

(1967) 07 GUJ CK 0012

In the Gujarat High Court

Case No : Civil Revision Application No. 967 of 1963

H.S. Shobasingh and Sons

APPELLANT

Vs

Saurashtra Iron Foundary and Steel Works (Pvt.) Ltd.

RESPONDENT

Date of Decision : 14-07-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20
Contract Act, 1872 — Section 49

Citation : AIR 1968 Guj 276 : (1968) 9 GLR 932

Hon'ble Judges : N.K. Vakil, J

Bench : Single Bench

Advocate : N.R. Oza, for N.S. Parghi and D.K. Vyas, for the Appellant; R.C. Mankad and B.K. Mehta, for the Respondent

Judgement

(1) This revision application raises a question of jurisdiction of the Court of the Civil Judge (Junior division) at Bhavanagar to grant reliefs asked for in Civil Suit No. 423 of 1962 filed by the present opponent against the applicant. The parties had entered into correspondence whereby the opponent had placed an order for 24 Semi Chilled Cast Iron Rolls which the present applicant had agreed to supply on certain terms. The opponent had paid Rs. 4,000/- as advance to the applicant. After some inordinate delay, goods were supplied but they were found not in accordance with the sample or as per the terms of the contract and the opponent refused to take the delivery of the goods and the goods were then carried by the applicant to Bombay. It may be mentioned that the opponent firm is at Bhavanagar while the applicants are of Bombay. The opponent ultimately filed the above said suit against the applicant for the return of Rs. 4000/- which were given as advance and also claimed Rs. 3,000/- as damages for breach of the contract. On behalf of the applicant the suit was contested on various grounds one of them being that the Bhavanagar Court had no jurisdiction to try and decide the suit. Issue No. 6 was accordingly framed which was as follows:

It is provided that cause of action or any part of it had arisen within the

jurisdiction of this court and this Court can hear the suit?

It was urged before the learned Judge that no part of the cause of action arose within the jurisdiction of the Bhavanagar Court as the contract was completed by the applicants and acceptance of the contract was made at Bombay and therefore only the court at Bombay had jurisdiction. After hearing the parties and taking into consideration the various authorities which were cited, the learned Judge came to the conclusion that it would be correct to say that for the sum of Rs. 3,000/- which was claimed as damages, if there were no other qualifying circumstances, the cause of action would not arise within the jurisdiction of the Bhavanagar Court but there was also the claim for Rs. 4,000/- which were advanced to the applicants by the opponent and he came to the conclusion that on the principle of debtor required to find his jurisdiction and accordingly a part of the cause of action for the suit for the recovery of Rs. 7,000/- did arise within the jurisdiction of the Bhavanagar Court and he therefore held the issue in the affirmative and order-merits. Being aggrieved by the said order, this revision application has been filed challenging the said order.

(2) The first contention raised Mr. Oza, the learned Advocate for the applicant is that the Lower Court erred in assuming jurisdiction on the ground that the technical common law rule of the obligation of the debtor to find his creditor and pay the debt where the creditor resides applies in India. Accordingly to Mr. Oza, that technical common law rule cannot be imported into the law in India and in any case even if it has any use, it can only be one of the factors to determine the question of implied intention of the parties as to where the contract will be performed. In support of this contention Mr. Oza particularly relied upon a Full Bench decision of the Punjab High Court in *Firm Hira Lal Girdhari Lal and Another Vs. Baij Nath Hardial Khatri*, . There, the question arose as regards the determination of the territorial jurisdiction of the Court in a case of contract. Their Lordships observed that the territorial jurisdiction of the Court is to be determined on the ground that the price of goods was payable within its jurisdiction, the Court should find as a fact whether the money was agreed expressly or impliedly to be paid within its territorial jurisdiction. To find this fact, the Court is entitled to take into consideration the contract, its attending circumstances, the creditor's ordinary place of residence or business and he course of dealings between the parties including all the other factors relevant in the case. If the court then comes to the conclusion that on the facts and circumstances established in the case, the amount sought to be recovered was payable within the jurisdiction of the Court, then it should proceed to entertain the suit, otherwise it had no jurisdiction to do so on the basis of this ground. But the particular observations on which Mr. Oza relied were that the English common law rule that, where there is no express agreement that payment is to be made at a particular place, a debtor must seek his creditor is not applicable in India as a matter of law, to determine the forum where the suit is to be instituted. The creditor's place of residence or business is only one of the circumstances attending the contract which may be taken into consideration in

finding as a fact the place where the money was agreed to be paid. In this case, the learned judges have tried to exhaustively discuss this question and have referred to decisions of various High Courts including the Bombay High Court. They have also referred to the Privy Council decision to which we shall presently make a reference and after considering the case law, they came to the above conclusion. I do not find it necessary to enter into a discussion of the reasoning and grounds on which the Full Bench of the Punjab High Court came to the above stated conclusion because I find that this conclusion is directly contrary to more than one decision of the Bombay High Court and which are binding on this Court. I may refer to one of them. In *Bharumal Udhomal and Others Vs. Sakhawatmal Veshomal and Others*, the Division Bench of Chagala C. J. And Dixit J. held that strictly, section 49 of the Contract Act only comes into operation when there is an application by the promisor to the promisee. Where it is not suggested that the promisor made any application to the promisee for the performance of the contract, section 49 would have no application. If section 49 have no application then there is no reason why the common law rule should not apply in India. It is further laid down that the common law is a reasonable rule and it is in conformity with justice and equity because it recognises the obligation of the debtor to pay his debt and that obligation can only be discharged by the debtor going to his creditor and repaying the amount, and the common law rule imposes this obligation only when there is no express contract to the contrary. Now, this being a decision of the Division Bench of the Bombay High Court prior to the 1st of May 1960, it is binding on this Court. Therefore whatever the decision of the Punjab High Court may be, it cannot be of any help to the present applicant who challenges the decision arrived at by the lower Court. It is further to be noticed that in this decision of the Bombay High Court the earlier decision Bombay High Court in *Puttappa v. Virabhadrapa*, (1905) 7 Bom LR 993 has been fully considered. I am making a reference to this fact because it has been submitted on the part of the applicant that the common law rule, tried to be relied upon by the Court below was held in the earlier decision, not to be applicable in India in view of section 49 of the Contract Act. This contention was also raised before the Bombay High Court in the later decision that the finding and the reasoning of the earlier Bombay decision could not be read to lay down that in all cases, the rule of the English common law will not apply in India in the light of section 49 of the Contract Act; that the said conclusion was arrived at by Chief Justice Sir Lawrence Jenkins, in the earlier case, in the light of the special facts of that case and therefore it could not be held that the rule of English common law was ousted for all times from being applied in India, even in fit cases. In the Punjab High Court decision (*supra*), these two rulings of the Bombay High Court have been discussed and the learned Judges appear to have taken the view that the Privy Council in the case of AIR 1927 156 (Privy Council) had approved of the decision in (1905) 7 Bom LR 993 (*supra*) and the effect was that the Privy Council even had decided that the rule of English common law that the debtor should find his creditor had no application in India. In the case of *Bharumal Udhomal and Others Vs. Sakhawatmal Veshomal and Others*, this aspect was

also canvassed for and it would be useful to refer to the observations of Chief Justice Chagla, in respect thereof:

"The Privy Council in AIR 1927 156 (Privy Council) had to consider this judgment and, when we read the judgment of the Privy Council it seems clear that the Privy Council was not prepared to accept the view of Sir Lawrence Jenkins C. J. with respect, as correct."

The Privy Council pointed out that no authorities were cited before Sir Lawrence Jenkins and the Privy Council pointed out that there were two decisions of the Bombay High Court which had taken the contrary view which had not been brought to the attention of Sir Lawrence Jenkins viz., the judgment of Mr. Justice Tyagi in *Motilal v. Surajmal* ILR(1906) Bom 167 and the judgment of Mr. Justice Farran in *Dhunjisha Nusserwanjee v. A. B. Forde* ILR(1887) Bom 649, where both the learned Judges have taken the view that the common law rule applies in India and have given effect to that rule. The Privy Council at pages 157-158 thought the submission that Section 49 replaced any rule of law with regard to the obligation of the debtor to seek out this creditor, a "strange one". Finally at p, 158 after considering the three Bombay authorities to which reference has been made, they wind up by saying:

"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.

Therefore it is clear that although the Privy Council was reluctant to say that the decision of the Division Bench of the Bombay High Court in (1905) 7 Bom LR 993 was erroneous, the Privy Council was at pains to point out that there were two earlier judgments of the Bombay High Court which had taken a contrary view, and also the Privy Council was at pains to point out that the nature of the suit which Sir Lawrence Jenkins was considering was rather of a peculiar character.

Therefore it will be entirely wrong to suggest that the common law rule has not been given effect to by the Bombay High Court or that the judgment in (1905) 7 Bom LR 993 has the effect of displacing that rule by the provisions of section 49, Contract Act."

It is clear from these observations that the Division Bench of the Bombay High Court in the later decision definitely came to the conclusion that the Privy Council had not supported any such view and on the contrary the Privy Council had not endorsed the stand taken by the earlier decision of the Bombay High Court. Now, I would also like to refer to a passage from the Privy Council decision itself AIR 1927 156 (Privy Council) . Their Lordships after considering fully the question and also taking into account the case of (1905) 7 Bom LR 993 , (supra) finally concluded as follows:

"Their Lordships do not think that in state of the authorities it is possible to accede to the present contention that section 49 of the Indian Contract Act gets rid of interneers, that should justify be drawn from the terms of the contract itself or from the necessities of the case, involving in the obligation to pay 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. Accordingly, part of the contract was preferable in Rangoon so as to satisfy section 49 of the Indian Contract Act, and there was jurisdiction to entertain the suit."

No manner of doubt can be raised that their Lordships of the Privy Council definitely laid down that section 49 of the Indian Contract Act does not oust the rule of English common law of the obligation to pay the creditor and the further obligation of finding the creditor so as to pay. Having regard to the observations made in the Privy Council decision and the conclusion reached by the Bombay High Court in the decision of *Bharumal Udhomal and Others Vs. Sakhawatmal Veshomal and Others*, that the common law rule does apply in India in fit cases, the first contention raised on behalf of the applicants cannot survive.

(3) But an attempt was made to point out that though Chief Justice Chaghal had made a reference to the Privy Council decision of AIR 1927 156 (Privy Council) , he has not made a reference to the Privy Council decision in *Bansilal Abirchand v. Ghulam Mahbub Khan*, AIR 1925 PC 290 which is referred to in the later Privy Council decision, namely, AIR 1927 156 (Privy Council) . I have carefully gone through this decision but I find nothing at all which can help the applicants. On the contrary, it appears that the said decision has also not negatived the applicability of the English common law rule in India. The only point which was decided there was that even if this English common law rule is applicable in India. The rule can apply only within the realm and it cannot be extended beyond the realms with which we are not concerned here. Both the parities are residing in India. In the case before the Privy Council, one of the parties was residing in British India while the other was residing in the territory of Nizam State, and the question had arisen whether Court in British India gad jurisdiction to try the suit. Besides, it is to be noticed that this case was also considered in the later Privy Council case and it came to the conclusion as already referred to.

(4) The next contention of behalf of the applicants was that even if it is assumed that the said rule is applicable in India, it cannot apply to the present case. The argument was that here Rs. 4,000/- were given to the applicant by way of advance towards the performance of the contract and it was not a case of a loan simpliciter which the applicant was bound to return. Unde the circumstances it was argued that the common law rule cannot be applicable because there was no debt. I do not see any force in this submission. The amount of Rs. 4,000/- was

given to the applicant towards the payment of the price of goods in case the contract was carried out. But as we have seen, the applicant had failed to carry out the contract and on the failure of the contract he had no right to keep back Rs. 4,000/- and he was bound to return the amount. Under the circumstances, the amount was a debt which he owed to the opponent which he was bound to return finding out his creditor at the place where he resided. Now, this view of mine gets support from another decision of the Bombay High Court. In *Champaklal v. Nectar Tea Co* AIR 1933 Bom 179, Rangnekar J. Held that where a person agrees to employ another as his agent, moneys paid by the agent as a deposit, impliedly mean that it is security for a completion of the contract and a guarantee of good behavior and faithful performance of the obligation of the party making the deposit under the contract, and the moment the agreement is broken there is either failure of consideration or there is an equity in favour of the agent which impliedly makes the retention of the sum of the deposit a debt due by the employer to the agent. The rule that the debtor must find his creditor applies and the agent can bring a suit where he resides. Therefore this is also an authority which negatives the first point raised on behalf of the applicants that the English rule of common law does not apply in India. Regarding this point the learned Judge has observed that the principle of law is that unless the right is excluded by the terms of the contract, money paid for consideration which fails may be recovered back as a debt for money received by the defendant to the use of the plaintiff. The learned Judge also referred to AIR 1927 156 (Privy Council) for receiving support for the conclusion that he has reached. But in the case on hand there is a further fact which requires my notice so far as the submission made on behalf of the applicants is concerned and it is this that as a matter of fact, the applicant had written a letter to the opponent dated 22nd March 1962 and which is referred to by the learned Judge in the order whereby he appears to have agreed in terms to return the amount of Rs. 4000/- in case the opponent did not approve of the goods ultimately. It appears that this letter was written at the time when the opponent had rejected the goods as being not in accordance with the terms of the contract. To my mind, therefore, in this case, there can hardly be any scope for the opponent to challenge the jurisdiction of the Bhavnagar Court where the opponent resided and to whom he had written that he will return the money to him. I am however making it clear that I have referred to the above stated letter only for the purpose of deciding the issue of jurisdiction and I have not made use of it in order to hold that by that letter a conclusive liability of the applicant had arisen to return that amount. That fact will have to be determined on merits.

(5) Lastly, on behalf of the applicants an argument was advanced that if this rule of English common law were to be introduced in Indian law for determining questions of jurisdiction. It will be in conflict with another statutory provision namely, section 20 of the Civil Procedure Code. The argument ran that section 20 only provides three clauses laying down the provisions under which a suit can be filed in a particular Court. And this English rule of common law, if adopted,

would amount to adding a fourth clause to section 20 because this rule would not otherwise fall within any of the three clauses of section 20. I am unable to find any substance in this contention also. This rule of common law very clearly does not raise a fourth clause at all. It only lays down that a cause of action would arise at the place where the creditor resides because there is an obligation on the part of the debtor not only to pay back the money but also an obligation to find him and make the payment to the creditor where he resides. Under these circumstances, a part of the cause of action arises within the jurisdiction of the Court where the creditor resides. This aspect also receives support from the decision of the Bombay High Court in AIR 1933 Bom 179 where this aspect has been considered. Therefore, this third contention also must fail.

(6) One more effort was made to challenge the decision of the Court below on a different ground and that was, that in any case the learned Judge having held that the cause of action for the recovery of Rs. 3,000 which was in the nature of damages could only arise in Bombay where the contract was to be performed and was broken the conclusion of the learned Judge that he was entitled to try the whole suit including the claim for Rs. 3,000/- was erroneous and had assumed jurisdiction wrongly at least in respect of the claim for Rs. 3,000/-. I am not able to agree with this submission. The fact remains that the suit was for the recovery of Rs. 7,000/-. There is no contention that these two reliefs for the return of Rs. 4,000 and damages of Rs. 3,000/- could not be combined into one single suit. Therefore for this suit, when the learned Judge found that the part of cause of action did arise in his jurisdiction, he was right in holding that he was also then entitled to hear and decide the whole suit. No other contentions were raised before me and having regard to the conclusions that I have reached this Civil Revision Application must fail and it is dismissed with costs. Rule discharged.

(7) Revision dismissed.