Both petitions their Lordships have, from this point of view, carefully considered. They have not forgotten that the circumstances are somewhat special: that the right of appeal introduced by the Act of 1926 is very probably conceded in order to rectify an omission inadvertently made from previous legislation, and is not one thought of for the first time. Even so, however, their Lordships are unable to find in the circumstances of either case sufficient ground for any exercise of the Prerogative in favour of the petitioners.

Their Lordships will accordingly humbly advise His Majesty that both petitions should be dismissed and with costs.

A. M. T.

Appeals dismissed.

Solicitors for petitioners: *T. L. Wilson & Co.*

Solicitor for respondents: *Solicitor, India Office.*

APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Agha Haidar.

PUNJAB NATIONAL BANK, LTD., KASUR, (PLAINTIFF) Appellant

versus

UMADATT-HANS RAJ AND ANOTHER (DEFENDANTS) Respondents.

1927

Sept. 27.

Civil Appeal No. 1916 of 1923.

Civil Procedure Code, Act V of 1908, Order XLI, Rule 33—Second appeal—power of Court—where no appeal was made to the District Court—Amendment of plaint—when not permissible.

Plaintiff sued two defendants and prayed that his claim should be decreed against one or both. The trial Court decreed the suit against defendant No. 2. The latter appealed to the District Court but plaintiff neither appealed nor filed

1927

PUNJAB NATIONAL BANK v. UMADATT-HANSRAJ.

cross-objections. The appeal was accepted and the suit dismissed. The plaintiff then preferred a second appeal to the High Court and urged that the lower Appellate Court should have passed a decree against defendant No. 1.

Held, that the plaint alleged no cause of action against defendant No. 1, and that permission to amend the plaint could not be granted at this late stage, as it would practically amount to a retrial of the case.

Held further, that even if Rule 33 of Order XLI of the Code of Civil Procedure was wide enough to enable this Court to alter the decree of the trial Court so as to make it one against defendant No. 1, those powers have to be exercised with care and discretion and only when the party appealing to it can fairly be said to be entitled to the relief equitably.

Also, that the present case would not be a proper one for the exercise of those powers.

Ramalingam Chettiar v. *Subramania Chettiar* (1), referred to.

Second Appeal from the decree of Rai Bahadur Lala *Rangi Lal, Additional District Judge, Lahore, dated the 9th June 1923, reversing that of* Rai Sahib Lala *Narinjan Das, Senior Subordinate Judge, Lahore, dated the 17th June 1922, and dismissing the plaintiff's suit.*

HAR GOPAL, for Appellant.

FAKIR CHAND and J. G. SETHI, for Respondents.

JUDGMENT.

BROADWAY J.

BROADWAY J.—The facts giving rise to this second appeal are briefly these:—

The Punjab National Bank had dealings with a firm known as Gokal Chand-Salig Ram, while a firm entitled Uma Datt-Hans Raj acted as the Bank's agents. Gokal Chand-Salig Ram were in the habit of buying produce, making a certain deposit

(1) (1927) I. L. R. 50 Mad. 614.

with the Bank, purchasing the produce through the Bank, acting through their agents Uma Datt-Hans Raj and executing a promissory note in favour of the Bank for the amount advanced. They undertook to increase the deposit whenever called upon to do so by the Bank, the Bank intending to cover itself in this way when the rates of the produce varied adversely. In addition to the execution of a promissory note the produce purchased was hypothecated or mortgaged to the Bank for the amount of the money payable.

It appears that on the 8th of September, 1915, the firm Gokal Chand-Salig Ram purchased a *kotha* of gram for Rs. 3,834-11-3 and executed a promissory note for that amount in favour of the Bank. The purchase was made through the agency of Uma Datt-Hansraj. A sum of Rs. 565 was deposited to cover any loss. The interest payable under the promissory note was at the rate of seven and a half *per cent.* Prices went down, and it is said the Bank called upon Gokal Chand-Salig Ram to increase the deposit. They failed to do so, whereupon the Bank exercised its rights and sold the *kotha* of gram through their agents Uma Datt-Hans Raj. It appears that the amount realized at the sale was Rs. 3,266-0-9. This amount should have been paid into the Bank to the credit of Gokal Chand-Salig Ram. As a matter of fact Uma Datt-Hans Raj only paid in the sum of Rs. 2,205-4-0. I would note that the sale took place on the 5th of February, 1917.

On the 25th of July, 1919, the Bank instituted a suit, impleading as defendant No. 1, Gokal Chand-Salig Ram and as defendant No. 2, Uma Datt-Hans Raj. The suit was based on the promissory note, and

1927

PUNJAB NATIONAL BANK v. UMADATT-HANSRAJ.

it was alleged that the amount outstanding including interest to date of suit came to Rs. 1,734-3-0. It was prayed that a decree for that amount together with further interest and costs should be granted against one or both of the defendants.

BROADWAY J.

Gokal Chand-Salig Ram, for some reason best known to themselves, pleaded that they had not executed any promissory note and this matter was put in issue. Uma Datt-Hansraj raised the plea that the plaint showed no cause of action against them but this was not put in issue. The case then proceeded, and a Commissioner was appointed to go into all manner of accounts between the plaintiff and Gokal Chand-Salig Ram as well as between Gokal Chand-Salig Ram and Uma Datt-Hans Raj. Why this was allowed to be done it is difficult to understand. Finally, the trial Court came to the decision that nothing was due to the Bank from Gokal Chand-Salig Ram; but the Bank's claim was decreed against Uma Datt-Hans Raj.

Uma Datt-Hans Raj preferred an appeal against this decree which was disposed of by the Additional District Judge, Lahore, on the 9th of June, 1923. The Bank apparently was content with its decree and neither appealed against the dismissal of the suit so far as Gokal Chand-Salig Ram were concerned nor filed any cross-objections. The learned Additional District Judge came to the conclusion that the plaint disclosed no cause of action against Uma Datt-Hans Raj and that if there was any dispute between the Bank and Uma Datt-Hans Raj relating to their agency that was a matter which could not be gone into in this suit but might well form the subject of a suit for rendition of accounts. In conclusion the

learned Additional District Judge stated that it was not "necessary to consider whether the suit against defendant No. 1 should or should not have been dismissed because the Bank has not appealed". On the 6th of August, 1923, the Bank preferred this second appeal against the decree of the Additional District Judge dismissing their suit, impleading both the original defendants as respondents.

It was urged that, inasmuch as the Bank had a lien on the *kotha* of gram, Uma Datt-Hans Raj were not entitled to retain any part of the purchase money to reimburse themselves for moneys due to them by Gokal Chand-Salig Ram. It was also urged that the Additional District Judge should have acted under rule 33, Order XLI of the Civil Procedure Code and passed a decree against Gokal Chand-Salig Ram.

This second appeal was admitted on the question of lien, and the learned counsel for the parties in this case have admitted that the Bank had a lien on the *kotha* of gram in accordance with the hypothecation that had been made. The question for determination, however, is whether or not, so far as Uma Datt-Hansraj are concerned, the plaint discloses any cause of action. Mr. Hargopal for the Bank has read the plaint and has emphasized the points that he considered of importance, notably the contents of paragraphs 3 and 5. On the other hand Mr. Fakir Chand for Uma Datt-Hans Raj has urged that nothing in the plaint really amounts to an assertion or allegation which can be construed into forming any cause of action. After a careful consideration of the plaint I have come to the conclusion that the contention of Mr. Fakir Chand is correct and that no cause of

1927

PUNJAB NATIONAL BANK v. UMADATT-HANSRAJ.

BROADWAY J.

action at all was alleged in the plaint. Mr. Hargopal then urged that he should be allowed even at this stage to amend the plaint pointing out that Uma Datt-Hans Raj had taken this plea but that it had not been put in issue. I am afraid we are unable to agree to this course being adopted. It would practically amount to a retrial and it appears that at this late stage equity does not require such a course being adopted. The suit against Uma Datt-Hans Raj having been, therefore, rightly dismissed, the appeal as against them must be dismissed as well.

Turning to the next point, Mr. Hargopal urged that rule 33 of Order XLI, Civil Procedure Code, was wide enough to enable the Additional District Judge and this Court to modify or alter the decree of the trial Court so as to make it one against Gokal Chand-Salig Ram. Mr. Sethi for Gokal Chand-Salig Ram has, however, strenuously protested against the use of this rule and Order against his clients. He has indeed urged that the powers of this Court are limited in this direction, and, having regard to a Madras ruling in *Ramalingam Chettiar* versus *A. L. S. P. P. L. Subramania Chettiar and others* (1), there seems some force in this contention. But the authorities of this Court have not gone as far as Mr. Sethi contends the Madras High Court have. At the same time it is obvious that, even if this rule and Order gives a Court such wide powers, these powers have to be exercised with care and discretion and only when the party appealing to it can fairly be said to be entitled to the relief equitably. In the present case we have a Bank, drafting through its counsel, a most defective plaint and allowing the case to be mis-

(1) (1927) I. L. R. 50 Mad. 614.

handled from start to finish. We have a finding of the trial Court arrived at, apparently after a careful examination of all the dealings between the Bank and this firm, that this firm is not indebted to the Bank as a result of all the transactions between them. It is also clear that the firm of Uma Datt-Hans Raj have escaped liability through the errors into which the plaintiff-Bank fell in drawing up its plaint, and, having regard to all these circumstances, I am forced to the conclusion that the present case would not be a proper one in which to exercise the powers conferred on this Court by rule 33, Order XLI, Civil Procedure Code, even assuming that those powers were wide enough to cover the case. To decide whether the firm of Gokal Chand-Salig Ram were in any way indebted to the Bank it would be necessary to treat this appeal practically as a first appeal from the decision arrived at by the trial Court and, speaking for myself, I do not think that it was the intention of the Legislature to give such a right of appeal when rule 33 was enacted. I would, therefore, dismiss the appeal *in toto;* but in the circumstances of the case direct that the parties bear their own costs in this Court.

AGHA HAIDAR J.—I concur.

AGHA HAIDAR J.

N. F. E.

Appeal dismissed.