

1949

Present : Nagalingam and Windham JJ.

SENEVIRATNE, Appellant, and KARIAWASAM, Respondent

*S. C. 11—D. C. Kandy, 2,770**Civil Procedure Code—Examination of accounts—Appointment of Commissioner—Right to summon witnesses—Section 430.*

Plaintiff and defendant jointly bought an estate and defendant was placed in charge of it. Plaintiff sued defendant for an account. Defendant tendered to Court two sets of accounts duly audited. Plaintiff applied to Court for a Commission to a firm of accountants to examine and report on the accounts and his application was allowed. The Commissioner so appointed wanted the attendance at his office of the defendant and his accountant and plaintiff applied to Court for a summons on them. The Judge directed summonses to issue.

Held, that the Commissioner was not one appointed under section 430 of the Civil Procedure Code and that the issue of summons was not justified in law.

APPPEAL from a judgment of the District Judge, Kandy.

M. H. A. Azeez, for defendant appellant.

Cyril E. S. Perera, with *L. G. Weeramantry*, for plaintiff respondent.

Cur. adv. vult.

April 12, 1949. NAGALINGAM J.—

The facts which give rise to this appeal may be shortly stated as follows : The plaintiff and the defendant purchased jointly certain landed property known as "St. Martin's Group" and the defendant was placed in charge of it as Superintendent to work and manage the estate. The plaintiff alleging that the defendant had not tendered accounts instituted this action to compel the defendant to render an account and on the basis of that account to compel him to pay such sums as may be found due to the plaintiff. The plaintiff also claimed damages on the basis of mismanagement of the estate by the defendant. The defendant alleged that the accounts for part of the period had already been tendered and that for the remaining period accounts were under preparation by a firm of Chartered Accountants and that he was willing to pay the plaintiff any sum that may be lawfully due to him. He also denied that the plaintiff was entitled to any damages on the ground of mismanagement of the property.

At the date of trial the defendant tendered to Court two sets of accounts covering the period during which he was in charge of the estate and which were duly audited. Plaintiff's counsel thereupon made application to Court that the accounts tendered as well as the books of account and connected papers kept by the defendant "be forwarded with a

Commission to Mr. H. L. Pope of the firm of Messrs. Pope & Co., Accountants, for examination and report thereon". Plaintiff's counsel further said that he reserved to the plaintiff the right to file objection to the audited accounts after the receipt of Mr. Pope's report. Defendant's counsel consented to the application and Commission was issued to Mr. Pope.

Mr. Pope apparently met with difficulty in understanding the accounts tendered and wrote to the firm of Messrs. Satchithananda, Schokman & de Silva, the Chartered Accountants who had prepared the accounts, for assistance in investigating the accounts and requesting that the clerk of the firm who was engaged in the work may be directed to attend his office so that he may go through the accounts with him. To this letter Messrs. Satchithananda, Schokman & de Silva replied that the accounts were perfectly understandable without any assistance on their part. Mr. Pope also wrote to the defendant to attend his office and explain the accounts but the defendant sent no reply and did not attend. The plaintiff thereupon applied to Court for summons to issue on Messrs. Satchithananda, Schokman & de Silva and the defendant directing their attendance at Mr. Pope's office. Notwithstanding the defendant's objection, the learned Judge directed summons to issue. The appeal is taken from that order.

The order of the learned District Judge has been sought to be supported by reference to section 430 of the Civil Procedure Code which empowers that "in any action in which an examination or adjustment of accounts is necessary, the court may issue a commission to such person as it thinks fit, directing him to make such examination." The first point to be emphasized is that a Commission under section 430 can only issue where an examination or adjustment of accounts is deemed necessary and that must mean, deemed necessary by Court, (not by one of the parties), as for instance, where the Court before entering a decree in a partnership action (section 202 of the Civil Procedure Code) or in an action for an accounting of pecuniary transaction between principal and agent (section 203 of the Code) considers it essential that the accounts or disputed items of accounts should be examined to facilitate it in entering up the decree. The corresponding section under the Indian Procedure, Order 26 Rule 11 has been interpreted in this sense: See *Bharatchandra v. Kiranchandra*¹. The normal procedure in an action for accounting would be for the party called upon to account to file his accounts and for the plaintiff then to file his objections to those accounts and the Court would next have to investigate the objections so filed. If the Court finds that the objections cannot be dealt with conveniently and that it will be more expeditious that an investigation should be made by an accountant to assist it in determining the liability of the defendant, the Court would then be entitled under section 430 to issue a Commission.

In this case it would be seen from what has been said before that the case did not reach such a stage that the Court did require the assistance of an accountant to determine the liability of the defendant. In fact

¹ A. I. R. 1925 Cal. 1060.

the application for a Commission was to enable the plaintiff to have the accounts looked into with a view to formulating his objections to them. Although the term "Commission" was used, one can quite understand why it was used, though not in the sense in which the term has been used in section 430 of the Civil Procedure Code. On the defendant tendering his accounts, the plaintiff would have been entitled to examine the documents and he could examine them only in the Court premises. It may have been inconvenient for bulky accounts to be examined at length in the Courthouse, and the application for the Commission cannot but be regarded merely as an application for an authority of Court to enable the documents to be removed from the Court and to be examined in the more congenial surroundings of an accountant's office. The Commissioner so appointed would not properly be a Commissioner within the meaning of section 430 of the Civil Procedure Code but merely a witness with facilities provided for formulating objections, if any, to the accounts filed. The terms of the Commission are explicit and leave no room for doubt as to the nature of the authority conferred on the Commissioner. They only direct the Commissioner to examine the accounts and make a report. The Commission does not empower the Commissioner to examine the parties or witnesses.

It has, however, been contended that under section 434, a Commissioner appointed to investigate accounts has the power to examine the parties and witnesses. But this section appears in a part of the Chapter headed "General Provisions" and is intended primarily to apply to Commissions for the examination of parties and witnesses in terms of sections 420, 422, &c. Section 436 is a section that throws light on the construction to be placed on section 434. That section provides that when a Commission is issued under this Chapter the Court shall direct the parties to the action to appear before the Commissioner in person or by their recognized agents or Proctors, clearly indicating that where the Commissioner is required to examine parties the Court would give a direction to that effect to the parties. The absence of such a direction in the Commission must be regarded as an implied indication by Court that it withholds from the Commissioner the power to examine parties or witnesses even if section 434 be deemed to apply to a Commission to examine accounts and that the Court intends to avail itself of the exception created by the section by the use of the words, "unless otherwise directed by the order of appointment".

The defendant contends that he would not have agreed to a Commission being issued to Mr. Pope had it been suggested that Mr. Pope was to examine parties or witnesses. The consequences of construing the Commission in the way the learned District Judge has done would be, to put it at the lowest, most unsatisfactory. The effect would be to enable a witness of the plaintiff to interrogate the defendant and his witnesses in regard to the defence even before the Court could pronounce its views on the nature of the defence. Even a Commissioner whose appointment under section 430 has been duly made has been held to be not in the position of a Judge or arbitrator. See *Tin Cowri Devi v. Sotto Dowel*¹,

¹ 6 C. L. J. 105.

which case is not available to me but a reference to it is found in Sarkar's Commentary on the Indian Civil Procedure Code¹. In a case reported in *All India Reporter*², where the Court appointed a Commission to investigate and to report on the profits arising from certain property mortgaged, it was held that the Commissioner was not entitled to take evidence as to the possession of the property by any of the parties or the extent of that possession.

For the foregoing reasons the conclusion I reach is that Mr. Pope was not appointed a Commissioner within the meaning of section 430 of the Civil Procedure Code and that the order directing the defendant and his witnesses to appear before him was not justified in law. I therefore set aside the order of the learned District Judge. The defendant will have the costs of appeal and of the argument in the lower Court.

WINDHAM J.—I agree.

Appeal allowed.

1948 Present: Nagalingam and Basnayake JJ.

VEDIN SINGHO, Appellant, and MENCY NONA, Respondent

S. C. 491--D. C. Balapitiya, 39

Seduction—Corroboration of plaintiff's evidence necessary.

In an action to recover damages for seduction the evidence of the plaintiff must be corroborated in some material particular.

APPEAL from a judgment of the District Judge, Balapitiya.

U. A. Jayasundera, for defendant appellant.

K. C. de Silva, for petitioner respondent.

October 25, 1948. NAGALINGAM J.—

The first plaintiff is a minor. Acting by her next friend, the second plaintiff, she instituted this action claiming damages on the ground that the defendant had seduced her under promise of marriage. After trial, the learned judge entered judgment for the first plaintiff in a sum of Rs. 750.

On appeal, it has been contended that there is no evidence which would show that the evidence of the first plaintiff has been corroborated in any material particular, which is made a requirement under our law before an action of this nature can succeed. The learned judge has relied upon one circumstance as showing corroboration of the first

¹ 8th ed. 1919.

² A. I. R. 1925 Patna 576.