1904.

MUNICIPAL OFFICER, ADEN, v. ABDUL KARIM.

We therefore declare that the case is a fit one for appeal to the Privy Council and direct that the certificate applied for be granted.

Costs of this application to be costs in appeal.

Certificate granted.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904. *January* 13.

RAMPYARABAI, WIDOW OF GANESHRAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* BALAJI SHRIDHAR (ORIGINAL DEFENDANT), RESPONDENT.*

Indian Evidence Act (I of 1872), sections 32 (2), 34—Accounts—Corroboration.

The plaintiff relied on entries in the handwriting of her deceased husband kept in the ordinary course of his business.

Held, that entries in accounts relevant only under section 34 of the Indian Evidence Act (I of 1872) are not alone sufficient to charge any person with liability; corroboration is required; but where accounts are relevant also under section 32 (2), they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under section 34, require corroboration. Entries in accounts may in the same suit be relevant under both sections, and where that is so, it is clear that inasmuch as they are relevant under section 32 (2), the necessity of corroboration prescribed by section 34 does not arise.

Though accounts which are relevant under section 32 (2) do not as a matter of law require corroboration, the Judge is not bound to believe them without corroboration; that is a matter on which he must exercise his own judicial discretion as a Judge of fact.

SECOND appeal from the decision of L. Crump, District Judge of Sátára, confirming the decree passed by V. V. Paranjpe, First Class Subordinate Judge of Sátára.

The plaintiff, who was the widow of one Ganeshram, sued in the year 1897 to recover from the defendant Rs. 1,423, including interest, as the balance due to her deceased husband on a current account. The plaint alleged that the sum claimed was due in respect of fifteen debit items amounting to Rs. 1,644 of various

* Second Appeal No. 266 of 1903.

dates from the 9th November, 1891, to the 5th March, 1895, and that Rs. 551-9-0 paid by the defendant in two items, *viz.*, Rs. 401-9-0 and Rs. 150, had been credited in his favour.

The defendant admitted having received only four items in the account amounting to Rs. 139-2-0, but he contended that he received those items in satisfaction of the debt due to him by the plaintiff's deceased husband. He denied having received the rest of the debit items in plaintiff's account or having paid the two credit items specified in the plaint. He further contended that the khata sued on was fictitious and that the claim was time-barred.

The Subordinate Judge found that the dealings shown in the khata in suit were not proved to have taken place between the parties. He, therefore, dismissed the suit.

On appeal by the plaintiff, the Judge confirmed the decree, though he held that the item of Rs. 175 specified in the plaint was proved. The Judge made the following observations :—

The items are set out in detail in the plaint. There were admittedly dealings between the parties, and the first question is how is the claim arrived at and what is the exact nature of the dispute? According to plaintiff there were two accounts kept, one styled the khasgat (or private) account and the other the chalu (or current) account; the first seven items specified in the plaint (excluding those of interest) are taken from the khasgat khata.

* * * * * *

Ganeshram, the deceased husband of plaintiff, died in 1896, and it is admitted that the khasgat khata is an account regularly kept in the ordinary course of business and it is in the handwriting of the deceased. It is admissible in evidence under sections 32 and 34 of the Indian Evidence Act. It is urged by defendant that his accounts are also in part written by a deceased person, but this circumstance is of little value. The mere omission to record a certain transaction is obviously of less importance than an assertion of it. If plaintiff's case is true, then there is nothing unnatural in defendant's accounts not showing these items. It appears to me that an account such as this is "*a priori* entitled to a higher degree of credit than a similar account produced by a living person." It cannot possibly be a recent fabrication. At the same time corroboration is required. It is true that there is no very adequate explanation as to why defendant wished to open two accounts. One witness (Exhibit 60) says that in his experience two accounts are sometimes opened by the same man and it is possible to suggest several motives. I do not think the circumstance seriously detracts from the value of the khata.

1904.

RAMPYARA-BAI v. BALAJI SHRIDHAR.

The only question is, whether there is sufficient corroboration as to the several items.

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It appears to me therefore that of the items in the khasgat khata one only, *viz.*, No. 3, Rs. 175, can be held proved. It is argued that as the account is strongly corroborated in this one instance, the other items should require a less stringent proof. Admitting that this is so, I am of opinion that the proof is in no instance sufficient. I do not think it necessary to consider the credit items in detail. Even if satisfactorily proved, it is clear it would be impossible to hold the remaining debit items proved. It may be—it is indeed by no means improbable—that this account represents genuine transactions, but if persons will advance money without reasonably securing themselves against repudiation they alone are to be blamed for any loss which may be caused to them.

Plaintiff preferred a second appeal.

R. P. Karandikar (with *S. R. Bakhle*), for the appellant (plaintiff) :—The Judge noticed only seven items out of the fifteen items specified in the plaint, and out of the seven items he held only one, *viz.*, that of Rs. 175, proved. Both the parties had produced their accounts. The plaintiff is a widow. She cannot appear in public and she was examined on commission. In her deposition she distinctly says that the items in suit were advanced by her deceased husband to the defendant, who was on friendly terms with her husband. If corroboration is necessary, we submit that there is sufficient evidence of corroboration. The Judge has omitted to consider material evidence which was in no way assailed. Though the Judge was of opinion that our claim may be just, he has not applied his mind to the sufficiency or otherwise of the evidence given by the plaintiff. With respect to corroboration the Judge has referred only to section 34 of the Evidence Act. This is an erroneous view. The corroboration as it is in this case is, we submit, sufficient to support the plaintiff's case : *Baburav* v. *Lala*.[1] The evidence of the plaintiff, who says that the advances were made by her deceased husband in her presence, would make the accounts relevant under section 32 of the Evidence Act and the question of corroboration cannot arise : *Musammat Rajeswari Kuar* v. *Rai Bal Krishan*.[2]

(1) (1889) P. J. p. 331. (2) (1887) 14 I. A. 142.

M. B. Chaubal, for the respondent (defendant):—We had produced our accounts in Court. They were also written by a person who is dead. The items which we denied are not written in our accounts; section 32 alone of the Evidence Act would not be sufficient to create liability. Sections 32 and 34 must be read together. Both the Lower Courts have agreed in holding that the entries by themselves would not be sufficient evidence of the liability. Section 32 was not relied on in the Lower Courts. A new case is sought to be made out in second appeal.

[JENKINS, C. J.:—The Judge has not taken a correct view of the law on the point of corroboration. The case will have to go back.]

Then we submit that the whole case should be re-opened. The finding of the Judge that the item of Rs. 175 is proved is such as cannot be accepted. What the Judge says with respect to it is that there is stronger evidence in support of this item than in support of any other in the claim. This circumstance in itself would not be sufficient to warrant a conclusion that the item is proved. The very fact that the Judge did not pass a decree for Rs. 175 supports our contention.

Karandikar, in reply:—The Judge has found that out of the several items in the plaint the one for Rs. 175 is proved. This is a finding of fact which cannot now be upset.

JENKINS, C. J.—The plaintiff sues to recover a sum of money and in support of her claim she produces certain accounts and also calls oral evidence.

The accounts are relevant both under section 34 and under section 32 (2) of the Indian Evidence Act, 1872.

The learned Judge has considered that corroboration of these accounts was required, and by that we understand that he considered corroboration was necessary as a matter of law. Entries in accounts relevant only under section 34 are not alone sufficient to charge any person with liability: corroboration is required; but where accounts are, as here, relevant also under section 32 (2) they are in law sufficient evidence in themselves, and the law does not as in the case of accounts admissible only

1904.

RAMPYARA-BAI v. BALAJI SHRIDHAR.

under section 34 require more. Entries in accounts may in the same suit be relevant under both sections as here, and where that is so, it is clear that, inasmuch as they are relevant under section 32 (2), corroboration is not required by the Act. The learned Judge was in error in supposing that the requirements of section 34 applied to the accounts, though they were relevant under section 32 (2).

An error in law therefore has been committed and we cannot allow the decree to stand.

At the same time we wish it to be distinctly understood that though the accounts, which are relevant under section 32 (2), do not as a matter of law require corroboration, the Judge is not bound to act on them without corroboration; that is a matter on which he must exercise his own judicial discretion as a Judge of fact. In what I have said I have in no way limited the discretion of the Judge as a Judge of fact in determining whether or not he will act on the accounts without corroboration, the only point being that the law does not require corroboration.

Therefore the decree must be reversed and the case be remanded for determination on the merits.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batty.

1904. *January*, 25.

JETHALAL HIRACHAND VAKIL (ORIGINAL PLAINTIFF), APPELLANT, *v.* LALBHAI DALPATBHAI SETH (ORIGINAL DEFENDANT), RESPONDENT.*

Injunction—Encroachment on land—Building over a dhora*—Compensation not proper remedy.*

The defendant encroached on an abutment (*dhora*) of the wall of the plaintiff, which stood on a piece of ground belonging to the plaintiff. The wall divided the properties belonging to the parties. The abutment was on the defendant's side of the wall. The Lower Appellate Court awarded compensation for this encroachment, on the ground that there was a merely technical encroachment on the part of the defendant because only a foot or so of the plaintiff's ground was covered thereby.

* Second Appeal No. 566 of 1902.