

(1912) 05 CAL CK 0021

Calcutta High Court

Case No: None

Adamji Khadi Bhai

APPELLANT

Vs

Issuf Ahmed Mulla

RESPONDENT

Date of Decision: May 27, 1912**Citation:** 16 Ind. Cas. 750**Hon'ble Judges:** Beachcroft, J; Ashutosh Mookerjee, J**Bench:** Division Bench

Judgement

1. This is an appeal on be-half of the defendant against the preliminary decree in a suit for accounts made by the Court of Appeal below in reversal of the decree of dismissal made by the primary Court. The plaintiff alleges that the defendant, who resides at Colombo in Ceylon, has acted as his Commission Agent and claims full accounts from him. The suit was commenced on the 23rd August 1907 in the Court of the Munsif at Cuttack. The written statement was filed on the 3rd February 1908 and the issues were framed on the 27th February following. On the 28th March, the defendant applied that he might be examined on Commission. On the 2nd issue, if the necessary fee was paid. We have not been informed as to the precise date when the fee was paid, but we find from the order-sheet that on the 7th May, the defendant prayed for the actual issue of the Commission. But on the 9th May, the order for the issue of a Commission was cancelled, under very exceptional circumstances. The Pleader for the defendant stated that he could not file interrogatories inasmuch as the account papers filed by the plaintiff were written in Gujrati, which was not the language of the Court. It was thereupon suggested that the plaintiff should file a translation of the account-books in the language of the Court. The plaintiff refused to do so. It was then suggested on behalf of the defendant that an open Commission might issue without the interrogatories. This application was resisted by the plaintiff on the ground that it would be inconvenient for him to have the defendant cross-examined at Colombo, unless interrogatories were sent out. The Court thereupon held that the defendant might come up to Cuttack and be examined in Court, as this would set at rest all the objections on

behalf of both parties. The result was that the Commission was not issued. The suit was then tried out and dismissed. The plaintiff appealed to the Subordinate Judge and apparently convinced him that he had a good case on the merits. On behalf of the defendant, it was thereupon argued that he had been materially prejudiced by the refusal of the Court to issue the Commission, and it was urged that, even at that stage, the error should be rectified. The Subordinate Judge overruled the contention and decreed the appeal. On the present appeal by the defendant, the objection has been reiterated in this Court. The learned Counsel for the plaintiff-respondent has contended that this was a matter in which the Court had a discretion, that a Court of Appeal should not interfere with the exercise of such discretion by the primary Court, and that, at any rate, there has not been such a gross abuse of the powers of the Court as would justify our interference. He has further argued that the plaintiff was under no obligation to file a translation of the account papers, which, it was alleged, had been received by him from the defendant himself. In our opinion, the procedure adopted by the Court of first instance was erroneous and has affected the decision of the case on the merits.

2. Even if it be assumed for a moment that the plaintiff was under no obligation to furnish the defendant with a translation of the account papers, the Commission might clearly have been issued without the interrogatories, and the original papers might have been forwarded for the inspection of the defendant. This procedure was not followed because the plaintiff persuaded the Court to hold that this was not the right course to adopt. The defendant was however, plainly entitled to be examined on Commission. The principle applicable to cases of this description was explained by Mr. Justice Chitty in the case of *Ross v. Woodford* (1894) 1 Ch. 38 : 63 L.J. Ch. 191 : 8 R. 20 : 70 L.T. 22 : 42 W.R. 188 in the following terms: "There are many cases where the Court has been very reluctant to accede to applications by a plaintiff to take evidence abroad, because the tribunal has been chosen by the plaintiff himself; so, too with regard to the case of the plaintiff asking for a Commission to examine himself, the Court has full discretion; but it exercises that discretion strictly and does not grant the application unless a very strong case is made out. But the case is entirely different when it is the defendant's application, and particularly that of a defendant lawfully resident out of the jurisdiction according to the ordinary course of his life and business, and to compel these defendants to come over here, at great expense, to attend the trial or to give up their case, would be oppressive and unfair, and, in my opinion, it would be wrong to apply to the case of a defendant the principles that are applicable to the case of a plaintiff asking for a Commission to examine himself". To the same effect are the observations of Lindley, C.J. in *New v. Burns* 64 L.J.Q.B. 104 : 14 R. 339 : 71 L.T. 681 : 43 W.R. 182. In the case before us, the defendant, in the course of business, resides beyond the limits of British India. It is by the merest accident that the plaintiff claims to be entitled to institute a suit at Cuttack, because, according to him, the offer of the defendant was accepted within the jurisdiction of the Cuttack Court. It would obviously be unfair to adopt the

course taken by the Court of first instance, namely, to compel the defendant to come from Colombo to Cuttack to be examined in Court or practically to abandon his defence.

3. We do not feel pressed by the circumstance that the Court of first instance had a discretion in the matter; that discretion must be exercised judicially, and if there has been an erroneous exercise which has prejudiced the parties, a Court of Appeal will not hesitate to set matters right, whether the order directs the issue of a Commission as in *Keely v. Wakley* (1893) 9 T.L.R. 571 or refuses the application as in *Haridas Baisakh v. Mir Moazam Hossein* 15 W.R. 447 : 8 B.L.R. Ap. 16 and *Maruthamuthu Pillai v. Krishnamachariar* 30 M. 143.

4. The result is that this appeal is allowed, the decrees of the Courts below discharged and the case remanded to the Court of first instance in order that the defendant may be examined on Commission and the case retried. The appellant is entitled to his costs both in this Court and in the Court of the Sub Judge.