APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, and Mr. Justice Waller.

R. C. KRISHNASAMY NAIDU AND OTHERS (PETITIONERS—PLAINTIFFS), APPELLANTS,

1923, October 5.

v.

R. CHENGALRAYA NAIDU AND OTHERS (RESPONDENTS—DEFENDANTS), RESPONDENTS*

Civil Procedure Code (V of 1908), sec. 151, O. XLI, rr. 17 and 19—O. IX, rr. 8 and 13—Dismissal of appeal for default of appearance of appellant and his vakil—Vakil's non-appearance due to his attitude of non-co-operation—Appellant not aware of order until after 30 days from dismissal—Subsequent application for restoration—Limitation—Delay, if excusable—Inherent jurisdiction, whether applicable—Limitation Act (IX of 1908), art. 168 and sec. 5—Amendment by enactment or rule so as to apply sec. 5 to applications under O. XLI, rr. 17 and 19.

Where an appeal was dismissed for default of appearance of the appellant as well as of his vakil who did not appear to conduct the appeal in pursuance of his instructions by reason of the latter taking up the attitude of non-co-operation with the Courts, and the appellant came to know of the dismissal more than thirty days after the order, whereupon he took immediate steps to bring the matter before the Court and applied to set aside the order of dismissal of the appeal;

Held, that where a Code declares the law on any matter specifically dealt with by it, the law must be ascertained by an interpretation of the language used by the legislature, for the essence of a Code is to be exhaustive on such matters;

that Order XLI, rules 17 and 19 are exhaustive in respect of dismissals for default of appearance in appeals and setting aside of such dismissals, just as the provisions of Order IX, rules 8 and 13 are exhaustive in the case of suits, *Neelaveni* v. *Narayana Reddi* (1920) I.L.R., 43 Mad., 94 (F.B.);

that the Court cannot act in such cases under section 151, Civil Procedure Code, or otherwise under its inherent powers,

* Appeal against Order No. 443 of 1923.

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Debi Bakhsh Singh v. *Habib Shah* (1913) I.L.R., 35 All., 331 (P.C.) distinguished; *Sonubai* v. *Shivajirao* (1921) I.L.R., 45 Bom., 648, dissented from; and

that an application to set aside an order of dismissal for default of appearance under Order XLI, rules 17 and 19, Civil Procedure Code, is governed by article 168 of the Limitation Act, and should be made within thirty days from the date of dismissal, and the Court has no power to excuse the delay in making the application.

APPEAL against the order of the Subordinate Judge of Chittoor in Civil Miscellaneous Petition No. 52 of 1921 in Appeal Suit No. 48 of 1921.

The material facts appear from the judgment.

M. S. Vaidyanatha Ayyar for appellants.

O. P. Srinivasan for respondents.

JUDGMENT.

This is an appeal from an order of the Subordinate Judge of Chittoor, dated 23rd September 1921, refusing to set aside an order dismissing an appeal, dated 4th March 1921.

The facts are that the petitioner being the appellant in the appeal before the Court instructed a vakil to appear and conduct his appeal. We will assume on the evidence before the Court that this vakil did not appear on 4th March 1921 to conduct the appeal in pursuance of his instructions by reason of the vakil having taken up the attitude of non-co-operation with the Courts and we will also assume that the appellant did not come to know of the order of the Court dismissing his appeal until sometime after it was dismissed and that he took immediate steps on making the discovery to bring the matter before the Court. Assuming these facts to be correct, the appellant has suffered grave injustice, for his appeal, for no fault of his own, has never been heard, although it may be that he has a remedy against his vakil for negligence. Under Order XLI, rule 17 of the Civil Procedure Code,

"If on the day fixed the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed;"

and under rule 19 where the appeal is so dismissed,

"the appellant may apply to the Appellate Court for the re-admission of the appeal; and where it is proved that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit."

These rules provide a remedy in a case like the present for having the appeal re-admitted. But by article 168 of the Limitation Act, IX of 1908, an application for the re-admission of an appeal dismissed for want of prosecution must be brought within thirty days from the date of the dismissal. It, therefore, follows that, if the Court is confined to acting under Order XLI, rule 19, this application is "statute barred."

It is, however, contended that the Court has an inherent power under section 151, Civil Procedure Code, or otherwise, to reinstate an appeal under such circumstances. There are two authorities quoted in support of that proposition *Debi Bakhsh Singh* v. *Habib Shah*(1) and *Sonubai* v. *Shivajirao*(2). In the former, the Privy Council acted under section 151, Civil Procedure Code, in a case where a suit was dismissed for non-appearance, the plaintiff being dead and the Court being unaware of that fact, and their Lordships say,

"The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead or the ranking of death under the category of default does not seem to be very stateable."

Their Lordships, in effect, held that the Court had made a mistake in thinking that the plaintiff was alive, that the plaintiff or appellant could not be said to have

(1) (1913) I.L.R., 35 All., 331 (P.C.). (2) (1921) I.L.R., 45 Bom., 648.

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not appeared or to have defaulted in appearing when he was no longer alive, that, therefore, that was a case to which the rules did not apply and that the Court, to do justice, could fall back on its inherent powers.

In *Sonubai* v. *Shivajirao*(1) the facts were that a pleader employed to conduct an appeal died and his death was communicated to the guardian *ad litem* of a minor and such guardian at the time being insane, took no steps and the appeal was dismissed for want of appearance. The Court held that it had an inherent power under section 151, Civil Procedure Code, to reinstate the appeal, thinking that the death of the pleader unknown, in fact, to the appellant was equivalent to the death of the plaintiff himself. If this case is rightly decided, we think that the assumed facts before us are as strong, for the non-appearance of the vakil due to his political attitude could not reasonably be imputed to his client. But the question as to when this Court can act under section 151 or otherwise under its inherent powers is a matter which has been fully considered in *Neeluveni* v. *Narayana Reddi*(2) and it can be stated thus :—Where a Code declares the law on any matter specifically dealt with, the law must be ascertained by an interpretation of the language used by the Legislature, for the essence of a Code is to be exhaustive on such matters. In that case, the Court held that Order 9, rules 8 and 13, were exhaustive in respect of cases where the plaintiff made default in appearance in a suit, and I think that we are bound to say that Order 41, rules 17 and 19, are equally exhaustive. The Privy Council case referred to above can be distinguished on the ground that there had been, in fact, no failure to appear because failure to appear cannot include the case

(1) (1921) I.L.R., 45 Bom., 648. (2) (1920) I.L.R., 43 Mad., 94. F.B.

of a man who is dead; whereas in this case there has been a failure to appear by the vakil and, if it is held that, in such a case as this, the Court can act under its inherent powers, it would involve a finding that in every case of dismissal of an appeal or a suit by reason of the non-appearance of the vakil, the Court has inherent powers which it must exercise almost *ex debito justitiæ* in favour of setting aside the order dismissing the suit or appeal. In our judgment, *Sonubai* v. *Shivajirao*(1) was wrongly decided. To hold otherwise in this case would be merely an evasion of the definite words of article 168 of the Limitation Act.

We regret that we have come to this conclusion because, in our view, it is not right that a party's suit or appeal should be irrevocably dismissed by non-appearance through no fault of his own, and again, through no fault of his own, by his not becoming aware of the dismissal for the short period of thirty days. The remedy for such injustice is not in our hands. Section 5 of the Limitation Act might have been made applicable by an enactment or rule to applications under rules 17 and 19, and, in our judgment, it is very desirable that this should be done. It will, however, not help the present appellant. We regret that this appeal must be dismissed. In view of the fact that the respondent did not bring the full facts before the Original Court at an early stage and has brought before us facts which we do not accept, we think that the right order as to costs will be that there will be no costs here or below.

K.R.

(1) (1921) I.L.R., 45 Bom., 648.