Before Mr. Justice Phear.

1869
June 22.

BALDEODAS AGARWALLA *v.* ALEXANDER KAICH AND ANOTHER

Partnership—Banian—Lien of Banian on Goods under agreement with Firm—Construction of Agreement.

The plaintiff became banian to the defendants, under an agreement by which he had a lien upon all goods "belongingto" them in their godowns for all balances that might be due by them. Sometime after the date of the agreement, while there was a balance due, the defendants' firm took in a new partner.

Held, that the words "belonging to" included all goods in the possession of the new firm that came to them in the way of business. Held also, that the new firm not having given notice to the contrary, must be taken to have engaged the plaintiff as banian, by the old firm, upon the terms expressed in the agreement with the old firm and to be liable for the balance due.

THIS was a suit for a declaration of the rights of the plaintiff as banian of the defedants, under a certain agreement in respect of certain goods in the godowns of the defendants; also for an injunction to restrain the defendants from dealing with the goods; also for the appointment of a receiver and for accounts to be taken, if necessary.

The injunction had been obtained, and the cause now came on for hearing. The plaintiff became the banian of the first defendant, under an agreement dated the 5th June 1867, of which the 11th and 12th clauses were as follow:—

On sales of any goods belonging to the said firm which have been mortgaged or pledged by the firm, or upon which there is any lien, the said Baldeodas Agarwalla is to pay the amount due on security of the said goods and clear the same; and it is hereby expressly agreed that the said Baldeodas Agarwalla shall have the first charge or lien on the proceeds of sale of such goods for the money which may be so paid by him to clear such goods, together with interest and dasturi, and the said money shall be detained by or repaid to Baldeodas Agarwalla with interest at the rate of twelve per cent. per annum, and dasturi at the rate hereinafter mentioned, out of the proceeds of sale of such goods.

That an account current be established between the said Baldeodas Agarwalla and the said firm of Alexander Kaich and Co., and that the rate of interest chargeable on account shall be at the rate of twelve per

cent. on both sides, and the said Baldeodas Agarwalla shall have a first lien or charge on all goods and merchandizes belonging to the said firm of Alexander Kaich and Co., in his custody, or under his care and control, for all sums that may for the time being be due and owing to the said Baldeodas Agarwalla from the said firm of Alexander Kaich and Co., and the said firm of Alexander Kaich & Co., shall not, in any event, except with the consent of the said Baldeodas Agarwalla take away or remove any portion of such goods or merchandizes without first paying to the said Baldeodas Agarwalla moneys that may be due to him from the said firm of Alexander Kaich and Co., with interest at the rate aforesaid.

The second defendant did not become a partner in the firm of the first defendant until after the lapse of some time from the date of the agreement, and he contended that he was not liable to the debts contracted by the firm before he joined it, and that it lay on the plaintiff to prove the agreement between him and the plaintiff.

Both defendants contended that the goods upon which the plaintiff had a lien under the 11th and 12th clauses included only the goods of Alexander Kaich and Co., and did not include all goods that might happen to be in the godowns.

Upon this latter point, PHEAR, J., ruled that the words "belonging to," in the 11th and 12th clauses of the agreement meant all the goods in the possession of the firm, and which had come to them in the way of business.

The agrement was admitted.

Mr. *Graham* and Mr. *Marindin* for plaintiff.

Mr. *Piffard* for first defendant.

Mr. *Branson* and Mr. *Evans* for second defendant.

The material facts proved will appear from the judgment of

PHEAR, J.—When Mr. Grunenwald became a partner with Mr. Kaich, there is no doubt that the new firm thus constituted did not necessarily become liable for the debts of the old firm; but this new firm kept on the plaintiff as its banian upon precisely the same terms as those upon which he was banian to the old firm, with full knowledge of what those terms were.

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Mr. Evans has very fairly declined to argue, on behalf of his client, that the written agreement of the 5th June 1867 did not represent the agreement upon which the plaintiff became and acted as banian of the new firm. It is clear on the facts that, though no express words of contract were agreed to in this behalf, the new firm did impliedly take and continue the plaintiff as banian on the terms expressed in the agreement. (His Lordship here read the 12th clause). No doubt, these words in themselves considered as words of a current agreement apply only to such sums of money as may be due from the new firm to the plaintiff. And the question now is, whether or not the new firm took over the balance which was due to the plaintiff from the old firm, and placed it in the same condition as if it were a sum of money due to the plaintiff from the new firm. I thing it did so. As I have already said, the new firm continued the plaintiff in his old position of trust, without telling him that there had been any change in the terms of his responsibility; they never told him that, from the date of the new partnership, he could not look to in-coming goods as security for any other than the sums disbursed by him since the establishment of the new firm. There is no doubt on the evidence that the plaintiff did think that his old balances were taken into the new current account between him and the new firm, and were covered by the security of the existing goods from time to time in the godowns, and he had very good cause to suppose that that was the true relation between himself and his employer. And if this were not so, the consequences to him would be very serious indeed; for at the commencement of the new partnership, he had a lien upon the goods in the godowns for the whole of the balance then existing. If the new state of things was such that no goods subsequently brought in became liable for that balance, then day by day, and week by week, as the old goods were allowed to pass out, his security would gradually diminish and ultimately disappear, and I suppose it is probable that at the present time there are no goods in the godown identical with those which were there when the new partnership commenced. So that unless the new firm did take over the old balance, and bring it under the operation of clause 12 of the

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newly adopted agreement, the plaintiff has by this time lost all the security which he undoubtedly had at the commencement of the partnership for the balance then due to him. Clearly this very inequitable result was never for a moment contemplated by the defendants themselves. They had no intention of letting the plaintiff into a trap of this kind. No one thought that there had been any break made in the relative position and circumstances of the parties. Under the circumstances I think that the defendant's new firm did impliedly agree to take over the old balance due to the plaintiff, and to take it into the account currrent between the new firm and the plaintiff

An account must be taken, and the case be adjourned to take the account. The injunction must remain in force.

Attorney for the plaintiff : Mr. *Dover*.

Attorneys for the defendants : Messrs. *Robertson* & Co.

Before Mr. Justice Phear.

CHANDRAKANT ROY *v.* N. P. POGOSE.

1869
Aug 2.

Summary Procedure—Act, V. of 1866—*Jurisdiction.*

Where in a suit under Act V. of 1866, the defendant is at such a distance as would make it impossible for him to put in an appearance within the seven days allowed by the Act, the Court will stay execution for a time long enough to allow him to appear.

Suits cannot be brought under this Act against persons resident out of the jurisdiction,

THIS was an undefended case on a bill of exchange under the summary procedure provided by Act V. of 1866. By that Act, seven days are allowed for the appearance of the defendant. The defendant in this case was shown to be out of the jurisdiction of the Court, and the point arose as to whether the Act applies where, by reason of distance, it would be impossible for the defendant to put in an appearance within the seven days allowed by the Act.

Mr. *Kennedy* (Mr. *Agabeg* with him) contended that Act V. of 1866 applied to cases like the present. The words of section 2 of that Act are that, "in all suits commenced in any High