

examination-in-chief and cross-examination, and that the said witness, Lala Gurnarain, was then undergoing a continuation of his cross-examination.

Mr. Dunne (Mr. J. G. Woodroffe with him), in support of the application, referred to the case of *Nistarini Dassi v. Nundo Lall Bose* (1) in which a similar application (2) was granted by Stanley, J.

STEPHEN, J. In this case it is shown by affidavits that there has apparently been a prolonged and unnecessary cross-examination. Considering the application which was made on a previous occasion on behalf of the plaintiff for adjournment and the [627] non-appearance of the plaintiffs to-day, I think it is my duty to order that the cross-examination of Gurnarain do close on Tuesday. This order is not to affect the defendant's right to re-examine.

Costs reserved.

The Registrar to be at liberty to telegraph the effect of this order to the Commissioner.

Attorneys for the plaintiff: *Wilson & Co.*

Attorneys for the defendant: *Dignam & Co.*

30 C. 627.

ORIGINAL CIVIL.

ISSUR SINGH v. G. BERGMANN.* [29th April, 1903.]

Practice—Stay of Proceedings in Small Cause Court—Transfer of suit on a Promissory note—Suit for an account in the High Court—Procedure—Matter of convenience rather than of right—Costs.

As a General rule, it would be no answer as regards a suit in the Small Cause Court upon a promissory note, for the defendant in that suit to say that the claim is a matter of account. But if subsequently a suit is instituted in the High Court by the defendant in the Small Cause Court suit, in which all transactions between the parties can be dealt with, and if he gives security for the total amount of his indebtedness, then it is desirable that there should not be a separate proceeding in respect of the promissory note though *prima facie* it does not constitute an item in a running account between the parties. The question of procedure becomes a matter of convenience rather than of right, and justice can be done between the parties by apportionment of costs after the account has been taken in the High Court suit.

[Fol. 9 I. C. 299; Ref 32 I. C. 582.]

ORIGINAL SUIT.

The plaintiff, Issur Singh and others, who carry on business as traders at No. 10, Municipal Market, Calcutta, in winter cloths and woollen goods, used to indent for goods from Europe through the defendant, who is a merchant carrying on business under the name and style of B. Regold and Bergmann at No. 142, Radha Bazar Street, Calcutta, and who acted as indent agents of the plaintiffs. In respect of these various indents, drafts were drawn against goods, and security was given from time to time by the plaintiffs for the amounts due on those drafts. The security [628] consisted of goods and also promissory notes executed in favour of the plaintiffs, which were endorsed over to the defendant. Payments were made by the plaintiffs from time to time in respect of their indebtedness to the defendant, and realizations were made by

Original Civil Suit No. 26 of 1903.

(1) (1869) I. L. R. 26 Cal. 591; 891. (2) Unreported.

1903
APRIL 29.
ORIGINAL
CIVIL.
30 C. 627.

the defendant in respect of the security given by the plaintiffs. Subsequently, in place of two of the drafts, the plaintiffs executed two promissory notes in favour of the defendant. The defendant alleged that all these transactions were separate and distinct, and that all payments made by the plaintiffs were specifically appropriated to the transactions represented by the several indents, and that in that way all the indents were kept separate throughout the year. The defendant claiming to proceed on one of these notes and alleging that nothing had been paid on it instituted on the 9th of December 1902 a suit in the Court of Small Causes, Calcutta. Subsequently on the 14th of January 1903 the plaintiffs instituted this suit in the High Court for a general account to be taken of all the transactions between the plaintiffs and the defendant, and alleging that the said promissory note was a part of the transactions and could not be separated therefrom so as to give the defendant a separate cause of action with respect thereto, obtained a Rule calling upon the defendant to show cause why the suit instituted by him in the Small Cause Court should not be transferred to this Court in order that it might try and determine that suit together with this suit.

The suit and the Rule were heard together. No evidence was tendered.

Mr. *Dunne* (Mr. *K. S. Bonnerjee* with him) for the plaintiff. I ask that there may be a reference for the taking of accounts. The matter of the Rule for the transfer of the defendant's suit in the Small Cause Court may stand over till the accounts are taken and report made thereon. It is admitted there have been various dealings between the parties. I offer no evidence.

Mr. *Sinha* (Mr. *J. G. Woodroffe* with him) for the defendant. The whole object of the suit is to delay the payment of my claim in the Small Cause Court suit. The plaintiff is not entitled to an account at all. If he is, the promissory note on which [629] the defendant has sued in the Small Cause Court does not enter into the account: it is an isolated transaction. I am ready to prove that it is so.

SALE, J. I think the question in this case really resolves itself into one of convenience.

It appears that the plaintiffs and the defendants carried on a business in which the defendants, acted as indent agents of the plaintiffs. The plaintiffs were in the habit of indenting for goods from Europe through the defendants, and in respect of those various indents, drafts were drawn against goods coming out. They were no doubt treated as separate transactions to a certain extent. It appears that subsequently security was given by the plaintiffs in respect of the amounts due from time to time on those drafts, the security consisting of goods and also promissory notes which were endorsed by the plaintiffs in favour of the defendants. It is alleged that payments were made by the plaintiffs from time to time in respect of their indebtedness. It is also said that realizations were made by the defendants in respect of the security given by the plaintiffs. The defendants, however, allege that all these payments were specifically appropriated to transactions represented by the indents, and in that way these indents were kept separate throughout the year. Subsequently in place of two of the drafts the plaintiffs gave the defendants two promissory notes, the notes bearing on their face interest at the rate of twelve per cent. per annum. The defendants claiming to proceed on one of these notes and alleging that nothing had been paid on it instituted a suit in the Calcutta Court of Small Causes. *Prima facie*

I should judge that they were entitled so to do, the object of a promissory note is to show that the particular transaction represented by the note is a separate transaction, and it is intended that the remedies in respect of that transaction should be separately pursued. Subsequently, however, the plaintiffs instituted this suit for a general account to be taken of all the transactions between the plaintiffs and the defendants. I am not prepared to say upon the pleadings as they stand that the suit instituted by the plaintiffs in this Court in respect of all these transactions is in any sense a [630] vexatious suit; nor is it desirable, in my opinion, that at this stage there should be an issue as to whether it is vexatious or not, because, after all, that question must depend upon the result of the account, and justice can be done between the parties by the apportionment of costs after the account has been taken. I propose to direct an account to be taken in this suit. I think that, so far as the promissory notes are concerned, they do not *prima facie* constitute items in a running account. I think, however, the fact that security has been undoubtedly given in respect of the total amount of indebtedness of the plaintiffs to the defendants makes it desirable that there should not be a separate proceeding in respect of one of those promissory notes, having regard to the fact that there exists a suit in the High Court in which all the transactions between the parties can be dealt with.

While, therefore, as a general rule, it would be no answer as regards a suit instituted in the Calcutta Court of Small Causes upon a promissory note for the defendants to say that the claim is a matter of account, the situation is altered when a suit such as the present one is instituted in this Court by the defendants in the Small Cause Court suit. The question of procedure then becomes, as I have already said, a matter of convenience rather than a question of right.

I, therefore, propose to refer it to the Official Referee to enquire and report what sum, if any, is due to the defendants or the plaintiffs in respect of the various transactions mentioned in the plaint and the written statement, and in making his report I desire him to state whether the sums paid to the defendants or the realizations made by them were in respect of any particular items in the account or in respect of the general indebtedness.

The probability is that when that report is made, there will be further materials before the Court enabling the Judge to deal with the costs of this suit and of the present application. The application for the stay of proceedings in the Calcutta Court of Small Causes must stand over until the report is made.

The costs of the suit and of the Rule are reserved.

Attorney for the plaintiffs: S. K. Sirkar.

Attorney for the defendants: N. C. Bose.

30 C. 631 (=7 C. W. N. 565.)

[631] MATRIMONIAL JURISDICTION.

BOYLE v. BOYLE.* [13th May, 1903.]

Divorce—Wife's costs—Dismissal of wife's petition—Liability of husband—Deposit or security for costs.

* Original Civil Suit No. 5 of 1902.