1948 *Present :* **Nagalingam and Basnayake JJ.**

SUNDARAM, Appellant, *and* GONSALVES, Respondent

S. C. 51—D. C. Colombo, 17,804 M

Civil Procedure Code—Discovery of documents—Not in possession of party—Power of Court—Section 103—Order for costs—Discretion of Judge—When Appeal Court will interfere—Section 211.

A court has no power under section 103 of the Civil Procedure Code to order the production of documents except such as are known by discovery or otherwise to be in the possession of a party. Possession in this section means sole legal possession or a power and right to deal with them.

A court of trial has a discretion in the matter of costs. But where no discretion is exercised and costs are arbitrarily given, a Court of Appeal will interfere.

APPEAL from a judgment of the District Judge, Colombo.

H. V. Perera, K.C., with *A. C. Nadarajah*, for plaintiff appellant.

J. R. V. Ferdinands, for defendant respondent.

Cur. adv. vult.

July 19, 1948. BASNAYAKE J.—

The plaintiffs, two persons named Sundaram and Ganapathy, carry on business under the name of Pappa & Co. The defendant, Gonsalves, is the proprietor of a business known as Chemical Products Co. On July 7, 1943, the plaintiffs and the defendant entered into an agreement, the tenor of which is that the plaintiffs would supply the defendant raw material and tools for the manufacture and supply to them by the defendant of certain manufactured goods. The plaintiffs instituted the present suit on April 1, 1947, on an alleged breach of that agreement by the defendant. On June 25, 1947, the defendant's proctor submitted, with notice to the plaintiffs' proctor, the following motion praying for an order under section 103 of the Civil Procedure Code (hereinafter referred to as the Code) :—

"The plaintiff on the 24th of September, 1945, removed from the Defendant his Two Ledgers, Two Journals and Two Cash Books, and these Books are at present in the possession of the plaintiff.

For the purpose of preparing the Defendant's Answer to this action it is necessary that these Books should be returned to the Defendant

in order that they may be examined by a Chartered Accountant, who had been already retained by the Defendant for this purpose. Plaintiff refuses to return the Books.

In these circumstances I move in terms of Section 103 of the Civil Procedure Code for an Order on the plaintiff to produce the above Books in Court. "

On July 4, 1947, counsel for the plaintiffs stated that they had no books belonging to the defendant and desired the defendant to file an affidavit giving particulars. On July 16 the proctor for the defendant filed the following affidavit and moved that the Court be pleased to direct the plaintiffs in terms of section 103 of the Code to produce the documents referred to in the affidavit.

" I, J. C. Gonsalves of Lunawa, make Oath and state as follows :—

(1) I am the Defendant in the above styled action.

(2) On the 24th of September, 1945, Mr. K. V. S. Sundaram, the 1st Plaintiff in this action, came to my house at " Lyn Grove ", Lunawa, and removed the following Books of Accounts, to wit :—Two Ledgers, Two Journals, and Two Cash Books kept by me, and has failed to return same to me up to date.

(3) The aforesaid Books of Accounts are at present in the possession of the said Plaintiff.

(4) I have for the purposes of getting ready for this action retained a Chartered Accountant to examine these Books of Accounts and give me a report.

(5) My Proctor wrote to the Plaintiff asking for the said Books of Accounts but the Plaintiffs deny that they have any Books of Accounts belonging to me.

(6) In these circumstances I move in terms of Section 103 of the Civil Procedure Code for an Order on the Plaintiffs to produce the above Books of Accounts in Court. "

On August 29, 1947, the following objections were filed by the plaintiffs :—

" The Statement of Objections of the plaintiffs abovenamed appearing by Subramaniam Sivasubramaniam, their Proctor, sheweth as follows :—

(1) The plaintiffs do not have in their possession or power any books of account of the defendant.

(2) The plaintiffs admit the correctness of paragraph five (5) of the defendant's affidavit dated the 13th July, 1947. The allegation in paragraph 3 of the affidavit stating that the books of account are at present in the possession of the plaintiffs is entirely untrue.

(3) During the period when the agreement of the 7th July, 1943, was in operation, the plaintiffs had on different occasions obtained some

of the account books kept by the defendant for perusal and return. On all such occasions, the books had been duly returned to the defendant.

(4) Section 103 of the Civil Procedure Code has no application to the facts of this case.

(5) The application of the defendant is intended to harass the plaintiffs and to prejudice the mind of the Court by suggesting that the plaintiffs have failed to return some of the books which they had removed on earlier occasions and all of which have been returned to defendant.

(6) As a matter of fact the defendant did have in his possession and power his account books subsequent to the 24th September, 1945. The plaintiffs have in their hands various statements of accounts prepared by the defendant from his own books of account including some statements signed by him in 1946.

Wherefore the plaintiffs pray that the application of the 23rd June, 1947, be dismissed with costs and for such other and further relief as to this Court shall seem meet."

On September 4, 1947, the plaintiffs filed a list of witnesses and documents in connexion with the inquiry for the production of account books and obtained summons on their witnesses. Eventually the matter came up for hearing on September 10, 1947. On that day counsel for the defendant submitted that, as the plaintiff had filed a statement of objections stating that the books of which inspection is sought are not in his power or possession, he did not desire the Court to go into an inquiry whether the plaintiff had such books as the matter could be more properly considered at the trial. Counsel for the plaintiff then pressed for his costs stating that he had documents to show that the books in question were in the defendant's hands. He also submitted that the application was not one which lay under section 103 of the Code. In reserving the consideration of costs till the trial stage the learned District Judge observes :—

"I shall defer it till after the trial. If at the trial I am satisfied that the defendants made a frivolous or unnecessary application I shall mulct them in costs. If on the other hand, I find that the plaintiffs did in fact have in their possession or power certain of the defendants' books in respect of which they had the right to obtain an order for production I shall mulct the plaintiffs in costs."

The rules as to costs are to be found in Chapter XXI of the Code. For the purpose of this appeal only sections 209 and 211 need be noticed.

"209. When disposing of any application or action under this Ordinance, whether of regular or of summary procedure, the court may, unless elsewhere in this Ordinance otherwise directed, give to either party the costs of such application or action, or may reserve the consideration of such costs for any future stage of the proceedings ; any order for the payment of costs only is a decree for money within the provisions of section 194 as to payment by instalments."

"211. The court shall have full power to give and apportion costs of every application and action in any manner it thinks fit, and the fact that the court has no jurisdiction to try the case is no bar to the exercise of such power :

Provided that if the court directs that the costs of any application or action shall not follow the event, the court shall state its reasons in writing."

By these sections the Court is invested with a discretion in the matter of costs. But that discretion must be exercised judicially. It is not free to do what it chooses. It will be helpful to note in this connexion the words of Lord Halsbury :

"'Discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion : according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself." [1]

Lord Wrenbury's dictum on the same subject is an equally good guide. He says :

"A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably." [2]

Learned counsel for the appellant submits that the learned District Judge has not exercised his discretion in his order as to costs and that he has proceeded on a wrong interpretation of section 103 of the Code. I shall first consider whether the learned District Judge has exercised his discretion in regard to costs. The defendant's proctor alleged that the plaintiffs on September 24, 1945, removed his client's books and that they were in the possession of the plaintiffs. He stated that he wanted them for the preparation of the answer. When the plaintiffs denied the allegation that the books were with them, the defendant swore an affidavit that, on September 24, 1945, the first plaintiff removed the books specified therein by him. When the plaintiffs by their counter-affidavit denied his allegations, he lost courage and although he was represented by eminent counsel did not desire the Court to inquire into the matter. Defendant's counsel's suggestion that the matter could more properly

[1] *Sharp v. Wakefield, (1891) A. C. 173 at 179.*
[2] *Roberts v. Hopwood, (1925) A. C. 578 at 613.*

be considered at the trial is irreconcilable with the earlier submission of the defendant's proctor that the books were necessary for the preparation of his answer. The defendant did, on October 30, 1947, actually file his answer without the aid of the books which he said were so necessary and for the examination of which he had engaged a Chartered Accountant. I can find no redeeming feature in the case of the defendant. Having made allegations which he was not prepared to substantiate, and having put the plaintiffs to the expense of meeting them, he seeks to avoid costs without even explaining his conduct.

The learned District Judge gives no reasons for reserving the consideration of the costs of the inquiry till the trial stage of the case. I can find no material in the record on which the order can be sustained. It appears from section 211 of the Code which I have quoted above that the rule is that the successful party is entitled to his costs. Where the Court does not award costs to the successful party it is required by statute to state its reasons in writing. As I have stated earlier, the learned District Judge has not done so. He has not acted in accordance with the principles by which a tribunal vested with discretion should exercise that discretion. In the circumstances the submission of learned counsel for the appellant is entitled to succeed.

The defendant's application under section 103 of the Code was made not in consequence of an admission by the plaintiffs either in an affidavit under section 102 of the Code or in their plaint or otherwise that the books were in their possession or power. The learned District Judge appears to have taken the view that he had a right to order the production of any document regardless of whether it was admitted to be in the possession or power of a party or not. I can find no authority in the Code for his view. Under section 103 of the Code, the Court may at any time during the pendency therein of any action order the production by any party *of such of the documents in his possession or power* relating to any matter in question in such action or proceeding as the Court thinks right. The Court's power to order production is confined to such documents as are known by discovery or otherwise to be in the possession or power of any party. Unless there is an admission direct or indirect that the documents are in the possession or power of any party at the time, no order under section 103 can be made. The words "as the Court thinks right" vest the tribunal with a discretion in granting an application. The Court will not order the production of a document even where it is admitted to be in a party's possession or power unless it thinks it right to do so. Possession in this section means sole legal possession, or a power and right to deal with them. In the instant case there is no admission in the pleadings nor has the defendant taken the trouble to ascertain, by obtaining discovery under section 102, whether the books are in the plaintiffs' possession before making his application under section 103.

The corresponding provisions both in England[1] and in India[2] are in the main the same as our section. I am fortified in my view by the

[1] *Order 31, Rule 14.*

[2] *Order 11, Rule 14.*

decisions of the English [1] and Indian [2] Courts which have given the same meaning to corresponding provisions of their Civil Procedure rules.

Learned counsel for the respondent submits that the learned District Judge has exercised his discretion as to costs on the material before him and that when discretion has been properly exercised it will not ordinarily be reviewed in appeal. This Court has undoubtedly the power to entertain an appeal against an order as to costs [3]. An appeal lies from any error in law or in fact committed by a District Court [4]. A question of costs may, like any other order which involves the exercise of discretion, fall under either category. In this connection one is reminded of the following observations of Lord Sumner :

> " Justiciable questions are not divisible into three kinds, questions of law, questions of fact, and questions of discretion. Judicial discretion as to costs goes to the judge's powers over questions of law and questions of fact, but the powers themselves alike are powers over costs and costs only. " [5]

The powers of this Court in regard to an appeal as to costs appear to have been considered by Hearne J. in *Yapa Appuhamy v. Don Davith* [6], wherein he remarks :

> " It is true that a Court of Appeal does not ordinarily interfere with the discretion exercised by a court of trial as to costs. But, where it is clear that a court of trial has exercised no discretion at all and has arbitrarily given costs against the party who succeeded on the issue before the court, it would be contrary to all principles of justice if it did not interfere. "

I am in agreement with Hearne J. when he says that this Court has power to interfere when the court of trial has exercised no discretion at all and has arbitrarily given costs, but I do not wish to restrict, to the instance given by him, the power to review in appeal an order involving the exercise of discretion. I prefer to adopt the principles enunciated by Lord Wright in regard to the powers of the Court of Appeal in England to review orders involving the exercise of discretion. He says :

> " It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not

[1] *Kearsley v. Phillips, 10 Q. B. D. 36, 40, and 465.*
Murray v. Walter, Cr. and Ph. 114.
Heeman v. Midland, 4 Madd. 391.
Princess of Wales v. Liverpool, 1 Sw. p. 123.
Bray on Discovery, p. 191.
See also the cases cited at p. 153 of Bray on Discovery.

[2] *Rameswar Narayan Singh v. Rikhanath Koeri, (1920) A. I. R. Patna 131 at 136.*
Baidyanath and others v. Bholanath Roy and others, (1923) A. I. R. Patna 337 at 338.

[3] *Government Agent, Uva, v. Banda et al, (1910) 13 N. L. R. 341.*
[4] *Section 73, Courts Ordinance.*
[5] *Donald Campbell & Co. v. Pollak, (1927) A. C. 732 at 763.*
[6] *(1937) 10 C. L. W. 25.*

entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The Court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and one which requires a careful examination by the Court of Appeal." [1]

I think the above remarks apply with equal force to appeals provided by the Courts Ordinance and may fairly be used as a guide.

The judgment of the learned District Judge is set aside and the plaintiff is declared entitled to his costs. This appeal is allowed with costs.

NAGALINGAM J.—I agree.

Appeal allowed.

1949 *Present :* **Gratiaen J.**

In re ATHURUPANE

S. C. 457—In revision M. C. Panadure, 8,977

Criminal Procedure Code—Postponement of proceedings—Rules for remanding accused—Bail—Judicial discretion—Cautious exercise necessary—Sections 289 (2) and (4), 396.

Where an accused person is remanded for a term not exceeding the period prescribed in section 289 (2) of the Criminal Procedure Code it is essential that he should be produced in Court at the expiry of that term so that the Magistrate might bring his mind to bear once more on what would be the appropriate order to make should the inquiry or trial be postponed.

The fixing of bail calls for the exercise of judicial discretion and for the most anxious care in each case.

ORDER made in revision in respect of certain orders of the Magistrate, Panadure.

Accused present in person.

R. A. Kannangara, Crown Counsel, for Attorney-General.

[1] *Evans v. Bartlam, (1937) A. C. 473 at 486.*