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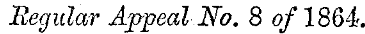
The respondent cannot require that it should proceed, in order that he may have an opportunity of taking objections to the decree of the court below. He should have filed a separate appeal, if he desired to secure the right of asking for a decision on such objections, irrespective of the contingency that the appeal filed by the opposite party might not come to a hearing.

WARDEN, J., concurred.

Application rejected.



Regular Appeal No. 8 *of* 1864.

COST FERNANDES .... *Appellant.*
VA'SUDEV SHA'NBOG .... *Respondent.*

Mutual dealings—Evidence of books—non-production—Limitation—Act VIII. of 1859, *Sec.* 170—*Act XIV. of* 1859, *Sec.* VIII.

In a suit for the balance of an account with interest in a case of mutual dealings between traders, where the High Court had directed the production of the defendants' books of account, and was satisfied, after receiving the report of the District Judge, that there were such books in existence, and that no satisfactory excuse for their non-production was given; and where the defendant had otherwise conducted his case in a very suspicious manner :—

Held (reversing the decree of the District Court) that the plaintiff was entitled to judgment, on a *primâ facie* case being made out by him; and that the suit as regards limitation came within the provision of Sec. VIII. of Act XIV. of 1859.

July 4. R. A. No. 8 of 1864.

THIS was a regular appeal from the decision of F. D. Melvill, Acting Judge of Honore, by whom the following judgment, in which the facts are stated, was recorded :—

"This action was instituted by Cost Fernandes to recover a balance of account—due on the 30th of November 1862 from Vásudev, on account of himself and the other defendants—Rs. 9,979-1-8.

"Vásudev replied that so much of the account as referred to more than three years before was barred by the Limitation

Act; and that the lists of accounts produced by plaintiff are forgeries. He has had dealings with the plaintiff, and has every year up to 1860 given signed lists including the balance of the previous year. These lists have been suppressed by him. Vásudev's account books have been fraudulently taken by his coparceners. Nothing is due to plaintiff; but on the contrary he owes Vásudev a large amount. The others did not reply in time, and their petition to file answers afterwards was rejected by the Judge.

"The points at issue are—(1) are the accounts proved; (2) is any portion of the claim barred by the Statute of Limitation; (3) what amount is due to the plaintiff.

"The documents produced by the plaintiff, and on which he sues, are lists or rather memos. of the different items contained in the accounts of different years. These lists he says were furnished to him by Vásudev. He has not produced his own accounts, nor any distinct evidence to prove that Vásudev did make over these lists to him. He has, however, called a number of witnesses to prove that defendant Vásudev has virtually admitted the genuineness of these accounts. Several of these state that about a year and a half ago plaintiff and defendant were disputing about these accounts at the house of the former. This portion of the evidence is utterly valueless. I find from the statements of the witnesses that the memos. then produced by the defendant were original, and not copies. They could not, then, have been identical with those memos. now sued on, which had already been filed in court. I consider, moreover, that this evidence is open to very grave suspicion. In the first place, it is full of the most glaring discrepancies. In the second place, if the facts deposed to were established, plaintiff's story would be open to great objections. He admits that he had already received from defendant memos. of the items of the accounts between them. These memos. he states in his plaint to be incorrect and fraudulent. How,

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then, would he, after such memos. had been furnished to him enter into any negotiation about a settlement of accounts with defendant on the strength of other memos. furnished by him; or, if he had entered into such negotiation, would he not, on finding that these memos. were also incorrect, naturally at once refuse to have anything more to say to him, and allow the suit which he had filed to take its course. Instead of doing this, it is alleged that defendant was allowed to go away in order to correct the lists in which the latter said clerical errors might have crept. These considerations compel me to disbelieve the evidence of witnesses Nos. 28 to 33.

"Two or three witnesses have been examined to prove that in September or October last plaintiff's son and defendant Vásudev went to the house of Rozario, the then Sheristedár of the Judge's Court, in order to settle these accounts. Defendant had taken with him some memos. which were copies merely, and not originals, and he stated that they were copies of the lists which plaintiff had filed, and which he had obtained from the court. I am by no means satisfied with this evidence. The witnesses contradict each other on the question of the production of accounts by the plaintiff's son. Two of the three who have been examined did not apparently take defendant's memos. into their hands. They are not, therefore, qualified to state whether those papers were copies or not; and I cannot trust their memory sufficiently to believe them, when they state that defendant said they were copies. The evidence produced is then not sufficiently strong to establish the point that defendant did then, by the fact of his having taken copies of the memos. filed in court by the plaintiff, and having produced such copies in order to effect a settlement of accounts, virtually admit the genuineness of those memos.

"The last two witnesses called by the plaintiff are intended to prove that, about a year ago, Vásudev produced some memos. of accounts in the shop of one Ganpayá, in order to have his dispute with plaintiff settled. There is, how-

ever, nothing to show that these were copies, and it may be presumed, therefore, that they were originals. The remarks that I have already made in regard to the original memos. said to have been produced by defendant in plaintiff's house apply equally to this portion of the evidence.

"Plaintiff has urged that defendant Vásudev has virtually admitted the claim, by failing to comply with a notice to produce his accounts. Vásudev, however, states that he could not produce them, as they were in possession of another defendant, Nelwalá.

"Vásudev has produced evidence which shows that memos. sued on are utterly opposed to the custom of the country. Several witnesses have stated that mutual trading is not carried on for very many years without accounts being balanced; that they are generally balanced every year, when the party against whom the balance is, gives a signed memo. to the other. He has also filed copies of a deposition made by plaintiff in another suit in October 1862 (one month before the present suit was filed), in which he stated that, though he had been called upon to produce the memos. of accounts given him by Vásudev, he could not find them all, and asked for time to produce them, and though that time was granted, he did not produce them.

"I consider that the facts brought forward by the defendant are in themselves sufficient to throw great suspicion on the claim. The evidence for the plaintiff, however, has utterly failed to prove the genuineness of the accounts. It may be here observed, as a curious feature in this case, and one not calculated to aid the plaintiff's cause, that instead of suing on his own account to recover the balance due, he has sued on accounts said to be furnished by the defendant, and which plaintiff himself impugns as incorrect and fraudulent.

"My finding on the first point at issue is that the accounts are not proved. No finding is required on the other points. I throw out the claim with costs."

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The grounds of objection taken to this decision on appeal to the High Court were as follow:—(1) That the Acting Judge misunderstood the nature of the case; (2) that he was wrong in refusing to admit evidence duly offered on behalf of the plaintiff, namely, his account books; (3) that his decision was contrary to the evidence recorded in the case; (4) that he failed in duly appreciating the evidence; (5) that he was wrong in not ordering the defendant's accounts to be produced when applied to by the plaintiff; (6) that he was wrong in assuming fabrication of documents, in the absence of all evidence to warrant the same.

The appeal first came on for hearing on the 22nd of March 1865, before Couch and Warden, JJ.

Anstey, Reid, and *Nánábhái Haridás* for the appellant.

White and *Shántárám Náráyaṇ* for the respondent.

Per Curiam:—The case is referred back to the lower court, in order that such evidence upon the matters in dispute as may be furnished by the account books of the plaintiff or of the defendants may be taken and forwarded to this court, together with the District Judge's proceedings upon the application for a review of judgment made by the plaintiff, and the proceedings of the Principal Ṣadr Amín prior to those before the District Judge. Further hearing postponed.

The report of the District Judge, R. White, having been received, the hearing of the appeal was resumed on the 6th of December 1865.

Reid, Howard, and *Nánábhái Haridás* for the appellant.

O'Leary and *Shántárám Náráyaṇ* for the respondent.

The Judge, it appeared, had only received in evidence the account books themselves, and had refused to take evidence of the handwriting of the entries therein, although he had been twice petitioned to do so.

Per Curiam:—Referred back to the District Judge, with the additional direction to receive the evidence of the witnesses mentioned in the petition of the 29th of May 1865, and any other witnesses who may be offered by either party to prove or disprove the genuineness of any account book or books, or to explain any entry or entries therein, or to show in whose handwriting or by whose authority any entry was made; and if no account books of the defendants shall be produced, to inquire into the reasons for their non-production and take evidence thereon, and to enforce the production thereof, if any such book or books appear to be in existence and capable of being produced; and to certify his proceedings herein within three months from this date.

The case was resumed for further hearing this day.

Reid, Howard, and *Nánábhái Haridas* for the appellant:—We now ask that judgment may be given against the respondent for refusing to produce the books: Act VIII. of 1859, Sec. 170, Act XXIII. of 1861, Sec. 37. We show that the books did exist; and the defendants have not accounted for their non-production.

Shántárám Náráyán for the respondent:—I appear for Vásudev alone. The other defendants allowed judgment to go by default. The account sued on extends over a period of more than twenty years, from 1840 to 1862. The claim must be limited to three years previous to bringing the suit. The District Judge did not go into the question of limitation, as he held that the claim was not proved.

Couch, C. J.:—In this case the plaintiff seeks to recover the balance of an account, alleged to be due by the respondent Vásudev, as manager for himself and the other defendants; and the nature of the transactions between the parties was such, that the plaintiff relied much on the defendant for vouchers and accounts of their mutual dealings.

The defendant Vásudev answered—1st, that the suit was barred by the law of limitation; and 2ndly, that the lists of

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accounts produced by the plaintiff were forgeries, and that he had suppressed those given to him.

We are clearly of opinion that the suit does not come within the limitation of three years. Sec. 8 of Act XIV. of 1859 appears to be intended for cases like this. The evidence taken in the case completely disposes of the allegation of forgery. It is not likely, in the first place, that the plaintiff would forge documents which he himself impugns as incorrect and fraudulent. If he had had recourse to forgery, he would probably have brought forward a much stronger case than he has done. It is important in a case like this to observe that the defendant with regard to the allegation of forgery has made an entirely groundless charge.

There are other suspicious features in the case set up by Vásudev. "Nothing (he says) is due to the plaintiff; but on the contrary he owes me a large amount." The generality of this allegation is in itself suspicious; and no proof has been offered in support of it. Then with regard to his books of account, his first statement on that subject, made on the 16th of January 1863, a month after this suit was brought, was that his account books were fraudulently taken away by his coparceners. But of that he has produced no evidence; and he now gives quite a different excuse for the non-production, namely, that one of the other defendants had kept and written the books.

There are thus most serious objections to the way in which the defendant's case has been put forward, and great light would probably be thrown on the dispute by the production of the defendant's books. The plaintiff had undoubtedly a right to have those books produced, and to extract evidence from them. In a case like the present the books of the defendants would afford the most valuable evidence that could be produced, namely, admissions in writing made by the defendants at a time when there was no dispute regarding the mutual dealings between the parties. And as

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we have come to the conclusion on the evidence that the non-production of the books has not been satisfactorily accounted for, we may safely also conclude that they would be evidence in favour of the plaintiff's case, if they were produced.

Our view on this point is strengthened by the provision of Act VIII. of 1859, Sec. 170; and although it is not necessary for us in the present case to give judgment under that section, we certainly might do so under the circumstances.

We have come to the conclusion, in the absence of any satisfactory evidence to the contrary, and having in view the suspicious character of the defence, that the plaintiff sufficiently proved his claim.

We, therefore, reverse the Acting Judge's decision, and award to the plaintiff the amount claimed, Rs. 9,979-1-8, with interest on Rs. 6,841, at 6 per cent. per annum, from the 26th of February 1863 (the date of the institution of the suit) until payment; with costs.

Decree reversed.

Appeal No. 3 of 1866 under Act XX. of 1864.

VALLABHDA'S HIRA'CHAND and another ...*Appellants.*
GOKALDA'S TEJIRA'M ....*Respondent.*

Bombay Minors' Act, Secs. 6, 9, 10, 16, and 24—mistake in copying Bengal Act—Inventory.

Held that persons appointed Administrators to a minor's estate under Sec. 6 of the Bombay Minors' Act (No. XX. of 1864) are not liable to furnish an inventory and accounts under Sec. 16 of the Act.

July 9. Ap. No. 3 of 1866 under Act XX. of 1864.

LI'LA'DHAR NANDRA'M died, leaving him surviving two sons, who were minors, to whom he left his estate; having by an instrument in writing appointed the appellants and two other persons to administer the estate.

The appellants applied for and obtained a certificate of administration from the Judge of Puná, under Sec. 6 of the