

(1958) 12 CAL CK 0008
In the Calcutta High Court
Case No : Matter No. 2672 of 1952

Nath Bank Ltd.

APPELLANT

Vs

Andhar Manick Tea Co. Ltd.

RESPONDENT

Date of Decision : 22-12-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10, 13, 44A
Stamp Act, 1899 — Section 18

Citation : AIR 1960 Cal 779 : (1960) 30 CompCas 306 : 64 CWN 161

Hon'ble Judges : H.K. Bose, J

Bench : Single Bench

Advocate : Ranadeb Chaudhuri, for the Appellant; K.P. Sinha, for the Respondent

Judgement

H.K. Bose, J.—This matter comes up before me by way of an application for exception, to a report dated 12-2-1957 made by the Assistant Referee of this Court in a reference directed by a consent decree passed by Bachawat J. on 20-1-1954. The consent decree, however, reserved the consideration of all further directions and of the question whether the plaintiff Bank is entitled to any decree in terms of prayers (e), (f), (g) and (h) of the plaint in the suit in which the said consent decree was passed and also the question of cost of the reference and of the suit.

2. The report of the Assistant Referee shows that in course of the hearing of the reference the parties came to certain terms of settlement and it is on the basis of these terms of settlement that the reference was disposed of. By the terms of settlement the parties agreed that a sum of Rs. 52,480/12/- was the amount due from the defendant Andhar Manick Tea Co. Ltd. to the plaintiff Nath Bank (in liquidation) but it is provided in the terms that the settlement is without prejudice to the rights and contentions of the defendant as regards (a) jurisdiction, (b) maintainability of the suit including the scope of reference and the defendant would be at liberty to agitate the points of law in court.

3. The present application is by way of exception to this report and for setting

aside of the report of the Assistant Referee and also for determination of the question of jurisdiction of this Court to entertain the suit or to pass the decree.

4. The report was filed on 2-8-1957 but the present application was noted as" made on 18-11-1957. It is not seriously disputed at the hearing that the application for exception to report and for setting it aside is barred by limitation. The parties are, however, agreed that this Court should decide the question of jurisdiction to entertain the suit or to pass any decree in terms of the different prayers of the plaint.

5. The case as laid in the plaint is that the defendant company at ail material times carried on business as planter, producer and exporter of tea at 18 Netaji Subhas Road, Calcutta and maintained an overdraft account with the plaintiff Bank which had its head office at Calcutta. The account was a mutual, current and open account. As security for the repayment of the overdraft the defendant executed in favour of the plaintiff three promissory notes dated 28-12-1942, 26-3-1946 and 18-3-1949 for Rs. 40,000/- each and executed three deeds of hypothecation dated 25-8-1943, " 22-3-1946 and 18-3-1949, hypothecating the entire tea crop grown or produced or manufactured" in the defendant's Andhar Manick Tea Estate then or at any time thereafter during the continuance of the security. These deeds of hypothecation were duly registered with the Registrar of Joint Stock Companies, Bengal, On the 28th December 1942 the defendant also executed a general form of security for overdraft creating charge on the assets and stock-in-trade of its business, as further security for repayment of the overdraft , and also executed on that date a letter of lien and a letter of continuity. Pursuant to the said arrangements the plaintiff bank advanced diverse sums from time to time and the last credit in the account was on 1-3-1949 when the defendant paid a sum of Rs. 1900/-. The plaintiff claims a sum of Rs. 53,467-1-8 including interest calculated up to 30-3-1952. It appears that on 8-5-1950 the plaintiff bank was directed to be wound up by this Court, On 9-7-1952 the present suit was instituted by the liquidator. In prayer (c) of the plaint decree for Rs. 53,467/1/8 is asked for and prayers (e), (f), (g) and (h) were for (e) declaration of charge on the assets including tea crop; (f) sale of the properties; (g) receiver and (h) injunction.

6. It has been argued by the learned advocate for the defendant company that as all the assets of the defendant company including the tea crop are in Eastern Pakistan, the proper forum for filing the suit was the Pakistan Court -- no matter where the cause of action arose, and it is the Pakistan Court which alone has jurisdiction to entertain such a suit. It is submitted that the debt in suit is a specialty debt and not a simple contract debt and so the test of determining the jurisdiction is the place where the security exists. Reliance is placed on the cases reported in *Commissioner of Stamps v. Hope* 1891 AC 476; *New York Life Insurance Company v. Public Trustee* 1924 2 Ch. 101; *Toronto General Trusts Corporation v. The King* 1919 AC 679 and *Egyptian Delta Land and Investment Co. Ltd. v. Todd* 1929 AC 1. Reference has also been made to *Cheshire's Private*

Inter-National Law, 4th Edn. at pp. 444 and 449-450. In the case reported in 1891 AC 476 the question arose whether a debt due to a testator was liable to probate duty under the Stamp Duties Act of New South Wales on the ground that it was a simple contract debt the locality of which was in New South Wales where the debtors resided, It was held by the Judicial Committee upon the facts of that case that the debt was a specialty debt the locality of which was at the place where the Deed creating the specialty was situated, namely, the Colony of Victoria. Lord Field made the following observations at p. 481:

"Now a debt per se, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute local existence; but it has been long established in the Courts of this country, and is a well-settled rule governing all questions as to which Court can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well-settled had been and is whether it is a debt by contract or a debt by specialty. In the former case, the debt being merely a chose in, action -- money to be recovered from the debtor and nothing more--could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be bona notabilia within the area of local jurisdiction within which he resided; but this residence is of course of a changeable and fleeting nature, and depending upon the movements of the debtor, and inasmuch as a debt under seal or specially had a species of corporeal existence by which its locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was bona notabilia where it was "conspicuous," i.e., within the jurisdiction within which the specialty was found at the time of death; see Wentworth on the Office of Executors, ed. 1763, pp. 45, 47 60(1)".

7. In tile next case cited by the learned advocate for the defendant company and reported in 1924 2 Ch. 101, the facts were that the plaintiff company was incorporated in New York, and had its central office and the bulk of its assets in New York. The Company had a branch in London and other capitals of Europe. Certain life policies were issued in London to German nationals before the outbreak of the war. The policy moneys were expressed to be payable in London but all premiums were payable either at New York office or at London and proofs of death were to be furnished at New York. The question arose whether the policies were "property, rights and interests within His Majesty's Dominions." It was held by the Court of Appeal reversing the judgment of Romer J. on this point, that inasmuch a corporation may have a dual residence both in New York and in London and carrying on business at both places, it was permissible and necessary to look at the terms of the contracts and to determine from them at what place the debts would be recoverable; and as the debts were payable in London, the debts were situate within His Majesty's Dominions. Pollock M. R. expressed himself thus at p. 111 :

"If that be so, there is clear evidence that the plaintiffs in this case are resident both in New York and in London, in both places they carry on business, and in both places they are subject to the jurisdiction of the Courts, Then how is the determination to be reached whether they are to be treated as subject to the present jurisdiction, so that it may be said that the debt is due from the plaintiffs as being resident here, inasmuch as the debtors reside both in London and in New York? It seems to me we are entitled, in those circumstances, to look at the terms of the contract, and to determine from them what, for this purpose, is to be the place in which, and at which, the debt would be recoverable. Following out that principle it seems to me clear that primarily the debt is recoverable in London. In both those policies of insurance the promise was that the money should be paid at the head office or the company in London. Now going to *Hex v. Lovitt* 1912 AC 212, in which I think the point to be determined was analogous to the present case, it was said: "In each of these cases the Courts, having regard to the necessary course of business between the parties, held that the bank had in some measure localised its obligation to its customer or creditor, so as to confine it, primarily at all events, to a particular branch." I am of opinion that that same reasoning is applicable here, and that in the present case the very terms of" the contract of insurance have, primarily at all events, localised the place where the debt is to be paid at London. It may be that if the money was not paid in London some form of suit could be taken in New York by the person who had failed to receive payment in London, but I think counsel for the appellant is quite right in saying that the plaintiffs would have to make tender in London and the executors of the deceased would have to make application in London, so that, primarily, following the words in 1912 AC 212, London is indicated as the place at which this debt is localised for present purposes. That being so, then the debt is one which falls to be paid within the United Kingdom, and the words of Clause 16 of the Treaty of Peace Order are applicable, as the debt is part of the property, rights or interests of a German national within His Majesty's Dominions.

I do not refer to the Income Tax cases, or other tax cases, which I think, must be considered closely in relation to the terms of the statute upon which the circumstances arose for decision. I base my judgment upon the fact that even accepting that there are two residences of the plaintiff company, the particular residence at which this debt arose, and at which it is proposed to be paid, is localised and therefore, in accordance with the terms stated in Professor Dicey's book in this case the debt or chose in action may be looked upon as situate in this country, because it is the country where it is properly recoverable and can be enforced."

8. Warrington LJ. at pp. 116-117 has made the following observations :

"There are two cases, curiously enough both of them coming from Canada, in which similar problems have had to be solved. The first case is 1919 AC 679. What was ambiguous there was the locality of a specialty debt. That locality is

usually fixed according to the rules of common law as being the place where the document creating it is actually found at the material moment. In the case in question, there happened to be two documents creating the specialty debt, one document was in Alberta and the other document was in Ontario, and the question was in which of the two provinces was the debt locally situated. The Privy Council there resorted to a consideration of the facts of the case, finding that the specialty debt was a mortgage on land in Alberta, that it was registered in Alberta, that by the law of Alberta the mortgage deed was retained in the registry, and that the document which was in Ontario was a duplicate of it -- of course, it was just as much a deed creating the specialty debt, it was not a copy, it was a duplicate, as the other in Alberta; but finding all those facts, the Judicial Committee came to the conclusion that in that case the specialty debt must be treated as localised in Alberta."

9. Atkin LJ. observed as follows :

"I think the passage which was cited to the contrary in 1919 AC 679 in the Privy Council has been misunderstood. The Lord Chancellor there was speaking only of specialty debts, and in respect of specialty debts, the test has always been not the place and residence of the debtor, but the actual place where the actual document constituting the specialty exists -- namely, where the piece of paper is to be found and in reference to that it is, of course, quite obvious that the piece of paper cannot have an existence in more than one place, but speaking of simple contract debts generally I think what I have said must be true."

10. In *The Delhi Cloth and General Mills Co. Ltd. Vs. Harnam Singh and Others*, Vivian Bose J. after dealing with the facts of that case summarised the position thus :

"We now have to determine the legal liabilities which arose out of these facts. This raises complex questions of private international law, and two distinct lines of thought emerge. One is that applied by the English Courts, namely, the *lex situs* the other "is the one favoured by Cheshire in his book on Private International Law, namely, the "proper law of the contract."

The English approach is to treat the debt as property and determine its *situs* and then, in general, to apply the law that obtains there at the date when payment is due. But the difficulty of the English view is that they have different sets of rules for ascertaining the *situs*, with the result that the *situs* shifts from place to place for different purposes, also that it is determined by intention. Thus, it can be in one place for purpose of jurisdiction and in others for those of banking, insurance, death duties and probate. The *situs* also varies in the cases of simple contract debts and those of specialty." ("Paragraphs 32 and 33 of *The Delhi Cloth and General Mills Co. Ltd. Vs. Harnam Singh and Others*,).

11. Later on Bose J. in paragraph 37 quotes a passage from Cheshire's book which is as follows :

"It is submitted that, at any rate, with regard to the question of valid creation, the proper law is the law of the country in which the contract is localised. Its localisation will be indicated by what may be called the grouping of its elements as reflected in its formation and in its terms. The country in which its elements are most densely grouped will represent its natural seat the country with which the contract is in fact most substantially associated and in which lies its natural seat or centre of gravity."

12. Now in this case the Supreme Court was considering the case of simple contract debts. In the case before me the debt is in respect of an overdraft account which was opened and maintained at the Calcutta head office of the plaintiff bank. The advances were made from Calcutta, The promissory notes dated 22nd March 1946 and 18th March 1949 were executed by the managing agents at Calcutta. The arrangement about the overdraft account was modified to a certain extent on 7th February 1948 and the resolution was passed at a meeting of the defendant company at Calcutta. The certificate of registration of the mortgage or hypothecation dated 18th March 1949 shows that this mortgage was registered with the Registrar of Joint Stock Companies in West Bengal on 29th March 1949. The deed was also executed in Calcutta. The managing agents of the defendant company signed the deed pursuant to the provisions of Article 122 read with Article 90, Clauses (q) and (r) of the Articles of Association of the defendant company. It also appears that this mortgage or hypothecation which was stamped with Pakistan stamp obtained from the Chittagong Treasury, was also registered with the Registrar of Joint Stock Companies, East Bengal in Pakistan on 31st March 1949, that is two days after it was registered with the Registrar in West Bengal. This original deed of hypothecation is with the plaintiff bank at Calcutta. The two promissory notes dated 22nd March 1946 and 18th March 1949 are also in Calcutta. The relevant books of account are with the liquidator, in Calcutta. Furthermore, it is stipulated in Clause 12 of this deed of hypothecation dated 18th March 1949 that the defendant company will repay the advances on the overdraft and adjust the account at the head office of the plaintiff bank in Calcutta. It appears that the deed of hypothecation dated 18th March 1949 was purposely stamped with stamp obtained from the Pakistan Treasury as the particulars of the mortgage had also to be registered with the Registrar of Joint Stock Companies, East Bengal inasmuch as the tea estate is in Pakistan and also for the purposes of Section 277 of the Indian Companies Act, 1913. Although Son Behari Pal, the local manager of the Chittagong Branch of the defendant company has suggested in the course of his evidence that there are no assets whatsoever of the defendant company in the Union of India, it can be fairly presumed that the defendant company which has its registered office here and carries on some business here has some assets in the shape of furniture and other things and also some money though the extent of such assets may not be considerable and indeed may be very small. Some of the directors of the defendant company are residents of the Indian Union and most of the partners of the managing agency firm of J. N. Roy Chaudhury and Co. are

citizens of the Indian Union. So there can be no doubt that the business activities of the defendant company in the Indian Union are not as little as they are suggested to be. If the principle "proper law of the contract" spoken of by Mr. Foote, Mr. Wolff and Mr. Cheshire in their books on private international law is applied, then the elements of the contract in this case as reflected in its formation and in its terms will be considered to be most densely grouped in Calcutta in the State of West Bengal and the country with which the contract in fact closely connected and in which lies its natural seat or centre of gravity is Calcutta. See also *In re, Helbert Wagg and Co.'s Claim* 1956 1 Ch. 323.

13. If, on the other hand, the "lex situs" principle is applied, the original document creating the specialty debt being in Calcutta at the material time, the locality of the debt must be deemed to be in Calcutta.

14. In the case of 1919 AC 679 on which reliance was placed by the learned Advocate for the defendant company, there were two documents creating the specialty debt -- one document was in Alberta and the other was in Ontario. The question was in which of the two provinces was the debt locally situated. It appeared that the specialty debt was a mortgage on land which was in Alberta -- the registration of the mortgage took place in Alberta and according to the law prevailing in Alberta the mortgage deed had to be and was retained in the Registry of Alberta and it was only a duplicate of this deed of mortgage which was in Ontario. It was upon these facts that the Privy Council came to the conclusion that the locality of this debt was to be treated as in Alberta.

15. The case reported in (1929) AC 1 is an Income Tax Act case where different considerations arise.

16. The facts before me, as I have indicated already, are different. In the case before me the mortgage or hypothecation deed was stamped with Pakistan stamp and was also registered with the Registrar of Joint Stock Companies for the purpose of perfecting and safeguarding the title of the plaintiff bank as the mortgage or charge-holder of the assets in Pakistan as otherwise any Pakistan creditor of the defendant company by obtaining a mortgage in respect of these very assets and by getting his mortgage registered in Pakistan might acquire priority over the plaintiff bank's claim in respect of these assets. Moreover, in the absence of this registration in Pakistan the defendant company would not be allowed to carry out its obligations under any decree that might be passed on this mortgage in any Court.

17. Reference may be made to Palmer's Company Law, 19th Edn. p. 261. Mr. Sinha, the learned Advocate for the defendant company referred to Dicey's Conflict of Laws, 7th Edn. at pp. 502, 503 and 509 in support of his argument that the locality of the debt in the present case was in Pakistan. Mr. Ranadeb Chaudhury, on the other hand, referred to p. 505 of Dicey's book and particularly to the following passage:

"A debt due on a deed or other specialty is situated at the place where the deed

itself is situate from time to time and not at the place where the debtor resides. The reason for this rule is that in the few of the ecclesiastical tribunals a debt under seal had a "species of corporeal existence "

18. Reference was also made by Mr. Chaudhury to the following passage:

"A mortgage debt is normally a specialty. A mortgage confers an interest in land and will be held situate where the land is situate, but where it is necessary (e.g. for taxation purposes) to distinguish between the situs of the mortgagee's interest in land and that of the mortgagor's personal obligation to repay, then the latter (if in the form of specialty) will be held situate where the deed is situate from time to time. Where a system of land registration, is in force and a duplicate Deed is retained in the registry, then the personal obligation is situate at the registry and not where the other copy of the Deed is from time to time."

19. In Halsbury's 3rd Edition, vol. 7, paragraph 70. at page 35, the following passage occurs:

"Where a mortgage whether legal or equitable of foreign immovables has been validly made according to English law, an English Court will comply the mortgagor to pay off the mortgage debt out of the proceeds of sale of the land, although the mortgage does not comply with the *lex loci rei sitae* or a mortgage of the particular kind in question is unknown to the local law."

Reference was also made to paragraph 137 of Vol. 7 of Halsbury by Mr. Chaudhury. The learned counsel for the plaintiff Bank also placed reliance on *In re, Anchor Line Henderson Bros.* 1937 1 Ch 483 at p. 488 and also on the case reported in *Ex parte Holtnausen.* 1874 9 Ch 722 in support of his argument that this Court has jurisdiction to direct sale of the properties in Pakistan in enforcement of the mortgage or hypothecation created by the defendant company.

20. Taking into consideration all these facts, it appears to me that this Court has jurisdiction to entertain this suit and to pass a decree in terms of prayers (e), (f), (g) and (h) of the plaint.

21. The next point that has been argued by the learned Advocate for the defendant company is that although the debt in suit is one specialty debt, there has been duplication of demand for repayment of this debt both in Pakistan and in the Indian-Union and so to avoid double payment this Court should refrain from passing any decree as asked for by the plaintiff Bank. Reference is made to the letters dated 1st July 1955 and 17th September 1955 written by the Director-in-charge of the Pakistan zone of the plaintiff Bank to the defendant company at Sadar Ghat Road, Chittagong demanding payment of the dues on the hypothecation bond dated 18th March. 1949. The Registrar of Joint Stock Companies, East Bengal Zone, by his letter dated 12-13th April 1955 has also asked for clarification of the point as to which zone of the plaintiff Bank -- whether the Pakistan zone or the Indian Union zone--- is entitled to obtain

repayment of this loan in suit. It has also been pointed out by the learned Advocate for the defendant company that the Pakistan zone is functioning as a separate and independent entity under a scheme which has been sanctioned by the Dacca High Court, though the Bank at Calcutta has been ordered to be wound up, Mr. Sinha has submitted that these are special facts and circumstances of the case which should weigh with this Court in refusing reliefs to the plaintiff Bank in respect of prayers (e), (t), (g) and (h) of the plaint.

22. In my view, if a decree is passed by this Court, such a decree can be enforced in Pakistan by employing the machinery provided by Section 13 of the Code of Civil Procedure. The explanation appended to Section 10 of the CPC also indicates that even if a suit had actually been filed in the Pakistan Court in respect of the subject matter of this suit that would not have precluded this Court from trying this suit. It is true that it is open to the Pakistan Court to take into consideration the factors mentioned in Clauses (a), (c) and (i) of Section 13 of the CPC and it is also clear that Pakistan is not a reciprocating territory within the meaning of Section 44A of the CPC (See *Chormal Balchand Firm Vs. Kasturi Chand Seraoji and Another*, and *Dominion of India Vs. Hiralal Bothra*,). But that does not deprive this Court of its jurisdiction to try this suit or to pass an effective decree. If the Bank in Pakistan attempts to realise the claim which is the subject matter of this suit by instituting proceedings in Pakistan Court, the decree which will be passed by this Court in this suit can be pleaded in bar of such a claim which is sought to be enforced by the suit instituted in Pakistan. It has been held that a defendant is entitled to non-suit a plaintiff on the basis of a foreign judgment (See *Chockalingam. v. Duraiswami* ILR 51 Mad 720: AIR 1928 Mad 827).

23. The next point argued on behalf of the defendant company is that the hypothecation bond having been stamped with Pakistan stamp is not admissible in evidence in view of the provisions of Section 18 of the Indian Stamp Act. But it may be pointed out that the hypothecation bond was executed in the Indian Union and so Sec. 18 of the Stamp Act has no application. Moreover, it has been held that Section 18 does not make the document inadmissible. The Nagpur High Court in a case reported in *Kedarmal Raghunath v. Ratiram* AIR 1935 Nag. 54 has held that such a document is impoundable and should be admitted in evidence even if Section 18 is applicable to such a document. It appears to me, therefore, that this point of Mr. Sinha has no substance. In my view, not only is the plaintiff entitled to a personal decree for the amount claimed but the plaintiff is also entitled to a decree in terms of prayers (e), (?), (g) and (h) of the plaint.

24. The report of the Assistant Referee is therefore confirmed and there will be decree in terms of prayer (c) for Rs. 52,480/12/- with further interest at 6 percent from 10th July 1952 till today; interest on decree; and also decree in terms of prayers (e) and (f). The defendant will pay the costs of the suit including the costs of the reference and the costs of counsel appearing in the reference. The plaintiff will be entitled to costs of the present proceeding as of a

hearing of a suit. Certified for two counsel. Costs of the Official Liquidator to come out of the assets in the first instance.