APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Krishnaswami Ayyar.

CHANDRAMATHI AMMAL (PLAINTIFF'S LEGAL REPRESENTATIVE), APPELLANT,

v.

NARAYANASAMI AIYAR AND OTHERS (DEFENDANTS NOS. 1 TO 12 15 TO 43, 45 TO 51, 53 TO 74, 76 TO 78, 80 TO 91, 93 TO 105, 107 TO 158, 160 TO 183, 185 TO 191, 193, 194 AND 196 TO 207, AND LEGAL REPRESENTATIVES OF THE 13TH AND 14TH AND THE 184TH DEFENDANTS), RESPONDENTS.*

1909. October 14, 15. November 9.

Civil Procedure Code, Act XIV of 1882, ss. 102, 157, 158—Circumstances under which ss. 157 and 158 are applicable—On party's default to appear, Court must proceed under s. 157 and not under s. 158.

Sections 157 and 158 of the Code of Civil Procedure are independant and mutually exclusive and neither can be treated as an exception to the other.

When a case is set down for hearing on the original or adjourned date, the first question for the Court is "Are the parties in attendance?" If both or either of the parties be not present, the Court is bound to deal with the case under Chapter VII or under that chapter read with section 157, as the case may be, whether or not there has been default of the kind referred to in section 158.

Shrimant Sagaji Rao v. *Smith*, [(1896] I.L.R., 20 Bom., 736], referred to. *Marianissa* v. *Ramkalpa Gorain*, [(1907) I.L.R., 34 Calc., 235], referred to.

SECOND APPEAL against the decree of S. Ramaswami Aiyangar, Subordinate Judge of Madura (East) in Appeal Suit No. 396 of 1904, presented against the decree of V. S. Krishna Aiyar, District Munsif of Manamadura, in Original Suit No. 212 of 1903.

The facts for the purpose of this case are fully set out in the judgment.

K. Srinivasa Ayyangar for appellant.

S. Srinivasa Ayyangar for 60th, 93rd and 94th respondents.

C. V. Anantakrishna Ayyar for 11th, 29th, 60th, 93rd, 94th and 99th respondents.

JUDGMENT.—This case has had an unfortunate history. On the 16th June 1904, time was given to the plaintiff to produce his evidence and the suit adjourned to the 25th of June. On that date the plaintiff was absent and as noted in the diary his vakil

* Second Appeal No. 795 of 1906.

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stated he had no instructions. This according to the authorities clearly constituted a default in appearance (see *Soondarlal* v. *Goorprasad*(1), *Ramanuja Reddiar* v. *Rangaswami Aiyangar*(2), *Lalta Prasad* v. *Nand Kishore*(3) and *Mariannissa* v. *Ramkalpa Gorain*(4)). The District Munsif instead of dealing with the case under section 157 of the Code decided the suit under section 158 against the plaintiff on the issues raised. The plaintiff who had been ill for some days having died two days after the disposal of the suit, his representative treating the Munsif's judgment as under sections 102 and 157 applied for restoration of the suit under section 103. The Munsif ordered it on terms. The defendants applied to the High Court in revision. A Division Bench set aside the Munsif's order of restoration holding that the disposal of the 25th June 1904 was under section 158 on the merits and that section 103 had no application to such a case. The plaintiff's representative had in the meanwhile preferred an appeal to the District Court against the original decree of the District Munsif dismissing the suit. The appeal was transferred to the Subordinate Judge. He has dismissed it holding that the Munsif disposed of the case rightly under section 158 and that under that section what the Munsif adopted was in the circumstances the proper course, though the language of the section gave him a discretion to pass some other order. The plaintiff's representative has preferred this second appeal. The question is whether the District Munsif was right in dealing with the case under section 158 or whether he should have acted under section 157. The point is not free from difficulty. We agree with the contention of Mr. S. Srinivasa Aiyangar that sections 157 and 158 should if possible be read as mutually exclusive. Section 157 deals with cases of failure to appear and section 158 with cases of failure to do the thing for which time has been granted. Neither can be treated as an exception to the other, for there may be failure to do the thing for which time has been granted, the parties themselves being present, and there may be failure to appear even when no time is granted to do anything in particular. Treating the sections then as independent and mutually exclusive, which of the sections has the first application ? The problem arises only when the facts answer the conditions of

(1) (1889) I.L.R., 23 Bom., 414.
(2) (1908) 18 M.L.J., 51.
(3) (1900) I.L.R., 22 All., 66.
(4) (1907) I.L.R., 34 Calc., 235.

both the sections. It is argued for the respondent that we should apply section 158 first. If the facts render it inapplicable we are according to him at liberty to apply section 157. We are unable to agree with the above contention. It seems to us that when a case is set down for hearing, whether it is on the original or the adjourned date, the first question for the Court is are the parties in attendance. If both or either of the parties have or has failed to appear, the Court is bound to deal with the matter under chapter VII or section 157 read with chapter VII, as the case may be. Any other defect in the case or default of any party is matter for investigation and orders only after the question of default in appearance has been settled. The appearance of the parties or more correctly the determination of the consequences of non-appearance has a natural precedence over the disposal of the matters arising in the trial of the cause. We are therefore inclined to hold, that, if there be default in appearance on the adjourned date of hearing, section 157 should alone be applied, no matter whether there has or has not been default of the kind referred to in section 158. It is only in case the parties are in attendance and there is failure to do what a party is given time to do that section 158 is to be put in requisition. This view is in accordance with the pronouncement of Jardine and Ranade, JJ., in *Shrimant Sagajirao* v. *S. Smith*(1). The learned Judges observe at page 744 "If he had put in any appearance in person or by pleader, his default in producing the evidence might have been a reason for a decision under section 158. But *as he did not appear*, we think the most appropriate section to which the order must be referred is section 157, and its consequential section 102." The decision in *Mariammissa* v. *Ramkalpa Gorain*(2) has adopted substantially the same view though part of the reasoning by which it has been arrived at does not commend itself to us. We entirely agree with the following observations of Mookerjee and Holmwood, JJ: "The scope of the two sections is quite distinct, and there is no justification for applying section 158 to a case to which section 157 is more appropriately applicable. Section 157 clearly contemplates two things, first that the original suit is pending, and secondly that one or other of the parties does not appear. If these

(1) (1896) I.L.R., 20 Bom., 736. (2) (1907) I.L.R., 34 Calc., 235.

conditions are satisfied, the Court may dispose of the suit in the mode directed by chapter VII, when one or other of the parties does not appear, even though any of the contingencies contemplated by section 158 has happened." When however the learned Judges go on to say that section 158 contemplates the presence of materials on the record for the decision of the suit and that section 157 presumes the absence of such materials, for, the Court is *to dispose of*, not decide, the suit, we are unable to agree with them. The employment of the different phrases "disposal of the suits" and "decision of the suits" in the two sections is well explained by the fact that the various modes of disposal specified in chapter VII do not all involve any decision of the suit (see the orders under sections 93 and 102 as compared with the decree under section 100), while the decision under section 158 has the operation of a decree. However as we have pointed out already the Calcutta decision is on the whole in support of our view.

Our attention has been drawn to certain Madras decisions, notably to the cases of *Comalammal* v. *Rangasawmy Iyengar*(1) and *Rangasawmy Mudaliar* v. *Sirangan*(2). Certain of the observations in those cases are opposed to our view. They were cases decided under the Act VIII of 1859, sections 147 and 148 of which corresponded to sections 157 to 158 of the Code of 1882. The language of section 148 is no doubt somewhat different but we cannot regard the difference as material for the present purpose. In our opinion the criticism of those cases by the Calcutta Judges that section 147 would be superfluous on the view therein put forward, is not well founded, for provision would be necessary for cases of default in appearance when no time was granted. Section 147 would also be necessary for the further reason that it contains a direction in the alternative to make such other order as the Court thought fit. But we agree that these early Madras cases do not sufficiently realize the true scope of the two different sections in the Code and we are unable, with all respect, to agree with the reasoning therein adopted. Perhaps the position of the sub-heading "Of Adjournments" in chapter III of the Code of 1859 under which sections 147 and 148 are found is not so suggestive of the interpretation we have put upon the corresponding sections 157 and 158 in the order in which they stand in the scheme of the Code of 1882

(1) (1868) 4 M.H.C.R, 56. (2) (1868) 4 M.H.C.R., 254.

where the order of the headings of the successive chapters up to adjournments shows the importance of section 157 also preceding section 158. However this may be, we feel satisfied that the view we have adopted is the sound one. None of the other Madras cases cited has any bearing on the point. The decision in *Badam* v. *Nathu Singh*(1) seems also to us to be open to question for section 158 was applied there in preference to section 157. We must therefore reverse the decrees of the Courts below and direct the Munsif to restore the case to his file. We do not think it necessary to direct him to proceed under section 157 and then hear the application under section 103 for restoration. We have before us the grounds of the application for restoration. At one stage the Munsif considered them sufficient and ordered restoration. We are of opinion that having regard to the extreme illness of the plaintiff on the date on which the case was originally disposed of, evidenced by the further fact of his death two days later, he was prevented by sufficient cause from appearing when the suit was called on for hearing. Under Order XLI, Rule 33 of Act V of 1908, we have not merely power to make the order which ought to have been made by the Munsif under section 157 of the Code of 1882, but in the circumstances also the further order that the suit do stand restored and the Munsif do proceed to try the suit according to law. We direct accordingly. All costs hitherto incurred will be provided for in the revised decree.

(5) (1903) I.L.R., 25 All., 194.