

1881

JULY 9.

ORIGINAL
CIVIL.

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[467] ORIGINAL CIVIL.

*Before Sir Charles Sargent, Kt., Justice, in chambers.*KEVALDAS SAKARCHAND v. PESTONJI NASSERVANJI
AND OTHERS.* [9th July, 1881.]*Inspection where to be given—Contract made in Bombay to be performed upcountry—
Civil Procedure Code, s. 132.*

Defendant was owner of certain cotton-ginning factories at and near A in the Mofussil, and had also a place of business in Bombay. He entered into a contract in Bombay with the plaintiff to gin certain cotton of the plaintiff's at the said factories of the defendant in the Mofussil. Plaintiff brought a suit for damages for the breach of this contract, and demanded inspection, in Bombay, of all defendant's books relating to the business of the said ginning factories belonging to the defendant. The defendant was willing to give the inspection asked for; but contended that it should be had at A, where all the books in question were kept, and objected to bringing the books down to Bombay as demanded by the plaintiff.

Held, that the contract, though made in Bombay, having been intended to be performed at a considerable distance from Bombay at and near A where the business of ginning was conducted, and where the books relating to the said business were kept, A was the proper place at which to give inspection.

THIS was a suit for damages for the breach of an agreement alleged to have been entered into between the plaintiff and the defendant in Bombay, whereby the defendant agreed to gin certain cotton of the plaintiff's at the defendant's ginning factories at Anklesvar, Pali, and Hansot, in the Broach Collectorate, in certain specified quantities, and at certain specified rates of payment, and in preference to the cotton of all other customers. The contract contained other provisions in respect of which also damages were sought: which provisions, however, it is, for the present purpose, unnecessary to specify.

Plaintiff wrote to the defendant demanding inspection, in Bombay, of all defendant's books relating to the business of ginning cotton carried on by him at his said three factories at Pali, Hansot, and Anklesvar. Defendant, however, objected to give the inspection asked for in Bombay, on the ground of the immense inconvenience to his business it would entail to remove to Bombay so many books that were in daily use at his factories; but offered to give inspection of all the books in question at Anklesvar. The defendant's head-office was at Anklesvar, and the accounts [468] of all his three factories, he alleged, were made up there. Anklesvar is a station 198 miles from Bombay, on the Bombay and Baroda Railway. The plaintiff objected to go to Anklesvar to take inspection; and, accordingly, took out a summons against the defendant to show cause why the inspection asked for should not be given at the office of the defendant's attorney in Bombay.

The affidavit, on which the summons was granted, alleged that the books in question were not then required by the defendant at his factories, as all work at the said factories was then (it being the rainy season) suspended; that it was necessary the books in question should be brought to Bombay in order that translations might be made of certain entries; and that a full and free inspection would not be had up-country, where the defendant could more easily obstruct the same than in Bombay.

* Suit No. 165 of 1881.

JUDGMENT.

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July 9, 1881.—The summons came on to be heard before Sir Charles Sargent.

Inverarity (for defendant) showed cause.—The books of which inspection is asked amount to fifty in number, and constitute the bulk of the books relating to the defendant's business at his several factories. Our affidavit shows that it would inflict the most serious inconvenience on the defendant if these books had to be brought down to Bombay. The factories are not now at work, it is true; but all the accounts of the past season are being made up, and the books are in daily request for that purpose. They contain some two hundred accounts, which are now being made up. The defendant, it is true, has a place of business in Bombay, but his head-office is at Anklesvar. The contract was not one capable of performance any where; it was to be performed at Anklesvar.

In such a case the rule must be that inspection is to be had, if required, at that place where the contract was to be performed, and where the books are. Any other rule would result in putting a grievous instrument of oppression into the plaintiff's hands. He might purposely bring his action in Bombay, rather than in the place where the books are, simply in order to cause us to come to some unjust compromise rather than suffer the heavy loss and inconvenience which would certainly be entailed upon [469] us if we were forced to bring all our books down to Bombay. All our books are now at Anklesvar, and it is much more reasonable that the plaintiff should send up some one to examine them there, than that our business should be stopped for weeks, or longer, while the plaintiff is taking inspection of them in Bombay. Moreover, not only will all our books have to come down, but also the *mehtas* who alone can explain them. And, as to having translations made of certain entries, we undertake to let the plaintiff take true copies of any entries he pleases, and allow translations of such copies to be used in the trial.

Skipsey (for the plaintiff) *contra*.—My affidavit shows that it is not true that the books are wanted at Anklesvar at the present moment for the proper conduct of defendant's business. At any rate, some can be spared; they can send down a few at a time without any inconvenience to themselves. Section 132 of the Civil Procedure Code seems to contemplate that inspection should be given at the office of the attorney of the party giving it.

[SARGENT, J.—The words are "at his pleader's office or some other convenient place." The defendants say their attorney's office in Bombay is a most inconvenient place.]

No doubt it is not so convenient to them as Anklesvar, but that is equally inconvenient to us, and the contract having been made and the suit brought here, in Bombay, all proceedings in that suit should be had in Bombay.

SARGENT, J.—I feel no hesitation in holding that where parties have entered into a contract which, though made in Bombay, is intended to be performed at or near the place where the party to perform it carries on his principal business and keeps his books, that if general inspection be sought of those books in an action brought against that party, it should ordinarily, if the defendant requires it, be taken at the place where he, the defendant, keeps his books. The parties must be taken to have contemplated that it should be so, and that place must under the circumstances be deemed to be the "convenient place." The plaintiff can bring

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his action there if he likes, and, if he chooses to bring it in Bombay, he cannot claim the right to suit his own convenience at the cost of most serious inconvenience to the defendant. But I do not say that the [470] costs of the rule and of taking inspection at defendant's place of business up-country should be borne entirely by the plaintiff in the event of his having to pay the costs of the suit. As to that, I say nothing now, but reserve the question of the costs of taking the inspection until the hearing. But this much is quite clear, that, in such a case as this, it would be most unreasonable to require the defendant to bring all these books down to Bombay to the serious obstruction of his business in the meantime.

Costs of the summons costs in the cause.

5 B. 470 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Sir Charles Sargent, Kt., Mr. Justice M. Melvill and Mr. Justice Kemball.

SHA NAGINDAS JEYCHAND (*Plaintiff*) v. HALALKORE NATHWA GHEESLA, DECEASED, BY HIS WIDOW BAI PANEE (*Defendant*).*
[14th June, 1881.]

General Stamp Act I of 1879, sch. I, arts. 16 and 21, ss. 21, 23, 24, 27—Judicial sale—Certificate of sale, stamp duty on—Sale or transfer subject to a mortgage or other lien—Mortgage-debt "part of the consideration"—Interest—Proclamation of sale.

Where a certificate of sale, granted to the purchaser of property sold by public auction under an order of Court, has expressly set out that such sale is made subject to the mortgage right of a third party, the principal sum (but not the interest) due at the time of the sale on such mortgage, is to be deemed "part of the consideration in respect whereof the transfer is chargeable with *ad-valorem* duty" under s. 24 of the Indian Stamp Act: so that the whole consideration in respect of which such sale is, under arts. 16 and 21 of sch. I of that Act, liable to stamp duty, is the sum of the purchase-money and the principal money so due on the mortgage. The certificate of sale, therefore, whenever it is possible, should set out the exact amount that is due, at the time of the sale, in respect of the principal sum secured by the mortgage.

Semble.—It is otherwise if the mortgage be only recited in the proclamation of sale, and not expressly set out, as an existing incumbrance on the property sold, in the certificate of sale.

Arrears of *interest* due on the mortgage are to be excluded from such calculation, since s. 23 of the Indian Stamp Act—which enacts that "where interest is expressly made payable by the terms of the instrument, [471] such instrument shall not be chargeable with duty higher than that with which it would have been chargeable had no mention of interest been made therein"—applies as much in this case as if the document of transfer, on which the stamp duty was to be calculated, had been the document itself which stipulated for the payment of interest.

[N.F., 10 C. 92=13 C.L.R. 164; 7 M. 421 (F.B.); F., 15 B. 532; R., 6 O.C. 76 (78); 1 S.L.R. 44 (46).]

THIS case was referred for the opinion of the High Court by Rao Bahadur Mukundrai Manirai, First Class Subordinate Judge at Ahmedabad, under s. 49 of the General Stamp Act I of 1879.

The facts of the case, as stated by the Subordinate Judge, are briefly these. The plaintiff, Nagindas, having attached a house, the property of his judgment-debtor (the defendant), one Kuber Hargovan informed the

* Civil Reference, No. 16 of 1880.