

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1909.

KEDARMAL BHARAMAL, APPELLANT AND PLAINTIFF, v. SURAJMAL GOVINDRAM, RESPONDENT AND DEFENDANT. *

September 11.

Pakki Adat agency—Place of performance of contract by Pakki Adatya—Custom—Jurisdiction.

K., a Bombay merchant, employed S. as his agent at Akola on the *pakki adat* system. On K.'s instructions S. entered as his agent into certain contracts at Akola. On an agency account being taken a sum of money was found to be due from S. to K. On K. suing for this sum S. pleaded that the High Court at Bombay had no jurisdiction to hear the suit on the ground that no part of the cause of action had arisen in Bombay.

Held, in the case of *Pakki Adat* agency primarily the place of payment is the place where the constituent resides, but payment should be made in any other place if the constituent has chosen to give directions to that effect and that the High Court at Bombay had jurisdiction to try the suit.

Per CHANDAVARKAR, J.—A *pakki adatya's* liability ceases when hard cash has come into the hands of his constituent.

THE plaintiff was a merchant and a constituent in Bombay. The defendant was the plaintiff's agent at Akola on *pakki adat* system. Under instructions and directions from the plaintiff the defendant transacted at Akola certain *sodas* (contracts) for the forward sale of *jowari* for the Vaida of Falgun Sud 15th, Samvat 1959 (13th March 1905). The defendant also did business for the plaintiff in cotton, cotton seeds and hundies. In the case of cotton, ready cotton was purchased at Akola, and forwarded to the plaintiff in Bombay.

The defendant remitted cash to Ujjain from Akola on the plaintiff's account for which he subsequently drew hundies on the plaintiff at Bombay which hundies the plaintiff accepted and paid in Bombay.

At the foot of the agency account there was a profit payable to the plaintiff who filed this suit for the recovery thereof and for the agency account. As the defendant resided out of

* Suit No. 57 of 1905. Appeal No. 1490.

Bombay the leave of the Court was obtained under clause 12 of the Letters Patent. The defendant contended in his written statement that this Court had no jurisdiction to entertain this suit as no part of the cause of action had arisen in Bombay.

After filing his written statement the defendant took out a Chamber summons, dated 31st March 1905, calling upon the plaintiff to show cause why the leave granted to him under clause 12 of the Letters Patent to institute this suit in this Court should not be revoked and in the alternative why the questions as to whether the monies, if any, due to the plaintiff were payable in Bombay and whether this Court had jurisdiction to try this suit should not be tried as preliminary issues. Affidavits were made on the summons, each party contending that according to the custom of the trade the monies were payable at his place.

Tyabji, J., who heard the summons dismissed the same following his previous decision in *Motilal v. Surajmal* (1).

The defendant appealed against this decision and the appeal Court ordered the following preliminary issue to be tried:—

“Whether the monies, if any, due to the plaintiff are payable in Bombay.”

Batty, J., before whom evidence on this preliminary issue was heard decided that the plaintiff had not proved the custom, that the place of payment was the place where the constituent resided, and that therefore the cause of action did not arise within the jurisdiction of this High Court.

The plaintiff appealed.

Bahadurji (with *Jardine*) for appellants.

We say that the onus is on defendant to establish that the monies were payable at Akola and this onus he has failed to discharge.

Batty, J., held that this onus was on us.

We say the Adatya's duty was to remit and pay in Bombay or if we directed elsewhere then to such place as we might direct.

(1) (1904) 30 Bom. 167.

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That is according to the pakki adat system : see *Bhagwandas v. Kanji* (1).

Payments made by Adatyas to constituents are made in three ways : by (1) hundis, (2) currency notes, (3) making credit entries in Bombay. The witnesses also agree that the constituent has to bear all the charges including the cost of remittance. If exchange is above par it is debited to the principal if below par it is credited to the principal. *See Hiralal Motiram's evidence as to exchange. Interest ceases to run against the Adatya on posting remittance, the reason being that he then ceases to have the use of the money. In case the hundi is lost in transmission the Adatya sends another a Pett Hundi. If the drawee fails then the Adatya recovers from the drawer and credits the constituent with principal and interest. Batty J. seems to have thought that the above circumstances are against us and to have argued why should the principal bear the charges if the monies were payable in Bombay. Our answer is that that is the system upon which the business is carried on. The important point is that the Adatya as soon as he recovers the money holds the money as agent and as agent would be entitled to all his charges under sections 217 and 218 of the Indian Contract Act. The money is payable in Bombay and the Adatya is bound to pay elsewhere, if so desired. We have given evidence of this and the defendant has given no evidence to the contrary. From incidental charges it appears that the money was to be paid in Bombay. Defendant cannot show that the money was to be paid at Akola. See *Rein v. Stein* (2), *Bel & Co. v. Antwerp, London and Brazil Line* (3) ; *Motilal v. Surajmal* (4).

Robertson with Weldon for the respondent.

We contend that the evidence shows that both parties intended that the contract should be carried out where the Adatya was. There is no obligation to pay in Bombay. They are entitled to order us to remit the money, because it is theirs, to Bombay, and we should be obliged to carry out those orders taking due precautions for safety but could they call upon us to go to Bombay and pay

(1) (1905) 30 Bom. 205.

(2) [1892] 1 Q. B. 753.

(3) [1891] 1 Q. B. 103.

(4) (1904) 30 Bom. 167.

cash there? The Akola merchants nearly all agree that the money is payable at Akola. We belong to Akola therefore how could we have understood that payment was to be made in Bombay: *Comber v. Leyland* ⁽¹⁾; *The Eider* ⁽²⁾; *Fry and Co. v. Raggio* ⁽³⁾.

We cannot admit that payment was to be without application indeed we say that application was necessary. Akola currency would suggest that the contracts were to be performed at Akola. In *Hare v. Henty* ⁽⁴⁾ the authorities are collected about a debtor's duty to seek out his creditors.

Strangman in reply referred to *Charles Duval & Co., Limited v. Gons* ⁽⁵⁾.

CHANDAVARKAR, J.—The question in this case is whether the custom set up by the plaintiff is proved. The learned Judge in the Court below has held the custom not proved upon the ground that, according to the witnesses both for the plaintiff and the defendant, what is proved is that the constituent should be paid the money due to him by his *pakka adalia* at the place where he so desires. The learned Judge has also held that as the plaintiff had not given any directions on that point, no part of the cause of action arose within the jurisdiction of this Court and therefore the suit did not lie.

Now, it is to be observed at the outset that the learned Judge has to some extent misapprehended most of the evidence on the custom set up by the plaintiff. The version he has given of some of the evidence is plainly different from what the witnesses have actually said. The effect of the evidence of the witnesses both of the plaintiff and the defendant is summarized by Batty, J., as follows:—“The result of the evidence seems to be (1) that, as plaintiff admits, no place of payment was fixed by the term of the contract: (2) that the place of payment was fixed by custom: (3) that while plaintiff asserts that, according to custom, the constituent's place of business was the place of payment, most of his witnesses admit that where correspondence is silent on the point, payment must be made either where the constituent is or

(1) [1898] A. C. 524.

(3) (1891-92) 40 W. R. 120.

(2) [1893] P. 119.

(4) (1861) 30 L. J. C. P. 302 at p. 303.

(5) [1904] 2. K. B. 685.

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at any other place to which he may direct remittance to be sent: and that this is not a matter of courtsey or favour but a rule of business: (4) that the constituent always has to bear the loss or to take the benefit of exchange: (5) the Adatya's liability for interest ceases with the despatch of the hundi."

That is the way Mr. Justice Batty reads the evidence of most of the witnesses for the plaintiff.

A careful perusal of the plaintiff's witnesses has satisfied me that it is not an accurate description of what they have said. The net result of that evidence correctly read is that primarily the place of payment is the place where the constituent resides, which in the present case is Bombay, but that the payment should be made in any other place, if the constituent has chosen to give directions to that effect.

[After discussing the evidence given by different witnesses, his Lordship continued].

Upon the whole, then, I have arrived at the conclusion that the weight of the evidence is in support of the custom set up by the plaintiff. Batty J. would, I think, have come to the same conclusion if he had not misapprehended the evidence of several of the witnesses.

But it was argued that an inference to the contrary must be drawn from certain circumstances, namely, the *hundyman* system and loss of interest on hundis in transit. I do not think that it is a necessary inference from those circumstances that they are inconsistent with the custom set up by the plaintiff. It must be remembered that the transaction we have to deal with is one between a principal and his agent. Where the latter has to remit to the former moneys which he has collected for the principal he is certainly entitled to charge all the expenses he has to incur in collecting and sending. The evidence shows that *hundyaman* is charged on that account as part of the contract. It is but reasonable that if the custom is that an up-country agent should pay to his principal in Bombay moneys collected by the former on the latter's account, the agent ought to debit the principal with charges incurred in remitting the moneys to Bombay: and that the principal should lose interest

during transit. That is also the conclusion come to by Batty, J., at the page 114 where he remarks :—“ The evidence in this case shows that he undertakes to send such profits not as a debt due from himself but as proceeds realized by him on the constituent's charges, and custom recognises that he is entitled to such charges as an agent as under section 217 of the Contract Act for expenses properly incurred by him in conducting such business.” If then these are the terms of the contract, we do not see how they affect the material question as regards the custom set up by the plaintiff. The learned Advocate General has however sought to bring this case within the principle of *Comber v. Leyland* ⁽¹⁾. He has argued that what the evidence establishes is that the up-country *pakka adatya* has to remit the money to his constituent in Bombay and when he has remitted the money by means of a hundi, then his obligation is at an end. No doubt some of the witnesses have spoken of remittance but they were not asked whether they understood payment and remittance as synonymous expressions. It is merely speculating to suppose that they so understood, especially when we find that most of the witnesses have distinctly stated that the up-country *adatya's* liability ceases, not when he has simply remitted the money but when the money in cash is received by the constituent. One of the witnesses examined by the defendant, *viz.*, Ramanand, says, (page 66) that the constituent will not give credit to the *Adatya* merely because the latter has sent a hundi for moneys due; credit will be given after the constituent has cashed and received actual payment. The effect of the evidence is to prove that the *pakka adatya's* liability ceases when hard cash has come into the hands of his constituent. That circumstance distinguishes the present case from *Comber's*..

For these reasons, I think, the decree of the Court below must be reversed and as the learned Judge in that Court disposed of the suit on a preliminary point, we must remand it for trial on the merits. Plaintiff must bear the costs of the previous hearing of the appeal and have the costs of the present appeal heard before us and the costs of the issues tried in the Court below.

(1) [1898] A. C. 524.

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BATCHELOR, J.—I agree with my learned colleague in the order he has proposed but in deference to the arguments we have heard I think it is desirable to state my views as briefly as possible.

The only question before us is whether the money payable under this contract is payable in Bombay so that the cause of action may be said to have arisen in part within the jurisdiction.

Now it seems to me that this case is one which depends entirely upon its own evidence. What does the evidence show? Does it show that the money is payable in Bombay or does it show only that the money is payable where the principal, the creditor, elects to be paid? In my opinion it shows that the money is payable in Bombay with a discretion to the principal to select some other place for payment if he chooses to do so. [His Lordship discussed the evidence of several witnesses and continued]:—

Then it is said that inference is displaced by the circumstance that admittedly it is the principal who has to bear the charges on account of remittance and of exchange, this latter item including the item of interest. But I cannot take that view. The principal's liability for these charges, if it stood alone, would no doubt be some indication that payment was to be made at Akola, though the indication would be faint inasmuch as the Agent's authority to deduct these charges may be referred to section 217 of the Contract Act. But however that may be, in my opinion, the best answer to the argument is this, that the evidence must be considered as a whole and, so considered, it shows that by the ordinary mercantile usage attached to this form of contract, the contract embodies both stipulations, first, that the money should be payable in Bombay, and secondly, that the Agent should be entitled to deduct these charges. I can see no reason why these two stipulations should not co-exist in the same contract if the parties are minded to combine them. And on the evidence in this case I find that that is precisely what the plaintiff and the defendant elected to do. That in my opinion is the contract which they made. Some assistance to the respondent was sought to be obtained from the use of the phrase

“Akola chalan,” but the word ‘chalan’ means no more than currency and the Akola currency is admittedly the British currency. That being so, it seems to me that the only distinction sought to be introduced was the distinction between the British currency of Akola and the currency of the neighbouring Native State which borders upon Akola. It may be desirable just to notice the case of *Ramin Chettiyyar v. Gopalachari* ⁽¹⁾, though it has not been cited to us. That case is distinguishable inasmuch as there the only fact in the plaintiff’s favour was that he resided at Kumbakonam, and there was no evidence that the debt was payable at Kumbakonam.

For these reasons I agree in the order proposed by my learned colleague.

Attorneys for the appellant:—*Messrs. Wadia, Gandhi & Co.*

Attorneys for the respondent:—*Messrs. Dikshit, Dhunjishah and Soonderdas.*

B. N. L.

(1) [1908] 31 Mad. 223.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

RANCHHODDBHAI VALLUVBHAI (ORIGINAL CLAIMANT), APPELLANT,
v. THE COLLECTOR OF KAIRA, RESPONDENT.*

1909.
February 1.

Bombay Civil Courts Act (XIV of 1869), section 16—Land Acquisition Act (I of 1894)—Assistant Judge hearing a claim—Value of the claim under Rs. 5,000—Appeal lies to District Court and not to High Court—Jurisdiction—Practice and procedure.

Where a claim under the provisions of the Land Acquisition Act, 1894, is heard by the Assistant Judge and the amount in dispute does not exceed Rs. 5,000 in value, the appeal lies to the District Court and not to the High Court.

Taxmi v. Aba ⁽¹⁾, followed.

APPEAL from the decision of K. Barlee, Assistant Judge of Ahmedabad.

* First Appeal No. 149 of 1907.

(1) (1908) 32 Bom. 634; 10 Bom. L. R. 924.