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The question which has now to be considered, is whether the decree of the Subordinate Judge dismissing the suit ought to stand, and the position of the parties appears to be this: that the plaintiff has all along, until he saw that the judgment of the High Court was likely to be given against him, been insisting upon having the sale-deed with the warranty of title; and it is admitted by his learned counsel at the bar, that he had no right to any such covenant. It has not been attempted to be shown that he had. Thus he was insisting upon having that which he had no right to have, and he delayed performing his part of the agreement for the payment of the purchase-money on that account. Under such circumstances as these, it certainly is not a case in which it would be right for this Committee to advise Her Majesty to make any decree for specific performance.

The cases to which their Lordships have been referred are very different from this. They are cases where apparently the plaintiff has been willing to submit to have the agreement which was actually proved performed. Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed, and the decree of the High Court affirmed, and the appellant will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant.—Messrs. *T. L. Wilson and Co.*

Solicitors for the respondent.—Messrs. *Pyke and Parrot.*

RAJESWARI KUAR AND ANOTHER (DEFENDANTS) *v.* RAI BAL KRISHAN, (PLAINTIFF).

[On appeal from the High Court for the North-Western Provinces.]

P. C. J. C. 1887, *July* 15th.

Evidence—Burden of proof.

In a suit for money due on a bond between the representatives of the original parties to it, the defendant attempted to reduce the claim on the ground that the money had not been received in full, the bond having been given partly in respect of an old debt, and partly in respect of a credit in account, upon which the debtor had not, in fact, drawn certain items.

The Judicial Committee concurred with the High Court, which had reversed so much of the decree of the Court of first instance as disallowed these items; the latter Court not having correctly adjusted the burden of proof, and having

Present.—LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK, and SIR R. COUCH.

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acted as if the plaintiff had relied on his own books to prove the debt; besides, having erred in weighing the evidence.

Appeal from a decree (21st March, 1884) of the High Court modifying a decree (19th March, 1883) of the Subordinate Judge of Benares.

The suit was brought by the plaintiff on the 3rd February, 1882, to recover Rs. 16,144-15 principal, and Rs. 7,733-2 interest, due on a bond mortgaging a taluka called Uchagaon Karotha, which was executed by the defendant's deceased husband, Raghubans Sahai, to the plaintiff's deceased father, Rai Narain Das, on the 9th of July, 1869, to secure payment of Rs. 20,000 on the 9th of July, 1874, with interest at 6 per cent. per annum.

The execution of the bond was not disputed, nor the liability of the obligor to pay Rs. 13,000 out of the total amount of Rs. 20,000, admitted in the bond to have been previously due with interest thereon, but the defendant's contention was that the remaining sum of Rs. 7,000, which is stated in the mortgage bond to have been borrowed from Rai Narain Das for the settlement and disposal of the claim for monthly allowance of one Vilayati Begam, not having been applied to that purpose, the plaintiff was bound to prove that it had been paid to, or expended for other purposes of, Raghubans Sahai, and that he had not so done.

The Subordinate Judge threw the burden on the plaintiff of proving that the amount in question of Rs. 7,000, which appeared by his books of account produced in Court not to have been paid over to Raghubans at the time of the execution of the bond, had been in fact subsequently paid, and by his judgment disallowed out of that amount as insufficiently proved, one item of Rs. 1,000 entered in the plaintiff's books as paid for Government revenue of the mortgaged estate on the 6th July, 1869 (*i.e.*, three days before the date of the bond), a second item of Rs. 826-5-6, shown by the plaintiff's books to have been transferred on the date of the execution of the bond to the plaintiff's account in satisfaction of the interest due up to that date upon the previous debt, and various other items, aggregating Rs. 1,673-10-2, together with interest on those amounts, and gave plaintiff a decree for the rest of his claim.

The ground on which the Subordinate Judge rejected the proof of the two first of those items was that, having regard to the date of the bond, it seemed highly improbable to him that those items, of which that for Rs. 1,000 appeared by the plaintiff's accounts to have been paid to Raghubans three days before the date borne by the bond, and the second, that for Rs. 826-5-6, to have been debited to him on that date, should have formed part of the Rs. 7,000, which the bond stated was to be applied to buying up Vilayati Begam's claim.

On appeal, the High Court (Oldfield and Tyrrell, JJ.) gave judgment as follows :—

"The plaintiff brings this suit to recover money due under a bond dated 9th July, 1869, executed by the husband of the defendant, Rai Raghubans Sahai, in favour of the father of plaintiff, Rai Narain Das. There is no dispute as to the execution of the bond, which is for a sum of Rs. 20,000, of which Rs. 13,000 are on an old book debt, and Rs. 7,000 is stated to be borrowed for the settlement and disposal of the claim for monthly allowance of one Vilayati Begam.

"It is admitted by plaintiff that this sum was not expended in the way stated, nor paid to Rai Rhagubans Sahai in one sum ; but it is alleged that it was placed to his credit and drawn by him at various times for various purposes.

"The defendant does not distinctly deny that Rai Raghubans Sahai received it, but rather suggests that it could not have been received, as it was not required for the purpose named, and in fact puts plaintiff to the proof that the sum was paid.

"The only items of this sum which the Subordinate Judge disallows are items aggregating Rs. 3,499-15-8 and the interest claimed on them, and the plaintiff has appealed in regard to them.

"The items are Rs. 1,000, alleged to have been paid to Rai Raghubans Sahai on 6th July, 1869, for payment of Government revenue, Rs. 826 paid on 9th July, 1869, as interest to date of bond due on the old book debt of Rs. 13,000, and the above sum of Rs. 1,000 and items aggregating Rs. 1,673-10-2, paid to Rai Raghubans Sahai on various dates.

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"The reasons of the Subordinate Judge for disallowing the items appear to us quite insufficient, and we have no doubt whatever that Rai Raghubans Sahai received the full sum of Rs. 7,000, of which the above items form portions. The Subordinate Judge dwells chiefly on the admitted fact that the recitals in the bond as to the manner in which the sum of Rs. 7,000 was drawn are opposed to the real facts as alleged by plaintiff, and to there being no evidence apart from the account books. But in the first place there is the bond for the amount, both Rai Raghubans Sahai and Rai Narain Das are admitted to have been shrewd men of business, and it is most unlikely that Rai Raghubans Sahai would have for many years allowed the sum for which he had given a bond to remain undrawn. Next there is the evidence of the plaintiff's account books. They are the properly kept books of a firm of character and respectability, and have been proved by the gomashta of the firm, and contain particulars of all the items. The circumstance that items in these accounts may not be supported by vouchers in the handwriting of Rai Raghubans Sahai is accounted for by the admission that he and Rai Narain Das were very great friends, and the former was not in the habit of requiring from the latter vouchers for every sum he might draw from him, and the Subordinate Judge's objection in respect of the item of Rs. 1,000, that if it had been paid, plaintiff could produce the receipt, has little force, as it would have been with Rai Raghubans Sahai and not plaintiff. Moreover the admitted friendly terms on which Rai Narain Das and Rai Raghubans Sahai lived does not allow us to suppose that the former would cheat him by making false entries in his books, and we cannot hold that the claim as to these items fails without at the same time holding that the entries of the items are forged. But this supposition is preposterous, and, indeed, is not suggested by the Subordinate Judge, who, on the contrary, accepted the general correctness of the account-books by decreeing the larger portion of the claim in accordance with them.

"It is also noteworthy that the defendant does not distinctly deny that Rai Raghubans Sahai received the sum, but rather pleads ignorance, and has not attempted, by the production of his books of account (and it is impossible to believe that he left no memoranda of accounts), to disprove the claim. We therefore consider

that the payment of the entire sum in the bond has been established.

"There is another item disallowed about which the appellant also appeals.

"It is admitted that plaintiff's father received from the defendant's husband at various times a sum of Rs. 10,000; but plaintiff alleges that Rs. 1,000 of this was credited not in satisfaction of the bond in suit, but of another loan.

"We consider that he has established this fact by the evidence of the accounts and of the gomashta, whose statement there seems no reason whatever to disbelieve.

"We decree the appeal, and modifying the decree of the Subordinate Judge, we decree the claim in full with all costs and interest at 6 per cent. from date of institution of the suit to realization."

On this appeal,

Mr. *W. A. Raikes* and Mr. *Dunlop Hill*, appeared for the appellant.

Their contention mainly was that the entries in the books did not support the claim on the bond. The objection also was taken that the payments made had not been credited on their correct dates, whereby the interest account had been incorrectly made up.

Mr. *R. V. Doyne* for the respondent was heard on this last point only.

Their Lordships' judgment was delivered by LORD HOBHOUSE.

LORD HOBHOUSE.—In this case the appellant and respondent are the representatives of the original parties to the transaction, but no change of interest or any legal question is raised by their succession to their predecessors, and the case is exactly the same as if the present plaintiff and defendant were the original parties themselves.

The plaintiff sued on a bond for a debt of Rs. 20,000, and the nature of that debt is stated on the face of the bond. Rs. 13,000 was an old debt, and Rs. 7,000 was stated to be a new debt contracted at the time of the bond, and the bond stated also what the object of the contract for the new debt was. The defendant alleges

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that those recitals are false. In effect he alleges that the bond must be taken as of no value, and that the account between the parties must be taken as between an ordinary debtor and creditor. In the first place it is alleged that the object for which the Rs. 7,000 is said to be borrowed was not the object, and that the money was not applied to that object. Their Lordships think that is a matter of no importance whatever. It may be that the object stated was not the object. It may be that a week afterwards the recipient of the Rs. 7,000 changed his mind and did not apply the money to that object. It does not signify what the object was. To prove that the Rs. 7,000 was not actually advanced, the defendant called for the plaintiff's books of account. Those books of account were produced, and they showed apparently the whole transaction between the parties, and the impugned recital was substantially correct. About the old debt for Rs. 13,000 there was no question, and the Rs. 7,000, the new advance, was made out in this way: Rs. 1,000 was paid for revenue some two or three days before the date assigned to the bond; a sum of Rs. 800 odd due for interest was allowed on account and taken as capital; and the remainder, Rs. 5,600 odd, was credited to the defendant in the books of the plaintiff to be drawn as occasion required. Then the books of the plaintiff showed that the money was drawn out, and if they are to be taken as evidence in favour of the plaintiff, there is a complete answer to the charge of incorrectness made by the defendant.

Now what the Subordinate Judge did, was to look whether the items of discharge in the plaintiff's books were corroborated or not. Where they were corroborated he allowed the discharge, and where they were not corroborated he disallowed them. In doing that their Lordships think that the Subordinate Judge acted on an entirely wrong principle. He acted on a principle which would have been correct if the plaintiff had relied on his own books as proving his debt; but that was not the case. The plaintiff relied upon the bond which was executed by his debtor, and unless that bond is displaced there is no answer to the action. It is the defendant who seeks her defence in the books of the plaintiff. She calls for the books and extracts her defence out of them, and it would be a monstrous thing if the party sued were allowed to call for the accounts of the plaintiff, and extract from them just such items as proved matters

of defence on her part, and were not to allow those items which make in favour of the plaintiff. The High Court held that the books must be admitted *in toto*. Their Lordships think the High Court were entirely right, and that the decree cannot be complained of on that ground.

Then a much smaller matter was put forward, just at the end of Mr. *Raikes'* argument on behalf of the appellant. It appears from the plaintiff's books that a number of sums were received from time to time by him on behalf of the defendant. The dates of those receipts are given, and it is alleged that they were not carried into account on those dates as against the principal or the current interest, as it may be, of the bond, so as to discharge the defendant from interest *pro tanto* from those dates. The principle that they should be so carried into account is a sound one, but their Lordships are exceedingly doubtful whether that principle has been violated, and it certainly is the duty of the appellant who asks them to modify a decree of the High Court on this point to show them clearly that it has been violated. Their Lordships find that the plaintiff's gomashta, who is the battle-horse of the defendant on this matter, was not asked a question on the subject, and it may have been that if he had been asked questions he might have shown that in taking the interest account the receipts were credited on the right dates; or he may have given some other explanation of the mode in which the account was made out. That the parties were in habits of very great intimacy is shown by the gomashta, and it is also shown that the defendant's predecessor was a shrewd careful man of business, and it is unlikely that he should not have known how his own account was standing with the plaintiff. His own books are not produced, so that their Lordships do not know whether he himself would have given any different account of the transactions. Moreover it does not appear that this point was raised before the High Court, and even if it were raised as late as the appeal to Her Majesty, it is raised in so obscure a way that it requires Mr. *Raikes'* explanation to understand how it was raised at all.

Under these circumstances their Lordships must say that although the principle contended for by Mr. *Raikes* is a sound one, they have no evidence before them that the decree contains any

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violation of it. They therefore think that the decree appealed from should be affirmed, and the appeal dismissed with costs, and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Oehme and Summerhays.*

Solicitors for the respondent—Messrs. *T. L. Wilson and Co.*

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August 6.

EXTRAORDINARY ORIGINAL CRIMINAL.

Before Sir John Edge, Kt., Chief Justice.

QUEEN-EMPRESS *v.* RIDING AND OTHERS.

Criminal Procedure Code, s. 509.—Deposition of medical witness taken by Magistrate tendered at sessions trial.—Magistrate's record not showing, and evidence not adduced to show, that deposition was taken and attested in accused's presence.—Deposition not admissible in evidence—Act I of 1872 (*Evidence Act*), *s.* 114, *illustration* (*e*).

Before the deposition of a medical witness taken by a committing Magistrate can, under s. 509 of the Criminal Procedure Code, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record or be proved by the evidence of witnesses to have been taken and attested in the accused's presence. It should not merely be presumed, under s. 114, illustration (*e*) of the Evidence Act (I of 1872) to have been so taken and attested.

THIS was a trial at the Criminal Sessions of the High Court before Edge, C.J., and a jury, of three soldiers named Riding, Adair and Linehan, upon charges of robbery, under sec. 395 of the Penal Code. In the course of the case for the prosecution, it appeared that through some oversight the Assistant Surgeon, who had examined the complainant, and who had given evidence before the committing Magistrate as to the injuries said to have been inflicted by the prisoners, had not been served with a summons, and was therefore not present for the purpose of giving evidence.

The *Public Prosecutor* (Mr. *G. E. A. Ross*) for the Crown accordingly tendered in evidence, under s. 509 of the Criminal Procedure Code, the deposition of the Assistant Surgeon which had been taken by the Magistrate.

This deposition was signed by the Assistant Surgeon and by the committing Magistrate. The record contained no statement as to whether or not the deposition had been taken and attested in the