## APPELLATE CIVIL.

*Before Mr. Justice Varadachariar and Mr. Justice Horwill.*

KOTTA VENKATARAJU GARU (PETITIONER—APPELLANT), APPELLANT,

1936, November 10.

*v.*

MAHARAJA OF PITTAPURAM AND FIVE OTHERS (RESPONDENTS), RESPONDENTS. *

*Practice—Restoration of cases dismissed for default—Principles governing—Non-appearance of practitioner—Cases dismissed for default on ground of—Restoration of—High Court—Cases dismissed in—Restoration of.*

In dealing with applications for the restoration of cases dismissed for default of appearance, the Court has to consider the position of the party concerned rather than the conduct of the members of the Bar, though it may sometimes be difficult to dissociate the one from the other. A litigant should not be deprived of 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. Where the non-appearance is due to the default of the Counsel engaged in the case, a similar consideration will *mutatis mutandis* be applicable, when the Court has to decide whether there was sufficient cause for the non-appearance of the party or of his Counsel. This consideration is all the more weighty when dealing with cases of default in appearance before the High Court, because it may sometimes happen that the party is not present in Court at all, having entrusted his case to Counsel in the High Court. The party's interests should not be irreparably prejudiced by reason of every default on the part of Counsel.

*Arunachela Ayyar* v. *Subbaramiah*, (1922) I.L.R. 46 Mad. 60, and *Raja Ajai Verma* v. *Baldeo Prasad*, (1929) I.L.R. 52 All. 536, referred to.

Observations in *Abdul Aziz* v. *The Punjab National Bank, Ltd.*, (1928) I.L.R. 10 Lah. 570, 578 and 579, referred to as to

* Letters Patent Appeal No. 89 of 1936.

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what will constitute "sufficient cause" for non-appearance in cases of default of appearance by Counsel engaged in a case.

APPEAL under Clause 15 of the Letters Patent against the order of CORNISH J., dated 14th August 1936 and made in Civil Miscellaneous Petition No. 2676 of 1936, petition for setting aside the order of dismissal for default and to restore Second Appeal No. 848 of 1932 preferred to the High Court against the decree of the District Court, East Godavari at Rajahmundry, in Appeal Suit No. 81 of 1930 (Land Suit No. 2 of 1930 on the file of the Court of the Deputy Collector of Cocanada, Headquarters Division).

*V. Suryanarayana* for appellant.

*Advocate-General* (*Sir A. Krishnaswami Ayyar*) for respondents.

VARADACHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This Letters Patent Appeal has been preferred against an order of CORNISH J. refusing to restore Second Appeal No. 848 of 1932 which was dismissed under Order XLI, rule 17, Civil Procedure Code, as the appellant's Counsel did not appear when the case was called. In support of the application, a verified petition has been filed by the Counsel engaged in the case and it is there stated that at the time the second appeal came on before our learned brother, the Counsel was actually engaged in arguing a case before another Division Bench, that he did not make other arrangements for the second appeal because he expected the case before the Division Bench to be over earlier but that to meet all contingencies he had asked a representation to be made to our learned brother, if the case should be reached earlier, that he was actually engaged

before another Bench and that he would be before CORNISH J. in a few minutes.

When the matter came on before us on a previous occasion, a question had been raised by the office whether the appeal was competent without leave granted by the learned Judge himself. Mr. Suryanarayana maintained that as this was not an order relating to the appellate decree itself no leave was necessary under the terms of Clause 15 of the Letters Patent. But, as the point was not free from doubt, we preferred to allow the case to stand over to enable Mr. Suryanarayana to apply to CORNISH J. himself for leave. Leave has since been obtained.

We think it proper to refer here to the observations made by the learned Judge at the time that he granted leave because these observations make it clear that, while it might be true that Mr Suryanarayana had made proper arrangements for his difficulty being represented to the learned Judge, there was some mistake in carrying out these instructions so that the learned Judge was not properly informed of the exact situation. His observations leave little doubt in our mind that, if only the matter had been properly placed before the learned Judge, this unfortunate situation would not have arisen.

The application was not opposed even before the learned Judge ; and before us it has been very fairly stated on behalf of the respondents that they do not oppose the appeal. In these circumstances, we have less difficulty in dealing with the matter than we should otherwise have. We would only point out that, in dealing with applications of this kind, the Court has to consider the position

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of the party concerned rather than the conduct of the members of the Bar, though it may sometimes be difficult to dissociate the one from the other. As regards the position of the party, it was observed in *Arunachela Ayyar* v. *Subbaramiah*(1) that a litigant should not be deprived of 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 ; where the non-appearance is due to the default of the Counsel engaged in the case, a similar consideration will *mutatis mutandis* be applicable, when the Court has to decide whether there was sufficient cause for the non-appearance of the party or of his Counsel. This consideration is all the more weighty when dealing with cases of default in appearance before *this* Court, because it may sometimes happen that the party is not present here at all, having entrusted his case to Counsel here [cf : *Raja Ajai Verma* v. *Baldeo Prasad*(2)]. It will be unmerited hardship if the party's interests should be irreparably prejudiced by reason of every default on the part of Counsel.

From the point of view of the duty of the members of the Bar, we have no doubt that every endeavour will be made to maintain and if possible improve upon the traditions of cordiality between the Bench and the Bar and that no endeavour will be lacking on the part of the members of the Bar to facilitate the disposal of work before the Court as far as possible. In this view we strongly commend to the profession the remarks made by

(1) (1922) I.L.R. 46 Mad 60. (2) (1929) I.L.R. 52 All. 536.

CORNISH J. in his note*. It is difficult to lay down any general rule as to what will constitute "sufficient cause" for non-appearance in cases of default of appearance by Counsel engaged in a case. The observations of JAI LAL J. in *Abdul Aziz* v. *The Punjab National Bank, Ltd.*(1) seem to us, if we may say so, to lay down a safe guide in matters of this kind. With these remarks we allow the appeal and direct the restoration of Second Appeal No. 848 of 1932. There will be no order as to costs either in the Letters Patent Appeal or in the application before CORNISH J.

A.S.V.

(1) (1928) I.L.R. 10 Lah. 570, 578 and 579.

* In view of the difficulty suggested by VARADACHARIAR and HORWILL JJ. I give leave to appeal. But I think it right that I should formally state my reasons in writing, which I stated orally, for my refusal to allow the civil miscellaneous petition. The case was posted third in the list after a part-heard case and some applications to excuse delay. When it was called on nobody was present on behalf of the appellant. After some delay, during which the Advocate was sent for, a clerk came and said that the Advocate was engaged in another Court. I pointed out in dismissing the civil miscellaneous petition that an Advocate so placed could have done one of three things: he might have got some friend to inform the Judge when he came into Court of his difficulty and asked for the case to be passed over; or he might have come to the Judge in his room; or he might have written a note to the Judge. But the Advocate did none of these things. He considered it sufficient after the case had been called on to send a clerk. It seemed to me that submission to such treatment was tantamount to allowing an Advocate to dictate to the Court when and where he should appear.