1871

IN THE MATTER OF THE PETITION OF BHABADA DASI.

by him under Act XXVII of 1860 if such a certificate has been obtained by fraud as in the present case. We therefore dismiss the appeal with costs,

Before Mr. Justice E. Jackson and Mr. Justice Ainslie.

1871
April 26.

HARIDAS BAISAKH (DEFENDANT) *v.* MIR MOAZAM HOSSEIN (PLAINTIFF).*

Commission for Examination of Witnesses, Obligation on Court to Issue.

Baboos *Hem Chandra Banerjee* and *Nalit Chandra Sein* for the appellant

Baboo *Kali Mohan Das* and *Durga Mohan Das* for the respondents.

JACKSON, J.—We think that this case must be remanded to the Judge in order that the witnesses whom the defendant cited to prove that Abdul Majid was a partner in the shop, should be examined either on commission, or it would be better perhaps if he should summon them to Dacca and examine them himself.

The Judge says, "I do not see what useful end would be obtained by examining the witnesses of whose non-examination the appellant makes complaint." It is very difficult to say what might be the result of their evidence. We understand that they were called to prove the partnership between the defendant and Abdul Majid. The evidence which has been given to prove that partnership has been held by the Judge insufficient, and it is just possible that these witnesses might give evidence to prove that which the Judge has held not sufficiently proved yet.

As to the right of the defendant to have these witnesses summoned, we find on the record that he applied that a commission might issue for their examination on the 16th September; the day fixed for the hearing of the case was the 24th September; and the witnesses were not wholly examined until the 27th September,

We think that the appellant should be heard, and the charges she has put forward be enquired into before a fresh certificate is given to Elahi Khanum allowing her to take possession of Haidar Buksh's property amounting to so large a sum as 25,000 rupees. If the Court is satisfied that the certificate was originally obtained without fraud, it may order the certificate to be renewed. But if it is proved that Elahi Khanum is not a daughter of Haidar Buksh, and has never been in possession of his property, and that she did obtain the original certificate by fraud and perjury, the Court should not renew the certificate to her, but should deal with her according to the criminal law, and the Court will under such circumstances, consider whether the certificate should now be given to Mussamat Bhikun. We observe that Elahi Khanum makes the same allegations of fraud and falsehood against Mussamat Bhikun as Mussamat Bhikun makes against her.

We reverse the orders of the Judge, directing that a further certificate be given to Elahi Khanum and remand this case with directions that full enquiry be made into the charges of fraud brought against her before such further certificate is granted.

* Special Appeal, No. 2340 of 1871, from a decree of the Judge of Dacca, dated the 23rd July 1870, affirming a decree of the Additional Subordinate Judge of that district, dated the 27th September 1869.

Although it is evident that even in this application there was a good deal of delay, as it might have been made nearly a fortnight sooner, still there was time for the commission to issue and the defendant was therefore entitled to have that commission issued. The facts of the case are somewhat peculiar, and it is just possible that the evidence of these witnesses may throw light upon it. We think that the defendant is entitled to have them examined before the question is decided against him.

We therefore remand this case for such examination of the witnesses. After hearing that evidence the lower Appellate Court will pass a fresh decision in the case.

Costs of this appeal will abide the result.

AINSLIE, J.—I wish to add that, in my opinion, it is not the business of the Court, on receiving an application for a summons to a witness, or for a commission to examine a witness, to consider whether it is likely that the summons can be served, or the commission executed, so as to bring the witness or his deposition before the Court on the day fixed for the hearing of the suit. A party to a suit has a legal right to ask the assistance of the Court in these matters, and the Court should grant it as a matter of course; it is for the party, and not for the Court, to consider whether he can derive any advantage from his application (1). If he has delayed it so long that he fails to get the process executed in sufficient time, he of course must take the consequences of his delay; and the Court will not adjourn the case to remedy his neglect. But unless it appears clearly that it is not only improbable, but impossible, for the process to be effectually issued, the application should certainly be complied with. Indeed, I have great doubts whether it should not be complied with in every instance, as it may happen that the case may not be called up for hearing on the day originally fixed, and possibly the witness or the return to the commission might be in Court on the day to which it may be adjourned. If a party to a suit thinks it worth his while to incur the expense of taking out a process on the chance of deriving benefit from it, I would not prevent his doing so. I would only take care that he did not use

(1) *Act VIII of* 1859, *s.* 149.—"The parties or their pleaders may, at any time after the issue of the summons to the defendant, if the summons be for the final disposal of the suit, or after the issues have been recorded, if the summons to the defendant be for the settlement of issues only, obtain, on application to the Court, summonses to witnesses or other persons to attend either to give evidence or to produce documents, and in any such summons the names of any number of persons may be inserted."

Sec. 175.—"When the evidence of a witness is required who is resident at some place distant more than 100 miles from the place where the Court is held, or who is unable from sickness or infirmity to attend before the Court to be personally examined, or is a person exempted by reason of rank or sex from personal appearance in Court, the Court *may*, of its own motion, or on the application of any of the parties to the suit, or on the representation of the witness, order a commission to issue for the examination of such witness or interrogatories or otherwise: and may by the same or any subsequent order give all such directions for taking such examination as may appear reasonable and just."

1871

HARIDAS BAISAKH v. MIR MOAZAM HOSSEIN.

the late issue of the process as an excuse for delaying the final hearing of the case.

I would call the attention of the Courts below to the remarks of Mr. Justice L. S. Jackson in the case of *Anurup Chandra Mukhopadhia* v. *Hiramani Dasi* (1).

1871
Sept 8.

Before Mr. Justice Phear.
In Chambers.

KALAS CHANDRA BOSE *v.* BHUBAN CHANDRA BOSE AND OTHERS.
Rule of Supreme Court.

Rule 176 of the Rules and Orders on the Plea Side of the Supreme Court is still in force.

AN order, dated September 1st, 1871, had been made in this case on the application of the defendants that the plaintiffs should attend on September 2nd and show cause why they should not admit certain documents relied on by the defendants in the suit.

The affidavit of S. Gabriel, a clerk in the office of Messrs. Carruthers and Dignam, attorneys for the defendants, stated:—"That the plaint in the suit was filed on August 13th, 1870; that the suit was brought to have a declaration of the right of the plaintiffs to a one-third share of and in the premises in the plaint and in certain property left by one Gakul Chandra Bose, deceased, and for a partition and receiver &c., until partition, and for an injunction to restrain the defendants from collecting the rents; that on August 12th, a writ of summons was issued, and on 22nd served on Prasannakumar Sirkar and Pyaricharan Sirkar two of the defendants, who duly appeared; that on 4th January the defendants filed their written statement, and on 5th the plaintiff filed his written statement; that on 24th August 1871, some of the defendants, by Messrs. Carruthers and Dignam their attorneys, caused a notice to be served on the plaintiff's attorneys, Messrs. Dhur and Mitter, to admit certain documents relied on by the defendants in the suit; that in pursuance of such notice, on 26th August, the plaintiff, and a clerk in the office of Messrs. Dhur and Mitter, called at the office of Messrs. Carruthers and Dignam, inspected the said documents, and stated that they would write and say whether they would admit the documents or not; that they had not written or in any way consented to such admission."

The order of September 1st was, "that the plaintiff do attend on 2nd September and show cause why the plaintiff should not admit the documents, and why, in case of his refusing to admit them, the plaintiff should not pay the costs of proving such documents at the trial of the suit whatever may be the result, and why the plaintiffs should not pay the costs of this application.

Mr. *Dignam* for the defendants submitted, that Rule 176 of the rules and orders on the Plea Side of the Supreme Court (2) applied by virtue of Rule

(1) 3 B. L. R., App., 38. (2) Skinner's Rules and Orders, App., 105.