Present: Bertram C.J. and De Sampayo J.

1920.

MANIAN *v.* SANMUGAM.

20—D. C. Colombo, 52,029.

Objection that the evidence was formally defective to justify finding—Question of law—Objection not taken in the District Court—Raising question for the first time on appeal.

At the hearing the plaintiff swore that he gave defendant some jewellery. Defendant's counsel stated that he would not cross-examine on this point, but that he would call the defendant to deny it, and leave it to the Court to decide on the credibility of the parties. The defendant, however, was not called as a witness. The Judge decided for the plaintiff on this item. On appeal counsel urged that the evidence was formally insufficient to justify the finding, as the plaintiff did not say in express terms that he supplied the jewellery.

Held, that as the point was not taken in the lower Court, the point could not (in the circumstances of this case) be taken in appeal.

"The point is, in effect, a point of law . . . . The case seems to me to come within the principles enunciated in the case of *The Tasmania.*[1]"

[1] *(1890) 15 A. C. 223.*

1920.

Manian v. Sanmugam

THE facts appear from the judgment.

H. J. C. Pereira, for appellant.

Drieberg (with him *E. W. Jayawardene* and *Joseph*), for respondent.

October 18, 1920. BERTRAM C.J.—

This is an action between two members of the same family, plaintiff being a nephew of the defendant. For some time the plaintiff was in the service of the defendant, and during an illness of the defendant took charge of his business. On his recovery it appears that the defendant had good reason to suspect the honesty of the plaintiff in the management of his affairs. He alleged that the plaintiff had misappropriated some of his moneys; arrangements were, however, made for an amicable settlement, and, as a result of an arbitration, plaintiff paid Rs. 100 to the defendant, and gave a joint and several promissory note, signed by himself and his father, for the sum of Rs. 1,250. At the time of this settlement there were other questions at issue between the parties; some of these questions were mentioned, others were not. It is by no means clear that there was any intention to include any of these questions in the settlement. The defendant had no doubt good reason to believe that this was the intention, and this may have been his understanding of the matter. But the onus lies on him to satisfy the Court that such was, in fact, the intention. The learned District Judge after careful consideration has come to the conclusion that that onus has not been discharged, and no sufficient reason has been adduced to us on the appeal for over-ruling this decision of the learned Judge.

The learned Judge on going into these other questions had allowed some claims put forward by the plaintiff and has disallowed others, and in the nett result has given judgment for the plaintiff. The only one of these transactions to which we now need refer related to a proposed marriage between the plaintiff and a sister of the defendant, which ultimately did not take place. The plaintiff in his plaint alleged that, in pursuance of the arrangements for the marriage, he entrusted to the defendant a "tali" and certain other articles of the aggregate value of Rs. 390, and claimed that as the marriage had not taken place, these articles, or their value, should be returned to him. It is not disputed that if the facts were as alleged this was a legitimate claim.

At the hearing of the action plaintiff swore that for the purpose of the marriage he supplied a "tali," stating its value, and giving particulars of the other property. Towards the close of the cross-examination of the plaintiff, Mr. Elliott, who appeared for the defendant, stated that "as regards the claim for jewellery, paraphernalia, &c., he does not cross-examine because the defendant

will deny, and will rely on the question of credibility." As a matter of fact, the defendant ultimately was not called. It is explained that the case was a protracted one; that it related to painful family matters; and that the defendant, when the time came for him to give evidence, preferred to leave things as they stood, and to take no further trouble in the matter. For the first time on appeal, Mr. H. J. C. Pereira, in scrutinizing the record, found that the evidence is formally insufficient to justify the learned Judge's finding of fact on this item. The plaintiff does not say in express terms that he supplied the "tali" and other articles to the defendant. The only person referred to as taking part in the arrangements is defendant's mother. It is not proved, therefore, as the evidence stands, that defendant was party to that arrangement. This point was not taken in the Court below; it could not have been raised in the argument of counsel, as the learned Judge makes no reference to it in his judgment. The fact that Mr. Elliott said he would call the defendant to contradict the evidence of the plaintiff indicates that he understood the evidence in the same sense in which it was understood by the learned District Judge, because if it was understood in any other sense there was nothing for the defendant to contradict. The point is, in effect, a point of law. It is not that in a conflict of testimony the learned Judge's finding is wrong, but that there is no evidence on record to justify the finding. It is, in fact, a point which might be taken in a case in which, under the law, no appeal lay on a question of fact. The case seems to me to come within the principles enunciated in the case of *The Tasmania*.[1] The law is thus put by Lord Herschell on page 225: "It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation had been offered by those whose conduct has been impugned if an opportunity for explanation had been afforded them when in the witness box." Had the point been taken in the Court below, I have not the least doubt that the learned Judge would have had the necessary witnesses recalled so as to clear up the obscurity. I think we should be acting in accordance with the principles laid down by the House of Lords in *The Tasmania*[1] and often followed by this Court if we declared that this point cannot be taken on the present appeal.

In my opinion the appeal should be dismissed, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.

[1] *(1890) 15 A. C. 223.*