

may justify, and should consider such other evidence as there may already be in this suit, and such further evidence (if any) as may be tendered to him by the parties on the question of payments of interest.

We reverse the decree of the District Judge and remand the cause for amendment of the plaint in the manner above mentioned, and then for a new trial. The plaintiff must pay the costs of the regular and second appeals to the defendant. The costs of the suit must be disposed of on the new trial in such manner as the Subordinate Judge may deem to be just.

Decree reversed and case remanded.

5 B. 184.

APPELLATE CIVIL.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice,
and Mr. Justice M. Melvill.*

DULICHAND (Plaintiff) v. DHONDI (Defendant).* [5th October, 1880.]

The Dekkhan Ryots Act, No. XVII of 1879, ss. 7, 12, 74—Practice—Procedure—Right of defendant to call witnesses—Act X of 1877, ss. 100, 101.

The plaintiff sued, under s. 3, cl. (w) of Act XVII of 1879, for money due on a bond dated the 8th September 1877. The defendant, though duly summoned, did not appear on the day fixed in the summons, which was for the final disposal of the suit. The Court, therefore, proceeded with it *ex parte*. The defendant, being subsequently summoned and examined as a witness under s. 7 of the Act admitted the bond sued upon, but pleaded part-payment of the plaintiff's claim. He then applied to the Court that his witnesses should be summoned, [185] and that their evidence be taken in support of his allegation. The Subordinate Judge was of opinion that he (defendant) was not entitled to offer the evidence. On his referring the case to the High Court.

Held that it was his duty to summon the witnesses named by the defendant.

THIS case was referred for the opinion of the High Court by Rao Saheb G. V. Limaye, Joint Subordinate Judge of Ahmednagar, under s. 617 of the Civil Procedure Code, Act X of 1877. He stated it as follows:—

“This is a suit under s. 3, cl. (w) of Act XVII of 1879 to recover the sum of Rs. 44-2-0, principal and interest, due on a bond dated 8th September 1877.

“The defendant, though duly served, did not appear on the day (28th July 1880) fixed for the final disposal of the suit. The suit was therefore proceeded with in his absence under s. 100, cl. (a) of the Code of Civil Procedure, X of 1877. The defendant was, however, summoned and examined as a *witness* under s. 7, para. 2 of Act XVII of 1879 on 16th August 1880. In his deposition he admitted the bond, but, in answer to questions put to him by the Court, he stated that he had paid plaintiff Rs. 4 in part satisfaction of the debt. On the same day he submitted an application to the Court, praying that the witnesses named in the list presented along with the application be summoned.

“He has neither (as was obligatory on him under s. 101 of the Civil Procedure Code, if he had been desirous of answering the claim) satisfied the Court that there had been a sufficient cause for his non-appearance in obedience to the summons to attend and answer the suit, nor even attempted so to do.

* Civil Reference No. 18 of 1880.

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"Hence arises the question, whether the defendant, under the circumstances stated above, can, as of right, be allowed to adduce evidence to prove his allegation of part-payment?

"I am humbly of opinion that the defendant cannot be permitted to produce evidence under the circumstances.

"Section 101 of the Code of Civil Procedure is, I humbly submit, too clear to leave any room for doubting the correctness of the view I have taken; but the doubtful nature of the wording of [186] para. 2 of s. 7 of Act XVII of 1879 has necessitated this reference.

"Chapter IX of the Code of Civil Procedure authorizes the Court to examine the parties, but the scope of the whole chapter indicates a procedure after the defendant has appeared in obedience to the summons to appear and answer, and therefore the examination of the defendant as a witness, as contemplated by cl. 2 of s. 7 of the Act of 1879, cannot be treated as identical with the examination under ch. IX of the said Code, and cannot legally serve as a material for framing issues, in the absence of which the defendant is not, I submit, entitled to adduce any evidence.

"The right to claim issues and produce evidence to prove his allegations, is enjoyed by the defendant when he appears and answers the suit. In the present case, if the application of the defendant be granted, it would restore him to a position which he would have occupied had he appeared in obedience to the summons to appear and answer the suit, and entitle him to claim an issue as to the alleged part-payment. It is, therefore, necessary to determine whether the statements made by the defendant in his examination as a *witness*, in answer to questions put to him whilst under examination, can be treated as an answer to the claim, having the same effect which would follow his appearance and defence when summoned as the defendant, and I am humbly of opinion that his evidence under s. 7 of the Act of 1879 cannot be viewed in the light of defence.

"The form of the summons to the defendant, as prescribed by the Code of Civil Procedure, has not been altered by the Act of 1879. According to s. 159 of the said Code, and with a view to give effect to the provisions of the 1st para. of s. 7 of the Act of 1879, the witnesses of the plaintiff are summoned on the day fixed for the appearance of the defendant. If he does not appear, the suit is proceeded with *ex parte*. If in such a case the examination of the defendant, summoned and examined as a witness after that date, under s. 7 of the Act of 1879, be taken to be his answer to the suit, his denial, for instance, in his examination, of the execution of the bond sued on, would necessitate [187] the resummoning of witnesses and the retrial of the suit. And such a procedure will also unnecessarily increase the costs of the suit.

It would be clear from this instance that had it been the intention of the Legislature to impart to the examination of the defendant, as a witness, the character and effect of an answer to the suit, the Act of 1879 would have provided for the staying of the trial of the suit until the defendant had appeared and been examined.

"Again, para. 2 of s. 7 of Act XVII of 1879 having provided that in every suit the Court shall examine the defendant as a witness, if such examination be interpreted as an answer to the suit, defendants who may have a good defence to make will be encouraged to disobey the summons to appear and answer.

"Moreover in cases, the subject-matter whereof exceeds one hundred rupees but does not exceed Rs. 500 in amount or value, the plaintiff, in

anticipation of the difficulties which the defendant will have the ability to throw in his way, if para. 2 of s. 7 be interpreted in the manner above suggested, will never consent to any Second Class Subordinate Judge trying his case under the provisions of Chap. II of Act XVII of 1879, and thus the object of the said Act would, to a great extent, be frustrated.

"In conclusion, I would respectfully submit that the examination of the defendant, contemplated in para. 2 of s. 7 of Act XVII of 1879, is not an answer to the suit, and unless therefore the defendant satisfies the requirements of s. 101 of the Code of Civil Procedure, his position as a witness will not be changed to that of the defendant appearing and answering to the suit. It, therefore, follows that in the present case, he is not entitled to produce evidence in support of his allegation of part-payment."

The parties did not appear in the High Court.

The following is the judgment of the Court:—

JUDGMENT.

WESTROPP, C. J.—The view stated is very technical, and certainly opposed to the spirit of the Dekkhan Ryots Act.

By s. 74, the Civil Procedure Code is only to be applied so far as it is consistent with the Act. By s. 12, the Court is [188] bound to inquire into the merits of the case whenever the amount of the claim is disputed. In the present case it is disputed, and the Subordinate Judge cannot ascertain the merits of the case, unless he examines the persons who are acquainted with them. It seems, therefore, to be his duty to summon the witnesses named by the defendant.

5 B. 188 (F.B.).

APPELLATE CIVIL—FULL BENCH.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice,
Mr. Justice M. Melvill Mr. Justice E. D. Melvill and
Mr. Justice Nanabhai Haridas.*

DOWLATRAM HARJI AND ANOTHER (Plaintiffs) v. VITHO
RADHOJI AND ANOTHER (Defendants).^{*}
[30th November, 1880.]

The Indian Stamp Act, No 1 of 1879, ss. 7, 12, 13 and 14—Stamp—Contract by principal and surety on same stamp paper, but separately written—Writing on the reverse of a stamp paper—Whether Government Notifications under the Stamp Act are not ultra vires when more stringent than the Act itself.

In a bond engrossed on a stamp paper of sufficient value, and dated the 19th April 1879, the contract of the principal was written first, and after his signature followed the contract of the surety, signed by the latter. The document commenced on the side other than that on which the stamp was impressed and terminated on the side impressed with the stamp. The stamp was not in any way defaced, nor was the paper so written as to admit of the stamp being used again. Held, that the bond constituted only one instrument, and was properly stamped, not being open to objection under ss. 7, 12, 13 and 14 of the Indian Stamp Act, No. 1 of 1879.

The construction of the words "on the face of the instrument," used in s. 12 of Act I of 1879, considered.

Quære, whether certain Government Notifications—to the effect that an instrument, commenced on the side of the paper other than that on which the stamp

^{*} Civil Reference No. 23 of 1880.