1935

POKHAR SINGH v. TULA RAM

to hold that, so long as the court is functioning and has not become *functus officio* after the confirmation of the sale and the satisfaction of the decree, it can be too late for the judgment-debtor to invite the attention of the court to its statutory duty under section 60 to see that a property which is not saleable should not be sold. The mere fact that the judgment-debtor was negligent at an earlier stage and did not object to the attachment itself may affect the question of costs but would not necessarily amount to an estoppel against him, as there should be no estoppel against a statutory right. To hold that once a sale has taken place, howsoever wrong and illegal it may be, there is a complete bar and the court has no option but to proceed to confirm the sale of a property which is non-saleable under section 60, will be nullifying the provisions of that section, which is a result that ought to be avoided.

We are, therefore, of the opinion that the court below has erred in holding that the objection of the judgment-debtor to the saleability of the property was not maintainable. We accordingly allow this appeal, and setting aside the order of the court below send the case back to that court with the direction to restore it to its original number and to dispose of it according to law.

REVISIONAL CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice and Mr. Justice Mulla

1935
July, 26

GANGA RAM *v.* HABIB-ULLAH AND ANOTHER*

Evidence Act (I of 1872), sections 126, 162—Criminal Procedure Code, section 94—Criminal court ordering a person present in court to produce a document then in his possession—Inherent jurisdiction—Whether production can be refused on the ground of privileged communication by client to lawyer—Privileged communication.

Section 94 of the Criminal Procedure Code gives power to the court to issue a summons or written order to a person to

*Criminal Reference No. 7 of 1935.

produce a document, which is in his possession, in court; where, however, the person is actually present in the court room and the document is with him, the formality of issuing a summons is quite unnecessary and the court has equal inherent power to order him to produce the document. Clause (3) of the section exempts documents which are protected under sections 123 and 124 of the Evidence Act, but not section 126; therefore, in criminal cases the protection under section 126 afforded to communications by client to lawyer can not be availed of against an order to produce the document; the document must be produced, and then, under section 162 of the Evidence Act, it will be for the court, after inspection of the document if it deems fit, to consider and decide any objections regarding its production or admissibility.

Dr. *N. U. A. Siddiqui*, for Azmat Husain Mukhtar.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

SULAIMAN, C.J., and MULLA, J.:—This is a reference by the District Magistrate of Pilibhit recommending that an order of a Bench of Honorary Magistrates calling upon the complainant's Mukhtar in a case pending before them to produce in court a particular document should be quashed, or in the alternative steps be taken against the Mukhtar under the Legal Practitioners Act.

It appears that the complainant had previously filed an application in the court of the District Magistrate against the accused, which was returned to him with the direction to file a regular complaint. Upon this the complaint in this case was filed. The complainant and his witnesses had apparently denied that the witnesses also had signed the previous application. After the complainant and one witness had been examined, and the second witness was being cross-examined, the counsel for the accused filed an application before the court that the application in the possession of the complainant's Mukhtar should be allowed to be inspected by the accused and that it should be caused to be filed, as there was an apprehension that it might be destroyed. The complainant's Mukhtar stated that the papers with him were receipts in connection with this case, and then he

1935

GANGA RAM v. HABIB-ULLAH

was put the question by the court, "Have you got in your hand the petition which was made by the complainant in the court of the Collector?" He answered, "I have not got it." After that the case continued. The cross-examination of the witness was completed, and then two more witnesses were examined and the statement of the accused was then taken down. Finally a charge was framed and read out. After the charge had been framed, the accused's Mukhtar filed another application in the court that for the sake of further cross-examination the application, which had been returned to the complainant and which was in the hand of the Mukhtar for the complainant, should be caused to be filed. In reply to this application the complainant's Mukhtar filed a written application stating that his client had given him some papers in connection with the case, that the disclosure of such papers would have an adverse effect on the case, that as a legal adviser he did not think it necessary to disclose the same and that he did not want to file the papers; but that if the court considered it necessary that the papers should be filed and thought that nothing would go against his client if the papers were filed, then he would file the same. After this the court heard arguments of both the Mukhtars on the point and concluded that it was necessary that the paper in dispute should be filed, and accordingly passed an order for the filing of the same. Upon this the complainant's Mukhtar filed the document, but prayed that it should be kept in a sealed cover.

The first question for consideration is whether the application was a privileged document which the complainant's Mukhtar could refuse to produce. Protection was claimed under section 126 of the Indian Evidence Act; but the provisions of that section obviously do not apply to this case. Under that section a legal practitioner is not permitted, without his client's express consent, (1) to disclose any communication made to him in the course and for the purpose of his employment as

such legal practitioner, or (2) to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or (3) to disclose any advice given by him to his client in the course and for the purpose of such employment. That section deals, therefore, with disclosures of communications made in the course, and also for the purpose, of his employment as legal adviser. He was not called upon to disclose any such communication. Again, the section apparently does not refer to the production of documents which are in the possession of a legal adviser but to stating the contents or condition of any of the documents with which he has become acquainted in the course and for the purpose of his employment. Nor was he called upon to disclose any advice which he had given to his client. It follows that the proviso to that section was equally inapplicable, as he was not called upon to disclose any communication made in furtherance of any illegal purpose or to disclose any fact which had been observed by him in the course of his employment showing that any crime or fraud had been committed. The protection in this section does not refer to the production of documents, as against which the client himself is not protected. The section dealing with the production of documents is section 162 of the Indian Evidence Act, under which a person summoned to produce a document shall, if it is in his possession or power, bring it to court, notwithstanding any objection which there may be to its production or to its admissibility. It is for the court to decide the validity of any objection to its production or admissibility. The second paragraph of the section lays down that the court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility. This paragraph certainly lays down that the court has a discretion in the matter, if it deems fit, to inspect such a document, even though there is an objection to its

1935

GANGA RAM v. HABIB-ULLAH

production or to its admissibility, provided that it does not refer to matters of State. Except in the case of matters of State the court may inspect the document, though there is an objection as to its production Indeed, under the last paragraph, the court may even get the document translated by a translator, who may be enjoined to keep the contents secret, unless the document is to be given in evidence. It would, therefore, follow that the Mukhtar could not validly object to the order of the court to produce the document, at least for the inspection of the court, before the court decided whether the objection to its production was or was not valid.

These provisions should apply even to civil cases. Under order XVI, rule 7 of the Civil Procedure Code, any person present in court may be required by the court to give evidence or to produce any document then and there in his possession or power.

In the present case, the Mukhtar had much less justification for refusing to produce the document, as it was a criminal case in which the procedure was governed by section 94 of the Code of Criminal Procedure. Under that section a court has power, if it considers that the production of any document is necessary, to issue a summons or a written order to the person in whose possession or power such document is, to produce it at the time and place stated. In terms the section would apply to a person who is absent at the time and who is called upon to attend the court and produce the document in his possession. It is significant that sub-section (3), which contains an exception, only exempts documents which are protected under sections 123 and 124 of the Indian Evidence Act, i.e., documents relating to affairs of State and official communications, and not section 126, which applies to professional communications made to legal advisers. Thus, in a criminal case even the protection under section 126 cannot be availed of.

The learned District Magistrate has, however, come to the conclusion that, inasmuch as section 94 of the

Code of Criminal Procedure empowers the court to issue a summons, and as no written summons was issued in the present case, there was no authority to call upon the Mukhtar to produce the document. It seems to us that the omission to comply with the formality of getting a summons issued, when the person was actually present in the court room, was a trivial irregularity. Obviously the court has inherent jurisdiction to call upon a person present in the court room to produce a document which is in his possession at the time. When he is not present in the court room, a summons has to be issued; but even that is not absolutely necessary, for if the court is of the opinion that the document may not be produced, a search warrant may be issued instead of a summons. We are, therefore, of the opinion that the court was entitled to order the complainant's Mukhtar to produce any document which he had in his possession at the time while in the court room. It was the duty of the Mukhtar to produce the document, and then request the court to consider his objection as to its production or admissibility.

Were it clear that the complainant's Mukhtar had that particular application actually in his hands when he was asked whether he had got it in his hands and he replied that he had not got it, his denial would be a gross professional misconduct, because it was a deliberate attempt to mislead and deceive the court. The denial would not be in the nature of claiming a privileged protection, but a deliberately false statement with a view to mislead the court. If this point were clear, we would have taken a very serious view of the conduct of the Mukhtar; but, as stated above, it appears that a considerable time elapsed between the denial and the actual production of the document in court, with the result that it might well have been that at the particular time when he was questioned whether this particular application was in his hands, the Mukhtar did not have that document in his hands. As regards the delay in produc-

1935

GANGA RAM v. HABIB-ULLAH

ing it, the conduct of the Mukhtar was certainly reprehensible; but the question was one of law, and was not free from some difficulty, and the Mukhtar concerned was an inexperienced junior practitioner. When specifically ordered by the court that he should produce the document, he did produce it, though under protest. We would, therefore, direct that no action be taken on account of his failure to produce the document at the first opportunity. We, however, decline to quash the order directing him to produce the document. Let the case be returned.

APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice and Mr. Justice Bennet

1935 *July*, 31

NIHAL CHAND AND ANOTHER (DEFENDANTS) *v.* BHAGWAN DEI (PLAINTIFF)*

Privacy, right of—Customary right—General custom of province—Judicial notice—Not necessary to allege and prove existence of such custom in the locality—Evidence Act (I of 1872), section 57.

It is well established and recognized that a customary right of privacy exists generally in these provinces, and it is open to a court to take judicial notice under section 57 of the Evidence Act of the general prevalence of such a custom having the force of law. It is, therefore, not necessary that such custom should be alleged and proved by evidence produced in each case to establish it.

Bhagwan Das v. *Zamurrad Husain* (1), disapproved.

Mr. G. S. *Pathak*, for the appellants.

Mr. *Shiva Prasad Sinha*, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a defendants' appeal arising out of a suit brought by the plaintiff for the closing up of a large window in the upper storey opened recently by the defendants, on the ground that her right of privacy was infringed inasmuch as her

*Appeal No. 27 of 1934, under section 10 of the Letters Patent.

(1) (1929) I.L.R., 51 All., 986.