

(1917) 08 CAL CK 0022
In the Calcutta High Court

George Burgh McNair

APPELLANT

Vs

J. D. Campbell and Others

RESPONDENT

Date of Decision : 20-08-1917

Acts Referred:

Penal Code, 1860 (IPC) — Section 174

Citation : 42 Ind. Cas. 532

Hon'ble Judges : N. R. Chatterjea, J; Fletcher, J

Bench : Division Bench

Judgement

Fletcher, J.—This is a Rule obtained by Mr. McNair calling on Messrs. Donald Campbell and Company, who are the decree-holders in claim case No. 4 of 1917 of the third Court of the Subordinate Judge at Mymensingh and also on the Subordinate Judge to show cause why the notice issued by the paid Subordinate Judge on the 9th July 1917 should not be cancelled. The facts so far as material are very short. This firm of Messrs. Donald Campbell and Company sued a gentleman of the name of A. FC Gaznavi in the Original Side of this Court and obtained a decree for about six lacs of rupees. That decree of this Court was sent for execution to the Court at Mymensingh and, presumably, Messrs. Donald Campbell and Company had given credit to Mr. A. K. Gaznavi on the footing that he was a person of wealth and was able to meet any sum that might become due to them from him on the agreement on which he entered into these transactions. The decree-holders then proceeded to attach certain properties that apparently ostensibly belonged to Mr. A. K. Gaznavi, and Mr. A. K. Gaznavi put in a claim that the properties were not his but had been dedicated to religious and charitable purposes by some document and, therefore, the decree-holders Messrs. Donald Campbell and Company could not recover their money out of these properties because they did not, in fact, belong to Mr. A. K. Gaznavi. It may be unfortunate that that position, if true, was not disclosed at some earlier stage so that this firm of merchants in London, Messrs. Donald Campbell and Company, might have known before they entered into this transaction that the properties which they sought to attach had been dedicated to religious and

charitable purposes. But the case having passed from the hands of the firm of Solicitors who conducted the case in this Court, the gentleman in Mymensingh who conducted the business of the decree-holders did not accept this case of Mr. Gaznavi that this was a genuine dedication, but he alleged that the whole thing was a sham to withdraw the properties from the diligence, of the creditors of Mr. Gaznavi. It appears that, in the course of certain proceedings, the firm of Messrs. Morgan and Company of which the senior partner is Mr. McNair had acted on behalf of Mr. Gaznavi. By some means or other--- it is not necessary- for us to enquire how---a document purporting to be a copy of a letter writ-ten by Mr. Gaznavi to Me. McNair came into the possession of the gentle man conducting the proceedings in the Court at Mymensingh. What that letter contains we do not know; we have not seen it. But the decree-holders wished to get that letter in evidence and, therefore, they took out a commission to examine Mr. McNair. A notice of the appointment before the Commissioner was served on Mr. McNair on the 27th June and he was directed" to attend before the Commissioner at 4-45 p. M. that day. Mr. McNair took the view, and a proper view I may say, that the letter that he was required to produce having been given to him as the Solicitor of Mr. Gaznavi, he should not produce that document without the consent of Mr. Gaznavi. That course was obviously right, although I think that the view put forward on the other side that Mr. McNair was liable to attend before the Commissioner and state whether he had received a letter without reference to what were the contents of that letter is accurate. A Solicitor can only take objection to produce a privileged document before a Court or a Commissioner appointed by the Court to take evidence. He cannot say that he declines to come to Court because the document is, in fast, a privileged document. However, it appears, although apparently Mr. McNair was not aware of that, that the decree-holders required his evidence for other purposes besides the production of this letter. Mr. McNair did not attend before the Commissioner and he rote a letter to the Commissioner saying that he could not produce the document as it was a privileged one. He heard nothing more about the matter after that. The Commissioner returned the commission to the Court at Mymensingh and the next thing that Mr. McNair heard was that he was called upon to show cause before the Court at Mymensingh why he should not be prosecuted under the provisions of Section 174 of the Indian Penal Code. That, of course, is a procedure that nobody will seek to justify. Mr. McNair is well known both in this Court and in Calcutta. There is no reason to put him to this treatment of having to go down to Mymensingh and show cause why he should not be prosecuted u/s 174, Indian Penal Code, because he wrote a letter to the Commissioner on the 27tih June 1917 stating that he could not produce the letter which he was asked to produce. The Commissioner ought to have written back to Mr. McNair making a Suitable appointment and giving him a proper notice to appear an have his deposition taken. There is no reason to think that Mr. McNair was not billing to appear before the Commissioner, in fact he was quite willing. Mr. McNair was not at all in fault except that he was under a mistake that he anticipated that his evidence was required for, as he had already-stated" to the Commissioner in writing, that

he would not be able to produce the document wanted from him. The present Rule must be made absolute.

2. The only other question that is to be considered in this case is the question of costs. There does not seem to be any reason to think that the decree-holders are responsible for the course adopted by the Commissioner in sending the commission back to Mymensingh, because Mr. McNair did not appear before him 2 hours 45 minutes after the Commissioner had written that letter to him on the 27th June 1917. It is, however, as the learned Advocate-General has remarked, a strong case that an application should have been made by the decree-holders for a warrant or proclamation against a gentleman in the position of Mr. McNair because he should have appeared before the Commissioner within this limited time of 2 hours 45 minutes without regard to any other business that Mr. McNair might have had at that time. That case, Of course, cannot stand and, as already stated, we must make the Rule absolute. I am afraid that this is not a "case in which we can order the decree-holders to pay the costs. They do not seem" to be responsible for initiating these proceedings. The Commissioner who returned the commission to the Mymensingh Court seems" to be really responsible. The proper course¹ ought to be that the commission should be sent back or a fresh commission issued to take the evidence of Mr. McNair and a suitable appointment must be made for Mr. McNair's attendance before the Commissioner. It is quite clear that a notice served 2 hours 45 minutes before without any reference to what Mr. McNair's engagements," however pressing they may be, are, is not a suitable and proper notice.

The Rule is accordingly made absolute. We make no order as to costs.