## JAGANADAN PILLAI *v.* PERERA.

1901.
*May 15.*

*D. C., Kandy, 12,983.*

Onus probandi—*Duty of the party beginning to discharge the burden of proof fully—Evidence in rebuttal—Discretion of judge—Civil Procedure Code. s. 166.*

In an action raised to recover the balance of the price of a house sold to defendant, defendant in support of his plea of payment read in evidence the conveyance wherein plaintiff had acknowledged receipt of the full consideration and closed his case. Plaintiff thereupon proved by witness and documents that the balance claimed was not really paid. After plaintiff's case was closed defendant proposed to call evidence in rebuttal.

*Held* that, as the onus was on defendant to prove payment, it was his duty to adduce all the evidence he had, and that the District Judge having, in the exercise of his discretion vested in him by section 166 of the Civil Procedure Code, refused to allow the defendant to call evidence in rebuttal, there appeared no reason to interfere with it.

THE plaintiffs alleged that they conveyed a house and grounds to the defendant for Rs. 3,000 and were paid Rs. 2,500, and they raised the present suit to recover the balance Rs. 500. The defendant pleaded payment.

In support of his plea. his counsel read in evidence that part of the conveyance wherein plaintiff acknowledged to have received the full consideration, viz., Rs. 3,000, and closed his case.

Thereupon witnesses were called on behalf of the plaintiffs, who proved that only Rs. 2,500 had been paid, and that defendant had written two letters to the plaintiff's proctor requesting him to effect a settlement of the case by receiving Rs. 125.

After plaintiffs had closed their case, defendant's counsel proposed to call evidence in rebuttal, but this was objected to under section 163 of the Civil Procedure Code.

The District Judge (Mr. J. H. de Saram) held as follows:—

"I am of opinion that plaintiff is not entitled to adduce any evidence in reply. The onus was on him to prove the issue, which is one of payment. He should have adduced all his evidence before he closed his case. Mr. Vanderwall explained that when he put the transfer in evidence, he was under the impression that he shifted the burden of proof on plaintiff. That was not so. There was no shifting of the burden of proof. Mr. Vanderwall was content to discharge the onus that lay on the defendant by reading in evidence the transfer in which the plaintiff acknowledged receipt of the consideration. If Mr. Vanderwall intended to call Mr. Beven, he should have done so when he read the transfer in evidence and before he closed the plaintiff's case.

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He asked me to permit him under the provisions of section 166 to adduce evidence. I could not do so, because I do not consider a mistake on the part of a proctor gave cause within the meaning of that section. It would certainly be a dangerous precedent to establish."

He gave judgment for plaintiff.

Defendant appealed.

*Walter Pereira*, for appellant.—The District Judge thought he had no power to allow evidence in rebuttal. O'Kinealy in his note on section 180 of the Indian Code states that the judge has a clear discretionary power, but it should not be exercised without good reason. In the Ceylon Code the section that applies is 166. The District Judge assumes that the defendant's proctor had committed a mistake in not calling all the evidence he had as to payment. Defendant should be given an opportunity to rebut. If necessary, your lordships may put him on terms. We are prepared to pay the costs resulting from the supposed mistake of the proctor.

*Bawa*, for respondent.—It is not open to the defendant to repudiate the conduct of his proctor. Section 150 regulates the burden of proof, and section 166 vests discretion in the judge to allow further evidence. But this was not a case for the exercise of that power. The burden of proof was on the defendant, who alleged payment. He should have proved it to the hilt, especially as the acknowledgment of Rs. 3,000 in the body of the deed was contradicted by the notary's attestation that Rs. 2,500 only was paid in his presence.

*Walter Pereira*.—The attestation proves nothing, because the notary is bound to record only what was paid in his presence, and he cannot well speak of previous payments not made in his presence. Ordinance No. 2 of 1877, section 26 (18).

15th May, 1901. MONCREIFF, J.—

In this case the proctor for the defendant, having agreed to an issue with the proctor on the other side, opened the ball by putting in a deed of transfer, intending thereby to prove that he had paid the whole of the purchase money mentioned in the deed, amounting in all to Rs. 3,000. The sole issue raised by the judge was as to whether the whole of the money had been paid or whether the defendant had only paid Rs. 2,500. The defendant was perfectly well aware of the *onus*, and with his eyes open, having put in this deed, he closed his case. The deed contained the ordinary acknowledgment on the part of the transferor of the receipt of the

full price, viz., Rs. 3,000, but in the attestation clause Mr. Beven certifies to the payment of a sum of Rs. 2,500, being part of the consideration, and further certifies that the sum was paid by two cheques on the Mercantile Bank. The plaintiff then called some witnesses to prove that no more than Rs. 2,500 of the consideration had been paid, whereupon the proctor for the defendants desired to call rebutting evidence, and the judge declined to allow him to do so. The judge acted in his discretion, and I think he was right, and I am not prepared to interfere with his discretion. I agree to dismiss the appeal and affirm the judgment.

BROWNE, A. J.—

I agree, and would only add that this case shows how necessary it is when a plea of payment is made that the dates and the amounts of the payments should be specified. Further, I would suggest that, if at the inception of the trial the defendant had been examined as to the particulars of his payments, the issue would clearly have been on what date he paid Rs. 500, or rather, did he pay that sum on such and such dates. He, however, for want of this particularization, was given a free hand under the issues raised to plead any payment on any date he liked, and therefore it was his duty to adduce all his evidence thereon at the outset of the case. It does not appear to me that the matter of the plaintiffs' cross-examination afforded ground for allowing evidence in rebuttal. I therefore agree to affirm.