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Present : Bertram C.J. and De Sampayo J.

WIJESEKERA *v.* NAMASIVAYAM.

390—D. C. Colombo, 53,967.

Application to call witnesses after judgment—Courts Ordinance, s. 40—Commission to examine witness out of the Island after judgment.

An application was made (after judgment and) on appeal to examine on commission a witness residing out of the Island. The Supreme Court refused the application in the circumstances of the case.

Under section 40 of the Courts Ordinance all that the Supreme Court need consider in an application to call a witness after judgment is the interests of justice. But, nevertheless, the Court would have to be satisfied, in any case, that there was some special reason for such action.

THE plaintiff sued defendant in this action for the recovery of Rs. 15,000. This sum comprised several items of indebtedness, one of which was a sum of Rs. 4,439·87, which the plaintiff alleged had been paid by him to defendant by mistake in the belief that the same was due to defendant for guaranteeing certain loans made to him by the Hong Kong and Shanghai Banking Corporation, whereas the said sum was not due to defendant, inasmuch as the defendant had not guaranteed such loans ; and, further, the plaintiff was exempt from liability to pay them for the reason that plaintiff dealt directly with the manager and not through defendant.

The issues framed in respect of this part of plaintiff's claim were :—

(1) Did the plaintiff pay the defendant the sum of Rs. 4,439·87 by mistake in the belief that the sums making up that amount were due to him as shroff of the Hong Kong and Shanghai Banking Corporation for guaranteeing certain loans made by the said bank ?

(2) Were the loans not, in fact, guaranteed, and were the said sums making up the amount of Rs. 4,439·87 not due ?

(3) If so, was plaintiff entitled to reclaim the said sum of Rs. 4,439·87 ?

The defendant led evidence to prove that in the case of all Ceylonese and Indian customers of the bank all applications for financial help had invariably to be either recommended or guaranteed by him, and that no loans to, or overdrafts by, such customers were given by the bank, except through defendant's intervention or on his recommendation.

The plaintiff issued interrogatories (15), (16), (30), (31), and (32), which were in the following terms :—

(15) Do you admit that the bank does business with two classes of people in Colombo, viz., one class dealing with the bank through you and the other class dealing direct with the bank ?

(16) Do you admit that the former class pay you Re. 1 per mensem on every Rs. 1,000 borrowed by them from the bank irrespective of the commission you get from the bank for guaranteeing their loans ?

(30) Do you deny that these sums represented the commission of Re. 1 on every Rs. 1,000 per annum charged by you and were paid to you on your representation that you had guaranteed their overdrafts for the months of November and December, 1909, and January, February, March, April, May, and June, 1910 ? If you deny it, state on what account these sums were severally paid ?

(31) Did you ever guarantee Wijesekera & Co.'s overdrafts with the bank ?

(32) Do you deny that subsequently, when it was discovered that you had not guaranteed their overdrafts from Novermber, 1909, to June, 1910, you agreed to refund the said sums amounting in the aggregate to Rs. 4,439·87 ?

The defendant's answers to these interrogatories were as follows :—

(15) Yes. The European clients deal with the bank through the agent. The Ceylonese and Indians through me on my recommendation to the agent.

(16) The Ceylonese and Indian clients pay Re. 1 for every Rs. 1,000, whether the loans are guaranteed or recommended.

(30) Yes. I deny that these sums were paid to me on representation made to the plaintiff that I had guaranteed the overdrafts. Plaintiff was fully aware from the very commencement that the overdrafts had not been guaranteed, and that he had to pay the commission to me for recommending the overdrafts, as in the case of all my other clients similarly recommended.

(31) No, but they were given at my recommendation, and, apart from my express guarantee, I would be held responsible by the bank for any loss it might sustain as a result of accepting my recommendation.

(32) Yes. Plaintiff knew very well all along that the commission was paid all along, not for guaranteeing, but for recommending overdrafts. I deny that there was any such agreement to refund the sum of Rs. 4,439·87.

At the trial the plaintiff giving evidence in examination-in-chief said that European firms arranged for overdrafts directly with the manager, and that the present custom was for Ceylonese to go through the shroff ; and that in 1909 some went through the shroff, some did not ; when customers went through the shroff, the latter gave a guarantee to the bank, and was paid Re. 1 per Rs. 1,000 a month ; in 1908, December, he paid defendant for November account Rs. 263·29 as commission on his overdraft, because the defendant had made him understand that the defendant had guaranteed his account ; in July, 1909, he said he discovered that defendant had not guaranteed his account, and that plaintiff questioned him about it, and that defendant admitted that it was so and offered to refund the money paid as commission. He also said that defendant insisted on the commission being paid in cash, as defendant did not wish the manager to know that he was charging

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plaintiff commission. He further said that he did not know that the shroff of the Hong Kong and Shanghai Bank was entitled to charge commission on recommended loans, and that loans and overdrafts to him (the plaintiff) were never recommended by defendant, but that he dealt directly with the bank. He also added: "When I challenged defendant, he admitted he took commission only from guaranteed accounts. I do not know if others were paying for unguaranteed accounts." The plaintiff, on his re-examination, produced in evidence certain letters which had not been included in the list filed by him, and of which defendant had no notice whatever, and in which Mr. Whelan, who was the manager of the Hong Kong and Shanghai Bank at the time the transaction in question took place, had addressed him as "Dear Wijesekera," containing reference to business transactions, and inviting plaintiff to see him, from which he desired it to be inferred that the plaintiff's transactions with the manager, Mr. Whelan, were direct, and independent of the defendant, and without his knowledge, and were not covered by the defendant's guarantee or recommendation.

The defendant in his evidence denied that the plaintiff ever dealt directly with the bank, or that he ever told plaintiff that he had guaranteed defendant's account, but defendant said he had received commission from the plaintiff, as he was entitled to do according to the custom of the bank, not only from persons whose accounts he had guaranteed, but also from customers whose accounts he had recommended. He further denied that he ever agreed to refund the commission duly paid to him.

The portion of the judgment of the District Judge, P. E. Pieris, Esq., material to this point was as follows :—

> The shroff, if ever he figured to any appreciable extent in the matter of the overdraft, had dropped out of sight long ago. Whelan was on intimate terms with the plaintiff . . . . In December, 1909, on the 29th, he wrote personally to plaintiff, addressing him as "Dear Wijesekera," saying that it would be a convenience to the bank if plaintiff could let Whelan know what his probable requirements would be, especially as the holidays were approaching, and all the banks had to look after their funds carefully. When the manager writes thus to a client, the latter requires no assistance from the shroff. In April, 1910, Whelan again wrote to the plaintiff in his own hand, addressing him as "Dear Wijesekera," and subscribing himself again as "yours sincerely," asking for certain information regarding the overdrafts to communicate the same to Hong Kong. It does not seem necessary to pursue the matter further. It may be the case that defendant did have something to do at the start, when, presumably, plaintiff was not known to the bank, with bringing about his connection with the bank. There is no doubt that plaintiff sought his advice and assistance in order to smooth the way for him, but once the introduction had taken place all arrangements were made by the plaintiff directly with the agent, and without any assistance or interference from the defendant. Large sums were being handled, and defendant no doubt felt that he was entitled to have some of the pickings.

At the argument of the case in appeal the defendant's counsel moved that a commission be allowed to examine Mr. Whelan, who was residing in Jersey, in the Channel Islands, as it was impossible to secure his attendance in Ceylon to give evidence.

A. St. V. Jayawardene (with him *E. W. Jayawardene, Balasingham, H. V. Perera, Croos-Dabrera, Tiyagaraja,* and *H. E. Garvin*), for the defendant, appellant.—The Supreme Court has wide powers under section 40 of the Courts Ordinance to hear evidence after judgment. The only qualification is "as justice may require." The defendant was not in a position to know the relevancy of Mr. Whelan's evidence till after the plaintiff had given evidence. On the question as to what was the custom, the defendant has led sufficient evidence. But the defendant was not in a position to anticipate the letters produced by the plaintiff, which influenced the District Judge greatly in arriving at a judgment.

Plaintiff should have himself called Whelan if he intended to rely on the letters.

Counsel referred to *In re National Debentures and Assets Corporation,*[1] *Shields v. Boucher,*[2] *The King v. Robinson.*[3]

H. J. C. Pereira (with him *Elliott* and *Bartholomeusz*), for the plaintiff, respondent, referred to *Muttar v. Kathirasapillai.*[4]

June 23, 1920. BERTRAM C.J.—

After very carefully considering this application, we have come to the conclusion that it cannot be allowed. I announce this conclusion with some regret, because, in a case the decision of which presents such obvious difficulties as the present, it would have been more satisfactory to have had all the light that could have been shed upon it by a witness of the character of Mr. Whelan. But, in the circumstances of this case, we are precluded from acceding to this application. It is quite true that our hands are entirely free in the matter. Under section 40 of the Courts Ordinance all that we need consider is the interests of justice. "Special grounds" are not in terms mentioned in the section. Nevertheless, it is obvious that such a special procedure, as the calling of witnesses after judgment, could only be exercised on special grounds, and we should have to be satisfied in any case that there was some special reason for such action. I cannot help being impressed with the very forcible considerations urged in the case of *Nash v. Rochford Rural District Council,*[5] which Mr. Pereira has cited to us. Although I do not say that we should be concluded as regards every case, I think that they sufficiently conclude the present application. Moreover, it is not

[1] *(1891) L. R. 2 Ch. D. 505.*
[2] *(1846) De Gex and Smale 40.*
[3] *(1917) 2 K. B. 108.*
[4] *(1911) 14 N. L. R. 144.*
[5] *(1917) 1 K. B. D. 384.*

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as though we were asked to allow to be called before us a witness who is on the spot, and who could be cross-examined by counsel conversant with the facts of the case. We are asked to issue a commission for his examination, and, as far as we can see, it will be a commission to examine him, not in London, but in Jersey. As to the legal conditions of Jersey, we have not very full information. Moreover, apparently the case would not stop there. It is not as though mere formal evidence is required from Mr. Whelan. Mr. Jayawardene himself expressly desires to take him over certain parts of the evidence which has been given in the case, and Mr. Pereira indicates that in all probability he will have to adduce counter evidence if Mr. Whelan's evidence is taken on commission. From the facts of the case I should think that such a procedure is a very likely one. I do not, therefore, think that we should be justified in embarking upon this new development of the case. I may further add that, although Mr. Whelan is not apparently of the same class of witness as the witnesses referred to in the case of *Muttar v. Kathirasapillai*,[1] there is very great force in the principle laid down by the Chief Justice in that case, that it is dangerous to allow an important witness to be called after the pinch of the case has been ascertained.

In this case the appellant foresaw the necessity of calling evidence of local custom as to shroff's commission. He chose the alternative of calling such evidence as is locally available, and did not think it necessary to have the evidence of Mr. Whelan taken on commission. I think he must now stand by that election, and that we must decide the case on the point on which Mr. Whelan's evidence would be material with the assistance of such evidence as was called in the Court below.

The application should, therefore, be disallowed.

DE SAMPAYO J.—I agree.

Application disallowed.