1911
April, 13.

FULL BENCH.

Before Mr. Justice Sir George Knox, Mr. Justice Banerji and Mr. Justice Karamat Husain.

DEBI SAHAI (PLAINTIFF) *v.* SARASWATI AND OTHERS (DEFENDANTS.)*

Civil Procedure Code (1882), *sections* 10, 102 *and* 103—*Suit dismissed for default of appearance—Date fixed, not for hearing of case but for appointment of a guardian to a minor defendant only—Order of dismissal* ultra vires.

Consequent on the death of one of the defendants to a suit, the plaintiff applied to bring the heirs of the deceased defendant on to the record, and, as one of them was a minor, nominated as his guardian his elder brother. The brother declined to act as guardian, and the court fixed a date upon which the plaintiff was to appear and nominate another person as guardian. Upon the date so fixed the plaintiff failed to appear, and the court dismissed the entire suit, subsequently also rejecting an application for its restoration.

Held that the court had no jurisdiction to dismiss the whole suit, as the only matter then before it was the appointment of a guardian to the minor defendant.

IN this case, on the death of one of the defendants to the suit the plaintiff applied to bring upon the record the heirs of the deceased defendant, and, as one of them was a minor, nominated his elder brother as his guardian. The elder brother refused to act as guardian, and the court thereupon fixed a date upon which the plaintiff was directed to suggest some other person as guardian. Upon the date so fixed neither the plaintiff nor anyone on his behalf appeared, and the court, purporting to act under section 102 of the Code of Civil Procedure, 1882, dismissed the entire suit. An application for restoration made by the plaintiff was also rejected. The plaintiff thereupon appealed to the High Court. The appeal, originally coming before KNOX and KARAMAT HUSAIN, JJ., was, at their recommendation, laid before a full Bench by order of the Chief Justice of the 4th March, 1911.

The Hon'ble Pandit *Sundar Lal* (with him The Hon'ble Pandit *Madan Mohan Malaviya* and Babu *Girdhari Lal Agarwala*), for the appellant:—

The only matter that was before the court on 16th July, 1907, was the appointment of a guardian. On that date the suit was

* First Appeal No. 46 of 1909 from an order of Girraj Kishore Datt, Subordinate Judge of Bareilly, dated the 6th of February, 1909.

not up for hearing at all. The court could have disposed of the matter of appointment of a guardian in any way on that day, but of nothing else. The order dismissing the whole suit is illegal. Even under section 158 of the Civil Procedure Code (Act XIV of 1882) the court could not have dismissed the suit on that date.

Munshi *Gokul Prasad* (with him Mr. *W. Wallach*, Mr. *B. E. O'Conor*, The Hon'ble Pandit *Moti Lal Nehru*, Dr. *Satish Chandar Banerji*, and Babu *Sital Prasad Ghose*), for the respondent :—

The question for decision is whether the lower court rightly or wrongly refused the application for restoration, and not whether the order dismissing the suit was a proper order. The plaintiff has not alleged or proved any sufficient cause for not appearing on the 16th July. The affidavit filed in support of the application for restoration says nothing more than that neither the plaintiff nor his pleader was present when the case was called on. It does not give any reason for the non-attendance. The lower court was therefore justified in rejecting the application for restoration. Besides, the order dismissing the suit fell within the purview of section 158 of the old Code. It is doubtful whether any application for restoration under section 103 could be made in this case ; for the order dismissing the suit was, properly speaking, not one under section 102, as an order of dismissal for default could not be made before the date fixed for hearing. The plaintiff's remedy, therefore, was by way of appeal or revision against the order of dismissal. As to section 151 of the new Code of Civil Procedure, the court's powers are, no doubt, very wide; but they should be exercised where there is no other remedy open to the party.

Babu *Surendra Nath Sen*, for another respondent :—

Section 151 contemplates cases in which no other remedy is provided by the Code by way of appeal or revision, &c. The plaintiff had a specific remedy, namely, an appeal from the decree which was framed after dismissal of the suit.

The Hon'ble Pandit *Sundar Lal* was not heard in reply.

KNOX, BANERJI and KARAMAT HUSAIN, JJ.—The suit in which the order was passed from which this appeal has been filed was a suit for recovery of property of considerable value. The

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number of persons arrayed as defendants was originally 245. Upon the institution of the suit the court decided to fix a date for settlement of issues. Owing to the great number of defendants the date originally fixed for settlement of issues expired before the parties had been served. While the case was thus pending, one of the defendants, Dularia, died. In lieu of the date originally fixed for the settlement of issues the court fixed the 25th of July, 1907, for the same purpose. In consequence of the death of Dularia an application was made to bring her heirs on the record. It so happened that one of the heirs was a minor, and it was necessary to appoint a guardian for the suit. The plaintiff, thereupon, suggested that the minor's brother, a co-defendant in the suit, should be made guardian. Upon notice going to the said brother, he appears to have noted on the summons that he did not want to act as guardian. This fact of his refusing to be guardian was brought before the court on the 12th of July, 1907, and the court then ordered the plaintiff to suggest some one else as a guardian. It granted three days for the plaintiff to decide what course to take and directed the case to be put up for this purpose on the 16th of July, 1907. On the 16th of July, 1907, neither the plaintiff nor any pleader on his behalf appeared in court, and the learned Judge, apparently overlooking the fact that the only matter which he had before him on that day was the appointment of a guardian, treated the absence of the plaintiff as absence on the day fixed for the case, and although that day had not arrived, the court dismissed the case for want of prosecution on behalf of the plaintiff. The same day the plaintiff's pleader filed an application asking that the order passed might be re-considered and the case readmitted under its original number. This application, was supported by two so-called affidavits. Neither of the affidavits deserves the name of an affidavit. They are mere pieces of waste paper. Be that as it may, the court dismissed the application on the ground that the applicant had failed to show any sufficient cause for his non-appearance. From this order the present appeal has been filed. While it is true that neither the application nor the affidavits disclosed any sufficient cause, sufficient cause was amply manifest on the face of the record, and the court should have taken note

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of it. The date on which the plaintiff did not appear was not the date for the hearing of the suit itself, and the farthest the court could go was to decide the application which had been put before the court and for the hearing of which the 16th of July, 1907, had been fixed. It is contended that the application was not an application under section 103 of Act XIV of 1882. The order of the learned Subordinate Judge answers that contention fully. He evidently considered it, as his judgement shows, a case to be dealt with under section 102. We allow the appeal; set aside the order passed on the 6th of February, 1909; allow the application for restoration of the case, and direct the court below to restore the suit under its original number and proceed to hear it according to law. The costs will abide the event.

Appeal allowed.

Before Mr. Justice Sir George Knox, Mr. Justice Banerji and Mr. Justice Richards.

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KESRI AND OTHERS (PLAINTIFFS) *v.* GANGA SAHAI AND OTHERS (DEFENDANTS).

Execution of decree—Joint decree-holders—Application for execution by one on behalf of himself and others—Leave to bid obtained for himself—Purchase by the applicant alone—Rights of co-decree-holders in respect of property so purchased.

One of several joint decree-holders made an application for execution on his own behalf and on behalf of his co-decree-holders, and then alone obtained leave to bid for the property, and purchased it, the purchase money being equal to the amount of his share of the decree. *Held*, in a suit by the co-decree-holders to recover their shares of the property so purchased, that they were entitled to recover, the equity being on the side of the plaintiffs.

THIS was a re-hearing, on an application for review of judgement, of First Appeal No. 58 of 1907, decided by the same Bench on the 9th of April, 1910, and reported in I. L. R., 32 All., 541.

The facts, so far as they are material to the present decision, were as follows:—A mortgage deed was executed in favour of Debi Din and Bahadur, jointly. Their shares in the mortgage money were, approximately, two-thirds and one-third respectively. The mortgagees obtained a decree for sale. The respondent No. 1, heir of Debi Din, alone applied for execution of the decree; the heirs of Bahadur did not join in the application. It was