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[384] ORIGINAL CIVIL.

*Before Mr. Justice Starling.*ANANDRAO VITHAL VARADI (*Plaintiff*) v. BUDRA MALLA, PURKHA
DHOLLA, AND HARIBA TUKARAM VARADI (*Defendants*).*

[17th December, 1892].

Practice—Inspection—Production—Discovery—Co-defendants—Inspection granted to defendant against co-defendant—Civ. Pro. Code (Act XIV of 1882), ss. 129 and 131.

A defendant may obtain discovery or inspection as against a co-defendant if the latter can be regarded as an opposite party.

The plaintiff sued to set aside a mortgage made by the third defendant (his uncle) to defendants Nos. 1 and 2, alleging that shortly after he (the plaintiff) had attained his majority he had been induced to join in the mortgage by the undue influence and threats of the third defendant, who represented that the money to be raised by the mortgage was required to pay off the debts of the plaintiff's father. The plaintiff further alleging that he had received none of the money and that no money had been paid by defendants Nos. 1 and 2 to the third defendant in his presence. Defendants Nos. 1 and 2 took out a summons against the third defendant for inspection of certain account books and documents. It was objected that no question was raised in the suit between the third defendant and defendants Nos. 1 and 2, and that consequently, under s. 131 of the Civil Procedure Code (Act XIV of 1882), the latter were not entitled to inspection.

Held. that inspection must be given. It was possible that not being able to set aside the mortgage as regarded himself, the third defendant was colluding with the plaintiff. Under the circumstances he might be considered a "party opposite" to the first two defendants, although eventually the Court might not be able to make any order between him and them.

IN chambers. Summons for inspection.

The first two defendants were Marwaris trading in partnership under the name of Dholla Cutchra. The third defendant was the uncle of the plaintiff, being his deceased father's brother.

The plaintiff alleged that his father, Vithal Tukaram Varadi, died intestate in July, 1887, and left a widow and the plaintiff, his only son, who was then a minor, his heirs according to Hindu law.

The third defendant, Hariba, obtained letters of administration, *durante minoritate*, to the estate of the said Vithal. He and [385] Vithal had been jointly the administrators of the estate of their father, Tukaram Varadi (the plaintiff's grandfather), and Hariba, after Vithal's death, continued to administer that estate in which the plaintiff claimed his father's share.

The plaintiff attained his majority in November, 1888. He complained that Hariba (defendant No. 3) had not made over to him his father's estate, or his share of his grandfather's estate, or accounted for the same, and he alleged that on the 11th February, 1890, Hariba (defendant No. 3) by undue influence and threats had induced him to execute a mortgage of certain properties to defendants Nos. 1 and 2 for Rs. 42,000, falsely and fraudulently stating that the money was required to pay off certain debts of his father's. He alleged that he had received no money from the first and second defendants, nor had any money been paid by them to Hariba in his (plaintiff's) presence. He prayed that the said mortgage might be set aside, and that inquiry might be made as to whether any debts were due by his father Vithal, &c., &c.

* Suit No. 236 of 1892.

The suit was filed on the 22nd April, 1892. Hariba (defendant No. 3) filed a written statement denying in a very guarded manner the plaintiff's allegations.

On the 6th November, 1892, a summons was taken out by the first and second defendants, calling on the third defendant Hariba to show cause why he should not allow them inspection of certain account books and documents.

Payne (for defendant No. 3) showed cause.—The applicants are not entitled to inspection as against their co-defendant. There are no questions raised between them—Civil Procedure Code (XIV of 1882), ss. 129 and 131 (1); Peile on Discovery, [386] p. 10; *Brown v. Watkins* (2). Further, the affidavits do not show that the documents are in our possession.

Lang (Acting Advocate-General), for defendants Nos. 1 and 2 in support of the rule.—The defendants are entitled to inspection. The plaintiff sues to set aside a mortgage made to them by himself and third defendant. The third defendant ought really to be a plaintiff in this suit.

JUDGMENT.

STARLING, J.—This is a summons by two defendants for inspection of documents in the possession of the third defendant.

Mr. Payne showed cause against the summons, and argued that although under s. 131 of the Civil Procedure Code (XIV of 1882), any party to the suit may call upon any other party to the suit to produce for his inspection any specified document, yet that "any other party" must mean "opposite party," and, further, that "opposite party" in respect of a defendant can only mean the plaintiff and not a co-defendant. In this contention he is supported by the judgment in the case of *Brown v. Watkins* (2), as the Court came to the conclusion that the rule under discussion there which corresponds to s. 131 of the Civil Procedure Code (Act XIV of 1882), did not authorize granting discovery as between co-defendants. This case has, however, been discussed in the Court of appeal in the case of *Shaw v. Smith* (3), and the Court held that "opposite party" did not refer only to the defendant as contrasted with the plaintiff, or *vice versa*, but to any two parties, whether plaintiff or defendants, co-plaintiffs or co-defendants, between whom it was necessary to adjust rights. Agreeing, as I do, with this view of the section, I am of opinion that there is no objection to one defendant seeking discovery or inspection as against a co-defendant, provided that co-defendant can be regarded as an opposite party.

(1) Section 129 :—

The Court may, at any time during the pendency therein of any suit, 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 before the first hearing, apply to the Court for a like order.

Section 131 :—

Any party to a suit may, at any time before or at the hearing thereof, give notice through the Court to any other party to produce any specified document, for the inspection of the party giving such notice or of his pleader, and to permit such party or pleader to take copies thereof.

No party failing to comply with such notice shall afterwards be at liberty to put any such document in evidence on his behalf in such suit, unless he satisfies the Court that such document relates only to his own title, or that he had some other and sufficient cause for not complying with such notice.

(2) 16 Q.B.D., 125.

(3) 18 Q.B.D., 193.

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[387] The question I have, therefore, to decide is whether the third defendant, against whom inspection is sought, is a party opposite to the first two defendants.

It appears that one Vithal Tukaram, the father of the plaintiff, died in 1887, leaving the plaintiff a minor. On his death the third defendant obtained letters of administration to Vithal's estate *durante minoritate* of the plaintiff. Shortly after the plaintiff attained his majority, he and the third defendant executed a mortgage of Vithal's estate, the consideration for which was alleged to be certain debts due by Vithal on promissory notes, advances made to the third defendant for the purposes of the administration, and a sum paid in cash on the execution of the mortgage-deed. The plaintiff now seeks to have the mortgage set aside and an account taken of what is really due in respect of the alleged consideration, alleging fraud and misrepresentation and undue influence on the part of the third defendant as to the debts of Vithal and the amount borrowed by him, and denying that the amount which ought to have been paid in cash was so paid.

Now, if the mortgage transaction was honest, and the suit not brought by the plaintiff in collusion with the third defendant, I should have expected to find, in the written statement of this defendant, not merely a general denial of fraud, &c., but a distinct assertion of what the consideration was, and a positive statement that the moneys were due or had been paid. Instead of this I find only general denials of fraud, &c., but no assertion that the promissory notes were existing at the time of the execution of the mortgage-deed, or that anything was done in respect of them. The defendant further does not assert that he actually borrowed any money for the purposes of the administration, nor does he say that the money which the mortgage-deed showed he had received in cash was so received. Further, he assents to an account being taken. The only account, however, asked for in the plaint is subject to the mortgage being set aside, and assumes that the circumstances which will be proved will be such as will induce the Court to say that the mortgage cannot be held to be good for anything more than can be proved on an account being taken of the various items which make up the [388] consideration. Consequently, it seems to me to be very possible that, not being able to set aside the mortgage as regards himself, he is colluding with the plaintiff to enable him to save what he can from the fire. Under these circumstances I consider him to be a "party opposite" to the first two defendants, although eventually the Court may not be able to make any order between him and them.

I therefore allow the first two defendants inspection of the documents set forth in part 1 of the first schedule to the third defendant's affidavit of documents affirmed on the 11th day of October, 1892, and filed on the 19th day of November, 1892.

With regard to the other documents of which inspection is sought, the third defendant distinctly swears that they are not in his possession, power, or control; and however much I may suspect the entire truth of that statement, there is nothing on the face of his affidavit which would enable me at the present stage to make further enquiries.

Attorneys for the plaintiff: Messrs. *Chalk, Walker, and Smetham*.
Attorneys for the first and second defendants: Messrs. *Janardan*
and *Ardeshir*.

Attorneys for the third defendant: Messrs. *Payne, Gilbert, and Sayane*.