

It would not enable their Lordships to allow (as the appellant asks them to allow) an entirely new case to be now brought forward before them, which is not even set up, or hinted at, in the plaint.

The new case suggested appears to be that, assuming an invalid adoption of Luchmunjee, and treating Luchmunjee as a mere trespasser, still the plaintiff could recover by proof of his title from Damodurjee. Whether he has such a case or not, their Lordships do not think it necessary to decide, but they feel themselves bound to say that that case cannot be gone into, inasmuch as it has not been set up in the plaint. Their Lordships do not desire to construe plaints with any extreme strictness or technicality but it would manifestly be extremely inconvenient, and certainly contrary to their practice, to allow a case to be raised here which is entirely different from the one which has been previously insisted upon.

For these reasons their Lordships are of opinion that the decree of the High Court is right, and ought to be affirmed. Their Lordships understand the High Court simply to have ruled that the plaintiffs had failed to prove the title on which they sued, that the Principal Sudder Ameen's decree ought, therefore, to be reversed, and the suit dismissed with costs. But inasmuch as the formal decree, which simply orders that the appeal be decreed with costs, and the decision of the Principal Sudder Ameen reversed, may hereafter lead to some doubt as to what was really decided by the High Court, their Lordships think that the formal decree should be varied by ordering that the decision of the Principal Sudder Ameen be reversed, and the suit dismissed with costs in both Courts; and their Lordships will humbly advise Her Majesty to this effect. The appellants must pay the costs of this appeal.

The 12th December 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,  
Judges.

Suit for Account—Commission under Act VIII. of 1859, s. 181—Investigation of Accounts—Witnesses—Evidence.

Case No. 45 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 7th December 1871.

Chand Ram (Defendant), *Appellant*,

*versus*

Brojo Gobind Dass (Plaintiff), *Respondent*.

*Mr. M. L. Sandel* and *Baboo Joy Gobind Sen* for Appellant.

*Baboos Ashoolosh Dhur, Kalee Mohun Dass, and Rujonee Nath Bose* for Respondent.

In a suit for an account of moneys received and disbursed by defendant while employed as a mohurir in plaintiff's shop, and for sums which defendant might be found to have misappropriated, defendant objected that one D (a relative of plaintiff's), who had been jointly employed with him as manager, with equal powers and responsibilities, ought to have been sued together with him :

Held that, to release D on payment of a trifling sum, and to sue defendant alone for a large amount (as plaintiff had done), no accounts being taken between them, was most inequitable, and the suit should have been dismissed :

Held that, as plaintiff had filed his khatta-books in Court, and did not allege that they had been falsified, he should have balanced the account himself, and the lower Court should not have deputed an Ameen under Act VIII. of 1859, s. 181, to investigate the accounts :

Held that such investigation does not include or allow the taking of the depositions of witnesses, and such depositions are not legally admissible as evidence in the cause.

*Glover, J.*—The plaintiff in this case sued the defendant, a mohurir employed in his shop at Bundur Bazar, for an account of moneys received and disbursed by him whilst so employed, and also for such sums, estimating them at Rs. 2,500, as he might be found to have misappropriated.

The amount claimed was afterwards, with the permission of the Court, raised to Rs. 5,101-15-8-5, and the plaint, with stamp, amended accordingly.

The defendant objected in the first place to the form of suit, alleging that he and one Raj Coomar Dass, a relative of the plaintiff, were jointly employed as managers of the shop, with equal powers and responsibilities, and that both ought to have been sued together. He added that the plaintiff had improperly released Raj Coomar from liability because he was his relation, and was trying to saddle defendant with the whole burthen.

He further objected that persons in his position of salaried mohurir were not liable to be called on to give in detailed accounts; that the accounts of sales, &c., were made up daily, and had been submitted in due course to the plaintiff; that there was little or no profit from the trade; and that when he was discharged by the plaintiff on the 3rd Srabun 1277, the whole stock of cloth and

cash, Rs. 5,879-13 worth of the former, and Rs. 185-10, was made over to the newly-appointed gomashtha, Ram Surun Chowdhry, plaintiff's brother-in-law.

The Subordinate Judge deputed an Ameen under section 181 of the Code of Civil Procedure to investigate the plaintiff's accounts, and decided, first, that the defendant Chand Ram was in sole charge of the plaintiff's shop and solely responsible, Raj Coomar being an inferior clerk only; and, secondly, that the Ameen's investigation showed a considerable deficit in his accounts, together with sundry false credits and debits. The Subordinate Judge went into this latter question at some length, and gave a decree to the plaintiff for Rs. 4,047-12-5-1-5.

The points which have been argued before us in this appeal (the merits of the case not being gone into) are:—

(1.) Whether a suit like the present will lie against Chand Ram only, his co-servant Raj Coomar not having been made a defendant?

(2.) Whether the Subordinate Judge was entitled to receive as evidence the depositions of the witnesses who had given evidence before the Ameen?

The plaintiff alleges that Raj Coomar was only an inferior mohurir, with no power of management and with no responsibility; the defendant, that he was his (defendant's) fellow clerk, enjoying the same salary and exercising the same powers of purchasing and selling cloth.

We have had the evidence on this point read, and think that it greatly preponderates in favor of the defendant's contention. Of the four witnesses examined by the plaintiff, two describe Raj Coomar as subordinate to Chand Ram, without in any way entering into detail or pointing out in what the inferiority consisted. The third, whilst saying that Chand Ram had the more authority, admits that their position was equal. The fourth states distinctly that the two were equal in salary, position, and authority. The defendant's witnesses, who are many in number, say the same thing, and the plaintiff himself, although he now denies their equality, very clearly admitted it when a suit was brought against him by Nimayenund. In his answer to that suit, Brojo Gobind Doss alleged that the shop was in the joint charge of Chand Ram and Raj Coomar; that they both had authority to buy and sell, to spend money, and make out accounts. In this case, also, the receipt taken by plaintiff from Raj Coomar, and filed by the defendant,

shows that Raj Coomar was not the mere salaried mohurir he is now alleged to be. That receipt speaks of money due from Raj Coomar on account of the "tuhveel," and acknowledges that the balance has been paid. The Subordinate Judge says that this receipt was on account of an excess of salary drawn by Raj Coomar. We think otherwise, and that it most clearly refers to shop-transactions carried on by Raj Coomar, and on account of which there was a balance due to his employer.

On the whole evidence, we are of opinion that Raj Coomar was not a mere mohurir, but was associated with Chand Ram in the management of the shop, and was equally responsible with him.

And that being so, it follows that he ought to have been associated with him in this suit. The accounts to be investigated extended over some years, from 1274 to 1277, during the first two of which Raj Coomar was as much concerned with them as the defendant Chand Ram; and to release Raj Coomar from the suit on pretence of being satisfied, without taking any account of the transactions managed by the two servants whilst jointly occupied in conducting the shop-business, was manifestly a most unfair proceeding towards Chand Ram. If the two were, as we consider they were, jointly responsible, then to release the one on payment or pretended payment of a trifling sum, and to sue the other for upwards of Rs. 5,000, no accounts being taken between them and no arrangement made for testing their different responsibilities, was most inequitable.

We are of opinion that the plaintiff's suit should have been dismissed on this ground. We think it right, however, to make some remarks on the way in which the Subordinate Judge has applied the provisions of section 181 of the Code of Civil Procedure. In the first place, we think that this was not a case in which a Commissioner should have been appointed at all. The plaintiff filed his khatta-books in Court; and as he nowhere alleged that they had been in any way falsified by the defendant, he could have made up the account from them, without troubling the Court in the matter, and have fixed the amount due to him from the defendant, instead of stating a sum by guess. It never seems to have struck the Subordinate Judge as an unusual proceeding on the part of the plaintiff, that, being provided with account-books the entries in which were undisputed by him, he should have asked the Court to

balance the account for him, instead of making up the total himself.

Secondly, the Subordinate Judge, in deciding the question of "false credits and debits," has relied on the evidence of witnesses examined by the Ameen, and sent up with his report. Now, section 181 of the Code of Civil Procedure does not seem to give an Ameen authority to take evidence on solemn affirmation, and in any case such evidence does not by that section become evidence in the cause. In section 180, it is distinctly stated that the depositions of witnesses are to be recorded and used by the Judge as evidence. In section 181, the word "depositions" is not to be found, and it is the "proceedings" only of the Commissioner, *i. e.*, his report or opinion, which are to be received as evidence. The wording of the next section (182) also shows that an investigation into accounts does not include or allow the taking of the depositions of witnesses. In this case the Ameen, although admitting that he had not gone through the various items of debit and credit in the khatta-books owing to want of time, seems to have hunted up persons whose names were entered therein on account of sundry transactions in cloth, and to have examined them touching their business transactions with the plaintiff's shop; and finding in some instances that their account of matters did not agree with the entries in the khatta-books, at once jumped to the conclusion that the defendant Chand Ram had made false entries, and misappropriated the proceeds. The Subordinate Judge accepted this evidence, and acted upon it, although its effect was to invalidate the correctness of the very khatta-books which the plaintiff had put in as the basis of his claim. The evidence of the witnesses taken by the Ameen was not legally receivable, and the Subordinate Judge ought not to have been influenced by it. That he was so, and that he was generally prejudiced against the defendant, is clear from the wording of his judgment throughout. Thus, he speaks of the receipt given by Raj Coomar, and filed by the plaintiff as not being proved, whereas the plaintiff himself had in his deposition admitted it. He gives it as his opinion that the defendant Chand Ram has brought himself within the clauses of the Penal Code, and declares that "he sees no crime which the defendant is not capable of committing," and this on the strength of supposed false entries in books which the plaintiff has filed as true!

It has been contended, though faintly, that in any case the defendant is liable for the time between the dismissal of Raj Coomar and the 2nd Srabun 1277; and under ordinary circumstances he might be; but the extremely disingenuous way in which the plaintiff has brought his case, and his endeavour to conceal the real position of Chand Ram and Raj Coomar, make any further enquiry impossible.

Without, therefore, going into the merits of the case, we reverse the decision of the Subordinate Judge, on the point of law, and dismiss the plaintiff's suit with all costs.

The 13th December 1872.

*Present:*

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble Charles Pontifex, Judge.

Plaint—Cause of Action.

*Appeal from an order of the Hon'ble A. G. Macpherson, exercising the Ordinary Original Civil Jurisdiction of the High Court.*

Dorab Ally Khan (Plaintiff), *Appellant*,  
*versus*

Khajah Moheesooddeen (Defendant),  
*Respondent.*

*The Officiating Advocate-General and Mr. Kennedy for Appellant.*

No one for Respondent.

A plaint which had been rejected, admitted on appeal, leave being reserved to defendant, if so advised, to apply to have it taken off the file.

THIS was an appeal from an order rejecting the plaint dated the 5th of September. The order is as follows: "If I had been of opinion that this plaint disclosed a good cause of action, I should have granted the prayer for leave under section 13 of the Letters Patent to sue in this Court. I shall, therefore, grant the leave (notwithstanding the order I am about to make) so that the plaintiff may have it in his power to appeal, if he should be so advised. But I reject the plaint under section 32 of the Civil Procedure Code, because it appears to me that the subject-matter of the plaint does not constitute a cause of action." The case of Sowdaminee Chowdrain *vs.* Kishen Kishore Poddar,\* decided

\* 12 W. R., F. B., 8.