

## APPEAL FROM ORIGINAL CIVIL.

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*Before Sanderson C. J. and Rankin J.*

RADHA KISSEN GOENKA

v.

THAKURSI DAS KHEMKA.\*

1925

Dec. 14.

*Practice—Application for summary judgment—Calcutta High Court Rules  
(Original Side), Ch. XIII-A.*

When there is denial of the claim the defendant should not be ordered to furnish security, under Chapter XIII-A of the High Court Rules, merely because looking at the statements on either side it seems that the plaintiff has a better chance of success than the defendant.

APPEAL from an order of C. C. Ghose J.

This suit was instituted for recovery of Rs. 22,753-10-3 from the defendant in respect of certain share transactions and if necessary for an account and for a declaration that the shares and properties deposited with the plaintiff were charged for payment of the said amount. The plaintiff alleged that there was an adjustment of accounts in respect of transactions between the parties and Rs. 20,304 was found due to him on 6th April 1922, and the defendant acknowledged in writing his liability for the said sum and promised to pay the same on demand with interest at 12 per cent. per annum and deposited certain shares and jewellery as security against the said sum. He further alleged that thereafter he received various sums of money from and on account of the defendant amounting to Rs. 4,995-4 and the account between the parties being made at up to 26th March 1923 a sum of Rs. 17,535-1-6 was due to him which together with interest represented the claim.

\*Appeal from Original Civil No. 110 of 1925 in Suit No. 949 of 1925.

The plaintiff took out summons for summary judgment under High Court Original Side Rules, Chapter XIII-A.

Thereupon the defendant filed an affidavit admitting the adjustment but denying his promise to pay on demand or promise to pay interest. He stated that he had made various payments from time to time to the plaintiff and the plaintiff had realised dividends on the shares deposited with him, and asked the amount due to be ascertained by an account directed by the Court. He denied having received the second account alleged by the plaintiff to be sent to him and stated that on taking of account nothing will be due by him after selling the shares and jewellery deposited with the plaintiff. [The facts in the plaint, petition and the affidavit appear fully from the judgment.]

The learned Judge on the Original Side made an order that the defendant, on furnishing security for Rs. 22,753-10-3, would be at liberty to defend the suit and file his written statement, in default there would be decree for the plaintiff for his claim and costs and the plaintiff would be at liberty to have the shares and jewellery deposited with him sold by the Registrar of the Court. On that the defendant appealed.

*Mr. S. N. Banerjee* (with him *Mr. S. R. Das*), for the respondent, took a preliminary point that no appeal lay: *Sukhlal Chundermull v. Eastern Bank, Limited*, (1).

*Mr. A. K. Roy* (with him *Mr. P. C. Basu*), for the appellant. An order under Chapter XIII-A of the rules of this Court, imposing terms on the defendant is appealable, because, in default, a decree follows without further proceedings: *Chotulal Misser v.*

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*Marwari Commercial Bank* (1). In this case there has been a substantial denial of facts and an unconditional leave to defend should have been given: *Jacobs v. Booth's Distillery Company* (2).

*Mr. S. N. Banerjee.* The rules of this Court under Chapter XIII-A are different from English rules under O. XIV. The Court on appeal should not interfere with the discretion of the learned Judge. The defendant's counsel admitted liability for Rs. 15,000. The defendant is not prejudiced by the order for sale of securities.

*Mr. A. K. Roy,* in reply, the admission for Rs. 15,000 was to buy peace. There is denial in the pleadings.

RANKIN J. This is an appeal from an order made on the 7th of July last by my learned brother, Mr. Justice C. C. Ghose, under Chapter XIII-A of the rules of the Original Side which provide the procedure for obtaining summary judgments in cases where a debt or a liquidated demand in money is alleged to be payable by the defendant.

The plaint set out that there had been certain transactions between the parties and that on the 6th of April, 1922, an account was adjusted which showed a sum of Rs. 20,304 due by the defendant to the plaintiff. It was further alleged that the defendant acknowledged in writing his liability for this amount and that the defendant promised to pay the same on demand with interest at 12 per cent. per annum. The plaint further stated, that the plaintiff held certain shares and certain jewellery as security for the debt: and, that the plaintiff had received on account of the

defendant various sums of money amounting to Rs. 4,995. Paragraph 5 of the plaint then goes on to state that the account between the parties up to March 1923, was made up and that the sum found due was Rs. 17,535 and that a copy of the account was sent to the defendant who received the same with no objection thereto. The plaintiff submits that the same should be taken as accounts adjusted. The plaintiff in the relief which he claims asks for a decree for Rs. 22,753, for an account, if necessary, of the transactions, for a declaration of charge on the shares and jewellery, and an order for sale and certain further reliefs.

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The plaintiff having taken out a summons for summary judgment, the defendant by his affidavit totally denied that there was any promise to pay on demand or to pay interest. The document exhibited to the plaint contained no mention of any promise to pay interest. He stated further that he had made various payments to the plaintiff and that the plaintiff had received certain dividends upon the shares held by him in deposit, which ought to be directed by the Court to be found by an account so as to ascertain the amount due. He denied having received the account sent to him or having in any way agreed to the later adjustment of account set up by the plaintiff. He goes on to say that if the shares and the jewellery are sold the plaintiff will be found to be entitled to recover nothing more; but he does not say, apart from sale of the shares and the jewellery, that the sum due is any given sum or that nothing is due. With that exception he gives denial of the money portion of the plaintiff's claim.

In his affidavit in reply the plaintiff sets out a short account purporting to say exactly what he has received by way of dividends and payments and purporting to verify his original plaint.

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If the matter stood there it is reasonably clear that no judgment should have been passed against the defendant under this procedure at all. To begin with, the claim for interest was denied and it is entirely a wrong practice under Chapter XIII-A to order security merely because looking at the statements on either side one rather thinks that the plaintiff has a better prospect of success than the defendant. There was a specific denial with respect to this agreement and it would be quite impracticable to decide that matter under Chapter XIII-A.

As regards the main question, it is clear that the plaintiff was an accounting party and though he gave a version of an adjustment, he did not profess to be at all sure that it amounted to a promise by the defendant to pay the sum so found because he submitted that it amounted to an adjusted account and he asked for an account by way of alternative relief.

So far, therefore, it seems to me that this case is one in which the proper order would have simply been unconditional leave to defend; but it appears that at the last stage of the summons the parties appeared before the learned Judge and the learned counsel for the defendant is recorded to have said that he consented to a decree for Rs. 15,000 "which he contended was the principal sum due." If that Rs. 15,000, had been offered as the purchase price of peace in settlement of the whole matter, it could not have been taken as an admission for any purposes of this sort; but it certainly looks as though that was the defendant's statement of the amount that he really owed. There may be some doubt about the minutes, and we have enquired to-day as to what figure the defendant admits. We are told that he admits at any rate Rs. 13,000.

It seems to me, therefore, that one may on this summons give judgment against the defendant for Rs. 13,000; but it is to be observed that a part of the plaintiff's relief which he seeks by going on with the action is an order for sale of the security. Under the practice of Chapter XIII-A, it is one thing to give judgment for a given sum and it is another thing to say whether that judgment should be immediately enforceable having regard to other matters outstanding between the parties.

It seems to me that the order of the learned Judge (a part of which as regards the sale of these properties is entirely without jurisdiction under Chapter XIII-A) should be altogether set aside and that the proper order to make is that the plaintiff on this application should have judgment for Rs. 13,000 but that this judgment is not to be executed pending the final determination of the other matters in the suit. The defendant must have leave to defend as regards the rest of the claim.

SANDERSON C. J. I agree.

As regards costs, we are of opinion that the plaintiff must pay the defendant's cost of the appeal, and there will be no costs of the summons before my learned brother on the Original Side.

The defendant must file his written statement by Friday next and there will be cross order for discovery within a week of the filing of the written statement.

This case will be put in the special list of suits.

Attorneys for the appellant: *N. C. Boral & Pylne.*

Attorney for the respondent: *P. D. Himatsingka.*

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