

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Roy Dhunput Singh Babadoor v. Doorga Bibi, from the High Court of Judicature, at Fort William, in Bengal; delivered, June 13th, 1883.*

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Present:

LORD WATSON.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

SIR ARTHUR HOBHOUSE.

THIS was a suit brought by the Plaintiff, the Appellant, on a bond dated the 25th July 1872. The bond was given to secure a sum of Rs. 26,000 and interest, and among other securities which were pledged with the Plaintiff by the bond was a Kistbundi, which had been executed in favour of the Defendant by the Nawab Nazim for a Lac and Rs. 11,375. That security being in the hands of the Plaintiff, he would have had a right to receive the money if it had been paid by the Nawab Nazim; but the Nawab did not pay his debts, and the Government on account of this debt of a Lac and Rs. 11,375 arranged to pay the sum of Rs. 33,843. A cheque for that amount was drawn upon the Collectorate at Berhampore; and the principal question is whether the full amount of that cheque or only Rs. 24,577 were received and appropriated by the Plaintiff, and the balance, Rs. 9,266, retained by the Defendant, or by her agent Kirtibas in fraud of her. Mr. Doyne, in his argument, attempted to show that, even assuming that the Plaintiff received the whole Rs. 33,843, there would be still a balance coming to the Plaintiff on account of the principal and interest of the bond. The

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Defendant, in her written statement, set up as her defence that she had paid the bond; and, no doubt, the onus lay upon her of proving that she did pay it. The issues which were raised are set out at page 53. The second issue is the important one; that was, not whether the whole amount of principal and interest had been paid, but "whether the Plaintiff received Rs. 24,577 or Rs. 33,800 from the Defendant after 6 Magh 1281, that is, either on the 7th or 8th May, and how the payment was made." That issue was exhaustive of the question, and it was intended to be exhaustive. There was no issue on the question whether anything was due on the bond, independently of the question what sum was paid in Magh 1281. It was intended, that if it were proved by the Defendant that the Plaintiff received the Rs. 33,800, his bond was satisfied, and that the Defendant would be entitled to a decree.

With regard to the evidence as to that Rs. 33,800, the Defendant herself proved that when she received the cheque for the Rs. 33,843 she handed it over to Jhubbu, who was the agent of the Plaintiff, and another witness corroborated her. It is not very important whether it was really handed to Jhubbu or to Kirtibas, because Kirtibas held the Defendant's power of attorney to receive the money. Jhubbu could not get the money from the Collector, and when the cheque was paid both Jhubbu and Kirtibas attended at the Collectorate. No doubt Jhubbu went on the part of the Plaintiff to see that when Kirtibas received the money it should be handed over by Kirtibas to the Plaintiff or to his agent. Sadanund, whose evidence is given at page 46, said that he was the Am-mokhtar of the Plaintiff. "The Plaintiff sent to me a bond executed by Doorga Bibi with a view that, if Doorga Bibi did not pay him the money due from the Nizamut Commissioner, a suit

“ should be instituted for money under the said  
 “ bond against her. In accordance therewith  
 “ I caused a draft plaint to be prepared. Kirti-  
 “ bas, the Mokhtar of the Defendant Doorga  
 “ Bibi, and Jhubbu Babu, the Kazanchi of the  
 “ Plaintiff, came to me with a cheque at the  
 “ Berhampore Collectorate” and said, “Take  
 “ steps for our getting the amount of the cheque  
 “ to-day.” Accordingly, I”—that is, the agent  
 of the Plaintiff—“took steps and caused the  
 “ money to be drawn out. Kirtibas received  
 “ the money and gave a receipt for it.” There-  
 fore, whether the cheque was handed to Jhubbu  
 or was in the hands of Kirtibas is unimportant.  
 Kirtibas handed over the cheque, and he received  
 the money, and gave the receipt for it. Then  
 comes the important part of Sadanund’s evi-  
 dence. He says, “The Sepahis of Dhunput  
 “ Babu”—that is, the Plaintiff—“weighed out  
 “ the whole of the money of the cheque, took it,  
 “ and went away.” Therefore the money which  
 was drawn by Kirtibas upon the cheque was  
 handed over to the Sepahis of the Plaintiff, who  
 weighed it, took it, and carried it away ; but still  
 it is said that the Plaintiff received only Rs. 24,577  
 of the Rs. 33,843. If the Plaintiff did not  
 receive more, how did the Defendant, or Kir-  
 tibas her agent, receive the balance, Rs. 9,266 ?  
 Did the Sepahis give it to him, or how did he  
 get it, or how did the Defendant get it ? There  
 is no evidence upon the subject except that the  
 Sepahis had the money handed over to them, and  
 that they and the barkundazes took it away. It  
 was said by Sadanund that they took it in a boat.  
 It does not appear that he saw them take it in the  
 boat, but Ram Sagur Ta saw them take it away  
 in carts. If the Sepahis had parted with any  
 portion of the Rs. 33,843 before it reached the  
 Plaintiff’s residence, the fact ought to have been  
 proved by the Plaintiff, and the Sepahis ought

to have been called; but they were not called, and, therefore, it may be assumed that they could not have given any evidence on the part of the Plaintiff that any portion of the Rs. 33,843 was handed over to anyone else, or that it did not arrive at the Plaintiff's kothi. It is, however, said that on the day after this money was received Kirtibas brought 24,000 to the kothi. At page 33 of the evidence, Fakir Chand, who was employed as the principal gomashta on behalf of the Plaintiff at the Azimgunge kothi, was examined. He spoke of the bond's having been given, and then he says :--“ In the month of “ Magh 1931, Kirtibas Ghose, the gomashta of “ the Defendant, came from Berhampore and “ paid Rs. 24,000 and a few rupees at the “ Plaintiff's kothi in liquidation of her debt. “ The money was paid in my presence to the “ kazanchi of the Plaintiff, Mahatab Chand alias “ Jhubbu Babu. The said khazanchi is an “ officer subordinate to me.” How or when did Kirtibas get the Rs. 24,000 out of the hands of the Sepahis? If he brought the money the next day he could not have carried it, and it could have been proved very easily that Kirtibas came with the hakeris and brought the rupees with him, and paid it into the kothi of the Plaintiff; but there is no evidence of the kind, and their Lordships have no doubt that the whole of the Rs. 33,843 which were handed over to the Sepahis, and put in their care for the purpose of safe custody on behalf of the Plaintiff, was carried by them to the kothi of the Plaintiff, and received by him at that kothi. If the Plaintiff or Kirtibas as her agent after that got back any portion of the Rs. 33,843, namely, the Rs. 9,266, which is the difference between the Rs. 24,577 and the Rs. 33,843, the Plaintiff ought to have given evidence to prove that fact; but he gave no evidence of the kind.

It appears, therefore, to their Lordships that the Plaintiff did receive the Rs. 33,843. No doubt the onus in the first instance lay upon the Defendant to prove that she paid the money; but when she proved that the Rs. 33,843 was handed over to the Sepahis of the Plaintiff, then the onus was shifted, and it lay upon the Plaintiff to show what, if any, portion of that money was returned by him, or got out of his possession, into the hands of the Defendant or of Kirtibas as her agent. The First Court found in favour of the Plaintiff, but the High Court reversed that judgment upon the ground that the Rs. 33,843 were handed over to the Plaintiff. In the grounds of appeal to the Privy Council, at page 65, no question is made about the Court's having found that the Rs. 33,843 would be sufficient to satisfy the debt of the Plaintiff; it is only alleged in general terms that the Defendant's plea of payment was not proved, and it is contended that the Court ought not to have accepted as true the evidence adduced by the Defendant, and that they ought not to have rejected as untrustworthy the evidence adduced by the Plaintiff. The substance of that is this, that the Court ought not to have believed that the whole Rs. 33,843 were paid over to the Plaintiff; and that they ought to have found that only Rs. 24,577 of that amount had been so paid over, and that the balance, Rs. 9,266, was either returned to the Defendant or had been misappropriated by Kirtibas as her agent whilst the money was under his control.

It appears to their Lordships that, after the money had been put into the hands of the Plaintiff's Sepahis and his barkundazes, it no longer remained under the control of Kirtibas, nor did it remain in any way under the control of the Defendant. No portion of that Rs. 33,843

has been returned to the Defendant; and their Lordships are of opinion that the second issue was properly found in favour of the Defendant by the High Court.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this Appeal. The Appellants must pay the costs of this Appeal. There has been a deposit. The costs will be paid out of the sum which has been deposited.