

BOMBAY HIGH COURT

Kedarmal Bhuramal

Vs

Surajmal Govindram

(Batty, J.)

18.06.1907

JUDGMENT

Batty, J.

1. This case was originally before the late lamented Mr. Justice Tyabji who following his own decision in *Mitilal v. Surajmal*² held that payment if claimable from the defendant was to be in Bombay and that leave could therefore be given under clause 12 of the Letters Patent.

2. This case, however, on appeal was referred back that the following issue, viz. whether the moneys if any due to the plaintiff are payable in Bombay, be tried as a preliminary issue.

3. The Advocate General contended that the ruling in *Motilal v. Surajmal*, above mentioned, practically sufficed for the disposal of this case and that the onus was on defendant to show that precedent did not apply. I considered however that it was for plaintiff to show that his case is one within the jurisdiction of the forum which he has selected. Moreover plaintiff cannot even rely on the precedent cited, without showing that the facts are essentially the same in both cases. A large mass of evidence has been taken by this Court since remand, as well as on commission. Mr. Robertson admits, whatever doubt there may be about the law, there is absolutely none about the facts for every one of the witnesses as to the facts has said exactly the same thing. Admittedly the transactions in respect of which the claim is made, were between the plaintiff as Bombay constituent and the defendant as pukka adatyas at Akola on terms described in Original *Suit Kanji v. Bhagvandas*² and in appeal *Bhagvandas v. Kanji*³ The plaintiff's munim offered himself as a witness. Defendant has not come forward to give evidence.

4. The plaintiff's munim Jey Narayan admits there has been no agreement for the defendant to pay in Bombay, but says that is the custom (Note Book 13 p. 7). Later he says the money is to be paid where the creditor is and where he asks the money to be paid. (p. 8). 'If the moneys are payable to us-then' he says 'payment is made in Bombay'. It is well established by all witnesses on both sides, that money due from the pakka adatyas is invariably remitted at the constituent's

charge. If the remittance is sent by Hundi, the constituent credits the pakka adatyas with its cost: and himself bears the loss or takes the benefit of the exchange. Similarly the constituent pays railway charges if the money be sent by Railway (Note Book 14, p. 58). If money-is paid in Bombay through a third firm, exchange is charged by the adatyas as if a Hundi had been sent (p. 57). The constituent does not, until he has received the money, give credit for it to the pakka adatyas but then credit is given as of the date of despatch of the Hundi and from that date the adatyas liability for interest ceases. If a Hundi be dishonoured it is returned to the adatyas and he obtains from the endorser or drawer a Zikri Chithi or Pent and sends it to the constituent. The adatyas, also has to recover interest for the interval and pay it to the constituent (pp. 64 and 09) and then the constituent credits the adatyas as of the date of the original Hundi. (p. 69). There is full agreement on all the above points in the evidence adduced on both sides. Jokhram (p. 58) says if no directions are given to the adatyas the money is remitted to Bombay. Mangalchand (p. 55) says the moneys payable in respect of such business were sent according to the desire of constituents sometimes in Bombay by Hundi. If the Bombay firms makes a profit it depends on whether they desire payment in Bombay or up-country: payment must be made according to the constituent's wishes (p. 54). Dayal Valji says it is the practice for payment to be made in Bombay (p. 59). "If any of our pakka adatyas owed us money, they would have to remit the money to Bombay (p. 60), So also Murlidhar Shivlal : If profit result to up-country constituents the profit is paid up-country, If we make profit as constituents, payment is made in Bombay. Mr. Gill called by the defendant says in examination-in-chief " if we are dealing as commission agents for up-country constituents in forward contracts if profits result to the constituent the money is payable in Bombay (p. 67). Mr. Gill says also the constituent would have to pay in Bombay. We very often remit to the up-country constituents." And in cross-examination he says "if no instructions are given by the up-country constituents as to place of payment profits are paid in Bombay where the contract is made. And further on when I say money is payable in Bombay it is not paid in Bombay without instructions, it is sometimes, not always, remitted up-country without instructions. Finally he states in re-examination that he would remit without instructions in the case of small sums only. Mr. Gill, however says he does not do business on the custom of Shroffs: though he does on the pakki adat system. He does not know the expression Hundiaman used by the other witnesses, but agrees with them that constituents are always debited with the cost of remittances.

5. The voluminous evidence taken on commission, it is admitted, is to the same effect as that recorded by me. In that evidence the following passages relating to the place of payment seem important.

6. Plaintiffs witness Omkarmal says:Nothing is mentioned in the correspondence or telegrams about the place of payment of profit and loss.... If a constituent in Bombay desires us to remit

elsewhere we shall do so."Gangadas, also a witness for plaintiff, says : "Nothing is said in the correspondence about the place of payment.... According to the sarafi system the payment is to be made at the place at which he desires it to be made."

"If the constituent writes nothing, I will send him an account of his money of my own accord and remit the money of my own accord.... Sometimes we get the constituents paid in cash at their own places. If the constituents so desire we shall remit the amount to any place he asks us to send it to.

7. To the question "Do you admit that you obey the directions of constituents generally as a matter of mohobut ? (courtsey or as a favour). This witness answered: "No, there is no such thing as (sic) (mohobut) in the matter. We go by the rules of business"; and later again: "If the constituent asks us to send his money elsewhere than the place of his business I send it not as a matter of mohobut, but as a matter of duty under business rules." Bansidhar, next witness for plaintiff, said : "In the correspondence there is nothing mentioned as to the place of payment of the profit. These sodas take place according to Akola sirasta. If a profit results to the constituent the money is payable to him wherever he orders it. If a Bombay constituent gives me no instructions I will send the money to Bombay....If a constituent asks us to send the money to a place other than his place of business we do so." Of defendant's witnesses, Ramanad says "the amount is payable at Akola and not at Bombay". He differs from plaintiff's witnesses in saying that he sends to enquire as to how the money is to be sent, but is in accord with them in saying " If he (the constituent) requires me to send the money to some other place I would remit the money to that place by Hundi or by money order as he desires." Another of defendant's witnesses Prithiraj says: " The profit which accrues to a constituent is payable at Akola.... I would send the amounts I hold for the constituent at his request to any place other than Bombay." He admits that he has never written to a constituent in Bombay that he would not pay him there but would only pay at Akola, Ramavallabh the next witness for defendant is much to the same effect. 'Mostly' he says 'the amount is remitted to the place of the constituent or as he directs' &c. Later he says : 'My impression is that the sarafi system is the same in Bombay. The sarafi system is that the money is to be sent to the constituent where he is. At the foot of his account it is stated that the money is payable Akola Chelan. The wording does not mean sarafi system. It mean³ that the money is payable at Akola.' Other witnesses say, it means Akola, i.e. British currency. Then giving instances he says : " To their constituents money was remitted by Hundi to Bombay or other places as desired by them".

8. The result of the evidence seems to be (1) that as plaintiff admits no place of payment was fixed by the terms 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 own witnesses admit that when correspondence is silent on the point, payment must be made either where the constituent is or at any other place to which he may direct remittance to be sent; and that this is not a matter of courtesy or favor but a rule of business: (4) that the constituent always has to bear the loss or take the benefit of exchange; and (5) that the adatyds liability for interest ceases with the despatch of the Hundi. Evidence of this nature does not appear to have been adduced before Mr. Justice Tyabji in *Motilal v. Surajmal*. That decision in that case rests on the principles laid down in *Coke on Littleton* and *Shepherd's Touchstone*, 378 and 136 and adopted in *Haldane v. Johnson*⁴ *Fessard v. Mugnier*⁵ and *Robey v. Snaefell Mining Co*⁶. that when no place is fixed for payment, a debtor must seek out his creditor and pay him. In *Motilal v. Surajmal*, Tyabji J. held that Sections 46, 47, 48 and 49 of the Contract Act had no bearing on the case and neither side contends that they are applicable here. Section 46 refers to time only. Sections 47 and 48 apply only when a certain day is fixed for performance and Section 49 when performance is to be without application. The last mentioned section substitutes, as stated in *Pollock's Indian Contract Act*, a reasonable rule for the common law principle followed in the cases above cited and requires reference by the promissor to the promitee for the appointment of a reasonable place for performance. If performance is to be without application and neither day nor place is fixed, Section 49 would apply and exclude plaintiff's contention that the debtor must seek out the creditor and pay at his place of business. The Indian Contract Act makes no provision for the place of performance when no time or place is fixed and when there is no provision to perform without application. But in such case, the ruling in *Bell & Co. v. Antwerp London and Brazil Line*⁷ and not that in *Robey v. Snaefell* would apply. It was there laid down that when the debtor is bound to pay on demand the creditor need not demand his debt at the debtor's place of business or dwelling house or any particular place. He may demand payment from the debtor wherever he may find him. And it was said if the debtor be bound to perform out of the jurisdiction if required, how can it be said to be a contract which according to its terms ought to be performed within the jurisdiction? As plaintiff's case is that Section 49 does not apply, it follows that performance was not promised without application and therefore. *Bell & Co. v. Antwerp L and B. Line* must govern this case unless plaintiff shows that under the terms of the contract, express or implied, he could only demand payment in Bombay. But plaintiff's munim says " there has been no agreement for the defendant to pay in Bombay; but that is the custom." And his own witnesses show that it is a rule of business and not a mere matter of courtesy or favour (mohobut) that the adataya must comply with the constituent's directions if they require payment elsewhere than the place where the constituent resides or carries on business. It follows, I think, that the custom on which the terms as to place of payment depend, reserves for the directions of the constituent the fixing of the place of payment and does not make payment at Bombay a necessary term of the contract. The result is the parties did not agree to terms which would give this Court jurisdiction under clause 12 of the

Letters Patent. I think the same result is attained if regard be had to the customary terms as to the constituent's liability for the cost of remittances and as to the adatyas liability for interest. Whether sent by Hundi or by railway, the constituent and not the adatyas must pay the charges. This indicates that the case does not fall within *Robey v. Snaefell* and that the defendant is not as in that case bound to carry the money at his own charges to the plaintiff. The performance prescribed and promised is of the kind to which illustration (a) of Section 50 of the Contract Act refers. Defendant is discharged by what is to be done at his own place as in *Comber v. Leyland*⁸ When he has despatched the hundi as required, his liability for interest ceases and he is credited from that date. That his discharge is conditional on the hundi being honoured on presentation within due time in no way extends the obligations imposed. It is a necessary part of that obligation. (See Pollock on Section 50 of the Indian Contract Act). His duty is to despatch the equivalent of a specific sum and that duty would not be discharged by sending a hundi dishonoured on presentation any more than by sending bad coin or false currency notes. The fact that he is liable to replace a worthless remittance by a good one, does not show that any further duty is imposed on him than that which he is required to perform at his own place of business. The pakka adatyas duties and his relation to his constituent were investigated in *Kanji v. Bhagvandas*⁹ and defined on appeal (1905) 7 Bom. L.R. 611 as arising from his undertaking to find goods for cash or cash for goods, or pay the difference.

9. Thus, I think the liability he undertakes can hardly be classed with that of an ordinary buyer and seller bound to find out his creditor at his place of business. He undertakes to find a customer, himself or another, at current prices for his constituent and guarantees payment to the constituent of the profits if any. 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 behalf at the constituent's charges and custom recognises that he is entitled to such charges as an agent is under Section 217 of the Indian Contract Act, for expenses properly incurred by him in conducting such business. This, in my opinion, implies that his contract is to do a certain set of services for his constituent which can be performed consistently with the terms of his undertaking at the pakka adatyas own place of business. And in the absence of express or implied promise for performance elsewhere, the undertaking gives rise to no cause of action in any other locality. I do not overlook the fact that letters A B and C refer to Hundis transmitted to Bombay on the constituent's account. But these remittances were admittedly made not in consequence of express agreement as to place of payment, but in accordance with a custom which contemplated the possibility of payment being required elsewhere. And if the constituent could have insisted on payment being made elsewhere, as the evidence as to custom shows, he cannot claim, that performance was promised at Bombay rather than any where else. For these reasons I think the cause of action, was not one arising under the contract within the local limits of this Court's

jurisdiction and that the plaint must accordingly be returned for presentation in a Court having jurisdiction. Costs to be paid by the plaintiff including those of the issue, the summons and the appeal and the cost of the commission.

10. I decide the preliminary issue accordingly against the plaintiff.

Cases Referred.

1(1904) 6 Bom. L.R. 1041 : I.L.R. 30 Bom. 167

2(1904) 7 Bom. L.R. 65

3(1905) 7 Bom. L.R. 611 : I.L.R. 30 Bom. 205

4(1853) 22 L.J. Ex. 264

5(1865) 34 L.J.C.P. 136

6(1887) 20 Q.B.D. 154

7[1891] 1 Q.B. 103

8[1898] A.C. 524

9(1904) 7 Bom. L R. 65