Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hurro Nath Roy Bahadoor v. *Krishna Coomar Bukshi* (*ex parte*), *from the High Court of Judicature at Fort William, in Bengal; delivered 24th July* 1886.

Present:

LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

The Plaintiff in the suit, who is the present Appellant, is the owner of a large estate, and the Defendant acted as his Dewan for some twenty years or so. Some months before the institution of the suit, the Plaintiff demanded an account of the Defendant's dealings, but the Defendant left the place without rendering any. In June 1877 the plaint was filed. After stating the Defendant's position and duties as Dewan, the Plaintiff alleged that he had taken money out of the treasury in the year 1866, and at other times, and had misappropriated it. He then specified certain sums taken, and certain allowances to which the Defendant was entitled, and concluded thus:—
"There is a balance against him of Rs. 19,925
"14 annas, for the recovery of which I institute
"this suit. If by the decision of the Court a
"larger sum should be proved to be payable to
"me by him under proofs and papers, the prayer
"is also for recovery of the same."

The High Court has said that this is a suit virtually for an account. Their Lordships agree with that view. They think that, though the

pleading may not be quite precise or technical, it is impossible to assign any other character to a plaint alleging a continued agency in the Defendant for the purpose of drawing and expending the Plaintiff's money, and praying relief on the ground that the agent had drawn from his principal more than he had expended for him. To such a claim by a principal, the agent may answer that accounts have been settled between him and his principal, or that, though none have been settled, he has in the course of his agency applied for the principal's benefit as much as he has received or more. Nothing could prevent the Defendant in a suit framed like this from claiming the benefit of an account if in his favour, just as the Plaintiff claims it if a larger sum than he specifies should be found due to him. Such a suit is essentially one for account.

In his written statement the Defendant did not set up the defence of settled account, nor that the account when taken would be in his favour. He denied his accountability altogether. He denied the receipts of money which were ascribed to him, and alleged that all the expenditure was effected through the Plaintiff's own Treasurer and Poddar, agreeably to his own instructions. As for the papers produced from the treasury to show drawings of money by the Defendant, he charged that they were false and fabricated. Such a line of defence was perfectly legitimate, if true; but it has been found by both the Subordinate Judge and the High Court to be false. The Subordinate Judge finds the Plaintiff's treasury accounts to be genuine, and he finds further that in the majority of instances the Defendant expended the Plaintiff's money without his authority, meaning, as their Lordships understand, that he expended the money by his own general authority as Dewan, and did not take the

Plaintiff's orders for each specific payment. As regards amount, the Subordinate Judge finds that, setting aside two smaller sums which have been sufficiently accounted for in the suit, two larger sums, amounting altogether to Rs. 40,353 8 annas, are proved to have come into the hands of the Defendant.

Such findings as these establish a relationship between the Plaintiff and the Defendant under which the latter is accountable for his receipts. Their Lordships think that the regular course would have been to order an account to be taken of the Defendant's dealings with the Plaintiff's money as his Dewan or agent. In taking the account either party might waive inquiry as to particular periods of time or particular departments of expenditure, and that is often done. But neither could shut out the other from inquiry into any part of the Defendant's transactions as Dewan. In such an account the agent is *primâ facie* liable for what he has received, and is bound to discharge himself; but the evidence which is considered sufficient to discharge him may vary as to different items, and he certainly would be entitled to all such intendments and presumptions as are made in favour of one who is called upon to render an account of transactions which have taken place long ago, though under circumstances which prevent any absolute bar by lapse of time.

The Court however seems to have thought that its duty was to make a final decree at the hearing upon the items specified in the plaint and the accounts appended to it. And taking a distinction between sums for which the Defendant had marked papers and other sums for which, though paid to him or to his order, he had not marked, the Court found that a sum of Rs. 1,369 was due to the Plaintiff, and made a

decree for that amount, apportioning the costs of the suit rateably according to the proportion of the amount claimed to the amount recovered. Both parties appealed to the High Court, who dismissed the suit altogether with costs. The present appeal is from that decree. The Defendant has not appeared, so that the hearing has been *ex parte*, and the evidence bearing on the points now material has been minutely examined. Their Lordships have now to weigh the reasons assigned by the Courts below for their decrees.

It is first necessary to deal with the plea of limitation, which is raised by the Defendant, and which is governed by Act IX. of 1871. Both Courts have decided that there is no such bar in this case. The only articles suggested as applicable to it are those numbered 60, 90, and 118. Their Lordships think it sufficient to say, with both Courts, that time must be counted from the date on which the Defendant ceased to discharge the duties of Dewan by departing from the Plaintiff's service, and, therefore, whether three years or six years be the limit, there is no bar.

The principal reason assigned by the Subordinate Judge for his conclusion is that the Defendant's mark appears on some of the sehas which show advances made to him or to his orders, and does not appear on others. And he cites the Plaintiff's Treasurer as saying that he was released from liability for the marked items, but was liable for the unmarked ones, and that the Defendant was not liable for them. The Treasurer's evidence shows that the payment of money on the Defendant's orders without his mark was an irregular procedure not giving to the Treasurer complete immunity from responsibility. But they cannot find that he has anywhere said that the Defendant was not responsible to the Plaintiff

for the money paid out on his orders; and if he had said so it would be a mistake of law. The Subordinate Judge was in error when he held that the Defendant was not bound to discharge himself of all the sums which he ordered to be drawn from the treasury.

The only other reason assigned by the Subordinate Judge is that most of the disbursements in some lawsuits called the two-anna case were made through Tarini Kant, the Plaintiff's general Mokhtar; that Tarini Kant had filed accounts in the Plaintiff's treasury which the Plaintiff had not produced; and that the Plaintiff had sued Tarini Kant for an account, and had claimed against him the sum of Rs. 6,725, which again was claimed in the present suit.

It is not quite clear what the Subordinate Judge considered to be the exact bearing of Tarini Kant's interventions in these matters. He did not apply them so as to discharge the Defendant of any specific items of charge. And if he thought that the Plaintiff was bound to clear up his dealings with Tarini before he could charge the Defendant with money taken for the two-anna case, it is difficult to see why such an objection as that does not apply to marked items as well as to unmarked. The High Court appear to have so applied it, and they are logical and consistent in doing so. But it is necessary to see whether the existence of unproduced accounts between the Plaintiff and Tarini supplies any reason why a decree for account should not be made between the Plaintiff and the Defendant. If it does, it appears to their Lordships that the Plaintiff was harshly treated in not being allowed an opportunity to produce them. For the Defendant did not rely upon them in his written statement, did not call for their production, and apparently did not ask the Plaintiff's witnesses any question about Tarini Kant except a quite

general one put in the cross-examination of the Treasurer. This is one of the circumstances showing what miscarriages are likely to occur if the Court attempts to make a final decree at the hearing of a suit for account, instead of the regular decree for account.

The Plaintiff's suit against Tarini was instituted almost simultaneously with his suit against the Defendant; and both were before the Subordinate Judge of Rajshahye. The suit was for an account, and the Plaintiff charged Tarini with receiving as Mokhtar on various accounts the sum of Rs. 17,677. 7. 6, of which he had properly spent no more than Rs. 17,227. 6, leaving Rs. 450 due from him on those accounts. He also alleged a misappropriation of Rs. 800 on accounts of which the items were not specified by him, or which do not appear in the present record. Tarini admitted the receipt of some amounts, denied the receipt of others, and claimed a balance due to himself on the account. The suit was compromised in the year 1878, and was dismissed, each party paying his own costs.

With regard to the sum of Rs. 6,725 which the Subordinate Judge says the Plaintiff has sought to recover against both Tarini and the Defendant, their Lordships cannot find such a sum; but it is perhaps a misprint for the sum of Rs. 6,525 which appears in the accounts of both suits. In the Tarini suit it is charged as received by him by way of instalment on the 23rd of Aughran 1280 (see p. 324 of the Record), but it is part of the accounts upon which only Rs. 450 is claimed, and therefore it must be almost, if not wholly, written off in the legitimate expenses which the Plaintiff allows to Tarini. In the present suit a sum of Rs. 6,525 is charged against the Defendant (see p. 124 of the Record), as a howlat taken in the name of Tarini on the 23rd Aughran 1277, but it is

wholly written off (see p. 120) as part of the legitimate expenses which the Plaintiff allows to the Defendant. Even supposing that there is some error in the dates, and that the two sums relate to the same transaction, their Lordships cannot see that it is proved or probable that the Plaintiff is seeking to recover the same amount twice over. It is very likely that both the Dewan and the Mokhtar are bound to account to the Plaintiff for the same sum of money,—the Dewan because he ordered its payment, the Mokhtar because he received it and had the application of it. It is very likely that full accounts could not be stated between the principal and his two agents without including some of the same money in both accounts. That might make it expedient for Tarini to be joined with the Defendant as an accounting party; a point which need not now be considered, as no objection has been taken to the frame of the suit on that ground. But the appearance of the same items in accounts against two persons both responsible for them does not show that the Plaintiff is claiming those sums against both. To show that, it would be necessary to go deeper into the accounts, and to find that the Plaintiff is trying to get the benefit of the same charge twice over by writing it off against a different set of discharges in each case. Nothing of that kind appears on the record. And their Lordships think that the finding is another illustration of the inconvenience likely to result from making a final decree when a decree for account is the proper one.

The High Court considered that the Plaintiff's evidence was defective. The Subordinate Judge thought that the sehas produced, being rough sheets in the nature of a day book, were written at the time when the work was being done, and were better evidence than any-

thing copied from them could be. The High Court think them only part of the materials for a complete yearly account, such as should be regularly prepared and recorded in a Zemindar's office. Yearly accounts of this kind were called for by the Defendant, and none were produced. The High Court attach great importance to the position of Tarini; they comment adversely on the non-appearance of the Plaintiff as a witness, and they consider that there must have been some statement of account filed because the word "aday" is written over two of the items of charge. Their conclusion is that it is impossible to say how much, if any, of the sums remains unaccounted for, and therefore the suit must be dismissed. So far do they carry their view that the Plaintiff ought to suffer from not having given the best evidence, that they refuse to give him any relief as to the sum of Rs. 4,388, though the receipt of it is admitted by the Defendant, who does not show how it was discharged.

If this were the proper occasion for deciding whether the Plaintiff should recover anything, their Lordships would have to consider long before assenting to the views taken by the High Court. It appears to them that sufficient weight has not been given to the onus thrown upon the Defendant by his fiduciary position. They observe that the Treasurer states that there were no such yearly accounts as the High Court suppose. If there are such they may yet be produced, though whether they or the contemporary sehas are the better evidence must depend on circumstances which at present are not known. The Plaintiff excused himself from examination in Court on a plea of ill health, which may have been false. But it was supported by certificates from the Civil Surgeon of Rajshahye. The Subordinate Judge believed it, and he issued an order for a commission to examine

the Plaintiff, which, as appears from a petition in p. 22 of the Record, the Defendant prayed to have reversed. On the subject of Tarini their Lordships have already made observations.

But all their Lordships wish to do now is to avoid prejudice to a proper inquiry by anything falling from either the High Court or this Committee in the course of what they consider to be a premature attempt to make a final decision. Whatever weight may be attributed to the reasons given by the High Court for the disallowance of any item of the charge, they are inapplicable to a decree for account. The Defendant is the Plaintiff's agent, and has drawn from his treasury substantial sums of money to be applied in the Plaintiff's business on the Defendant's responsibility. On proof of those facts there is a clear case for an account, in which the Defendant must discharge himself in some way from the money he has drawn. In taking that account any relevant papers in the Plaintiff's treasury may be called for, evidence may be got as to particular items, it may be ascertained whether, as to any item, the Plaintiff has already got the benefit of it in his account with Tarini, the appearance of the word "adai" may be accounted for, and its effect determined. Their Lordships are not expressing an opinion that in a suit for account it may not appear at the hearing that the issue is so simple and so clearly raised, and met by evidence, as to be ready for decision at that time. But the general rule is the other way. And this suit is an example of the general rule.

Their Lordships are of opinion that the High Court should have remanded the suit to the Subordinate Judge to take a general account of all dealings and transactions between the Plaintiff and the Defendant in the character of the Plaintiff's Dewan, only not disturbing any settled

account, if such there be. And inasmuch as the Defendant has taken the course of denying his receipts, his fiduciary position, and his accountability *in toto*, a defence which the High Court say is shown to be false by a mass of evidence adduced by the Plaintiff, he should have been ordered to pay the whole costs of the suit up to and including the appeal to the High Court. If he had been truthful and honest he would have submitted at once to a decree for account, and thus have saved great delay and expense. Their Lordships will now humbly advise Her Majesty to make such a decree, and the Defendant will be ordered to pay the costs of this appeal.