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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

KESSOWJI DAMODAR JAIRAM (*Original Plaintiff*), Appellant v.
LUCKMIDAS LADHA AND KHEMJI JAIRAM (*Original Defendants*),
Respondents.* [30th March, 1889.]

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Jurisdiction—Letters Patent, cl. 12—Leave to sue—Part of the cause of action—Part not material—Practice—Summons to rescind leave given—Limitation Act XV of 1877, art. 178.

Where leave to bring a suit has been given to a plaintiff under cl. 12 of the Letters Patent, and a defendant objects, and asserts that the Court has no jurisdiction, he is not bound to wait until the case comes on for hearing; but may take out a Judge's summons calling on the plaintiff to show cause why the leave given should not be rescinded and the plaint taken off the file.

Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub(1) referred to.

The granting of such leave is neither a decree nor an order, and the period of limitation for such an application to rescind it is that provided by art. 178 of the Limitation Act XV of 1877, viz., three years.

The plaintiff and the second defendant were the owners of a family business which was carried on by *munims* in Bombay, Cutch and Zanzibar. The first [405] defendant was for many years the *munim* in management of the business at Zanzibar. This suit was brought, praying that an account might be taken of the management by the first defendant of the business at Zanzibar, and that in taking such account the first defendant might be charged with all sums misappropriated by him, or lost by his neglect or fraud. The second defendant was joined as a defendant merely because he refused to join as a plaintiff. The plaintiff instanced various acts of misappropriation and neglect and fraud on the part of the first defendant, some few of which were said to have been effected by means of transfer and other entries made in the books of the Bombay firm on instructions sent by the first defendant from Zanzibar. At the time of filing of the suit the leave of the Court, under s. 12 of the Letters Patent, was obtained.

On a summons taken out to rescind such leave,

Held, that the leave given must be rescinded, no such material part of the cause of action having arisen in Bombay as would justify this Court in transferring to itself a case which, *prima facie*, ought to be tried elsewhere.

APPEAL against an order of Scott, J., dated 4th May, 1888.

The suit was filed in August, 1886, leave being given under cl. 12 of the Letters Patent, 1865, on the ground that part of the cause of action arose within the jurisdiction.

The summons on the defendants was not served until the 23rd May, 1887 and their written statement was filed on the 29th December, 1887. On the 24th January, 1888, the defendants took out a Judge's summons calling on the plaintiff "to show cause why the leave to bring this suit given to him under cl. 12 of the Letters Patent should not be rescinded, and why the plaint should not be taken off the file, and returned to the plaintiff."

By an order made by Scott, J., on the 4th May, 1888, the above summons was made absolute, and the leave to bring the suit given to the plaintiff under cl. 12 of the Letters Patent, 1865, was rescinded and cancelled, and the plaint ordered to be taken off the file and returned to the plaintiff. From this order the present appeal was brought by the plaintiff.

* Suit No. 331 of 1886.

(1) 13 B.L.R. 91.

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The plaintiff was a resident of Bombay; but both the defendants resided at Cutch, in the territory of His Highness the Rao of Cutch. The second defendant, although resident at Cutch, carried on business in Bombay by his agents.

The plaintiff stated that the plaintiff's grandfather, Jairam Siwji, had established and carried on an extensive business at Bombay, [406] Cutch, and Zanzibar. He died in 1866, leaving two sons, *viz.*, Damodar Jairam, (father of plaintiff), and the second defendant, Khimji Jairam, who was then only ten years old. After his death, Damodar Jairam assumed general charge and supervision of the said business, but the actual management was carried on by *munims*. The *munim* at Zanzibar in 1866 and subsequently to that time was Ladha Damji, father of the first defendant, Luckmidas Ladha. The business of the firm at Zanzibar was carried on under the names of Siwji Topan and Jairam Siwji.

In 1870 Damodar Jairam died. The plaintiff was his only son, and he was then only about three years old. On his father's death the plaintiff and his uncle, the second defendant Khimji Jairam, became owners of the said business, which was carried on as aforesaid on their behalf by *munims*.

Ladha Damji continued to act as *munim* at Zanzibar down to his death in 1871. In April, 1872, his son, the first defendant, Luckmidas Ladha, succeeded him as *munim*, and assumed charge of the business at Zanzibar.

The plaintiff came of age on the 3rd September, 1885. The plaintiff alleged that he had discovered that throughout the period of the management of the said business at Zanzibar by the defendant Luckmidas Ladha, he had in many instances neglected and sacrificed the interests of the said business, to the great loss of the plaintiff and his uncle, the second defendant Khimji Jairam, and to the great gain and advantage of the said Luckmidas Ladha, who had accumulated a large fortune.

The plaintiff then set forth the following wrongful acts on the part of the first defendant in the course of his management of the Zanzibar business:—

“The defendant Luckmidas Ladha, without any consideration to the said Zanzibar business or firm but in consideration of large bribes to himself, wrote off and cancelled numerous debts due to the said firm, and in particular the following:—

“1. A sum of 3,27,000 dollars due from His Highness the Sultan of Zanzibar.

“2. A moiety of the loss sustained in the contract of farming the customs at Zanzibar from 1928 to 1933, amounting to about 1,50,000 dollars; a moiety of the sum of 3,27,000 dollars due from His Highness the Sultan of Zanzibar; and a moiety of bad debts due in respect of the said customs contract, all which [407] moieties were given up to Ibjji Siwji, who was a partner with the said firm of Siwji Topan at Zanzibar in the transactions out of which the said claims so given up as aforesaid arose.

“(b) The defendant Luckmidas Ladha, without any consideration to the said firm, but in consideration of bribes paid to himself, paid large sums out of the assets of the said firm to divers persons, and in particular the following:—

“1. A sum of 39,800 dollars was borrowed by the said Ladha Damji in his life-time and on his own personal account from one Currim

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Suleman Ali, and the same sum was afterwards lent by the said Ladha Damji to one Gujer, an American at Zanzibar, at a higher rate of interest than that payable by the said Ladha Damji to the said Currim Suleman Ali. After the death of the said Ladha Damji, *viz.*, in or about the year 1872, the said Gujer became bankrupt, and the defendant Luckmidas Ladha thereupon fraudulently and in order to make the said firm of Siwji Topan bear the loss of the said sum, which was really a loss to the said Ladha Damji's estate, entered the said sum of 39,800 dollars in the books of the said firm, as if the said loans had been transactions of the said firm to the credit of the said Currim Suleman Ali, and to the debit of the said Gujer, and afterwards paid the said sum out of the assets of the said firm of Siwji Topan to the said Currim Suleman Ali. At this time (1872) both the plaintiff and the second defendant, Khimji Jairam, were minors.

"2. There was a sum of 20,000 dollars, or Rs. 42,000, to the credit of the deposit account of His Highness the Sultan of Zanzibar in the books of the Zanzibar business of Siwji Topan up to May, 1872, when in the said month of May, 1872, the defendant Luckmidas Ladha withdrew that sum as follows,—that is to say, he wrote a transfer on the Bombay firm requesting them to credit that sum to himself at interest at 6 *per cent. per annum* and debit the Zanzibar firm therewith, which was done accordingly, and the said sum of Rs. 42,000 was afterwards paid to the defendant Luckmidas Ladha or his order in Bombay.

"3. A sum of Rs. 1,00,000 was in or about the year 1879-80 paid by the defendant Luckmidas Ladha to Jivandas Ibji Siwji without any consideration whatsoever.

"4. A sum of money was due from one Nanji Dama to one Waghji Korji and although Nanji Dama was indebted in a large sum of money to the Zanzibar firm of Siwji Topan and although the said Nanji Dama was in bad circumstances, nevertheless the defendant Luckmidas Ladha debited the account of the said Nanji Dama with 18,000 dollars in divers sums of money, and paid that sum to the said Waghji Korji in account.

"5. Another sum of dollars 13,077 $\frac{3}{4}$ was due from one Syed Nassur bin Syed bin Abdulla to the said Waghji Korji, and although a sum of dollars 35,000 was due from the said Syed Nassur bin Syed bin Abdulla to the said Zanzibar business of Siwji Topan, and although he was in bad circumstances, the defendant Luckmidas Ladha debited the said sum of dollars 13,077 $\frac{3}{4}$ to the said Syed Nassur bin Syed bin Abdulla, and paid that sum to the said Waghji Korji, and the plaintiff is informed that the said sum has not been repaid by the said Syed Nassur to the Zanzibar firm."

[408] The plaintiff alleged that his uncle, the second defendant, was colluding with the first defendant, and had refused to join in bringing this suit.

The prayer of the plaint was as follows :—

"(a) That an account be taken by and under the directions of this Honourable Court of the management of the said business of Siwji Topan and Jairam Siwji at Zanzibar by the defendant Luckmidas Ladha, who may be charged and debited with all sums misappropriated by him or otherwise lost to the said business by his neglect, default or fraud.

"(b) That, for the purpose of such account being taken, the defendants and each of them be ordered to produce in Bombay all the books of the said business at Zanzibar and the books of the defendant

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Luckmidas Ladha during the period of the said management by him of the said business."

The first defendant filed a written statement in which he denied the allegation of the plaint, and pleaded that the High Court of Bombay had no jurisdiction to hear the suit, and that no part of the alleged causes of action sued upon arose within the Court's jurisdiction.

The Judge's summons of the 24th January, 1888, was taken out by the defendant, as above mentioned, for the purpose of raising the question of jurisdiction.

It was contended for the plaintiff that this application was too late, that part of the cause of action arose in Bombay, and that, as a matter of convenience, the suit was properly brought in Bombay, inasmuch as all the persons connected with the matters to be investigated had left Zanzibar and were now in India. As showing that part of the cause of action arose in Bombay, the following passage from an affidavit filed by the plaintiffs' *munim* was relied upon:—

"7. With reference to the 8th paragraph of the said affidavit, I say that the defendant's witnesses in Cutch and Zanzibar can, as above stated, be examined under commissions that may be issued in this suit.

"The first item of 39,800 dollars mentioned in cl. (b) of the 10th paragraph of the plaint filed herein, which ought to have been paid by the defendant Luckmidas Ladha out of the estate of his late father, Ladha Damji, for the reasons stated in the said cl. (b), to which for brevity's sake I beg to refer when produced, was by the direction of the said Luckmidas Ladha paid in Bombay by the Bombay firm of Jairam Siwji to Currim Suleman Ali, the person mentioned in the said clause.

[409] "8. The second item of dollars 20,000, or Rs. 42,000, also mentioned in the said cl. (b), is the amount of a transfer which the said defendant Luckmidas Ladha and one Waghji Korji, his *co-munim* of the said Zanzibar firm of Siwji Topan and Jairam Siwji, improperly requested the said Bombay firm to credit to an account to be opened in the names of Bhai Ladhabai Damji, (the first defendant's late father), and Bhai Korji Valabhdas, the father of the said Waghji Korji, at interest at $1\frac{1}{2}$ per cent. *per mensem*, and the transfer was, as I am informed and believe, accordingly made in the books of the Bombay firm of Jairam Siwji. Hereto annexed and marked with the letter (A) are copies of Exs. (C) and (D) annexed to the affidavit of one Morarji Ladha, then a *gumasta* in the employ of the said firm of Jairam Siwji, dated the 8th October, 1878, and filed in certain suit No. 1 of 1878 in this Honourable Court in its extraordinary jurisdiction, which was filed by the second defendant, Khimji Jairam, in his own name and in the name of the plaintiff, then a minor, against the said Waghji Korji, to which I crave leave to refer when produced.

"9. The firm of Ibji Siwji was for a number of years in partnership with the said firm of Siwji Topan and Jairam Siwji of Zanzibar in the customs contract taken from His Highness the Sultan of Zanzibar. Ibji Siwji had an account with the said firm of Siwji Topan at Zanzibar, on which account a sum of about dollars 1,00,000 was due to the said Ibji Siwji. The said sum of dollars 1,00,000 was, as I am informed and believe, retained by the said firm of Siwji Topan as security for the half-share of the said Ibji Siwji in the loss in the said customs contract from 1928 to 1932, and in the large sum due from His Highness the Sultan of Zanzibar in respect of advances made to him out of the partnership assets. The said sum of dollars 1,00,000 was in November, 1875, paid in Bombay to

Ibji Siwji in rupees, and a certain writing was obtained by the said Luckmidas Ladha from the said Ibji Siwji in Bombay, the terms whereof were not carried out by the said Luckmidas Ladha, who unauthorizedly and improperly made large concessions therein for which he is responsible to the plaintiff. I have already shown above that it would be for the ends of justice that this suit should be brought and tried in this Honourable Court, and some of the causes of action, amounting to a very large sum of money, have arisen within the jurisdiction of this Honourable Court; some of the plaintiff's witnesses are also resident in Bombay."

For the defendant it was contended that no material part of the cause of action arose in Bombay.

On the 4th May, 1888, Scott, J., as already mentioned, made absolute the summons of the 24th January, 1888, and ordered that the plaint should be taken off the file. The following is the judgment then delivered:—

"SCOTT, J.—This is a suit brought by a subject of the Rao of Cutch, now carrying on business in Bombay and Zanzibar, against two other subjects of the Rao of Cutch and resident in Cutch, one of whom carries on business through a *munim* in [410] Bombay. The plaint was presented on the 16th August, 1886, and accepted, under cl. 12 of the Letters Patent, by the Judge in chambers, on the ground that part of the cause of action arose within the jurisdiction of this High Court. Such presentation is an *ex-parte* application made on the presumption of the truth of the allegations contained in the plaint.

"It is obviously possible that the leave contemplated by cl. 12 of the Letters Patent may be granted *per incuriam*, and it may be necessary, after further consideration, that such leave should be withdrawn. The withdrawal may be necessary, because another jurisdiction furnishes the proper *forum* of the dispute as the place where the whole cause of action arose; or this Court may itself feel bound to decline jurisdiction, on the ground that the parties are foreigners, and that only an infinitesimal part of the cause of action arises within its jurisdiction.

"Now in the present case the plaintiff is undoubtedly a foreigner, a subject of the Rao of Cutch. The two defendants are also subjects of the Rao of Cutch. The dispute in the suit concerns the management of a business carried on at Zanzibar, and the plaint charges the first defendant with sums misappropriated or lost to the said business by his neglect or fault or fraud. That is the subject-matter of the plaint, to which leave was given under cl. 12 of the Letters Patent. The plaint was filed on the 16th August, 1886, but the writ was not served till 23rd May, 1887, and the written statement was not filed till the 29th December last, and it must be noted that its first paragraph disputed the whole jurisdiction of the Court. On the 24th January, 1888, a summons was issued calling on the plaintiff to show cause why the leave should not be rescinded and the plaint removed from the file. I have, therefore, to decide whether a sufficient portion of the cause of action arose within the jurisdiction.

"A preliminary plea of limitation was first discussed. But I think the case of *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub*(1) shows that such a plea is not sustainable. In that case, Macpherson, J., admitted a plaint *ex parte*, and three months afterwards heard an application to reconsider his decision. [411] Appeal was brought, not on the first leave given, but on the refusal of the application to rescind

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that leave. In the present case we have reached the stage of the second application. My decision will go forth in the form of an order; and an appeal, no doubt, may be brought upon it within the period limited by the Limitation Act. But the period of limitation as regards the original leave is a different matter. That original leave under cl. 12 of the Letters Patent was neither a decree nor an order; and the time of limitation was consequently regulated by art. 178 of the 2nd schedule of the Limitation Act.

“As I was not barred by limitation from entering into the merits of the summons, I next considered the merits as brought out by the pleadings, the affidavits, and the circumstances of the case. The well-known case of *DeSouza v. Coles*(1) seems to me in point. In that case an application was refused for leave to commence a suit in the original side of the High Court to recover a sum which was made up of various items with respect to some of which the cause of action arose in Madras, but as to the great bulk of which claim the cause of action arose elsewhere. Upon appeal the decision was sustained. Lord Chelmsford's words in *Luckmee Chaud v. Zorawur Mul* (2) might also be applied to this case. His Lordship says: ‘Now, where can it be said that the cause of action properly arose? Muttra was, undoubtedly, the central place of business; at Muttra the partnership books were kept; at Muttra the partners would have recourse to those books for the purpose of ascertaining the state of transactions between them. It, therefore, appears clear to their Lordships that if there is a cause of action arising out of the balance resulting from these partnership transactions, that cause of action arose at Muttra.’ Now in that case the contract of partnership was entered into, not at Muttra, but at Rutlam, and yet the Court, which had jurisdiction in Muttra, was held to be the proper *forum*, because it was the scene of all the partnership transactions. Substituting Bombay and Zanzibar, for Rutlam and Muttra, their Lordships would undoubtedly have pronounced in favour of Zanzibar in the present case, as the partnership was not only carried on, [412] but entered into, at Zanzibar. The main cause of action is that the defendant has not properly accounted for his management in Zanzibar—the non-accounting occurred entirely in Zanzibar—all the dealings were there—and the alleged fraud took place there. It was alleged on the one side, and contradicted on the other, that part of the dealings connected with three considerable items took place in Bombay. I am inclined to think this was established only in the case of one item. But, even supposing it was the case in three items, the suit only concerns them incidentally, and they are only a very inconsiderable portion of the main cause of action,—to wit, the conduct of a very extensive business carried on for many years in Zanzibar. It may be that now some of the books and some of the witnesses are in Cutch, but that fact does not affect the rule, that a suit must be brought in the jurisdiction within which the main cause of action arose.

“As to the argument of the superior convenience of Bombay, that alone is not a ground for leave under cl. 12 of the Letters Patent. Moreover, the fact itself is very disputable, as the bulk of the evidence must be at Zanzibar and the partnership transactions occurred there. A careful analysis of the plaint itself almost decides the question. The prayer is that an account be taken of the management by the first

(1) 3 M. H. C. R. 384.

(2) 8 M. I. A. 291 (307).

defendant at Zanzibar, and that in taking the account the first defendant be charged with all sums misappropriated by him, or lost by his neglect or fraud. That is the whole subject-matter of the suit. The body of the plaint then sets out that the first defendant assumed the management of the business at Zanzibar in 1872, on behalf of the plaintiff and the second defendant. The plaintiff, on attaining his majority in 1885, says that he discovered neglect, default, and fraud on the part of the first defendant in his management at Zanzibar. He gives the following instances:—(1) He cancelled, in consideration of a bribe, a debt of three lakhs and a quarter of dollars due from the Sultan of Zanzibar. (2) He also cancelled a very large claim due from one Ibji Siwji of Zanzibar. (3) He fraudulently charged the firm with a personal debt of his own of about 40,000 dollars. (4) He improperly transferred to himself an item of 20,000 dollars due to the firm from the Sultan. This transfer he had made to an account of his [413] own in Bombay. Now this is the only item mentioned in the plaint where Bombay is concerned, and even if the suit was upon that item alone, it would be difficult to say that the cause of action arose in Bombay. At any rate, in the present suit that transfer to a Bombay account is only one of a multitude of evidentiary facts which will have to be proved in order to establish a claim which arose entirely in Zanzibar. (5) Then came further charges of improper payments of large amounts made in Zanzibar. There is no other mention of Bombay at all in the plaint. I will not go into the question of the nationality and residence of the parties. But the first defendant is a native and resident of Cutch, not even trading in Bombay, and the second defendant is also a native and resident of Cutch, only trading here through a *munim*. Such facts when coupled with the other facts already discussed, that the main cause of action arose in Zanzibar, must influence the Court in the consideration whether the suit is one which ought properly to be determined in Bombay. I have discussed this point so fully in a recent decision that I will not do more than allude to it here. I am of opinion that the words in cl. 12 of the Letters Patent 'if the cause of action shall have arisen in part,' must be construed to mean a material part of the cause of action. I do not think the plaint in this suit, even as it has been developed in the affidavits, discloses any circumstance constituting a material part of the cause of action arising in Bombay. The leave, therefore, given in this suit must be cancelled, and the plaintiff must pay the costs."

The plaintiff appealed.

Lang (Jardine with him), for the appellant,—We submit the procedure adopted by the defendant was wrong. There is no section of the Code which gives a defendant the right to raise the question of jurisdiction by a summons obtained in chambers to take the plaint off the file. The defendant ought to have waited until the hearing to raise the point.

[BAYLEY, J., referred to *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (1)].

[414] That case is distinguishable.

SARGENT, C. J.—We think the procedure was right. It is important in a suit is brought which this Court has no jurisdiction to hear there should be some means of putting an end to it at the earliest possible moment and thus prevent the parties from uselessly incurring heavy costs. The necessity of the procedure does not appear to have been doubted or

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questioned in the case of *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (1) and we will not hold that it was wrong.]

Lang :—Then on the merits we contend that a material part of the cause of action arose in Bombay. Large sums of money belonging to the firm were misappropriated by the defendant in Bombay. The balance of convenience is in favour of the case going on in Bombay, instead of compelling the plaintiff to sue in Zanzibar, or in Cutch.

[SARGENT, C. J.—The plaint is for an account of the business in Zanzibar. You sue the agent for an account of his management at Zanzibar. No doubt, you charge him with misappropriating certain sums by means of directions given in Bombay; but the account of the management at Zanzibar is the material thing.]

I admit the whole of the cause of action does not arise in Bombay, but it is clear that part of it does. We say a material part arises here. Then the question is, will this Court under the circumstances refuse to hear the plaintiff and send him either to Cutch, which is a foreign Court, or to Zanzibar, where there is no efficient machinery for dealing with a suit like this, and where the parties must suffer great inconvenience and expense, as all the witnesses are in India. Counsel relied on the affidavits.

Latham and *Inverarity*, for the respondents were not called on.

JUDGMENT.

SARGENT, C. J.—We think this Court has no jurisdiction, and the order appealed from must be confirmed. The object of this suit, as set forth in the plaint, is to have the accounts taken of the Zanzibar business. The defendant, who was manager there, is charged with misappropriating money. Reliance is placed [415] upon the fact that certain sums of money, which form part of the total amount with which he is charged, were misappropriated by him by means of certain misrepresentations made or directions given in Bombay. We do not think that that is sufficient to give this Court jurisdiction. The mere fact that the fraud in connection with certain items in the account was effected in Bombay would not justify a change of venue. It is possible that the case would be tried here in a manner more satisfactory to the plaintiff than it can be elsewhere; but that is not a matter for our consideration. The simple question is, whether such a material part of the cause of action has arisen in Bombay as would justify us in transferring to this Court a case which *prima facie* ought to be tried elsewhere. We think there is not. The appeal must be dismissed with costs.

Appeal dismissed.

Attorneys for appellants :—Messrs. *Craigie, Lynch, and Owen.*

Attorneys for respondents :—Messrs. *Little, Smith, Frere, and Nicholson.*