the agent has been virtually a local principal. In such cases the agent, as manager, stands between the firm or the company and those who deal with him or work for him or for whom he works, as its representative.

1880
JUNE 22.
ORIGINAL CIVIL.
4 B. 416.

His position is readily distinguishable generally from that of a servant employed only to carry out orders or to execute a particular commission, and equally distinguishable from that of a factor or commission agent, who is not in any way identified with the firm. The manager or agent contemplated by the Code means, I think, one having an initiative and independent discretion, albeit subject possibly to principles and general orders prescribed for his guidance.

The phrase "carrying on business" is itself one of varying import, according as it is construed with an implied addition, so as to make it mean the whole business, the principal part of the business, any part of the business, or that part which may properly be supposed to have been contemplated by the parties to a contract. It has, in the English Court, been interpreted according to the context, and the apparent purpose of the Legislature, and the same rule of construction must, I think, be applied in the present instance. Personal service is, according to s. 75, to be made whenever it may be practicable. The substituted service of s. 76, is but an exception, and one which ought not to be extended to cases which are not certainly within the intention. In the present case the firm of Ganeshlal Sunderlal had not, according to any evidence that I can trust, a place of business in Bombay. The firm did not pay license-tax. Its letters and telegrams to its employee Gulabchand were sent to the plaintiff's place of business, or addressed to Gulabchand simply as an individual, not in the name of the firm. He, in fact, acted for other firms as well as for that of Ganeshlal Sunderlal, and it does not appear that in acting for the latter firm he had dealings on their account with any other person than the plaintiff. He seems to have been a kind of inspector and adviser as to the markets, checking and aiding the plaintiff in the transactions that he carried on for the defendants' firm, but not himself initiating any [423] business, or in any way standing between his employers' firm and that of the plaintiff.

Such functions could not, in my opinion, make Gulabchand a manager or agent within the meaning of s. 76. He, however, appears in particular instances to have drawn *hundis* on the firm of Ganeshlal Sunderlal which the firm accepted and paid. This seems to place him in a higher position than that of a mere gumasta in the ordinary course. The defendants say that the *hundis* being really for their own business they were fearful of injuring their credit by not accepting them, and they did not dismiss Gulabchand, or denounce his assumed authority. He might, then, reasonably be deemed their agent or manager for this particular kind of business if for no other, and service on him might possibly suffice in the case of a plaintiff suing on *hundi* transactions as with the firm through him. But this is not the character of the present suit. The plaintiff says he acted as the banker and commission agent of Ganeshlal Sunderlal. He received goods from that firm direct, was drawn on by it, and corresponded with it. The account on which the suit was brought, was rendered, not to Gulabchand as representative of the firm, but to the firm itself, and to the firm was sent the registered letter demanding payment. The suit, therefore, did not arise out of business carried on by Gulabchand as manager or agent, so that service on him would suffice as being on an agent managing such business. As between the adverse firms in this case he did not "personally carry on such business." They were in direct communication with each other, and it is to such business,—the business thus transacted,—that this suit relates. Gulabchand was, as to these transactions,

1880
JUNE 22.
ORIGINAL CIVIL.
4 B. 416.

not an agent, or even a go-between, but merely a confidential servant of the one firm to check the operations done for it by the other, and perhaps to advise on those operations. Service on him was not, therefore, as against Ganeshlal Sunderlal, due service.

The Code does not provide that a service unduly made under s. 76 shall become effectual through being brought to the notice of the persons really interested as defendants. It was probably foreseen that such a provision would sometimes [424] encourage trickery, and often raise questions of difficulty, such as have actually arisen in the present case.

A service effectually made under s. 76, on the other hand, seems to be effectual without regard to the circumstance of its being or not being communicated to the real defendants; but, as in this case there was no such service, I will not discuss that subject further. Nor it is necessary to say more on the fourth question than that there is, at least, room for very grave suspicion that the service of the summons was purposely kept from the knowledge of the defendants. That this should be so, shows the necessity of not enlarging the scope of s. 76 so widely that any petty subordinate employed at a distance may by his fraudulent assistance to a plaintiff involve his employers in unlimited liabilities. The question of who were the constituent members of the firm, does not, under these circumstances, call for decision. The service was ineffectual as to the members, whoever they were, and the decree must be set aside with costs of this motion and incidental thereto.

Decree set aside.

Attorneys for the plaintiff.—Messrs. *Macfarlane and Gilbert.*

Attorneys for the defendants.—Messrs. *Gefferson, Bhaishanker, and Dinsha.*

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4 B. 424.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

VAMAN SHRIPAD (*Original Plaintiff*), *Appellant v.* MAKI AND OTHERS, (*Original Defendants*), *Respondents.**

[27th August, 1879.]

Landlord and tenant—Lease—Construction.

A lease of land, whereby the lessee is given the power of holding the land as long as he pleases, is determined by the death of the lessee.

THIS was a second appeal from the decision of R. F. Mactier, Judge of the District of Satara, confirming the decree of the Subordinate Judge of Dahivadi.

The suit was to recover possession of land let to persons whom the defendants represented. The plaintiff alleged and the defendants [425] did not deny that the lease gave to the lessee the right to hold the land so long as the lessee chose to hold it; but the plaintiff contended that the lease was determined by the death of the original lessee, while the defendants contended that the plaintiff could not eject them so long as they chose to remain.

* Second Appeal, No. 228 of 1879.