enquiry into the complaint in this case which has been dismissed under section 203.

O'KINEALY, J.—So far as I can ascertain it has been the constant practice of this Court, since the introduction of the Code, to prevent new proceedings when the first complaint has been disposed of by an order under section 203 until that order is set aside. I am content, therefore, to follow that practice in the present case without any further discussion. I therefore agree that the subsequent proceedings should in this particular case be set aside. Looking also at the reasons given for the disposal of the case under section 203, I think that the order should not be allowed to stand in the way of a further enquiry; and setting it also aside, I agree with my colleague that a further enquiry should be made as directed.

S. C. B.

ORIGINAL CIVIL.

Before Mr. Justice Ameer Ali.

1896
May 18.

RAMPERTAB MULL AND ANOTHER *v.* JAKEERAM AGURWALLAH AND OTHERS, *

AND THREE OTHER SUITS BY SAME PLAINTIFFS AGAINST OTHER DEFENDANTS.

Practice—Civil Procedure Code (Act XIV of 1882), sections 102, 103, 108—Application to set aside order of dismissal made under section 102—Appearance of parties—Ex parte decree.

When the plaintiff's suit came on for hearing his Counsel applied for a postponement. This application was refused, and the plaintiff's Counsel, not being further instructed, left the Court. The suit was then dismissed for want of prosecution. Subsequently the plaintiff made an application under section 103 of the Civil Procedure Code (Act XIV of 1882) for an order to set the dismissal aside.

Held, refusing the application, that the above circumstances amounted to an appearance on the part of the plaintiff.

THIS was an application by the plaintiffs under section 103 of the Civil Procedure Code (Act XIV of 1882) to set aside an order dismissing four suits made under section 102 on the 4th February 1896.

* Original Civil Suits Nos. 217, 218, 220, and 221 of 1894.

1896

RAMPERTAB MULL v. JAKEERAM AGURWALLAH.

In his affidavits filed in support of his application the plaintiff Rampertab Mull stated that the four suits were for the recovery of damages for malicious prosecution, and arose out of the same criminal proceedings instituted and carried on against himself and his co-plaintiffs by the defendants in the four suits; that the evidence would be practically identical in each case; that about the end of June 1895 he heard of the death of Jakeeram, one of the defendants in suit No. 217 of 1894, and that he had been unable to ascertain who his representatives were, although he had used all diligence in searching for them; that on the 25th January 1896 he had learned for the first time of the death of Issur Chunder Ghose, a defendant in suit No. 218 of 1894, but had not had time to ascertain the names of his representatives; that the suit No. 217 of 1894 came on for hearing on the 4th February 1896 when he appeared by Counsel, who applied for a postponement, but such application was refused, whereupon his Counsel not being further instructed left the Court, and the suit was dismissed *ex parte*, and that on the same day the other three suits were dismissed *ex parte*, no one appearing.

Mr. *Jackson* and Mr. *Allen* for the plaintiffs.

Mr. *R. N. Mitter* for the defendants.

The following cases were cited in argument: *Administrator-General of Bengal* v. *Lala Dyaram Das* (1), *Hira Dai* v. *Hira Lal* (2), *Ramtahal Ram* v. *Rameshar Ram* (3), *Shibendra Narain Chowdhuri* v. *Kinoo Ram Dass* (4), *Manilal Dhunji* v. *Golam Husein Vazeer* (5).

AMEER ALI, J.—These are four actions for malicious prosecution in which the plaintiffs are the same, but the defendants in each case are different. These cases came on for hearing on the 4th February 1896.

Counsel for the plaintiff applied for an adjournment of all the cases on the ground that in suit No. 217 one of the defendants, Jakeeram, had died some months ago, and the plaintiff had not been able to discover his representatives. He also stated that the plaintiff had come to know, within the last two or three days, that

(1) 6 B. L. R., 688. (2) I. L. R., 7 All., 538.
(3) I. L. R., 8 All., 140. (4) I. L. R., 12 Calc., 605.
(5) I. L. R., 13 Bom., 12.

1896

RAMPERTAB MULL v. JAKEERAM AGURWALLAH.

the defendant Issur Chunder Ghose in suit No. 218 had died, and the plaintiff had not been able to make any enquiries about his representatives.

Another ground was that the plaintiff's witnesses were residing at a distance from Calcutta, and it would take some time to issue and serve the subpœnas on them.

As regards the other actions the ground urged for postponement was that they arose out of the same criminal proceedings as the suits Nos. 217 and 218, and that, as the evidence in all the suits would be "practically identical," it would be to the advantage of all the parties if the four suits were heard together.

When the application was made I considered the grounds wholly insufficient. The application was opposed in three cases, and, having regard to the opposition of the defendants, I dismissed the suits for want of prosecution.

On the 20th April 1896 applications were made under section 103 of the Civil Procedure Code to set aside the order of dismissal and to have a day appointed for proceeding with the suits.

Mr. Mitter appeared in three of the suits Nos. 217, 220 and 221, and opposed the applications, *first*, on the ground that the matter did not fall under section 103 of the Civil Procedure Code, inasmuch as the order of dismissal was not made under section 102. He urged that section 102 referred to cases where the plaintiff does not appear, and that therefore the only method by which the decrees in the present suits could be set aside was by proceeding under the review section. It was contended that on the 4th of February the plaintiff did, as a matter of fact, appear and apply for postponement; that when his application for postponement was rejected he withdrew, and therefore that section 103 does not apply.

Mr. Mitter further contended that even if section 103 applied the plaintiff was bound to prove, when the case was called on, that he was prevented by sufficient cause from appearing, and that his affidavit did not disclose any sufficient cause for setting aside the order of dismissal.

On the other side, various cases were cited with the object of showing that in cases similar to the present it had been held that an

1896

RAMPERTAB MULL v. JAKEERAM AGURWALLAH.

application merely for postponement did not amount to an appearance, and that therefore the present application was within section 103.

I took time to consider the first question, as it was mentioned that there was a reference pending before a Full Bench of the Court, in which a point having some analogy to this question appeared to be involved. That was a reference in the case of *Jonardan Dobey* v. *Ram Dhone Singh* (1), but it does not afford much assistance in regard to the question under consideration.

In that case there were three defendants. One of them appeared on the day fixed for the hearing of the suit and applied for an adjournment. The case was adjourned to another day, and on that day none of the defendants appeared. The Court proceeded to deal with the matter under section 157 of the Code. Upon an application under section 108 the question arose whether the appearance of the defendant on the first day precluded the Court from dealing with the case under section 108. The learned Judges, who decided the reference, appear to have regarded the application for adjournment as an appearance, but having regard to the provisions of section 157 and the general provisions of Chapter VII they were of opinion that the Court was not precluded from dealing with the application under section 108.

That case therefore is not of much assistance in dealing with the question raised by Mr. Mitter.

In the case of *Administrator-General of Bengal* v. *Lala Dyaram Das* (2) an application was made by Counsel when the case was called on for an adjournment on the ground that the defendant was ill and therefore unable to attend. The application being refused Counsel, who had applied for the postponement, said he did not appear further. It was held that that amounted to non-appearance, and that the suit had been heard *ex parte*. In that case, as a matter of fact, the defendant was ill at Lucknow and unable to be present at the hearing. It will be seen, therefore, that there is some difference between that case and the present.

The cases in 7 and 8 Allahabad series are in some respects similar to the present case. In the case of *Hira Dai* v. *Hira Lal* (3)

(1) I. L. R., 23 Cal., 738. (2) 6 B. L. R., 688.

(3) I. L. R., 7 All., 538.

1896

RAMPERTAB MULL v. JAKEERAM AGURWALLAH.

the defendant did not appear either at the first hearing of the suit or on the day to which it was adjourned. He had however filed a *vakalutnamah* under which a vakil had appeared and objected to an attachment being granted before judgment. The Court considered that that was not a sufficient appearance.

The case of *Ramtahal Ram* v. *Rameshar Ram* (1) was similar. In the case of *Shibendra Narain Chowdhuri* v. *Kinoo Ram Dass* (2) an appeal was called on for hearing. The pleader of the appellant expressed himself not prepared to go on with the case and the appeal was dismissed. That was considered a dismissal for default under section 556 of the Civil Procedure Code.

It is clear from these cases that when the defendant and, by parity of reasoning I may take it the plaintiff, is prevented from proceeding with the case by unavoidable absence, or is prevented from instructing his pleader or Counsel from unavoidable causes or *bonâ fide* mistake, it has been held to amount to a non-appearance under section 102 of the Code. In the present case the plaintiff was present. He instructed Counsel to apply for an adjournment, and when that was refused he took no further steps. I mention this to show that it is by no means clear that the plaintiff has brought himself within the provisions of section 102 of the Code, but having regard to the wide terms in which sections 102 and 103 are couched I am not prepared to hold that the applications do not come within section 103.

Assuming, therefore, that the applications do come within section 103, the next point to consider is whether sufficient cause has been made out for the alleged non-appearance.

The four cases are entirely separate from each other. It may be they arise out of the same criminal prosecution, but the defendants are separate, and the evidence must be given separately.

Mr. Mitter for the defendants repudiated the suggestion that the evidence in all the cases was identical. I must therefore deal with each case separately.

In the case against Jakeeram the plaintiff says he heard of Jakeeram's death towards the latter end of June 1895; that he instituted enquiries among the people who knew Jakeeram and had

(1) I. L. R., 8 All., 140. (2) I. L. R., 12 Calc., 605.

1896

RAMPERTAB MULL v. JAKEERAM AGURWALLAH.

dealings with him, but that such enquiries led to no result, until in the middle of August 1895, he was informed by one Bhugwan Dass that Jakeeram had died at Arrah. Nothing of this kind was mentioned in the affidavit of the 4th of February, nor is there any affidavit by Bhugwan Dass in support of the statement made by Rampertab.

Then he says that about the end of August he went to Arrah, where he was informed by one Ramessur Pawray that Jakeeram had died at Patna, but that nobody related to him was at Patna. He further says he returned in the beginning of September 1895 when he found his brother Setaram very ill and that he had to look after him all this time. These matters again are not mentioned in the affidavit of the 4th of February, nor is there any affidavit of Ramessur Pawray in support of these statements.

There is another plaintiff, Sew Lall. Rampertab states that in August 1895 Sew Lall went to Bikaneer to celebrate his daughter's marriage. There is no affidavit by Sew Lall in support of this statement. The entire story depends upon the statement of this single plaintiff Rampertab. There is no statement that he informed his attorney about the death of Jakeeram or about the endeavours he was making to discover him; nor is there the smallest foundation for suggesting that the plaintiff acted with sufficient diligence in taking the necessary steps for placing upon the record the representatives of Jakeeram. I am assuming that an action for malicious prosecution survives against the representatives of the deceased defendant, but it should be understood that I have not by any means come to that conclusion.

According to the plaintiff's own allegation when he appeared on the 4th of February the suit had abated in consequence of the fact that no steps had been taken to revive the suit as against the representatives of Jakeeram, and even now the plaintiff is not in a position to have the abatement removed and the suit revived.

There was another defendant on the record, and he is perfectly entitled to say that the mere fact of the plaintiff not being able to find the representatives of Jakeeram is no reason whatever for keeping the case hanging over him.

If the plaintiff is entitled to seek redress from the Court the defendant on his side is equally entitled to be protected from

1896

RAMPERTAB MULL v. JAKEERAM AGURWALLAH.

harassment. The ordinary rule is that a plaintiff must proceed with his action with sufficient diligence. I am not satisfied with the affidavit, and I have given sufficient reasons for coming to the conclusion that the plaintiff never took any steps *bonâ fide* or with sufficient diligence to bring on the record the representatives of Jakeeram. Had he taken any such steps it is apparent to my mind he would have got the affidavit of the persons I have mentioned to support his statements.

Section 103 gives a remedy for cases where there has been a *bonâ fide* mistake, or when, from unavoidable causes, such as those mentioned by Mr. Justice Jardine in the case of *Manilal Dhunji* v. *Golam Husein Vazeer* (1) a party has failed to appear in a suit, but it certainly does not refer to a case where the plaintiff attempts, as he appears to me to attempt in this case, to keep the action hanging against the defendants for purposes which it is unnecessary to discuss.

As regards the suits Nos. 220 and 221 there is no reason whatever for setting aside the order of dismissal. The plaintiff had no ground for postponement on the 4th of February, and he has no cause whatever for setting aside the dismissal. The only ground he suggests for not having been in a position to prosecute the four suits on the 4th of February is that the evidence in all the cases would be practically identical whatever that may mean. As I have already pointed out the evidence in each case would have to be given separately. And therefore there was no reason on the part of the plaintiff for not being ready to go on with these two cases. It is absurd to act on the mere idea of the plaintiff that he considered the evidence identical, and therefore did not concern himself with getting ready.

I hold therefore that so far as suits Nos. 217, 220 and 221 are concerned no case has been made out for setting aside the order of dismissal.

As regards the suit No. 218 the matter seems to me to stand on a different footing. The plaintiff says that he learnt for the first time on the 25th January 1896 that Issur Chunder Ghose was dead, and he had no time to ascertain who were his representatives.

(1) I. L. R., 13 Bom., 12.

1896

RAMPERTAB MULL v. JAKEERAM AGUR-WALLAH.

There may be some ground for holding that in this case he has made out a sufficient case to set aside the order of dismissal.

As I have already said I express no opinion on the question whether an action for malicious prosecution survives against the representatives of the original defendants. The result is that the applications in suits Nos. 217, 220 and 221 will be dismissed with costs; and that the order for dismissal in suit No. 218 will be set aside.

I will fix a day for hearing the case upon an application for that purpose being made to me.

Attorney for the plaintiff: Babu *M. M. Chatterji.*

Attorney for the defendant: Mr. *H. C. Chick.*

F. K. D.

[END OF VOL. XXIII.]