

(1961) 10 RAJ CK 0007
In the Rajasthan High Court
Case No : Civil Revision No. 14 of 1958

Firm Shah Chandanmal Fatehraj and Others	APPELLANT
Vs	
Hazarilal	RESPONDENT

Date of Decision : 28-10-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20
Contract Act, 1872 — Section 49
Sales of Goods Act, 1930 — Section 25(1), 39

Citation : AIR 1962 Raj 122 : (1961) RLW 606

Hon'ble Judges : Jagat Narayan, J

Bench : Single Bench

Advocate : J.P. Jain, for the Appellant; P.C. Bhandari, for the Respondent

Final Decision : Dismissed

Judgement

Jagat Narayan, J.—This is a revision application by the defendants against an appellate order of the Senior Civil Judge, Baran, holding that the Court of Munsif Baran has jurisdiction to try the suit.

2. Hazari Lal plaintiff is a resident of Baran. Bhanwarlal and Mishrimal defendants carry on business at Merta under the name and style Shah Chandanmal Fatehraj. The plaintiff placed a "biltycut" order with the defendants for the purchase of a wagon load of wheat to be booked for Bangalore. The defendants asked the plaintiff to send an advance and drew a Hundi Ex. 12 on him for a sum of Rs. 1500/-. This Hundi was presented for payment to the plaintiff through a bank at Baran on 4-8-54 and was duly honoured. The defendants consigned a wagon load of wheat for Bangalore and sent the railway receipt with Beejak Ex. 9 and Hundi Ex. 13 for Rs. 7,750/- the full price of the wheat at "biltycut" rate, drawn on the plaintiff to the latter through the bank at Baran. By then the defendants had not received intimation about the payment on the earlier Hundi. It was however noted on the Beejak that if the sum of Rs. 1500/- had already been paid then it would be accounted for in the next transaction. It may be mentioned here

that the plaintiff had placed a further order for the despatch of wheat with the defendants by then. Hundi Ex. 13 was presented to the plaintiff for payment at Baran on 9-8-54 through the bank and was duly honoured by him. The second order for despatch of wheat was cancelled by the plaintiff. Thereafter he sent his man to Merta to get the money. These facts are admitted. What happened after that is disputed.

3. The plaintiffs case is that in Beejak Ex. 9 the following excess charges were made by the defendants:

(1)

Rs

86

10

0

in the price.

(2)

Rs

4

13

6

charged as Dharmada which was not recoverable on the transaction.

(3)

Rs

76

14

3

charged as agency commission which was not recoverable on the transaction.

He asked the defendants to return the above amounts together with the sum of Rs. 1500/- which had been paid as advance, but they did not return the money in spite of several demands by letters and telegrams. The plaintiff also sent his man twice to Merta to get the money, but the defendants did not make the payment. He then instituted the present suit at Baran on 17-9-54 for the recovery of the above amounts together with a sum of Rs. 84-0-6 as the expenses of the man who went to Merta to bring the money and Rs. 2-15-0 spent on sending telegram to recover the money.

4. The suit was contested by the defendants. Their case was that Dharmada and agency commission were payable, that they had already purchased wheat on the second order of the plaintiff, that they incurred loss on account of the order being cancelled and that they arrived at a settlement with the representative of the plaintiff who came to Merta under which it was agreed that a sum of Rs. 150/- would be paid as loss by the plaintiff to the defendants. The defendants drew a cheque for Rs. 1350/- on 20-9-54 after the suit had been filed and sent it to the plaintiff. The defendants also took a plea that the court at Baran could not try the suit.

5. The learned Munsif held that he did not have jurisdiction to try the suit as no part of the cause of action arose at Baran. He distinguished the decision of this Court in Chiranjilal Vs. Sumer Oil Mills, on the ground that there was no term in the contract in the present case that the railway receipt would be sent to the plaintiff at Baran. He also relied on some rulings in which it was held that a suit against a commission agent could only be instituted in a Court exercising jurisdiction at the place where he carries on business. Against this decision the plaintiff filed an appeal. The appellate court reversed the decision of the trial court relying on the following decisions of this Court:

Kishan Lal and Another Vs. Bhanwar Lal, : Chiranjilal Vs. Sumer Oil Mills,

Against the decision of the appellate court the present revision application has been filed.

6. On behalf of the applicants an attempt was made to distinguish the above two decisions of this Court Further some decisions of other High Courts were referred to in which a different view was taken.

7. I shall first deal with the two decisions of this Court referred to above. In Kishan Lal and Another Vs. Bhanwar Lal, the plaintiffs were the owners of two firms, one situated at Jodhpur and the other at Indore and both these firms were acting as commission agents. The defendant who was a resident of Jodhpur entered into certain forward transactions of bullion with the Indore firm which resulted in, a loss, a part of which was paid by the defendant to the firm of the plaintiffs at Jodhpur. The plaintiffs paid the entire amount of loss to third parties at Indore and instituted a suit at Jodhpur to recover the balance from the defendant who resisted the suit inter alia on the ground that the transactions were illegal in view of a notification dated 3-6-43 issued by then State of Marwar under the Defence of India Act and Rules as in force there. It prohibited forward transactions in bullion where the date of delivery was more than 12 days after the contract and provided a punishment for breach of its provisions. The suit was dismissed by this Court. The following observation was made in para 13 of the R. L. W. report: (para 13 at p. 83 of AIR):

"The contract of agency implied that if as a result of the transactions profits accrued, they were to be payable by the plaintiffs to the defendant, and if losses accrued, they would be paid by the defendant to the plaintiffs. The defendant,

like any other reasonable person, entered into this business with an expectation of profits though losses might occur. The payment of profits to defendant or losses to plaintiffs must be deemed to be part of the contract of agency. As no specific terms have been alleged to have been settled between the parties, the general law will apply in deciding the place where those profits or losses were to be paid. The general law is that the debtor must find the creditor and in that view it must be held that part of the contract between the parties was that on accrual of profits they were to be paid by the Indore firm to the defendant at Jodhpur, or in other words, that a part of the contract was to be performed in Marwar. It may equally be held that part of the contract was that if losses accrued, they were to be paid by the defendant to the Indore firm at Indore. The fact that they were actually paid at Jodhpur under instructions of the Indore firm does not indicate, that it was part of the contract to do so at Jodhpur. The Indore firm may have, for instance, on the occurrence of losses, arranged with any bank at Jodhpur to receive payment from the defendant, but unless this may have been done as part of the original contract, it is of no consequence in arriving at the place of performance of this part of the contract".

A perusal of the judgment shows that there was no special term in the contract from which the above inference was drawn. The observations are of a general nature.

8. The decision of the High Court in the above case was reversed by their Lordships of the Supreme Court in *Kishan Lal and Another Vs. Bhanwar Lal*, On behalf of the applicants it was argued that the above observations made by this Court were impliedly overruled by the Supreme Court. A perusal of the judgment of their Lordships however goes to show that the above observations were neither approved nor disapproved. The above observations of this Court therefore stand unaffected and are applicable to the facts of the present case. In this view of the matter as money was admittedly payable by the defendants to the plaintiff the present suit was triable by the court at Baran where the plaintiff resided.

9. In 1952 Raj LW 436: *Chiranjilal Vs. Sumer Oil Mills*, a contract was entered into between the parties at Udaipur for the supply of Til seeds to the plaintiff who resided at Kishangarh within the jurisdiction of the Jaipur Court. The defendant carried on business at Ratlam. The defendant was to load the Til in a wagon at Ratlam and was to obtain a railway receipt which was to be sent to the plaintiff at Kishangarh through a bank and was to be delivered to him upon payment of the price of the Til as well as other charges. It was held that a part of the cause of action arose at Kishangarh inasmuch as the railway receipt which alone would have entitled the plaintiff to take delivery of the goods was to be delivered at Kishangarh.

10. On behalf of the applicants it is sought to distinguish this case on the ground that in the present suit the plaintiff has not made any allegation in the plaint that it was a term of the contract that the railway receipt would be sent to him at

Baran.

11. It is true that the plaintiff did not plead in the plaint that it was an implied term of the contract that the railway receipt would be sent to him at Baran where he would make payment. He however pleaded that the transaction was a Bilticut one. The incidents of such a transaction are now well known and the technical defect in the drafting of the plaint can be overlooked in the interest of justice.

12. "Bilti" is the Hindi word for a railway receipt. A Bilticut rate includes the cost of bagging weighing, transport to the railway station, loading in wagons, and other station charges till the Bilti is issued. The well known and usual practice of the trade is to consign the goods to self, to endorse the railway receipt in favour of a bank at the place of the buyer of goods and to present it through the bank to the buyer. The buyer makes payment to the bank which endorses the railway receipt in his favour and delivers it to him.

13. The property in the goods does not pass to the buyer upon the delivery of the goods to the railway u/s 39 of the Sale of Goods Act as the goods are not delivered for transmission to the buyer within the meaning of that section. For the goods are consigned to self so far as the railway is concerned.

Section 25(1) of the Sale of Goods Act becomes applicable in such a case. The seller reserves right of disposal of goods until delivery of the railway receipt is taken on payment. It is only when the buyer makes the payment and takes delivery of the railway receipt that the property in the goods passes to him.

14. The place of payment in transactions of this nature is the place where the buyer resides. For payment is to be made by him at that place on presentation of the railway receipt.

15. It was thus implicit in the plaint that the railway receipt will be sent to the plaintiff at Baran where he would make the payment. The decision in 1952 Raj LW 436 : Chiranjilal Vs. Sumer Oil Mills, is thus applicable to the present case.

16. u/s 20(c) of the CPC a suit can be instituted in a court within the local limits of whose jurisdiction the cause of action wholly or in part arises. The words "cause of action" mean necessary conditions for the maintenance of the suit and include material facts which give jurisdiction to the court in which the suit is instituted. In a suit arising out of contract the cause of action arises at any of the following places:

(a) the place where the contract was made,

(b) the place where the contract was to be performed, or performance thereof completed,

(c) the place where, in performance of the contract any money to which the suit relates was expressly or impliedly payable.

As delivery of the railway receipt to the buyer after endorsing it in his favour is

necessary to give him title to the goods, the place where it is to be delivered is the place where the performance of the contract is to be completed. This is the basis underlying the decision in 1952 Raj LW 436: Chiranjilal Vs. Sumer Oil Mills,

17. As has been pointed out above in a contract of this nature the place of payment of money is the place where the buyer resides. The court of that place has therefore jurisdiction to try a suit arising out of such a contract. In this connection the following decisions may also be referred to:

K.E.P.V. Venkatachalam Pillai Vs. Rajaballi M. Sajun, Jagdish Prosad v. Produce Exchange Corporation Ltd., AIR 1946 Cal 245; Lakshmipathi v. Mohamed Ghani, AIR 1947 Mad 83 Shimoga Oil Mills v. Radhakrishna Oil Mills, AIR 1952 Mys 111 Firm Hajarimal v. Firm Gulabchand Udechand, AIR 1956 Nag 118 ; Ram Lal and Others Vs. Bhola Nath and Others,

In the last mentioned case the goods were sent by value payable parcel post by the defendant from Delhi to the plaintiff at Kasganj. On taking delivery the plaintiff found that the parcel did not contain the goods which he ordered. He accordingly instituted a suit at Kasganj against the Delhi firm for damages. It was held that the suit had been correctly filed at Kasganj on the ground that the contract was not completed till delivery was made and the goods paid for at Kasganj.

18. I accordingly find that the place where payment for the goods purchased by the plaintiff was to be made was Baran. The Court at Baran has therefore jurisdiction to try the present suit which arises out of the contract on this ground as well.

19. On behalf of the applicants the following decisions were referred to in which the view taken was that a suit against a commission agent only lies where he carries on business:

Firm Ramditta Mal Sant Lal v. Firm Jot Ram Kidar Nath, AIR 1940 Lah 171; Firm Brij Raj and Co. v. Firm Sagarmal Dhan Raj, AIR 1952 Punj 119; Prem Nath v. Kaudoomal Rikhiram, AIR 1958 Punj 361, Shah Ganpat Pasu and Co. v. Gulzarilal, AIR 1958 Madh Pra 409; Tika Ram v. Daulat Ram, AIR 1924 All 530.

With all respect I find it difficult to see why a suit cannot be brought against a commission agent at a place other than that where he carries on his business if the cause of action in part arises there within the meaning of Section 20, Code of Civil Procedure. In a bilticut transaction of the nature of the one in suit it is the buyer who incurs all the risk and the seller does not incur any risk. The seller takes an advance sufficient to cover his costs and the probable fluctuations in the market rate before loading the goods on the railway. The railway receipt is only delivered to the buyer on payment of the MI price. It is only after paying the full price that the plaintiff can find out whether or not the goods have been supplied in accordance with the order. There is no reason why the commission agent should receive preferential treatment in the matter of the institution of a suit in a

case of this nature.

20. It was held in *Kedarmal v. Sarajmal*, ILR 83 Bom 364 that in the case of Pucci Adat agency the place of payment is the place where the constituent resides. A Pucca Adatia is an agent who carries on transactions in his own name on behalf of the principal. A Kachcha Adatia on the other hand carries on transactions on behalf of the principal in the name of the latter. He is more like a broker. In the present case the applicants are Pucca Adatias.

21. Another aspect of the present case is that it is primarily a suit for the recovery of a sum of Rs. 1500/- deposited by the plaintiff with the defendants as advance in respect of some transactions which did not take place. Such deposit being a debt the defendants are bound to repay it to the plaintiff at the latter's place. In this connection the following decisions may be referred to: AIR 1952 Mys 111 *Champaklal Mohanlal Vs. The Nectar Tea Company*, *Muhammad Esuff Rowther Vs. M. Hateem and Co.*, *Gappulal v. Kanderwal Bros.* AIR 1955 Mad 96 *Man Mal v. Firm Dhanraj Santok Chand*, ILR (1960) Raj 43 *Hari Das v. Shanker Lal*, ILR (1960) Raj 187 AIR 1927 156 (Privy Council) In the last mentioned, case their Lordships of the Privy Council observed:

"It is quite true the contract does not say where Messrs. Jeetmull are to pay, but it does say, by an implication which is indisputable that they are to pay Messrs. Tata, Sons and Company, and it follows that they must pay where that firm is. Hence one would think that upon the face of this contract, not indeed in express terms, but by the clearest implication, payment is to be made in Rangoon."

22. It was urged before their Lordships that this constituted an importation of a technical rule of the English Common Law into the jurisprudence of India, namely, the rule that the debtor must seek out the creditor. Adverting to this argument, it was observed by their Lordships that:

"The simple answer to that would have been that, on the contrary it was a mere implication of the meaning of the parties.""

23. Then, their Lordships referred to *Motilal Pratab Chand v. Surajmal Joharmal*, ILR 30 Bom 167 in which it was held that:

"Where no specific contract exists as to the place where the payment of the debt is to be made, it is clear, it is the duty of the debtor to make the payment where the creditor is",

24. Their Lordships also referred to *Dhunjisha Nusserwanjee v. A. B. Forde*, ILR 11 Bom 649; in which it was held that:

""In the absence of stipulation in the contract itself, the intention of the parties to it was to guide the Court in determining the place of its performance."

25. Then, referring to certain other authorities and Section 49 of the Indian Contract Act, their Lordships observed as follows:

"Their Lordships do not think that in this state of the authorities it is possible to accede to the present contention that Section 49 of the Indian Contract Act gets rid of inferences that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him. The rule in Section 49 is one which it was intended should apply both to the delivery of goods and to the payment of money, to which obviously different considerations apply from those applying in a case like the present, where the question is one of jurisdiction, and their Lordships are satisfied that an intention is shown in the contract that payment should be made in Rangoon."

26. Another view of the matter is that if the defendants had asked the plaintiff as required by Section 49 Contract Act to appoint a place he would certainly have appointed Baran as the place of payment.

27. It was observed in AIR 1955 Mad 96.

"The plaintiff's suit is for the recovery of the advance money, because of the breach of the contract to supply pipe. Now with regard to the recovery of the amount of deposit or advance under breach of contract, the principle of law is that unless the right is excluded by the terms of the contract, money paid for consideration which fails becomes money received by one party to the use of the other party and is recoverable as a debt. The moment the agreement is broken there is either failure of the consideration or there is an equity in favour of the plaintiff which impliedly makes the retention of the amount of the deposit or advance a debt due by the defendant to the plaintiff."

It will thus be Seen that the view taken by this Court in the cases of Chiranjilal Vs. Sumer Oil Mills, and Kishan Lal and Another Vs. Bhanwar Lal, so far as their application to the facts of the present case is concerned, is supported by the decisions of other High Courts as well.

28. In the result I hold that the decision of the appellate court that the suit is triable by the court at Baran is correct and dismiss the revision application. In the circumstances of the case, I direct that parties shall bear their own costs of this revision application.