[ORIGINAL CIVIL JURISDICTION.]

SUIT No. 47 OF 1871.

Appeal No. 283.

1875.
Oct. 1.

HIRJI JINA' (PLAINTIFF) *v.* NA'RAN MULJI AND OTHERS (DEFENDANTS).

Account—Apportionment—Decree—Construction—Amendment of decree—Clerical error—Practice.

The decree of the court of first instance directed the Commissioner to take an account of the moneys paid by the plaintiff, during the period between 24th January 1865 and the date of the filing of the plaint, for the use and at the request of the defendants, and to allow credit to the defendants for the sums for which the plaintiff had given credit in his particulars of demand, and for all other sums for which the defendants should prove themselves entitled to credit wherever the same might have become payable. The defendants in their surcharge to the plaintiff's account claimed credit for various payments made by them to the plaintiff between 25th January 1865 and 5th July 1865. The plaintiff claimed to appropriate these payments in satisfaction of his claim against the defendants prior to 24th January 1865. The Commissioner, by his construction of the terms of the decree, held the plaintiff entitled to make such appropriation. The Judge in the court of first instance explained his decree to mean that the whole account prior to 24th January 1865 was wiped out, and directed the Commissioner that the plaintiff was not entitled to make the appropriation he claimed. *Held* that the construction put by the Commissioner on the decree was right.

Where the Court of first instance puts upon its own decree a construction, which to the Appellate Court appears to render the decree erroneous, and the decree, on the face of it, admits of another construction, which to the Appellate Court appears to render the decree correct, the Appellate Court will adopt the latter construction.

A clerical error in the decree was ordered to be amended at the hearing of the appeal.

THIS appeal from an order of Bayley, J., dated 19th December 1874, after argument on the preliminary point, whether or

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not an appeal lay from an order of such a nature (1), came on for hearing on the merits on 1st October 1875 before WESTROPP, C.J., and SARGENT, J.

The plaint, filed on 23rd January 1871, was framed on the common money counts and on an adjusted account. The written statement of the defendants raised three defences, viz., no jurisdiction, never indebted in Bombay, and limitation. On 15th December 1873, the suit came on for hearing before Bayley, J., and three issues were then framed, viz., 1st.—Is the suit barred? 2nd.—Has this court jurisdiction? 3rd.—Are the defendants indebted? The whole contest in the Court of first instance was on the question whether or not an adjustment of the account by the first defendant took place in Bombay in 1868 as alleged by the plaintiff, and to this point all the evidence recorded in the case, as well that given in Court as that taken on commission, was directed. On 20th December 1873, a fourth issue was framed by the Judge, whether the account was adjusted in Bombay by Náran Mulji as alleged by the plaintiff, and on the same day the judgment was delivered, and the following findings on the issues were recorded by the learned Judge:—1st.—The suit is not barred so far as concerns moneys paid in Bombay by the plaintiff in respect of *hundis* drawn on the plaintiff by the defendants, but is barred so far as concerns all other sums. 2nd.—This court has jurisdiction so far as concerns moneys paid in Bombay by the plaintiff in respect of *hundis* drawn on the plaintiff by the defendants, but has not jurisdiction so far as concerns all other sums. 3rd.—No finding. 4th.—the account was not adjusted in Bombay by Náran Mulji as alleged by the plaintiff. A decree was accordingly made on the same day referring it to the Commissioner to take an account of those matters in which the Court held it had jurisdiction, and restricting such account to the six years immediately preceding the date of the filing of the plaint, 23rd January 1871. The precise wording of that portion of the decree which directed the account, was as follows:—"This Court doth order that it be referred to C. E. Fox, Commissioner, &c., to take an account of the moneys paid by the plaintiff in Bombay during the period between 24th January 1865, and the date of the institution of this suit, being six years, for the use and at the

(1) 12 Bom. H. C. Rep.

request of the defendants in respect of *hundis* drawn on the plaintiff by the defendants, and the said Commissioner is to allow credit to the said defendants for the sums in that behalf mentioned in the particulars of demand annexed to the plaint, and for all other sums, if any, in respect of which the defendants shall prove themselves entitled to credit wherever (1) the same may have become payable." Liberty was also reserved in the decree to the Commissioner to report specially whether interest should be allowed.

On 1st April 1874, the plaintiff filed in the Commissioner's office his account, wherein he gave to the defendants credit for two payments, made by the defendants for the plaintiff in respect of two purchases of teak at Dhollera, for which credit had been given to the defendants by the plaintiff in the particulars of his demand annexed to the plaint. To this account the defendants, on 23rd June 1874, filed a surcharge, whereby they claimed credit for Rs. 12,170-3-6 in respect of payments made by the defendants to the plaintiff between 25th January 1865 and 5th July 1865. The plaintiff admitted receipt of the payments mentioned in the defendants' surcharge, but said they were received and ought to be appropriated in satisfaction of his claim against the defendants in respect of moneys due from the defendants prior to 24th January 1865, on which day the plaintiff alleged there was due to him from the defendants a balance of about Rs. 12,000. On 15th September 1874, the Commissioner held that the plaintiff was entitled to make such appropriation of the payments by the defendants, and, as they did not admit the balance claimed by the plaintiff to be due from them on 24th January 1865, ordered the plaintiff to file an account showing how that balance was arrived at. The defendants thereupon obtained from the Commissioner a certificate, dated 2nd October 1874, that such had been his decision, and moved before Bayley, J., for the reversal of that decision. On 19th December 1874 Bayley, J., made an order, directing the Commissioner that the plaintiff was not to be allowed to

(1) This word was written in the decree "whenever," but that appearing on reference to the notes of the learned Judge and of the counsel engaged in the case, as well as to the report of the judgment by a short hand writer, to be a clerical error for "wherever," the Court, at the hearing of the appeal, ordered the error to be rectified.—*Ed.*

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appropriate the payments mentioned in the defendants' surcharge in satisfaction of moneys due from them prior to 24th January 1865. This was the order now appealed against by the plaintiff.

Inverarity and *Kásináth Trimbak Telang* for the appellant:—The real question for the consideration of the Court is the proper construction of the decree of reference of the 20th December 1873.

The defendants do not pretend that at the time of making the payments, they made any specific appropriation of them. They have produced no books, and the fact that all these payments were made between January and July 1865 points clearly to the inference that they were intended by them to be applied in satisfaction of those very debts to which they were actually appropriated by the plaintiff by setting the items in the account against the debits. Nothing was ever said in the Court below in the argument, or in the judgment, or, it is submitted, in the decree of reference, which could have had the effect of preventing the appropriation by the plaintiff of the payments by the defendants in satisfaction of the barred balance, and it was not till the passing of the order now appealed against that we had any idea that Bayley, J., intended his decree of reference to bear such a construction as this order puts upon it. The order now appealed against explains the decree of reference to mean that the whole of the account prior to the six years before the institution of the suit should be wiped out, but that is not what the decree says, and if it had said so, we should immediately have appealed against it. What the decree of reference does say is that, besides those sums for which the plaintiff gives credit to the defendants, they shall be allowed credit for all other sums, "in respect of which they shall prove themselves entitled to credit." But they cannot prove themselves to be now entitled to credit for payments long ago properly appropriated in satisfaction of a previous debt. The payments for which the defendants claim credit by their surcharge were appropriated, at the time they were made, in the plaintiff's books in satisfaction of debts then due by the defendants, that is, credit was given for these payments as against the debits on account of sums due from the defendants to the plaintiff, and at the time of such payments the debts in respect of which they were so appropriated were not barred. Such an appropriation in

account is proper: *Mulchand Gulábchand* v. *Girdhar Mádhav* (1); *Clayton's case* (2). If no appropriation had been made by either party, the law would have appropriated the payment in satisfaction of the first debt.

Marriott (*Scoble*, Advocate General, with him) for the respondents.—This Court has nothing to do with the question whether the decree of reference was right or wrong, but has simply to decide whether it will bear the construction put upon it by the order now appealed against. The effect of the finding of the Court below on the first issue was to cut the head off the plaintiff's claim, and that effect was embodied in the decree of reference. There was no prior specific appropriation by the plaintiff of the payments mentioned in the defendants' surcharge, but he is only now seeking to appropriate them to the satisfaction of a barred balance. Those items which the Judge held to be barred ought not to be included in the account. That is what the decree meant, whether right or wrong, and under the decree the Commissioner has no power to take any account other than that for the period specified in the decree. The construction put by a Judge on his own decree ought to be upheld: *Powell* v. *Powell* (3).

WESTROPP, C.J.—It seems to us that in this case the Commissioner took the right view of the decree, the important part of which is that which directs the taking of the account. (His Lordship, after reading the portion of the decree set out above, proceeded.) We do not perceive upon what principle the account decreed could properly have been limited to six years as it was. However, we are not now re-hearing the cause or reviewing the decree, and, taking it with that limit, we have only to say what is the true construction of that portion of the decree as to credits which I have now read. It is contended on behalf of the defendants that moneys which, assuming the defendants to have been silent at the time of payment as to appropriation, would by law have been appropriated to the satisfaction of the earlier claims of the plaintiff, ought, notwithstanding the general rule of law, under the special language of the decree in this particular case, to be applied in satisfaction of the

(1) 8 Bom. H. C. Rep. 6 A.C.J.

(2) 1 Mer. 572, see p. 608. (3) L. R. 10 Ch. App. 130.

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latter items in the account, those namely, which are comprised within the last six years only of the account. That is, although it is a running account of mutual dealings between the plaintiff and the defendants, the defendants claim to be justified by the terms of the decree in drawing a line across the account, and saying to the plaintiff "you are not to go behind that line to show any claim against us, but we are entitled to bring from behind that line payments made by us, and apply them in reduction of your claim on this side." But we are of opinion that, unless the language of the decree is so explicit as to admit of no doubt whatever on this point, we should not be justified in putting on the decree a construction so contrary to settled law, and to the justice of the case. If a hard and fast line is to be drawn across the account, excluding items of the plaintiff's claim previous to a given date, the defendant is only entitled to credit for sums paid in respect of the items of the plaintiff's claim on or subsequently to that date. It may be that the learned Judge is now of opinion that a certain construction ought to be put on his decree, yet, if we think that construction wrong, and the words admit of another, which we think right, we should not be justified in not putting the latter construction on them. Looking then at the decree, we are of opinion that the words "entitled to credit" mean *properly* entitled, after taking into account all debits. The defendants could not properly be allowed credit for payments in respect of one set of items when the law would appropriate those very payments to an entirely different set of items. That is, payments properly applied by the law to earlier debits are not (in the absence of an express appropriation by the party making those payments) to be applied to later debits, and so leave the earlier unsatisfied. The failure of the plaintiff to prove the alleged adjustment in 1868 does not in the slightest degree affect the present question. We think in this case the defendant is, under the decree, only entitled to credit for such items as he would, by the ordinary custom of merchants in taking accounts, and by the ordinary rule of law, be entitled to claim. The order of 19th December 1874 must therefore be reversed, but there being some vagueness in the decree, and the learned Judge in the Court below having been with the defendants on the construction to be put on it, we think the parties ought to bear their own costs, both of the argument in the

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Division Court on the Commissioner's certificate, and of this appeal. The appellant, however, must have his costs of the former argument before us on the question whether an appeal lay from the order now reversed (1)

SARGENT, J.—I concur that this order must be reversed. I confess I have felt some difficulty in putting on the decree a construction different to that which the Judge making the decree had himself put on it. On consideration, however, I think the plaintiff may contend that whatever the intention of the learned Judge may have been in making the decree, that intention has not been so clearly expressed as to preclude that construction which can alone do justice between the parties. Under the circumstances, therefore, I think the plaintiff is entitled to insist on the appropriation of these payments in the manner for which he contends.

Order reversed.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 52 OF 1874.

1875. Oct. 5.

GANPAT PUTAYA' (ORIGINAL PLAINTIFF, APPELLANT) *v.* THE COLLECTOR OF KANARA (DEFENDANT, RESPONDENT).

The Code of Civil Procedure, Section 309—*Attachment—Court Fees—Prerogative of the Crown.*

The Crown has the first claim to the proceeds of a pauper suit to the extent of the amount of the court fee that would have been payable at the institution of the suit had the plaintiff not been a pauper; and Section 309 of the Code of Civil Procedure does not preclude the Crown or its representative from urging its prerogative.

THIS was a regular appeal from the decision of A. L. Spens, Judge of the District of North Kanara, rejecting the plaintiff's claim.

(1) 12 Bom. H. C. Rep.