APPEAL FROM ORIGINAL CIVIL.

Before Costello and Lort-Williams JJ.

SHAHLABALA DASEE

v.

GOBARDHANDAS LADSARIA.*

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June 19, 20.

Estoppel by Judgment—Dismissal of suits for non-prosecution, if bars fresh suit—Rules and Orders of High Court, Original Side, Ch. X., r. 36.

In the absence of any rule forbidding the bringing of a fresh suit, a plaintiff, whose suit has been dismissed under the provisions of rule 36 of Chapter X of the Rules of the Original Side, is at liberty to bring a fresh suit, if he be so minded.

APPEAL by the plaintiff from a judgment of Buckland J.

This was a suit to recover Rs. 50,000 or such damages as the court might allow, for breach of a covenant, contained in a lease, whereby the defendant covenanted to return the property leased, in good order and condition. A previous suit, based on the same cause of action, had been brought in the year 1928. That suit was dismissed, under rule 36 of chapter X of the Rules of the Original Side, on the 22nd May, 1930.

An application was made to have that order set aside and that application was dismissed. There was no appeal against the order for dismissal or against the order of the 22nd May, 1930.

The plaintiff filed this suit on the 1st May, 1931. Mr. Justice Buckland heard the suit on the 24th January, 1934, and dismissed the suit on the ground that the suit was barred by reason of the earlier suit having been dismissed for default. The plaintiff appealed.

*Appeal from Original Decree, No. 28 of 1934, in Original Suit No. 941 of 1931.

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Pugh (with him *N. C. Chatterjee* and *S. K. Basu*) for the appellant. A dismissal under rule 36 of Chapter X of the Rules of the Original Side cannot be *res judicata*. In order to constitute estoppel by judgment the case must be heard and decided. *Hook* v. *Administrator-General of Bengal* (1), *Rungrav Ravji* v. *Sidhi Mahomed Ebrahim* (2), *Muhammad Salim* v. *Nabian Bibi* (3).

Rule 36 of Chapter X is in words similar to the words of rule 12 of Order 36 of the Rules of the Supreme Court in England. Cases under that rule show that where a suit is dismissed for non-prosecution, there is always a right to bring a fresh action. In re *Orrell Colliery and Fire-brick Company* (4), *Magnus* v. *National Bank of Scotland* (5).

The plaintiff may be ordered to pay the costs of the previous suit, but the fresh suit is not barred. See Seton's Judgments and Order, 7th Edition, Vol. I, page 1012.

Section 12 of the Civil Procedure Code clearly implies that unless there is a section or rule prohibiting it, a fresh suit is not barred.

Roy, Advocate-General (with him *S. R. Das* and *S. K. Ray Chaudhuri*) for the respondents. Clearly, the intention of the High Court in framing rule 36 was to put an end to such suits for good.

Various provisions in Civil Procedure Code, such as Order IX, rule 5, Order VII, rule 13, Order XI, rule 21 and Order XXV, rule 2, imply that where a right to a fresh action is not given by any rule or section, a suit which has been dismissed cannot be continued by means of a fresh plaint based on the same cause of action.

The case of *Muhammad Salim* v. *Nabian Bibi* (3) is covered by rules 2 and 4 of Order IX of the Code and is, therefore, distinguishable.

(1) (1921) I.L.R. 48 Calc. 499 (507); L.R. 48 I.A. 187 (194).
(2) (1882) I.L.R. 6 Bom. 482.
(3) (1886) I. L. R. 8 All. 282.
(4) (1879) 12 Ch. D. 681.
(5) (1888) 36 W. R. (Eng.) 602.

A plaintiff cannot bring a fresh suit on the same cause of action, as of right. *Fox* v. *Star Newspaper Company* (1).

Laches, such as involves a plaintiff in a dismissal under rule 36 of Chapter X should not be encouraged. It would be a handle to a wealthy plaintiff to oppress poor defendants by successive suits and would tantamount to an abuse of the process of the court.

COSTELLO J. In this appeal from a judgment of Mr. Justice Buckland, dated the 24th January, 1934, a point of considerable importance arises. The learned Judge himself said:—

> In this case a preliminary point of considerable importance has been raised, on behalf of the defendant, by the learned Advocate-General.

The suit was brought to recover a sum of Rs. 50,000 or such damages as the Court might allow, for breach of a covenant contained in a lease, whereby the defendant covenanted to return the property demised by the lease in good order and condition. It appears that a suit, which admittedly was precisely the same as the present suit (the previous suit being numbered 1771 of 1928) was instituted by the same plaintiff against the same defendant and on the same cause of action; that is to say, Shailabala Dasee was the plaintiff in Suit No. 1771 of 1928, and she is the plaintiff in the present suit, and Gobardhandas Ladsaria was the defendant in Suit No. 1771 of 1928, and he is defendant in the present suit.

On the 22nd May, 1930, suit No. 1771 of 1928 was dismissed by an order of Mr. Justice Lort-Williams under the provisions of Chapter X, rule 36 of the Rules of this Court. There was no appeal from that order, but an application was made, said to be by way of review, to have that order set aside. It so happened that that application came before me. I say "it so happened", but I recollect that the reason why it came before me was (as was in effect

(1) [1900] A. C. 19.

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admitted at the time) that the parties, or rather the plaintiff of set design waited until Mr. Justice Lort-Williams had proceeded on leave and until there was another Judge dealing with the interlocutory matters. The application for review was dismissed by me on the 6th August, 1930, and again there was no appeal from that order.

The present suit was instituted on the 2nd May, 1931, and as I have stated, the cause of action and the issues in this suit are identical with those of the 1928 suit. The learned Judge says in his judgment:

> In these circumstances, it is contended, on behalf of the defendant, that this suit cannot proceed, upon the ground of *res judicata*, but not upon the limited grounds which are to be found in section 11 of the Civil Procedure Code, but upon the broader principles which were referred to and recognised by their Lordships of the Privy Council in *Hook* v. *Administrator-General of Bengal*(1). Reliance is also placed upon the inherent powers of the court which are preserved by section 151 of the Civil Procedure Code, and I have also been referred to the judgment of Sir Francis Maclean C. J., in *Ram Gopal Mazumdar* v. *Prasunna Kumar Sanial* (2), in support of the proposition that the plaintiff, having elected to proceed, as she did, by applying to have the order of dismissal set aside and having failed on that application, is not entitled now to litigate the matter afresh by a separate suit.

The learned Judge stated the point which he had to determine, briefly and concisely, in these terms, "whether an order of dismissal under Chapter X, "rule 36 of the Rules of this Court operates as a bar "to a fresh suit". The rule in question runs thus:

> Suits and proceedings, which have not appeared in the Prospective List within six months from the date of institution, may be placed before a Judge in Chambers, on notice to the parties or their attorneys, to be dismissed for default, unless good cause is shown to the contrary, or be otherwise dealt with as the Judge may think proper.

The authority of that rule was challenged, in the year 1924, in the case of *Udoy Chand Pannalal* v. *Khetsidas Tilokchand* (3), where, however, Sir Lancelot Sanderson C. J. held that the rule is not *ultra vires* and that the Court has jurisdiction to dismiss a suit for default when it appears on the Special List. It was also held in that case that the decision of a Judge on the Original Side of the High

(1) (1921) I. L. R. 48 Calc. 499; L. R. 48 I. A. 187.
(2) (1905) 10 C.W.N. 529.
(3) (1924) I. L. R. 51 Calc. 905.

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Court dismissing a suit for want of prosecution under Chapter X, rule 36 of the Rules of the Court, is a judgment within the meaning of clause 15 of the Letters Patent and, accordingly, an appeal lies from that decision. It is obvious, therefore, on the authority of that case, that it would have been open to the present plaintiff had she so chosen to have appealed against the order of my learned brother Lort-Williams, dated the 22nd May, 1930.

Mr. Justice Buckland came to the conclusion that, once a suit has been dismissed under the provisions of Chapter X, rule 36, it is not open to the plaintiff to bring a fresh suit on the same cause of action. He expressed his opinion quite definitely in these words:

> I have no reasonable doubt that the object and intention of the rule is to enable the Court, finally, to dismiss such a suit unless the Judge is satisfied that there are grounds for allowing it to proceed.

It was pointed out that, on notice being sent to the parties, they have an opportunity to, and, frequently do, appear. Thereupon, the Judge can take into consideration any affidavits filed, and anything that counsel may put before the court on behalf of the parties. The learned Judge has given a number of reasons as to why he comes to the conclusion that once a suit is dismissed for default under Chapter X, rule 36 of the Rules of this Court, the plaintiff is not entitled to bring a fresh suit on the same cause of action. I am bound to say that, with the reasoning of the learned Judge, so far as it goes, I respectfully and entirely agree. As a matter of common sense and of first impression, one cannot fail to be of opinion that it is undesirable that a plaintiff should be allowed, in circumstances such as the present, to suffer no greater penalty and incur no more serious handicap than the payment of certain costs to the defendant.

It has been pointed out by the learned Judge, in his judgment, and emphasized by the learned Advocate-General in his address to us, that a plaintiff of means might use the procedure of the court as an instrument of oppression and that,

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having launched his suit against any person, he might delay the prosecution of that suit so that it ultimately appeared on the Special List, as it has been called, and the suit was dismissed. Forthwith he might launch a fresh suit and indeed a succession of suits at any rate until the alleged cause of action became no longer available by reason of the operation of the statute of limitation. I wholly sympathize, if I may use the term, with the expression of opinion given by the learned Judge, in his judgment. But we have to consider whether that judgment is justified by any provision in law. It is admitted by the learned Advocate-General that neither the precise terms of section 11 of the Code of Civil Procedure, nor the general principles of the doctrine of *res judicata*, as explained in a number of decisions of their Lordships of the Judicial Committee of the Privy Council, including the cases of *Munni Bibi* v. *Tirloki Nath* (1) and *Maung Sein Done* v. *Ma Pan Nyun* (2), are of any avail to the defendant in the present proceeding. It is undoubtedly right to say that here there is no case of *res judicata*, because the original suit No. 1771 of 1928 was never heard and determined, and in no sense could it be said that the plaintiff's case had been disposed of on its merits.

We have, therefore, to see whether there is any other principle or provision, either in the general adjectival law or in the rules of this Court, which prevents the plaintiff from proceeding with the suit, out of which this appeal arises. The learned Advocate-General has sought to rely on a number of orders and rules contained in the first schedule to the Civil Procedure Code, but none of them, in my opinion, are really material for our present purpose. He has also argued that the provisions of section 12 of the Code of Civil Procedure do not stand in his way: That section lays down that—

> Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any court to which this Code applies.

(1) (1931) I. L. R. 53 All. 103; L. R. 58 I. A. 158.

(2) (1932) I. L. R. 10 Ran. 322; L. R. 59 I. A. 247.

As far as one can see, the rules in the first schedule to the Code of Civil Procedure, which do bar a fresh suit in respect of the same cause of action, are these: Order II, rule 2, Order IX, rule 9, Order XXII, rule 9, and Order XXIII, rule 1. None of these have any application to the present circumstances. In my opinion, section 12 operates against the contention of the defendant in the present suit. Mr. Pugh argued that we must deduce from it that, unless there is a rule either in the Code of Civil Procedure or in the Rules of this Court, there is nothing in the general provisions of law to prevent the plaintiff instituting a fresh suit, after the former suit has been dismissed under the provisions of Chapter X, rule 36, of the Rules of this Court.

It is to be remembered that rule 36 of Chapter X of the Rules of this Court is apparently designed to serve the same purpose as rule 12 of Order 36 of the Rules of the Supreme Court in England, and to a large extent Chapter X, rule 36 of this Court is analogous to Order 36, rule 12 of the English Procedure, one of the main differences being, however, that in this Court the Registrar takes the initiative on finding that suits are not being prosecuted with due vigour and diligence, whereas under the English Procedure it is left to the defendant to stimulate the activities of the plaintiff either by himself causing the action to be set down for trial, or by taking out a summons asking that the action may be dismissed for want of prosecution. There is no very direct, certainly no very modern decision, as to what precisely is the effect of an order made under the provisions of Order 36, rule 12, as regards the rights of the plaintiff to bring a fresh suit. We find in the notes in the Annual Practice of 1934, at page 2213, a statement to the effect that, where an action has not been set down for trial under Order 36, rule 32, the effect of a dismissal is not clear. The note seems to be based upon the judgment of Sir George Jessel

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M. R. in the case of *In re Orrell Colliery and Fire-Brick Company* (1) and the judgment of Mr. Justice Kay in *Magnus* v. *National Bank of Scotland* (2).

The case of *In re Orrell Colliery and Fire-Brick Company* (1) was decided in the year 1879. There it was held that where an action has been commenced against a company and continued by leave after a winding-up order, and before trial an order had been obtained to dismiss the action for want of prosecution, the plaintiff in the action was not debarred from bringing forward a claim in the same matter in the winding up. Sir George Jessel M. R. said at page 682 of the report:—

> It is very much to be desired that a new rule should be made to meet cases of this kind. But in the meantime the former practice applies except so far as it has been altered by the Judicature Act and the Rules of Court, and I find nothing in them which varies it on this point.
>
> Formerly a man could abandon his action by not taking any further steps in it, whether it were brought at Common Law or in Chancery. In the former case the defendant signed judgment of *non-pros.*, which exactly described what had happened; in the latter case he would have the bill dismissed for want of prosecution, but in either case the plaintiff could bring a new action for the same matter, with this exception only, that in Chancery, if the cause had been set down to be heard, the dismissal of the bill for want of prosecution, was equivalent to dismissal on the merits, and was a bar to a new action.
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> In this case, if the action had been set down for hearing, there might have been a question whether the former rule of Common Law or that of the Court of Chancery ought to prevail. But in a case where, as here, the action had not been set down, there was only one rule, namely, that a fresh action might be brought. If the new Rules had been intended to make an alteration in this respect, it would have been so expressed. But that has not been done, and consequently the practice is the same as it was before the Rules were made.

As far as one can ascertain, the position in this court seems to be the same as it was in England at the time when the *Orrell Colliery* case (1) was decided.

A year or two later, and in between the *Orrell Colliery* case (1) and *Magnus* case (2), there was the case of *Gilder* v. *Morrison* (3). There, by a Master's order, an action was to be dismissed, unless notice of trial were delivered by a certain day. Through a mistake of the solicitor's clerk, notice of trial was not delivered within the required time. The Judge in Chambers refused, in the exercise of his

(1) (1879) 12 Ch. D. 681, 682. (2) (1888) 36 W. R. (Eng.) 602, 604.
(3) (1882) 30 W. R. (Eng.) 815.

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discretion, to extend the time fixed by the Master's order. On appeal, the Court declined to interfere with the Judge's discretion. Mr. Justice Grove in his judgment observed :—

I am of opinion that this is a case in which we should not interfere with the discretion of the learned Judge. *Carter* v. *Stubbs* (1), on which the plaintiffs' counsel relies, is the exact converse of the present case. There the learned Judge thought fit to vary the Master's order, and the court of appeal, as well as the divisional court, refused to interefere with his discretion. If this were a solitary instance of an application of this kind, we might be inclined to grant the indulgence asked for ; but cases of this kind are becoming too common, and in the interests of clients this carelessness on the part of solicitors and their clerks must be put a stop to. If we encouraged such conduct we should practically be abolishing the rules made under the Judicature Acts, and a negligent party might postpone a case day after day, and set all the rules at defiance, if he knew that he could be reinstated in the position which he had lost by his own carelessness or intentional disobedience to the rules merely by payment of the costs.

Then the learned Judge continued in the words following and they are the important part of his judgment for our present purpose :—

A new writ may be issued immediately in this case, so that the right of the plaintiff is not lost, as he merely has to pay the costs incurred so far as a penalty for his carelessness, and begin over again.

Then we come to the case of *Magnus* v. *National Bank of Scotland* (2), which was decided in the year of 1888. In that case, there was a consent order, dismissing an action for want of prosecution, and it was held that, unless it proceeded upon a compromise of the cause of action, there was no bar to another action between the same parties for the same matter. The former practice of the Court of Chancery on this point is unaffected by the Rules of Court under the Judicature Act. The plaintiffs in the action, having made default in making discovery and answering interrogatories, told the defendants they intended to abandon the action, and would pay their costs. Not having done this, the defendants issued a summons to dismiss the action for want of prosecution. The plaintiffs, thereupon, paid the defendant's costs, and at the hearing of the summons they appeared, and consented to an order dismissing the action as against the defendants. The plaintiffs then brought

(1) (1880) 6 Q. B.D. 116. (2) (1888) 36 W. R. (Eng.) 602, 604.

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a fresh action against the same defendants for the same matter; whereupon the defendants raised the question of law whether the plaintiffs were not estopped, by reason of the order on the summons. The Court held that the order, not having proceeded upon a compromise of the cause of action, was no bar to the fresh action. The judgment of Mr. Justice Kay is very illuminating upon the point which is now before us. He is reported, at page 604 of the report, as saying :—

> Now if that consent order had proceeded on a compromise of the cause of action, it would have been an absolute bar to a new action. But here the order was made on a summons to dismiss for want of prosecution, an order on which would not be a bar, and therefore, unless it is shown that the consent proceeded upon the compromise of the cause of action, I cannot see how it is possible to say this would be a bar. Can it be said that when you attend on a summons to dismiss for want of prosecution, and submit to an order by consent, that order is a bar to another action ? That seems to me against all the rules of the court. There is a great deal more in this than mere technicality, because the principle of the court is that unless the merits of the case have been dealt with, the dismissal of one action is not a bar to another action of the same kind. That is a very ancient rule of the Court of Chancery which I should be sorry to see disturbed.

A little lower down in the judgment, the learned Judge said :—

> The object of this summons to dismiss for want of prosecution was to prevent the plaintiffs going on with that action. Everybody knows that would not prevent another action being brought. Of course the plaintiffs were compelled by the terms of the order to pay all the costs of that action.

Now, on the authority of the three cases, to which I have referred, it seems to me that on general principles there is nothing to prevent a plaintiff, whose suit has been dismissed for want of prosecution, from instituting forthwith a suit against the same defendant upon the same cause of action; and, in the absence of any rule made by the court to deal with such a state of affairs, it is clear that, in circumstances such as the present, where the suit was dismissed under the provisions of Chapter X, rule 36, the plaintiff is at liberty to bring a fresh suit if he be so minded. I feel impelled to say that, unlike Mr. Justice Kay, I should not be sorry to see the practice altered and an appropriate rule made by this Court negativing, or at any rate circumscribing, the right of the plaintiff to bring one or two and

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possibly more actions against the same defendant on the same cause of action, where the first and the second or the subsequent action has been disposed of under the provisions of the rule which we are now considering. I go further than that and say that, in my opinion, it is highly desirable that a rule of that character should be made by this Court, unless the matter is dealt with by other authority and suitable provisions inserted, either in the body of the Civil Procedure Code or in the rules contained in the schedule to that Code. We have now, however, only to administer the law as we deem it to exist at the present time. For the reasons which I have given, we are compelled to come to the conclusion that this appeal must be allowed.

The result is that the case must go back to be disposed of on its merits. The appellants will have the costs of this appeal. The costs of the court below will abide the result of the further proceedings.

LORT-WILLIAMS J. The subject for consideration in this appeal is the effect of the dismissal of a suit for want of prosecution under rule 36, Chapter X of the Rules of this Court on the Original Side.

The learned Judge (Buckland J.) has decided that the plaintiff is precluded by such dismissal from bringing a fresh suit upon the same cause of action. I cannot understand upon what principle of law such a decision can be supported. This is a very drastic rule, which provides that a judge may dismiss for default any suit which has not appeared in the Prospective List within six months from the date of institution. Such orders are sometimes necessarily made in a somewhat summary way, and I am surprised to find that it has been suggested, nay more, decided that the effect of the many decisions which I have given under the provisions of this rule was to deprive the plaintiffs for ever of the right to agitate their claims.

Of course, there are well-known principles of law which preclude the plaintiff from bringing a fresh suit upon the same cause of action, *e.g.*, the principle

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of *res judicata*. But no one has suggested that, in the circumstances of such a dismissal for default, there has been anything in the nature of a trial or decision upon the merits.

And of course, where special rules have been made by or for the court, which forbid the bringing of a fresh suit, the plaintiffs are bound by them so long as these rules are *intra vires* of the rule-making authority; such, for example, are to be found in Order IX of the Code of Civil Procedure. But there is no similar provision in rule 36, or elsewhere in the rules of this Court, or in the Code of Civil Procedure, which is relevant to the present discussion.

On the contrary, section 12 of the Code provides that—

> Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any court to which this Code applies.

Inferentially it seems to follow that where no such rules exist, no such preclusion is intended to apply.

In the absence of such rules, I know of nothing to prevent a plaintiff, whose suit has been dismissed under the provisions of rule 36, from bringing a fresh suit upon the same cause of action, except the law of limitation.

The law upon this subject has been clearly stated by Sir George Jessel M. R. in *In re Orrell Colliery and Fire-Brick Company* (1) as follows:—

> Formerly a man could abandon his action by not taking any further steps in it, whether it were brought at Common Law or in Chancery. In the former case the defendant signed judgment of *non-pros.*, which exactly described what had happened; in the latter case he would have the bill dismissed for want of prosecution, but in either case the plaintiff could bring a new action for the same matter, with this exception only, that in Chancery, if the cause had been set down to be heard, the dismissal of the bill for want of prosecution was equivalent to dismissal on the merits, and was a bar to a new action.

And by Mr. Justice Kay in *Magnus* v. *National Bank of Scotland* (2) as follows:—

> The practice in this Court was well settled long before I went to the bar. In Lord Redesdale's book I find the law thus stated on page 238 of the original edition:—"A decree or order dismissing a former bill for the same matter may

(1) (1879) 12 Ch. D. 681, 682. (2) (1888) 36 W. R. (Eng.) 602, 603-4.

"be pleaded in bar to a new bill, if the dismission was upon hearing, and was "not in terms directed to be without prejudice. But an order of dismis- "sion is a bar only when the Court determined that the plaintiff had no title "to the relief sought by his bill, and therefore an order dismissing a bill for "want of prosecution is not a bar to another bill."..... There is a great deal more in this than mere technicality, because the principle of the court is that unless the merits of the case have been dealt with, the dismissal of one action is not a bar to another action of the same kind. That is a very ancient rule of the Court of Chancery which I should be sorry to see disturbed..... The object of this summons to dismiss for want of prosecution was to prevent the plaintiffs going on with that action. Everybody knows that would not prevent another action being brought. Of course, the plaintiffs were compelled by the terms of the order to pay all the costs of that action.

In Seton's "Judgments and Orders", 7th Edition, 1912, Volume I, at page 136, it is stated upon the authority of these decisions that where an action has been dismissed for want of prosecution, the plaintiff must pay the costs of the old one first; and a similar statement appears in Daniell's Chancery Practice, 8th Edition, 1914, Volume I, at page 474.

In my opinion, it would be difficult to support the making of any rule, which, in such circumstances, would preclude the bringing of a fresh suit upon the same cause of action, unless the first suit had been set down for trial. If that has been done, the plaintiff cannot complain that he has not had an opportunity of having his case heard, and if he fails to proceed with the prosecution of his claim, and it is dismissed for defualt, the court, in such circumstances, would be justified in making a rule that no fresh suit should be brought upon the same cause of action. In a case, such as the present, where there has been a dismissal of the suit, but not upon the merits, I think it ought to be provided that no fresh suit shall be instituted until all costs incurred in the first suit have been paid by the plaintiff to the defendant.

I agree with my learned brother that this appeal must be allowed with costs.

Appeal allowed.

Attorneys for appellant: *Dey & Kshatriya.*

Attorney for respondents: *P. D. Himatsingka.*

S. M.