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not shaken in cross-examination, and the present [92] plaintiff Ramchandra called no evidence to rebut it. Though no actual finding was recorded on the issue, a decree was passed in favour of the plaintiff Khandu, which necessarily involved the finding of the issue in the affirmative.

The plaintiff Ramkrishna alleges that he can now bring forward evidence and circumstances which will prove conclusively that Khandu Mahadu was not a *bona fide* purchaser for value of the premises, but was a mere nominee of the mortgagees and purchased on their behalf, no consideration really passing between them; and that this evidence and these circumstances were unkown to him when he defended the former suit; and that in the former suit he did not intend to allege that the sale was not *bona fide*, but merely that the sale took place without due notice and was impeachable on that ground. On the last point I think that the issue cannot be construed to mean less than it expresses, and that Ramkrishna cannot be allowed to contradict the record. If he was not prepared to negative the issue, he ought not to have allowed it to be raised, and it must be taken to have been properly raised. If since then he has discovered evidence and circumstances which would show that the issue was wrongly decided in that suit, he ought to have moved for a new trial.

The issue must be taken to have been properly framed, and that finding remaining unimpeached, it decides the present suit: see *Krishna Behare Roy* v. *Chowdranee* (1). The present defendants claim through Khandu. I find the second issue in the affirmative and for defendants, and dismiss the suit with costs.

Attorney for the plaintiff:—Mr. *D. S. Garud.*

Attorneys for the defendant:—Messrs. *Payne, Gilbert and Sayani.*

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## [93] ORIGINAL CIVIL.

*Before Mr. Justice Telang.*

RAMPURTAB SAMRUTHROY AND ANOTHER (*Plaintiffs*) *v.* PREMSUKH CHANDAMAL AND OTHERS (*Defendants*).*

[20th, 21st and 24th November, 1890.]

*Practice—Jurisdiction—Leave to sue under cl. XII of the Letters Patent*, 1865—*Amendment of plaint in cases in which leave to sue under cl. XII is neceesary—Cause of action—Part of cause of action arising outside the jurisdiction*—Hundi—*Suit by drawee within the jurisdiction against the drawer outside the jurisdiction—Leave to sue under cl. XII of the Letters Patent.*

In suits for which leave to sue under cl. XII of the Letters Patent, 1865, is necessary the plaint cannot be afterwards amended. The grant of leave must be taken to relate to the suit as put forward in the plaint on which leave is endorsed by the Judge accepting it.

The grant of leave under cl. XII of the Letters Patent, 1865, is a judicial act, which must be held to relate only to the cause of action contained in the plaint, as presented to the Court at the time of the grant. Such leave, which affords the very foundation of the jurisdiction, is not available to confer jurisdiction in respect of a different cause of action which was not judicially considered

* Suit No. 136 of 1889.

(1) 2 I. A. 283.

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at the time it was granted. In respect of such a different cause of action, leave under cl. XII cannot be granted after the institution of the suit; and, therefore, the Court cannot try such different cause of action, except in another suit duly instituted.

In suits upon *hundis* drawn outside the jurisdiction upon drawees within the jurisdiction, part of the cause of action arises outside the jurisdiction, and leave to sue under cl. XII of the Letters Patent, 1865, is, therefore, necessary for such suits.

[F., 34 C. 619 (625)=5 C.L.J. 405=11 C.W.N. 649=2 M.L.T. 406; R., 17 B. 466; 21 B. 126 (134); 29 M. 239 (261)=11 M.L.J. 91 (104).]

THE plaintiffs resided at Indore, but carried on business as merchants in Bombay by their *munim*, and they sued the defendants to recover the sum of Rs. 19,800 due upon seventeen *hundis*.

The plaint merely alleged that "at various dates between the 22nd November, 1888 and the 26th January, 1889, the defendants *from Sihore* drew seventeen different bills or *hundis* aggregating in amount Rs. 19,800, upon the plaintiffs in Bombay in favour of several individuals and firms in Bombay, and the plaintiffs at the request of the defendants made to them in Bombay and on the defendants' account paid the said several *hundis* in Bombay; and [94] that the plaintiffs called upon the defendants for repayment, but no repayment had been made."

The plaint was accepted under cl. XII of the Letters Patent, and leave to sue under that clause was given.

The plaintiffs' case was that the defendants, who were five in number, were partners and carried on business together at Sihore and Indore, the principal office being at Indore. All the defendants, except the second (Ramlal), were members of the same family. The plaintiffs alleged that they began to do business with the Indore firm in *Samvat* 1941; that in *Samvat* 1943 at the request of the Indore firm they began also to do business with the Sihore branch firm, the business in both cases consisting of receiving opium and selling it in Bombay for the defendants. The defendants drew *hundis* from time to time both from Indore and Sihore which the plaintiffs paid in Bombay, repaying themselves out of the proceeds of the opium sold by them on account of the defendants. The *hundis* now sued on were all drawn, as above stated, by the Sihore firm.

The defendants denied that the Sihore firm was in any way connected with the Indore firm, and insisted that the latter firm was not liable for *hundis* drawn by the former. They also alleged (*inter alia*) that the *hundis*, in respect of which the suit was brought, were merely items in one account comprising a long series of transactions between the plaintiffs and the defendants, and they contended that the plaintiffs were not entitled to bring a suit in respect of certain selected items in an account, but must sue for the balance (if any) due upon the whole account. They submitted in their written statement that an account should be taken of the dealings between the plaintiffs and the defendants. At the hearing they urged that, in the event of the Court taking this view of the case, the suit should be dismissed, inasmuch as the plaint would require amendment, and the frame of the suit would thus be altered, and for the suit as so altered leave had not been obtained under cl. XII of the Letters Patent, 1865. Such leave was necessary, and without it the Court had no jurisdiction to try the case.

The defendants called no evidence at the hearing.

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[95] *Latham* (Advocate-General) and *Anderson*, for the defendants :—The frame of the suit is altogether erroneous. The suit is brought on certain *hundis* which were not separate and isolated transactions, but were items in a long account. We say that upon the whole account, if an account were taken, nothing at all would be due to the plaintiffs. We say that the *hundis* sued on were paid for by transactions subsequent in date, as appears from the account. The plaintiffs cannot pick certain items out of an account and sue in respect of them. This suit must, therefore, fail.

It may be suggested that the Court can amend the plaint and can order accounts to be taken. That cannot be done in this case, for part of the cause of action arose out of the jurisdiction, and leave to sue under cl. XII of the Letters Patent, 1865, is required—*Mulchand Joharmal* v. *Suganchand Shivdas* (1). If no leave was required, no doubt the plaint might be amended ; but here leave is required, and the leave which has been obtained for the suit in its present form could not be taken as leave for the suit if altered as suggested. If the suit is not maintainable in the form for which leave was granted when it was filed, it must be dismissed. The Court cannot give leave now, nor can the leave already granted be held to avail for the altered suit. The question of leave is not a matter of discretion with the Court—*Hadjee Ismail Hadjee Habib* v. *Hadjee Mahomed Hadjee Joosub* (2).

*Lang*, *Kirkpatrick* and *Russell*, for plaintiffs :—We say these *hundis* were separate transactions. The plaintiffs have sworn that the balance in their favour on the whole account, if the accounts were taken, is Rs. 31,000, and they have produced their books. This fact must be taken as established, as the defedants have called no evidence at all. If the whole account shows a large sum due, why may not the plaintiffs sue for a part of it if to do so saves trouble and expense? We say an account is not necessary, and that the only effect of taking an account will be to show that a larger sum is due to the plaintiffs than they pray for. But if, on the defendants' allegation, the Court thinks an [96] account necessary, it can be ordered without amending the plaint or altering the frame of the suit. The account is merely the means adopted by the Court, at defendants' suggestion, to ascertain the extent of defendants' liability alleged by the plaintiffs. No leave under cl. XII of the Letters Patent, 1865, is required—*Dhanraj* v. *Gobindaram* (3) ; *Laljee Lall* v. *Hardey Narain* (4) ; *Muhammad Abdul Kadar* v. *The East Indian Railway Company* (5) ; *Llewhellin* v. *Chunni Lal* (6). As to the Court's power to amend, counsel also referred to *Reference from the First Class Subordinate Judge and Judge of the Small Causes at Kaira* (7) ; *Mohummud Zahoor Ali Khan* v. *Mussumat Thakooranee Rutta Koer* (8) ; *Karimbhai* v. *The Conservator of Forest, N.D.* (9); *Tildesley* v. *Harper* (10).

## JUDGMENT.

TELANG, J.—The defendants in this case until lately were residents of Indore and Sihore, and carried on business in those places, both of which are beyond the local jurisdiction of this Court, and lie, in fact, outside British India. The only jurisdiction, therefore, which this Court

(1) 1 B. 23 (30, 38). (2) 13 B.L.R. 91. (3) 1 B.L.R. (O.J.) 76.
(4) 9 C. 105. (5) 1 M. 375. (6) 4 A. 423.
(7) P.J. for 1877, p. 133 (8) 11 M.I.A. 468 (485). (9) 4 B. 222.
(10) L.R., 10 Ch. D. 393.

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can exercise over them is that given by cl. XII of the Letters Patent. Under that clause, the plaintiffs have obtained the usual leave to file their suit in this Court, but that leave was, in fact, granted in respect of the trial of the cause of action disclosed in the plaint as it then stood. If I now permit an amendment of the plaint in the sense indicated by Mr. Kirkpatrick, I shall be permitting the plaintiffs to obtain in this suit an adjudication by the Court upon a cause of action different from that for which the leave of the Court has been obtained, and one, too, which must be substantiated by very different evidence, and which must involve an investigation of an entirely different character. I consider that such a proceeding is not sanctioned by the law. In *Shaikh Abdool Hamed* v. *Promothonauth Bose* (1), Phear, J., decided in Calcutta that the leave required by cl. XII of the Letters Patent must be [97] granted, if at all, at the time of the acceptance of the plaint, and cannot be granted afterwards. And this view, which is entirely in consonance with the express words of cl. XII, has, I believe, been always accepted in this Court. In *DeSouza* v. *Coles* (2), the learned Judge, to whom the plaint was presented for acceptance, declined to grant leave under that clause, and the appellate Court held that the order refusing leave was a judicial order subject to appeal, although they affirmed the order in the circumstances of that particular case. In *Hadjee Ismail Hadjee Habeeb* v. *Hadjee Mahomed Hadjee Joosub* (3). Macpherson, J., granted leave under cl. XII to institute the suit in the High Court of Calcutta, but on appeal Couch, C. J., and Pontifex, J., reversed his order. Couch, C.J., said (at p. 101) that the order under that clause "is not a mere formal order, or an order merely regulating the procedure in the suit, but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have." In that case, too, I notice that an attempt was made to get the Court of appeal to treat the suit as one merely against defendant No. 1 to set aside a release, when the plaint was against four defendants, and was, in substance, a plaint for an account of the estate of a deceased person, and for the payment to the plaintiff of his share in such estate after ascertainment of it by the Court. Upon that attempt, Couch, C. J., in the course of his judgment made some remarks which have an important bearing on the point I have here to decide: "The plaintiff," he said (at p. 98), "cannot be allowed, when the case comes here on an appeal from the order of Macpherson, J., to say that he would prefer to put his suit in another form. He filed his plaint against the four defendants, and prayed for relief against all, and in the order by which he was at liberty to bring his suit in this Court, the object of it was expressly stated. We must, therefore, treat it as a suit which has been brought against all four defendants, and properly brought against them." Although there is no such express statement of the object of the present suit in the order of Bayley, J., as appears to be usual by the practice of the High Court of Calcutta, I cannot think that that ought to make any difference in the [98] application of the principle indicated by Couch, C.J. Even without any such distinct order, which by the practice of this Court is not separately drawn up, the grant of the leave must, I think, be taken to relate to the suit as put forward in the plaint on which the leave is endorsed by the Judge accepting the plaint. In my opinion, this result must follow from the very character of the order as explained by the authorities. And if, as held in the case now under citation, a

(1) I. L. R. N.S. 218. (2) 3 M.H.C.R. 384. (3) 13 B.L.R. 91.

plaintiff, even on appeal from the order granting leave, cannot be allowed to "put his case in another form," it seems to me that, a *fortiori* he must not be allowed to do so, when that order stands in full force, and the trial takes place under the jurisdiction conferred by that very order. Again, in the case of *Jairam Narayan Raje* v. *Atmaram Narayan Raje* (1), where the plaintiff had obtained leave to sue *in forma pauperis* under the Code of Civil Procedure, but had not obtained or asked for leave under cl. XII of the Letters Patent, West, J., said (at p. 488): "But it (*i.e*, leave under cl. XII) was, in fact, not asked for. I am told that I ought to infer it from leave having been granted to the plaintiff to sue as a pauper, but such leave does not by any means necessarily imply that *this particular question was judicially considered*. The leave of the Court ought to have been as distinctly sought and obtained for the purpose of joining the different elements of the cause of action in a single suit in this Court, as for the purpose of suing *in forma pauperis*."

From all these authorities it seems to me to result, that the grant of leave under cl. XII of the Letters Patent is a judicial act which must be held to relate only to the cause of action disclosed in the plaint as presented to the Court at the time of the grant; that such leave, which affords the very foundation of the jurisdiction, is not available to confer jurisdiction in respect of a substantially different cause of action which was not judicially considered at the time it was granted; that, in respect of such a different cause of action, leave under cl. XII cannot be granted after the institution of the suit; and that, therefore, the Court cannot try such different cause of action, except in another suit duly instituted.

[99] It follows from these considerations that any amendment, such as Mr. Kirkpatrick proposes to make in the plaint, cannot be of any avail. If the Court cannot in this suit try the cause of action in respect of the entire accounts between the plaintiff and the defendants, an amendment of the plaint for the purpose of praying for those accounts to be taken, and for the payment of the balance that may be found to be due on foot of such accounts, cannot enable the plaintiff to obtain a decree. In the course of the argument, I did, indeed, suggest that the Court might perhaps consider itself seized of the case by virtue of the leave when once granted, and that being so seized of the case, it might then proceed to deal with any application for amendment as in a case under the ordinary jurisdiction. But, in view of the authorities above referred to as to the nature of the order under cl. XII, and having regard to the fact that the point is one relating, not to procedure, but to jurisdiction, it appears to me that that suggestion cannot be maintained.

But it was further argued that this case was one in which, as originally instituted, no leave under cl. XII was necessary at all, that the grant of it by Mr. Justice Bayley must be taken to have been made only *ex majori cautela*; and that, therefore, it is open to the Court to allow an amendment in this case in the same manner and to the same extent as it can allow amendments in ordinary cases where no question of jurisdiction arises. It has been conceded by the Advocate-General that an application for leave under cl. XII by a plaintiff, or a grant of the leave under that clause by the Court, cannot operate, by way of estoppel or otherwise, as decisive on the question of the necessity for obtaining such leave. And it becomes, therefore, necessary to consider whether the case is one in which

(1) 4 B. 482.

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this Court had jurisdiction independently of the leave granted under cl. XII. Now, in the first place, it is to be remarked that, according to the evidence of the plaintiff Harbilas, the contract between him and Chotmal in respect of the Sihore business took place at Indore, and the transactions in respect of which this suit is brought were entered into in pursuance of that contract. It follows, therefore, that if the contract and the breach of it constitute together the cause of [100] action, the whole cause of action in this case did not arise within the jurisdiction of this Court, an essential part having arisen in Indore—see *Laljee Lall* v. *Hardey Narain* (1) and the cases there cited. In that view of the case, the argument for the plaintiffs is obviously untenable.

Looking at the case, however, apart from this evidence of the plaintiff, and dealing with it on general grounds as a suit by the drawee of *hundis* against the drawers, Mr. Kirkpatrick relied on the case of *Dhanraj* v. *Gobindaram* (2) as showing that the whole cause of action here arose in Bombay. That was a suit for a balance of account claimed by the plaintiff in respect of transactions which had taken place in Calcutta, and in which he had acted as "*aratdar*" of the defendant. It may well be that the view which the Court took of the case was that the plaintiff there was agent of the defendant; that the agency transactions were intended to take place and did in fact take place, in Calcutta; that the *hundi* (for the report mentions only one, and that, too, drawn several months after the despatch of the goods which were consigned for sale in Calcutta) was only a mode of paying money to the principal, and was not part of a series of regular mercantile transactions in *hundis*; and that the cause of action in respect of expenses incurred by the plaintiff in the course of the agency transactions must, therefore, be held to have arisen in Calcutta. In that view of the case it would be, in principle, somewhat like the case of *Luckmee Chund* v. *Zorawar Mull* (3) before the Privy Council. But the special circumstances now indicated distinguish that case from the one before me, and, therefore, I do not think that the case of *Dhanraj* v. *Gobindaram* (2) is an authority binding on the Court in this case.

On the other hand, the case of *Sichel Borch* (4), to which I drew attention in the course of the argument, appears to be a strong authority for holding that, in such a case as the present, a part of the cause of action arises where the bill of exchange or *hundi* is drawn. Counsel for the plaintiff very fairly admitted [101] that that case was not distinguishable from the present one, and, in truth, this case seems in one circumstance to be even stronger than *Sichel* v. *Borch* (4). In that case, the defendant, a merchant in Norway, and not a British subject, drew in Norway his bill of exchange payable in London at four months, and after endorsing it to the order of D. *sent it by post to D. in London*; D. endorsed it to the plaintiff also in London. On motion to set aside the writ of summons, notice of which was served in Norway under s. 19 of the Common Law Procedure Act, 1852, it was argued (as in the Calcutta case) that "there was no complete contract until the bill reached D. in London." Pollock, C. B., however, after saying that the words 'cause of action' in the section above mentioned meant the whole cause of action, went on to observe as follows:—"The cause of action here is the contract and the breach of the contract; and it is not because the breach of the

(1) 9 C. 105.
(2) 1 B.L.R. (O. J.) 76.
(3) 8 M.I.A. 291.
(4) 33 L. J. Ex. (N. S.) 179 (180)=2 H. & C. 954.

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contract was in this country that the cause of action is within the jurisdiction. We must consider the contract which gives rise to the breach. The contract, strictly speaking, is neither in Norway nor in this country. The contract, so far as one of the parties is concerned, is, no doubt, in England; but the contract, so far as the other party is concerned, is in Norway." And Baron Martin said: "The cause of action means the entire cause of action. The cause of action would be the drawing of the bill, or the endorsement of the bill, both of which took place in Norway." It is clear that, according to that case, the whole cause of action here did not arise within the jurisdiction of this Court.

The case of *Lalji Lall* v. *Hardey Narain* (1), which Mr. Kirkpatrick cited in favour of his argument, was decided on s. 17 of the Code of Civil Procedure, and proceeded upon the basis that the phrase "cause of action" there did not mean the whole cause of action. The decision in that case, therefore, is not of binding authority here. But the following passage in the judgment of Cunningham, J., is important in support of the view I have above expressed. The learned Judge said (at pp. 108, 109):

"Conflicting decisions have been given by the English Courts as to the meaning of the corresponding words in the Common [102] Law Procedure Act, 1852, s. 18, the latter of the two just mentioned views being taken in *Sichel* v. *Borch* (2), *Allhusen* v. *Malgarejo* (3) and *Cherry* v. *Thompson* (4); the former in *Jackson* v. *Spittall* (5), and ultimately by agreement in *Vaughan* v. *Weldon* (6). On the original side of this Court, the provisions in the Letters Patent enabling a suit to be brought, 'with the leave of the Court,' if the cause of action has arisen wholly or partially within the local jurisdiction, has been understood as suggesting the inference that 'cause of action' means, for the purposes of suits on the original side, the contract as well as the breach; and this view appears to have been taken on the original side of the Bombay, and until recently, of the Madras High Courts: see *Suganchand Shivdas* v. *Mulchand Joharimal* (7)."

Another of the cases relied on, *viz.*, *Llewhellin* v. *Chunni Lal* (8) (see also *Bishunath* v. *Ilahi Baksh* (9), where this case was followed), is also of no authority on the question before me, because it was decided, like the last case, on the words 'cause of action' in s. 17 of the Civil Procedure Code, which were interpreted to mean "material portion of the cause of action." *Muhammad Abdul Kadar* v. *The East Indian Railway Company* (10), which was also cited, was, however, a decision on the charter. It was, apparently, the case which Cuningham, J., had in mind when referring to the view of the Madras High Court in the words he uses at the close of the passage just cited. The interpretation, however, which the learned Judges in that case put upon the phrase 'cause of action' has not prevailed in this Court. Kernan, J., said: "s. 12 of the Letters Patent applies to cases in which the cause of action arises partly outside the jurisdiction, *e.g.*, if the contract of the company in this case had been to deliver a portion of the goods, say, at Arconum, outside the jurisdiction, and a portion in Madras, and if the action was

(1) 9 C. 105. (2) 33 L.J. Ex. (N.S.) 179=2 H. & C. 954.
(3) L.R. 3 Q.B. 340. (4) L.R. 7 Q.B. 573. (5) L.R. 5 C.P. 542.
(6) L.R. 10 C.P. 48. (7) 12 B H.C.R. 113. (8) 4 A. 423.
(9) 5 A. 277. (10) 1 M. 375.

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brought, alleging, as breach, non-delivery at both places. In such cases, the cause [103] of action could not be said to have arisen wholly in Madras (1). And Kindersley, J., said that the words 'cause of action' "rather relate to cases of several 'cause of action' contained in one and the same suit, some of which have arisen out of the jurisdiction" (1).

I do not think that in this Court I can act upon this interpretation of the phrase 'cause of action;' and I may further remark that in the Madras case, Morgan, C. J., at the original hearing had taken a different view from that which prevailed in appeal, and that the appellate Court there followed the case of *Gopikrishna Gosami* v. *Nilkomul Banerjee* (2) in Calcutta, which had been decided, not on the charter, but on s. 5 of the old Civil Procedure Code, and in which Birch, J., expressly based his judgment on that section, making a point of the case coming up on "the appellate side of the Court;" and Markby, J., the other member of the Bench, said that he did not "pretend" that the rule laid down in the case was "applicable to other Courts governed by other statutes."

I must, therefore, hold that in this case, which is governed by cl. XII of the Letters Patent, the leave of the Court was necessary under that clause to give the Court jurisdiction; that the jurisdiction so conferred was confined to the cause of action disclosed in the plaint as originally framed; and that the Court cannot now allow an amendment which shall substantially alter that cause of action. In this view it becomes unnecessary to consider whether the cause of action intended to be introduced into the suit by amendment would itself be one over which this Court could exercise jurisdiction without leave granted under cl. XII.

That being the opinion at which I have arrived, I must find in the negative on issue No. 6, in the affirmative on issue No. 15, in the negative on issue No. 22, and, without finding on the other issues, I must dismiss the suit with costs.

*Suit dismissed.*

Attorneys for the plaintiffs:—Messrs. *Payne, Gilbert and Sayani.*
Attorney for the defendants:—Mr. *D. S. Garud.*

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15 B. 104.

## [104] APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.*

GOVIND BIN LAKSHMANSHET ANJORLEKAR (*Original Plaintiff*), *Appellant v.* DHONDBARAV BIN GANBARAV TAMBYE (*Original Defendant*), *Respondent.** [24th March, 1890.]

*Small cause suit*—Res judicata.

Decisions in previous suits which were in the nature of small cause suits and in which there was no right of second appeal.

*Held* not to operate as *res judicata*.

[N.F., 28 C. 78 (81); F., 29 M. 195 (197)=16 M.L.J. 41=1 M.L.T. 25; R., 15 M. 111 (118); 17 M. 168 (179); 18 M. 189 (191); 5 Bom. L.R. 742 (743); 1 C.W.N. 687 (688); 54 P.R. 1904; 57 P.R. 1907=66 P.W.R. 1907.]

* Second Appeal No. 51 of 1889.

(1) 1 M. 377.

(2) 13 B.L.R. 461.