1895

JAGARNATH SINGH v. BUDHAN.

falls within the definition of a decree as contained in section 2 of the Code. The law enables an appellant to apply for the re-admission of his appeal (section 558), and it gives him the right of appeal against the order refusing such an application. Similar provision is made in regard to a plaintiff whose suit is dismissed on default. But the law does not expressly give an appellant the right to appeal directly against an order under section 556. We cannot agree with the learned Judges of the Bombay High Court that an order dismissing an appeal on default is the "formal expression of an adjudication upon a right claimed." It seems to us rather that through his default the appellant has lost his right to obtain the adjudication of his right claimed, that is, the right claimed in the proceedings or suit. The right to be heard does not in our opinion come within the definition of a decree, and by providing specially for redress against such an order it seems to us that the law does not contemplate an appeal against such an order.

With the exception of the case cited there is ample authority for holding that an appeal against an order under section 556 is not admissible.

The appeal is, therefore, dismissed with costs.

S. C. C. *Appeal dismissed.*

ORIGINAL CIVIL.

Before Mr. Justice Sale.

NITTOMOYE DASSEE AND ANOTHER (PLAINTIFFS) v. SOOBUL CHUNDER LAW AND ANOTHER (DEFENDANTS.)*

1895 *July* 16.

Interrogatories—Discovery—Production of documents—Code of Civil Procedure (Act XIV of 1882), sections 121, 125, 129, 130, 133, 134—Definition of term "family."

To interrogate a party to a suit as to the construction he puts on the meaning of the word "family" is not admissible, although, to ask him who the persons are who are living in his household, is so. The former question if replied to would only be of value as the opinion of a party to a suit on what is really a question of law.

Under the Civil Procedure Code interrogatories for the purpose of eliciting facts bearing upon issues arising in a suit are limited in operation and are not permissible in cases where the procedure provided by section 134 of the Code is applicable.

* Suit 689 of 1894.

1895

NITTOMOYE DASSEE *v.* SOOBUL CHUNDER LAW.

Ali Kader Syud Hossain Ali v. *Gobind Dass* (1) and *Weideman* v. *Walpole* (2) approved.

Sections 121, 125, 129, 130, 133 and 134 of the Code of Civil Procedure discussed.

THIS was an application by the plaintiff on summons in chambers to consider the sufficiency of certain answers given by the defendants Soobul Chunder Law and Narain Persaud Seal to certain interrogatories administered by the plaintiff.

On the 10th of September 1894 the plaintiffs filed their suit against the defendants praying, *inter alia*, for payment of a legacy of Rs. 5,000 with interest thereon, and declaration of her rights under the will of her husband Rakhaldoss Law, and, if necessary, for the appointment of a receiver. The defendants in their written statement stated that as the plaintiff had refused, although they had demanded it, to deliver up to them certain jewellery and silver articles mentioned in the will of her deceased husband, she was not entitled to the legacy of Rs. 5,000 given her under the will. They also contended that she must be considered to have relinquished all benefit under the will.

The clause in the will of the deceased testator was as follows:—

"And I direct that during the lifetime of my wife Sreemutty Nittomoye Dassee, the jewellery (a list whereby is given at the foot hereof) of which I did not make a gift to my wife, but which was intended for the use of the *family*, as also my silver articles, plates, glass and China-ware (including chandeliers) and articles of household furniture shall continue to be used by the family in the same way as now, and I direct that my executors shall, from time to time at the cost of my estate (other than the said sum of rupees thirty thousand), replace such of the said effects as may be worn out or broken or become unserviceable. And subject to family use of the same during the lifetime of my said wife Nittomoye Dassee, I give and bequeath the whole of the said articles of jewellery, silver, plates, glass, China-ware and household furniture unto my said brother Soobul Chunder Law, his heirs, executors, administrators and assigns."

The interrogatories administered by the plaintiff relating to the expression "*family*" contained in the will were as follows:—

1. State the name or names of the person or persons respectively whom you allege that Rakhaldoss Law, the testator in the plaint in this suit named, intended to and did include within the designation of "the family" in the sentence, "but which was intended for the use of the family"

(1) I. L. R., 17 Calc., 840. (2) L. R., 24 Q. B. D., 537.

in the clause of his will, dated the 6th day of August 1889, recited and quoted by you in the 7th paragraph of your written statement in this suit.

2. State the name or names of the person or persons respectively whom you allege that the said testator intended to and did refer to as constituting the "family" in the sentence "shall continue to be used by the family in the same way as now" in the said clause of his said will recited and quoted by you as aforesaid.

3. State what you allege that the said testator intended to and did mean and refer to as "family use" in the sentence, "and subject to family use of the same during the lifetime of my said wife" in the said clause of the said will recited and quoted by you as aforesaid, as regards the manner and way, the person or persons by whom, and the occasions on which the said use was to be enjoyed.

4. State the name or names of the person or persons respectively whom you allege to have been, up to and at the date of the testator's said will and of his death, using and in the enjoyment of the use of the said jewellery, silver articles, plate, glass and China-ware (including chandeliers), and articles of household furniture referred to in the said clause of his said will recited and quoted by you as aforesaid.

5. State the manner and way in which you allege that the said jewellery and other articles in the last preceding interrogatory mentioned had been up to the date of the testator's said will, and of his death, used and enjoyed by the person or persons named by you in answer to the said last preceding interrogatory. Also state the period during and the various occasions upon which the same has been used and enjoyed by the said person or persons so named by you.

State the name or names of the person or persons respectively whom you allege to be now entitled during the lifetime of the plaintiff to the use and enjoyment of the said jewellery and other articles abovementioned according to the terms of the said will of the said testator, and state the manner and way in which it was intended that the same should be disposed of and dealt with, and the person or persons in whose possession and care it was intended that the same should remain, and by whom the same should be used and enjoyed on the occasion when you called on and required the plaintiff to deliver up the said jewellery and other articles to you as the executors appointed by and under the said will.

7. State whether from and after the death of the said testator you kept books of account containing entries relating to his estate, and if your answer be yea, state whether the said amounts were kept and the said entries were made in new books opened by you for the purpose, or were continued by you in the Bengali books of account of the said Rakhaldoss Law kept during his lifetime and up to the date of his death.

8. State whether you have in your possession or power, or in the

1895

NITTOMOYE DASSEE v. SOOBUL CHUNDER LAW.

possession or power of any one on your behalf, any or all of the Bengal *khattahs* and other books of account of the said Rakhaldoss Law kept during the period from the Bengali year 1275 to the year 1287. If your answer be yea, state, enumerate and describe the various books so in your possession or power, or in the possession or power of any one on your behalf, for each of the several years abovementioned.

The defendant in reply filed the following answers:—

1. We say that the matters dealt with in the first, second and third and in the first part of the sixth of the said interrogatories are matters arising upon the construction of the will of the testator Rakhaldoss Law in the pleadings in this suit mentioned. We are advised and submit that the construction of the said will is a matter for the determination of this honourable Court, and that we are not bound to put forward any construction of the said will in answer to the said interrogatories.

2. In answer to the fourth interrogatory we say that up to and at the date of the testator's said will and of his death the jewellery and silver articles (with the exception of five silver mounted *hookahs*) mentioned in the said interrogatories were in the custody of the plaintiff. We are not aware that any person was using and in the enjoyment of the use of the said jewellery at the date of the testator's said will and of his death, but we believe that during the lifetime of the said Rakhaldoss Law the plaintiff was using and in the enjoyment of the use of the said jewellery and silver articles with the exception of the said five silver mounted *hookahs*, and that occasionally the wife of Soobul Chunder Law used the said jewellery with the permission of the plaintiff, in whose custody, as above stated, the jewellery used always to remain. The plate, glass and China-ware (including chandeliers) and articles of household furniture remained for the most part in the outer apartment of the *boitakhana* house, and as regards those that remained in the outer apartment of the *boitakhana* house they were used and enjoyed by the male descendant of Kanai Lall Law. And as regards those that remained in the inner apartment of the *boitakhana* house and of the family dwelling house, and also as regards the said silver articles thereof, they were used and enjoyed by the male descendants of Kanai Lall Law, and the ladies of the family.

3. In answer to the fifth interrogatory we say that we do not allege that the said jewellery and other articles mentioned in the said fourth interrogatory had been up to the date of the testator's said will and of his death used and enjoyed by the person or persons named by us in answer to the said fourth interrogatory in any specific manner and way. We believe that the plaintiff and the wife of one Soobul Chunder Law used the said jewellery in the same manner and way as Hindu ladies usually use articles of jewellery, and we believe that the male descendants of Kanai Lall Law and the ladies of the family used the said silver articles, plate, glass and China-ware (including chandeliers) and articles of household furniture in the same manner and

way in which such articles were intended to be used by the designer or fashioner thereof. The said jewellery was used by the plaintiff and occasionally by the wife of one Soobul Chunder Law as above stated down to the death of Rakhaldoss Law, since when the same, as well as the silver articles with the exception of the said five silver mounted *hookahs*, have been in the exclusive use and possession of the plaintiff. The said other articles have continued to be used by the members of the family, as they were used during the life-time of the said Rakhaldoss Law.

4. In answer to the sixth interrogatory we say that, on the occasion when we called in and required the plaintiff to deliver up the said jewellery and silver articles to us as the executors, it was intended that the said articles should remain in our custody as such executors as aforesaid, and there was no intention on our part in making the said request that the said jewellery and silver articles should be disposed of and dealt with or used and enjoyed by any person or persons whatsoever.

5. In answer to the seventh interrogatory we say that from and after the death of the said testator we kept books of account containing entries relating to his estate. The said accounts were kept and the said entries were made from the beginning of the Bengali year 1297 in new books opened by us for another purpose. The entries for the year 1296 were continued by us in the Bengali book of account for that year kept up to the death of Rakhaldoss Law. The plaintiff has had inspection of all the books referred to in this answer.

6. On the 5th day of January 1895 we filed our affidavit of documents in this suit, wherein we set forth a list of all the documents relating to the matters in question in this suit which are in our possession or power, or in the possession or power of any one on our behalf, and a summons taken out by the plaintiff on the 8th March 1895 to consider the sufficiency of the said affidavit was dismissed with costs on the 13th day of March 1895. We decline to make any further answer to the eighth interrogatory.

Mr. *Dunne* for the plaintiffs.

Mr. *O'Kinealy* for the defendants.

Mr. *Dunne*.—We have an absolute right to interrogate except on matters exempted by section 125 of the Code of Civil Procedure. It is one of the means of proving our case, and we are entitled to discovery of the defendant's books. The case of *Ali Kader Syud Hossain Ali* v. *Gobind Dass* (1) is distinguishable. The Court cannot say you need not ascertain from the plaintiff anything touching his own case, because you can find it out hereafter. We are not bound to wait. The point in this case is not that we are endeavouring to find out the defendant's case on these two points, but that we are endeavouring to ascertain the persons who are entitled

(1) I. L. R., 17 Calc., 840.

1895

NITTOMOYE DASSEE v. SOOBUL CHUNDER LAW.

to possession. We are not claiming the jewels for ourselves, but we are claiming them only for our lifetime. We claim our right to hold the jewels. Our object is to establish our own case, that we are the persons really entitled to the jewels, and we are entitled to do so by getting an admission from the defendant. We wish to know from him who he says are entitled to get these jewels. That is not a construction of law. We are not asking him to state a definition of the term "family." We want him to state who are the persons who would come within the definition of a "family" which is well known. The defendant knows what would be the proper answer, and if he answers properly, we cannot object; but he will not answer. He can always take the opinion of his Counsel as to who is really the right member of the family. We are not asking for any conclusion of law, inference of fact, or construction of a document. We are asking a mere question of fact. *Hoffman* v. *Postill* (1). The questions are all matters most material to my case.

Mr. *O'Kinealy*, *contra*.—There is nothing in the written statement to suggest that the plaintiff is not entitled to all the apartments she held before. But a witness in the case would not be asked what meaning the testator put on the word "family." That is for the Court. I am not bound to put a special construction on the terms used in the will. No doubt the Court would take evidence as to who lived in the house at the time with Rakhaldoss; but no such questions have been asked. No answer can be required as to conclusions of law, inference from facts, or construction of instruments. Seton on Decrees, Vol. I, p. 61. The defendant could not be bound by any admissions of law. *Ali Kader Syud Hossain Ali* v. *Gobind Dass* (2). The plaintiff is not entitled to find out what the plaintiff's case is to be. Under the English decisions these documents would be held to be privileged from inspection. *Emmott* v. *Walters* (3), *Lyell* v. *Kennedy* (4). The plaintiff's statement as to materiality must be accepted. *Morris* v. *Edwards* (5), *Budden* v. *Wilkinson* (6), *Nicholl* v. *Wheeler* (7).

Mr. *Dunne* in reply.

(1) L. R., 4 Ch. App., 673.
(2) I. L. R., 17 Calc., 840.
(3) W. N., 1891, p. 79.
(4) L. R., 8 App. Cas., 230.
(5) L. R., 23 Q. B. D., 287; L. R., 15 App. Cas., 309.
(6) L. R., 1893, Q. B., Vol. 2, 432.
(7) L. R., 17 Q. B. D., 101.

SALE, J.—In this application the question is whether the defendants should be ordered to give further and better answers to certain interrogatories. These interrogatories fall under two classes, and different considerations apply to them. In the first place the first second and third interrogatories, and a portion of the sixth interrogatory, refer to a certain issue which the plaintiff alleges arises in this suit.

About the suit it is only necessary to say that the plaintiff claims certain rights under the will of her late husband Rakhaldoss Law, and a question is raised as to what is meant by the term "family" as used in the will.

It has been held by this Court that the term "family" includes all persons residing in the house of the testator at the time of his death, whether as dependent members of his family or not. The interrogatories to which I have specifically referred do not, any of them, ask the defendants to state who the persons were, who were living in the household of the testator at the time of his death; but they are so framed that what the defendants are invited to say is, who, in the contemplation of the testator, constituted his family. It appears to me that interrogatories so framed are not such as the Court will compel parties to answer. They are directed not to ascertain actual facts, but to obtain the opponents' views as to the construction of the will. The authority cited in Seton, p. 61, shows that interrogatories of that character are not allowable.

As regards the other interrogatories a very different question arises. It appears that the defendants have n the usual course, and in obedience to the order for discovery under section 129 of the Civil Procedure Code, filed a list of documents with the usual affidavit stating that, except as to the documents particularly mentioned in the list, they have not any documents in their possession relative to the matters in question in the suit.

The plaintiff being dissatisfied with that affidavit and asserting that, besides the documents specifically mentioned and referred to in the list, the defendants have certain other documents relative to the suit in their possession, made an application to consider the sufficiency of the affidavit. In answer to that application the defendants filed another affidavit in effect admitting possession

1895

NITTOMOYE DASSEE v. SOOBUL CHUNDER LAW.

of the specific documents referred to, but denying that they were in any way relevant to the questions arising in the suit. The learned Judge who heard the application thought that for the purposes of discovery the defendant's original affidavit was conclusive, and dismissed the application.

What the plaintiff now contends is that she is entitled by means of interrogatories Nos. 7 and 8 to cross-examine the defendants as to the specific documents admitted to be in the defendant's possession, but the relevancy of which the defendants deny. It is admitted that these documents are not disclosed in the defendant's original list of documents. The plaintiff now seeks by means of interrogatories to obtain further admissions from the defendants as to these documents. The question then is whether, according to the practice of the Court or under the Civil Procedure Code, the plaintiff is entitled to take that course.

On this point a great many English authorities have been cited, but I think on a careful examination of these authorities that very little assistance is to be derived from them in determining a question which is really governed by the Civil Procedure Code.

In the first place I think it sufficiently appears from the Civil Procedure Code that interrogatories viewed as machinery for eliciting facts bearing upon issues arising in suits are intended only to have a limited operation. The case of *Ali Kader Syud Hossain Ali* v. *Gobind Dass* (1) explains one direction in which the Code limits the scope of operation. To my mind section 134 of the Code clearly indicates another direction in which the scope of interrogatories was intended to be limited.

Section 121 of the Code states when interrogatories may be delivered for the examination of the opposite party; section 125 states the circumstances under which a party may decline to answer interrogatories which have been administered.

In section 129 power is given to the Court to order any party to the suit to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the suit, and any party to the suit may at any time

(1) I. L. R. 17 Calc., 840.

before the first hearing apply to the Court for a like order. The practice which has been adopted in this Court under section 129 is that the party applies, without any affidavit in support of his application, that the opposite party may be directed to declare on affidavit the documents in his possession relative to the matters in question in the suit.

Sections 130 to 133 all deal with the production and inspection of the documents, but section 134 shows what is to be done in the event which has happened in the present case, namely, when one party alleges that the other party has documents in his possession relative to matters in suit which have not been disclosed by his affidavit. In such a case the applicant is to come before the Court with an affidavit showing (*a*) of what documents inspection is sought; (*b*) that the party applying is entitled to inspect them; (*c*) that they are in the possession or power of the party against whom the application is made. The applicant must, therefore, show *inter alia* that the documents of which he claims inspection are relevant to the matters in question in the suit. That appears under section 130, because it is that section only which gives the Court power to order production of documents *relating* to any matter in question in the suit, and the Court has no power to order the production of any other document.

It appears to me that section 134 indicates that it was intended that a party in a case, such as the present, should proceed, not by way of interrogatories, but according to the procedure laid down in that section. The Code does not, I think, contemplate that a party should be compelled to give discovery of documents by means of interrogatories or otherwise, the relevancy of which is denied. It is necessary that the Court should, in the first instance, be satisfied of this relevancy.

It is suggested that as, for the purposes of an application under section 130, the original affidavit of a party denying that he has in his possession documents relative to the suit other than those specified in his list is conclusive, so also in an application under section 134 the affidavit of a party would be conclusive on the issue of relevancy. This question does not now arise, and I am not at present prepared to accept the proposition thus broadly stated.

1895

NITTOMOYE DASSEE v. SOOBUL CHUNDER LAW.

The cases cited on this point are cases on the question of privilege, which I think stands on a different footing. In the case where a party has claimed to seal up portions of a document, the Court has sometimes appointed an officer to enquire and report as to the relevancy of the portions sought to be sealed up.

I think the case of *Weidcman* v. *Walpole* (1) is an authority which goes to show that the construction which I have put on section 134 is correct. It is based on Order 31, Rule 18, which is similar in terms to section 134 of the Code. At page 541 Huddleston, B., says: "The right of a party with reference to inspection is now governed by Order 31, Rule 18 which provides that, 'except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.' But what possible meaning can be given to that provision, if the contention of the plaintiff is right, and if the non-disclosure in the affidavit of documents of the document sought to be inspected precludes the applicants from making an affidavit that such document is in the possession of the other party?" And Mr. Justice Vaughan Williams comes to much the same conclusion. At page 542 that learned Judge says: "But when one comes to look at Rules 17 and 18, which deal with the subject of inspection, they both of them seem to contemplate the possibility of a party obtaining inspection of documents as to which the other party has made no admission whatever. It seems to me plain that Rule 17 means to give any litigant a right if he chooses, not only to give notice to his opponent to produce the documents as to which he has made admissions, but also to produce documents which have not been mentioned in the affidavit of documents or in any other affidavit. Then Rule 18 provides what shall be done in case the party to whom the notice is given does not comply with such notice, namely, that in the case of documents not referred to in the pleadings or any affidavit of such party, nor disclosed in his affidavit of documents, the party desir-

(1.) L. R., 24 Q. B. D., 537.

ing inspection may make 'an affidavit shewing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.' Mr. Davis endeavoured to reconcile that provision with his contention by suggesting that it was meant to apply only to cases where the party against whom inspection is sought has made no affidavit negativing the possession of such documents, but that where he has by his affidavit of documents already negatived the possession of such documents his affidavit is conclusive. And I am very far from saying that that is not a possible meaning of the rule. But, on the whole, I incline to the view that that is not the meaning which was intended. I think it is much more convenient that Rule 18 should be construed as applying to every case in which the party desiring inspection is able to state of his own knowledge that the other party is in possession of documents and that they are relevant. To my mind the proper course is to entertain the application upon an affidavit by the applicant as to the other side's possession of the documents, and as to their relevancy, and then to allow the other party to make an affidavit in answer. I may say for myself, although the question does not arise here, that, in my judgment, if the other party does make such an affidavit in answer, his affidavit, when made, is conclusive in the same way as his affidavit of documents is conclusive on the subject of discovery."

What I understand the learned Judge to lay down is that, just as for the purposes of discovery an affidavit of documents denying possession is conclusive, so for the purposes of production and inspection an affidavit denying *possession* of such documents would be equally conclusive. Obviously it would be futile to order a party to produce a document which he swears is not in his possession. But even supposing I thought it a question of discretion as to whether I should compel the defendants to answer these interrogatories, still, inasmuch as they have already in effect admitted possession of the documents in question, I think it would be useless and unnecessary to compel them to make a further answer. For these reasons, I think, this application must be refused with costs.

Application refused.

Attorneys for the plaintiffs: Messrs. *Carruthers & Co.*

Attorney for the defendants: Babu *Nobin Chand Burul.*

C. E. G.