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parties to the suit. Otherwise, if we accept the contention of the appellant, the result will be that by not raising a particular question in the execution proceedings a party will thereby retain the right to bring a separate suit in order to agitate that question. As has been pointed out by the Privy Council in several cases, proceedings under section 244 of the Code of 1882 (corresponding to section 47 of the Code of 1908) were intended to dispose expeditiously of all questions arising relating to execution. On other points I agree with the judgment of my learned brother.

B. M. S. *Appeal dismissed.*

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Rankin J.

1926

April 16.

KISSEN GOPAL KARNANI

v.

SUKLAL KARNANI.*

Jurisdiction—Procedure—Insolvency of the plaintiff—Court's power to restore a suit.

The sole plaintiff in a suit being adjudicated insolvent and the Official Assignee not being on the record, the suit was dismissed. After annulment of adjudication an application was made by the plaintiff for restoration of the suit.

Held, that the Court had jurisdiction to grant the relief.

AN appeal by the plaintiff, Kissen Gopal Karnani, against an order of Pearson J.

The plaintiff instituted this suit to recover an alleged balance of salary and took out a summons

* Appeal from Original Order No. 4 of 1926 in suit No. 3314 of 1923.

under Chapter XIIIA of the High Court Rules. Directions were given with regard to filing of the written statement and the case to be placed in the Daily List on 9th May 1924. On the 17th April 1924 the plaintiff was adjudicated insolvent at the instance of a person, who had obtained an *ex parte* decree against him in Bombay. On the 14th May the defendant's attorney wrote to the Official Assignee asking whether he was desirous of being substituted in the place of the plaintiff, and pointing out that in that event he will have to give security for costs. No reply was sent to that letter. The Official Assignee was not called upon by the Court to be substituted in place of the plaintiff. The suit came into the Daily List on the 12th November 1924 and the learned Judge was informed that the plaintiff had been adjudicated insolvent and, no one appearing for the plaintiff, the suit was dismissed with costs. On the 30th June 1925 the adjudication was annulled and thereafter on the 19th November 1925 the plaintiff made an application for setting aside the decree dismissing the suit and for restoration of the suit. The application was dismissed with costs. On that this appeal was filed.

Mr. S N. Banerjee (with him *Mr. H. C. Majumdar*), for the appellant. Order IX of the Civil Procedure Code has no application in this case. The plaintiff was civilly dead and he could not appear when the suit was called on; he could not take any step till the adjudication was annulled. The Official Assignee was not called upon to come into the suit. *Lekhraj Chunilal* v. *Shamlal Narrondas* (1). The Court has inherent jurisdiction to make the order. *Debi Bakhsh Singh* v. *Habib Shah* (2).

(1) (1892) I. L. R. 16 Bom. 404. (2) (1913) I. L. R. 31 Mad. 331.

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Mr. S. C. Ray, for the respondent. Order IX of the Civil Procedure Code applies. The application is made long after 30 days and is out of time. The Official Assignee was asked by the defendant's attorney and he did not choose to be substituted.

Mr. S. N. Banerjee, in reply.

SANDERSON C.J. This is an appeal by Kissen Gopal Karnani, the plaintiff in the suit, against a judgment of my learned brother Mr. Justice Pearson, made on the 19th of November 1925.

The application, in respect of which the judgment was delivered, was an application for an order that the suit might be restored and that the decree and order passed by Mr. Justice Pearson, on the 12th November 1924 striking out the suit, might be set aside in review or otherwise and thereafter the suit be proceeded with.

The suit was brought by the plaintiff to recover an alleged balance of salary and the plaintiff took out a summons under Chapter XIIIA of the Rules of this Court. Certain directions were given with regard to the filing of the written statement, as to the giving of discovery, and directions were made that the case should be placed in the Daily List of the 9th May 1924.

On the 17th April 1924, the plaintiff was adjudicated insolvent at the instance of a person, who had obtained an *ex parte* decree against him in Bombay On the 14th May 1924 it appears that the defendant's attorney wrote to the Official Assignee asking whether the Official Assignee was desirous of being substituted in the place of the plaintiff and pointing out that in that case the Official Assignee would have to give security for costs.

It was stated that no answer was sent to that letter.

On the 19th June and on the 1st July 1924. the appellant's attorney wrote to the Official Assignee and it appears that to both those letters replies were sent by the Official Assignee asking the appellant to go and see the Official Assignee. The appellant has sworn that in answer to the two letters which were sent by his attorney, the Official Assignee pointed out that as he had not been called upon by the Court to be substituted in the place of the insolvent plaintiff he would wait until he was called upon to do so.

The suit did not come into the Daily List until the 12th November 1924, although, as I have already said, an order had been made that it should be placed in the Daily List on the 9th May 1924.

On the 12th November the suit came on for hearing The learned Judge was informed that the plaintiff had been adjudicated insolvent. No one appeared on behalf of the plaintiff and the suit was dismissed with costs.

On the 30th June 1925 the adjudication was annulled, the appellant having paid off the decree-holder who, it was stated, was the only creditor of the appellant. The annulment order was not drawn up until the 4th August 1925. On the 17th August notice of this application was given to the defendant. It was not heard until the 19th November 1925 when the learned Judge dismissed the application with costs.

In my judgment, when the suit was before my learned brother in the first instance, viz., in November 1924, and when the learned Judge was informed that the plaintiff had become insolvent, the Court should have called upon the Official Assignee to state whether he intended to continue the suit, and if the Official Assignee decided that he would continue the suit, it would then have been necessary for the Court

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to make an order that he should give security for costs of the suit within a specified time.

That was not done, and, with much respect to the learned Judge, I am of opinion that the plaintiff's suit should not have been dismissed without such steps, as I have indicated, being taken.

If the learned Judge had been informed that the plaintiff's attorney had written to the Official Assignee asking him to proceed with the suit and that the Official Assignee's answer had been (as was alleged) to the effect that he did not propose to take any steps until he was called upon to do so by the Court, I am convinced that the learned Judge would not have dismissed the suit.

The only question, in my judgment, in this appeal is, whether this Court has jurisdiction to set right the mistake, which, in my opinion, has been committed.

I am of opinion that this Court has jurisdiction, whether it be under section 151 of the Code of Civil Procedure or whether it be under the inherent jurisdiction of the Court, to make such order as may be necessary for the ends of justice

In my judgment, therefore, the learned Judge's order of the 19th November 1925 and the decree dismissing the suit must be set aside. It follows that a further order is necessary, viz., that the suit do proceed in the ordinary course.

The appeal is allowed with costs. The plaintiff is entitled to the costs of the proceedings before Mr. Justice Pearson on the 19th November 1925 and the order dismissing the suit is set aside.

RANKIN J. I agree.

In this case the plaintiff having become insolvent it is suggested that action was rightly taken under rule 8 of Order IX of the Code of Civil Procedure. It

is quite true that the suit had not abated but it was a defective suit. The only plaintiff on the record being a plaintiff who could take no steps whatever, the judgment against him was improper. Order IX, rule 8, provides as follows :—" Where the defendant appears "and the plaintiff does not appear when the suit is "called on for hearing, the Court shall make an "order that the suit be dismissed unless the defendant "admits the claim.....". So, in any case to which the rule is applicable, the Court has no discretion but to dismiss the suit. It seems to me that rule 8 cannot be intended to apply in any case where there is a defective suit and there is known to be no person in the position of the plaintiff who has any right or duty to appear. If, therefore, the learned Judge's original order is supposed to have been made under Order IX, rule 8, it was made under a complete misapprehension as to the position. It is said now that the only remedy of the appellant was either by himself or by the Official Assignee to come in time under Order IX, rule 9, and ask that the suit might be restored. In my opinion that has no application to this case. In such a case it is necessary, before there can be a default on the part of any one, that some steps should be taken to have the suit made a competent suit once again. The provisions for doing that are contained in Order XXII, rule 8, and I agree with the contention of the learned counsel for the appellant and with the opinion of Mr. Justice Farrar in the case of *Lekhraj* v. *Shamlal Narrondas* (1), that, "What "the section contemplates is that the Court should fix "a time within which the Assignee may decline to "continue the suit, and to give security for the costs "thereof". In this case a letter had been written by the defendant's attorney to the Official Assignee asking

(1) (1892) I. L. R. 16 Bom. 404, 406.

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him whether he would continue, and mentioning that if he wanted to continue he would have to find security. That is an entirely different thing from an order made in the presence of the Official Assignee giving him a definite time within which to elect and state what security the Court would require him to furnish. When the Official Assignee has been heard on that and knows what is required, he can then determine either to take up the suit or to leave the suit alone. But the Official Assignee in this case never was in that position. In my judgment the position is very much the same as the position in the case dealt with by the judgment delivered by Lord Shaw in the case of *Debi Bakhsh Singh* v. *Habib Shah* (1). It is quite wrong to apply Order IX, rule 8, to a party who has no longer any interest in the proceedings and who does not make default by staying away. I think, therefore, that by one way or another Mr. Justice Pearson had power to discharge his previous order which after all was only an *ex parte* order, and I think that this Court on appeal from him has also power to set the matter right.

Attorney for the appellant: *Abhash C. Ghosh.*

Attorneys for the respondent: *K. K. Dutt & Co.*

N. G.

(1) (1913) I. L. R. 35 All. 331, 335.