

A **W.L.D. HARVIE LIMITED**

v.

**NARANJI DEOJI AND OTHERS**

[SUPREME COURT, 1962 (MacDuff C.J.), 25th, 28th May]

B Appellate Jurisdiction

*Interpretation—Magistrates' Courts Rules 0.13 para. (b)—“may” having a compulsory meaning in first sentence of rule.*

*Practice and procedure—venue—action in tort in Magistrate's Court at Suva—defendant carrying on business at Lautoka—special plea in objection to jurisdiction—duty of magistrate—Magistrates' Courts Rules (Cap. 5) 0.13 paras. (b)(c)(d)*

C —Magistrates' Courts Ordinance (Cap. 5) s.33.

The word “may” as used in the first sentence of para. (b) of Order 13 of the Magistrates' Courts Rules has a compulsory meaning. When, therefore, a defendant in an action in tort pleads specially in objection to the jurisdiction and provides evidence (which is not disputed) that he carries on business in Lautoka, the action, commenced in the Magistrate's Court at Suva, must be reported by the magistrate to the Supreme Court under section 33 of the Magistrates' Courts Ordinance and dealt with by the Supreme Court under paragraph (d) of Order 13 of the Magistrates' Courts Rules.

Cases referred to: *In re Baker, Nicholls v. Baker* (1890) 44 Ch.D. 262; 62 L.T. 817; *R. v. Mitchell, Ex parte Livesey* [1913] 1 K.B. 561; 108 L.T. 76.

Appeal against dismissal by magistrate of application for change of venue.

K. A. Stuart for the appellant.

S. Mohammed for the respondent.

F MACDUFF C.J. : [28th May, 1962]—

The Respondents (Plaintiffs in the Court below) instituted a suit in the First Class Magistrate's Court at Suva claiming from the Appellant (Defendant in the Court below) the sum of £350 damages for conversion and trespass. The respondents own land at Lami, within the districts of the Magistrate's Court at Suva, and alleged that the Appellant had wrongfully entered on that land and removed gravel therefrom.

Magistrates' Courts Ordinance (Cap. 5) s.33 : “Subject to the provisions of the Criminal Procedure Code, a magistrate may, of his own motion, or on the application of any person concerned, report to the Supreme Court the pendency of any cause or matter which in the opinion of such magistrate ought for any reason to be transferred from his court to any other magistrate's court or to the Supreme Court. The Supreme Court shall direct in what mode and where the cause or matter shall be heard and determined.”

H

The Appellant, a limited liability company, within the time fixed for filing a notice of defence, filed an affidavit to the effect, *inter alia* :

- “2. THE said defendant has its registered office at Lautoka and carries on business at Lautoka. A
3. I wish this action to be transferred to Lautoka for hearing.
4. THE defendant denies the trespass alleged.”

Subsequently the suit was called before the First Class Magistrate, Suva, where the Appellant objected to the Court's jurisdiction, the Respondents referred to the facts that the Plaintiff and all his witnesses were in Suva and that the cause of action arose in the same district. B

The learned Magistrate dismissed the application for transfer without giving reasons therefor.

The sole ground of appeal taken against that decision is that:

“THE learned Magistrate erred in law in holding that after the defendant had pleaded specially in objection to the jurisdiction of the Magistrate's Court at Suva by asking for the transfer of the action he had jurisdiction to have the trial held in Suva.” C

Order XIII of the Magistrates' Courts Rules provides as follows:

*“Place of Trial and of Instituting Suits.*

Subject to the law respecting transfer, the place for the trial of any suit or matter shall be regulated as follows : D

- (a) All suits arising out of the breach of any contract may be commenced and determined in the district in which such contract ought to have been performed, or in which the defendant resides or carries on business.
- (b) All other suits may be commenced and determined in the district in which the defendant resides or carries on business. If there are more defendants than one, resident in different districts, the suit may be commenced in any one of such districts; subject, however, to any order which the court may, upon the application of any of the parties, or on its own motion, think fit to make with a view to the most convenient arrangement for the trial of such suit. E F
- (c) In case any suit shall be commenced in any other district than that in which it ought to have been commenced, the same may, notwithstanding, be tried in the district in which it shall have been so commenced, unless the court shall otherwise direct, or the defendant shall plead specially in objection to the jurisdiction before or at the time when he is required to state his answer to or to plead to such suit. G
- (d) No proceedings which may have been taken previously to such plea in objection shall be in any way affected thereby; but the judge shall order that the suit be transferred to a magistrate's court of the district to which it may be proved to belong, or, failing such proof, that it be retained and proceed in the magistrate's court in which it has been commenced.” H

This is not a suit arising out of the breach of any contract with the result that paragraph (b) is the paragraph governing the place of institution of this suit.

A For the Respondents it is contended that in the first sentence of paragraph (b) the use of the word "may" is permissive and gives the magistrate a discretion. Reliance was placed on the dictum of Cotton L.J. *In re Baker, Nicholls v. Baker* (1890) 44 Ch. D. 262 where at page 270 he is reported as saying:

B "I think that great misconception is caused by saying that in some cases 'may' means 'must'. It never can mean 'must', so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a Judge has a power given him by the word 'may', it becomes his duty to exercise it."

C It is to be noted that this statement contains a contradiction within itself, the objection of the learned Lord Justice being more to terminology than effect. The difference is put in somewhat clearer terms in *R. v. Mitchell. Ex parte Livesey* [1913] 1 K.B. 561, at page 568 by Lord Coleridge J. where he said :

D "Originally, and apart from surrounding circumstances, the word 'may' in a statute means 'may' and nothing else. That has often been laid down, especially by Cotton L.J. in *In re Barker, Nichols v. Baker*. But it is equally clear that there are cases where the word 'may' has the effect of 'must'. Apart from the cases which have been cited there is *Rex v. Justices of Dublin*. By s.5 of the Beerhouses (Ireland) Act 1864 (27 & 28 Vict. c.35), the superintendent of police of the Dublin Metropolitan Police district is authorized to object before justices to the issue of a certificate for a licence, and the justices shall in such case proceed to consider, examine on oath into, and adjudicate upon the truth, sufficiency, and validity of such objection; and if such justices shall be satisfied of the truth and sufficiency of any such objection, 'they may refuse to grant such certificate'. In construing this enactment Andrews J. said: 'Having regard to these provisions, I think it clear, and it has not been disputed, that if the justice is satisfied of the truth, sufficiency, and validity of the objection, his duty is to refuse to grant the certificate, and that the word 'may' is to be interpreted in an obligatory, as distinguished from a merely permissive sense'. Undoubtedly the word 'may' there means must. Therefore regard must be had to the surrounding circumstances to discover whether the word 'may' is to have a permissive or a compulsory meaning."

H Having regard to the object, the scope and the wording of Order XIII it becomes obvious that the word "may" in the first sentence of paragraph (b) has a compulsory meaning. In paragraph (a) the word "may" is permissive, the plaintiff being offered an alternative venue. This also applies to the second sentence of paragraph (b). If the permissive meaning were given to the word "may" in the first sentence of paragraph (b) then there is no need to refer to the

district in which a defendant resides or carries on business, the alternative being any court in the Colony, an interpretation which has only to be stated to be shown to be fallacious.

It follows, therefore, that the proper court in which this suit should have been commenced was that of Lautoka. (Subject, of course, to the question of fact as to whether the appellant carried on business in the district of Suva, a matter in respect of which there was no evidence against that of the appellant and which was not raised before the learned magistrate).

Since the Appellant had pleaded specially in objection to the jurisdiction within the proper time the suit could not be tried in the First Class Magistrate's Court at Suva. The learned Magistrate was accordingly left with no alternative but to follow the procedure provided by Section 33 of the Magistrates' Courts Ordinance and report the cause to the Supreme Court and in that event the provisions of paragraph (d) of Order XIII come into effect.

The appeal is allowed. The decision of the learned Magistrate is set aside and the case is remitted to the learned Magistrate with a direction to report the cause to the Supreme Court under Section 33 of the Magistrates' Courts Ordinance.

The Respondents will pay the Appellant's costs here and in the Court below.

*Appeal allowed.*