Calcutta High Court
Babulall Choukhani vs Caltex (India) Ltd. on 29 September, 1965
Equivalent citations: AIR 1967 Cal 205, 71 CWN 458
Author: B Mukherji
Bench: B Mukherji
JUDGMENT Bijayesh Mukherji, J.

1. By this suit, the plaintiff Babulall Choukhani seeks to recover from the defendant Caltex (India) Ltd., said to be a company incorporated under the Indian Companies Act, the sum of Rs. 25,000 as retention fee at the rate of Rs. 2,500 a month for ten months from August 1, 1963, to May 31, 1964.

2. A claim as this rested on a bilateral agreement in the form of a letter dated April 30, 1963, by Caltex to Babulall who by an endorsement at the bottom thereof over his signature dated May 1, 1963, confirmed the terms it embodied. The importance of this document to the fortunes of the present litigation is such that it deserves to be reproduced in full:

| Seal | PETROLEUM | CALTEX | PRODUCTS

CALTEX (INDIA) LIMITED (Incorporated in the Bahama Islands) Liability of the members is limited. United India Life Bldg., 22 Chittaranjan Avenue Post Box 2382, Calcutta-1 Telephone: 235081-89. Telegrams "CALTEX"

April 30, 1963.

| In reply please refer to |
| C Misc.: EMs |

Mr. Babulal Chokhani,
24.A, Deshapriya Park Road,
CALCUTTA - 26.

Dear Sir,

Lease of land owned by you at Prince Anwar Shah Road, Tollygunge, Calcutta. We refer to the discussions which took place this morning between our Messrs. E. M. Schmidt, R. Majumdar and K. C. Dutta and yourself regarding the abovementioned subject. We list below the points agreed upon

and request that you sign the duplicate copy of this letter as a token of your confirmation and acceptance. It is understood that the conditions listed below are subject to the approval of our General Office and we will confirm the same to you by May 10, 1963 at the latest (1) Subject land is to be leased for the purposes of constructing and maintaining a Service Station. The initial period will be for 10 years with 2 renewal options of 10 years each.

(2) The area to be leased will be approximately 144' X 100' -- (one bigha) for which we will pay a rental of Rs. 2500/- per month.

(3) The rental will be increased by 10% as each 10 years option is exercised.

(4) If we receive all the necessary approvals from the concerned Government authorities the lease will then be finalised and rental payments commenced retrospective from 1 May 1963, (5) For the 3 months period from 1 May to 31 July 1963 we agree to pay a retention fee of Rs. 3750 which will be non-refundable regardless of whether we receive all approvals or not.

(6) If we require a further time extention past 31 July in order to receive the necessary approvals we agree to pay Rs. 2500/- per month. This amount will be non-refundable if we are not successful in receiving all the necessary approvals but will be applied against rental ft we do receive them.

(7) Necessary ownership documents will be produced by you for review by our lawyers in

Thanking you and assuring you of our best attention at all times,

I confirm the above terms
Sd./- Babulall Choukhani

1-5-63.

Yours very truly,
CALTEX (INDIA) LIMITED,
CALCUTTA DISTRICT.

By:
Illegible.

3. This is a document upon which both parties rely. It therefore appears in the admitted brief on documents, exhibit A, as the plaintiff's document No. 1 and the defendant's document No. 1 too at pages 1 and 2 thereof. Presumably, by way of abundant caution, the original letter is marked exhibit M as well.

4. The conditions listed in this document, exhibit M, seven in number, were subject to the approval of Caltex's "General Office", confirmation by which was promised "by May 10, 1963, at the latest"; vide the second paragraph of the letter dated 30-4-1963 Ext. M. The promise was honoured. By their letter dated May 8, 1963, which is Exhibit N and also the plaintiffs document No. 4 at page 7 of the admitted brief of documents. Ext. A, Caltex wrote to Babulall.

"Further to our letter No. C-Misc.: EMS dated April 30, 1963 (just the one reproduced in paragraph 2 ante) we are pleased to advise that confirmation has since been received from our General Office to the terms outlined in our letter under reference", and informed him (Babulall) that, for putting up the Service Station, they were submitting, to the authorities concerned, applications, copies of which would be forwarded to him (Babulall) for his information and such co-operation he could extend. More, Babulall was requested "to forward the deed of conveyance for verification by our Lawyers".

By the deed of conveyance was obviously meant the lease "the points about which were "agreed upon" on April 30, 1963 : Ext. M.

5. Between May 8 and 10, 1963, Babulall visited the office of Caltex "with the deed of conveyance in original for verification" by the lawyer of Caltex who recorded as much in their letter of May 10, 1963, to Babulall: vide a common document of the parties -- No. 5 of the plaintiff and the defendant alike at page 10 of the admitted brief of documents, Ext. A. Verification over, in terms of condition No. 5 listed in the letter of April 30, 1963, Ext. M, Caltex paid, and Babulall received, a cheque for Rs. 3,750 as the retention fee for the first three months from May 1 to July 31, 1963: vide the common document of May 10, 1963, just referred to.

6. By July 31 1963, Caltex obtained the approval of the Director of Fire Services, but not of the District Magistrate, 24-Paraganas, within whose jurisdiction the proposed leasehold is situate. In the first week of August, 1963, when Babulall was not in Calcutta, Caltex told his son Jagadish, so, and told him too that extension of time past July 31, 1963, was required to receive the District Magistrate's approval. Jagadish consented "for and on behalf of his father, Babulall. [See paragraphs 8 and 16 of the plaint.]

7. On August 21, 1963. however. Caltex "suggested certain variations to the terms of" the agreement dated April 30, 1963, Ext. M. So they did by a letter of that date; August 21, 1963, Ext. O which is the same as the plaintiff's document No. 6 and the defendant's document No. 11 at page 18 of the admitted brief of documents, Ext. A. What is more, R. Majumder and S. N. Sinha of Caltex called on Babulall with a view to persuading him to accept the new terms. But they failed. Babulall "stuck to the original terms" of April 30, 1963.

8. Babulall's demand for retention fee of Rs. 2,500 a month from August, 1963, in terms of condition No. 6 in the agreement of April 30, 1963, Ext. M, was put off on the assurance of payment on execution of the lease agreed upon. On 9-1-1964, however Caltex addressed a letter to Babulall informing him inter alia.

"The option on this plot of land as mentioned in our letter No. C. Misc. EMS dated April 30, 1963, (Ext. M), expired on the 31st July 1963 and for that we have paid you Rs. 3,750. Since we are unable to obtain approvals from the local authorities within the stipulated time, we did not ask for any extension of the option period and the subject was dropped".

This letter is Exhibit P and a common document of the parties -- No. 7 of the plaintiff and No. 12 of the defendant at page 1ft of the admitted brief of documents, Ext. A.

9. Herein lies the seed of this litigation. Some 41 days after the receipt of Caltex's letter of January 9, 1964, Ext. P, to be exact, on February 20, 1964, Babulall replied repudiating in particular that no extension or time was asked for after July 31, 1963, or that the subject was dropped ever. More, he demanded a "cheque for Rs. 15,000" for his dues as retention fee for six months from August 1968 to January 1964 at the rate of Rs. 2,.500 a month. A letter as this is a common document of the parties too --No. 9 of the plaintiff and No. 13 of the defendant at pages 21-22 of the admitted brief of documents, Ext. A.

10. Babulall alleges that Caltex purposely and with ulterior motive" "defaulted to obtain' the approval of the District Magistrate with view to frustrating the agreement of April 80 1963, for lease.

11. Hence this suit the date of institution of which is June 1, 1964.

12. The pleas Caltex resist the suit with are--One, this Court lacks jurisdiction to try the suit; two, no extension of time beyond July 31, 1963, was required nor granted; three, on a true construction of the agreement dated April 30, 1963, all that was provided for was the option on the proposed leasehold for three months from May to July 1963, and the option period having expired with the expiry of July 1963, nothing further remained in the agreement to be enforced upon; and, four, at all events, there cannot be a decree beyond January 9, 1964, when Babulall was distinctly given to understand that the matter stood dropped and was therefore free to do whatever he liked with his land.

13. The last plea just noticed is the last argument Mr. De, the learned counsel for Caltex, addresses to me, without prejudice to his other contentions. Not that it is in the written statement in so many words.

14. The parties go to trial on the following issues:

(1) Has the Court jurisdiction to try the suit?

(2) What is the true interpretation of the agreement dated April 30, 1963?

(3) Is the plaintiff entitled to Rs. 25,000 at the rate of Rs. 2,500 a month from August 1, 1963 to May 31, 1964?

(4) Did the defendant require a further extension of time beyond July 31, 1963, and was such extension granted by the plaintiff, as pleaded in paragraphs 8 and 16 of the plaint?

(5) What reliefs, if any, is the plaintiff entitled to?

15. To (take) the first issue first--the issue on jurisdiction. True it is, as pointed out by Mr. De, the cause title of the plaint, in so far as it describes Caltex as "a Company incorporated under the Indian Companies Act", is inaccurate, They are, in fact, incorporated in the Bahama Islands, as it appears from the printed heading in their business letters, Exts. M (reproduced in full in paragraph 2 ante and the heading of which is separately marked as exhibit I), P (that letter dated January 9, 1964, referred to in paragraph 8 ante) and R (another letter dated April 6, 1964, which is a common document of the parties -- No. 16 of the plaintiff and No. 15 of the defendant at pages 31-32 of the admitted brief of, documents, Ext. A). No less does such incorporation of Caltex in Bahama Islands appear from the unchallenged evidence of their Sales Manager, Shyam Nandan Sinha (S. N. Sinha), their only witness (q. 6). But this wrong description about incorporation will not take away the jurisdiction of this Court if it has the requisite jurisdiction under the law to try the suit. Even Mr. De does not go so far as that. Then, there is Section 3(7) of the Companies Act 1 of 1956 to which Mr. Ghose, the learned counsel for Babulall, the plaintiff, draws my attention. By virtue thereof a body corporate or corporation includes a company incorporated outside India. Caltex are just that: a company incorporated in Bahama Islands outside India and therefore a body corporate or corporation. And they are being sued as such too. More, it will not be perhaps out of place to refer to Section 599 ibid falling under Part XI captioned: Companies incorporated outside India. This section (Section 599) provides inter alia that any failure by a foreign company (just as Caltex are) to comply with any of the foregoing provisions of this Part (Section 592 et seq.) shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof. So, Caltex, only because they are incorporated in Bahama Islands, cannot escape their liability to be sued, even though they may be guilty of infractions of certain statutory requirements. Not that that is the case before me. This only serves as an illustration of the vulnerability of a foreign company like Caltex to a suit instituted against them in the municipal Courts of the country.

16. Mr. De, be it said in fairness to him, dues not contend either that Caltex have earned immunity from being sued in the Courts here. He makes that clear in the first stage of his arguments, when however Section 599 ibid, is not referred to, to make it clearer still at the second stage of his arguments when I refer to this section specifically. [See paragraph 34 infra.] But he seeks to negate the jurisdiction of this Court on the ground that Caltex carry on business in Bombay where their head office is. Such is the evidence of their Sales Manager S. N. Sinha:

"The head office is in Bombay, and what we cull district office, in Calcutta" (q. 7).

Mr. De therefore contends that Babulall has mistaken his forum -- Calcutta for Bombay --where his action should have been raised.

17. Let this contention be examined. On June 1, 1964. the lime of commencement of the suit were Caltex, the defendant before me, carrying on business within the local limits of the ordinary original civil jurisdiction of this Court? If they were, Clause 12 of the Letters Patent empowers this Court "to receive, try and determine" the suit in hand. As the printed headings of the business letters, exts. M, P and R, proclaim, the office of Caltex is housed in United India Life Buildings at 22 Chittaranjan Avenue a place within the local limits of the ordinary original civil jurisdiction of this Court. The accommodation they have at 22 Chittaranjan Avenue looks like rented. Or assume that they are the owners. It does not matter which. What do Caltex do here, or to keep strictly to the point, what did they do here on June 1, 1964, with nine telephone lines: 23-5081-89, a telegraphic address; Caltex, and advertising the wares they deal in, at the very top of such business letters in the manner following:

PETROLEUM | Seal | PRODUCTS |CALTEX |

[See paragraph 2 ante.] There can be one, and only one, answer: that they were doing commercial business here on June 1, 1964, and that they are doing so even now. The evidence I have heard and other matters I have had put before me lend assurance to such an answer x x x x xx xx 18-21. x x x x To sum up, upon a review of all that goes before, I find as facts -

A. Caltex do carry on business in Calcutta.

B. They did carry on business in Calcutta on June 1, 1964, when this suit was instituted.

C. The general supervision of the head office at Bombay is no doubt there, as it must necessarily be. It does not, however, mean that the head office alone carries on business at Bombay and that the Calcutta district office does not. (What does it do here then, if not business?) D. Upon the whole of the evidence it does not emerge that the head office of Caltex at Bombay decided not to extend the option period, though it appears to have confirmed the terms come to between Babulall and the Caleatta district office on April 30 and May I, 1.963. What emerges instead is that the district office took that decision -- a mutter which was within its "purview", as I have it on the high authority of the head office itself: vide the plaintiff's document No. 15 at page 30 of the admitted brief of documents, ext. A: paragraph 18 ante.

22. I do not overlook Explanation II to Section 20 of the Procedure Code Mr. De has referred me to. No doubt, it provides inter alia that a Corporation shall be deemed to carry on business at its sole or principal office in India. But Section 20 (surely inclusive of Explanation II) does not touch this litigation. It does not, because Section 120 of the Procedure Code prescribes that the provisions of

Section 20 shall not apply to the High Court in the exercise of its original civil jurisdiction--just the jurisdiction I am exercising here and now.

23. What touches, and indeed governs, this litigation is Clause 12 of Queen Victoria's Letters Patent of December 28, 1865, which, to quote from the judgment of P. B. Mukharji, J. in K. G. Kalwani v. Union of India , "still exhibits surprising vitality", though a hundred years has passed by. The deeming provision of Explanation II to Section 20: that a corporation shall be deemed to carry on business at its sole or principal office, no matter that it does carry on business here, there and everywhere, is not to be found in clause 12 of the Letters Patent. With no such legal fiction there, the only test that has to be satisfied, in the context of the suit in hand, is: do Caltex carry on business in Calcutta? Or, to be exact in the context of the present litigation, did Caltex carry on business in Calcutta on June 1, 1964, the time of commencement of this suit? The findings I have come to in paragraph 21 ante upon a review of the evidence answer these questions in the affirmative and satisfy the test Clause 12 of the Letters Patent provides for. I see no absurdity in Caltex carrying on business in Calcutta, Bombay or in as many places as their business enterprise takes them to. Not to hold so is to shut one's eyes to the reality plain to be seen.

24. Do the decisions Mr. De cites show anything to the contrary? Union of India v. Ladulal Jain , Bata Shoe Co., Ltd. v. Union of India and supra are the three cases he refers me to, on jurisdiction. But they all turn on Government carrying on business of running the railways a matter with which I have little to do here. As P. B. Mukharji, J. pointed out in Kalwani's case :

"That a private company or corporation can carry on business within the meaning of Clause 12 of the Letters Patent is too well settled to permit re-agitation."

Caltex are a private company. Caltex are a corporation, incorporated as they are outside India: Section 2(7) of the Companies Act 1 of 1956. So, why equate Caltex with Government running the railways and re-agitate a questaion "too well-settled to permit re-agitation"?

25. This is one consideration. There is still another. In Bata Shoe Co.'s case for short delivery of goods consigned from Agra Fort to Bikaner, both places being outside the territorial jurisdiction of the Presidency Small Cause Court at Bombay, a suit was instituted just there: Presidency Small Cause Court, Bombay, against the Union of India representing the B. B. and C. I. Railway, the head office of which was at Bombay. Gajendragadkar, J. (as his Lordship then was) held, Vyas, J. agreeing, that the Union of India representing the B. B. and C. I. Railway could not be said to carry on business within the meaning of Section 18(b) of the Presidency Small Cause Courts Act 1882 (almost in similar terms to Section 20 of the Procedure Code and Clause 12 of the Letters Patent), even though the head office of the railway was at Bombay, and that the Bombay Presidency Small Cause Court had therefore no jurisdiction to try the suit. Kalwani's case reveals non-delivery of a consignment of artificial silk goods from Chandari railway station to Howrah railway station, both places being outside the territorial jurisdiction of this Court on the original side, and a suit instituted just here on the ground that the railway concerned had its head office at 17 Netaji Subhas Road within this Court's territorial jurisdiction. G. K. Mitter, J. at the trial and P. B. Mukharji, J. sitting with H. K. Bose, J. (as his Lordship then was) in appeal held that the Union of India owning the

railway concerned did not carry on business at the head office of the railway within the meaning of Clause 12 of the Letters Patent. Now, compare Ladulal's case where, for non-delivery of a consignment of 134 bags of rice from Kalyanganj railway station in West Bengal to Kanki railway station in Bihar, a suit is instituted against the Union of India and the Northern Frontier Railway represented by its General Manager, in the court at Gauhati within the territorial jurisdiction of which Pandu, the principal place of business of the railway, its headquarters is situate, but Kalyanganj and Kanki are not. Raghubar Dayal, J. speaking for the Court holds that the Union of India does carry "on the business of running railways and can be sued in the court of the Subordinate Judge of Gauhati within whose territorial jurisdiction the headquarters of one of the railways run by the Union is situated". More, Pratap Chandra Biswas v. Union of India, AIR 1956 Assam 85, holding in favour of the Union of India carrying on such business and therefore dissented from in Kalwani's case is impliedly approved by the Supreme Court in Ladulal's case .

It therefore appears that this decision of the Supreme Court overrules by implication not only Bata Shoe Co.'s case and Kalwani's case Mr. De cites but also a crowd of other decisions Mr. De does not. That apart, in Ladulal's case the contention on behalf of the Union of India before the Supreme Court is that in reality the Union has its headquarters office" at New Delhi, the head office of the railway at Pandu having been only the Union's branch office which is "controlled by the Union of India from New Delhi". And certainly the factual position is such that this may be said. If the Railway Board at New Delhi does not control Pandu head office, who does? Still the suit in the Gauhati Court, within the territorial jurisdiction of which the Pandu "branch office" of the Union of India is, is held to be a suit filed in a court of competent territorial jurisdiction. On this analogy, the present suit against Caltex with their district office at Calcutta may be regarded as a suit in a court having the territorial jurisdiction to try it. But I do not push this analogy too far. I rest my finding instead on the fact that Caltex carried on business on June 1, 1964, at 22 Chittaranjan Avenue within the territorial jurisdiction of this Court, thus satisfying the test clause 12 of the Letters Patent lays down.

26. Now the cases Mr. Ghosh relies upon may be noticed. In Guardian Assurance Co., Ltd, v. Shiva Mangal Singh , Sulaiman, C. J. held Bajpai, J. agreeing, that the assurance company concerned, a foreign company, whose managing agents were Andrew Yule and Co., Ltd., Calcutta, could be said to have been carrying on business in Calcutta on the following among other grounds, (i) payment by the assurance company of the rent of a room in the premises occupied by Andrew Yule & Co., (ii) setting apart of the said room for carrying on business on behalf of the assurance company, (iii) maintenance of separate account books for such business in Calcutta, (iv) payment by the assurance company of the licence tax to the Corporation of Calcutta, (v) display of a sign board by the assurance company indicating that it has its office in the same premises, and (vi) authorizing the managing agents, Andrew Yule and Co., under a duly executed power-of-attorney to accept insurance proposals, issue cover-notes and policies and pay all claims. If I may say so, care has not been taken to get from Caltex's solitary witness, S. N. Sinha, a little more. But it is no function of a judge to be lachrymose over what might have been brought in evidence. His function is to go by evidence that exists. And that, coupled with the probabilities, is enough to sustain a finding that Caltex do carry on business in Calcutta. (See paragraph 17 et seq. supra). To go over that again, side by side with the grounds Guardian Assurance Co.'s case reveals, here are they seriatim:

(i) 22 Chittaranjan Avenue where Caltex carry on business looks like a rented accommodation as the very name of the premises: United India Life Building : goes to show. The name is not Caltex House, as in Bombay, where the head office of Caltex is housed. It appears so from the head offices letter of 27-3-1964, to the address of Babulall: the plaintiff's document No. 15 at page 30 of the admitted brief of documents, ext. A. Thus, it seems, Caltex arc paying rent for the accommodation here to carry on business, here in Calcutta. If Caltex own the United Life Building which is 22 Chittaranjan Avenue, there is no escape either. They own it so to carry on business too. Even as a licensee without licence fee--an absurd thing to think of the position will be just so.

(it) It needs no imagination to see that the accommodation at 22 Chittaranjan Avenue they are in enjoyment of has been set apart for carrying on their business with nine telephone lines : 23-5081-89, on three floors (q. 107 to Babulall), a telegraphic address: Caltex, and a post box too bearing the number : 2382.

(iii) That Caltex run their separate accounting here may be taken for granted, because on matters before this Court the existence of such separate accounts may be considered so probable that a prudent man ought, under the circumstances of this case, to act upon the supposition that separate accounting exists: vide definition of "Proved" in Section 3 of the Evidence Act. For the pay and emoluments of the District Marketing Manager, Sales Manager and others officers, assistants, clerks, typists and menials making a big staff (q. 107 to Babulall) for receipts from different service stations, for telephone and electric bills, for other receipts and expenses galore, separate accounts are bound to be maintained here. My only regret is that Mr. Ghosh did not get all this on record. Nor did I. Still there can e no running away from so probable a fact, so probable that it may very well be regarded as certain.

(iv) Similarly, payment by Caltex of the licence fee to the Corporation may be taken as equally probable, even without direct evidence to that end.

(v) So also about the sign board. The headings of the business letters show how the sign board will be like.

(vi) Caltex do business here on their own, subject, of course, to the general supervision of the "General Office" at Bombay. So they are in a stronger position than the assurance company of the Allahabad case carrying on business through agents, Andrew Yule and Co.

Let me now close my review of Guardian Assurance Co.'s case noticing an interesting contention advanced there. The contention was: a corporation can carry on business only where it dwells and the corporation can dwell only at the place at which its directors meet, hold their meetings and carry on the principal business of the corporation. Incidentally, in the light of this contention, Babulall would have to go to the Bahama Islands to file his suit against Caltex a result which makes the contention refute itself. Sulaiman, C. J. repelled it. In having done so, his Lordship referred to the provisions of "the 1913" Companies Act, and Section 277 in particular, recognising the obvious fact that foreign companies do carry on business in India. Part XI of "the 19.56" Companies Act does recognize just that, laying down "Provisions as to establishment of places of business in India" by

"Companies incorporated outside India." His Lordship referred too to the following amongst other English cases which Mr. Ghosh also refers me to :

(i) La Compagnie Generate Transatlantique v. Thomas Law and Co., (1899) AC 431, where the appellants, "a French company formed under the French law with its head office in Paris", "owned steamers trading between French ports and English ports and other places. The Company were lessees and paid the rent of an office in London where their name was painted up". One Fanet acted for them there. In an action in the Admiralty Division against the appellants founded on a collision between their vessel and the respondents', the writ was served on Fanet, The question arose if a foreign company could be sued in England. The House of Lords answered the question in the affirmative. Earl of Halsbury L. C. in his short speech upheld the view of Bacon v. C. who, "with that broad common sense which not infrequently distinguished that learned judge's observations, said, in a similar case, Lhoneux, Limon and Co. v. Hong Kong and Shanghai Banking Corporation, (1886) 33 Ch D 446:

"They hire an office, write up their name, and beyond all questions stamp upon themselves and upon their place of business here ths assumption that here they carry on their business", [I say just so of Caltex. They hire an office in United India Life Building at 22 Chittaranjan Avenue. If they own it, so much the better. They print off thousands of letter papers. See the number 20,000 in print at the top of such letter papers, exts. M, N, P and R. They write up their name and the products they specialise in. They insert there their telephone numbers not one, but nine showing the volume of business they have to tackle with here. They put in their telegraphic address and post box number too. So they must be carrying on business right here. Still to say that they do not is to defy broad common sense.]

(ii) Dunlop Pneumatic Tyre Co. v. Act Fur Motor Und Motorfahrzeugbau Vorm Cudell and Co., (1902) 1 KB 342: The defendants, incorporated according to the law of Germany, carried on business there as manufacturers of motorcars, with no place of business in England, save that they did hire a "stand" at the Crystal Palace for the exhibition of articles of their manufacture at the National Cycle Show held there, for nine days only, from November 22 to November 30, 1901. Even so, the Court of Appeal (Collins M.R., Romer L. J. and Mathew L. J.) held that during the continuance of the 9-day show the defendants were carrying on business so as to be resident at a place within the jurisdiction. (A fortiori therefore Caltex carrying on business here for months and years on end in the manner noticed "dwell" within the jurisdiction of this Court within the meaning of Clause 12 of the Letters Patent. So the Court has jurisdiction this way too).

(iii) Saccharin Corporation Ltd. v. Chemische Kabrik Von Heyden Aktiengesellschaft. (1911) 2 KB 516: As the sole agent of the defendants, the German company, one Blaguis carried on business at a fixed place (Fenchurch Street) in London. Amongst other things, he had powei to enter into contracts of safe for the defendants. The form of contract was headed with the defendants' name and address in Germany and under the defendants' name appeared that of Blasius as their sole agent in the United Kingdom.

More, on the contract form appeared a telegraphic address and a telephone number purporting to be those of the defendants. So any one desiring to communicate by telegraph or telephone with the defendants in London would do so by wiring or speaking to Blasim's office. Therefore, the defenadants adopted Biasing's place of business as their London address, even though Blasius paid the rent therefor (the premises in Fenehurch Street). Of course, if the defendants had vented the office and Blasius had occupied it with their consent, that would have been a very strong piece of evidence against them. (All this I have borrowed from the judgment of Fletcher Monlton L. J.) The defendants, it was held, were carrying on their business at the agent's office so as to be resident at a place within the jurisdiction. (Much stronger is the case before me where no agency is seen. What is seen instead Caltex themselves carrying on business.

27. Two other cases Mr. Ghosh cites on the point of jurisdiction. One is the Peoples Insurance Co. Ltd. v. Benoy Bhusan Bhowmik , where Mukherjee, J. (as his Lordship then was), sitting with Blank, J. pointed out towards the close of the judgment that, in view of the clear language of Explanation If to Section 20 of the Procedure Code, once it was established that the corporation had got a branch office at any place, it must be deemed in the eye of law to curry on its business at that place irrespective of the nature of the work that was actually carried on there. But this part of Explanation II is such that cause of action, wholly or in part, and a subordinate office of the corporation at a place where such cause of action arises must co-exist. The case before their Lordships presented no difficulty. The branch office of the insurance company was at Dacca where part of the cause of action due to the death of the insured arose. But in the case before me, even if I take it that part of the cause of action has arisen within my jurisdiction, the other part having arisen at 24-A Deshapriya Park Road. Babulall's residence, within the jurisdiction of the Alipore Court, what I miss is leave of the Court which was not obtained, though it was the first thing to have been obtained before the institution or the suit, under Clause 1.2 of the Letters Patent. So this decision cannot help Mr. Ghosh. The other case he cites is Davies v. British Geon Ltd., (1957) 1 QB 1, where a labourer working at the factory at Sully, within the district of Cardiff registry, under the defendant company (which had its principal and registered office in Piccadilly, London) contracted dermatitis and issued a writ against the Company in the Cardiff District Registry. The question arose if, within the meaning of Order 12, Rule 4 of the Rules of the Supreme Court, the Company, on whose behalf appearance was entered in London, resided or carried on business within the district of the registry. Denning and Birket L. JJ. held, Harman, J. dissenting, that the defendant company "resided" in London where the principal office was, but "carried on business" both in London and at their factory, so that the Company ought to have entered appearance in the Cardiff registry instead of in London. Thus, a company carrying on business at more places than one is quite a conceivable proposition. It is neither reason nor common sense to say that "an individual can carry on business at more than one place while a company cannot", to quote from the observations of Denning L. J. in the course of arguments at the Bar at page 6 of the report. Therefore, "the head office theory", unless backed by a legal fiction, as in the first part of Explanation II to Section 20 of the Procedure Code (the like of which is not there in Clause 12 of the Letters Patent), cannot alter the reality I see in Caltex carrying on business both in Bombay and Calcutta. Give the plain meaning to the plain English word "business". And you cannot but hold that Caltex do carry on business in both the places Bombay and Calcutta.

28. Upon a review of authorities, the evidence I have had put before me, and the probabilities, the conclusion I have come to is that Caltex did carry on business on June 1, 1964, the date of institution of this suit, as they do now, at 22 Chittaranjan Avenue, inside the territorial jurisdiction of this Court, within the meaning of Clause 12 of the Letters Patent. I therefore find the first issue in favour of the plaintiff Babulall.

29. The question of jurisdiction (issue No. 1) thus settled, I proceed to the next two issues which run into one another. The second one is on the true interpretation of the agreement dated, strictly speaking, April 30 and May 1, 1963. Marked exhibit M at and during the trial, it has been reproduced in full in paragraph 2 ante. Read as a whole and fairly, its interpretation does not present much of a difficulty. Indeed, it appears to be so easy of solution except on one point dealt with in para graph 34 el seq infra. It is an agreement following discussions between Babulall on one hand and E. M. Schimdt, R. Majumdai and K. C. Dutta of Caltex on the other. And such discussions were had on the morning of April 30, 1963 the very day Caltex district office addressed the letter, ext. M. to Babulall. The points agreed upon in the course of discussion were :

1. Babulall's land at Prince Anwar Shah Road, Tollygunge, was to be leased, first for a ten-year term and therefore with two renewal options of ten years each, for constructing and maintaining a service station by Caltex district office.

2. The area of the land to be leased so would be approximately 144' X 100' one bigha, for which Caltex district office would pay Babulall Rs. 2,500 a month as rent.

3. As each ten-year option for continuation of the lease would be exercised, the rent would be increased too by 10%.

4. On receipt by Caltex district office of "all the necessary approvals from the concerned Government authorities", the lease effective from May 1, 1963, and necessarily carrying rent therefrom would be finalised, i.e. executed.

5. For the first three months (May-July 1963) Caltex district office would pay Babulall the retention fee of a consolidated sum of Rs. 3,750 which would be "non-refundable", no matter whether all approvals could be obtained or not, that is to say, even if the lease would fall through, as it was bound to, for lack of approval of the authorities a condition precedent to the installation of a service station.

6. If Caltex district office would require a further extension of time beyond July 31, 1963, on the expiry of the first 3 month option, "in order to receive the necessary approvals'", Caltex district office was agreed to pay Babulall Rupees 2,500 a month. If the lease would come on receipt of "the necessary approvals", such payments were to be reckoned as, and applied against, rent. If the lease would fail because of such approvals not forthcoming, such payments (Rs. 2,500 a month from August 1963) would be "non-refundable" too.

7. With a view to ensuring that the land which was being leased out so was free from all incumbrances, Babulall would produce his documents of title for inspection by the lawyers of Caltex district office.

In the original letter of April 30, 1963, ext. M, the seven points above are listed as "the points agreed upon". Of these, the points bearing serials 2, 4, 5 & 6 use the word "we" & the one bearing serial No. 7 uses the word "our". Since the writer of the letter is the Caltex district (office) of Caltex (India) Limited, I have substituted, in reproducing the points, points 2 and 4 to 6, Caltex district office for we, that indeed being the plain meaning of we in the context of the letter. By parity of reasoning, I have substituted Caltex district office for our in point No. 7.

30. Such being the clear terms, I see here a completed agreement (for lease) duly executed by Caltex on April 30, 1963, and by Babulall on May 1, 1963. Mr. De however sees here an agreement for an agreement (not necessarily in writing) for lease. How he does so beats me. The subject of the letter is captioned: "Lease of land owned by you at Prince Anwar Shah Road, Tollygunge, Calcutta". Of the seven points agreed upon, the first one says : "Subject land is to be leased etc."; the second one says : "The area to be leased is approximately 144' X 100'" for which the other party to the agreement (Caltex) will pay a rent of Rs. 2,500 a month; the third one provides for an increase of rent, the fourth one emphasizes that, necessary approvals forthcoming, not only will the lease be executed then, but also will it relate back to May 1, 1963; the sixth one makes it clear that, necessary approvals not had by July 31, 1963, retention fee will be paid at Rs. 2, 500 a month, but that such payments "will be applied against" rent, so soon as approvals are had and the lease follows; and the seventh one provides for a prior inspection of the would-be lessor's documents of title so that the lease may be put on a secure basis. If this is not an agreement for lease, I do not know what an agreement for lease is. Mr. De unnecessarily troubles himself with absence of a provision for forfeiture and the like, though such absence enures to the benefit of his client. It will be a lease of the parties, not yours nor mine. And it has been their pleasure to be content with the seven points enumerated above. It has been their pleasure too not to bother themselves with the provisions Mr. De is anxious about, What is more important, any addition of new terms (the like of which Mr. De postulates) will make for a breach of the agreement solemnly come to by them.

31. In the course of his arguments, Mr. De formulates a test: how the parties to the agreement understood it. Mr. Ghosh accepts the test. So do I. Translating this test to the documentary evidence of Caltex, it is found, as Mr. Ghosh so rightly submits, that Caltex always understood this agreement, ext. M, as an agreement for lease, and not as an agreement for an agreement for lease. So much so, that they called for, and received, the deed of conveyance, thus leaving no scope for a further agreement. For convenience sake, here is a chart of the documentary evidence, letters all, showing just so: (Not reported herein Ed).

x x x x x

32. Equally ineffective is his other contention that what this concluded agreement, ext. M. concludes is only a 3-month option for May to July 1963. To contend so is to overlook point No. 6 of the seven "points agreed upon". Babulall and Caltex, the two parties to the agreement, visualize (presumably

from past experience which Caltex must have had and Babulall may have had) that all the necessary approvals--a condition precedent to the installation of the contemplated service station may not be forthcoming in three months' time. Will Babulall then be free to lease the land to somebody else after July 31? Certainly not. Hence point No. 6 is one of the points agreed upon. And what it clearly provides for, obviously to prevent Babulall from doing so, is this. Caltex will pay Babulall Rs. 3,500 a month if they require a further extension of time past July 31 in order to receive the necessary approvals. If the approvals are received in the course of this extended time, a lease will follow. And the lease being there, payments at Rs. 2,500 a month will count as rent. If however the approvals elude Caltex, such payments will be non-refundable, the clearest implication thereby being that they will count as retention money paid by Caltex to Babulall as the price for disabling him (Babulall) to seek any other as a lessee for the land in question during this uncertain period.

33. x x xx

34. But how long beyond? That is the question, and so important a question. Take an extreme view. On the expiry of the 3-month option, Caltex say, as they do (wrongly though in fact and at law): 'we drop the matter' Can they do it and run away from the agreement by the sixth agreed point of which they nave agreed to go on paying Rs. 2,500 a month if for the necessary approvals they require time beyond July 31, as they do very much in the facts before me? Or take another extreme case. Say. the authorities who seem to revel in tortuous progress of even such routine matters take ten years to grant all the approvals needed, Caltex meanwhile losing all interest in the matter. Will Caltex then be mulcted in retention fee of Rs. 2,500 a month in terms of point No. 6 for that long? The agreement is silent about it. This silence creates a difficulty. But it is a difficulty which is capable of being overcome with reason. In none of the two illustrations I have taken, Caltex can be saddled for 10 years with the liability of Rs. 2,500 a month the price they had agreed to pay Babulall for the further option on the expiry of the 3-month option. To saddle them so is to make the option period equal to the lease period the first 10-year term though a lease is not "born" yet. It will be making the two unequals equal to one another an inconceivable proposition. That apart, it negates reason and brings the whole thing on the verge of ridicule and absurdity. So, the theory of a reasonable time may have to be pressed into service to work out justice for which alone a Court of law exists. I was thinking on this line on the morning of May 20, 1965, the arguments having been concluded on the day previous. At the same time, I was left wondering why this aspect of the case was not argued at the Bar. In fairness to Mr. De, I hasten to record that he had just touched this point on the very first day of hearing (March 19, 1965) never to develop or even mention it again during the carriage of the suit on the remaining days up to May 19, 1965, when he concluded his address to me. So I ordered the suit to appear in the list of May 21, 1965, marked: To be mentioned, after I had failed to get both Mr. De and Mr. Ghosh on May 20, 1965, when I could see Mr. Ghosh only appearing in my Court in another case. On May 21, 1965, Mr. De and Mr. Mukherji (Mr. Ghosh's junior) were good enough to appear before me. And I told them what was troubling me. I told them too of another matter: one on Section 599 of the Companies Act 1 of 1956 since dealt with in paragraph 15 ante. They wanted to address me on May 31, 1965, on my return from a short leave. I have heard them, as arranged, though not on May 31, 1965, when I was assigned different work on the Appellate side. Indeed. I could hear them only on September 9, 1965, when I returned to this side On the point I am on now, Mr. De's argument consists of three propositions. First : the option excludes the agreement and the

agreement excludes the option. Second: without possession of the land to be leased out, Caltex cannot be made liable on the foot of any agreement to lease. Third: 'find out what time I require to get necessary approvals from the authorities. And make me liable for that long only.'

35. I am unable to accept the first proposition Mr. De enunciates. As I read the agreement of April 30/May 1, 1963, (paragraphs 2 and 29 ante), the 3-month option incorporated in the 5th point of the 7 points agreed upon is included in the agreement of which it forms part. Therefore, this particular option and the agreement as a whole are not mutually exclusive. Both stand together, one being part of the other. Equally ineffective is Mr. De's second proposition. To contend so is to run away from the agreement the 6th agreed point of which stipulates: if Caltex require further extension of time past July 31, 1963, with a view to getting the necessary approvals, they will go on paying Babulall Rs. 2,500 a month. Where does Mr. De find here or anywhere else in the agreement that so long Caltex are not inducted into the land, they are not liable to pay on the expiry of the 3-month option on the last moment of July 31? Such contention, therefore, appears to be destitute of merit. Not so, however, the third proposition of Mr. De which comes to this : 'Make me liable for the time I require to obtain the necessary approvals, and not a day beyond that.' I accept this subject to one reservation : 'Make me liable for such reasonable time I require to obtain the necessary approvals.' The lackadaisical manner in which such matters moved has been noticed. (See paragraph 33 ante.) The Director of Fire Services sat over Caltex's letter of May 8, 1963, for 2 months and 16 days, that is to say, till July 22, 1963, when he condescended to inform the District Magistrate, 24-Parganas, that there was no objection "from Fire Service point of view". Deputy Inspector General of Police D. Dhar would beat the Director of Fire Services. On January 8, 1964, it was his pleasure to inform the said District Magistrate that there was no objection "from the traffic point of view", though he was written to on the subject on or about June 6, 1963, as it appears from the notes and Order dated June 5 and 6, 1963, of the District Magistrate's office: ext. K/1. Some 7 months to attend to, and to report on, a matter as this. (See paragraph 33 again: B and C ante.) That red-tape and delay go together has not been said in vain. The District Magistrate, 24-Parganas, would necessarily beat them both the Director of Fire Services and the Deputy Inspector General of Police. He informed Babulall on March 20, 1964, that the matter was still under investigation: ext. B, though Caltex had petitioned him (the District Magistrate) on May 6, 1963: ext. E/1; and the earliest the District Magistrate could attend to this petition was June 6, 1963: ext. E/2. 10 months and a half passed by. And the matter was still under investigation. Investigation indeed with vengeance, it seems. No more need be said to demonstrate the deplorable lack of efficiency and earnestness with which such matters were handled by the powers that be. Now, suppose as the result of such a lamentable drift, the matter had dragged its slow length for years, say, 3 or 4 years, (not 10 years I took by way of an illustration as an extreme case), and the authorities decided not to grant the approvals without which the Service Station Caltex were after could not be started and the proposed lease could not be executed either.

Will that make Caltex liable to pay Babulall Rs. 2,500 a month for that long (3 or 4 years) in terms of the 6th agreed point in the agreement of April 30/May 1, 1963? It will not. It should not. Hence, I say, I accept Mr. De's third pro position with a reservation, the reservation being that Caltex are answerable for the payment of Rs. 2,500 a month for such time on the expiry of the 3-month option as may be regarded reason able for getting the necessary approvals. Not to take the reasonable time

as the test is to work out injustice, and, what is worse, to put an interpretation on the agreed point No. 6 in the agreement which was not intended by either party thereto. By having agreed to pay Babulall Rs. 2,500 a month on the expiry of the 3-

month option on July 31, 1963, if Caltex required "further time extension" "in order to obtain the necessary approvals", they had agreed to no more than paying so for such reasonable time as would be necessary to get the approvals. And Babulall took it to be just that as well.

36-38. x x x

39. This is then how the evidence stands On the one hand, I have before me the clear and categorical evidence of Babulall that both he and those who acted for Caltex distinctly understood the delay of some six to eight months for getting all the requisite approvals as inevitable, thus lending assurance to his averment to that end in the plaint. On the other hand. I have no evidence from Caltex, making the denial of such an understanding in their written statement an idle one. This is not all. Babulall's clear evidence of such understanding is there (qq. 30, 32 and 105). Mr. Ghosh has a point when he submits that in spite of such statement in chief there has been no cross-examination on this. Naturally, it leads to the inference that Babulall's evidence to that extent: both parties to the agreement knew that all the necessary approvals would take some six to eight months' time is accepted. The authorities on the point are ample and clear. See, for example, Browne v. Dunn, (1893), 6 Rule 67 at page 70, relied on by P. B. Mukharji, J. in A. E. G. Carapiet v. A. Y. Derderian . Chunilal Dwarka Nath v. Hartford Fire Insurance Co. Ltd. , etc. No doubt, Phipson on Evidence, 10th edition, in paragraph 1542 at page 595, lists five exceptions where "failure to cross-examine ....

.... will not ..... amount to au acceptance of the witness's testimony." The exceptions are; (i) where "the witness has had notice to the contrary beforehand", (ii) where "the story is itself of an incredible or romancing character", (iii) when "abstention (from cross-examination) arises from mere motives of delicacy, as where young children are called as witnesses for their parents in divorce cases", (iv) "when counsel indicates that he is merely abstaining for convenience, e.g., to save time , or (v) "where several witnesses are called to the same point", it being then "not always necessary to cross-examine them all". The omission I notice here does not come under any one of these exceptions. On the contrary, the story here--the story that six to eight months' time would be taken to get all the requisite approvals--looks so probable. Why probable, now it looks certain. Even on January 8, 1964, eight months and eight days after May 1, 1963, Deputy Inspector General of Police D. Dhar was writing to the District Magistrate to say that there was no objection to the proposed installation of the Service Station (petrol pump) "from the traffic point of view". (See paragraph 33 ante.) And still there has been no cross-examination of Babulall on the point. It may therefore be taken as an acceptance of the truth of this part of Babulall s evidence: That both he and Caltex took for granted the delay of six to eight months in obtaining the necessary approvals. I find as a fact just that.

40. But can I go further than this? For example, can I read that as an implied term of the agreement of April 30/May 1, 1963, I see before me? On a problem as this, I should recall what Scrutton, L. J. says in Comptoir Commercial Anversois v. Power Son and Co., (1920) 1 KB 868 at p. 899, cited by

Lord Morton of Henryton in Pragdas Mathuradas v. Jeewanlal (1929) Ltd. : "The Court ..... ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included. It must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted".

I govern myself accordingly. In the case in hand, I do not imply this term (the inevitable delay of six to eight months to get all the requisite approvals), because to my thinking it would be a reasonable term to include if Babulall and Caltex had thought about the matter, or because if either Babulall or Caltex had spent some thought on the matter, neither of them would have made the contract unless this term was included. I imply the term, because both Babulall and Caltex had thought about it, because both of them had intended that so obvious and necessary a thing should be a term of the contract--for which and because of which (six to eight months' delay) they had provided in agreed point No. 6 what would happen if the requisite approvals were not forthcoming on the expiry of the first 3-month option. Furthermore, they have only not expressed it in so many words because its necessity was so obvious that it was taken for granted by both, as my finding upon evidence is. Though they have not expressed it in so many words, they have done so by implication by providing in the 6th agreed point how things would go on if all the approvals could not he had in the course of the first three months (May-July 1963). Therefore, if I am correct in reading this as an implied term, Babulall can recover Rs. 2,500 a month for five months more on the expiry of the first 3-month option on July 31, 1963. 5 plus 3 will make 8 months, just what the understanding was between the parties, as pleaded and deposed to by Babulall and as found by me too upon evidence. At the same time, it does not behave me to make this time-limit of 6 to 8 months a rigid one. In the very nature of things, it may be a little less or more. Say, it is 8 months and a few days more, nearing or even reaching 9 months. Still, it will be within the time-limit of 6 to 8 months and thereabouts. It will be a mistake to see in it a mathematical precision. Regarded so, even the averment in the 3rd paragraph of the plaint (6 to 8 months or even more ; paragraph 37 ante) may stand. What I do not allow Babulall to do on the basis of this expression (6 to 8 months or even more) is to claim for far more than 8 months 1.0 months from August 1963 to May 1964 as claimed by him in this suit in addition to what he has got for the first 3-month (April-June) option making it a total of 13 months, and, what is more, for many more months yet from June 1964, as is stated on his behalf. That will be allowing Babulall to take an ell once he has been given an inch under the cover of "even more". This is why I limit the time-limit of 6 to 8 months that way.

41. Say, I am wrong in implying the inevitable delay of about 6 to 8 months to get all the necessary approvals as a term of the agreement. Even then there can be no running away from the fact that Caltex did inform Babulall on January 9, 1964 :

..... the subject was dropped." : ext. P and paragraph 8 ante.

Upon such breach of a valid agreement for a lease, ext. M, Babulall had two remedies : (i) an action to recover damages and (ii) an action for specific performance of the agreement. Babulall has chosen the first remedy by bringing the suit I am seized of, a suit to recover damages for the breach. From

January 9, 1964, he had the liberty to settle the land with anybody else or to deal with it in any other manner; the more so, as he did not choose the second remedy specific performance of the agreement. Still the ends of justice require that he should have a little more lime beyond January 9, 1964. Surely, the prospective lessees were not waiting at his door, so that Babulall would offer them this land of his immediately on getting Caltex's letter of January 9, 1964. It is therefore but just that he should have the whole of January 1964 with a view to finding out a new lessee in place of Cultex guilty of having broken the agreement of April 30/May 1, 1964. To that extent Babulall would be worse off by reason of the loss of retention fee which would have been his but for the breach on the part of Caltex. The measure of his damages would be that too.

42. Mr. Ghosh will not however like me to stop at January 1964. He refers me in the notings in the office of the District Magistrate, exts. J series, wherefrom it will appear that Caltex did not proceed with the matter in spite of letters written to them, letters by registered post the last of which was received by Caltex, according to the office notes (ext. J/5), on May 18, 1964. Ultimately, on July 13, 1964, the officer in charge of these administrative matters put it up before Additional District Magistrate V. Misra who ordered :

"File Sd. V. Misra 17/7" : exts. J series again and q. 56 et seq to District Magistrate's office assistant Prakriti Ranjan Barua."

Mr. Ghosh therefore contends that Babulall is entitled to retention fee beyond January 1964 and up to July 1964. The claim of this suit is up to May 1964. I am unable to accept this contention. Whatever Caltex did or did not do in proceeding with their application for all sorts of "No objection" certificates and the ultimate approval of the authorities for installation of their Service Station, they notified Babulall on January 9, 1964, that for their part they had dropped the matter. So how Babulall can claim retention fee up to July 1964 is not clear to me The maximum I can stretch in Babulall's favour is up to January 1964. I have stated why.

43. To sum up, I find the two issues under discussion as follows :

On a true interpretation, the agreement, ext. M, is a completed and valid agreement for lease, not merely an agreement for a further agreement, not merely an agreement for the first 3-month option only, but an agreement for a further option period at an enhanced retention fee till finality is reached one way or the other about the granting of all the requisite approvals, it being understood by both parties to the agreement that some six to eight months' time would be required to reach that finality. Other parts of the agreement speak for themselves and are not in the realm of controversy.

No; he (the plaintiff Babulall) is entitled to six months' retention fee from August 1963 to January 1964 at the rate of Rs. 2,500 a month amounting to Rs. 15,000.

44-51.x x x

52. The fifth and last issue I have now reached merits the finding that Babulall is entitled to a decree, not for Rs. 25,000, as he prays the Court for, but for Rs. 15,000, as I have found in

paragraph 43 ante, pins costs.

53. In the result, I enter judgment for the plaintiff for Rs. 15,000 and award him costs in terms of prayer (c) of the plaint. No other relief.

54. Certified for two counsel.

55. The operation of the decree following this judgment do remain stayed till the end of this year (1965) with a view to enabling the party aggrieved by my decision to carry the present litigation in appeal.