Appellate Jurisdiction (a)

Regular Appeal No. 2 of 1868.

KATAKAM VENKAIYA ..... *Appellant (1st Defendant.)*

BHUPALAM PEDDA MULLASAPPAH..... *Respondent (Plaintiff.)*

In a suit to recover the balance alleged to be due on a partnership transaction, the 1st defendant who was examined as a witness for the plaintiff refused to produce certain accounts relating to the partnership which he was directed to produce by the Civil Judge. Thereupon judgment was given against the 1st defendant under Section 170 of the Civil Procedure Code.

On appeal, the High Court, holding that the accounts were relevant and material evidence in the suit, and that the Civil Judge was justified in requiring the 1st defendant to produce them, and being satisfied that the accounts were in the possession or control of the 1st defendant, affirmed the judgment of the Civil Judge.

1868. *October* 20. *R. A. No.* 2 *of* 1868.

THIS was a Regular Appeal against the decree of H. E. Sullivan, the Acting Civil Judge of Bellary, in Original Suit No. 6 of 1867.

Gould and *Parthasárathi Aiyangár*, for the Appellant, the 1st defendant.

The Advocate General, for the Respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—In this case the plaintiff sued the 1st defendant and others claiming to have been a partner with them in certain abkarry contracts during Fuslies 1271 to 1275 and seeking to recover the balance alleged to be due upon the partnership transactions. The 1st defendant, who certainly had the management of the contracts in question, denied that plaintiff was interested as a partner therein. Evidence appears to have been gone into to prove the partnership alleged by the plaintiff, and a great number of documents and accounts were produced. The 1st defendant was also called and examined as a witness by the plaintiff, and 1st defendant's late gumastah was also examined as the 10th witness for the plaintiff. The 1st defendant admitted that some of the accounts had been kept by the gumastah and regularly forwarded to him, and

(a) Present: Collett and Ellis, J.J.

1868. *October* 20. *R. A. No.* 2 *of* 1868.

as to some others he said that they had been kept by himself but were "not now forthcoming." At this stage of the suit, the Civil Judge required the 1st defendant to produce the accounts, being satisfied, as he states, upon the evidence that they were in his custody and possession. The 1st defendant did not produce them, his excuse being, as recorded in his deposition, that he had delivered the accounts to his gumastah who told him that he had returned them by a servant but that they had never reached him. The Civil Judge, being dissatisfied with this excuse, proceeded under Section 170, Civil Procedure Code, to pass judgment against the 1st defendant.

At the hearing of this and another very similar appeal, we purposely reserved our judgment in order to give the 1st defendant an opportunity to purge his contempt by submitting to the order of the Court and producing his accounts; and it having been objected that the 10th witness had not in his examination denied having received back the accounts from the 1st defendant, we intimated that we might be willing to have the 10th witness further examined on this point. When the case was mentioned again, the further examination of the 10th witness was not pressed for, and the 1st defendant not having produced the accounts required, we have now to say whether we are prepared to interfere with the discretion exercised by the Court below in the disposal of this suit.

That the Civil Judge was justified by the evidence in believing that the accounts were in the possession of the 1st defendant, there can be no reasonable doubt. It was where they should be, and he admitted that he had received some of them regularly in due course from the gumastah and some he had prepared himself. He assigned no reason for their having been sent back by him to the gumastah, who by the way he said had been dismissed by him shortly before the close of Fusly 1275. If the gumastah when examined did not deny having received them back, this was apparently due solely to his not having been examined on the subject at all, and it was open to the 1st defendant, if he had been so minded, to have cross examined him on the point. The only reasonable conclusion is that the accounts

1868. October 20. R. A. No. 2 of 1868.

still are where they ought to be and where they once were, viz., in the custody of the 1st defendant.

Then certainly the Civil Judge was justified in requiring the defendant to produce the accounts: they were relevant and material evidence in the suit. The case was therefore within Section 170, Civil Procedure Code, and that Section gives a Court power in such a case to pass judgment against a recusant party or to "make such other order in relation to the suit as the Court may deem proper in the circumstances of the case." We quite agree with what was said in the case reported in 3, *Madras High Court Reports*, 299, that the power given by Section 170 ought to be used with the utmost caution and forbearance, and we are inclined to think that had this suit come before us originally we might have left the suit to proceed to a further stage before enforcing against the 1st defendant the extreme penalty provided by Section 170. But we can entertain no doubt as to the accounts being in the custody and possession of 1st defendant, and though further opportunity has been afforded he has not chosen to produce them. There is no clear ground, so far as we can gather from all the proceedings in the case which we have examined, on which we can say that even at the stage which the suit had reached in the Court below, the Court exercised the power which is undoubtedly given to it by the law so indiscreetly as to justify the interference of an Appellate Court. We feel bound therefore to decline to interfere and to dismiss the appeal, and we think that the dismissal must be attended with the ordinary consequence of paying the respondent's costs.

Appeal dismissed.