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This, however, is obviously not such a case; as the District Munsif, in Original Suit No. 485 of 1901, was quite competent to pass a personal decree against the second defendant if the evidence required to establish the personal liability had been then produced.

The fact that a decree was passed in the absence of such evidence would not make it a decree passed without jurisdiction and a party to the suit is precluded in execution from impeaching the decree which was passed without opposition and which has not been set aside. (Cf. *Revell* v. *Blake*(1), *Sardarmal* v. *Aranvayal Sabhapathy*(2) and *Gomatham* v. *Alamelu Komandar Krishnamacharlu*(3)).

The case of *Lakshmanaswami Naidu* v. *Rangamma*(4) is clearly distinguishable. The decision proceeded on the footing that the decree there in question was on the face of it null and void.

We, therefore, reverse the order of the District Judge and direct that the application for execution be replaced on the file and proceeded with in accordance with law. The respondent will pay the appellant's costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Sankaran Nair.

1904. July 13, 14, 22.

VEERABADRAN CHETTY AND OTHERS (RESPONDENTS), APPELLANTS,

v.

NATARAJA DESIKAR (PETITIONER), RESPONDENT.*

Letters Patent, Art. 15—Appeal—Order by single Judge ordering commission to issue to examine a witness—Civil Procedure Code—Act XIV of 1882, ss. 383, 386—Power of Courts to issue commission—Cases enumerated in sections exhaustive—Court may prevent abuse of its process.

The present appellants obtained a decree against the late head of a mutt, and in execution thereof, attached certain gold and silver articles. The respondent,

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(1) L.R., 8 C.P., 533.
(2) I.L.R., 21 Bom., 205 at p. 211.
(3) I.L.R., 27 Mad., 118.
(4) I.L.R., 26 Mad., 31.

* Appeal No. 6 of 1904, presented under Article 15 of the Letters Patent, against the judgment of Mr. Justice Boddam in Civil Revision Petition No. 486 of 1903, presented against the order of the Subordinate Judge of Madura (East), in Miscellaneous Petition No. 115 of 1903.

the present head of the mutt, who had been made a party to the execution proceedings as the representative of the deceased, contended that the attached articles were not liable to be sold in execution of the decree as they were not assets of the deceased but property belonging to the mutt. The appellants thereupon applied to the Subordinate Judge to summon the respondent as a witness for the appellants. The respondent, who resided within the jurisdiction of the Court, then applied to the Subordinate Judge to take his evidence on commission, stating that he was unable, of his own personal knowledge, to give any evidence material to the questions at issue, and alleging that the appellants were insisting on his appearance in Court to put pressure upon him to relinquish or compromise his claim, as it was considered derogatory to a person in his position to appear in Court as a witness. The Subordinate Judge refused to issue a commission. On a revision petition being filed, a single Judge of the High Court set aside the order of the Subordinate Judge and ordered the respondent to be examined on commission. On an appeal being preferred under Article 15 of the Letters Patent:

Held, that an appeal lay.

Held also, that the issue of commissions for the examination of witnesses by the Courts of this country is governed solely by the provisions of the Code of Civil Procedure, and section 386 is exhaustive, and provides for all the cases in which the legislature intended that it should be competent to a Court to issue a commission for the examination of witnesses resident within its jurisdiction.

Held further, that a litigant's privilege of taking out summonses to witnesses is subject to the control of the tribunal which is called upon to enforce their attendance, though such control will be exercised sparingly and only in exceptional cases. This control is an instance of the authority of every Court of competent jurisdiction to prevent abuse of its process. In the present case, the appellant's application was not *bonâ fide*, and the respondent's attendance in Court was required, not for the purpose of obtaining material evidence but from other motives, and the order for the issue of a commission was therefore rightly made.

APPLICATION to the Court to summon a witness; and subsequent application by the witness that his evidence might be taken on commission. The facts are fully set out in the judgments. The Subordinate Judge refused to issue a commission. That order was set aside in revision by Boddam, J. Against the latter decision an appeal was preferred under Article 15 of the Letters Patent.

Hon. Mr. *P. S. Sivaswami Ayyar* and *K. N. Ayya* for appellants.

S. Srinivasa Ayyangar for *P. R. Sundara Ayyar* for respondent.

JUDGMENT—SUBRAHMANIA AYYAR, J.—The appellants obtained a decree against the late Pandara Sannadhi of Tiruvannamalai Mutt in the Madura district for moneys lent to him. In execution of the decree certain gold and silver pooja articles, etc., were attached and seized. The respondent, the present head of the

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mutt, who had been made a party to the execution proceedings as the representative of the deceased, raised a contention that the attached articles were not liable to be sold in execution of the decree as they were not assets of the deceased but property appertaining to the mutt. With reference to the investigation of the claim thus made, the appellants applied to the Subordinate Judge of Madura (East) to summon the respondent as a witness for the appellants. The respondent thereupon applied to the Subordinate Judge to take his examination on commission, suggesting at the same time that he was not in a position to give, of his own personal knowledge, any evidence material to the questions at issue and that the appellants insisted on his appearance in Court merely with a view to put pressure upon him and make him give up his claim or bring about a compromise, it being considered derogatory to heads of mutts in the position of the respondent to appear in Court as witnesses. The Subordinate Judge refused to grant the respondent's application on the ground that the respondent being resident within the jurisdiction of the Subordinate Court and not being a person legally exempted from appearing as a witness in Court nor incapacitated from doing so by illness or infirmity, it was not competent to the Court to issue a commission for the examination of the respondent. On revision Mr. Justice Boddam set aside the order of the Subordinate Judge and directed that the respondent be examined on commission.

It is contended for the respondent—

(1) That the order of the learned Judge did not amount to a judgment so as to allow of an appeal under the Letters Patent being preferred against it,

(2) that even in the circumstances relied on by the Subordinate Judge it is competent to the Courts of this country to direct the examination of a witness on commission if, for adequate reasons, it is thought fit to do so, and

(3) that assuming neither of these contentions is well founded, the circumstances of the case show that the appellants are seeking to compel the respondent's appearance not *bonâ fide*, but solely to obtain an improper advantage.

With regard to the first question I am unable to agree that the learned Judge's order does not amount to a judgment within the meaning of section 15 of the Letters Patent. A litigant is undoubtedly entitled to insist on the appearance of witnesses who

could give evidence material to his case and, if the examination of a material witness with reference to whom the issue of a commission is not warranted by law, is wrongly ordered to be taken on commission in spite of the objections of the party entitled to examine him in the presence of the Judge and in open Court the order so passed must clearly be held to deal with the question of the right, on the one hand, of the party seeking the personal attendance in Court, and, on the other of the liability of the person claiming to avoid it.

Passing to the next question I feel constrained to hold that the respondent's contention here also fails. I do not consider it necessary to refer to and consider, as Mr. S. Srinivasa Aiyangar, on behalf of the respondent, invited us to do, the procedure of the Courts of Chancery in England and elsewhere in the matter of the issue of commissions to witnesses. The question of the issue of commissions for the examination of witnesses by Courts of this country governed by the Civil Procedure Code, is one to be dealt with entirely under the provisions of the Code and, obviously, section 386 provides for all the cases in which the legislature intended it should be competent to the Courts to issue a commission for the examination of persons resident within the jurisdiction of the Court. In the view that this provision is exhaustive on the point it is incumbent on the Court to insist on the attendance of a witness personally in Court if his evidence is material and the party entitled to adduce such evidence requires that course to be adopted. This construction of the section is supported by *Gopal Chunder Sircar* v. *Kurnodhar Moochee*(1) cited on behalf of the appellants and decided with reference to the Code of 1859, the provisions of section 175 of which did not, so far as the point under consideration is concerned, differ from the present law. The provisions of section 386 of the Civil Procedure Code are far from being of the comprehensive character of Order XXXVII, Rule 5 of the Rules of the Supreme Court and the explanation for this I take to be that it was not thought desirable to confer such wide powers on the general body of Judges presiding over the subordinate Courts in this country.

The last contention on behalf of the respondent, however, must, I think, prevail. No doubt, on the application of a party to a legal

(1) 7 W.R.C.R., 349.

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proceeding summonses to witnesses would ordinarily issue as a matter, of course, but even in the case of witnesses who are not parties to the proceeding, and who have no *locus standi* to object to their being called upon to appear, except on the ground that the Court has no jurisdiction to compel their attendance, a litigant's privilege of taking out summonses is unquestionably subject to the control of the tribunal which is called upon to enforce their attendance, though such control will be exercised very sparingly and only in exceptional cases. In *Raymond* v. *Tapson*(1), after pointing out that no leave of the Court was necessary for the issue of a subpœna to a witness Jessel, M.R., took care to point out: "of course there was always a power in the Court to prevent an abuse of this power (of summoning witnesses)." He again observed: "The Court has still the power to say when the witness attends that the witness shall not be examined or that he shall be examined in open Court. It can always restrain the abuse of the power to summon witnesses." Cotton, L.J., added: "I quite agree that the Court ought to see that the parties do not abuse their privilege." Reference may also be made to the early case of *Rex* v. *Burbage*(2) where Lord Mansfield, admitting that in general a *habeas corpus ad testificandum* will lie to remove a person in execution to be a witness, refused to issue the writ in the particular instance as the application for it appeared to be "a mere contrivance." It is hardly necessary to point out that the control in question is an instance of the general authority of every Court of competent jurisdiction to prevent abuse of its process, an authority affirmed by the Judicial Committee in *Haggard* v. *Pelicier Freres*(3) cited by Mr. Srinivasa Aiyangar. Turning to the case of a person who is not a mere stranger to the proceeding but who is party thereto, his situation obviously possesses a distinction which must not be lost sight of. In his case the other party requiring his attendance could compel a discovery of material information required by him with reference to the questions duly raised in the cause. Further, where cases are well conducted, each party is, of course, expected to go into the box to prove facts bearing on the case and within his knowledge, so as to give the other side an opportunity of testing the truth of such

(1) L.R., 22 Ch.D., 430 at p. 434. (2) 3 Burrows, 1440.
(3) L.R., [1892], 2 A.C., 61.

evidence by cross-examination. Where, instead of waiting for and availing himself of this natural opportunity and leaving the Court to draw an inference adverse to one who fails so to appear and support his own case, an attempt is made to insist on the opponent appearing in Court, it is but reasonable to scrutinise the grounds of such an attempt and the opposition thereto. Viewing this case with reference to these considerations it is pretty clear that the appellant's application is not *bonâ fide*. It is well known that persons in the position of the respondent consider it derogatory to be examined in Court as witnesses and when such persons happen to be men worthily filling the position of the heads of mutts, their attendance as witnesses in Court is highly distasteful to their disciples and co-religionists. Consequently the suggestion on behalf of the respondent that his attendance in Court is required not for the purpose of obtaining any material evidence in the case, but from other and indirect motives which, if disclosed, would result in the dismissal of the application, is not altogether improbable. Had, however, the appellants been able to satisfy the Court that the respondent is personally aware of any facts or circumstances which would really help their case, the respondent ought, no doubt, to be compelled to appear, however inconvenient and disagreeable to him such appearance may be. The appellants, however, have failed to show anything of the kind, judging from the affidavits filed on their behalf. I would, therefore, dismiss the appeal on this ground with costs.

SANKARAN NAIR, J.—The appellants obtained a decree against the late Pandara Sannadhi of Tiruvannamalai Adhinam for a sum exceeding Rs. 7,000. On their application to execute the decree against the respondent as the legal representative of the deceased, the High Court directed that "execution do proceed against the appellant as the legal representative of the deceased defendant in respect of the moveable property of the deceased, if any, in his hands, which may be pointed out by the plaintiffs."

The appellants have attached in execution of their decree certain silver and gold articles on the ground that they were made by the deceased and form his property. The respondent claimed them as the property of the Adhinam. To prove their claim the appellants applied for a summons to the respondent to give evidence before the Court.

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The respondent contended that, on account of his position and sacred character, no summons ought to have been issued to him to give evidence in open Court. He alleged that the application was "simply malicious and vindictive" and made to "harass" him and to compel him to pay up the decree amount, as the appellant well knew that he would not attend to give evidence before a Court and further that his evidence was immaterial as he was living at Kumbakonam from 1894 to 1902 and consequently knew nothing personally of the nature of the property attached. And he prayed that the Court might issue a commission to take his evidence if required by the appellant. The respondent resides within the jurisdiction of the Subordinate Court before whom he is sought to be examined.

The Subordinate Judge refused the application of the respondent to issue a commission. A petition was filed in this Court to set aside the order.

The learned Judge of this Court who heard this petition held that the power to issue a commission is not confined absolutely to those cases mentioned in section 383 of the Civil Procedure Code and the Judge may, if he thinks it fit, issue a commission in other cases also. He held further that considering the peculiar position of the respondent it would be an act of unnecessary harshness to insist upon his appearance in Court in this case when he is not a primary party to the suit and is likely to cause the matter to be compromised rather than undergo the ordeal of an examination in Court and, being of opinion that the Charter Act gave him the power to interfere, reversed the order of the Subordinate Judge as made without the proper exercise of his judicial discretion and directed the examination of the witness by a Commissioner.

The decree-holder appeals and the same contentions that were raised before the learned Judge are insisted upon before us.

It is argued that the High Court has no power under the Charter Act to set aside the order passed by the Subordinate Judge and the case of *Tej Ram* v. *Harsukh*(1) is relied upon.

I agree with the learned Judge that this contention is unsound.

It is then argued for the appellant that the power of the Court to issue a commission to examine persons resident within its jurisdiction is confined to the cases mentioned in section 383 of the

(1) I.L.R., 1 All., 101.

Civil Procedure Code. This is denied on behalf of the respondent, who relies also upon the English law in support of his contention. Under section 4 of 1 Will. IV, Cap. XXII and Rule 5 of Order 37 which only followed the old Chancery practice, the power to issue commissions to examine witnesses was unrestricted, though such power was usually exercised only when the Court was satisfied that the witness could not be produced before the Court at the time of hearing on account of age, dangerous illness, precarious state of health, or on the ground that he was to go out of jurisdiction. Section 10 of 1 Will. IV, Cap. XXII and Rule 18 of Order XXVII also declare that the deposition of a witness living within the jurisdiction may be read in evidence at the hearing only when he is unable to attend "from illness or other infirmity."

The Indian Procedure Codes in declaring the circumstances under which a commission may be issued seem to have accepted (sections 383 and 386 of the Civil Procedure Code) the rules that governed the practice in English Courts and adopted the grounds under which alone the depositions of witnesses could be given in evidence at the hearing and in addition, regard being had to the peculiar conditions of Indian society, further empowered a Judge to issue commissions to examine witnesses exempted from attendance in Court under sections 640 and 641 of the Civil Procedure Code. Section 640 exempts certain women, while under section 641 the Government must notify the exemption from attendance of any person in their opinion entitled to that privilege on account of his rank. No power to exempt is given to the Courts.

The enactment of these elaborate provisions in the place of the simple and comprehensive rule of English law that an order may issue "where it shall appear necessary for the purposes of justice", seems to show that the Courts have not the absolute discretion or inherent power claimed for them on behalf of the respondent and a Judge is not therefore justified in issuing a commission except when authorized by the provisions of the Code. The case of *Gopal Chunder Sircar* v. *Kurnodhar Moochee*(1) is also in favour of this view.

It is not to be understood that where these conditions exist the Judge is bound to issue a commission; where such examination may result in injustice to any party or where it is not calculated

(1) 7 W.R.C.R., 349.

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to permit of the evidence being fairly tested or where the application is made to avoid cross-examination before the Court, a commission need not be issued.

"Even if the Court should be of opinion that the refusal of a commission will prevent the evidence of the witness from being given at all, yet if the non-attendance of the witness before the tribunal which has to decide the case and the consequent inability of the tribunal to observe the demeanour and hear the answers of the witness shall lead to injustice towards one of the parties, the commission ought to be refused." See *Berdan* v. *Greenwood*(1) I am, therefore, of opinion that this contention of the pleader for the appellant ought to be upheld. But this appeal must be dismissed and the order of the learned Judge confirmed on the ground that on the facts disclosed, the plaintiff appellant is not entitled to obtain a summons for the attendance of this respondent.

No doubt under section 159 of Act XIV of 1882, as under section 149 of Act VIII of 1859, a party is entitled to obtain a summons for the attendance of any witness on application before the day fixed for disposal. The Judge has absolutely no discretion under this section and he cannot refuse the application. It is not for him to assume or infer that such witness is not likely to know anything of the matter in dispute or to be of any use to the party applying. That is a matter for the applicant himself to consider. But every Court has undoubtedly a right to prevent the abuse of its own process. It is true very strong evidence must be adduced by the party opposing an application for summons to show that it is not made *bonâ fide* and that the granting of such application would be permitting an abuse of the process of the Court. But after a careful consideration of the evidence I am not prepared to differ from the conclusion that this application for summons was really made for the purpose mentioned in the respondent's petition; the Court is not bound therefore to summon the witness and a commission may be issued, the respondent having consented to the same. The appeal in my opinion must be accordingly dismissed with costs.

(1) L.R., 20 Ch.D., 764.