

• 1867.
April 16.

Special Appeal No. 243 of 1866.

NA'BANBHA'I VRIJBHU'KANDA'S *Appellants.*
NA'ROSHANKAR, CHANDROSHANKAR and an-
other *Respondents.*

Examination of Witnesses in Court of First Instance—Transfer of Suits—Irregularity “not affecting the merits of the case”—Waiver—Wagering Contract—Bona fides—Burden of Proof—Error in Law—Special Appeal—Act VIII. of 1859, Secs. 6, 172, 183, and 350.

A suit, instituted in the Court of the Principal Sadr Amín, was transferred, under Sec. 6 of Act VIII. of 1859, to the Court of the Munsif, who took further evidence, and decreed in favour of the plaintiff. The defendant appealed to the District Court, on the ground (amongst others) that part of the evidence had been taken by the Principal Sadr Amín; and the District Judge reversed the Munsif's decree, not on this ground, but on the merits. The plaintiff then appealed to the High Court, objecting that the suit had been illegally decided by the Munsif, upon evidence recorded by the Principal Sadr Amín; and that the *onus* of proving the *bona fides* of the transaction which was the subject-matter of the suit was thrown, by the District Judge, on the plaintiff, instead of on the defendant, who alleged the want of it:—

Held (1) That the Munsif's having used the evidence recorded by the Principal Sadr Amín, was only an irregularity, which was waived by the plaintiff's not requiring the witnesses to be examined again, and proceeding with the suit, and producing other witnesses to be examined in support of his claim; and as this irregularity did not affect the merits of the case—the decree of the Munsif being in the plaintiff's favour—it was not a ground for reversing the decree on special appeal. (2) That the *onus* was not thrown by the Judge upon the plaintiff in its proper sense, and so as to be an error in law; as the Judge did not hold that the defendant was entitled to succeed without giving any evidence, unless the plaintiff disproved the allegation of want of *bona fides*.

The meaning of Sec. 183, taken in connection with Sec. 172, is that the judgment is to be given upon the examination of the witnesses by the Judge himself in the court of first instance, and not upon a perusal of depositions, except those taken under Sec. 173 and the subsequent sections, which are expressly allowed to be read in evidence at the hearing; and care should be taken, in the transfer of suits and in the disposal generally of the business of the lower courts, to prevent the necessity of re-summoning witnesses.

THIS was a special appeal from the decision of C. G. Kemball, Acting Judge of the Súrat District, in Appeal Suit No. 215 of 1865, reversing the decree of the Munsif of Súrat.

The original suit was brought to recover Rs. 2,753-1-8, with interest, on a balance of account arising out of a contract for the purchase of twenty-five bundles of cotton thread by the defendant.

The Munsif decided in favour of the plaintiff, on the evidence before him, portion of which had been taken before the Principal Şadr Amín, from whose court the suit was transferred, under Sec. 6 of Act VIII. of 1859.

The Acting Judge reversed the Munsif's decree, on the ground that the contract between the parties was in the nature of a wagering contract, and not a *boná fide* transaction; and also on the ground that the evidence adduced by the plaintiff in support of his case was not satisfactory.

The Special Appeal was argued before COUCH, C.J., NEWTON, TUCKER, WARDEN, and GIBBS, JJ.

Shántárám Náráyan, for the appellant, contended (among other things) that there was a failure of justice, inasmuch as the evidence was recorded by one Judge in the court of first instance, and weighed by another, contrary to the provisions of Secs. 173 and 183 of Act VIII. of 1859; that the lower appellate court would not have come to the conclusion it arrived at, had this irregularity not been glossed over; that the lower court was wrong in casting the *onus* of the *bona fides* of the transaction on the plaintiff, instead of on the defendant, who had raised the defence.

Nánábhái Haridás, for the respondent, contended that the plaintiff had waived the irregularity of the evidence being used, by not requiring the witnesses to be again examined, and by producing other witnesses to be examined on his own behalf: he could have remedied the irregularity, by objecting to it in time before the court of first instance; that the plaintiff was not injured by the irregularity, as the judgment of the Munsif was in his favour; and that the lower appellate court's finding as to the *boná fides* of the transaction was on a question of fact, and could not be considered in special appeal.

1867.

NA' RANBHAI
VRJIBHUKAN-
DA'S
v.
NA' ROSHANKAR
CHANDRO-
SHANKAR
et al.

1867.
 NA' RANBHA'I
 VRIJBU'KAN-
 DA'S
 v.
 NA' ROSHANKAR
 CHANDRO-
 SHANKAR
 et al.

COUCH, C. J.:—In this suit, which was brought to recover Rs. 2,753-1-8, the balance of an account, together with interest, upon a contract to purchase twenty-five bundles of thread from the plaintiff, evidence had been taken in the Court of the Principal Şadr Amín at Súrat; and the suit was transferred, under Sec. 6 of Act VIII. of 1859, to the Court of the Munsif, who took further evidence, and decreed in favour of the plaintiff for the amount of his claim. Of eight witnesses who were examined by the Principal Sadr Amín, seven were for the plaintiff; and of six examined by the Munsif, three were for the plaintiff.

The defendant appealed to the District Court, on the ground (amongst others) that part of the evidence had been taken by the Principal Sadr Amín; and the District Court reversed the Munsif's decree with costs, but on the merits, and not on this ground.

The plaintiff has appealed to this court: stating, as one of the grounds, that the suit has been illegally decided by a different Judge, upon evidence recorded by the Principal Sadr Amín.

Now the evidence taken by the Principal Şadr Amín, even if taken in a former suit between the same parties, and not, as this was, in the same suit, would have been admissible as secondary evidence, if the witnesses had been incapable of being called; and the use of it by the Munsif was, in my opinion, only an irregularity, which was waived by the plaintiff's not requiring the witnesses to be again examined, and proceeding with the suit, and producing other witnesses to be examined in support of his claim.

The plaintiff now asks this court to reverse not only the decree of the District Court, which is against him, but also the decree of the Munsif, which was in his favour, and was founded on the evidence which he now contends was inadmissible. I think he is not entitled to this.

Further, by Sec. 350 of Act VIII. of 1859, this court ought not to reverse the decree, unless the irregularity has affected the merits of the case. In courts where the pro-

ceedings are conducted strictly, the plaintiff, having allowed this evidence to be used by the Munsif without objection, would not be at liberty afterwards to object to its being used, or obtain a new trial on that ground, even if the original decree had been against him: Taylor on Evidence, Sec. 1681. And although this rule cannot be applied to such courts as the Munsif's, it is only just and equitable that, before effect is now given to the objection, it should appear that the plaintiff has been prejudiced.

I think this does not appear. In the Munsif's court the plaintiff cannot have been prejudiced, because the decree was in his favour; and the only mode in which he can have been prejudiced in the District Court, is by the Judge having attached less importance to the finding of the Munsif upon the facts, than he would have done if all the evidence had been taken by the Munsif himself. There is a passage in the judgment of the District Court which raised some doubt in my mind, in the course of the argument, and suggested the possibility that, if the Munsif had himself taken all the evidence, the Judge might not have felt himself justified in coming to an opposite conclusion to his upon it; but I now think this would not have made any difference in the conclusion the Judge came to, and that the plaintiff has not been prejudiced.

I think, therefore, that the special appellant is not entitled to succeed on this ground of appeal; but as the question raised is of considerable importance, as regards the practice of the lowest courts, it may be well to express an opinion upon it, independently of the facts in this case. It must be determined by the provisions of the Code of Civil Procedure, by which the practice of those courts is regulated; there being no rule of jurisprudence which requires that the evidence in the suit shall be taken by the Judge who pronounces the judgment, and the practice in many courts being, as is well known, to the contrary.

Now Sec. 172 of Act VIII. of 1859 directs that: "On the day appointed for the hearing of the suit, or on some other day to which the hearing may be adjourned, the evidence of

1867.

NA' RANBHA' I
VRIJBHU' KAN-
DA'S
v.
NA' ROSHANKAR
CHANDRO-
SHANK' AR
et al.

1867.
 NA'RANBHAI
 VEJIBHUKHAN-
 DA'S
 v.
 NA'ROSHANKAR
 CHANDRO-
 SHANKAR
et al.

the witnesses in attendance shall be taken orally in open court, in the presence and hearing, and under the personal direction and superintendence, of the Judge ;” and in cases in which an appeal lies to a higher tribunal, it prescribes a mode of taking the evidence, intended to give as much assistance as can be given to a court which has to decide upon written depositions. In cases not appealable this mode need not be followed. Then Sec. 183 says : “ When the exhibits have been perused, the witnesses examined, and the parties heard in person or by their respective pleaders, the Court shall pronounce its judgment ;” and I think the meaning of this, looking at it in connection with Sec. 172, is that the judgment is to be given upon the examination of the witnesses by the Judge himself, and not upon a perusal of depositions, except those taken under Sec. 173 and the subsequent sections, which are expressly allowed to be read in evidence at the hearing.

Whenever it is practicable, the witnesses should be examined before the Judge who is to pronounce the judgment ; and care should be taken, in the transfer of suits, and in the disposal generally of the business of the lower courts, to prevent the necessity of re-summoning witnesses ; but where a deposition taken by another Judge is read, instead of the witness being examined, I think it is only an irregularity, which may be waived by the parties, and which would not be a ground for reversing the decree on special appeal ; unless it appeared that the appellant had been prejudiced by it.

The other ground of appeal taken in this case, that the *onus* was thrown upon the plaintiff of showing that the contract was not a time-bargain, is not, I think, sustainable. The *onus* was not thrown upon the plaintiff in its proper sense, and so as to be an error in law. One of the defendants having alleged that the contract was a wagering one, both parties gave evidence. The Judge did not hold that the defendant was entitled to succeed, without giving any evidence, unless the plaintiff disproved the allegation ; but that upon the evidence given, he was not satisfied that the transaction

was a *bonâ fide* one. If the plaintiff, having attempted to show that he was capable of performing the contract,—an issue which might be raised, and the proof of which would be upon him,—failed in showing it, as the Judge appears to have thought he did, very little evidence on the part of the defendant would suffice to raise the presumption that the contract was a wagering one, and change the burden of proof. It was for the Judge to estimate in the particular case the amount of evidence required, and the exact force of the presumption that the contract was a *bonâ fide* one; and if he has made a mistake in his estimate, it is not a ground for a special appeal.

I am, therefore, of opinion that the decree of the District Court should be affirmed.

NEWTON, WARDEN, and GIBBS, JJ., concurred.

TUCKER, J.:—I concur generally in the decision which has been arrived at. It appears to me that one of the main underlying principles of the Code of Civil Procedure is that, at an original trial, the Judge who decides the cause shall have personally heard the evidence of the witnesses, on whose testimony his judgment is to be based, except in certain specified instances; and I cannot find that it is anywhere contemplated that a Judge of a court of first instance should pronounce judgment on evidence taken before a predecessor in the same court, or before a Judge of any co-ordinate tribunal, from which a part-heard suit may have been removed.

I consider, therefore, that when a Judge of a court of original jurisdiction, whose proceedings are regulated by the Code of Civil Procedure, dies, or is removed to another appointment, before the conclusion of a trial, or when a partially tried suit is removed from one court to another, the evidence of the witnesses, who have been examined by the court which commenced the inquiry, must be taken *de novo*, unless the parties consent that the depositions already recorded shall be read at the hearing before the Judge or Court on whom it will devolve to pass judgment.

1867.

NA'RANBHAI
VRIJBHUKAN-
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v.
NA'ROSHANKAR
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SHANKAR
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1867.

NA' RANBHA'I
 VRIJBHU'KAN-
 DA'S
 v.
 NA' BOSHANKAR
 CHANDRO-
 SHANKAR
et al.

In the present case I hold that the plaintiff must be considered to have assented to the Munsif's procedure, as he took no exception at the time, and acquiesced in the decree which was made in his favour, on the evidence to the admission of which he now objects. Under these circumstances, I do not think that it is competent to him to make this objection at the present time; even though it may be manifest that he has, to a certain extent, been prejudiced by this procedure.

That he has been so prejudiced is, I think, evident from the District Judge's remark: "I note the fact" (*i.e.*, that the Munsif had decided on evidence recorded by another Judge) "here as a reason for considering that I am in as good a position to judge of the merits of the recorded depositions as the Munsif who decided this case," which shows that the District Judge considered that, under the circumstances, the Munsif's opinion on the evidence was not entitled to the same degree of weight which it would have carried with it, if the Munsif had been personally present when the testimony of the witnesses was given.

I do not, however, consider that the plaintiff is entitled to have a new trial on this account. Looking upon him as having assented to the Munsif's proceedings, he must accept the consequence of his act, even though he may be shown to have assented to a course of procedure which eventually operated unfavourably to his interest.

Decree affirmed.