## [APPELLATE CIVIL.]

*Before Mr. Justice Mitter and Mr. Justice Ainslie.*

KASINATH SHAHA (PLAINTIFF) *v.* DWARKANATH SIRKAR AND ANOTHER (DEFENDANTS).* 1872 *April* 16.

*Act VIII of* 1859, *s.* 170—*Judgment against Party for Non-attendance—Statement in Written Statement not Proof.*

The discretion which a Court has, under s. 170, of Act VIII of 1859, of passing judgment against a party for non-compliance with the Court's order to attend and give evidence or produce documents in a suit, is not confined to cases where the party summoning him cannot prove his case otherwise than by the evidence of such other party, or where the fact to be proved is solely and exclusively within the knowledge of such other party.

A bare allegation by a defendant in his written statement, without any proof in support of it, that a certain person is his inveterate enemy, is not sufficient to discredit that person's testimony.

KASINATH SHAHA sued the defendants to recover possession of certain jote lands. He alleged that he was the defendant's jotedar for upwards of twelve years, of the disputed land, on an annual jumma of Rs. 32-3; that his name was recorded in the defendants' sherista; that on the 1st Aghran 1277 (15th November 1870), the defendants dispossessed him, and that the first defendant, Dwarkanath Sirkar, had entered into possession.

The defendants in their written statement stated that the plaintiff was not in possession of the disputed land as jotedar or in any other capacity; that they never put him out of possession; that the land was held in jote by one Jagannath Shaha, on whose death without issue, they and their co-sharers had leased it to one Zaker and others, who were now in possession by paying rent, and submitted that the claim was barred by the law of limitation.

* Special Appeal, No. 1330 of 1871, from a decree of the Subordinate Judge of Rajshahye, dated the 26th June 1871, reversing a decree of the Munsif of that district, dated the 27th March 1871.

1872

KASINATH SHAHA v. DWARKANATH SIRKAR.

The Munsif fixed the following issues among others :—

" Is the suit barred by (the law of) limitation ?

" Whether the plaintiff's allegation, with regard to his jotedari (right) and possession, and his subsequent ouster, is true or not ?"

In support of his case the plaintiff cited all the defendants as his witnesses. They were summoned to appear with their books and papers relating to the mauza in which the land in dispute was situated. In answer to the summons, only two of the defendants, Panchauand Chowdhry and Girish Chandra Moitro, appeared and were examined, and Panchanand Chowdhry also produced the books and papers called for. The plaintiff had three other witnesses examined in his behalf. None of the other defendants who were summoned appeared to give their testimony, and the Munsif considered the excuses which they offered through their pleader for their non-attendance to be insufficient. In the opinion of the Munsif, the plaintiff's case was fully established by the evidence of the two defendants who were examined, by the books and papers produced by one of them, and by the other evidence adduced by him. In addition to this finding in the plaintiff's favor, the Munsif added :—

" Hence, with reference to the evidence alluded to, as well as under the provisions of s. 170 of Act VIII of 1859, and according to the ruling laid down in *Srimati Hemangini Dasi* v. *Ramnidhi Kundu* (1) the suit must be decided against the defendants, and a decree entered in favor of the plaintiff."

The defendant Dwarkanath Sirkar appealed against the Munsif's decree.

On appeal, the Subordinate Judge reversed the Munsif's decree, and dismissed the suit. He assigned the following reasons for arriving at a different conclusion from the first Court :—

" As for the evidence given by Panchanand Chowdhry, in favor of the plaintiff, I would observe that it cannot be relied upon, for it was long before the said Chowdhry gave this evidence that the appellant in his written statement described him as his ' inveterate enemy.' The witness Madhab Chandra Shaha is the plaintiff's nephew. The witness Haris Chandra Ghose is the plaintiff's servant. The witness Girish

(1) 1 B. L. R., S. N., xi

Chandra Moitro cannot speak about the alleged jumma and bound of the plaintiff with any degree of exactness. The witness Barada Gabind Sing states contrary to the plaintiff's own allegation that he was ousted in the month of Kartik (November). Under these circumstances the Court below was not justified in passing judgment against the defendants on their failure to appear as witnesses before him, for such a procedure is only applicable when a party to a suit refuses to attend and give evidence, though summoned to do so, and when the party, desirous of examining him, is unable to prove his case without his evidence, and when the matter which he is unable to establish turns upon such a question of fact as may justly be considered to be only within the knowledge of the party who refuses to give evidence. But it would appear that the special application made by the plaintiff on the 6th Magh 1277 (18th January 1871) citing the defendants as witnesses, mentions nowhere that he, the plaintiff, will be unable to establish his claim without the defendants' evidence. Moreover, the defendants in their verified written declaration, dated the 29th Magh 1277 (10th February 1871), state that the papers called for from the defendants are not in their possession. Besides, the plaintiff did not entirely rely upon the evidence of the defendants, but on the contrary he has furnished other evidence. Hence I see no reason why, under the circumstances of this case, judgment must, as a matter of course, be passed against the defendants under s. 170 of the Civil Procedure Code. This seems to be the view taken in the case of *Srimati Hemangini Dasi* v. *Ramnidhi Kundu* (1) which the Munsif has quoted in his decision. The evidence adduced on behalf of the defendants proves their allegation. The lower Court's decision must, therefore, be set aside, and the grounds of appeal are held to be valid."

Against this decision the plaintiff appealed to the High Court.

Baboos *Nalit Chandra Sen* and *Girish Chandra Mookerjee* for the appellant.

Baboos *Debendra Narayan Bose* and *Mohini Mohan Roy* for the respondents.

The judgment of the Court was delivered by

MITTER, J.—We are of opinion that this case falls within

(1) 1 B. L. R., S. N., xi.

1872

KASINATH SHAHA v. DWARKANATH SIRKAR.

the purview of the case of *Ishan Chandra Ghose* v. *Haris Chandra Banerjee* (1). The suit was for possession of a piece of land which the plaintiff claimed by virtue of an alleged jotedari right

(His Lordship, after briefly stating the facts, and reading the portion of the Subordinate Judge's judgment, from the words "Under these circumstances the Court below was not justified, &c.," to "within the knowledge of the party who refuses to give evidence," proceeded.)—In this case there is no dispute whatever that the defendants were duly ordered by the Court to appear and give their evidence, and consequently the first portion of the Judge's remark does not appear to be of much importance. With

(1) *Before Mr. Justice Macpherson and Mr. Justice Glover.*

ISHANCHANDRA GHOSE AND OTHERS (PLANTIFFS) v. HARIS CHANDRA BANERJEE AND ANOTHER (DEFENDANTS).*

*The 1st September* 1869.

Baboo *Taraknath Dutt* for the appellants.

Baboo *Bama Charan Banerjee* for the respondents.

MACPHERSON, J.—In this case the defendant, having been ordered to attend and give evidence, without lawful cause, failed to comply with that order; and in consequence, the Court of first instance passed judgment against him. The first Court decided in favor of the plaintiff upon other grounds also. In appeal the lower Appellate Court reversed this order, not being satisfied with the evidence of the plaintiff, and saying that the Munsif ought not to have decided against the defendant, because he failed to appear and give evidence.

It appears to me that the judgment, passed by the Court of first instance against the defendant, was a judgment which that Court had full power to pass and which that Court properly passed. And I think that the lower Appellate Court was wrong in interfering with that judgment. We have sent for the *nathi* B., and it appears clearly from it that the defendant was summoned specially under ss. 162 and 163 of the Code of Civil Procedure; and that, when he showed cause against being called upon to attend, the Court was not satisfied with the cause shown. Under these circumstances, and there being evidence which supported the plaintiff's case, the Munsif was quite right to decide against the defendant under s. 170. The judgment of the lower Appellate Court ought to be reversed, and the judgment of the Court of first instance restored with costs.

GLOVER, J.—I am of the same opinion. It is quite clear that the order of the Munsif was based substantially on the default of the defendant to come in and give evidence, and it appears, moreover, that the defendant was summoned after enquiry on the part of the Munsif that his evidence was necessary for the elucidation of the case.

*Special Appeal, No. 844 of 1869, from a decree of the Second Subordinate Judge of Hooghly, dated the 19th January 1869, reversing a decree of the Munsif of that district, dated the 24th August 1868.