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the 18th December, and that at the next hearing the Court seems to have acted under s. 157 of the Civil Procedure Code, which allows two alternative courses, the first of which is proceeding to dispose of the suit under Chapter VII of the Code, and the second, making such other order as the Court thinks fit. I am of opinion that the Court chose the first of these alternatives, and acted under Chapter VII, and passed an *ex-parte* decree under the provisions of s. 100 of that chapter. My brother Oldfield has explained the ground upon which the decree should be considered as passed *ex-parte*, and the application being made under s. 108, an appeal lay to this Court under cl. (9), s. 588, from the order rejecting the application to set the decree aside.

Appeal allowed.

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Before Mr. Justice Mahmood.

LAKHMI CHAND (PLAINTIFF) *v.* GATTO BAI (DEFENDANT).*

Practice—Appeal—Security for costs—Civil Procedure Code, s 549—Application that appellant be required to give security—Order directing appellant to show cause—Absence of counsel to support application—Dismissal of application—Application to restore case to register—Civil Procedure Code, ss. 98, 99, 647.

A petition was made under s. 549 of the Civil Procedure Code, praying that an appellant might be required to give security for the costs of the appeal. The ground upon which the petition was based was that the appellant was not pecuniarily in a position to pay the costs of the appeal if it should be dismissed. An order was passed directing the appellant to show cause why the prayer of the petitioner should not be granted. When the petition came on for hearing, no one appeared to support it or to show cause against it, and it was accordingly rejected. An application was subsequently made on behalf of the petitioner praying that the case might be restored to the register, on the ground that counsel for the petitioner was absent on the occasion of the hearing for fifteen minutes only, and that, as no one on behalf of the appellant had appeared to show cause, the petition should have been granted, and the absence of petitioner's counsel was immaterial.

Held that the matter was dealt with by s. 98 of the Civil Procedure Code, and that s. 647 of the Code, prescribing that the procedure laid down for suits should be followed as far as it could be made applicable in proceedings other than suits, made s. 99 the rule by which the Court was to be guided.

Held also that although no general rule could be laid down that the absence of counsel, when a case has been called on, should be treated as by itself a sufficient reason for restoring to the register either a regular suit, or an appeal, or a miscellaneous application, but each case of the kind must be dealt with according to its own particular circumstances, in the present case, taking the circumstances into consi-

* First Appeal No. 134 of 1884, from a decree of Maulvi Muhammad Samiul-lah Khan, Subordinate Judge of Aligarh, dated the 27th June, 1884.

deration, an absence of counsel for fifteen minutes was not enough to preclude the Court from restoring the petition to the register.

S. 549 of the Civil Procedure Code was never intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of first instance, and an application should not be granted under that section of which the only ground is a statement that the appellant is not pecuniarily in a position to pay the costs of the appeal, if it should be dismissed. *Maneckji Limji Mancherji* v. *Goolbai* (1) followed. *Ross* v. *Jaques* (2), *Seshayyangar* v. *Jainulavadin* (3), and *Jogendro Deb Roykut* v. *Funindro Deb Roykut* (4) referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

Mr. *G. E. A. Ross*, for the applicant (respondent in F. A. No. 134 of 1884).

Mr. *C. H. Hill*, for the opposite party (appellant in F. A. No. 134 of 1884).

MAHMOOD, J.—The facts of this case, so far as it is necessary to state them for the purpose of disposing of the present application, are the following:—On the 12th January, 1885, the respondent in F. A. No. 134 of 1884, an appeal pending before this Court, made an application under s. 549 of the Civil Procedure Code, praying that the appellant might be ordered to furnish security for the petitioner's costs both in this Court and in the Courts below. The application came before Duthoit, J., who so far granted it as to pass the following order:—"Let the office report the amount of the costs, and let notice issue to the other side." Upon this order, notices in Hindustani were issued by the office, which were examined by me, and which appeared to me to amount to notices directing the appellant to show cause why the prayer of the petitioner should not be granted. In the usual course of the business of this Court, the application came before me sitting in single Bench, on the 17th instant, and I passed the following order:—"No one appears to support the application, or to show cause against it. Rejected." This being the state of things, an application was made to me yesterday by Mr. Ross, who represents the respondent in the appeal, stating that the reason why neither he nor his colleague appeared when the case was called on, was as

(1) I. L. R., 3 Bom. 241.
(2) 8 M. & W. 13.
(3) I. L. R., 3 Mad. 66.
(4) 18 W. R. 102.

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stated in the petition. This application practically asks me to restore the case to the register. It was my intention before granting it to hear the other side, and to issue notice to the appellant to show cause why the prayer of the respondent should not be granted. But Mr. Hill, who represents the appellant, and who has received notice of the present application, has now appeared to show cause against it. I have heard counsel on both sides, and I should have felt myself bound to reject the application if I could have accepted the subtle argument of Mr. Hill, that there is no provision in the Civil Procedure Code under which an order granting it could be made. In my opinion, the Civil Procedure Code, which, in its first part treats of all matters arising in regular suits, deals with the present matter in s. 98. Here we have an applicant, an application, and a person representing the opposite party, and what happened was analogous to the case of a suit coming on for hearing, in which neither party appears, and in which the order of the Court is that the suit shall be dismissed without any order as to costs. Under these circumstances, I am of opinion that s. 647 of the Civil Procedure Code, which prescribes that the procedure laid down by the Code for suits shall be followed, as far as it can be made applicable, in proceedings other than suits, makes s. 99 the rule by which the Court is to be guided in the present matter. S. 99 provides that "whenever a suit is dismissed under s. 97 or s. 98, the plaintiff may (subject to the law of limitation) bring a fresh suit; or if, within the period of thirty days from the date of the order dismissing the suit, he satisfies the Court that there was a sufficient excuse for his not paying the court-fees required within the time allowed for the service of the summons, or for his non-appearance, as the case may be, the Court shall pass an order to set aside the dismissal, and appoint a day for proceeding with the suit." Here the allegations contained in the petition are not contradicted by Mr. Hill. They are to the following effect:—"That your petitioner applied for an order that the aforesaid appellant do furnish security for the costs of the respondent. That notice to show cause was issued and served on the appellant, and the said application was on for hearing to-day before Mr. Justice Mahmood. That your petitioner's counsel was in attendance at about quarter to 12 o'clock, the Court having

sat barely half an hour. That the said application was called on about half-past 11 o'clock and rejected on account of the absence of your petitioner's counsel, although no person for the appellant appeared to show cause. That your petitioner's counsel applied verbally, but the same was refused. That as no one on behalf of appellant appeared to show cause, the petition should have been granted, and the absence of your petitioner's counsel was quite immaterial."

Now, I am far from laying it down as a general rule that the absence of counsel, when a case has been called on, should be treated as by itself a sufficient reason for restoring to the register either a regular suit, or an appeal, or a miscellaneous application. But in the present case, taking into consideration the fact that counsel on the other side was also absent, and that if Mr. Ross' view of the case is correct, my own order might possibly have been the reverse of what it now is, I hold that a difference of, say, fifteen minutes is not enough to preclude me from restoring the original application to the register. Each question of this kind must be dealt with, not according to any hard-and-fast general rule, but according to its own particular circumstances, especially as the practice of this Court is not yet settled as to the action which should be taken in case of the absence of counsel. My order will, therefore, be that my former order of the 17th instant be set aside, and that the original application be restored. I make no order as to costs of this proceeding because that matter will be more conveniently dealt with by the Judge disposing of the original application.

On the 20th February, the original application came on for hearing before MAHMOOD, J.

Mr. *G. E. A. Ross*, for the applicant (respondent).

Mr. *C. H. Hill*, for the opposite party (appellant).

MAHMOOD, J.—I do not think it necessary to ask Mr. Hill to reply, because in my opinion the application must be dismissed with costs. My reasons for this conclusion are that the only ground upon which the application has been made consists of a statement to the effect that the appellant was not pecuniarily in a position to pay the costs of the appeal in this Court, if the appeal should be dismissed. I have already recently expressed

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my reasons for thinking that s. 549 of the Civil Procedure Code was never intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of first instance. At that time I was not aware of the rulings which Mr. Hill has cited to-day, but having now studied those rulings I consider that they go almost further in the same direction than I went on the occasion to which I have referred. One of these rulings is *Maneckji Limji Mancherji* v. *Goolbai* (1), in which Westropp C. J., laid down the rule that the mere poverty of an appellant is by itself no sufficient ground for requiring him to give security for the costs of the appeal. This case is, I think, on all fours with the present, and the decision seems to me the same in principle as that which was passed in *Ross* v. *Jaques* (2), although the point there apparently arose in a suit and not in appeal. Some authorities were also cited by Mr. Ross, the most recent being *Seshayyangar* v. *Jainulavadin* (3), in which the Madras High Court, consisting of the Chief Justice, Sir Charles Turner, and Mr. Justice Muttasami Aiyyar held that s. 549 of the Civil Procedure Code, though not necessarily inapplicable to pauper appeals, should not be applied to such appeals except on special grounds. This decision only supports Mr. Ross' contention to a partial extent, and it appears to me that the *ratio decidendi* favours the argument of Mr. Hill. Mr. Ross also cited an older case—*Jogendro Deb Roykut* v. *Funindro Deb Roykut* (4)—which again only supports him to a limited extent. The main point decided there was that "where the appellant was, according to his own statement, a pauper, and it appeared that others presumably able to furnish the necessary security were interested in the matter, the case was considered a proper one in which security should be given." I do not desire to express any opinion upon the rule here laid down, for although Mr. Ross touched on circumstances indicating that in the present case also "others presumably able to furnish the necessary security were interested in the matter," the application itself is silent on the point, and, as Mr. Hill has said, he is not called on to answer matters not appearing in the application. I dismiss the application with costs.

Application dismissed.

(1) I. L. R., 3 Bom. 241.
(2) 3 M. &. W. 13.
(3) I. L. R., 3 Mad. 66.
(4) 18 W. R. 102.