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no injustice whatever in the case, for the delivery of the property was at the option of the plaintiff, and the impossibility of delivery of all the property may have been in the mind of the arbitrator when he made the award.

Rule discharged.

Attorneys for the plaintiff :—Messrs. *Payne, Gilbert and Sayani.*
Attorneys for the defendant :—Messrs. *Little, Smith, Nicholson and Bowen.*

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17 B. 662=Chitty's S.C.C.R. 375.

[662] SMALL CAUSE COURT REFERENCE.

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

GIRDHAR DAMODHAR (*Plaintiff*) *v.* KASSIGAR HIRAGAR, (*Defendant.*)*
[7th July, 1893.]

Jurisdiction—Foreigner—Non-resident foreigner carrying on business by his munim *in Bombay—Small Cause Court—Small Cause Courts Act (XV of 1882), s.* 18.

Where a foreigner who did not reside in Bombay carried on business there by his *munim.*

Held that under s. 18 (1) of the Small Cause Courts Act (XV of 1882) the Small Cause Court in Bombay had jurisdiction to try a suit brought against him in that Court.

Per SARGENT, C.J.—*Prima facie* the word 'defendants' in cl. (*b*) of s. 18 has the same meaning in each of the three cases in which that clause gives [663] jurisdiction to the Court; and as the word clearly includes non-British subjects among the defendants over whom the clause gives jurisdiction if they are "resident," or "personally work for gain," within the territorial limits of the Small Cause Court, it would be a strained construction to hold that it did not include them among the defendants over whom the clause gives jurisdiction on the ground that they are "carrying on business" within the limits.

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* Small Cause Court Suit No. 21864 of 1892.

(1) Section 18 of the Presidency Small Cause Courts Act (XV of 1882) :

Subject to the exceptions in s. 19, the Small Cause Court shall have jurisdiction to try all suits of a civil nature.

When the amount or value of the subject-matter does not exceed two thousand rupees; and

(*a*) the cause of action has arisen, either wholly or in part, within the local limits of the jurisdiction of the Small Cause Court, and the leave of the Court has, for reasons to be recorded by it in writing, been given before the institution of the suit; or

(*b*) all the defendants, at the time of the institution of the suit, actually and voluntarily reside, or carry on business, or personally work for gain, within such local limits; or

(*c*) any of the defendants, at the time of the institution of the suit, actually and voluntarily resides, or carries on business, or personally works for gain within such local limits, and either the leave of the Court has been given before the institution of the suit, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution.

Explanation I.—When in any suit the sum claimed is, by a set off admitted by both parties, reduced to a balance not exceeding two thousand rupees, the Small Cause Court shall have jurisdiction to try such suit.

Explanation II.—Where a person has a permanent dwelling at one place, and also a lodging at another place for a temporary purpose only, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging.

Explanation III.—A corporation of company shall be deemed to carry on business at its sole or principal office in British India, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Although it is true that a non-British subject, who does not personally carry on business within the territorial limits of the Court, does not make himself personally subject to the municipal law of British India, still, by establishing his business in British India, from which business he expects to derive profit, he accepts the protection of the territorial authority for his business and his property resulting from it, and may be fully regarded as submitting to the Courts of the country.

[R., 20 B. 133 (143) ; 25 B. 528 (532) ; 26 M. 544 (552) ; 29 M. 69 (70) ; 37 M. 163 (169) = 18 Ind. Cas. 189 = 24 M.L.J. 619 (625) ; 11 M.L.J. 91 (106) ; (1914) M.W.N. Sup. 1 = 15 M.L.T. 1 ; **Cons. and Expl.**, 29 M. 239 (249) = 16 M.L.J. 238 = 1 M.L.T. 71 ; **D.**, 26 M. 544 (552) (**P.C.**) = 5 Bom. L.R. 494 = 7 C.W.N. 754 = 30 I.A. 220 = 13 M.L.J. 287 = 8 Sar. P.C.J. 523.]

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THIS was a case stated by C. W. Chitty, Chief Judge, for the opinion of the High Court, under s. 69 of the Presidency Small Cause Courts Act (XV of 1882).

The suit was brought by the plaintiff in the Court of Small Causes to recover from the defendant the sum of Rs. 1,300-11-6, being the price of goods sold by the plaintiff to the defendant in Bombay.

It was admitted that the defendant resided in Cutch, out of the jurisdiction of the Court, and that he carried on business in Bombay by a *munim*. It was also the fact that no leave of the Court had been obtained for the institution of this suit.

Several defences were pleaded by the defendant at the trial, but the only one material to this report was the defence that the Court had no jurisdiction to try the suit. At the conclusion of the hearing the Chief Judge gave judgement for the plaintiff, but at the defendant's request he stated a case for the High Court. One of the questions on which the opinion of the High Court was asked was the following :—

Whether the Court had jurisdiction, the defendant not being a resident of Bombay or a British subject, but a resident of Cutch, and no leave having been obtained to file this suit ?

Macpherson and *Inverarity* for the defendant :—The defendant is a foreigner, who does not reside in Bombay, and we contend that the Court has, therefore, no jurisdiction. The jurisdiction of the Court must be based either on cl. (*a*) or cl. (*b*) of s. 18 of the Presidency Small Cause Courts Act (XV of 1882). These **[664]** clauses give jurisdiction, 1st, where the cause of action wholly or in part has arisen within the local limits, and leave has been obtained; 2ndly, where the defendant (*a*) actually and voluntarily resides, or (*b*) carries on business within the local limits. The action is brought to recover the price of goods sold to the defendant in Bombay. The cause of action having thus arisen in Bombay, the Court of course would have had jurisdiction if leave had been obtained (s. 18) ; but it is admitted that no leave was obtained in this case. So the jurisdiction (if any) must arise from some other circumstance, and cl. (*a*) may be excluded from consideration. It is also admitted that the defendant does not reside within the jurisdiction. The sole ground, then, upon which jurisdiction over the defendant can be claimed is that by his *munim* he carries on business in Bombay, and the question is, does this circumstance give the Court in Bombay jurisdiction over a non-resident foreigner ? We say it does not. We contend that the expression "or carry on business" in cl. (*b*) of s. 18 must be read "or *being British subjects* carry on business." The words "being British subjects" must be understood, for the Indian Legislature has no power by its laws to give its Courts jurisdiction over non-resident foreigners. That is a principle recognised by all Legislatures and Courts of Justice—Reports of State Trials, New

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Series, Vol. IV, p. 1331; *Lopez* v. *Burslem* (1); and see *Kessowji Damodar Jairam* v. *Khimji Jairam* (2). Legislatures can only affect foreigners who reside within their territory. In *Macleod* v. *Attorney General for New South Wales*(3) it was held that in an Act of the New South Wales Legislature, inflicting a punishment for bigamy "wheresoever the second marriage shall take place," the word "wheresoever" must be read "wheresoever *in this colony*." We adopt the argument addressed to the Court for the defendant in the case of *Kessowji Damodar Jairam* v. *Khimji Jairam* (2) (see pp. 510, 511 and 512 of the report).

Scott, for plaintiff, *contra*.—The Court has jurisdiction. This Court in construing an Act of the Legislature has no power to add words to it. I contend that the decision in *Kessowji Damodar* [665] *Jairam* v. *Khimji Jairam* (2) was wrong and should not be followed, and I adopt the argument made in that case (see p. 513 of the report) for the plaintiff. In that case Scott, J., added words to the Letters Patent. That case is in conflict with *Harivallabhdas* v. *Utamchand*(4), on which I rely. Counsel also cited *Daniel* v. *Oakley*(5).

Macpherson in reply.—If the words "being a British subject" are not imported into s. 18, cl. (*b*), we impute an intention to the Indian Legislature to do what it has no power to do.

JUDGMENT.

SARGENT, C. J.—The only question which has been argued before us in this Small Cause Court reference is whether cl. (*b*) of s. 18 of the Small Cause Court Act (XV of 1882) confers jurisdiction on the Small Cause Court when the defendant is not a British subject and resides outside the territorial limits of that Court, but is "carrying on business" by a *munim* within those limits. That such "carrying on business" need not be "personal" was, I think, not disputed. The decision of the Madras Court in *Muthaya Chetti* v. *Allan* (6) on the same words in the Letters Patent, and the reasons given by Turner, C. J., for so holding, are, I think, conclusive. The soundness of the early decision of the Madras Court to the contrary in *Subbaraya Mudali* v. *The Government, &c.*, (7) was, I may remark, doubted by Sausse, C.J., and Arnold, J., in *Framjee Cowasjee* v. *Hormasjee Cowasjee*(8).

Passing to the real question in this reference, *viz.*, whether the case of defendants carrying on business within the territorial limits of the Small Cause Court—which it is to be observed are the same as those of the High Court,—must be restricted to British subjects, is not free from authority. In *Kessowji Damodar* v. *Khimji Jairam* (2) Mr. Justice Scott, construing similar words in s. 12 of the Letters Patent, 1865, held that they must be confined to British subjects.

It is to be remarked, at the outset, that the general term "defendants" precedes and governs the whole of the cl. (*b*), and, therefore, *prima facie* it was intended to have the same [666] meaning when read with each of the three several cases mentioned in the clause as giving the Court jurisdiction; and as non-British subjects are clearly subject to the jurisdiction if they are "resident" or "personally work for gain" within the territorial limits of the Small Cause Court, it would be a strained construction of the clause to hold that they were excluded when

(1) 4 Moore's P. C. C. 300, (305).
(2) 12 B. 507.
(3) L.R. (1891) Ap. Ca. 455.
(4) 8 B.H. C. R. (O. C. J.) 236.
(5) 28 Sol. Journal, 477.
(6) 4 M. 209.
(7) 1 M.H. C.R. 286.
(8) 1 B. H. C. R. 221.

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the ground of jurisdiction is that they are "carrying on business" within those limits. The learned Judge who decided *Kessowji Damodar* v. *Khimji Jairam* was not unconscious of this difficulty in excluding non-British subjects, but he held that he ought to disregard it, as "to do otherwise," he said, "would be a violation of the rule that every statute is to be construed and applied, so far as the language admits, so as not to be inconsistent with the comity of nations, or with the established rules of private international law."

There is no authority that I am aware of, nor was any referred to in argument, for there being a rule of construction couched in such very general terms. The rule as stated by Lord Esher, M. R., in the important case of *Companhia de Mozambique* v. *British South Africa Company* (1), is that "the question whether the Courts of a nation will or will not entertain jurisdiction of any dispute is to be determined exclusively by its nation itself, *i. e.*, by its Municipal Law. If by express legislation the Courts are directed to exercise jurisdiction, the Courts must obey. If there is a proper inference to the same effect, the result is the same. But there are certain rules which have, by universal consent, indicated the circumstances from which the inference may properly be drawn." One of those rules, as stated by the Court in *Ex parte Blain* (2), is that, *prima facie*, all legislation is territorial, in the sense, as stated by James, L. J., that, "unless the contrary is expressly enacted or plainly implied, legislation is only applicable to foreigners who by coming into England, whether for a long or short time, have made themselves subject to English jurisdiction," and accordingly the Court in that case held that the Bankruptcy Act is not to be construed so as to give the Court of Bankruptcy power to adjudicate a foreigner bankrupt, who, although member of an English firm, carrying on business in England, had never been in England and had not [667] committed any act of bankruptcy in England. The above principle was doubtless assumed in the decision of the Privy Council in *Lopez* v. *Burslem* (3) and also by the House of Lords in *Jefferys* v. *Boosey* (4), where it was held that tha Copy-right Act did not apply to foreigners resident abroad ; and again in *Macleod* v. *Attorney-General of New South Wales* (5) the Privy Council held that an Act of the New South Wales Legislature, which legislated as to the offence of bigamy, must be confined to an act done within the territorial jurisdiction of New South Wales, but it is to be remarked that these were all cases in which the Legislature conferred a benefit or imposed a penalty as the consequence of some act done or omitted to be done, and, therefore, have no direct bearing on the construction of such an Act as that under consideration. The question is whether the Legislature did not intend to depart from the general territorial rule. It may be true that non-British subjects who do not reside in British India do not make themselves personally subject to to the general Municipal Law of British India, still by establishing their business in British India, from which business they expect to derive profit, they accept the protection of the territorial authority for their business and their property resulting from it, and may be fairly regarded by so doing as submitting to the jurisdiction of the Courts of the country. Moreover, in considering what was the true intention of the Legislature, it is right to bear in mind the special circumstances of the presidency towns in this country as regards the great number of non-British subjects

(1) L. R. (1892) 2 Q. B. 358 (394). (2) 12 Ch. D. 522.
(3) 4 Moo. P. C. C. 300. (4) 4 H.L.C. 815. (5) L.R. (1891) Ap.Ca. 455.

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who carry on trade within them, either personally or by their *munims* and other agents, and are constantly having transactions with British subjects giving rise to causes of action both within and outside the presidency towns, the latter of which do not fall under cl. (*a*)—a circumstance which might well affect the Legislature in determining the jurisdiction of the Presidency Courts, as regards defendants.

These considerations coupled with the general language of the clause, which, as already observed, requires it to be construed as giving jurisdiction to try suits against defendants generally who [668] satisfy any one of the conditions mentioned in the clause irrespective of their being British or non-British subjects, create, in my opinion, a strong presumption in favour of a less strict application of the "territorial" principles of construction above referred to, than was adopted in *Kessowji Damodar* v. *Khimji Jairam*(1) ; and I cannot think that the above considerations are entitled less weight because the construction would enable actions to be brought in the Presidency Courts against non-British subjects on causes of action arising out of British India, or even out of India. Such causes of action would necessarily be personal actions, to which the rule of territoriality has never been applied in England. It was urged, indeed, that the tribunals of other countries would not give effect to the judgment of the Small Cause Court in such cases ; but such an argument is entitled to little weight, if indeed it is not quite irrelevant, as observed by Lord Hobhouse in delivering the judgment in *Ashbury* v. *Ellis*(2) in the following terms :—"When a judgment of any tribunal comes to be enforced in another country, its effect will be judged of by the Courts of that country with regard to all the circumstances of the case."

Upon the whole of I am of opinion that the Small Cause Court had jurisdiction to try the suit, and the question as to the jurisdiction must, therefore, be answered in the affirmative.

STARLING., J.—In this case the plaintiff sues the defendant, who is the subject of a Native State, in respect of a cause of action arising wholly within the jurisdiction of the Bombay Court of Small Causes, alleging that he is carrying on business within the jurisdiction. The fact that the cause of action arose within the jurisdiction will not in this case justify the filing of the suit, because the leave of the Court was not obtained to its being filed in accordance with cl. (*a*) of s. 18 of Act XV of 1882 ; consequently the only point which the Court has to consider is whether a non-resident foreigner carrying on business within the city of Bombay can be sued in the Small Cause Court.

Now it seems to me that, in this case, we have nothing to do with questions of international law. All we have to do is to [669] determine whether the defendant is a person against whom the Legislature has permitted a suit to be filed in the Courts of this country, in which a decree can be passed and executed in this country against the property of the defendant within the jurisdiction, and against his person if he comes within the jurisdiction ; and I am of opinion that the defendant, who admittedly has a firm in Bombay in which he carries on business through his *munim*, is such a person, In this conclusion I am supported by the case of *Ex-parte Blain*(3), in which James, L. J., at p. 526 says: "No doubt it (*i. e.*, the English Legislature) has a right to say, to a Chilian, or to any other foreigner, 'If you make a contract in England or commit a breach of contract in England, under a particular Act of

(1) 12 B. 507. (2) L.R. (1893) Ap. Ca. 339. (3) L.R. 12 Ch. D. 522.

Parliament, a particular procedure may be taken by which we can effectually try the question of that contract, or that breach, and give execution against any property of yours in this country.' But that is because the property is within the protection and subject to the powers of the English law. To what extent the decision of such a question would be recognized abroad remains to be considered, and must be determined by the tribunals abroad. If a foreigner, being served with a writ under the provisions of the Judicature Act, did not choose to appear, and the Legislature said, 'If you do not appear you will commit a default in that way, and we will give judgment against you,' whether that judgment would, under the circumstances, be recognized by foreign tribunals, as being consistent with international law and the general principles of justice, is a matter which must be determined by them." Cotton, L.J., also at p. 531 says: "We are not dealing with the question which might arise if an English Act of Parliament had expressly said that, as against a Chilian subject, or any other alien who had never been in England, the Court should, on certain facts being proved, entertain a petition and make an adjudication. In such a case it might be the duty of the Court, acting in the execution of the English Act of Parliament, whatever the consequences might be and however foreign nations might object, to say, this is the English Statute, and we must act on it, and the question which you, a foreigner, raise, we are bound to disregard."

[670] Now these two passages seem to me fully applicable to this case. The Legislature has enacted that, if a person carries on business within the jurisdiction, a suit may be brought against him, and I do not think we ought to explain away the plain words of this enactment and say that it is not every person who carries on business within the jurisdiction who may be sued, but only British subjects. What a foreign Court might do, if a decree in such a suit were sued upon in such a Court, is not a question which we need discuss, and this is distinctly laid down in the case of *Ashbury* v. *Ellis* (1).

Cases in bankruptcy do not afford much help in the elucidation of the present question, for it is a local enactment extending to England only, and many of its provisions are of a highly penal nature.

In *Ex parte Crispin* (2) it was held that a foreigner who comes to England temporarily, contracts debts, and then commits an act of bankruptcy, can be made a bankrupt although he may be abroad at the time the petition is filed. This decision has never been disapproved of, but on the contrary was quoted with approval in *Ex parte Pascal*(3), in which at p. 512, Mellish, L.J., cites that case, and holds that it makes no difference if the debt were contracted abroad. The real test in these cases is whether the defendant has done within the jurisdiction, either personally or by his authorized agent, an act which brings him within the terms of the enactment applicable to his case, and I do not see any reason why the trading of a foreigner by his servants within the jurisdiction should not be held to be such an act.

The case of *Ex parte Blain* has been relied upon by the defendant, and also by Scott, J., in *Kessowji Jairam* v. *Khimji*(4), as showing that Acts such as the Bankruptcy Act and the present one cannot operate upon foreigners who reside outside the jurisdiction. I do not think that is the effect of *Ex parte Blain*. It seems to me that the *ratio decidendi* of that

(1) L. R. (1893). Ap. Ca. 339.
(2) L. R. 8 Ch. 374.
(3) 1 Ch. D. 509.
(4) 12 B. 507.

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case was that the Chilian partners had never been within the jurisdiction, and consequently could not have personally committed an act of [671] bankruptcy by a particular act of their agents (the English partners) which they had not authorized, and of which they had not cognizance, and that, as such was the case, the Court would not assume that the Legislature intended that an act of partners in England not authorized by the Chilian partners should operate upon the latter, who were not actually subject to the jurisdiction in a case where the operation would result in a compulsory personal attendance in England. If this be the true view of that case, it in no way militates against the conclusion to which I have come.

It has never been doubted that under certain circumstances a suit could be brought in England against a foreigner, and the questions which have arisen have always been as to what was good service of the writ; generally whether it could be served as a matter of course, or whether leave of a Judge must be obtained, or whether notice only of the action should be given. This remark applies to all the cases cited on the recent rules under the Judicature Acts as to suits against firms. Partners can now be sued in the name of their firm, and the questions that have arisen have been as to how service of the writ in the action was to be effected. The Judges have seemed to be of opinion that service as a matter of course in certain instances would be an infringement of international law, but yet it would appear that they admitted the possibility of the writ being served by leave of a Judge. Consequently these cases, in my opinion, only apply to the construction of certain new and rather complicated rules of practice which really do not give us any practical assistance in the present case. Besides which, the question is, not whether a writ can be served, but whether an action can be brought. When one looks at the changes there have been in the rules themselves, and the divergent decisions of various Courts on the rules, it can hardly be said that the practice in England has at present been put upon a satisfactory basis so as to afford unerring guidance to us in such a case as the present.

Attorneys for the plaintiff:—Messrs. *Bhaishankar and Kanga.*

Attorneys for the defendant:—Messrs. *Little, Smith, Nicholson and Bowen.*

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17 B. 672.

[672] APPELLATE CIVIL.

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

In re GULABDAS BHAIDAS.* [15th September, 1892.]

Company—Indian Companies Act (VI of 1882), s. 28—Shares issued as fully paid up—Rights of a purchaser with notice taking from a purchaser without notice—Notice—Contributory.

Twenty shares of the Bella Spinning, Weaving and Manufacturing Company, Limited, were originally allotted to A as fully paid up shares partly for work done, and partly for work to be done for the company. The agreement under which the shares were so allotted was not registered as required by s. 28 (1) of Act VI of 1882.

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* Appeal No. 108 of 1892.

(1) Section 28 of Act VI of 1882 provides as follows:—

"Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same has been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."