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formalities, his action, according to the view of the Allahabad High Court in *Jagannath Sahu* v. *Chhedi Sahu* (1), is "without jurisdiction or at least tainted with material irregularity." A similar view was taken in the case reported in *Puran Lal* v. *Rup Chand* (2) in which the two previous Allahabad decisions, to which we have made reference, were followed.

Raza and Smith, JJ.

The result is that we allow this application with costs. The learned Subordinate Judge must now take up the case and decide it according to law.

Application allowed.

APPELLATE CIVIL

Before Sir Syed Wazir Hasan, Knight, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava

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BACHCHEY LAL (DEFENDANT-APPELLANT) *v.* GUNDOO MAL (PLAINTIFF-RESPONDENT)*

Accounts—Settlement—No allegation of fraud or coercion —Accounts, when can be opened.

Where the case is one of parties having gone into accounts and settled them after ascertainment of the exact balance and there is no allegation of any fraud or coercion and all that is alleged by the defendant is that the settlement is vitiated by certain mistakes justifying the reopening of the accounts, which, however, he fails to make out, no question of the examination of the account books arises and the court cannot go behind the settlement arrived at between the parties and reopen the accounts. *Williamson* v. *Barbour* (3), *Henry McKellar* v. *John Wallace* (4), and *Bhagwan Bakhsh Singh* v. *Joshi Damodarji* (5), relied on.

Mr. *B. K. Dhaon*, for the appellant.

Messrs. *M. Wasim* and *Makund Behari Lal*, for the respondent.

HASAN, C.J. and SRIVASTAVA, J.:—This is a defendant's appeal against the decree, dated the 27th of

*Second Civil Appeal No. 166 of 1932, against the decree of Babu Mahabir Prasad Varma, Subordinate Judge of Lucknow, dated the 27th of February, 1932, confirming the decree of Saiyid Yaqub Ali Rizvi, Munsif, North Lucknow, dated the 22nd of August, 1931.

(1) (1928) I.L.R., 51 All., 501 (503). (2) (1931) I.L.R., 53 All., 778.
(3) (1878) 9 Ch.D., 520. (4) (1853) 5 M.I.A., 372.
(5) (1919) I.L.R., 42 All., 230.

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February, 1932, of the Subordinate Judge of Lucknow affirming the decree, dated the 22nd of August, 1931, of the Munsif, North Lucknow. It arises out of a suit for recovery of money claimed to be due on the basis of a promissory note.

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The plaintiff's case was that the defendant used to purchase and sell bullion through him on payment of his commission and that the accounts were settled between the parties on the 15th of March, 1925, when a sum of Rs.4,849-6-0 was found due from the defendant. It was further alleged that a subsequent accounting took place between the parties on the 12th of January, 1928, when a sum of Rs.4,000 was found payable to the plaintiff. The defendant, in order to meet this liability, executed a *sarkhat* for Rs.2,000 in favour of the respondent's sons and the pro-note in suit (exhibit 1) for Rs.2,000 in favour of the plaintiff. The plaintiff admitted that the *sarkhat* in favour of his sons had been entirely paid off. As regards the pro-note in suit, he alleged that he had received only Rs.500 towards it. He accordingly claimed a decree for Rs.1,500, the balance of the principal and for Rs.135-3-0 on account of interest, total Rs.1,635-3-0.

The defendant contested the suit on various grounds of which only two are material for the purpose of this appeal. One of them was that there were numerous mistakes in the accounting which took place on the 15th of March, 1925 and 12th of January, 1928, and that the accounts should, therefore, be reopened. The other was a plea of payment in respect of certain amounts for which credit was not given in the plaint.

Both the lower courts rejected all the pleas raised in defence and decreed the plaintiff's claim.

In *Williamson* v. *Barbour* (1), JESSEL, M. R., remarked as follows:

> "The practice of the Court of Chancery, which of course is the practice of the High Court of

(1) (1876) 9 Ch.D., 529 (532).

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Justice, is to consider whether the accounts shall be opened, or whether there shall be liberty to surcharge and falsify; that is, if the court is of opinion that errors of sufficient number and sufficient magnitude are shown, it is not, as I understand it, necessary that the errors shown should amount to fraud. If they are sufficient in number and importance, whether they are errors caused by mistake or errors caused by fraud, the court has a right to open the accounts. I have known cases—for instance, *Clarke* v. *Tipping* (1) which we are familiar with—in which the court abstained purposely from using the term 'fraud', although I am afraid no other term could be properly applied. That is not necessary. But there is this to be considered, that when the account is between persons in a fiduciary relation and the person who occupies the position of accounting party—that is the trustee or agent—is the defendant, it is easier to open the account than it is in cases where persons do not occupy that position—that is to say, that a less amount of error will justify the court in opening the account."

In *Henry McKellar* v. *John Wallace* (2), their Lordships of the Judicial Committee observed as follows:

"Parties having accounts between them, may meet and agree to settle those accounts by the ascertainment of the exact balance; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that vouchers should be produced, and that all the information which is possessed on one side and the other should be furnished in the settlement of those accounts; and, if it afterwards turn out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of Equity. If, on the

(1) 9 Beav., 284.

(2) (1853) 5 M.I.A., 372.

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other hand, persons meet and agree, not to ascertain the exact balance, but agree to take a gross sum as the balance; a sum which one is willing to pay, and the other is content to receive as the result of those accounts; it is obvious, that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled, therefore, it is either an account stated and settled, in the formal sense of that expression, or, it is the case of a settlement by compromise. In either case it may be vitiated by fraud; in either case it is good for nothing, if, either from the collusion of the parties, upon the circumstances under which the settlement takes place, it is proved in a Court of Equity, that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or from misrepresentations made on the one side or the other, as it ought to have been, and that injustice has been done to either side."

Both these cases were referred to and followed by a Bench of the Allahabad High Court in *Bhagwan Bakhsh Singh* v. *Joshi Damodarji* (1).

Thus the principles governing the decision of cases of this kind seem to be perfectly clear. It is agreed that the present case is one of parties having gone into accounts and settled them after ascertainment of the exact balance. There is no allegation of any fraud or coercion. All that is alleged by the defendant is that the settlement is vitiated by certain mistakes which justify the reopening of the accounts. The only alleged mistakes to which our attention has been drawn by the learned Counsel for the appellants are that two payments said to have been made by the defendant to the

(1) (1919) I.L.R., 42 All., 230.

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plaintiff are not entered in the plaintiff's account book, exhibit 67. One of these is a payment of Rs.1,000 in respect of a loan from Manakchand. The plaintiff's statement shows that he borrowed Rs.1,000 from Manakchand as a loan for defendant. Subsequently when the defendant paid back the amount he paid it to Manakchand. So the plaintiff was merely an intermediary and it was not necessary for the transaction to be entered in his account book. Manakchand was examined as D. W. 1. His evidence shows that the transaction of loan and the repayment of it by the defendant is entered in his account book. The other payment refers to a sum of Rs.10 which the defendant paid to one Sri Krishna on behalf of the plaintiff. The amount is a petty one and the payment was not made to the defendant directly. We, therefore, hold in agreement with the lower courts that the defendant has failed to make out any case for the reopening of the accounts.

As regards the complaint that the plaintiff has not given credit to the defendant for some payments made by him, this also seems to us to have no substance. The plaintiff in paragraph 19 of his replication had stated that the defendant had promised to pay him Rs.1,125 on account of commission. The receipt of this amount was admitted by the plaintiff. The question was whether he was entitled to appropriate it for his commission or whether the defendant should receive credit for it against the claim in suit. On the 22nd of July, 1931, the defendant agreed that if plaintiff stated on oath that he was entitled to *dalali* (commission), the sum of Rs.1,125 be taken to have been paid by the defendant to the plaintiff as such. In pursuance of this the plaintiff stated on oath that the defendant had agreed to pay *dalali* and that the amount of it had been settled at Rs.1,125. The lower courts were in the circumstances justified in disallowing the defendant's plea in respect of this item. The only other item for

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which credit was claimed by the defendant was a sum of Rs.750 entered in the defendant's accounts as having been paid to the plaintiff. It was pointed out by the learned Munsif that the payment in question is not recorded even in the defendant's books as a payment with reference to the transaction in suit. It was admitted by the defendant that he used to borrow money through plaintiff and repaid such loans through him. The learned Munsif after discussing the matter at some length came to the conclusion that the defendant had failed to prove that the aforesaid payment had been made to the plaintiff towards the claim in suit. We can see no reason to disagree with this finding of the trial court.

Lastly, the learned Counsel for the defendant-appellant drew our attention to the report of the commissioner who had been appointed to examine the accounts, in support of his argument that the plaintiff's accounts had not been regularly kept and that nothing was due to the plaintiff. No question of the examination of the account books arises when the defendant, as held by us above, has clearly failed in making out any case for going behind the settlement arrived at between the parties and the reopening of the accounts.

After the judgment had been dictated so far Mr. *Dhaon,* junior Counsel for the appellant, applied to us for permission to point out a number of other mistakes in the accounts which had not been referred to at the time of arguments. As a special case we acceded to the request and ordered the appeal to be set down for further hearing. Mr. *Dhaon* has based his argument on the report of the commissioner, dated the 9th of July, 1931, and relied strongly on the conclusion reached by him that on Magh Badi 5, 1984, according to the defendant's accounts irrespective of *dalali* there was a debit balance of Rs.12,530-3-0 against the plaintiff and that even if the payments towards *dalali* are taken into consideration the plaintiff was not entitled

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to any decree against the defendant. The figures worked out by the Commissioner are based on the assumption that the defendant's accounts are accepted by the court as correct. The learned Munsif discussed the matter at some length and came to the conclusion that the defendant's accounts "are extremely unreliable and deserve no credit or consideration." He was of opinion that they had "no evidentiary value." On appeal the learned Subordinate Judge also agreed with the opinion of the trial court. He was of opinion that the accounts of the defendants were very incomplete and quite unreliable. This being the position the opinion of the commissioner based on the entries in the defendant's account books cannot be made the basis for reopening the accounts. It was for the defendant to establish satisfactorily by reliable evidence that there had been mistakes in the accounting which could justify their being reopened. We can see no reason to disagree with the opinion of the two courts below that he has failed to do so. At the face of it, it is preposterous to say that the defendant had paid large sums of money to the plaintiff which were entered in his account books and for which no credit was given to him in the memorandum given by the plaintiff to the defendant which admittedly remained with the latter for about five months and yet the defendant did not notice the omissions and executed exhibit 66 blindly admitting liability against himself merely on the faith of the memorandum. We are of opinion that the defendant has failed to make out any grounds for interference with the decision of the lower court.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.