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HENDRIK KURE *v.* SAIBU MARIKAR.

D. C., Puttalam, 1,326.

Procedure—Right of District Judge, after both parties had closed their case, to call ex mero motu a witness not cited by the parties—Costs.

It is competent to the District Court, after both parties have closed their case, to call of its own motion a witness not cited by the parties and inform itself on any relevant point that required elucidation.

It is right as a general rule that, when a plaintiff brings his action in a class higher than that in which the result shows that he ought to have brought it and puts the defendant to unnecessary expense, such expense should be set off against costs payable by the defendant to the plaintiff.

THIS action was instituted for the recovery of Rs. 4,368.20 as damages consequent upon defendants wrongfully seizing (by means of a writ of injunction obtained in case No. 962 of the District Court of Puttalam, which they had brought against the present plaintiff) 335 logs of ebony as timber belonging to them, and keeping it under seizure so long that it deteriorated in value to the extent of the amount claimed.

The defendants pleaded (1) that the 11th section of the Ordinance No. 22 of 1871 barred plaintiff's claim; (2) that in case No. 962 the question of damages was considered and disposed of, and the judgment pronounced thereon was *res judicata;* and (3) that the timber had not deteriorated in value to the extent of Rs. 4,368.20 or any part thereof.

The District Judge overruled the plea of prescription, as prescription could not run during the pendency of the injunction, and held that the present claim could not have been included in the claim made by the present plaintiff in his answer in case No. 962, and the judgment thereon was not *res judicata.* And on the merits, after the plaintiffs and defendants had closed their respectve cases, the Court desiring to hear the evidence of an officer of the Forest Department, in whose custody the timber seized was admittedly left, called *ex mero motu* Mr. F. O. Felsinger. the Forest Ranger of Puttalam, and examined him as a witness on the question of weight and value of the timber. The Court then found " that the plaintiff has sustained a loss of not " less than Rs. 20 a ton by reason of the wrongful detention of " the timber. Taking it at 25 tons, this would amount to Rs. 500. " Interest at nine per cent. for three years on the total value of " the timber, Rs. 337.50. Depôt ground rent at Rs. 2.50 per men- " sem for three years, Rs. 40. Total Rs. 927.50;—for which amount " I give judgment in plaintiff's favour with costs in that class (4)."

Defendants appealed.

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Wendt, Acting A.-G., with *Morgan*, for appellant, submitted that the District Judge had wrongly taken the evidence of the Forest Ranger. Both parties had closed their cases, and the Court had reserved its judgment on the material they had placed before it (*Fernando v. Johanes Appu, 1 S. C. R. 262*). Section 134 apparently contemplated the case of a person whose value as a witness was unknown to the parties before the trial, but became apparent during the course of the trial. The words " not named as a witness by a party to the action " were suggestive. If they knew of his value but deliberately abstained from calling him, the Court should not. But, even if admissible, his evidence was improperly taken without notice to either party. [BONSER, C.J.— You do not complain of want of notice in your petition of appeal, but only of the fact that his evidence was taken.] The plaintiffs have sued in too high a class, and should therefore make good to defendant the unnecessary costs to which he was thereby put. That was the direction given by this Court in *Gunesekera v. Senaratne* decided on 14th February, 1900 (D. C., Matara, 2,206).

Sampayo, for respondent.—The provisions of section 134 of the Code justify the examination of the Forest Officer by the District Judge, and there is no reason for limiting their operation in the way suggested by the appellants. As to costs, it is submitted that the matter of class is discretionary with the judge, and where, as in this case, no sum is tendered to the party or paid into Court, the order as to costs, though in a higher class than the amount awarded, should not be disturbed.

28th June, 1900. BONSER, C.J.—

In this case the District Court awarded to the plaintiff damages amounting to Rs. 997.50, in an action which he brought against the defendants based upon the conduct of the defendants in getting an injunction against him and seizing certain timber belonging to the plaintiff, whereby the plaintiff was prevented from selling the timber and had to bear certain expenses for warehousing it.

The plaintiff claims Rs. 4,368.20, being damages sustained by him for the detention of the timber and its deterioration in value by reason of such detention.

The defendant appeals on several grounds, most of which were abandoned by his counsel in the argument; but one objection was pressed and that was this, that there was no evidence of the depreciation in value of this timber except the evidence of the forest ranger, and that that forest ranger had not been called by the plaintiff or the defendant, but that he had been called as a

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witness *mero motu* by the District Judge himself. It was contended that the District Judge had no right to inform himself in this way, and that that evidence ought to be disregarded entirely with the result that the plaintiff's claim for damages would be dismissed as not having been proved. It seems to me that the District Judge was quite right in acting as he did in getting evidence to inform himself on this pont—the evidence of a gentleman who has no bias on either side and who was well acquainted with the matter—and in my opinion not only was the District Judge's procedure in accordance with common sense, but it was justified by our Code. Section 134 clearly authorizes the District Judge to act in this way.

Then it was urged that the plaintiff by claiming a much larger sum than the District Judge held that he was entitled to, put the defendant to unnecessary expense. A claim between Rs. 1,000 and Rs. 5,000 falls under class V. of the schedule to the Stamp Ordinance. It was necessary, therefore, for the defendant to affix stamps of the value of that class to all his proceedings. To take one instance, he had to affix a stamp of Rs. 7.50 for his answer, whereas if the action had been brought in class IV., in which class the District Judge's judgment finds it ought to have been brought, the stamp would have been Rs. 5 only.

The District Judge ordered that the costs payable by the defendant should be paid in class IV. That is quite right so far as it goes; but he has not made any allowance to the defendant for the unnecessary costs which he has been put to by being obliged to use higher stamps. We have in several cases decided that it is right as a general rule that, when a plaintiff brings his action in a class higher than that in which the result shows he ought to have brought it, and puts the defendant to unnecessary expense, that unnecessary expense should be set off against costs payable by the defendant to the plaintiff.

In the present case I see no reason why that rule should not be followed. The decree will be amended by allowing the defendant to set off any unnecessary costs which he has been put to by the exaggerated claim.

As regards the taxation of the proctors' and advocates' costs, that will of course fall within the class corresponding to the class of the Stamp Ordinance; that is to say, it will be under class III. to the schedule of the Civil Procedure Code.

MONCREIFF, J.—I am of the same opinion.