

**SUPREME COURT OF NIGERIA**  
25TH FEBRUARY, 2000. SC. 50/1994  
**CORAM:- A. B. WALI, E. O. OGWUEGBU,**  
**A. I. KATSINA-ALU, O. ACHIKE, U. A. KALGO, JJSC**

UNIVERSITY PRESS LTD.	.....	APPELLANT
AND		
I. K. MARTINS NIG. LTD.	.....	RESPONDENT

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**ACTIONS** - *Contract - Breach of Contract - Venue for trial - Onus to establish - Is on the person who asserts.*

**APPEALS** - *Judgment - Obiter dictum - Ground of appeal - A court's obiter can never constitute an appealable ground of appeal.*

**COURTS** - *Judgment - Interlocutory matter - A court dealing with interlocutory matter - Should not give a preemptive determination of the substantive suit.*

**JUDGMENTS** - *Obiter dictum - What it means - And how treated in a case.*

**PRACTICE & PROCEDURE** - *Action - Venue - For trial - How to determine question of venue.*

**FACTS**

The plaintiff/respondent instituted this action at the High Court, Onitsha, claiming the outstanding debt of N22,100.00 in respect of reams of newsprint paper sold and delivered to the defendant/appellant, together with interest. Pursuant to the orders of the defendant, the plaintiff supplied and delivered to the former a total of 5000 reams of newsprint paper on two occasions of firstly 2000 reams on LPO No. 2257 and later 3000 reams on LPO No. 2262. The Defendant duly acknowledged the delivery by signing the waybill thereof at Onitsha after physically counting same.

The first supply of 2,000 reams duly paid for. As regard the second supply, the defendant resident at Ibadan complained in writing that there was a shortage in supply of 240 reams. On receipt of this complaint, the plaintiff travelled to Ibadan and held discussion with the defendant whereupon both agreed that the reams of newsprint were correctly supplied. However, the plaintiff made repeated demands for the payment of the outstanding sum but to no avail hence the institution of this action. The defendant entered a conditional appearance on protest and thereafter filed a motion on notice pursuant to Order 4 Rules 3 and 5 of the Anambra State High Court Rules 1988, praying the court, inter alia to strike out the suit in that the action was commenced at Onitsha High Court in Anambra State instead of at Ibadan High Court which, according to the defendant, is the appropriate venue. In the affidavit in support of the motion, it was averred that the contract for the supply of the newsprint was concluded in Ibadan whereat the two LPOS, Exhibits A and B attached to the affidavit, were issued. The plaintiff also filed a counter-affidavit to which were attached Exhibits A, A1, & B, being three copies of the plaintiff's way bill issued to the appellant, amongst other documents.

After submissions by parties' counsel and due consideration of the statement of claim and the affidavit evidence placed before him, the learned trial judge, ruled and declined jurisdiction. He held that the proper venue was the High Court, Ibadan, Oyo State. Accordingly, he struck out the action. Dissatisfied, the plaintiff appealed to the Court of Appeal, Enugu. Allowing the appeal, that court ordered the Onitsha High Court to assume jurisdiction but before another judge and determine the case on its merit. The court said (obiter), that ordinarily the debt arising from the contract between the parties should be paid by the defendant in Onitsha, which incidentally is the plaintiff/creditor's residence or place of business. The defendant, aggrieved have appealed to the Supreme Court raising three issues. The Respondent neither filed a brief nor was it represented at the hearing.

### **ISSUES FOR DETERMINATION**

*"1. Was the Court of Appeal right to hold that the trial Judge ought to have assumed jurisdiction to hear the claim ensuing out of the*

*contract and to make it the duty of the appellant to pay at Onitsha which is the respondent's residence or place of business when according to the said Court, there was conflict in the affidavits of the appellant and the respondent as to venue which conflict was not resolved by the High Court and when the court of Appeal failed to resolve the said conflict?*

*2. Was the Court of Appeal right to hold that the contract was entered into at Onitsha by looking at the Statement of Claim when it had already regarded such approach as a misconception (sic)?*

*3. Was the Court of Appeal right to have delved into the substantive issue of the appellant's indebtedness or not to the respondent when what was on appeal before it was the question of the appropriate venue of trial?"*

**HELD** (Unanimously dismissing the appeal per lead judgment of **ACHIKE JSC**)

***Judgments - Obiter dictum***

1. No doubt, the contested view expressed by the Court of Appeal is similar to such views often expressed by trial or appellate courts in the course of the preparation of their judgments. Invariably, such views are unsolicited in the sense that counsel in the case neither raised the issue nor were they invited to address the court on it. The issue arose impromptu and ought to be so treated. Such view or opinion in our jurisprudence is referred to as obiter dictum in contrast to ratio decidendi which is the substance for which a case stands. The obiter dicta are always overlooked when the principle for which a case stands is being ascertained. It is the ratio decidendi that lays down the principle of law that has the binding force of precedent. It makes good sense that such peripheral expressions, i.e. obiter dicta, should not be allowed to becloud the substance of a court's judgment. In the result, since the main issue in this appeal i.e. issue of venue, can readily be determined without overdramatizing the inconsequential speculations by the lower court on the substantive issue, there is no justification to give any protracted consideration to this issue. (p. 529 F)

***Practice & Procedure - Action***

2. Clearly, there can be no other justifiable way of examining and determining the appellant's protest on venue except by examination and evaluation of affidavit evidence separately fielded by the plaintiff and the defendant in conjunction with the statement of claim. To do otherwise will lead to a grave miscarriage of justice which we cannot overlook. See National Bank of Nigeria Ltd v John A. Shoyoye (supra). (p. 532 A)

***Actions - Contract***

3. Undoubtedly, the onus to dislodge the presumption of venue in favour of Onitsha High Court's jurisdiction on the face of the statement of claim that the contract, as earlier stated, was both made and performed at Onitsha, was on the defendant. The law is clear on the matter and quite elementary that it needs no authorities to confirm it that a person who asserts has the onus to establish what he asserts. A careful examination of all the documents relied on by the defendant in his protest to the venue for trial shows nothing affirmative to prefer Ibadan rather than Onitsha as the venue for trial. In the circumstances of this case, I am clearly of opinion that appellant has failed to show that it can rely on Order 4 Rule 3 of Anambra State High Court Rules 1988 to deny jurisdiction to the High Court Onitsha over the suit as it has not been shown that the venue is other than Onitsha High Court. (p. 535 G)

***Courts - Judgment***

4. It remains to observe that while his Lordship, Justice Uwaifo JCA in the leading judgment relied on the authority of National Bank Ltd v Shoyoye (supra) and adverted to what is undoubtedly a true and correct statement of the law, to wit, that in the absence of clear indication by the contract as to where the debt should be paid, it is the law that the debtor is under a duty to seek the creditor in order to pay him at his place of business or residence. As already noted, this statement of the law is rather premature as it inferentially conveys the impression that the obligation to pay under the contract has already been decided in the present case. This statement, obviously, has no nexus with the issue of venue for trial more

so as the reference to Shoyoye also gives the impression that the appellant has been adjudged liable in the present suit whereas that issue, even now, is still at large. Permit me to caution again that a court dealing with interlocutory matter should not be seen as giving pre-emptive determination of the substantive claim. In my view, with utmost respect, the remark is irregular and unwarranted. It is a technical error which cannot be said to have occasioned a miscarriage of justice. (p. 536 C)

### ***Appeals - Judgment***

5. A pronouncement identified as obiter cannot go to the substance of the appeal. A complaint on the court's obiter in a judgment can never constitute an appealable ground of appeal. (p. 537 B)

### **NOTABLE POINT OF INTEREST**

#### **ACHIKE JSC**

*1. Attitude of an appellate court where the trial judge delved into the substantive issue when considering an interlocutory matter*

Ordinarily, where the trial judge has in fact delved into and determined the substantive issue when considering an interlocutory matter it is clear that even if he has rightly determined the interlocutory matter before him, he cannot dispassionately revisit the substantive issue and be expected to take an opposite view from his original stand on the matter. Indeed, whether the trial judge remains constant in his view on the substantive decision he had earlier taken or not, it would make no difference to the dilemma arising from his procedural error. This is because if the trial Judge is allowed to revisit the substantive issue at any stage of the trial it will no doubt seemingly amount to the Judge sitting on appeal on his earlier decision on the substantive matter. This will surely outrage the sense of justice of an independent observer. In such a situation an appellate intermediate court will have no option than to order a re-trial before another Judge of the same jurisdiction. (p. 528 F)

**REPRESENTATION**

H. B. Fabunmi Esq. for the appellant

Respondent is absent and unrepresented

**B CASES REFERRED TO**

Western Steel Works Ltd v Iron and Steel Workers Union of Nigeria (1987) 1 NWLR (Pt.49) 285 at 305.

Odumegwu v Governor of Lagos State (1986) 3 NWLR (Pt.26) 39 at 45

Ogbonnaya v Adapalm (1993) 6 SCNJ 23 at 32

**C Folabi v Folabi (1976) 9 & 10 SC**

Nwosu v Imo State Environmental Authority (1990) 4 SCNJ 97

Onojobi v Olanipekun (1985) 11 SC (pt.11) 156 at p. 163

Akinsete v. Akindutire (1966) All N.L.R.137

**D**

**RULES REFERRED TO**

Anambra State High Court Rules 1988, O. 4 rr. 3 and 5

**E**

**LEAD JUDGMENT BY ACHIKE JSC**

The respondent, as plaintiff, instituted this action on 5/4/90 at the High Court, Onitsha, claiming the outstanding debt of N22,100.00 in respect of reams of newsprint paper sold and delivered to the appellant, as defendant, together with interest. The defendant entered a conditional appearance to the writ. Subsequently, the plaintiff filed a statement of claim. Its paragraphs 4,5 & 6 are relevant to the issue now contested by the parties and are hereunder reproduced:

**G** *"4. Sometime in November, 1989, during scarcity of newsprint, the defendant at Onitsha approached and pleaded with the plaintiff to supply it, the Defendant with some reams of newsprint to enable the Defendant execute a contract with the Federal Government.*

**H** *5. The Defendant at Onitsha ordered by means of Local Purchase Orders Nos. 2257 and 2262 6000 reams of newsprint paper at the rate of N85 per ream valued five hundred and ten thousand naira (N510,000.00) from the plaintiff. The plaintiff hereby pleads the local Purchase Orders and will rely on them at the trial.*

6. Pursuant to the said orders, the plaintiff duly supplied and delivered to the Defendant a total of 5000 reams of newsprint paper on two occasions of firstly 2000 reams on LPO No.2257 and later 3000 reams on LPO No. 2262 about 10/11/89, the Defendant duly acknowledged the delivery by signing the waybill thereof at Onitsha after physically counting same. The plaintiff will at the trial rely and found on various waybills issued the Defendant at Onitsha. The Defendant is hereby given notice to produce the originals of the waybills."

The first supply of 2,000 reams was duly paid for, the delivery in respect thereof was acknowledge by signing the waybill at Onitsha. The second supply was similarly acknowledge but a few days later, the defendant resident at Ibadan complained in writing that there was a short-supply of 240 reams. On receipt of this complaint, the plaintiff travelled to Ibadan and held discussion with the defendant whereupon both agreed that the reams of newsprint were correctly supplied. However, the plaintiff made repeated demands for the payment of the short-delivery reams but to no avail hence the institution of this action, to which, as earlier stated, the defendant entered a conditional appearance on protest.

Thereafter the defendant filed a motion praying the court, first, to strike out the suit in that the action was commenced at Onitsha High Court in Anambra instead of at Ibadan High Court which, according to the defendant, is the appropriate venue. Second, defendant complained that the writ of summons which was for service was issued out of jurisdiction without leave of the court. The second ground was however abandoned. The affidavit in support of the motion was deposed to by one Adewusi, a Credit Controller in defendant's employment. In paragraphs 6 to 11, including paragraphs 13 and 14 he deposed that the contract for the supply of the newsprint was concluded in Ibadan whereat the two LPOs, Exhibits A and B attached to the affidavit, were issued. Also exhibited to the affidavit were Receipt note, Exhibit C, letter dated 15th November, 1989 from the appellant's Production Manager to the respondent's Managing Director, i.e. Exhibit E, letter dated 28th November, 1989 written by respondent's Managing Director to the appellant's production Managing - Exhibit F, Minutes of the Meeting dated 9th Janu-

ary, 1990 attended by officials of both parties - Exhibit G and photocopy of Bank draft for the sum of N402,475 raised by the appellant in favour of the respondent - Exhibit H.

The respondent also filed a counter-affidavit to which were attached Exhibits A, A1 & B being three copies of the respondent's way bill issued to the appellant, letter dated 22nd December, 1989 written by the appellant's company secretary to the respondent - Exhibit C and two cheque leaves of United Bank for Africa - Exhibits D & E.

After submissions by parties' counsel and due consideration of the Statement of Claim and the affidavit evidence placed before him, Uzodike, J, ruled and declined jurisdiction. He held that the proper venue was the High Court Ibadan, Oyo State. Accordingly, he struck out the action.

Dissatisfied, the respondent appealed to the Court of Appeal, Enugu. Allowing the appeal, that court ordered the Onitsha High Court to assume jurisdiction but before another Judge and determine the case on its merit. The lower court said, obiter, that ordinarily "the debt arising from the contract between the parties should be paid by the defendant/appellant in Onitsha which incidentally is the plaintiff/creditor's residence or place of business."

The appellant formulated three issues for determination, namely,  
 "1. Was the Court of Appeal right to hold that the trial Judge ought to have assumed jurisdiction to hear the claim ensuing out of the contract and to make it the duty of the appellant to pay at Onitsha which is the respondent's residence or place of business when according to the said Court, there was conflict in the affidavits of the appellant and the respondent as to venue which conflict was not resolved by the High Court and when the court of Appeal failed to resolve the said conflict?

2. Was the Court of Appeal right to hold that the contract was entered into at Onitsha by looking at the Statement of Claim when it had already regarded such approach as a misconception (sic)?

3. Was the Court of Appeal right to have delved into the substantive issue of the appellant's indebtedness or not to the respondent when what was on appeal before it was the question of the appropriate



*venue of trial?"*

Respondent neither filed a brief nor was it represented at the hearing.

I think it is desirable to make a cursory remark touching on the issues submitted for the determination of this appeal. I am satisfied that the issues as formulated partly affect the main point in controversy between the parties i.e. the question of venue for trial, on the one part, and partly affect some question which incidentally arose from the body of the leading judgment of the lower court, on the other part. One is therefore tempted, for the purposes of this appeal, to characterise the above three issues in two categories namely, in terms of major or main issues and minor or subsidiary issues. Issue No.1 undoubtedly belongs to the first category while Issues Nos.2 and 3 will readily be subsumed under the second category. Nevertheless, the consequence attributable to a successful issue will obviously depend on whether it is a major or subsidiary issue; if the former, the effect will be crucial such that it may upturn the appeal in favour of the appellant but if the latter the effect may be no more than a pyrrhic victory without the sting that would radically change the judgment appealed against. From my close study of the three issues, I would wish to consider the three issues in the reverse order.

### Issue No. 3

*"was the Court of Appeal right to have delved into the substantive issue of the appellant's indebtedness or not to the respondent when what was on appeal before it was the question of the appropriate venue of trial?"*

Learned appellant's counsel submitted that the learned Justices of the lower court were right to hold that the presumption is that the plaintiff who is the alleged creditor should be sought by the defendant, (herein appellant, the alleged debtor,) to be paid where the lives, reliance being placed on the authority of National Bank of Nigeria Ltd and ors v John Akinkunmi Shoyoye & anor (1977) 5SC 181 at 182. But it is counsel's further submission that facts of Shoyoye were inapplicable to the circumstances of the present case in many respects. For example, in Shoyoye the amount of the indebtedness was not in dispute whereas in the present

case the appellant has seriously contested its continued indebtedness to the respondent to the tune of N22,100. Furthermore, it is submitted on behalf of the appellant that the issue of indebtedness goes to the substantive matter yet to be raised before the trial court whereas the preliminary issue before the trial court was simply the venue for trial. It is counsel's submission that the Court of Appeal erred in law to have made a pronouncement on the substantive matter wherein he adjudged the appellant a debtor to the respondent. Counsel relies on several authorities, to wit, Odumegwu Ojukwu v Governor of Lagos State (1986) 3 NWLR (Pt.26) 39 at 45 and Ogbonnaya v Adapalm (1993) 6 SCN J 23 at 32.

It is manifest that the case before the learned trial Judge of the High Court Onitsha had hardly taken off. Indeed, the question at stake was one of appropriate venue at which the case would commence. As we have shown earlier, there was an interlocutory application before the High Court to thrash out the proper venue and no question of liability in respect of the contract between the parties arose nor could it arise at that point in time. This Court has counselled for caution, times without number, that trial courts as well as intermediate appellate courts should desist from making positive pronouncements touching on the substantive issue while they are only engaged in determination of interlocutory matters before them. Surely, this practice is unacceptable because it pre-judges the real matter in controversy even before arguments by learned counsel have been marshalled on the substantive issue.

Ordinarily, where the trial judge has in fact delved into and determined the substantive issue when considering an interlocutory matter it is clear that even if he has rightly determined the interlocutory matter before him, he cannot dispassionately revisit the substantive issue and be expected to take an opposite view from his original stand on the matter. Indeed, whether the trial judge remains constant in his view on the substantive decision he had earlier taken or not, it would make no difference to the dilemma arising from his procedural error. This is because if the trial Judge is allowed to revisit the substantive issue at any stage of the trial it will no doubt seemingly amount to the Judge sitting on appeal on his earlier decision on the substantive matter. This will surely outrage the

sense of justice of an independent observer. In such a situation an appellate intermediate court will have no option than to order a re-trial before another Judge of the same jurisdiction. In the present case, the error of delving into the substantive issue was committed by an intermediate appellate court. Perhaps, it would have been equally simple for this Court to order a re-hearing of the case before another panel of the Court of Appeal if only to show that the outrage occasioned by such procedural error is no less worrisome or grievous because it was committed by an appellate court. It is needful, however, to recall that this case on appeal was filed at the trial court on 15/4/90 - approximately a decade ago! This is, to say the least, an affront to our much-avowed sense of justice and fair play, bearing in mind the aphorism 'that justice delayed is justice denied'.

The critical question that must be out is, where do we go from here? Clearly, it will exacerbate the already inordinate delay for this Court to order the case to be remitted to the Court of Appeal before another panel for determination, and thereafter allow the parties, in exercise of their constitutional right of appeal, to come to this Court. This dilatory approach can hardly be overlooked.

It is pertinent to give a global consideration to the problems raised under Issue No.3. Now it is beyond peradventure that the substantive aspect of this case was never properly before the lower court for determination, that is to say, it was not predicted on any of the grounds of appeal arising from the judgment of the trial Judge. **No doubt, the contested view expressed by the Court of Appeal is similar to such views often expressed by trial or appellate courts in the course of the preparation of their judgments. Invariably, such views are unsolicited in the sense that counsel in the case neither raised the issue nor were they invited to address the court on it. The issue arose impromptu and ought to be so treated. Such view or opinion in our jurisprudence is referred to as obiter dictum in contrast to ratio decidendi which is the substance for which a case stands. The obiter dicta are always overlooked when the principle for which a case stands is being ascertained. It is the ratio decidendi that lays**

**down the principle of law that has the binding force of precedent. It makes good sense that such peripheral expressions, i.e. obiter dicta, should not be allowed to becloud the substance of a court's judgment. In the result, since the main issue in this appeal i.e. issue of venue, can readily be determined without over-dramatizing the inconsequential speculations by the lower court on the substantive issue, there is no justification to give any protracted consideration to this issue.**

*For all I have said, I hold that the appellant's complaint under Issue No.3 is well-founded and accordingly, I turn in a negative answer to Issue No.3.*

Issue No.2

*"Was the Court of Appeal right to hold that the contract was entered into at Onitsha by looking at the Statement of Claim when it had already regarded such approach as a misconception?"*

On this issue appellant's learned counsel relied on two alleged conflicting assertions made in the leading judgment of the lower court. First, his Lordship said:

*"It is without doubt a misconception on the part of the plaintiff's Counsel to have argued in this Court as he did in the Court below that the learned trial Judge should have confined himself to the averments in the Statement of Claim on the question of venue even when Counsel for the defendant raised it by way of Motion. It seems to me that a plaintiff should not be allowed to determine the venue simply by facts in his Statement of Claim. When a defendant has facts at his disposal which will reveal the true position, it may be necessary for him to wait to disclose these in the statement of defence and lead evidence of them at the trial."*

Then later in the Judgment, he had this to say:

*"Looking at the Statement of Claim, the contract was made at Onitsha. There is nothing affirmative on the face of the LPOs and the paper Receipt Note which the defendant referred to as exhibits A, B and C respectively in its affidavit in support of the motion, nor of the three Waybills referred to as exhibits A, A1 and B in the plaintiff's counter affidavit that the contract was made other than in Onitsha."*

Against this background, learned appellant's counsel submitted that in view of the motion paper which is accompanied by the affidavit evidence placed before the lower court, it was not possible for that court to determine the vexed question of venue with reference only to the statement of claim. It is his further submission that the lower court has, by reason of the above two assertions, approbated and reprobated, on what should be the proper documents to be examined by the court with regard to the issue of venue at this preliminary point in time. Finally, counsel submitted that the issue of venue having been questioned, the determination of that issue could not be restricted to an examination of the statement of claim. In support of his contention, counsel relied on the National Bank of Nigeria Ltd v John A. Shoyoye (supra) at p.193-4 and Western Steel Works Ltd & anor v Iron and Steel Workers Union of Nigeria (1987) 1 NWLR (Pt.49) 285 at 305.

I have carefully examined the above-two excerpts of the leading judgment of the lower court the contents of which learned counsel for the appellant has invited us to hold amount to approbation and reprobation. Nothing can be further from the truth. In the first excerpt, Uwaifo, JCA (as he then was) chides plaintiff's counsel for his erroneous submission wherein he argued that the vexed issue on venue should be determined by restricting the inquiry to the plaintiff's statement of claim. Indeed, the learned Justice of the lower court emphasized the need to look elsewhere, where possible, in the resolution of the problem of venue. In his Lordship's analysis of the problem, as borne out in the second excerpt, it is quite clear, contrary to the submission of learned appellant's counsel (at pp 7 & 8 of his brief) that his Lordship examined not only the statement of claim but the motion paper and the affidavit evidence attached thereto.

It is clear that the defendant who was within his legal right not to file a statement of defence at that stage of his protest on venue was entitled to put across all facts available to it by way of affidavit evidence. There is no iorta of truth that the lower court confirmed itself to the statement of claim in reaching its decision on question of venue. I am satisfied that learned appellant's counsel did not give a dispassionate con-

sideration to the above two excerpts of the lower court's judgment that form the plank of his complaint. **Clearly, there can be no other justifiable way of examining and determining the appellant's protest on venue except by examination and evaluation of affidavit evidence separately fielded by the plaintiff and the defendant in conjunction with the statement of claim. To do otherwise will lead to a grave miscarriage of justice which we cannot overlook. See National Bank of Nigeria Ltd v John A. Shoyoye (supra) and Western Steel Workers Union of Nigeria (supra).**

The result is that Issue No.2 is resolved against the appellant as having no merit whatsoever.

Issue No.1

*"was the Court of Appeal right to hold that the trial Judge ought to have assumed jurisdiction to hear the claim ensuing out of the contract and to make it the duty of the appellant to pay at Onitsha which is the respondent's residence or place of business when according to the said Court, there was conflict in the affidavits of the appellant and the respondent as to venue which conflict was not resolved by the High Court and when the Court of Appeal failed to resolve the said conflict?"*

It may be recalled that the Court of Appeal observed, and rightly in my view, that there was conflict in the affidavit and counter-affidavit evidence of the appellant and the respondent in relation to the parties' respective views on the question of proper venue of the court to adjudicate on the case in controversy. Learned appellant's counsel however submitted that despite this state of the affidavit evidence, and without according any resolution to the conflict, the lower court proceeded to pronounce on the vexed issue of venue. It is counsel's submission that the failure by the lower court, like the trial court, to resolve the conflict in evidence left it in a quandary to determine the appropriate venue for the trial of the case. Counsel also submitted that the lower court was in error to have said that it was the duty of the appellant (i.e the defendant) to pay the plaintiff at Onitsha which is the respondent's residence or place of business without first resolving the conflicts in the affidavit evidence.

Undoubtedly, the question of payment would only arise after the

trial court had taken evidence on whether or not there was short-delivery as alleged. It is therefore premature and uncalled for at that stage for the lower court to pronounce on the appellant's obligation to locate the whereabouts of the respondent for the purpose of paying him when, in fact, the question of any indebtedness on the part of the appellant in favour of the respondent was yet to be determined. B

Be that as it may, it is needful to be guided by the appropriate Rules of Court in this regard, notwithstanding the unresolved conflict in the affidavit evidence. The motion on notice at the instance of the defendant/appellant was brought pursuant to Order 4 Rules 3 and 5 of the Anambra State High Court Rules 1988. In the affidavit in support of the motion the defendant deposed that one Mr. Fawibe issued the LPOs, i.e. Exhs A & B, at Ibadan on behalf of the defendant. The plaintiff, however, in its counter-affidavit deposed that the aforesaid Mr. Fawibe came down to Onitsha to make the contract and while there he collected the reams of newsprint, the subject matter of the contract and also issued the LPOs while at Onitsha. The plaintiff also deposed that the three waybills Exhs A, A1 & B were signed in Onitsha by both parties but the defendant on its part stated that the newsprint papers were received with an acknowledgment at Ibadan when they were brought the plaintiff. It is clear that the places of issuance of these exhibits constitute the areas of conflicts between the parties. As already noted, neither the trial court nor the lower court resolved these areas of conflict before reaching their diametrically opposing decisions. C D E F

Now we shall turn to the Rules of Court in our pursuit for the determination of the appropriate venue for trial of the suit i.e. Order 4 Rules 3 & 4. G

The stipulate as follows:

*"3. All suits for the specific performance, or upon breach of any contract, may be commenced and determined in the judicial division in which such contract was made or ought to have been performed or in which the defendant resides.* H

4. xxx

5. *In case any suit shall be commenced in any other judicial*

*division than that in which it ought to have been commenced, the same may, notwithstanding, be tried in the judicial division in which it shall have been so commenced; unless the court shall otherwise direct, or the defendant shall plead specifically in objection to the places of trial before or at the time when the suit is being set down for trial."*

Rule 3 as set out above makes venue dependent on three alternatives namely,

(a) the judicial division where the contract was made;

(b) the judicial division where the contract ought to have been performed;  
or

(c) the judicial division where the defendant resides. In the view of the trial court the plaintiff's position could not be subsumed under alternative (a) or (b) above; it preferred alternative (c) hence it held that Ibadan was the appropriate judicial division for the trial of the suit. On the other hand, the Court of Appeal was clearly of opinion that alternatives (a) and (b) could each operate in favour of the commencement of the suit at the Onitsha judicial division.

It is pertinent to observe that the objection taken by the defendant could not be determined within the provision of Order 3 Rule 5 of the Anambra State High Court Rules 1988. Since the defendant had not filed his pleadings it was perfectly in order for it to raise its objection on venue of trial by motion. The result is that, like the two lower courts, this Court is expected to determine the matter in controversy by looking at the writ of summons, the statement of claim, the defendants's motion paper, including the supporting affidavit and the counter-affidavit with their annexures exhibited thereon. We have earlier identified the areas of conflict in the affidavit and counter-affidavit of the parties and observed that neither of the two lower courts resolved the conflict by calling oral evidence as prescribed in such circumstances as laid down by this Court in its numerous decisions, such as Folabi v Folabi (1976) 9 & 10 SC Nwosu v Imo State Environmental Authority (1990) 4 SCN J 97, to mention just a few.

Discounting the areas of conflict in the parties' affidavit evidence, we may now turn out attention to the exhibits attached to both the



affidavit and counter-affidavit, i.e. Exhibits A & B on the one part (furnished by the defendant) and Exhibits A, A1 & B, on the other part, (fielded by the plaintiff). These exhibits are absolutely mute as regards the place of their issuance. No doubt such information would have gone a long way to assist in determining either where the contract was made B or where the contract was to be performed. It is however surprising that in the face of vehement denial of paragraphs 12, 13, 14 and 15 of the affidavit and assertion in clearest terms that one Mr. J. A. Fawibe, the defendant's company secretary came to Onitsha and issued LPO NO. 2262 at Onitsha for the supply of 4000 reams of newsprint paper, the C defendant did not think it sufficiently cogent to request Mr. Fawibe to personally depose to an affidavit to deny such weighty assertion, rather, through one Adewusi, the defendant deposed to an affidavit on the alleged information given to him by Mr Fawibe that the contract was D made at Ibadan. Failure to extract direct and positive evidence from Mr. Fawibe left a dent on the appellant's duty to prove his assertion that Ibadan rather than Onitsha ought to be preferred as the appropriate venue.

Let us also turn to the contents of the claim and the statement of E claim which so far remain unchallenged and can only be properly challenged by the defendant's statement of defence. I have at the outset of this judgment reproduced the salient paragraphs of the statement of claim i.e. paragraphs 4, 5 and 6. The combined effect of these paragraphs F as well as paragraphs 3 and 4 of the claim raises a strong presumption that the jurisdiction to entertain the suit resided in the Onitsha High Court, bearing in mind that the available conflicting affidavit evidence on crucial material facts deposed to by the parties remained untested by cross-examination and so unresolved. G **Undoubtedly, the onus to dislodge the presumption of venue in favour of Onitsha High Court's jurisdiction on the face of the statement of claim that the contract, as earlier stated, was both made and performed at Onitsha, was on the defendant. The law is clear on the matter and quite elementary H that it needs no authorities to confirm it that a person who asserts has the onus to establish what he asserts. A careful examination of all the documents relied on by the defendant in his protest to the**

venue for trial shows nothing affirmative to prefer Ibadan rather than Onitsha as the venue for trial.

In the circumstances of this case, I am clearly of opinion that appellant has failed to show that it can rely on Order 4 Rule 3 of Anambra State High Court Rules 1988 to deny jurisdiction to the High Court Onitsha over the suit as it has not been shown that the venue is other than Onitsha High Court. I agree with the lower court that the learned trial Judge was in error to have declined jurisdiction and struck out the suit.

It remains to observe that while his Lordship, Justice Uwaifo JCA in the leading judgment relied on the authority of National Bank Ltd v Shoyoye (supra) and adverted to what is undoubtedly a true and correct statement of the law, to wit, that in the absence of clear indication by the contract as to where the debt should be paid, it is the law that the debtor is under a duty to seek the creditor in order to pay him at his place of business or residence. As already noted, this statement of the law is rather premature as it inferentially conveys the impression that the obligation to pay under the contract has already been decided in the present case. This statement, obviously, has no nexus with the issue of venue for trial more so as the reference to Shoyoye also gives the impression that the appellant has been adjudged liable in the present suit whereas that issue, even now, is still at large. Permit me to caution again that a court dealing with interlocutory matter should not be seen as giving pre-emptive determination of the substantive claim. In my view, with utmost respect, the remark is irregular and unwarranted. It is a technical error which cannot be said to have occasioned a miscarriage of justice. It is a minor judgmental slip. It will not be in the interest of justice for an otherwise excellent judgment to be overturned by the Judge's technical slip which has not been shown to be fatal or such, as earlier stated, as would occasion a miscarriage of Justice. See Onojobi v Olanipekun (1985) 11 SC (pt.11) 156 at p. 163. Providentially, even if this somewhat high flier, makes its second judicial journey to the Court of Appeal, the panel that determined the appeal thereat is impos-

sible to be reconstituted at the Enugu Division - two of the Justice having left the lower court for good while the third Justice has been transferred out of the Enugu Division. That obiter however must be roundly discouraged and ignored.

For all I have said, Issue No.1, despite the inelegance and error of the lower court, as pointed out herein, should be resolved in favour of the respondent because that error cannot, in the circumstances of this case, be a ground for allowing the appeal. It is pretty clear that the error arose from the court's obiter. **A pronouncement identified as obiter cannot go to the substance of the appeal. A complaint on the court's obiter in a judgment can never constitute an appealable ground of appeal.**

All in all, the appeal fails. Accordingly, it is hereby ordered that the suit be remitted to the Onitsha High Court for determination on its merit before another Judge of the same judicial division. I assess costs at N10,000 in favour of the respondent..

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### WALI JSC

I have had a preview of the lead Judgment of my learned brother Achike JSC, and I entirely agree with his reasoning and conclusion for dismissing the appeal. And for the same reasons able stated in lead judgment which comprehensively dealt with all the issues raised and canvassed, I also hereby dismiss the appeal with the order that the case be remitted to the High Court of Justice, Onitsha which is the proper venue for its trial, for determination on merit before another judge of the same court.

I adopt the order of costs made in the lead Judgment.

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### OGWUEGBU JSC

I read in advance the judgment just delivered by my learned brother Achike, J.S.C. and I agree with it. The main issue in this interlocutory appeal is the appropriate venue for the institution and determina-

tion of the substantive action filed by the plaintiff in the High Court of Anambra State. It is the contention of the defendant right from the High Court Ibadan Judicial Division of the High Court of Oyo State is the proper venue and not Onitsha High Court where the action was filed.

B            The learned trial judge struck out the action for want of jurisdiction and the plaintiff appealed against the decision to the court below.

            That court reversed the decision of the learned trial judge and directed that the suit be determined on its merit by another judge in Onitsha Judicial Division. The defendant was dissatisfied and appealed to  
C this court. The plaintiff filed no brief and was neither present nor represented by counsel at the hearing of the appeal.

            Apart from the unfortunate remark made in the lead judgment by the court below touching on the substantive matter, the principal issue  
D for determination in this appeal is the proper venue for the institution and determination of the action giving rise to the interlocutory appeal and in trying to answer the question, I will have recourse to the relevant Rules of Court, namely, Order 4 Rules 3 and 5 of the High Court Rules of  
E Anambra State, 1988 which provide:

*"3. All suits for specific performance, or upon the breach of any contract, may be commenced and determined in the Judicial Division in which the contract was made or ought to have been performed or in  
F which the defendant resides.*

            4 .....

*5. In case any suit shall be commenced in any other Judicial Division than that in which it ought to have been commenced, the same may, notwithstanding, be tried in the judicial Division in which it shall  
G have been so commenced, unless the Court shall otherwise direct, or the defendant shall plead specially in objection to the places of trial before or at the time when the suit is being set down for trial."*

            The court below rightly observed that there was conflict in the  
H affidavit evidence of the parties on crucial issues which the learned trial judge should have resolved by calling oral evidence. See Falobi v. Falobi (1976) 9 & 10 S.C.I and Akinsete v. Akindutire (1966) All N.L.R.137. The conflict was not also resolved by the court below.

Exhibits "A", "B", and "C" annexed to the affidavit of the defendant and Exhibits "A", "A1" and "B" annexed to the counter affidavit of the plaintiff are silent as to their places of origin. These are Local Purchase Orders, Paper Receipt Note and waybills. The silence of these exhibits as to their sources led both parties to take opposing positions as to where the contract was made and the place of its performance. They would have been of great assistance in providing a clue as to where the contract was made or the place it was performed which would give the court jurisdiction having regard to the provisions of Order 4 Rule 3 of the High Court Rules of Anambra State.

Paragraphs 3 and 4 of the Claim read:

"3. Sometime in November, 1989, the defendant at Onitsha ordered by means of Local Purchase Orders Nos. 2257 and 2262 6000 reams of newsprint paper at the rate of N85 per ream valued five hundred and ten thousand nair (N510,000.00) from the plaintiff.

4. Pursuant to the said orders the Plaintiff duly supplied and delivered to the Defendant a total of 5000 reams of newsprint paper on two occasions of firstly 2000 reams and later 3000 reams about 7/11/89. The Defendant duly acknowledged the delivery by signing the waybill thereof at Onitsha." (the underlining is for emphasis).

In paragraphs 4, 5 and 6 of the Statement of Claim, the plaintiff repeated the same averments that the contract was made at Onitsha and that he duly supplied and delivered to the defendant a total of 5000 reams of newsprint paper on two occasions at onitsha. In paragraphs 6 to 12 of the affidavit in support of the motion deposed to by one Maxwell Adewusi, Credit Controller of the defendant company, it was averred that the contract was made and performed at Ibadan, Oyo State and these averments were based on information he received from one Mr. J.A. Fawibe, the Company Secretary of the defendant who negotiated with the plaintiff for the supply and delivery of the newsprint to its business premises in Ibadan. In paragraph 8 of the counter-affidavit, it was deposed that the defendant company through Mr. Fawibe issued the plaintiff L. P. O. NO. 2262 at Onitsha for the supply of 4000 reams of newsprint paper. He is a central figure in the making and performance of the

contract the subject of the action. There is no affidavit by him denying the averments. The onus is on the defendant to show that the contract was made at Ibadan and not Onitsha having regard to the strong presumption on the face of the Writ and the Statement of Claim that the contract was made and performed in Onitsha. I think the defendant failed to discharge the onus. The statement of Claim provides prima facie evidence that the contract was made and performed at Onitsha. This was not controverted in a Statement of Defence. In all the exhibits annexed to the defendant's affidavit in support of the motion, it was not disclosed that the contract or its performance was at any place other than Onitsha. By the provisions of Order 4 Rule 3, the jurisdiction depends on one of three alternatives namely:

- (a) where the contract was made; or
- (b) where the contract ought to have been performed; or
- (c) where the defendant resides.

I am of the view that (a) and (b) above cover the case of the plaintiff in the absence of the defendant's statement of defence and the failure of the courts below to resolve the issue of the conflicting affidavits. In view of the above, the defendant cannot justifiably insist that High Court, Ibadan and not that of Onitsha is the proper venue for the institution and determination of the action. The exhibits relied on by the defendant in asserting that Ibadan is the proper venue are not helpful to anybody.

As I said earlier, the observation made by the court below which touched on the substantive issue yet to be determined is unfortunate. It did not occasion any miscarriage of justice and should therefore be overlooked.

For the above reasons and the fuller reasons in the judgment of my learned brother Achike, J.S.C., I also dismiss the appeal and remit the case to the High court of Anambra State, Onitsha Judicial Division for hearing before another Judge. I also endorse the orders as to costs made by my brother Achike, J.S.C.

**KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment of my learned brother Achike JSC. I agree with it, and for the reasons that he has given I also would dismiss the appeal and remit the case to the High Court of Anambra State, Onitsha Judicial Division for hearing before B another judge. I also abide by the order as to costs.

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**KALGO JSC**

I have read in advance the judgment just delivered by my learned C brother Achike JSC and entirely agree with his reasoning and conclusions reached therein. The appeal has no merit and it must therefore be dismissed.

The main issue in contention between the parties to this appeal is D the venue of the trial i.e. what is the proper place to try the dispute between the parties: Is it Onitsha or Ibadan High Court. In determining the venue for the trial of any matter, it is generally accepted that there must be close examination of the writ of summons, the statement of E claim, and motion papers if any including affidavit evidence and annexures thereto. See National Bank of Nigeria Ltd v. John Akinwunmi Shoyoye & Anor (1977) 5SC 181 at 193-194; Western Steel Works Ltd v Iron & Steel Workers Union of Nigeria (1987) 1 NWLR (pt.49) 284 at 305. F

In this case, the statement of claim on pages 4-7 of the record showed that in paragraphs 5 and 6 the Local Purchase Orders (LPO) for the supply of the reams of newsprint was issued in Onitsha and the reams were delivered and the way-bills signed in Onitsha. And although G the affidavit evidence seemed to contradict the statement of claim in respect of the LPOs., Exhibit A and B, it is very clear that all the way-bills Exhibit A, A1 and B were signed at Onitsha. This was confirmed in the counter affidavit sworn to by one Martin Egeonu for the plaintiff/appellant, who also averred that the L.P.Os were given to him at Onitsha. H On the whole, it appears to me the slight contradiction in the affidavit evidence can be resolved in favour of the appellant in view of the overwhelming evidence that all the transactions in connection with the con-

tract took place in Onitsha. There is therefore no doubt in my mind that the provisions of Order 4, rule 3, of the Anambra State High Court Rules 1988 applies, (except the last alternative) to this case, since the contract would appear to have been entered into and performed in Onitsha and not

B Ibadan.

For the above reasons and the more detailed ones given by my learned brother Achike, JSC in the leading judgment , I find that there is no merit in the appeal. I also dismiss it and affirm the decision of the Court of Appeal. I abide by the consequential orders made in the leading judgment including order as to costs.

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