1869

RAMTANU ACHARJI v. KOMAL LOCHAN ROY.

Another objection has been taken by the appellant. It is that the lower Appellate Court has given to the plaintiff the costs of the suit against Balaram Biswas in the Collector's Court. This is clearly a mistake. The defendant by the bond makes himself liable for the due payment of several kists of rent on the days on which they were to become due. He does not in terms render himself liable for any costs the plaintiff incurred in endeavouring to recover that rent by suit against Balaram Biswas. It was his own act that he sued Balaram, and not the defendant, and if it was an unwise act to sue a person who could not pay instead of the surety, he must take the consequences. We cannot cast those consequences upon the surety. The decree will be modified by disallowing the costs of the Act X suit. The parties will get their costs in this Court and the lower Courts in proportion to the amount of the claim decreed or disallowed.

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*Before Mr. Justice L. S. Jackson and Mr. Justice Markby.*

ANURUP CHANDRA MUKHOPADHYA AND OTHERS (PLAINTIFFS) *v.* HIRAMANI DASI AND ANOTHER (DEFENDANTS)*

1869 *May* 1.

*Application for Summons to cite Witnesses—Practice—Error.*

A party is entitled, at any stage of the case before hearing to apply for a summons to cite witnesses, without reference to the number of such applications which he may have previously made, and it is the duty of the Court to comply with such application, if any time be left before the hearing of the cause.

The errors of procedure of the Court of first instance are not to be remedied when they have not been made a ground of complaint before the lower Appellate Court.

*Mr. Money* and Baboo *Ramanath Bose* for appellant.

Baboos *Srinath Das* and *Mahini Mohan Roy* for respondents.

JACKSON, J.—The first and principal ground of appeal which the learned counsel has relied upon in this case, is the refusal of the Court of first instance to summon the witnesses who were named by the plaintiff, and against whom the plaintiff applied for summons before the case came on for hearing. I think it quite clear that the plaintiff was entitled, at any stage of the case before hearing, to apply for such summons, without reference to the number of such applications which he might have previously made, and that it is the duty of the Court to comply with such application if any time be left before the hearing of the cause. But this is not the Court in which errors of procedure of the Court of first instance are to be remedied where error has not been made the ground of complaint in the the lower Court and first Appellate Court.

* Special Appeal. No. 2850 of 1868, from a decree of the Additional Judge of Hooghly, dated the 19th June 1868, affirming a decree of the first Principal Sudder Ameen of that district, dated the 7th January 1868.

1869.

ANURUPCHANDRA MUKHOPADHYA v HIRAMANI DASI.

We are shown that the memorandum of appeal, presented in the lower Appellate Court, did contain a reference to this refusal of the Court below. But Mr. Money, who appears for the special appellant, is unable to state that that ground was so much as mentioned at the hearing of the appeal before the Judge. Now I find that this appellant was represented in the Zilla Court by two learned counsel, Mr. Montriou and Mr. Reid, and it would not have given the appellant's counsel now before us the smallest trouble or difficulty to have ascertained from those learned gentlemen, whether the point was or was not argued. It is constantly the case that appellants insert in their memoranda of appeal very numerous objections to the decisions of the Court below, which are abandoned at the hearing of the appeal.

This was one of those points which it was entirely open to the appellant to insist upon or to waive, and I think that it was one of those points which the Judge would not be bound to notice, unless it was insisted upon. I infer from the silence of the Judge, and Mr. Money's inability to give us any assistance on the point, that this particular objection was wholly passed over in the argument before the Judge. That being so, there was no error on that point in the judgment of the Court below, and we are not called upon to enter into it here.

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MARKBY, J.—I am entirely of the same opinion; and with regard to all the points except the first, it is quite unnecessary for me to add any thing to what has been said by Mr. Justice Jackson; but with regard to the first, I wish to point out that, if there had been an error in the decision of a proposition of law upon which the judgment of the first Court was based, and that proposition of law is appealed against, and the same view of the law is adopted by the second Court, I think, and Mr. Justice Jackson I believe agrees with me in thinking, that it would not be necessary to show that that point had been argued and insisted upon in the lower Appellate Court. But I think that this is not that case. This is a case of complaint by the plaintiff that the privilege of producing and summoning witnesses has not been allowed him, and it is precisely the case in which a plaintiff is bound to show that he has insisted all through upon his privilege at every stage of the case: and that this is so clear from the circumstance, that if before the Judge the plaintiff had insisted upon this right, and shown that these were really important witnesses who ought to have been summoned, the Judge would have himself summoned the witnesses and so cured the mistake, and therefore I entirely concur in the judgment which has been delivered.