ORIGINAL CIVIL.

Before Mr. Justice Scott.

HORMASJI DORA'BJI VA'NIA' AND OTHERS, PLAINTIFFS, *v.* BURJORJI JAMSETJI VA'NIA', DEFENDANT. *

HA'JI ABDUL RAHIMAN, PLAINTIFF, *v.* KHOJA KHA'KI ARUTH, DEFENDANT.†

THE LONDON BOMBAY AND MEDITERRANEAN BANK, PLAINTIFFS, *v.* PESTONJI DHUNJIBHOY, DEFENDANT.‡

1886. *January* 14, 15, 21.

Civil Procedure Code (XIV of 1882), *Sec.* 244, *Cl. (c) and Sec.* 258—*Decree—Adjustment of decree not certified—Separate suit to enforce agreement to adjust.*

Under sections 244, clause (c), and 258 of the Civil Procedure Code (XIV of 1882) no compromise of a decree which has not been duly certified under the provisions of the last mentioned section can be recognized by any Court, and a separate suit to enforce such compromise is not maintainable.

IN the three cases comprised in this report the same point was raised, and the decision in all of them was given by Scott, J., in his judgment, *infra*.

The first of the above mentioned suits, *(Hormasjí Dorábjí Váníá* v. *Burjorji Jamsetji Váníá)*, was a suit for specific performance, the facts of which were as follows :—

In 1869 the defendant brought a suit in the High Court of Bombay, (No. 430 of 1869), against the plaintiffs and others for partition of their family property. That suit was subsequently referred to arbitration, and on the 14th July, 1879, an award was made. On the 16th February, 1880, a decree was passed in terms of the award.

The decree directed *(inter alia)* that the plaintiffs in the present suit should pay to the defendant, Burjorji Jamsetji Váníá, a sum of Rs. 23,059, and also a fourth part of the costs of the reference and arbitration.

On the 17th May, 1880, the parties to the said decree entered into a written agreement for a compromise. This agreement after reciting the decree of the 16th February, 1880, proceeded as follows :—

* Suit No. 267 of 1884. † Suit No. 345 of 1884. ‡ Suit No. 148 of 1873.

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"In respect of the above-mentioned money and in respect of the costs, &c., of the decree you (*i.e.* the plaintiffs in the present suit) have agreed to make over to me the under-mentioned properties, and to pay me sums of money in cash, agreeably to what is written below; and I have agreed to accept the same in respect of the amount of the said decree; and on my getting the said properties, &c., *I agree to give you a release* in respect of the amount of the said decree."

"The under-mentioned properties are to be made over to my name." (Here follow particulars of the properties).

"The particulars of the sums of money in cash, that you have agreed to pay, are as follows:—"

The terms of settlement are then set forth, and the agreement concludes as follows:—

"On my getting the properties and the sums of money in cash, agreeably to what is written above, *I have duly agreed to settle with all the costs the decree given against you*"

Notwithstanding the said agreement the defendant in the present suit on the 30th May, 1884, applied to the Judge in chambers for the issue of a notice to the plaintiffs, under section 248 of the Civil Procedure Code (Act XIV of 1882), to show cause why the decree in suit No. 430 of 1869 should not be executed against them for the sum of Rs. 9,585-10-8 which the defendant alleged was the balance due by the plaintiffs after giving them credit for divers sums aggregating Rs. 10,473-5-4 paid by them in respect of the amount of the said decree, and also for the further sum of Rs. 386-4-0, being the one-fourth share of the plaintiffs in respect of the costs of the said award.

The plaintiffs disputed the correctness of the amount for which the defendant gave them credit, and further alleged that they had fulfilled their part of the agreement of 17th May, 1880.

The plaintiffs, accordingly, instituted this present suit, praying *(inter alia)* that the defendant might be restrained from issuing execution in the said suit No. 430 of 1869 in respect

of the said sum of Rs. 9,585-10-8 and for a decree directing him specifically to perform the said agreement of the 17th of May, 1880, or so much thereof as still remained unperformed by him.

At the hearing it was agreed that the following issue should be first argued and disposed of:—

"Whether, having regard to sections 244 and 258 of the Code of Civil Procedure (Act XIV of 1882), the plaintiffs can maintain this suit."

Starling and *Vicáji* for the plaintiffs.—The defendant cannot now issue execution in Suit 430 of 1869. He is bound by the agreement of 17th May, 1880, which was duly executed by him. The plaintiff by the present suit seeks to enforce that agreement, and the defendant contends that the suit does not lie, because the agreement was not certified to the Court. He relies on section 258 of the Civil Procedure Code (XIV of 1882) and on section 244, clause (*c*). We contend that the agreement of the 17th May, 1880, does not amount, in legal effect, to an adjustment of the decree of 16th February, 1880, but that an adjustment will be effected as soon as the agreement is fully carried out. The agreement cannot be said to be fully carried out until the release mentioned in it is given by the defendant; and the release cannot be had until certain deeds of conveyance and mortgage of the immoveable properties are tendered by him for plaintiffs' execution.

This is a suit to compel the defendant, among other things, to tender the proper deeds of conveyance and mortgage, and otherwise to perform specifically his part of the agreement of May, 1880, with the ultimate object of adjusting the decree, the plaintiffs having performed every thing they were bound to do on their part under the agreement. It is only when the performance of the agreement is fully completed by both parties to it, and the release provided by it is finally given by the defendant, that it will take effect as an adjustment of the decree; and the parties will then be bound to have such adjustment certified to the Court in the execution proceedings. At present, the agreement is, in effect, a mere contract to adjust at a future time, which need not be immediately certified. The defendant has taken out exe-

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cution in the suit No. 430 of 1869 in defiance of the terms of this agreement. He asks the Court to believe that the moneys, which he admittedly received since the date of the agreement, were paid in part payment or part satisfaction of the decree itself; whereas the payments were made independently of the decree with a view to its prospective adjustment, and in pursuance of the agreement to adjust. Unless the defendant is restrained from executing his decree in the old suit, he will be perpetrating a fraud on the plaintiffs, and it is the object of this suit to prevent him from so doing, until the adjustment is completed and ripe for being certified to the Court.

We contend that the Court is bound to take notice of the agreement in this suit; inasmuch as neither its object nor its consideration is in any way illegal or opposed to the policy of any law, and the rights acquired by the plaintiffs under it ought to be enforced.

But even if the agreement be held to operate as an immediate adjustment of the decree, a suit for the specific performance of it will still lie, according to the decisions of the High Courts of Madras and Allahabad. There are two decisions of the Bombay High Court—*Pátankar* v. *Devji*[1] and *Pánduraug Rámchandra Chowghule* v. *Náráyan*[2]—which are against our contention. But they were both references from the Mofussil Courts made for obtaining the opinion of the High Court; and there was no argument at the bar.

The same question was fully considered in Madras before a Full Bench of five Judges in the recent case of *Mallámmá* v. *Venkáppá*[3], and it was there held, in a judgment of the late Chief Justice, that such a suit as the present, though the adjustment had not been certified to the Court executing the decree, was not barred by section 244, cl. (*c*), of the Civil Procedure Code (Act XIV of 1882).

In Allahabad, also, there have been three decisions of the Appellate Bench, namely, *Rámghulám* v. *Jánki Rai*[4], *Zahur Khán* v.

(1) I. L. R., 6 Bom., 146.
(2) I. L. R., 8 Bom., 300.
(3) I. L. R., 8 Mad., 277.
(4) I. L. R., 7 All., 124.

Bakhtáwar[1], and *Fateh Muhammad* v. *Gopál Dás*[2], in which the same view is taken. Thus there are five Judges of the Madras and four of the Allahabad Court who have taken a different view from that of the three Judges of this Court as to the true construction to be placed upon sections 244 and 258 of the present Civil Procedure Code. The Calcutta Court has also recorded a judgment, in a case which went up before them under the old Act of 1877, in *Guni Khan* v. *Khoonjo Beharij Sein*[3]. That case agrees with the subsequent Madras and Allahabad decisions. The same Court, also, in *Nubo Kishen Mookerji* v. *Debnáth Roy Chowdhry*[4], (decided under Act VIII of 1859, sec. 206), held that a suit will lie for restraining the defendant by injunction from breaking an agreement which he has entered into by way of an adjustment of a decree passed against him. *Nubo Kishen Mookerji* v. *Debnáth Roy Chowdhry*[5] is also in our favour. But in this case the adjustment is not completed, and the time has not come for certifying it to the Court.

Lang and *Jardine* for the defendant.—There is no element of fraud in this case, as the defendant has given credit for all the moneys he has received since the decree. The agreement of May, 1880, amounts to an adjustment under section 258 of the Civil Procedure Code (Act XIV of 1882), inasmuch as it substitutes a different mode of satisfaction from that provided by the decree itself. It is a fresh contract, which has the effect of varying the Court's arrangement for satisfying or discharging the decree in the ordinary way, and, therefore, it is an adjustment sufficient for the purposes of the Code, and ought not, unless certified, to be recognized by the Court. The Bombay cases were decided by the Appellate Bench; and this Court, sitting as a Division Bench, is bound to follow them. Section 258 of the old Code of 1877 enacted that "*such* Court," meaning the Court executing the decree, was not to recognize an uncertified adjustment. But the words "*such* Court" were repealed by section 258 of the present Code, and the words

(1) I. L. R., 7 All., 327.
(2) I. L. R., 7 All., 424.
(3) 3 Calc. L. R., 414.
(4) 22 Calc. W. R., Civ. Rul., 194.
(5) 22 Calc. W. R., Civ. Rul., 194.

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"*any* Court" were substituted by the Legislature, in order thereby to prevent the judgment-debtor from taking the adjustment by a fresh suit into *any* other Court, unless it was duly certified. The change in the law was made advisedly with the object of meeting cases like the present. *Davalatá* v. *Ganesh Shástri*[1] was decided under the old Act VIII of 1859, which did not bar such suits; but the judges there refrain from stating what the effect of section 258 of the Code of 1877 would be upon an uncertified adjustment. *Pátankar* v. *Devji*[2] was decided after the old Act had been amended, and the change of "*such* Court" into "*any* Court" shows conclusively that an uncertified adjustment is not cognizable by this Court in a fresh suit.

In *Pándurang Rámchandra Chowghule* v. *Náráyan*[3] the facts were exactly similar to those of this case.

In the second of the above-mentioned suits (*Háji Abdul Rahiman Háji Joonás* v. *Khoja Kháki Aruth*) the plaintiff sued to recover from the defendants the sum of Rs. 4,207, being the amount of certain instalments alleged to be due to the plaintiff under the provisions of a deed of mortgage dated 21st July 1883.

The plaintiff was the assignee of a decree obtained by one Háji Oomár Khamesá against the defendants on the 5th May, 1883, in the High Court of Bombay in Suit No. 146 of 1883. By that decree Háji Oomar Khamesá was declared entitled to recover Rs. 9,961-5-6 with interest at nine per cent. from the defendants; and payment was ordered to be made to him of the said sum by weekly instalments of Rs. 200 commencing on the 12th May, 1883; and, in order to secure the payment of the said instalments, the defendants were ordered to execute a mortgage to Háji Oomár Khamesá of certain property, with power to him to sell the same and to execute the decree for the whole amount in case of default for six months.

Háji Oomár Khamesá assigned the said decree to the plaintiff in the present suit; and subsequently to the assignment (*viz.*,

(1) I. L. R., 4 Bom., 295. (2) I. L. R., 6 Bom., 146.
(3) I. L. R., 8 Bom., 300.

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on 21st July, 1883,) the defendants executed to the plaintiff the mortgage on which the present suit was brought.

The mortgage deed, after reciting the facts above set forth, stated that the defendants had agreed to satisfy the amount of the said decree to the plaintiff in manner therein mentioned; and it contained a covenant by the defendants that they would on the 21st August, 1885, pay Rs. 9,961-5-6 with interest *at six per cent.* by *monthly* instalments of Rs. 400 from the 21st August, 1883.

The mortgage, therefore, differed from the decree both with regard to the instalments and the rate of interest.

The defendants now contended that the mortgage was an adjustment of the decree; that it had not been certified to the Court; and that the plaintiff's suit would not lie, having regard to section 258 of the Civil Procedure Code (Act XIV of 1882). They relied upon *Pándurang Rámchandra Chowghule* v. *Náráyan*[1].

Macpherson and *Jardine* for the plaintiff.

Lang and *Telang* for the defendants.

In the third of the above-mentioned suits *(The London Bombay and Mediterranean Bank* v. *Pestonji Dhunjibhoy)* the defendant was a shareholder in the plaintiffs' bank, which went into liquidation in 1866. On the 25th March, 1873, the official liquidator obtained a decree against the defendant for Rs. 10,500. By an agreement, dated 6th February, 1874, the plaintiffs' claim was compromised upon the terms that the defendant should pay Rs. 2,500, and should hand over the shares to the bank when called upon to do so. The defendant accordingly paid the Rs. 2,500, and received a receipt in full. The payment was not certified to the Court, and on the 1st October, 1885, the plaintiffs issued notice to the defendant, under section 248 of the Civil Procedure Code (XIV of 1882), calling on the defendant to show cause why the decree of 25th March, 1873, should not be executed. The plaintiffs alleged that it had been recently discovered that the shares, although standing in the defendant's name, really

[1] I. L. R., 8 Bom., 300.

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belonged to the firm of Cursetji Cámá and Co., and that the defendant was entitled to be indemnified by that firm in respect of any calls made upon him personally.

Under these circumstances the plaintiffs contended that they were not bound by the compromise; and they relied on the fact that the payments made by the defendant had not been certified to the Court.

The case was argued before Scott, J., in chambers on the 9th January, 1886.

Jardine, for the defendant, showed cause.

Macpherson, for the plaintiffs, *contra*.

The following cases were cited:—*Pátankar* v. *Devji*[1]; *Bábá Mohamed* v. *Webb*[2]; *Shidi* v. *Gangá Sahai*[3]; *Pándurang Rámchandra* v. *Náráyan*[4]; *Mallammá* v. *Venkáppá*[5].

The following judgment in the above three cases was delivered on the 21st January, 1886:—

SCOTT, J.—In the three cases recently before me the meaning of sections 244 and 258 of the Civil Procedure Code (XIV of 1882) has been brought into question. I propose to deal with them simultaneously.

The sections, so far as we are now concerned with them, run as follows:—

Section 244.—"The following questions shall be determined by order of the Court executing a decree, and not by separate suit * * * *.

"(c) Any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree * * *."

Section 258.—"If any money payable under a decree is paid out of Court, or the decree is otherwise adjusted, in whole or in part, to the satisfaction of the decree-holder, or if any payment is made in pursuance of an agreement of the nature mentioned in

(1) I. L. R., 6 Bom., 146.
(2) I. L. R., 6 Calc., 786.
(3) I. L. R., 3 All., 538.
(4) I. L. R., 8 Bom., 300.
(5) I. L. R., 8 Mad., 277.

section 257 A., the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree * * * *. "No such payment or adjustment shall be recognized by *any Court*, unless it has been certified as aforesaid."

This last section is not a new enactment of the previous Act. The provisions of section 206 of Act VIII of 1859 only prevent "the Court executing the decree" from recognizing a payment or adjustment out of Court. The words were "no adjustment of a decree in part or in whole shall be recognized by the Court unless such adjustment be made through the Court, or be certified to the Court by the person in whose favour the decree has been made, or to whom it has been transferred;" and then the section went on—"no satisfaction of a decree in part or in whole by such payment or adjustment shall be recognized by such Court unless the payment or adjustment be certified as aforesaid."

The same section was in Act X of 1877; but in the amending Act XII of 1879 the words "any Court" were substituted for the old words "such Court," and the new words were adopted in the present Code.

Now, the High Court of Madras in a Full Bench and the Courts of Calcutta and Allahabad have all considered this new section, see *Ishan Chunder Bandopadhya* v. *Indro Náráin Gossámi*[1] *Sitá Rám* v. *Máhipal*[2]; *Shádi* v. *Gangá Sahai*[3]; *Tegh Singh* v. *Amin Chand*[4]; *Shám Lál* v. *Kanahiá Lál*[5]; *Mallámmá* v. *Venkáppá*[6].

The Courts in each of these cases interpreted these new words as still only meaning "any Court executing the decree," and not "any Court whatsoever," and they have all held that the judgment-debtor is not deprived of his remedy by separate suit for the recovery of an uncertified payment. The principle which lies at the root of their decisions is that which guided the Courts in the cases under the old law, and which was lucidly laid down by Couch, J., in *Ginamani Dasi* v. *Prankishori Dasi*[7]. "If the

(1) I. L. R., 9 Calc., 788.
(2) I. L. R., 3 All., 533.
(3) I. L. R., 3 All., 538.
(4) I. L. R., 5 All., 269.
(5) I. L. R., 4 All., 316.
(6) I. L. R., 8 Mad., 277.
(7) 5 Beng. L. R., p. 232.

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defendant failed to certify the payment to the Court, and afterwards took advantage of the want of a certificate and sued out execution of a decree, and obliged the plaintiff to pay the whole amount, the defendant must be considered a trustee for the plaintiff of the money which had been previously paid."

This, no doubt, was an equitable view to take in a country where the poorer suitors frequently adjust their decrees by payments made out of Court, without certifying such payments. But it is extremely doubtful whether the words of the present section do not exclude this view. The hardship of such exclusion is for the consideration of the Legislature, who framed the section, and not of the Judges to whom its execution is entrusted. At any rate, the Bombay High Court has placed a stricter interpretation on the words "any Court".

A doubt was first expressed by Sargent, C.J., and Melvill, J., in *Davalatá* v. *Ganesh Shástri* [1], but the point then did not require decision. In *Pátankar* v. *Devji*[2] the precise point came up for decision. The plaintiff had paid defendant Rs. 21 in satisfaction of a decree, the payment not being certified. The defendant executed the decree, making no allowance for the money thus paid. The plaintiff then brought a separate suit for his Rs. 21. The Court held that such a suit was barred by the last paragraph of section 258.

The question next came before this High Court in *Pánduráng Rámchandra Chowghule* v. *Náráyan*[3].

In that case the plaintiff had given to the defendant a bond for Rs. 25 in compromise of a decree, and the plaintiff sued the defendant on the bond. The Court held that as the adjustment of the decree had not been certified to the Court, the Court could not recognize the adjustment under section 258, and, therefore, the bond was void for want of consideration.

This last case can be distinguished from the decisions of the Madras, Calcutta and Allahabad High Courts, inasmuch as it was not a suit for the recovery of an uncertified payment, but a

(1) I. L. R., 4 Bom., 296. (2) I. L. R., 6 Bom., 146.
(3) I. L. R., 8 Bom., 300.

suit to enforce an adjustment out of Court. The decision in the earlier case, however, is directly contrary to that of the other High Courts. But it is a decision of two Judges of this High Court to the effect that a separate suit will not lie for the recovery of an uncertified payment, and I think I ought to follow it. It seems to me to put the plain and obvious meaning on the new words introduced in the present Act whilst the other Courts have given no effect to the change of wording. The interpretation, no doubt, deprives suitors of a remedy against fraud, but that is a matter for the Legislature.

I will now apply this view of the law to the three cases I have to decide, and I think all can be decided on their facts without putting myself in contradiction with the other High Courts of India.

In the suit *Hormasji Dorábji Vániá* v. *Burjorji Jamsetji Vániá* the facts are as follows :—

The present plaintiff was, by a decree passed in 1880, ordered to pay defendant Rs. 23,000. The parties by a deed of compromise of the 17th May, 1880, settled the decree out of Court. The plaintiff has paid money under the compromise, and now claims specific performance of all its terms from the defendant. Thus it is not a suit for the recovery of money paid on an uncertified adjustment, and, consequently, it is distinguishable from the cases in the other High Courts. It certainly cannot be maintained under the law as expounded by the Court in *Pátankar* v. *Devji*[1]. I must, therefore, decide the issue "whether the suit ought not to be dismissed under the provisions of sections 244 and 258" in the affirmative. My judgment will be for the defendant with costs.

The facts of the next case (*Háji Abdul Rahiman* v. *Khojá Kháki*) are somewhat different. The defendants were ordered by decree to pay Rs. 9,988, in weekly instalments of Rs. 200, to a plaintiff of whom the present plaintiff is the assignor, and to give a mortgage of certain property which might be foreclosed in case of default in payment. A mortgage was given with a covenant to pay the decree in monthly instalments of Rs. 400. It was

(1) I. L. R., 6 Bom., 146.

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undoubtedly an adjustment of the decree, and it was not certified. The present suit is for arrears under this mortgage. Thus this suit also is not a suit for the recovery of money paid on an uncertified adjustment, and does not come within the decisions of the other High Courts.

The decision of Sargent, C. J., in *Pándurang Rámchandra Chowghule* v. *Náráyan*[1], and even the words of the learned Chief Justice are clearly applicable, *viz.*, "that as the adjustment of the decree had not been certified to the Court as required by section 258, the Court could not recognize the adjustment, and, therefore, the deed was void for want of consideration." In this case my judgment must be for the defendants, with costs.

The third case, *The London Bombay and Mediterranean Bank* v. *Pestonji Dhunjibhoy*, came before me in chambers on an application for execution.

The defendant was indebted to the plaintiffs' bank in Rs. 10,500 as contributory on the B list as settled by the Court of Chancery in England. A decree was obtained in this Court in 1873. In February, 1874, a compromise was come to, not of the decree, but of the original debt, and the bank accepted Rs. 2,500 in full discharge.

Now in 1885 the bank asks for execution of the decree of 1873. The compromise, it was argued, was an adjustment of the decree, and as it was not certified could not be used as a bar to execution of the decree, although it might be used (see *Fakir Chund Bose* v. *Madan Mohan Ghose* [2]) as evidence to show that the decree is not barred by the lapse of twelve years without any payment on account. To this it may be answered, (1) that the compromise is not an adjustment of the decree at all, but a settlement of the original debt, and that it may, therefore, be used as proof of a discharge by agreement of the parties; (2) that, if admitted in evidence at all, it must be admitted for what it purports to be,—that is, a full discharge, and not a mere part payment; (3) that until it is impugned as fraudulent it must be held as a valid dis-

(1) I. L. R., 8 Bom., 300. (2) 4 Beng. L. R., 130.

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charge; (4) that if it is not admitted at all, then the decree is more than twelve years old, and execution cannot issue.

It seems to me the plaintiffs are on the horns of a dilemma. Either the compromise cannot be admitted in evidence at all, or it must be admitted as proof of a complete discharge. Their only remedy is by suit to set aside the discharge, save in so far as it is a part payment.

On these grounds I reject the application for execution, with costs.

Attorneys for the plaintiffs.—Messrs. *Tobin and Roughton* and Messrs. *Tyabji and Dáyábhái.*

Attorneys for the defendants.—Messrs. *Bicknell and Kángá* and Messrs. *Hore, Conroy and Brown.*

NOTE.—See *Jhabar Mahomed* v. *Modan Sonahar*, I. L. R., 11 Calc., 671.

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Before Mr. Justice Scott.

1886. *February* 13.

WA'GHJI THACKERSEY AND OTHERS, (PLAINTIFFS), *v.* KHATA'O ROWJI AND ANOTHER, (DEFENDANTS).*

Practice—Interrogatories—Discovery—Guardian ad litem—Party for purposes of discovery.

Where a guardian *ad litem* of a lunatic defendant was made a party defendant for purposes of discovery, *held* that the discovery was not intended to include the right to administer interrogatories to him.

SUMMONS in chambers. This was a summons taken out by the plaintiffs on 8th February, 1886, calling upon the defendant, Punjá Wállji, to show cause why he should not answer certain interrogatories.

The suit was filed originally against the first defendant, Khatáo Rowji alone to recover the sum of Rs. 9,442.

The plaintiffs stated that, prior to the year 1879, the plaintiffs had dealings with the defendant, Khatáo Rowji, which resulted in a large balance in favour of the plaintiffs; that in 1878 Khatáo Rowji went away from Bombay on a pilgrimage, leaving his brother-

* Suit 208 of 1885.