

KONNEHAMY v. DE SILVA.

· D. C., Matara, 779.

1896.  
October 8.

*Evidence—Proof of payments on judgment-debt—Action for moneys overpaid—Civil Procedure Code, s. 349—Costs.*

Where a judgment-debtor sued his creditor for recovery of moneys overpaid on the decree, *held*, that it was not competent to him to prove payments except as certified under section 349 of the Civil Procedure Code.

*Held* also that the costs in the Court below should be taxed as though the proceeding had been not an action, but a petition under section 349.

PLAINTIFF alleged that he was judgment-debtor in D. C. case No. 35,876; that his creditor (who was plaintiff in the latter case and defendant in the present case) recovered from him various sums of money, leaving a balance of only Rs. 486; that, notwithstanding, the defendant sued out a writ of execution for

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Rs. 877 and recovered from him the whole of that amount. He now prayed that the defendant might be decreed to pay to plaintiff the sum of Rs. 391 recovered in excess from him by the defendant.

When the plaint was filed defendant took objection that the plaintiff ought to have proceeded by petition under section 349 of the Civil Procedure Code and had the alleged payments certified. The District Judge upheld the objection and returned the plaint to plaintiff, who thereupon filed a second plaint, which was open to a similar objection, but no objection having been taken the District Judge heard the case on the issues framed, viz. :—

(1) Whether plaintiff had paid defendant two sums of Rs. 327 and Rs. 150 before the payment of Rs. 400 on October 31, 1892 ; and

(2) Whether the two receipts which plaintiff produced, purporting to bear the signature of the defendants, for the two sums of money were forgeries or not.

The District Judge, after evidence heard, decided both the issues against the plaintiff.

Plaintiff appealed.

*Sampayo*, for appellant.

*Dornhorst*, for respondent.

8th October, 1896. BONSER, C.J.—

In his judgment the District Judge called attention to various matters which discredited the plaintiff's story, amongst them that the plaintiff was a trader and a man of business, and would not be likely to make such a mistake as to overpay his creditor ; that he did not commence the action till six months after the discovery of his mistake ; that the account which he gives of the payment of the first sum of Rs. 327 was contradicted by the evidence of Mr. Gooneratna, the Deputy Fiscal ; that when he filed his plaint he did not mention the fact that he held these two receipts ; that two of the witnesses whom he called to prove these payments were not mentioned in his original list of witnesses ; that the notarial receipt, which was admittedly given by the defendant on the last occasion when money was paid by the plaintiff to the defendant, contains no reference to this previous payment.

All these things influenced the mind of the District Judge and brought him to the conclusion that the story of the plaintiff was untrue. The evidence as to the handwriting is not of a very satisfactory character, and the District Judge was justified in attaching little weight to it.

Nothing which has been said by Mr. Sampayo has satisfied me that the District Judge has arrived at a wrong conclusion. I am therefore of opinion that the appeal must be dismissed.

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There is to my mind a fatal objection that the evidence as to these payments ought not to have been admitted contrary to the provisions of section 349 of the Civil Procedure Code. But we do not dismiss the appeal on that ground as we might, because the parties had evidently agreed to try these issues, and we consented to hear the appeal as though it had been an appeal from a petition by a judgment-debtor under section 349, which the Court had decided against the petitioner. But at the same time the costs in the Court below must be taxed as though the proceeding had been not an action, but a petition under section 349.

The respondent will have his costs of the appeal.

WITHERS, J.—

I am quite prepared to agree with the decision of the District Judge, and with the grounds he has assigned for his decision.

