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defendant No. 1 figured as the complainant in a cognizable offence of which information was lodged by him to the police and the latter prosecuted the plaintiff on the faith of such information. In the proceedings which followed before the joint Magistrate all the defendants gave evidence. Defendants Nos. 2 and 3 actively aided the police in prosecuting the plaintiff in other ways. Under these circumstances we entertain no doubt that all the three defendants were rightly considered by the learned District Judge to have prosecuted the plaintiff so as to entitle the latter to sue them for compensation for malicious prosecution.

In view of our findings on all the questions argued in second appeal 1, we uphold the decree appealed from and dismiss the appeals with costs.

Before Mr. Justice Sen and Mr. Justice Niamat-ullah.

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June, 19.

JOTI PRASAD AND ANOTHER (DEFENDANTS) *v.* HARDWARI MAL AND ANOTHER (PLAINTIFFS.)*

Public policy—Partnership—Bribes paid by one partner to public servants in connection with partnership business —Whether other partners can be debited with a share of such expenditure—Civil Procedure Code, order XXVI, rules 12 and 16—Commission to examine accounts—Power of court to take evidence on disputed points.

The plaintiffs and the defendants were partners in a contract, taken in the defendants' names, to supply fire-wood to the Military Department at Dehra Dun for one year. In a suit for accounts between the parties it appeared that the defendants had spent certain sums on bribes to servants of the Military Department, that on several occasions they had thereby procured the passing of short weights by the Department, and that such bribery was admittedly a part of the system of the firm. On the question whether in the accounts credit should not be given to the defendants in respect of these sums on the ground of their being opposed to public policy,—*Held*

* Second Appeal No. 2307 of 1927, from a decree of Raj Behari Lal, District Judge of Saharanpur, dated the 24th of August, 1927; modifying a decree of Mirza Kadir Husain, Subordinate Judge of Saharanpur, dated the 25th of June, 1927.

that if the defendants, on behalf of the firm, with the express or impliedn consent or concurrence of the plaintiffs, spent those sums on bribes, credit should be given to the defendants for such sums, and the consideration that the expenditure on bribes was opposed to public policy was irrelevant.

There is nothing in order XXVI of the Civil Procedure Code which prevents the court, in a case where a Commissioner has been appointed to examine accounts, from accepting evidence on a debatable point relating to items of the account between the parties, on which the Commissioner has refused to take evidence.

The facts of the case, material for the purpose of this report, were briefly these. The plaintiff and the defendants were partners in equal shares in a contract. taken in the names of the defendants, to supply firewood to the Military Department at Dehra Dun for one year. On the expiry of the period of contract the partnership was dissolved and the plaintiffs sued the defendants for rendition of accounts. A Commissioner was appointed by the court to examine the accounts and to report as to what sum of money was due from the defendants to the plaintiffs. Upon the report the trial court passed a decree for a certain amount and on appeal the lower appellate court modified the decree. The defendants appealed to the High Court and the plaintiffs filed cross-objections.

Messrs. *Iqbal Ahmad* and *Mukhtar Ahmad*, for the appellants.

Mr. *U. S. Bajpai*, for the respondents.

SEN and NIAMAT-ULLAH, JJ. :—[After setting forth the facts in detail the judgment proceeded as follows.]

It has been contended by the defendants that the firm was entitled to a credit of Rs. 2,525, spent on bribes to Babus, Jamadars and Havildars of the Military Department at Dehra Dun. It is common ground that bribes used to be given to certain persons from time to time and was indeed a part of the system maintained by the firm. The parties have admitted the existence of

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this system unblushingly and with utmost coolness. They have also admitted that the object of the bribe was *inter alia* to defraud the Government. There are numerous entries in the account books as to the payment of these bribes. The correctness of some of these entries has been repudiated by the plaintiffs. According to the plaintiffs, these entries may be classified under two denominations, *ba-badal* and *be-badal*. When a bribe is offered to a Government employee in return for a material gain or benefit to the firm, it is said to be *ba-badal*. When there is no return of that kind, it is said to be *be-badal*. The plaintiffs do not object to the entries in the account books relating to the payment of bribes which are *ba-badal*, and sums shown to have been paid under this head have been allowed as duly accounted for. The Commissioner's observations in this connection are interesting and may be reproduced:—"Before dealing with these contentions it may be useful to explain the meaning of *ba-badal* bribes, as it is practised in this much respected department. It is practised in this way. The employee concerned to receive the supply on the part of the Government from the contractor gives a receipt for the whole quantity ordered, while he actually receives a shorter quantity. The value of the difference is divided between the contractor and the employee. This amounts to nothing but a conspiracy on the part of the employee and the contractor to defraud the Government and to fill their own pockets. In this case large sums of money have been found entered in the names of Havildars and Jamadars and Babus, and the number of pounds of fire-wood released as above in lieu of them are also entered. Now as regards the other bribe. Apart from the moral aspect of the thing, which I am not supposed to take serious notice of, if once I am satisfied that they were paid, on a consideration of all the facts of the case I do not feel justified in allowing the sum of money. In the first place, I am not satisfied

that all this money was paid in bribes, although there is the possibility of something having been paid present to my mind. In such a case allowing anything in a sort of *quantum meruit* sense is out of the question."

This sum of Rs. 2,525 has not been allowed for by either of the courts below. The lower appellate court ruled that an item like this should not be allowed on grounds of public policy. "It is something highly demoralising. Then it is not easy to say how much money was actually spent in bribes."

It is of course opposed to public policy to offer bribes to a public servant to corrupt him and to alienate him from the discharge of his duties. An inquiry into the character of the bribes, whether it is *ba-badal* or *be-badal*, is entirely beside the mark. The finding that expenditure on bribes is opposed to public policy is irrelevant and unproductive. The bribe in question is not the consideration of a contract which is sought to be enforced by the defendants. If the bribes have been paid out of the assets of the firm, the partnership funds become reduced in value to the extent of the amounts so paid. If the defendants, on behalf of the firm, with the express or implied consent or concurrence of the plaintiffs, spent Rs. 2,525 or any part of it on bribes, the defendants are entitled to maintain that those sums have been duly accounted for. Plaintiffs deny that Rs. 2,525 were spent on bribes in whole or in part and that the entries in the defendants' account books are false and fictitious. Neither the Commissioner nor any of the courts below has gone into the question whether the sum of Rs. 2,525 in whole or in part was spent on bribes as alleged by the defendants. They have not also tried the further question whether the money was spent on behalf of the firm or with the consent or concurrence of the plaintiffs. If the amount has already been spent as is alleged by the defendants, so much of

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the money has gone out of the assets and is no longer available for distribution between the parties. If the amounts have been spent for the firm, it will not be fair and just to debit the entire amount so spent against the defendants, simply upon the ground that the defendants happened to be the writers of the account books. This part of the case has not been approached by the court below from the proper angle and we think it necessary to remit certain issues to the lower appellate court. We shall presently indicate these issues.

It appears from the Commissioner's report that out of the fire-wood purchased by the firm about 13,000 maunds have not been accounted for by the defendants. The Commissioner therefore debited against the defendants Rs. 2,400 which represented the value of the fire-wood not accounted for. The defendants contended that the reason why fire-wood of this value was not to be found was that it was lost as the result "of natural waste in conveyance, splitting, storage, driage, etc.," The contention of the defendants that about 13,000 maunds out of 79,000 maunds vanished in this way borders almost upon the ludicrous. The point, however, has not been tried or determined on the merits. The point was raised before the Commissioner. No evidence was allowed to be tendered. The defendants asked for permission to prove their allegation in the trial court, but their application was refused. There is nothing in order XXVI of the Code of Civil Procedure which prevents the court from accepting evidence on a debatable point between the parties where a Commissioner has been appointed to examine and report on the accounts. We are of opinion that the defendants have not had any chance to prove this part of the case, and we think it proper to remit an issue on this point as well.

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In view of what we have said above, we cannot dispose of this appeal without having findings from the lower appellate court on the following issues :—

(1) Whether Rs. 2,525 or any part of it, and if so how much, was actually paid as bribe by the firm or under circumstances which make it a payment by the firm.

(2) Whether the defendants are entitled to any allowance, and if so to what extent, for loss caused "by natural wastage, in conveyance, splitting, storage, driage etc.," as claimed by them.

Parties will be at liberty to adduce further evidence.

REVISIONAL CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Banerji.

MOTILAL RAMCHANDER (PLAINTIFF) *v.* DURGA PRASAD (DEFENDANT.)*

1930 *June*, 24.

Provincial Small Cause Courts Act (IX of 1887), section 17(1), Proviso—Setting aside ex parte *decree—Application not accompanied by cash or security, but security deposited within period of limitation.*

Where an application, not accompanied by cash or security deposit, was made to set aside an *ex parte* decree passed by a Small Cause Court, and two days after the presentation of the application the court directed security to be furnished and security was furnished within the time allowed by law for applying for setting aside an *ex parte* decree,—*Held* that the provisions of section 17(1), Proviso, of the Provincial Small Cause Courts Act were complied with. The application must be deemed to have been a proper application only when the proper deposit had been made, and must be deemed as having been presented on the date on which the deposit was made. The deposit having been made within time, no question arose

* Civil Revision No. 210 of 1929.