

1878

CHUNDER  
SEKHUR  
MOOKERJEE  
v.  
THE  
COLLECTOR OF  
MIDNAPORE.

power, the Government would, no doubt, be desirous of taking all steps that may be necessary for the object with a view to the comfort and health of the population. But it is a very different thing to seek to compel Government by a plaint filed in Court to maintain a particular khal in a certain position. Nor has the Court before it, as it seems to me, any materials upon which it could make any specific order such as it would have to make in order to be of use to the plaintiffs, because the Court has no means of ascertaining at what depth and width it would be necessary to maintain this khal for the purpose of effectual drainage of the plaintiffs' estate. These are general observations which appear to me necessary to be made; but it also seems to me, that the policy of the law, even before the Specific Relief Act, was against the enforcement of specific performance of contracts of this nature. It is not necessary for us to say what relief, if any, the plaintiffs would be entitled to. Under the circumstances, I think it quite clear that they could not succeed in the present suit, and that the suit was properly dismissed by the Court below. The appeal is dismissed with costs.

*Appeal dismissed.*

## ORIGINAL CIVIL.

*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.*

1878  
Jany. 30 &  
31.

CHUNDER CAUNT MOOKERJEE (DEFENDANT) v. JODOONATH  
KHAN AND ANOTHER (PLAINTIFFS).

*Costs—Tender—Difference between a Tender made on account of separable Claims and one made on reference to part of a single inseparable Claim—What is not an unconditional Tender.*

In a suit to recover Rs. 1,323-15-6, the balance of the price of goods sold, on which an account had been come to between the parties, it appeared that the defendant had tendered before suit a sum of Rs. 1,043-5, stating in the letter of tender that the sum so tendered was the only sum due. At the trial, the plaintiff obtained a decree for the full amount claimed by him. *Held*, both in the Court below and on appeal, that the tender was bad, and therefore the plaintiffs were entitled to their costs.

*Held per KENNEDY, J.*—That the tender was bad, being a tender of part of an entire debt.

*Held per* GARTH, C. J. (MARKBY, J., concurring), that the tender was also bad, as the plaintiffs could not have accepted the sum tendered without giving up the remainder of their claim.

1878

---

CHUNDER  
CAUNT  
MOOKERJEE  
v.  
JODDONATH  
KHAN.

THE plaintiffs in this case sued the defendant to recover a balance of Rs. 1,323-15-6 due to them in respect of 2,000 packets of ginger sold and delivered to the defendant in the course of the months of December, 1876, and January, 1877.

The plaintiffs alleged that, of the 2,000 packets of ginger, one thousand were to be paid for at the rate of Rs. 7-8-6 per maund, and the other thousand at the rate of Rs. 8-8-6 per maund.

The defendant, on the other hand, contended that the whole 2,000 packets were to be paid for at the uniform rate of Rs. 7-8-6 per maund. Certain payments on account and deductions that had been agreed to, were admitted on both sides. Before the institution of the suit, the defendant tendered to the plaintiffs the sum of Rs. 1,043-5 by a letter, which was as follows:—

7½, *Hastings Street, Calcutta, 30th January, 1877.*

MESSRS. GHOSE and BOSE,

*Re Ginger sold.*

DEAR SIRS,

WITH reference to your letter of the 29th instant, (demanding payment of Rs. 1,323-15-6), which I referred to my client; and in reply he instructs me to state that there is only due to your clients in respect of the ginger sold by them to him the sum of Rs. 1,043-5, which amount I hereby tender to you.

Yours faithfully,

A. ST. JOHN CARRUTHERS.

The plaintiffs having refused this offer and instituted this suit, the defendant pleaded that he had already tendered the amount due to the plaintiffs, and paid Rs. 1,043-5 into Court.

The only issue of fact between the parties was, whether the sum due to the plaintiffs was Rs. 1,323-15-6, or Rs. 1,043-5; and the Court (Kennedy, J.) having found this in favor of the plaintiffs, Mr. J. D. Bell (with him Mr. Allen) for the defendant, contended, that the plaintiffs were not entitled to any costs, as when the

1878  
 CHUNDER  
 CAUNT  
 MOOKERJEE  
 v.  
 JODOONATH  
 KHAN.

tender of Rs. 1,043-5 was made to them, they should have accepted it, and sued for any further sum claimed by them in the Calcutta Small Cause Court. Mr. Bell further contended, that the defendant was entitled to have awarded to him the extra costs to which he had been put by reason of the action having been brought in the High Court, and cited *James v. Vane* (1).

Mr. *Bonnerjee* (with him Mr. *Palit*), for the plaintiffs, contended that Mr. Carruthers' letter of 30th January, 1877, was not an unconditional tender which the plaintiffs could have accepted without waiving any further claim on their part, and further that a tender of part of an entire claim was bad—*Dixon v. Clark* (2).

KENNEDY, J.—I do not think that, looking at the terms of the Small Cause Court Acts, this is a case in which this Court should exercise its discretion. The provisions in Act XXVI of 1864, s. 9, are very peculiar, and only give a right to certify that the action was a fit one to be brought in the Supreme Court “by reason of the difficulty, novelty, or general importance of the case, or of some erroneous course of decision in like cases in the Court of Small Causes.”

Now, I cannot say that this case is a novel one, nor is it one in which there is any difficulty or general importance. It seemed to me a tolerably plain case on the evidence. I must therefore consider whether the case cited by Mr. Bell—of *James v. Vane* (1)—governs the present case. Now that case was very much determined, as far as I can see, on the construction of rules of that Court, which are not applicable here. But Cockburn, C. J., expressly rested his decision on this, that there was a distinction between a case where one inseparable claim was made and a case where the amount was made up of several separable items, and held that the case came under the latter class of cases. He says,—“Where a plaintiff claims an amount which is the result of one demand, and which cannot be separated, he may say to the defendant, when a smaller sum is tendered to him, I will not take less than the whole sum which I claim; but where the whole demand is made up of an aggregate of items,

(1) 29 L. J., Q. B., 169.

(2) 5 C. B., 365.

and the defendant comes and says—I acknowledge that I owe you so much, and there is your money for you, the plaintiff is wrong if he refuses to take it, and *quoad* that amount he ought not to be allowed to keep the claim alive in its entirety for the purpose of suing the defendant upon it in the superior Court, so as to get costs upon the higher scale.” In that case one demand was for £24-8-10 and the other for £4-10-6, and the tender was £26-10-6, a sum more than sufficient to cover the larger of the two demands. In this case there was nothing of that kind. The payments and tender were made in respect of a liability, which, upon a due appropriation of the payments, left a claim above the amount of Rs. 1,000; and therefore I think that, according to the principle on which Cockburn, C. J., goes, this case is not applicable. I may also mention the case of *Crosse v. Seaman* (1), in which the Court of Common Pleas decided that a tender and payment into Court which reduced the claims to a sum less than £20 did not bring it within the County Courts Act so as to preclude the plaintiff from getting his costs. I may further observe that, in the case of *Dixon v. Clark* (2), which was cited in the case of *James v. Vane* (3), it is expressly ruled, and the principle is adopted by Cockburn, C. J., in *James v. Vane* (3), that a tender of part of an entire debt is bad. I think, therefore, in this case that the tender of part of the claim cannot enable the defendant to throw on the plaintiffs the certainty of losing his costs if he proceeds in the tribunal where he thinks he is most likely to succeed. The plaintiffs will have their costs on scale 2.

From this decision the defendant appealed. The only ground of appeal material to this report was, that the learned Judge of the Court below ought not to have allowed the plaintiffs' costs on scale No. 2, but ought to have held that the plaintiffs should have sued in the Small Cause Court.

Mr. *J. D. Bell* and Mr. *R. Allen* for the appellant.

Mr. *Bonnerjee* and Mr. *Palit* for the respondents.

(1) 11 C. B., 524.

(2) 5 C. B., 365.

(3) 29 L. J., Q. B., 169.

1878

GRUNDER  
CAUNT  
MOOKERJEE  
v.  
JODOONATH  
KHAN.

1878

CHUNDER  
CAUNT  
MOOKERJEE  
v.  
JODOONATH  
KHAN.

The cases of *James v. Vane* (1) and *Dixon v. Walker* (2) were cited on behalf of the appellant.

The counsel for the respondents were not called upon on this point.

The judgment of the Court was delivered by

GARTE, C. J. (who, after holding that on the evidence the appeal should be dismissed, continued).—As regards the last point urged upon us, which only affects the question of costs, we think that the tender of the Rs. 1,043-5 was made in such a way, that the plaintiffs could not accept the sum tendered without giving up the remainder of their claim.

An offer of that kind to pay a portion of the debt in discharge of the whole is not a legal tender of the part only; and this case, therefore, does not come within the principle of the authorities which have been cited to us by Mr. Bell.

If the money had been tendered unconditionally, it might have been otherwise.

*Appeal dismissed.*

Attorney for the appellant : Mr. *Carruthers*.

Attorneys for the respondents : Messrs. *Ghose* and *Bose*.

(1) 29 L. J., Q. B., 169.

(2) 7 M. & W., 214.