APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Chandavarkar.

1901. *December* 13.

SUBBAJI NARSINH KULKARNI (ORIGINAL DEFENDANT), APPELLANT, *v.* SHIDDAPA BIN KALLYANAPA HUSBI (ORIGINAL PLAINTIFF), RESPONDENT.*

Practice—Suit by mortgagee on mortgage—Plea by defendant of absence of consideration—Plaintiff summoned as witness by defendant to prove non-payment of consideration—Non-appearance of plaintiff at hearing—Presumption arising from such non-appearance—Duty of parties to suit to come forward as witnesses in their own case—Circular No. 1750—Civil Procedure Code (XIV of 1882), section 120.

A mortgagee sued his mortgagor for possession to which he was entitled under the provisions of the mortgage. The defendant (mortgagor) admitted execution of the mortgage, and pleaded that he had received no consideration for the mortgage. The defendant summoned the plaintiff as a witness, intending apparently to support his case by cross-examining him as to the alleged consideration. The plaintiff, however, did not appear, and the defendant himself did not go into the witness-box at the hearing. Under these circumstances, the Court of first instance passed a decree for the plaintiff, holding that the inference which might be made against the plaintiff by reason of his non-appearance would not supply the want of positive proof which the defendant was bound to give of his allegation that he had received no consideration for the mortgage. The lower Appellate Court presumed from the absence of the plaintiff that his accounts did not contain entries showing the payment of consideration to the defendant, but held that such presumption did not relieve the defendant from the obligation of proving that no such consideration had been paid. It, therefore, confirmed the decree. On second appeal,

Held, that the decree should be reversed and the case re-tried. The plaintiff should have been compelled, if possible, to attend and give evidence and produce the mortgage-deed and accounts, and the defendant also should have given evidence on his own behalf and have submitted to cross-examination.

SECOND appeal from the decision of T. Walker, District Judge of Dhárwár, confirming the decree passed by Ráo Sáheb Sheshgiri Ramchandra Koppikar, Joint Subordinate Judge of Dhárwár.

Suit for possession of land.

The defendant had mortgaged the land in question with possession to the plaintiff, and by a lease executed on the same

* Second Appeal No. 280 of 1901.

day as the mortgage-deed the plaintiff (mortgagee) leased the land for a term to the defendant (mortgagor).

The lease having expired, the plaintiff (mortgagee) now sued for possession under the mortgage.

The defendant admitted the execution both of the mortgage and the lease, but alleged that he had received no consideration for the mortgage from the plaintiff.

The defendant summoned the plaintiff as a witness, but the plaintiff did not appear. The defendant did not himself go into the witness-box, and, except his own statement in the written statement, the defendant had no evidence to prove absence of consideration for the mortgage.

The Subordinate Judge passed a decree in plaintiff's favour. As regards plaintiff's non-appearance as a witness, he said:

> Defendant applied for processes for plaintiff and another witness, but they have failed to appear, though all the coercive processes allowed by law were exhausted for securing their attendance. Defendant now asks the Court to decide the case against plaintiff and apply section 120 of the Civil Procedure Code. I don't think the section is applicable under the circumstances. Plaintiff was cited as a witness and failed to appear. The section applies to cases where a pleader fails to answer a material question and is ordered, but fails, to produce his party. Even then absence of lawful excuse would be necessary. The default on part of plaintiff would justify an adverse inference to be drawn against him. But the only one admissible under the circumstances is that plaintiff's books might not contain entries relating to the bond sued on. But plaintiff might not be keeping any books at all and might have lent the money without entering the amount in them. No amount of adverse inference can supply the place of positive proof, which defendant is bound by law to furnish to support his allegation that he passed the documents without receipt of consideration.

On appeal, the District Judge confirmed this decree. He observed:

> It is true that plaintiff did not appear with his accounts, and I presume that the accounts would not show entries of the money paid on this mortgage. But this is not conclusive. The burden of proving the bonds to be hollow rests on defendant, and the absence of entries in plaintiff's accounts is not enough to discharge it.

Defendant appealed to the High Court.

H. C. Coyaji for appellant (defendant):—The trial in this case is defective. It is true the burden lay in the first instance upon

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us to prove want of consideration. We applied to the Court to take the measures prescribed by section 168 of the Civil Procedure Code (XIV of 1882) to compel the presence of plaintiff. We also did what we could to compel the production of plaintiff's books of account. But he did not appear and did not produce his books. Every presumption should, therefore, have been made against him. Unfortunately the defendant was not advised to go into the witness-box. In the mofussil, parties generally abstain from coming forward as witnesses on their own behalf; the inquiry before the Court of first instance had ended some months before the Circular with regard to that practice was issued.(1)

(1) Circular No. 1750, dated 13th September, 1900:

Bombay, 13th September, 1900.

SIR,—It appears (from the records and proceedings in cases coming before their Lordships the Honourable the Chief Justice and Judges in appeal, revision and otherwise) that in the majority of original suits the parties abstain from coming forward as witnesses on their own behalf to substantiate, by their own personal evidence on solemn affirmation, the statements of fact on which they respectively ask the Court to give judgment in their favour. At the same time it is the invariable practice for a party to call as his own witness his opponent in the case.

2. This practice does not appear to be conducive to the ends of justice and is therefore not one which deserves to be encouraged or countenanced by the Courts.

3. It is true that it is always open to either party to call his adversary as a witness, and that it is competent to the Court under section 66 of the Code of Civil Procedure to require the personal attendance of either or of both of the parties. But the fact that their appearance may be so enforced does not affect the objections which manifestly arise to the disposal of questions depending on allegations of fact which the parties relying thereon are reluctant to support by their own evidence.

4. In England and on the Original Side of the High Court, the non-appearance in the witness-box of a party in support of his own allegation of facts within his own knowledge would ordinarily be regarded, in the absence of some satisfactory explanation, as throwing great doubt on the *bonâ fides* of his case, and it is obviously undesirable that litigants should thus shirk responsibility and evade cross-examination.

5. I am therefore directed to state that their Lordships are of opinion that the attention of Subordinate Judges, and indeed of all Judges dealing as Courts of first instance with civil suits, should be drawn to the objections which exist to the practice referred to which seems almost exclusively confined to this Presidency.

6. It is hoped that by a judicious exertion of influence as well as by example, you may be able to impress on such officers within your district the desirability of discountenancing the tendency of the local bar in the conduct of suits to keep their respective clients in the background instead of offering them, as a matter of course, as witnesses to depose to such facts in issue as are within their knowledge.

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Shamrav Vithal for respondent (plaintiff) :—The burden of proof evidently rested on the defendant. He did not go into the witness-box. There was, therefore, no unsound or improper exercise of discretion on the part of the Subordinate Judge in refusing to take further coercive action to compel the attendance of the plaintiff.

FULTON, J.:—We think the District Judge was wrong in recording an opinion as to what might be the effect of the plaintiff's account-books if they were produced. They were not before him, and the reason, therefore, that he gave for not compelling the attendance of the plaintiff and the production of his books is unsound in law. It was clearly a case in which the plaintiff should have been compelled, if possible, to attend and give evidence and to produce his mortgage-deed and accounts so that the matter could have been thoroughly gone into. The defendant should, of course, himself have given evidence on his own behalf, and the only excuse for his not doing so is the existence of the old practice, reprobated in Circular No. 1750, dated 13th September, 1900, under which, in the mofussil, it was not usual for persons to give evidence on their own behalf. The case has not been properly tried, and the decrees of the Courts below must be reversed and the case remanded for re-trial to the Subordinate Judge.

At such re-trial the Subordinate Judge should point out to the defendant that his proper course is to go into the witness-box to prove his allegations and submit to cross-examination. The

7. Though no party can be compelled to come forward as a witness on his own behalf, it appears to their Lordships that in the ordinary run of cases a Judge would not exceed his functions, if at the outset he expressed the view that the parties to the litigation ought each to support his own case by his own testimony, and that failure in this respect would, in the absence of satisfactory explanation, be matter for unfavourable comment. This, it must be understood, is merely suggested as a general rule of conduct; its application in particular cases must be determined by the Judge in the exercise of his discretion.

8. In this connection, too, I am directed to bring to your notice section 142 of the Evidence Act, under which an absolute discretion is vested in the Court to permit or forbid the cross-examination of a witness, whether he be an opponent in the litigation or not, so that no party is entitled as of right to cross-examine an opponent called as a witness by him. It is thought that a stricter observance of the provisions of this section will help towards the end in view.

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plaintiff on his side should take a similar course; but if either party fails to do so and the other party wishes to call him, every possible effort should be made to compel attendance. Here the defendant wished for the plaintiff's evidence and asked for the attachment of his property. No good reasons are assigned by the Subordinate Judge for refusing his request, and those given by the District Judge, as above pointed out, appear based on a mere conjecture of what the account-books might contain. Costs to abide the result.

Decree reversed and case remanded.

ORIGINAL CIVIL.

Before Mr. Justice Russell; and, on appeal, before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Crowe.

1901. *September* 2 *and December* 20.

RUSTOM JAMSHED IRANI (PETITIONER), APPELLANT, *v.* HARTLEY KENNEDY, RESPONDENT.*

License—Eating-house—Commissioner of Police—Discretion to refuse license—Act XLVIII of 1860, sections 11 and 12—Construction—Specific Relief Act I of 1877, section 45.

The petitioner applied to the Commissioner of Police of Bombay under sections 11 and 12 of Act XLVIII of 1860 for a license for an eating-house in a specified locality in Bombay. The license was refused on the ground that no more shops of the description were required in that locality. On petition to the High Court under section 45 of the Specific Relief Act (I of 1877),

Held, that under sections 11 and 12 of Act XLVIII of 1860 the Commissioner of Police had no discretion to refuse the license.

THE respondent was the Commissioner of Police in Bombay, and, under sections 11 and 12 of Act XLVIII of 1860, was the authority from whom licenses for eating-houses in Bombay were to be obtained. The following are the sections of the Act:

11. Whoever in the towns of Calcutta and Madras has or keeps any hotel, tavern, punch-house, ale-house, arrak or toddy shop or place for the sale or consumption of gánja, chandul or other preparation of opium, hemp or other intoxicating drug, plant or substance, or any eating-house, coffee-house, boarding-house, lodging-house or other place of public resort and entertainment, wherein

* *In re* Act I of 1877; Appeal No. 1178.