APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., KC., Chief Justice, and Mr. Justice Wallace.

1922, August, 2.

R. A. ARUNACHELA AYYAR (DEFENDANT), APPELLANT,

v.

C. SUBBARAMIAH (PLAINTIFF), RESPONDENT.*

Ex parte decree—Setting aside—Grounds for setting aside—Sufficient cause—Duty of Court—Inevitable accident—Bona fide intent and attempt to get at Court in time, sufficient.

Where an application is made by a defendant to set aside an ex parte decree passed against him, the question to be considered by the Court is not whether by human possibility, being wise after the event, he could not have got in time to the place where the Court is held, but whether he honestly intended to be in Court and did his best, though in his own stupid way, to get there in time; and if the Court is satisfied that the man did try to get there and that he would have got there but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court to set aside the decree, mulcting, in proper cases, the delinquent in costs. A litigant should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be set right by his being ordered to pay costs.

APPEAL against the judgment and order of PHILLIPS, J., in the exercise of the ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 578 of 1920.

This appeal arises from an order on an application to set aside an ex parte decree passed against the appellant. The material facts appear from the following order of PHILLIPS, J., who dismissed the application :—

"This is an application to set aside the ex parte decree in this suit. The defendant obtained leave to defend the suit on condition of paying the amount claimed into Court. When the

* Original Side Appeal No. 116 of 1921.

case was finally taken up for hearing, the defendant was not present and his vakil reported that he had no instructions. The suit was in the list so early as the 19th September and was in the list the whole of that week, but was not taken up for hearing except in respect of an interlocutory application, when the defendant was not present, on the 21st September. From the 26th September for two weeks the Judge was not able to attend Court and the case was not taken up, although on several occasions during that period, that is, the whole of the first week and two days of the second week, the case appeared in the cause list. No intimation was given that the Court would not sit at all during that second week, and I may say it was a question of considerable doubt. Eventually the case was taken up on the 4th October and adjourned to the following day. It was not taken up on that day but was taken up on the 13th October. In the affidavit the defendant states that he was unable to appear on the 13th morning owing to the breach on the railway line, and that although he left Trichinopoly on the night of the 12th he did not reach Madras till 2-30 p.m., on 13th when the case had been disposed of. When he left Madras, which I must remark he did at his own risk at a time when the case was in the daily cause list, he informed his vakil that his address was in Pondicherry, and consequently when he was wanted to appear when the case was taken up a telegram was sent to Pondicherry, and had he received that telegram in proper time he could easily have come to Madras in time. He did not go to Pondicherry at all on the 4th October, but went to Trichinopoly without informing his vakil of the fact. Secondly, he says in his affidavit that he did not receive intimation until too late on the night of the 11th to catch the mail train. I may note that the telegram which he said he received has not been produced. It is therefore entirely his own fault that he did not receive intimation earlier. Even if he had started on the morning of the 12th from Trichinopoly, he could have reached Madras in time. It was contended on his behalf that owing to illness he was unable to appear, but the affidavit does not give this as the real ground, and the two medical certificates which have been produced do not show that he was unable to travel on the night of the 11th October. No doubt it may seem hard that when he has

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deposited the amount claimed into Court he should lose the benefit of putting forward his defence, but a mere case of hardship is not a sufficient ground for interference on his behalf. It is incumbent on him to show that he had sufficient cause for not attending Court. Taking into consideration all the circumstances, I am satisfied that he has been very negligent and it is his negligence alone that prevented his attendance in time. I cannot therefore hold that there was sufficient cause for his not attending Court, and must dismiss this application with costs."

The Advocate-General with *K. Jagannadha Ayyar* for appellant.

K. Bashyam Ayyangar and *V. V. Devanathan* for respondent.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—I have expressed myself on this subject in fairly strong language before and I propose to do so again.

When for some reason a man has not attended a case in Court and there is no sufficient explanation of his absence, the case, by reason of his absence, is allowed to go ex parte. If he comes to Court afterwards and asks that his case may be restored to file, the question to be considered by the Court is not whether by some human possibility, being wise after the event, he could not have got there in time or whether a man who studied his railway-guide a little better, would not have got in another train or taken another route, but whether a man honestly intended to be in Court and did his best though in his own stupid way, to get there in time, and once the Court is satisfied, as was the fact in this case, that the man did try to get there and that he would have got there in time but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court, in my judgment, to set aside the judgment, mulcting, in proper cases, the delinquent man in costs. In all those cases, this

universal panacea for healing wounds, as it has been called in England, will properly be applied. It is not right in cases of this kind that the man should have his case disposed of without being heard. These Courts are here so that people who have cases can have those cases heard and determined, and it should never be the intention of the Court that a man should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be put right, as far as the other side is concerned, by making the man to blame pay for it.

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The proper order in this case should have been that the case should be restored to the list and the judgment set aside on payment of all costs thrown away by the defendant, and that is the order that I propose to make. The costs of this appeal will be paid by the respondent. The costs of the application to set aside the judgment before PHILLIPS, J., will be costs in the cause.

WALLACE, J.—I agree. Whether there was negligence precedent or not does not affect the case. Under ordinary conditions if the appellant had started from Trichinopoly by the evening train on the 12th, he would have been in time for the hearing of this case on the 13th, and the breach of the railway line is obviously a sufficient cause for his not appearing, and that is the question which the Court has to decide. I am quite clear that there is sufficient cause for his not appearing and I therefore agree with the judgment of the learned Chief Justice.

WALLACE, J.

K.R.