

1869
 Jan'y. 4.

Before Mr. Justice Loch and Mr. Justice Mitter.

SHAHZADA PAKAKTAR, *alias* KAHNU SAHIB (ONE OF THE DEFENDANTS),
 v. JAKRIRAM BHAKAT (PLAINTIFF,)*

Cross-Examination—Act VIII. of 1859, s. 170.

A defendant failed to appear when ordered to attend under section 170, Act VIII. of 1859. The Judge did not at once pass judgment against him, but called the plaintiff's witnesses, and refused to allow the defendant's vakeel, who was present, to cross-examine them. *Held*, that the Judge ought to have allowed the defendant's vakeel to cross-examine the plaintiff's witnesses.

THE plaintiff sued to recover the amount due on a bond executed by Mohammed Shamsuddin, Rohumannissa Begum, and Sultani Begum, and alleging that the defendant, appellant, executed at the same time a security bond for the liquidation of the debt, if they should fail to meet it, included him also as a defendant in the suit. The defendants who executed the bond did not appear, and allowed judgment to go by default. The defendant, appellant, in his written statement, denied that he executed the security bond, or made himself liable for the debt due by the others.

The plaintiff made special application for an order, requiring the attendance of the defendant, appellant, and a notice was served upon him to show cause why he should not appeal and give evidence. On receipt of this notice, he filed a special petition, requesting that his appearance might be postponed till the witnesses cited by the plaintiff had been examined, in order that it might be ascertained whether they were able to identify his person; and the Court ordered that he should be in attendance on the day fixed, in order that he might be confronted with the witnesses. The trial was subsequently postponed on the prayer of the defendant, appellant. On the day fixed for the trial, the defendant did not appear, but he filed a petition stating that he had been seized with serious illness in the course of the preceding night that he had sent for the doctor; and that he would furnish a medical certificate as soon as he had obtained one. On this petition the Principal Sudder Ameen, observing that no medical certificate had been produced, and no other evidence to establish the alleged inability of the defendant to appear, and that the Sub-Regis'rar of the district and other witnesses with whom the defendant desired to be confronted were in attendance, held, that the defendant without lawful excuse failed to comply with the order of the Court, and directed that the case be tried *ex parte*. In the course of the day another petition was filed by the defendant, praying that the Court would

* Special Appeal, No. 2,466 of 1868, from a decree of the Judge of the 24-Pergunnas, dated the 10th June 1868, affirming a decree of the Subordinate Judge of that district, dated the 6th January 1868.

take evidence on his behalf, but it was rejected, and the Principal Sudder Ameen having taken evidence of the execution of the bonds produced by the plaintiff, and the evidence of the Sub-Registrar of the district, who swore that he had personally visited the house of the defendant, appellant, and had registered the security bond after ascertaining from him that it was genuine, gave judgment against all the defendants. But he declined to allow the vakeels of the defendant, appellant, to cross-examine the witnesses. The Judge, on appeal held that the procedure of the Principal Sadder Ameen was correct.

The defendant appealed specially.

Baboo Mahendra Nath Mitter for appellant.

Baboo Debendra Narayn Bose for respondent.

The judgment of the Court was delivered by

LOCKE, J.—The lower Courts have held that the defendant, when duly summoned to appear, failed to attend without lawful excuse. We think that this Court cannot interfere with this finding. But it is urged, in the second place, that the procedure followed by the Subordinate Court is not in accordance with the provisions of section 170 (1) of Act VIII. of 1859. The Subordinate Judge did not pass judgment against the party who failed to appear, as he might have done, under the provisions of the law quoted above, but he ordered that the case should be heard *ex parte*, and he refused to allow the vakeel of the defendant to cross-examine the witnesses of the plaintiff. The Judge, in appeal, held that the order of the lower Court was right.

We think that on the defendant failing to appear without lawful excuse, the Judge might at once have passed judgment against him. But if he proceeded to take the evidence of the plaintiff's witnesses, the defendant who had entered appearance was entitled to cross-examine them by his vakeel, and the Subordinate Judge was wrong in treating the case as an *ex parte* one; for, as the defendant had appeared and filed a written statement, it could not be called an *ex parte* case. If not an *ex parte* case, the defendant was entitled to cross-examine the plaintiff's witnesses.

We think that the case must go back to the first Court to allow the defendant's vakeel an opportunity to cross-examine the plaintiff's witnesses.

With regard to the third objection taken in special appeal, we find that it was not urged in the lower Appellate Court, and is of no real weight.

The case is, accordingly, remanded to the first Court to allow the defendant's vakeel to cross-examine the plaintiff's witnesses, and to re-try the case.

(1) Section 170, Act VIII. of 1859.—“ If any person, being a party to the suit, shall be ordered to attend to give evidence or produce a document, shall, without lawful excuse, fail to comply with such order, or attending, or being present in Court, shall without lawful excuse refuse to give evidence, or to produce any document, in his custody or possession named in such summons as aforesaid, upon being required by the Court so to do, the Court may either pass judgment against the party so failing or refusing, or make any such order in relation to the suit as the Court may deem proper in the circumstances of the case.”

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