

**(1973) 10 MAD CK 0006**  
**In the Madras High Court**  
**Case No : Appeal No. 575 of 1967**

E.M.E. Shanmugham Chettiar and Others APPELLANT  
Vs  
RM. AN. Annamalai Chettiar RESPONDENT

**Date of Decision :** 16-10-1973

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 20(3)  
Contract Act, 1872 — Section 46, 47, 48, 49, 50  
Limitation Ordinance, 1953 — Section 22(1), 23

**Citation :** AIR 1974 Mad 305 : (1978) 87 LW 292

**Hon'ble Judges :** Ramaparasad Rao, J;Natarajan, J

**Bench :** Division Bench

## Judgement

Ramaprasada Rao, J.—The defendants are the appellants. Plaintiffs and the defendants belong to Nattukottai Chettiar community. The 2nd and the 3rd defendants are the sons of the 1st defendant. On 7-2-1940, the plaintiff's adoptive father K. S. A. K. Raman Chettiar deposited under Ex. A-1, at Koolim in Malayasia S. 2397-53 with the 1st defendant who was then trading under the name and style of Y. M. Y. Firm as a money--lender, and on such deposits the 1st defendant executed Ex. A-1 acknowledging the deposit the deposit and contracting to pay thavanai interest, with three months rest. After the adoptive father's death, on 1-9-1948, the plaintiff wrote Ex. A-5 addressed to the 1st defendant putting on notice of his adoption to Raman Chettiar and his status and right to demand the deposit as above and also apprising the 1st defendant of a legal proceeding between him and his father when he was alive in O.S. 9 of 1942 on the file of Chief Court, Pudukottai, wherein his right to be paid under Ex. A-1 was agreed to between himself and his father. Under Ex. A-2, the decree passed by the Chief Court, Pudukottai in O.S. 9 of 1942,

the plaintiff became entitled to the amount which was in deposit with the 1st defendant under Ex. A-1. The plaintiff, therefore, requested the 1st defendant under Ex. A-5 to credit all the amounts payable under Ex. A-1 in his name, or in the alternative called upon the 1st defendant to execute a fresh letter for the purpose. There was no reply. Thereafter the plaintiff issued the suit notice Ex. A-7 which remained unanswered. He therefore filed the suit based on Ex. A-1, calculating the amount due on the present exchange rate.

2. The first defendant contended that the Y. M. Y. firm at Koolim is still existing, though as and from 1953 the firm is running as a partnership concern consisting of the 1st defendant as father and defendants 2 and 3 as his sons. Exs. B-1, B-3 and B-4 are further documents filed by the first defendant in support of his case that the Y.M.Y. firm, as a partnership firm, is still functioning in Koolim. The 1st defendant admits that S. 2397-53 was credited in the Y. M. Y. Firm in 1940, which was then run by the 1st defendant in his own name and as sole proprietor thereof. According to the defendants, the amount was payable only at Penang under Ex. A-1 and therefore the suit for its recovery laid in the State of Madras, without the same being filed at Penang in accordance with the Malayasian Law, is not maintainable. It was further stated that he claim is barred in accordance with the Malayasian Law. In any event as the amount is a loan and not a deposit, the suit is barred even under the Indian Law.

3. The following issues have been framed (1) Is the suit transaction a deposit or a loan; (2) Whether this court has jurisdiction to entertain the suit, (3) Whether the suit is barred by limitation; (4) What is the correct rate of interest; (5) Whether the suit is not maintainable; (6) To what relief is the plaintiff entitled. The learned Subordinate Judge of Sivaganga found that under Ex. A-1 the amount was deposited under a peculiar contract prevailing in the Nattukottai Chetty community, that it was not a loan pure and simple and that the depoist was payable on demand. He also found that the plaintiff was entitled by virtue of prior civil proceedings between himself and his adoptive further to file the suit. On the question whether the forum in which the action should have been brought was only Penang, the learned Subordinate Judge as a fact found that Penang has been referred to in general terms and in view of the fact that there was no permanent residence or place of business of the first defendant at Penang the suit was

rightly instituted in India and is not barred under the provisions of the Indian Limitation Act, as Article 60 therein would be the correct article which

would apply to the facts of the case. In the result he found that the law of *lex loci contractus* or *lexi loci solutionis* is not applicable and the

Malayasian Law of Limitation is not attracted, and decreed the suit.

4. Mr. Kesava Iyengar, learned Counsel for the appellants, who are father and sons, raised two contentions. Firstly, that under Ex. A-1, the

amount is payable only at Penang, and secondly that the suit is barred under the provisions of the Malayasian Law of Limitation. No other point

was urged excepting incidentally, Mr. Gopalachari, learned Counsel for the respondent, contending contra urged that the claim not being a debt

pure and simple and as there was no rigid consensus between the parties regarding the place of performance, and as the word "Penang" by itself is

of wide import and does not either expressly or by necessary implication connote a specific place of performance, the respondent had to seek the

appellants in India under the provisions of the CPC as the first defendant, the principal debtor, is admittedly residing in India. He would therefore

sustain the judgment.

5. We shall not consider the important content of Ex. A-1. The money was deposited at Koolim by the plaintiff's father with the first defendant. At

that time the first defendant was doing business under the name and style of Y. M. Y. Firm, but as sole proprietor thereto. Defendants 2 and 3 had

no connection with the said business at that time. In fact, they have been impleaded herein as sons of the first defendant, so that any decree against

the assets of the first defendant in their hands. No doubt, under Ex. A-1, there is a stipulation that the first defendant would repay the same at

Penang. Based on this solitary contractual obligation, Mr. Kesave Iyengar, relying upon Sections 47 to 49 of the Contract Act, urged that the

place of performance is Penang and Penang only, and any suit to recover the deposit as evidenced by Ex. A-1, cannot be maintained in a place

other than the courts in Malayasia situate in Penang.

6. Sections 46 to 50 to the Indian Contract Act deal with the time and place of performance of contracts. Reliance was placed upon Section 47

which runs as follows-

When promise is to be performed on certain day, and the promisor has

undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day, and at the place at which the promise ought to be performed.

No doubt, the first defendant agreed to perform his obligation without reference to the promisee, namely, the plaintiff's father. The contractual prescription as to the place of performance enumerated in S. 47 is for the guidance of the promisor, namely, the first defendant, with which the promisee, namely, the plaintiff's father or the plaintiff, has nothing to do. Even assuming that the agreed place of performance of contract is Penang, the statutory obligation is on the first defendant to offer to perform the contract in accordance with the terms of Ex. A-1. In the instant case there is no evidence, nor is it contended that the first defendant so offered to perform the contract at the place stipulated, namely, Penang, at any time after the execution of Ex-1. In his evidence the first defendant would admit that he returned to India in 1941, from Koolim and that he did not go to Malaya after 1941 and for the past 10 or 15 years he had no passport to visit Malaya. It is very clear that soon after, and indeed a year after, the first defendant executed Ex. A-1, he came away to India and never intended to perform the contract even according to the interpretation placed by him through his counsel. It is therefore clear that the first defendant as promisor did never exert himself to perform the contract at the alleged place at which the promise ought to be performed. He cannot therefore approbate and reprobate and call for his assistance Section 47 of the Contract Act. Surely u/s 47 there is no legal obligation on the part of the promisee to seek for performance of the contract at the place where the promisor ought to have performed the contract. it is open to him to avail himself of the common law and seek his debtor and institute an action in accordance with the law of that country in which he seeks to file the same and recover the amount due under Ex. A-1. This is what the plaintiff has done.

7. Though the English doctrine that the debtor should seek the creditor is not of general application in India and has to be applied with caution, yet the invocation of the rule depends on the facts and circumstances of each case. In a given case, if the contract does not provide either expressly or by necessary implication the place of performance, then out of necessity and exigencies of those circumstances the debtor should seek the creditor

and offer to perform his part of the contract. Thus though the rule of English common law is not unreservedly applied in India and there is pronounced disinclination to adopt the same, yet it is now settled out that the place of payment has to be determined independent of the above maxim taking into consideration the following factors (1) terms of the contract (2) the circumstances attendant upon it, (3) necessities of the case and (4) the statutory provisions of law such as those contained in the Contract Act or in the Civil Procedure Code. Bearing the above principle in mind, we can at once dispose of the serious contention of Mr. Kesava Iyengar, that the deposit was repayable only at Penang. The expression that the money will be paid at Penang is of an uncertain import. The first defendant was carrying on business in Koolim. He had no business at Penang at or about the time when he executed Ex. A-1. Even the evidence let in to substantiate that, as on the date of suit the first defendant is a partner of a firm at Koolim, does not establish that he has a business place at Penang. He would only pretend that he has business connections in Penang, which is 30 miles away from Koolim. There is no clinching evidence to show that there is a place of business of the first defendant either in his individual capacity or as a partner at Penang. It is only in circumstances, where the place of performance could be deciphered from the terms of a contract the argument that the cause of action primarily arises only at that place could be successfully urged. But if a contract does not provide either expressly or by necessary implication such a place of performance then we have already referred to the general provisions which would be availed of by a creditor for instituting a suit on such a contract and in a court where the defendant has his usual place of residence. It is not in dispute that ever since 1941 the first defendant as the borrower under Ex. A-1 was residing in Mahibalampatti, Tirupattur taluk, Ramanathapuram Dt., South India. It is the court which has jurisdiction over this place which was resorted to by the plaintiff for recovery of the deposit under Ex. A-1.

1. This would squarely satisfy the essential factors which are necessary to be considered to determine the place of performance of a contract if such a place is not named or such could not be found by necessary implication either. The suit, therefore, cannot be said to have been improperly laid.

8. The other alternative argument of Mr. Kesava Iyengar is that the first defendant should be deemed to be carrying on business at Koolim since he was running a partnership firm, though along with his sons the second and the third defendants. No doubt, there is evidence under Exs. B-1, B-3 and B-4, which touch upon the partnership business carried on by the defendants. Under Ex. B-1 the general nature of the business is described as real property owners and the date of commencement of business is given as 1-1-1951. Here again we have a reference to the usual residence of the 1st defendant as Mahibalampatti, Tirupattur Taluk, Ramanathapuram Dist. South India, whereas the usual place of residence of defendants 2 and 3 is given as 64, Jalan Roya, Koolim. The partnership business apparently was started 11 years after the 1st defendant received the deposit under Ex. A-1. The nature of the business in the partnership is not money-lending business. It is not known, nor is there any evidence to show that the partnership business took over all the obligations and responsibilities of the first defendant as the proprietor of the Y. M. Y. Firm, which was solely a money-lending firm. D.W. 1 in his evidence would say "In our accounts, the amounts have been credited in the name of K. S. A. K. Raman Chettiar of Arimalam (plaintiff's adoptive father)". It is not clear as to what he means by "our accounts", because he was asked to produce his kurippu and peredo (ledger and daybook), but in his evidence he says "I have not produced them". He will hesitantly say in the box and that the second and third defendants also are doing money-lending business, but he does not know in what vilasam they were doing such business. There is therefore no positive evidence adduced by the 1st defendant that defendants 2 and 3 have taken over all the responsibilities and obligations including that arising under Ex. A-1, when the partnership business was started in 1951. On the other hand, we have no hesitation in coming to the conclusion that the transactions which the first defendant had as sole proprietor of the Y. M. Y. Firm in 1940 were distinct and separate from the partnership business started by him along with his sons in 1951 not only because the nature of the business is different but also because there is no continuity in the quondam Y. M. Y. Firm. There is no nexus between the quondam proprietary firm of Y. M. Y. with the laterly constituted firm of Y. M. Y. in the name of all the defendants. Defendants 2 and 3 discreetly kept themselves outside the box. If, therefore, the

contracts as reflected under Ex. A-1 is a pointer to a specific dealing as between the plaintiff's father on the one hand and the first defendant on the

other, then the plaintiff's father or his successors in interest, namely, the plaintiff, could only bring a personal action against the promisor on the

basis that it is a deposit payable on demand by the promisor. The plaintiff cannot in the circumstances file a suit against the partnership firm of Y.

M.Y. Which is a stranger to the contract and with which neither the plaintiff nor his father had any dealings.

9. We have already referred to the fact that the first defendant came away from Koolim in 1941 and settled in Mahibalampatti, Tirupattur Taluk,

Ramanathapuram, Dist., South India, and never returned to Dist., South India, and never returned to Malaya. It has not been established that the

Y. M. Y. firm which belonged to the first defendant on the date when the deposit was taken, ever had a place of business after 1941 at Penang or

at Koolim. Again, there is no evidence to show that the quondam Y. M. Y. firm had any place of business at Penang. On the other hand, we have

already referred to the fact that the partnership firm of Y. M. Y. had no place of business at Penang. Under these circumstances, we do not agree

with Mr. Kesava Iyengar, that the suit ought to have been filed at Penang in accordance with the Malayasian law.

10. There is evidence to show that the plaintiff called upon the 1st defendant even in 1948 to make necessary entries consequent upon his

acquisition of a right to demand the deposit and claim for a payment thereof. The first defendant did not even then offer to pay the amount at any

specified place in Penang, nor did he reply to the said demand. The suit notice was not answered. In these circumstances, we conclude that the suit

has been properly laid and the forum has been rightly selected.

11. The suit is for the recovery of money. Whatever may be the legal position of similar contracts entered into outside India between a citizen and

an institution, such as a bank or an incorporated company having various branches, as was pointed out in State Aided Bank of Travancore v.

Dhritram 1942 2 MLJ 256 = AIR 1942 PC 6, it cannot be said that an action to enforce payment of money by an ordinary citizen under a written

contract entered into outside India, can only be instituted in a place otherwise than in India. In the above case the plaintiff who was a permanent

resident and employee in Bombay wrote in September, 1936, to the State Bank of Travancore at Allepey and enquired about the rate of interest

allowed on fixed deposits. On 1-10-1938, the plaintiff paid Rs. 11,000/- to the account of the Bank in the National City Bank of New York,

Bombay, filled up the necessary forms and wrote to the Bank at Allepey requesting them for the issue of a fixed deposit receipt. On 6-10-1938,

the bank issued the deposit receipt with effect from the 1st inst. Similar transaction took place in March 1937 also. In March 1938, when the

second deposit became due, the bank was in difficulties and was postponing payment. All proceedings against the bank were stayed. A scheme of

arrangement was approved by the creditors. Thereafter the plaintiff commenced an action in Bombay to recover the amounts due to him. In those

circumstances, it was held that the place where the contract was made as well as the place where the contract was to be performed was

Travancore and the law of the State governs the transaction. The learned Law Lords gave sufficient weight to the fact that the dealings were with a

banking institution and in such cases a banking transaction should be deemed to have been entered into at the only office of the Bank wherein

ordinary banking business of this kind has to be completed. In these circumstances, they held that the contract in that case was to be performed at

Travancore. We may at once refer to *Re Helbert Wagg and Co. Ltd.*, 1956 1 All ER 129. The learned Judge quoted Romer, L.J., and observed

that he knows of no authority for the proposition that a simple contract debt is situate in a country at a time when the debtor is not resident there.

Cheshire on Private International Law, 7th Edn. at page 421, has succinctly put the proposition thus:

This rule, that a chose in action, such as a right to recover a loan or money due under an insurance policy, is situated in the country, where the

debtor resides, encounters an apparent difficulty where, as will often occur in the case of a Corporation, the residence extends to two or more

countries. Although the place of residence is chosen because it is there that recovery by action is possible, it has been suggested that a debt is

situated in the country where it is payable even though this does not represent the residence of the debtor. The courts, however, have not taken this

view. They have insisted that the residence of the debtor is "an essential element in deciding the situs of the debt." If the debtor resides in two or

more countries, then, indeed, the debt is situated in the one in which "it is required to be paid by an express or implied provision of the contract or,

if there is no such provision, where it would be paid according to the ordinary course of business". If, however, the debtor resides only in one

country, it is there alone that the debt is situated notwithstanding that it may be expressly or impliedly payable elsewhere"".

In *Muthukanni Mudaliar Vs. Andappa Pillai and Another*, , Rajamannar, C.J., presiding over the court, observed that a suit can be instituted for

personal relief against a defendant in a court within the local limits of whose jurisdiction the defendant is residing or carrying on business on the date

of the institution of the suit, wherever the cause of action for the suit had arisen, and to such a suit, the provisions of the statute of limitation in force

in the country of the forum i.e., the "lex fori" would apply. In *N.S.K.R. Karuppan Chettiar and Another Vs. AR. VR. S. Somasundaram Chettiar*

and Others, , the principle that the law which governs a contract depends on the intention of the parties, express or implied, has again been

reiterated. When there is no intention expressed in the document which is decipherable, clearly courts are left to infer the intention by reference to

considerations where the contract was made and how and where it was to be performed. Considering the authorities, we are of the view that the

plaintiff was in order in seeking the forum of an Indian court for relations of the deposit after demand as it was well within the law of limitation

availing in this country to do so.

12. As the plaintiff's status and the right to demand payment of Mr. Kesava Iyengar is whether the suit is barred by limitation under the Malaysian

Law of Limitation. The Limitation Ordinance, 1953 of the Federation of Malaysian Law of Limitation. The Limitation Ordinance, 1953 of the

Federation of Malaya was referred to for the purpose. Section 23 of the said Ordinance, which was solely relied upon, runs thus:--

Subject to the provisions of sub-section (1) of Section 22 of this Ordinance, no action in respect of any claim to the personal estate of a deceased

person or to any share or intestacy, shall be brought after the expiration of 12 years from the date when the right to receive the share or interest

accrued, and no action to recovery arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the

expiration of six years from the date on which the interest became due.

13. This section is inapplicable even if it is said that the Malaysian law is attracted in the instant case. Here the claim is not in relation to an estate of a deceased person or to any share in such estate. As already pointed out, the plaintiff obtained a right in himself to demand the deposit under Ex.

A-1, even when his father was alive. Therefore, this section is not applicable. But off the record Mr. Kesava Iyengar relies on one other section to

sustain his contention as to the bar of the suit under the Law of Limitation availing in Malaya. The first defendant cannot take advantage of the said

Law of Limitation since he came away from Malaya in 1941 and ceased his connection therein. He chose Mahibalampatti as his permanent place

of residence. He has to place his business at Penang, and, as already stated, the word "Penang" is vague and uncertain and cannot therefore be

understood as a definite place where the performance can be demanded. We have already dealt with this aspect and referred to Section 20(3),

CPC which enable the plaintiff to file the suit in India, since the first defendant was a permanent resident therein. In accordance with Article 60 of

the Limitation Act, the cause of action is not barred until the lapse of three years from the date of demand. The plaintiff demanded payment by

notice Ex. A-7 dated 15-10-1963 which was acknowledged by the first defendant in Ex. A-8 on 16-10-1963. The plaint was filed on 9-10-1966

well within three years from the date of demand. As the law of *lex fori* applies to the facts of

this case, we are in agreement with the learned Subordinate Judge, that no provision of the Limitation Ordinance, 1953 of the Federation of

Malaya will non-suit the plaintiff. For all the above reasons the appeal fails and is dismissed with costs.

14. Appeal dismissed.