

plaintiff, therefore, to recover the amount decreed to him, must under Section 27 of Act X of 1862, pay the stamp duty of 5 Rupees, and the penalty under Section 15, Clause 2 of 20 times that amount. Subject to the payment into Court of those amounts, the decree of the Lower Appellate Court is affirmed with costs.

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of 1867.

APPELLATE JURISDICTION (a)

Regular Appeal No. 8 of 1867.

JESHTA RAMJI SAETT.....Appellant.  
AWAKER MULLANDEAGATA KUNHI.....Respondent.

The High Court will not interfere on appeal with the decree of the Lower Court dismissing a plaintiff's suit (under Section 170, Act VIII of 1859) on the ground of his refusing to answer a question material to the case when duly required to do so.

*Semble*, it might be otherwise had plaintiff since decree endeavoured to purge his contempt.

**T**HIS was a Regular Appeal from the decree of G. R. Sharpe, the Acting Civil Judge of Calicut, in Original Suit No. 14 of 1866. The suit was brought for damages sustained by defendant's not delivering goods entrusted to him by plaintiff for carriage. The defendant denied the contract and filed (No. I) a certified copy of an account of the goods shipped at Ponani by one Mavuji Kunji on the 8th February 1865. At the hearing, the Civil Judge gave judgment against the plaintiff under Section 170, Act VIII of 1859, as follows :—

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The Legislature having conferred the power of passing judgment against a party refusing, without lawful excuse, to answer questions when required by a Court to do so, I have been compelled to exercise that power in the present suit under the following circumstances. The plaintiff was under examination as a witness, and was asked by the defendant's Vakil whether the alleged shipper of the goods was appointed his agent in writing or not. The question having been twice repeated by the Vakil without eliciting an answer, I then myself put the question, but as no response was elicited, I warned the plaintiff that he would be

(a) Present : Scotland, C. J., and Holloway, J.

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fined if he continued recsant. The question was again put by the Vakil and afterwards by myself, but with no better result. I then warned the plaintiff that I should pass judgment against him if he again remained silent, and as he still continued to refuse to answer, I acted up to my warning. The plaintiff, I may remark, has, for many years, been known to me (as he is known to every judicial officer in the district) as a constant litigant, and the insolence of his demeanor when refusing to answer upon this occasion, satisfied me that in order to maintain the dignity of this Court a severe lesson must be given.

The plaintiff (Jeshta Ramji) having been duly summoned and attended as a witness in the case, and having without lawful excuse refused to give evidence when required by the Court to do so, I pass judgment against him under Section 170, Act VIII of 1859—all costs will be borne by plaintiff.

The plaintiff appealed.

*The Advocate General* for the appellant, the plaintiff.  
*Miller* for the respondent, the defendant.

The following judgments were delivered.

SCOTLAND, C. J. :—In this case the Civil Court has passed a decree dismissing the suit, because of the plaintiff's (appellant's) refusal to answer a relevant and material question whilst under examination as a witness of the defendant : and the only question is whether there has been an undue exercise of the discretionary power of dismissal which is undoubtedly given by Sections 126 and 170 of the Code of Civil Procedure. The power is one which ought from its very nature and effect to be used with caution and forbearance, and was clearly, I think, intended to be enforced only in extreme cases of contumacious refusal to give evidence as to material facts in the case. For the ordinary offence of contempt of Court fine and imprisonment has long been recognised as a fitting punishment, and Act XXIII of 1861, Section 21, expressly provides for such punishment being awarded both summarily by the Court and after trial before a Magistrate, and by Section 20 any person sentenced to the punishment may have it remitted on submission to the requisition of the Court. The Sections,

too, which give the power (126 and 170) contain the alternative provision that the Court may make such other order in relation to the suit as may be deemed proper.

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In this case the Civil Judge appears to have acted with caution towards the plaintiff: but I entertain some doubt whether, as the Judge did not in the first instance punish the plaintiff by fine or imprisonment and give him an opportunity of purging his contempt under Section 22 of Act 23 of 1861, it can be considered that there was such an extreme case of contempt as justified the order dismissing the suit. However, I think as the case is now presented to the Court, the decree ought not to be interfered with. Nothing has been said or done on the part of the appellant to indicate regret for the contempt and submission to the Lower Court, and we must consider that he still holds to his refusal to answer. Without, therefore, saying that my opinion would not have been different, if it had appeared that the appellant after the decree expressed his regret for the contempt and his willingness to submit to the orders of the Lower Court, I think the decree must be affirmed.

HOLLOWAY, J.—Assuming that Section 170 applies to the case of refusing to give further evidence and is not confined to the case of refusing to give any evidence at all, a point on which I confess to entertaining some doubts, although no point was made of it in the argument, I think that the order of the Civil Judge is under this Section perfectly correct and should be affirmed.

Whether legal or not under Section 170, it is clearly legal under Section 126, for the question between the parties was whether the defendant contracted with plaintiff through his agent or with another person through that agent. The question as to the mode of appointment of that agent which the plaintiff pertinaciously and after warning of the specific consequence refused to answer, was clearly a most material question.

It being therefore clearly within the power of the Court to give judgment against the plaintiff, is there any thing upon the face of this case to show that the power has been

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so indiscreetly exercised as to justify the interference of an Appellate Court? It certainly seems to me a stronger case for that exercise can scarcely be conceived.

There was a repeated refusal to answer a question put by the Court itself after full warning, and that question was one of the most material character.

Finding as I do a distinct provision of the Legislature and facts clearly bringing the case within that provision, I do not feel at liberty to say that some other provision of the law ought previously to have been applied. If that construction were put upon this plain provision, it would be in the power of a plaintiff to prevent a judgment against him, on account of the non-production of a document, by pertinaciously refusing to give any information as to the mode in which a particular contract was concluded. I will only say that I see nothing in the nature of the case to entitle the plaintiff to any favor: and my opinion is that the appeal should be dismissed with costs.

*Appeal dismissed.*

APPELLATE JURISDICTION (a)

*Referred Case No. 11 of 1867.*

VENKATARAMANAIYA against KUPPI.

Where in the course of the hearing of an appeal, the appellant desired to withdraw in order to avoid the decision of a question raised by the respondent at the hearing.

*Held that, under Section 348 of the Civil Procedure Code, the respondent was entitled to have the question heard and determined.*

1867.  
May 22.  
R. C. No. 11  
of 1867.

CASE referred for the opinion of the High Court by Srinivāsa Rāu, Principal Sadr Amin of Mangalore, in Appeal Suit No. 647 of 1865.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—The facts of this case we understand to be, that the appellant in the course of the hearing of the

(a) Present:—Scotland, C. J., and Collett, J.