Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Baboo Gunga Persad and another v. *Baboo Inderjit Singh and another, from the High Court of Judicature at Fort William in Bengal; delivered Saturday, February* 27*th*, 1875.

Present:

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

THE Appellants in this case are bankers in the district of Monghyr, and the Respondents, who were the Plaintiffs in the action, are zemindars resident in that district. They appear to have been in embarrassed circumstances, many decrees having been recovered against them. In this state of things they borrowed, as is admitted, from the Respondents, 29,000 rupees upon a zurpeshgi lease, the effect of which may shortly be stated to be that it was a lease for 15 years at a rent calculated to cover the interest on the Rs. 29,000 at nine per cent., and also the Government revenue payable on the property leased, the lessees and mortgagees undertaking to keep down the Government revenue, and to pay themselves such interest, and being at liberty to make what further profits they could out of the zurpeshgi, or farming lease. At the end of the 15 years the principal sum was to be paid down in a lump sum and the property redeemed. That was the mortgage transaction. It is, however, admitted that it was further arranged between the parties that this sum of Rs. 29,000 should not be paid by the mortgagees, the bankers, into

the hands of the mortgagors, but should be transferred to their account in the books of the former, to be applied, as occasion should require, in satisfaction of their judgment and other debts. The result of that arrangement was to make the bankers accounting parties to the Plaintiffs for Rs. 29,000.

It was, however, alleged by the Plaintiffs, though the transaction is denied by the Defendants, that the Rs. 29,000 proving insufficient to pay all the debts that were to be paid, one of the Plaintiffs, Bidyanund Sing, borrowed from his father-in-law a further sum of Rs. 3,157. 8. and paid it into the bank, the bankers giving a deposit note in the name of the father-in-law, but treating the money as the money of the Plaintiffs, or, at all events, of Bidyanund Sing. The effect of this transaction, if it did take place, was of course to increase the sum for which the bankers were accountable by the amount of the further deposit.

That being the position of the parties, the Plaintiffs brought their suit, in which they claimed upwards of Rs. 10,000 as unaccounted for. They gave credit for admitted payments on their account to the amount of upwards of Rs. 22,000, and claimed the difference between that sum and the original Rs. 29,000, plus the Rs. 3,157. 8. with interest. Therefore, as Mr. Justice Phear has observed, it lay upon the Plaintiffs to prove the payment of the additional sum of Rs. 3,157, 8 annas; and it lay upon the Defendants to disprove that payment, if the other side succeeded in establishing a *primâ facie* case against them; and in any case to account for so much of the Rs. 29,000 as the Plaintiffs did not admit to have been paid.

In the Court below the subordinate judge seems to have considered that the Plaintiffs case was wholly false and the Defendants case wholly

true, and to have dismissed the suit. It went on appeal to the High Court; and the learned judges there considered it to have been very unsatisfactorily tried in the lower Court. They doubted whether it would not be proper, in the circumstances of the case, to remand it for re-trial; but ultimately came to the opinion that after making one small allowance in favour of the Defendants, they ought to give the Plaintiffs a decree for the amount claimed. It is against that decree that the present Appeal has been brought, which has imposed upon this Board functions which it is not often called upon to exercise, namely, those of settling the items of a disputed account.

Their Lordships are disposed to concur generally with the High Court in the conclusion to which they came, that the case was unsatisfactorily tried by the subordinate judge, and that his decree cannot stand. The evidence which he seems to have considered sufficient to prove the payments which the Defendants were bound to prove consisted of the mercantile books of the banking firm and of a general statement by the Defendant Gunga Pershad that the items in those books were correct. Their Lordships are of opinion that the books being, as is admitted, at most corroborative evidence, the mere general statement of the banker, where the fact of the payments was distinctly put in issue, to the effect that his books were correctly kept was not sufficient to satisfy the burden of proof that lay upon him, particularly as with respect to many of the disputed items he had the means of producing much better evidence.

Again, the documentary evidence on which the Defendants case principally rested consisted of the two amanutnamas at pp. 40 and 45 of the Record, and the endorsements of payments thereon, which purported to have been signed by

the Plaintiffs; because these if really signed by them, were proof of settled accounts comprehending most of the disputed payments. In this country, or in any country where the administration of justice is conducted with any degree of formality and regularity, one would have expected to find that these documents had been put into the hands of the Plaintiffs; and that they had been called upon to admit or deny their alleged signatures, and that the proof of these documents to be given by the Defendants would have been far more specific than a mere statement that they were identified and verified, as the judge says, by the witnesses; the witnesses would have been called upon to state whether they saw Bidyanund Sing sign the first, or Bidyanund Sing and Inderjit sign the second, or, if not, whether they could speak to the handwriting and generally what took place on the two occasions on which the accounts are vaguely said by one of the witnesses to have been adjusted. Those amanutnamas, it may be remarked, were important, not merely by way of admissions of the actual sums that were therein stated by the endorsements to have been paid, but also as admissions of the liability for the rent and of the transfers of a balance of account into the joint names of Addyanund and Hunsraj, and of another and subsequent balance into the separate names of Addyanund and Hunsraj, transactions which do not on the face of them appear to be in the ordinary course of business, and therefore required explanation. No such explanation has, however, been given by the witnesses or has been supplied by any document showing that those transfers were made by the authority or at the desire of the Plaintiffs. The importance of proving that the last of those transfers was so made is very great, because such evidence would have gone far to show that

the admitted amanutnama, that for the Rs. 3,157, which was given by the firm to Hunsraj, was really given in consequence of a direction that the existing balance of the Rs. 29,000 should be so transferred, and not, as the Plaintiffs contend, as a deposit receipt for the additional sum which had been paid in.

Their Lordships, therefore, are clearly of opinion that even if they dissent from the judgment of the High Court they are not in a condition to affirm the judgment of the subordinate judge which dismissed the Plaintiffs suit.

On the other hand, their Lordships feel that in some respects the judgment of the High Court has gone too far, and contains here and there a passage which evinces some misconception of what took place in the Court below. For instance, at page 74 the learned judge who delivered that judgment says, that neither Gunga Persad nor the gomashtas "say a single word about the receipt " of Rs. 3,157, 8 annas, which Bidyanund Sing " swears that he paid into the kothi. Gunga " Persad does not say that that was not " received." The record, however, shows that Gunga Persad in his evidence did state that neither Hunsraj nor Bidyanund had paid him money in cash, evidently meaning thereby to deny the transaction in question. Then, again, the learned judges, in dealing with a circumstance that can hardly have failed to strike them as it has struck their Lordships, namely, the probability that the bankers would in the ordinary course of business have given an amanutnama for the original deposit of Rs. 29,000, say that the necessity for such a document was obviated by the zurpeshgi itself, " which contains express mention of all the " particulars relative to the deposit of the " Rs. 29,000, and the duty of the Defendants in " regard to its application." Their Lordships,

however, on examining that instrument cannot find that it contains anything of this kind. It says, "we have taken the same into our posses- "sion for the purpose of paying off debts "due to mahajuns." But if the document be examined it will be found that the pronoun "we" imports the Plaintiffs, not the Defendants; and consequently that the whole passage expresses the receipt of the mortgage money by the mortgagors, and not the real transaction between the parties, namely, that the money should be carried to the account of the Plaintiffs in the mahajuns books.

It is further to be observed that the learned Judges appear to have been struck with the fact that if the subordinate Judge had acted more in accordance with the rules of evidence, and had not given an undue credit to the books, and the general statement of their correctness, he would have gone much more carefully into the trial of the issues before him, and to have thought at one time that his miscarriage in the conduct of the inquiry might be a sufficient reason for sending the case down to be re-tried. They came, however, ultimately to the conclusion that it would not be right to send the case back to a re-trial because the Defendants had failed to make out so good a case as they might have done.

Their Lordships fully recognize the force of the consideration, which ultimately prevailed with the judges of the High Court. They admit that a re-trial ought not to be directed solely to enable a party to mend his case, and that to do so in India would be especially objectionable. Nevertheless, considering in this particular case the doubt that exists as to what really took place in the subordinate Judge's Court, and as to what is implied in his statement that the documents of which he speaks were identified and verified

by the witnesses; considering also how much the conduct of a trial in India depends on the judge, and that the Defendants may have been misled by his giving undue weight to the books, and to what was said concerning the entries in the books, and so prevented from going more fully into their case; and, further, considering that in this case the question is not merely one of money but one of character, and that the evidence on this record fails to establish satisfactorily on which side the truth lies, their Lordships are disposed, if the Defendants should be so advised, to send back the case for re-trial; but they think that it would be unjust to do so, except upon putting the Defendants, who ought to have seen that their case was conducted better, upon the terms of paying the costs of the litigation so far. If they are willing to accept those terms, then their Lordships would be prepared to recommend Her Majesty that the case should be remanded. Their Lordships desire to observe that if it should go back, the case should be tried much more strictly both with reference to the genuineness of the signatures of the endorsements on the two amanutnamas, and with reference to particular payments. It is only necessary to instance one of the latter, namely, that which is said to have been made in satisfaction of the judgment debt of Ram Chur Singh, as to which the case of either side, if true, might have been far better proved. It will be for the Appellants to consider whether they accept these terms, or whether they are content to leave matters as they are. If they do not accept them, their Lordships will have no other alternative but that of recommending Her Majesty to dismiss the Appeal, with costs.

The Appellants, having considered the terms proposed to them by their Lordships, intimated

by their Counsel that they accepted the same; and their Lordships, therefore, agreed humbly to report to Her Majesty that the case ought to be remanded to the High Court, with directions, upon payment by the Appellants within six months after the date of Her Majesty's order on this report of the costs incurred by the Respondents in the two Indian Courts except the stamp on the plaint (so far as the same remain unpaid), and also of the costs (if any), of the Respondents incurred on this Appeal (the amount thereof to be certified by the Registrar), to remit the said case back to the Zillah Court for re-trial; and with a declaration that in default of such payment within the said six months the decree of the High Court do stand affirmed; and that the costs of this Appeal be paid by the Appellants.