

CIVIL REVISION.

Before Suhrawardy and Graham J.J.

SIKANDAR ALI

v.

KUSHALCHANDRA SARMA*

1931

Aug. 3.

Appearance—Suit—Rejection of application by pleader for adjournment, plaintiff being present in court—Dismissal for default—Restoration of suit—Code of Civil Procedure (Act V of 1908), O. IX, rr. 8, 9.

The presence of the plaintiff in court with witnesses, who does not take part in the suit, but to whom the judge put questions as to the *bona fides* of his application, after rejection of an application by his pleader for adjournment and his retirement, is not an appearance within the meaning of the Civil Procedure Code.

When the suit is dismissed for default under such circumstances, the dismissal is one under Order IX, rule 8 of the Civil Procedure Code, entitling the plaintiff to apply for restoration of the suit under Order IX, rule 9 of the Code.

Satish Chandra Mukerjee v. Ahara Prasad Mukerjee (1), *Lalji Sahu v. Lachmi Narain Singh* (2), *T. Kaliyappa Mudaliar v. Kumaraswami Mudaliar* (3), *Esmail Ebrahim v. Haji Jan Mahomed Haji Mahomed* (4) and *Soonderlal v. Goorprasad* (5) referred to.

CIVIL RULE obtained by the defendants.

The facts are set out fully in the judgment.

Bhupendrakishore Basu for the petitioner.

Beerendrakumar De for the opposite party.

SUHRAWARDY J. This Rule is directed against an order of the Subordinate Judge of Cachar, restoring a suit, which was dismissed for default. The main ground upon which we are asked to interfere

* Civil Revision, No. 790 of 1931, against the order of U. C. Ghosh, Subordinate Judge of Cachar, dated May 23, 1931.

(1) (1907) I. L. R. 34 Calc. 403.

(3) (1926) 51 Mad. L. J. 290.

(2) (1918) 3 Pat. L. J. 355.

(4) (1908) I. L. R. 33 Bom. 475.

(5) (1898) I. L. R. 23 Bom. 414.

under section 115 of the Code of Civil Procedure is that the court had no jurisdiction to restore the suit under Order IX, rule 9 of the Code of Civil Procedure. What happened was that, at the date of hearing, which was fixed for 3rd November, 1930, the plaintiff filed a petition for adjournment on the ground, as it appears from the subsequent proceedings, that he had engaged two pleaders from Sylhet to conduct his case, one of whom was dead and the other was unable to come to Cachar on that date. The petition was rejected on the ground that there was no sufficient reason for an adjournment. The plaintiff again applied for time on that date and that petition too was rejected. Thereupon, the plaintiff's pleader stated that he had no further instructions to proceed with the case. The learned Subordinate Judge then called the plaintiff and some of his witnesses to the court room and put some questions, from which he discovered that the plaintiff had engaged some local pleaders also. He, accordingly, dismissed the plaintiff's suit for default. An application was made by the plaintiff for restoration of the suit and the learned Subordinate Judge restored it under Order IX, rule 9 of the Code of Civil Procedure and he also thought that he had power under section 151 of the Code as well to give relief to the plaintiff.

It is argued on behalf of the petitioner that in the circumstances of this case, the plaintiff must be taken to be present in court and, therefore, Order IX, rule 9 would not apply. There is some amount of divergence of opinion among different High Courts on this point. But, so far as this High Court is concerned, and the same view has been adopted in the Madras and Patna High Courts, it is settled that where a counsel appears on behalf of a party and presents an application for adjournment, which being refused, he retires from the case, the party should be taken as not having appeared in the suit.

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Mukerjee (1), *Lalji Sahu v. Lachmi Narain Singh* (2) and *T. Kaliyappa Mudaliar v. Kumaraswami Mudaliar* (3). A different view has been taken in the Bombay High Court in *Esmail Ebrahim v. Haji Jan Mahomed Haji Mahomed* (4) and *Soonderlal v. Goorprasad* (5). This latter case was disapprovingly noticed in the referring order in *Satish Chandra Mukerjee v. Ahara Prasad Mukerjee* (1).

Turning to the Code itself, Order IX, rule 8 says that "where the defendant appears and the plaintiff "does not appear when the suit is called on for "hearing....." The word "appear" in this rule apparently means "appearing in the suit." A party may be present in the precincts of the court or he may be found present in the court room, but, if he does not take part in the suit, it cannot be said that he has "appeared." This is what is meant by Order IX, rules 6 and 8. If a plaintiff comes to court and files an application for adjournment and, when the application is refused, he retires from the suit, though he may not have physically retired from the court, he is not to be considered any longer to be present in the suit and any order passed, in such circumstances, must be taken to be an order passed *ex parte*. That was the view taken by the learned Subordinate Judge when he dismissed the plaintiff's suit. The order he passed was "that the suit be "dismissed *for default*." By "default," I understand, he meant for the absence of the plaintiff, because no evidence was recorded in the case. The fact that the learned Subordinate Judge sent for the plaintiff and put him certain questions regarding the *bona fides* of his application would not be tantamount to his presence in the suit. The ground, therefore, on which this Rule was based, fails.

The next question, that we were invited to consider, is that, in the circumstances of this case,

(1) (1907) I. L. R. 34 Calc. 403.

(3) (1926) 51 Mad. L. J. 290, 294.

(2) (1918) 3 Pat. L. J. 355, 357.

(4) (1908) I. L. R. 33 Bom. 475.

(5) (1898) I. L. R. 23 Bom. 414.

the order of the court below is wrong on the merits. In the first place, we are not entitled to go into that question under section 115 of the Code of Civil Procedure and, in the second place, this order, having restored the suit, has given both parties an opportunity of having their differences settled in court. We do not think that we should be justified in interfering with it.

This Rule is, therefore, discharged. We make no order as to costs.

GRAHAM J. I agree.

Rule discharged.

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