

(1915) 04 MAD CK 0053
In the Madras High Court

Sowcar Bapu Sahib Yousuff Sahib and Co.	APPELLANT
Vs	
Isac Ismail and Co.	RESPONDENT

Date of Decision : 19-04-1915

Acts Referred:

Citation : 29 Ind. Cas. 462

Hon'ble Judges : Sadasiva Aiyar, J; Napier, J; Bakewell, J

Bench : Full Bench

Judgement

Sadasiva Aiyar, J.—The defendant is the appellant. The first question argued in this appeal is whether the entire cause of action arose within the local limits of the original side jurisdiction of this Court. It was contended that as the defendant lives in Kodambakam outside such limits and as the plaint, in paragraph 4 states "that statements of accounts were sent by the plaintiff" (to the defendant) it is clear from the plaint itself that such statements were sent on to Kodambakam outside the limits of Madras and that hence part of the cause of action arose outside such limits. I am, however, not prepared to differ from the concurrent conclusion of the three learned Judges of this Court who have already dealt with this case, that conclusion being that the statements of accounts were intended by the parties to be submitted by the plaintiffs to the defendant in the plaintiffs shop premises in Madras and that they were so submitted. The objection as to jurisdiction, therefore, fails.

2. The next contention of the appellant's learned Vakil is that the Rs. 10,000 made up of four sums paid by the plaintiffs to the defendant on different dates in July 1907 constituted an independent transaction of loan between the parties and that the claim for the recovery of these four sums was barred by limitation. The arguments under this contention were based partly on the fact that a promissory note payable on demand for the total of these four sums making up the Rs. 10,000 was obtained from the defendant by the plaintiffs on the 23rd July 1907, and partly on the fact that this sum of Rs. 10,000 was not entered as one of the items in the statements of accounts submitted from time to time by

the plaintiff to the defendant. So far as the argument is based upon the execution of a separate promissory note, I do not think there is anything in it because on the very date on which the promissory note was executed, an agreement was signed by the defendant on the counterfoil of the sheet on which the promissory note was executed, and that agreement clearly stated that these four sums making up Rs. 10,000 were to be the sums advanced to the defendant in respect of, and for his carrying on, the dealings which were to be commenced from that date between the parties. Whether the right given under the promissory note to the plaintiffs to recover the Rs. 10,000 on demand is treated as qualified by the agreement in the counterfoil, (namely, that the Rs. 10,000 was to be the amount of advance to be taken into account in the dealings that commenced between the parties) or whether the contract under the promissory note is treated as a collateral security for the due performance by the defendant of the agreement entered into between the parties according to the counterfoil paper, is, in my opinion not material, because the suit, reading the plaint as a whole, seems to me to be based upon the dealings between the parties, and upon the basis that the items making up the Rs. 10,000 should be treated as items constituting the dealings between the parties. If the promissory note is to be treated as a collateral security, the fact that the claim to enforce that security is barred by limitation, cannot affect the plaintiffs' right to enforce the obligation of the defendant in respect of the substantial claim arising out of the accounts of the dealings between the parties, such accounts being mutual, open and current accounts according to the evidence. While it must be admitted that the plaint is badly drafted in paragraphs 4 and 6, I think that reading it as a whole, the plaintiffs' claim was intended to be based on the dealings, treating the advance of the four items making up the ten thousand rupees as the commencement of the dealings. On this view of the facts, no question of limitation arises in respect of this sum of Rs, 10,000.

3. Finally, it was argued that the accounts ought to have been taken as if the dealings under the agreement in the counterfoil of Exhibit A had ceased on the 3rd March 1908 and not in May 1909. The question whether the accounts ought to be taken till March 1908 or May 1909 was not dealt with in the judgment given by the learned Judge who tried the case in the original side, nor was it dealt with in the preliminary decree which followed that judgment. This Letters Patent Appeal is against the decree See 24 Ind. Cas. 128.--Ed. of the learned Chief Justice passed in appeal on the preliminary decree. It was only in the subsequent proceedings that resulted in the final decree that the sum due on the accounts was ascertained, on the basis that it was to be taken till May 1909 and was awarded on that basis against the appellant.

4. The question, therefore, as to the date to which the accounts ought to be taken between the parties cannot be raised in this appeal against the preliminary judgment and decree.

5. In the result I would dismiss the appeal with costs.

6. Bakewell, J.--I agree with the conclusions of the learned Chief Justice in his judgment for the reasons mentioned therein and I have nothing further to add.

7. I concur in the order proposed by my learned brother.

8. Napier, J.--I agree. I will only add a few words on the points that were argued before us. The first point taken on the question of limitation was that the suit was one which was governed by Article 88 and that Article 85 had no bearing. Now Article 88 does not in terms apply, because that is a suit against a factor; but it was suggested that the relation between the plaintiff and the defendant in this case was one in which the plaintiff was a factor and that, therefore, it did not come within Article 85. Now it is true that the plaintiff was a factor in respect of some portion of the dealings between the parties. But it is not correct to suggest, as was suggested by the learned Vakil for the appellant, that it was as a factor that he made the advances which are included in the accounts. The position of a factor is stated in the judgment of Cotton, L.J., in *Stevens v. Bitter* 25 Ch. D. 31 : 53 L.J.Ch. 249 : 50 L.T. 36 : 32 W.R. 419, as "an agent entrusted with the possession of goods for the purpose of sale." When, therefore, we find that in the contract and the dealings between the parties there was something outside the mere entrusting of goods for sale and the sale by the agent, there are other elements on which the suit can be brought and those elements are quite sufficient to bring the case within Article 85. There were the advances from time to time and there were credits for the goods sold on the defendant's behalf. I see no reason, therefore, why a suit should not be brought under Article 85 for the Balance due on a mutual, open and current account.

9. The next point taken was that this total amount of Rs. 10,000 was not in fact treated by the parties as being an item in the account. With respect to that I entirely agree with my learned brother and I adopt the reasons given by the learned Chief Justice, which are to be found on pages 4 and 5 of his judgment. In my view the dissentient Judge, Mr. Justice Oldfield, overlooked the close connection between the circumstances under which the advances were made and treated this sum of Rs. 10,000 as an independent transaction. The facts of the case, in my view, do not support that contention, and I, therefore agree that this appeal should be dismissed with costs.