Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lala Dwarka Doss and others v. Rai Sita Ram, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered 27th June 1879.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS was an action brought by the Respondent against the Appellants, a firm of bankers at Jounpore, to recover a quantity of gold, said to consist of 1,000 gold mohurs, 500 guineas, and five ingots of gold, which are alleged to have been deposited with them by one Luchman Dass, or the value of the gold. The Plaintiff claims as the purchaser of the right of Luchman Dass in the deposit under an auction sale held in pursuance of execution proceedings upon a decree which he had obtained against Luchman Dass. The claim is founded upon the following case: Luchman Dass was one of a firm of native bankers carrying on business at Ghazeepore and Jounpore, certainly at Ghazeepore, and apparently also at Jounpore where he lived. The firm had got into difficulties, and in February 1870 had become bankrupt. In what particular way it had become so is not stated, but there seems to be no doubt, and some evidence is to be found in the Record of the fact, that Luchman's firm was largely indebted at that time. The case alleged is that Luchman Dass, with a view to protect the property from his creditors, on the 15th

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March 1870 deposited the gold in question with the Appellants. Evidence was given to the effect that the gold had been kept at Ghazeepore, and was brought on the 15th March 1870, or the day before, to Jounpore, and placed in the house of Luchman Dass, and that it was taken on the following morning to the Appellants and deposited with them. It is said that a surkut or receipt was given for the gold, which was signed by one of the Appellants, Luchmee Narain. The surkut is set out in the Record and is in these terms: "Receipt 'surkhut' granted to Baboo Luchman "Dass, Khuttree, resident of Mahra Tollah

"Cr. Dr.

"Dated Phagoon Toodee 13th Sumbut 1926.

"1,000 gold mohurs,

"500 guineas,

"5 gold ingots, weighing 500 tolahs.

"Firm of Madun Gopal, Ram Charun," which appears to be the Appellant's firm, and it is signed "Luchmee Narain."

The next fact which appears in the evidence is that about the 8th of June 1870 Luchman Dass made a demand upon the Appellants for the gold, or the value of it. At that time the Appellants did not deny the deposit, but said that when the settlement with the creditors took place—and it had been suggested that a settlement with the creditors was the reason for the demand—they would deliver it back. It is stated that after that demand, on the 30th June 1870, Luchman Dass deposited a pearl necklace with the Appellants for sale. On the following day he demanded the necklace or the price of it, and the Appellants denied having received it. On the following day, the 2nd of July, a demand was again made on the part of Luchman Dass for the gold, and on that occasion the Appellants repudiated the transaction and denied all know-

ledge of it. Luchman Dass proceeded criminally against the Appellants for fraudulently withholding the necklace, under section 409 of the Criminal Code, and it appears that the case was heard before the magistrate of the district, who convicted two of the Appellants and sentenced them to two years imprisonment. There was an appeal from the magistrate's decision to the Judge, who affirmed it; and a subsequent appeal to the High Court upon the question of law, who also affirmed the decision. Their Lordships mention these proceedings as a part of the history of the case, but they have not allowed the fact that the Appellants were convicted to influence their judgment in the present case. It is, however, impossible not to notice the fact, because the story of the necklace was more or less connected with that of the deposit in question in this suit, and the learned Counsel for the Appellants drew an inference adverse to the Respondent's case from that prosecution, suggesting that it was probably done to influence the minds of those who had to decide the question as to the gold adversely to the Appellants.

With regard to the deposit of the gold, the first proceeding was taken by Luchman Dass himself. On the 15th July 1870 he filed a petition praying to be allowed to sue the Appellants for the gold *in formâ pauperis*. In his plaint he does not mention the surkut, but in his deposition, made three days after the filing of the petition, he refers to the surkut, and he refers to it as having been made on plain paper. The petition to sue *in formâ pauperis* was ultimately dismissed, the Judge having come to the conclusion that Luchman Dass had not established to his satisfaction that he was entitled to sue as a pauper.

The next step in the case was the purchase by the Respondent of Luchman Dass's interest in

the gold at the auction sale already referred to. The date of his purchase was the 6th April 1871. The proceedings in the suit which led to the decree under which that purchase was made are not in the Record; but it has been admitted by the learned Counsel for the Appellants that there is no evidence whatever on the Record to show that that suit was other than a hostile suit, or that there was any collusion in it between the Respondent and Luchman Dass. Nor is there any evidence whatever in the case that the present action of the Respondent as such purchaser is brought in collusion with Luchman Dass. Indeed there are some indications in the proceedings that Luchman Dass was reluctant to assist the Plaintiff in the prosecution of this suit.

It may be observed that Luchman Dass was indebted to the Appellants at the time of the deposit in a sum of 1,500 rupees, and on the 17th April 1871 the Appellants brought an action against him and his partners for 500 rupees, the balance of that debt, and obtained judgment against him. It has been said that it was an improbable circumstance that Luchman Dass should have deposited this gold with the Appellants who were admitted creditors of his at the time of the deposit. That circumstance scarcely creates an improbability. Upon the hypothesis Luchman Dass was about to put away property of the value of thirty thousand rupees in order to keep it from the general body of his creditors. Unless he had kept it in his own possession he must have placed it with bankers or some other persons for safe custody. It appears that two of the partners of the Appellant's firm were his relatives; they had had business transactions together; and if such a scheme was to be carried into effect there seems to be no improbability—on the contrary, some pro-

bability—that the Defendant's firm would have been selected for that purpose. The small debt due from Luchman Dass to them was not likely to be an obstacle to his selecting them for the deposit.

The present action was brought in July 1873. The witnesses examined on the part of the Plaintiff to prove the case were agents and servants of Luchman Dass or of his firm, and they prove in distinct terms and circumstantially that this gold was brought from Ghazeepore, deposited in the house of Luchman Dass at Jounpore, and taken to the Appellants, and that the receipt was obtained in the manner which has been mentioned. Upon an examination of their evidence there are some inconsistencies and contradictions to be found in it. Those inconsistences and contradictions have raised considerable doubt in the minds of their Lordships as to the truth of the case represented by the witnesses, which would have led them to give further consideration to it than they have already done if there had not been corroboration of their evidence in the surkut which is alleged to have been given by Luchmee Narain, and they think that this case, at the point at which it has now arrived, must be determined principally by the view which ought to be taken of that surkut. If the surkut is genuine and was really given, there can be little room left for doubt. It would corroborate in the strongest way the parol evidence.

The Subordinate Judge who heard the witnesses, both as to the fact of the deposit and as to the handwriting of the receipt, came to the conclusion that the receipt was not in the handwriting of Luchmee Narain, and he disbelieved the case of the Plaintiff. Undoubtedly, having come to the conclusion that the surkut was not in the handwriting of Luchmee Narain, and necessarily therefore to

the conclusion that it was a forgery, he was obviously right upon that view of the surkut in disbelieving the evidence of the Plaintiff. But on the appeal to the High Court the Judges of that Court thought that the mode in which the Subordinate Judge had proceeded in testing the credit of the witnesses upon the question of handwriting was one likely to mislead, and their Lordships agree with the High Court in that opinion. Having come to that opinion, the Judges of the High Court determined to go into an original inquiry as to the genuineness of that document. Accordingly they gave the parties liberty to adduce evidence so that there might be, before themselves, the fullest possible investigation into the genuineness of that receipt. The Plaintiff called all the witnesses he had examined before the Subordinate Judge, and one additional witness; and the Defendant in like manner called the witnesses he had before examined. The Judges of the High Court evidently took great pains in the investigation; they saw the witnesses and the documents, and could observe the way in which they were submitted to the witnesses; and they have gone in a very careful judgment minutely into the various documents prepared or used to test the knowledge and credit of the witnesses as to the handwriting of Luchmee Narain, into the way the witnesses dealt with them, and into the opinions which were elicited from the witnesses in their own presence. It is obvious that an opinion can be formed with much greater accuracy and certainty by those who hear the witnesses examined, and who see the papers and observe the manner in which the witnesses receive and deal with them, and give their opinion respecting them, than by those who only see the result of the inquiry when it is committed to paper; and therefore, in all inquiries of this kind, the Court which has not the advantage of

hearing the witnesses and seeing the documents must be in a position far less able to judge of the genuineness of the document which is impeached than those who heard the evidence and saw and watched all that took place. The High Court having made the inquiry, delivered a judgment marked by extreme care, and the result of their examination of the evidence is stated at page 113 of the Record. After giving an analysis of the evidence, interspersed with their observations upon it, they say: "These "considerations lead us to the conclusion that "on the parol evidence alone the Appellant "established a *primâ facie* case which the Re-"spondents were bound to have answered. It "makes in favour of the credit due to the "witnesses, Hushmut Ali and Surju Pershad, "Ram Doss and Ramsurrun Loll, that they all "mentioned other persons who were present, "and the occurrences to which they respectively "speak, whom the Respondents might have "called to contradict them had they been so "minded. Luchmee Narain contented himself "with a simple denial of the deposit and of "the execution of the surkut. Sheodurshun, "who is said to have been present when the "deposit was made, and when its return was "demanded and refused, was not examined." Then they say "Beharee and Madho were "mentioned as having been present at the "deposit, Hurruck Narain and Beharee at the "second demand, and Nurthra Mahraj when "the demand was made by Ram Doss at the "Collectorate; yet the Respondent called none "of these persons to contradict the evidence "of the Appellant's witnesses." It seems that the High Court were accurate in saying that the Respondent called none of those persons; but the Appellant had called three of them, and it appeared that they could give no information.

They go on, "We are not therefore prepared "to say that even on the parol evidence, apart "from the surkut, the Appellant would not be "entitled to a decree."

It is unnecessary for their Lordships to say whether or not they would have agreed with that conclusion of the High Court upon the parol evidence if the surkut had not existed. The surkut having been found by the High Court to be a genuine document, it is not necessary for them to say what would have been the effect of the parol evidence upon their minds if it had stood alone. They cannot however but think that the High Court was right in giving considerable weight to the omission on the part of the Appellants to call witnesses whom they might have called. It is inconceivable that if Sheodurshun was able to contradict the fact of the deposit, he should not have been called to do so. He is said by the Appellants' witnesses to have been present at the time of the deposit. He is not only one of the Defendants, but it appears from the proceedings that he was attending to the defence in Court; yet he did not tender himself to be examined as a witness to contradict the fact of the deposit which was proved by the Plaintiff's witnesses to have taken place in his presence. It may also be observed that Luchmee Narain is examined in the most general way. He simply denies the fact of the deposit and of his having given the receipt; he is not examined circumstantially as to the relations of his firm with Luchman Dass, the position in which Luchman Dass was, though he must have known of these things, nor even as to the demands which were said to have been made for the gold, and no other witness from the bank or from any other quarter is called to show that there was no truth in the Plaintiff's case. It certainly seems to their Lordships that

there was a *primâ facie* case made by the Plaintiffs, and that it has not been so fully answered as it might have been, if it were untrue, by the Appellants.

Then, the High Court having gone into the inquiry as to the handwriting, came distinctly to the conclusion that the surkut was in the handwriting of Luchmee Narain, and they state their conclusion in these terms:—"To "us Beni Pershad appears to be by far the "most reliable and capable witness called to "speak to the handwriting,"—that is, the most reliable and capable on either side,—"and having "ourselves compared surkut A with other "documents admittedly written or signed by "Luchmee Narain, we have no hesitation in "accepting Beni Pershad's statement that surkut "A is in the handwriting of Luchmee Narain."

Their Lordships have already pointed out the extreme difficulty in which they are placed by being invited to say, without having seen the documents or the witnesses, that this conclusion is wrong. They think, adverting to the considerations already alluded to, that it is not possible for them to say, in the circumstances of this case, that upon this point the High Court is wrong; and that being so, they are unable to come to the conclusion that the case of the Respondent is untrue. It is a case proved in its circumstances by witnesses, supported by a written document found by the High Court, who heard the witnesses, to be a genuine document, and insufficiently answered on points where, if untrue, it might have been refuted by better and stronger evidence than that adduced by the Appellants.

There are no doubt points of difficulty in the way of the Respondent's case, which have been ably commented upon by the learned Counsel for the Appellants. One is the circumstance

that Luchman Dass, in his deposition in the pauper suit, speaks of the receipt as having been given on plain paper. Undoubtedly, although originally so given, according to the evidence, a stamp had been afterwards affixed to it. But although this misdescription is a circumstance adverse to the Plaintiff's case, it is only one to be weighed with the others, and it is possible that Luchman Dass was thinking of the receipt as it was originally given. It had not been in his possession for some time. Here again the Appellants have chosen to leave the case without contradictory evidence. The witnesses on the part of the Plaintiff state circumstantially that they went to the Appellant's bank and that the stamp was affixed, and Luchmee wrote lines upon it. Luchmee is not asked a question upon it, and the Plaintiff's case upon this fact stands unanswered.

Another circumstance which was strongly relied upon by the learned Counsel was that there was no evidence to show how this gold had come into the possession of Luchman Dass, or how long he had had it. The witnesses for the Plaintiff say it was at Ghazeepore, which would have been a place where it would naturally have been kept if Luchman Dass had really possessed it; and there was no cross-examination upon the point so as to put the Respondent upon further proof than he had given. It is obvious that if Luchman Dass had contemplated the scheme of secreting a part of his property in order to preserve it for himself and to defraud his creditors of it, this gold would have been collected from time to time, and would probably not have found its way into his books.

Then observations were made upon the fact that the Defendants' books contained no entry of the transaction. Assuming the transaction

to be that which it is supposed throughout to be, it is not likely that entries would have been found in the regular books of the Appellants regarding it, and although a discrepancy has been attempted to be fastened upon the evidence of the witnesses—some of them stating that there was an entry in a book, whereas no such entry has been found,—that may be explained by the circumstance that the entry is said to have been made in a small hand-book which would not be one of the regular books of the firm.

Their Lordships have given full consideration to all these circumstances; indeed they have considered the case with some anxiety, feeling that there were circumstances in it which should induce a Court to hesitate before coming to a decision upon it; and having so done, they have come to the conclusion, for the reasons above stated, that they are unable to reverse the decision of the High Court.

They will therefore humbly advise Her Majesty to affirm it, and to dismiss this Appeal.