APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

CHINNAYA *v.* U KHA.*

1935

Aug. 23

Evidence, appreciation of—Conflict of evidence—Credibility of witnesses—Duty of a Court of Appeal—Advantages of the trial Court—Interference by the appellate Court.

Where there is a conflict of oral evidence, and the issue in the case depends upon the credibility of the witnesses a Court of Appeal ought to bear in mind that it does not see or rehear the witnesses. It only reads the evidence and rehears counsel. When a Judge who hears and sees witnesses draws a conclusion or inference with regard to what is the weight to be attached to their evidence his judgment is entitled to great respect. The appellate Court will not interfere with such a decision unless it comes to the conclusion that the trial Court was plainly wrong.

Powell v. Streatham Manor Nursing Home, (1935) A.C. 243—*followed*.

Robertson for the appellant.

Po Aye for the respondent.

PAGE, C.J.—This case turns entirely upon the credibility of the witnesses who were called on the one side and on the other. If the plaintiff and his witnesses were to be believed there is no doubt that the decision at which the learned trial Judge arrived was correct. The sole issue in the case was whether certain jewellery, valued at one time at Rs. 8,000, had been sold for Rs. 4,000 to the plaintiff or had been pledged with him for a loan of a like amount. The *onus* was on the plaintiff of proving that the jewellery was pledged with him. Mr. Robertson, on behalf of the defendant, has contended that the evidence of the plaintiff and his witnesses ought not to be believed because the probabilities of the case are against the plaintiff's story. He pointed out that the plaintiff was

* Civil First Appeal No. 37 of 1935 from the judgment of this Court on the Original Side in Civil Regular Suit No. 362 of 1934.

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a money lender and that no record of any sort was produced in support of his case, no entry in his books,—for he kept none,—no memoranda of the payment of interest on two occasions, and no promissory note by way of collateral security executed in his favour.

On the other hand the defendant stated that his wife Ma Habi had gone to Rangoon to sell her jewellery in order to repay a loan which they had taken from a Chettyar in Bassein, and that she came back with the money which was the proceeds of the sale of the jewellery to the plaintiff. The evidence of witnesses tendered for the purpose of proving certain statements by Ma Habi to the effect that she had sold the jewellery in Rangoon was disallowed by the learned trial Judge, upon the ground that such statements by Ma Habi would not be admissible under section 32 of the Evidence Act as statements against the pecuniary or proprietary interest of Ma Habi. In my opinion such evidence was rightly rejected. In *Doe* v. *Robson* (1) Bayley J. observed :

> "It has long been an established principle of evidence, that if a party, who has knowledge of the fact, make an entry of it, whereby he charges himself, or discharges another upon whom he would otherwise have a claim, such entry is admissible in evidence of the fact, because it is against his own interest."

The same principle would apply to a statement made to a witness who is cited to prove the statement under section 32 (3) of the Evidence Act. At the hearing, in the course of his argument, the learned advocate for the appellant withdrew his objection that evidence of this statement was wrongly disallowed. The defendant, therefore, had to rely solely upon his own testimony, which was to the effect that the transaction

(1) 15 East 32.

was carried out by his wife Ma Habi, and that he himself knew nothing about it as he did not go to Rangoon. Thus, as between the two parties, there was a direct conflict in evidence.

Now, this Court is not a trial Court, and in *Powell and wife* and *Streatham Manor Nursing Home* (1) the duty of a Court of Appeal where there is a conflict of oral evidence and the issue in the case depends upon the credibility of the witnesses is re-stated. At page 249 Viscount Sankey L.C. observed :

"What then should be the attitude of the Court of Appeal towards the judgment arrived at in the Court below under such circumstances as the present? It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing Court. * * * There the onus is upon the appellant to satisfy the Court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after a trial before a judge alone, and a verdict after a trial before a judge and jury. On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses : see *Clarke* v. *Edinburgh Tramways Co., per* Lord Shaw (2) where he says : 'when a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen

(1) (1935) A.C. 243. (2) 1916 S.C. (H.L.) 35, 36.

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them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided: witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.' "

Now, in my opinion, those principles ought to be applied at the hearing of appeals from decrees or orders passed by learned Judges sitting on the Original Side of the Court. In the present case there was abundant evidence in support of the plaintiff's case, some of the plaintiff's witnesses being relatives of the defendant or of his wife. If their evidence was accepted there is an end of the matter. Mr. Robertson has properly drawn attention to certain extraneous matters which tend to throw doubt upon the probability of the plaintiff's case being correct, but those matters were in the mind of the learned Judge who tried the case, and after weighing the testimony of the witnesses called on the one side and on the other and considering the case in all its bearings he came to the conclusion that the plaintiff's witnesses ought to be believed. I am not prepared, sitting in a Court of Appeal, to say that the conclusion which he reached was wrong, or to interfere with the decree that he passed.

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For these reasons, in my opinion, the appeal fails and must be dismissed with costs.

MYA BU, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

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Aug. 19.

K. B. ROYCHOWDHURY
v.
BURMA LOAN BANK, LTD.*

Judgment—Letters Patent, cl. 13—Order for the examination of a person under Companies Act (VII of 1913), s. 196—Order not a judgment.

Where the Court orders the public examination of a person under s. 196 of the Companies Act, the order is not a judgment within clause 13 of the Letters Patent and is therefore not appealable.

In re Dayabhai v. *A.M.M. Murugappa Chettyar*, I.L.R. 13 Ran. 457—*followed.*

K. C. Sanyal (with him *Talukdar*) for the appellant.

Chowdhury for the respondents.

PAGE, C.J.—In this case my learned brother Braund J., taking winding-up matters, has made an order that the appellant should be examined under section 196 of the Indian Companies Act. A preliminary objection is taken that no appeal lies from that order upon the ground that the order is not a judgment within clause 13 of the Letters Patent. In our opinion it clearly is not a judgment within the meaning of that term as defined in *In re Dayabhai Jiwandass and seven others* v. *A.M.M. Murugappa Chettyar* (1). In my opinion the preliminary objection succeeds, and the appeal is dismissed, with costs three gold mohurs.

MYA BU, J.—I agree.

* Civil Misc. Appeal No. 66 of 1935 from the order of this Court on the Original Side in Civil Misc. No. 127 of 1934.

(1) (1935) I.L.R. 13 Ran. 457.