

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Batchelor.

GANGASHANKAR PRABHASHANKAR, PLAINTIFF, v. BADHUR
MADHBHAI AND OTHERS, DEFENDANTS. *

1908.

October 15.

*Dekkhan Agriculturists' Relief Act (XVII of 1879), section 7(1)—
Defendant summoned for examination—Payment of batta.*

It is not necessary to pay *batta* to any agriculturist defendant summoned to be examined under section 7 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The *batta* is not payable by the plaintiff and the suit is not liable to be dismissed on failure to pay it.

CIVIL reference under section 617 of the Civil Procedure Code (Act XIV of 1882) by J. N. Bhatt, Subordinate Judge of Borsad, in the Ahmedabad District.

The plaintiff filed a suit against Badhur Madhbhai and others in the Court of the Subordinate Judge of Borsad in its Small Cause Jurisdiction. The defendant being an agriculturist, section 7 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was applicable and an agriculturist summons was ordered to be issued according to Form LXXXVIII at page 201 of the High Court Civil Circulars. The form was prepared in conformity with the provisions of section 7 of the Dekkhan Agriculturists' Relief Act which requires that in every suit the defendant shall be examined as a witness. The plaintiff was required to pay *batta*

* Civil Reference No. 4 of 1908.

(1) Section 7 of the Dekkhan Agriculturists' Relief Act (XVII of 1879):—

7. *Summons to be for final disposal of suit*:—In every case in which it seems to the Court possible to dispose of a suit at the first hearing, the summons shall be for the final disposal of the suit.

Court to examine defendant as witness:—In every suit the Court shall examine the defendant as a witness unless, for reasons to be recorded by it in writing, it deems it clearly unnecessary to do so.

Explanation:—The compulsory examination of the defendant shall not be dispensed with merely by reason of the fact that the defendant has filed a written statement.

1908.

GANGA-
SHANKAR
v.
BADHUR
MADHUBHAI.

for the attendance of the defendant as a witness and he refused to pay it on the grounds that there was no provision in the Civil Procedure Code (Act XIV of 1882) to compel a party to pay *batta* to a witness not summoned at his request, and that it was not necessary at all to pay *batta* to a defendant for being examined by the Court. Owing to the said contentions the Subordinate Judge submitted the following questions for an authoritative determination:—

“(1) Whether it is necessary to pay *batta* to an agriculturist defendant summoned to be examined under section 7 of the Dekkhan Agriculturists' Relief Act?

“(2) If it is, whether the same is payable by the plaintiff and whether the suit is liable to be dismissed on failure to pay it?”

The opinion of the Subordinate Judge was in the affirmative on the first question and in the negative on the second question for the following reasons:—

As regards the first question, I have the honour to observe that there are sections in the Civil Procedure Code (Proviso to section 36, section 68, section 120) which authorise a Court to direct that a party shall appear in person. But the consequences of non-appearance or dismissal of the suit of the plaintiff are a decree against the defendant or some lesser punishment affecting his interest in the suit (section 107). But there seems to be no provision in the Code that a party's presence shall be enforced by arrest, or proclamation or attachment of property just as there is provision to enforce the presence of a witness summoned to give evidence or produce a document, by warrant, proclamation or attachment (sections 168, 169, 174) if he fails to appear in response to the summons. In this connection the difference between the form of summons to a witness to give evidence (Form No. 125, Sch. IV, Civil Procedure Code) and the forms of summonses to a person for examination under section 267 (Form XIII at page 167, High Court Civil Circulars) and to a party for examination under section 287 (Form XXVI at page 169, High Court Civil Circulars) may be noted. In the former there is a penal clause drawing the witness's attention to the consequences of non-attendance whereas the latter two forms are silent as to the consequences. This difference in the forms indicates that the appearance under the latter two summonses is not obligatory and supports the view that there is no provision in the Code to enforce the presence of a person summoned otherwise than *as a witness*. If this view is correct, as I think it is, it is necessary for a Court if it has to secure the appearance of any person, be he a party to the suit or not, to issue a witness summons in the first instance. I am humbly of opinion that the Legislature had in mind this view

of the law when it enacted in section 7 of the Dekkhan Agriculturists' Relief Act that the defendant shall be examined *as a witness*. The words italicised have reference to the procedure to be adopted in securing the defendant's presence.

Whether a party ordered to appear in person and failing, can be proceeded against under section 174, Indian Penal Code, depends on the question whether the process was compulsory. A party failing to appear under the proviso to section 36 or section 66 cannot in my opinion be proceeded against criminally. Even if we assume that a party can be so proceeded against, liability to be criminally tried does not serve the direct purpose of the Court, which is to require his presence for examination. Unless the Court can issue a warrant for arrest, the presence cannot be enforced and for this purpose it becomes necessary to issue a witness summons in the first instance.

The point however does not seem to be free from doubt. For it may be argued contrary to what has been said above (1) that notwithstanding the absence of express provision as to issue of warrant in cases other than those of defaulting witnesses, a Court has inherent power to enforce its process and that the absence of such power would render the issue of summonses under sections such as sections 148, 267, 287, a futile procedure, as is not infrequently the case when a defendant is ordered to appear under section 237; (2) that section 171 seems to imply that it is not necessary to summon a party as a witness if the Court desires to examine him the words being "if the Court at any time thinks it necessary to examine any person other than a party to the suit, &c."

The next question is whether the plaintiff can be called upon to pay the *batta*. In the first place, the duty under section 7 of the Dekkhan Agriculturists' Relief Act, is imposed on the Court and not on the party. So it appears awkward that the Court of Justice should demand from the plaintiff *batta* to accomplish that which the Legislature requires of the Court. Besides to push the interests of an agriculturist to the extent of enforcing his presence in Court at the plaintiff's expense could hardly have been contemplated by the Legislature. In the second place, under the Civil Procedure Code, *batta* can be demanded from a party only if a witness summons is issued at his instance (section 160). No doubt, there are the words "subject to the rules of the Code, &c.," in section 171; but they could not have been meant to make any party pay the *batta* of a Court witness. Much less, can a Court by examining a party under section 7, Dekkhan Agriculturists' Relief Act, impose on the plaintiff a liability to pay *batta* to the defendant, for section 178 must be read in conjunction with section 160. Thirdly, there would have been no necessity for such resolution as is referred to in Circular 27 of the High Court Civil Circulars at p. 13, if a party were to be made liable for *batta* of a Court witness. For all these reasons I think that a plaintiff is not liable to pay the *batta* and that his suit cannot be dismissed on failure to pay it.

This question again does not appear to be free from doubt, as it is arguable from an opposite point of view as under :—

1908.

GANGA-
SHANKARv.
BADHUR
MADHUR.

1908.

GANGA-
SHANKAR
v.
BADHUR
MADHBHAI.

1. In section 267 of the Civil Procedure Code, there is an indication of Court's power to throw on any party the expenses of a summons to be issued by it of its own motion. The last words of the section are "and before issuing the summons of its own motion, shall declare the person on whose behalf the summons is so issued."

2. Though the High Court Civil Circulars at p. 13 shows that advances are to be made by Government in the first instance, they are to be refunded under the Circular from the amount realised in execution. This means that one of the parties is ultimately to bear the expenses of summons issued by the Court of its own motion. Why not then, should the expenses be borne at the commencement in such a case as the present?

G. N. Thakore (amicus curiæ), for the plaintiff.

N. K. Mehta (amicus curiæ), for the defendants.

SCOTT, C. J.:—The two questions referred for our opinion are :—

(1) Whether it is necessary to pay *batta* to any agriculturist defendant summoned to be examined under section 7 of the Dekkhan Agriculturists' Relief Act?

(2) If it is, whether the same is payable by the plaintiff and whether the suit is liable to be dismissed on failure to pay it?

We answer both questions in the negative.

Order accordingly.

G. B. R.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Batchelor.

1908.
November 16.

THE GOVERNMENT PLEADER, HIGH COURT, BOMBAY, APPLICANT,
v. JAGANNATH MORESHVAR SAMANT, OPPONENT. *

*Bombay Regulation II of 1827, section 56 (1)—Pleader—Misbehaviour—
Suspension of Sanad—High Court's disciplinary jurisdiction.*

Pleaders are a privileged class enrolled for the purpose of rendering assistance to the Courts in the administration of justice. Their position, training

* Civil Application No. 523 of 1908.

(1) Material portion of section 56 of Regulation II of 1827 is as follows :—

A pleader accused of a criminal offence, or guilty of misbehaviour or neglect of duty, shall be liable to be suspended or dismissed.