APPELLATE CIVIL.

1912.
March 20.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

LALTA PRASAD AND ANOTHER (PLAINTIFFS) *v.* RAM KARAN (DEFENDANT).*

Civil Procedure Code (1908), order IX, rules 8 and 9, section 151—*Dismissal of suit for default—Restoration—Sufficient cause—Court's inherent power to restore.*

Order IX, rule 9, of the Code of Civil Procedure, 1908, makes it compulsory on a court to set aside a dismissal under rule 8 where the plaintiff satisfies the court that there was sufficient cause for non-appearance. It, however, cannot take away the court's power to restore the case for any other valid reasons.

The facts of this case were briefly as follows:—

Lalta Prasad and another filed a suit against the defendant respondent under the Religious Endowment Act. The District Judge examined one plaintiff at the first hearing, and ordered Lalta Prasad to be present in person on a subsequent date to which he adjourned the suit. He mentioned to the plaintiff's pleaders, Rai Debi Prasad and B. Munna Lal, that the case would be taken up at 12 o'clock on the day of hearing, but none of the plaintiff's pleaders put in an appearance, nor did the plaintiff, Lalta Prasad, himself. The defendant was present. It was said that the plaintiff's pleader, Rai Debi Prasad, as well as the defendant's pleader, Babu Vikramajit Singh, were absent at a late municipal meeting. The Judge waited for twenty minutes, and then dismissed the suit under order IX, rule 8, of the Code of Civil Procedure. The plaintiff applied for restoration, filing an affidavit that he was lying, on the day of hearing, in the chamber of his pleader, Babu Munna Lal, with a bad leg, waiting to be informed of his case having come up. Babu Munna Lal also filed an affidavit to the effect that he had conceived the Judge to have fixed two o'clock for this case and so had started another in the court of the Additional Subordinate Judge. The Judge held that the plaintiff had another pleader besides Babu Munna Lal, and he could have been informed by any of his pleader's clerks within the twenty minutes the court was waiting. He accordingly rejected the application. The plaintiff appealed.

Dr. *Tej Bahadur Sapru*, for the appellant:—

The case is one of misapprehension. The plaintiff's negligence was due to the common and natural reluctance of parties to appear

* First Appeal No. 123 of 1911 from an order of Austin Kendall, District Judge of Cawnpore, dated the 30th of May, 1911.

1912

LALTA PRASAD v. RAM KARAN.

unrepresented in a court. The affidavits filed disclose a sufficient cause for setting aside the order under order IX, rule 8. The plaintiff should not be made to suffer too much for his own folly or for the abstention of his pleaders. He cited *Somayya* v. *Subbamma* (1). Restoration is obligatory on courts if sufficient cause is shown. There is no negative proposition that such applications can be granted unless sufficient cause is shown.

Dr. *Satish Chandra Banerji* (with him Lala *Purushottam Das Tandan*) for the respondent :—

The ruling in 26 Madras 599, has not been followed in this Court; *Lal a Prasad* v. *Nand Kishore* (2). I submit there is no other rule which can help the appellant. He has not made out sufficient cause for an interference. The lower court exercised sufficient discretion in the matter. The plaintiff cannot claim anything as a matter of right.

Dr. *Tej Bahadur Sapru*, in reply, referred to the provisions of section 151 of the Code of Civil Procedure.

KARAMAT HUSAIN and TUDBALL, JJ. :—This is an appeal from an order refusing to re-instate a suit dismissed for default of appearance by the plaintiffs under order IX, rule 8. The suit is one in respect to a trust by certain trustees against a co-trustee who is charged with the management of the property.

The lower court rejected the application for rehearing on the ground that sufficient cause had not been shown. The facts briefly are as follows. The suit was partly heard. One of the plaintiffs had been examined and the suit adjourned to enable the other plaintiff to appear for examination. Two of the leading pleaders were appearing for them. One of these gentlemen and also the pleader for the opposite party are members of the Municipal Board of Cawnpore and on the date fixed were late in attending court owing to a meeting of the Board. The other pleader for the plaintiff represented this to the Court early in the day and the Judge consented to taking the case at 12 o'clock. The pleader, however, misunderstood what the Judge said and thought that the case would be taken up at 2 o'clock. He informed the plaintiffs accordingly, and the same information was conveyed to their other pleader on his arrival. As a result, when the case was called at 12 o'clock, both pleaders were engaged in other cases

(1) (1903) I. L. R., 26 Mad., 599. (2) (1899) I. L. R., 22 Calc., 66.

1912

LALTA PRASAD v. RAM KARAN.

in other courts. The case was called repeatedly and the court waited for 20 minutes. One of the plaintiffs was waiting in his pleader's room. It is inconceivable that he did not hear the case called. Finally at 12-20 p.m., when no one appeared, the Court dismissed the suit under order IX, rule 8.

On their application for restoration the plaintiffs pleaded that they had not heard the calling of the case and placed before the court the misunderstanding into which their pleader had fallen. As a matter of fact it is admitted that the calling was heard, but too late, to enable the plaintiffs to appear in person. They arrived just after the case had been dismissed.

It is highly probable that, like most litigants in these provinces, they were unwilling to enter the court without their pleaders both of whom were at that time unable to leave the cases in which they were engaged.

The lower court has held that there was not sufficient cause for non-appearance and has rejected the application for restoration. In the course of his order the learned Judge made comments on the plaintiffs' case so far as it had been placed before him.

On appeal, we are asked to hold that there was sufficient cause. While we think that it might be difficult to hold that there was sufficient cause in view of the fact that the case was actually called and repeatedly called for 20 minutes in the manner in which cases are called in Mofussil courts both within the court room and outside the court room, so that persons in attendance in the court compound were sure to hear, we are of opinion that the case is one of those in which the court may exercise its inherent powers of passing orders necessary for the ends of justice. Nothing in the Code of Civil Procedure can limit or otherwise affect such powers under which, in our opinion, a court can restore such a case as this on grounds other than sufficient cause for non-appearance. Order IX, rule 9, makes it compulsory on a court to set aside a dismissal under order IX, rule 8, where the plaintiff satisfies the court that there was sufficient cause for non-appearance. It, however, cannot take away the court's power to restore the case for any other valid reason.

In the present case, it was no doubt foolish of the appellants not to have gone into court and asked for more time to enable them to secure the attendance of their pleaders, but at the same

1912

LALTA PRASAD v. RAM KARAN.

time it is clear that they were pressing their suit and had attended court for that purpose, and the court might well have acceded to their request, passing a suitable order as to costs.

We, therefore, allow this appeal and set aside the order of dismissal of the suit, which the lower court will restore to its file and proceed to take up again at the point to which it had arrived when the order of dismissal was passed. The appellants will, however, whatever the result of their suit, bear their own costs of the application under order IX, rule 9, and of this appeal. In no case will these be recoverable from the respondent. The costs of the latter in this matter will abide the result of the suit.

Appeal allowed.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

1912
March 21.

RAGHUBAR RAI AND OTHERS (DEFENDANTS) v. JAIJ RAJ AND ANOTHER (PLAINTIFFS) AND MUSAMMAT CHUNA (DEFENDANT).*

Contract—Covenant in sale-deed to discharge a debt due to a third party—Suit for compensation for breach—Actual damage not necessary to support suit—Cause of action—Limitation—Act No. XV of 1877 *(Indian Limitation Act), schedule II, article* 116.

On a sale of immovable property the vendees covenanted with the vendors to pay a certain sum of money on account of a mortgage debt due by the vendors. They did not pay in accordance with the covenant, and the mortgagee thereupon brought a suit upon his mortgage and obtained a decree.

Held on suit by the vendors for compensation for breach of the covenant, that it was not necessary that the vendors should have suffered any loss before they could bring their suit; and that, as no time was specified in the sale-deed for the payment of the mortgage money, limitation began to run from the date of the execution of the deed. *Lethbridge* v. *Mytton* (1), *Carr* v. *Roberts* (2), *Loosemore* v. *Radford* (3), *Ashdown* v. *Ingamells* (4), *Dorasinga Tevar* v. *Arunachalam Chetti* (5), *Raghunath Rai* v. *Brijmohan Singh* (6), *Kumar Nath Bhuttacharjee* v. *Nobo Kumar Bhuttacharjee* (7) and *Battley* v. *Faulkner* (8) referred to.

The facts of this case were as follows:—

On the 20th of April, 1895, the plaintiffs sold certain landed property to some of the defendants and left a sum of Rs. 708 with

---

*Second Appeal No. 414 of 1911 from a decree of E. R. Neave, Additional Judge of Gorakhpur, dated the 9th of February 1911, reversing a decree of Gokal Prasad, Subordinate Judge of Gorakhpur, dated the 22nd of August 1910.

(1) (1831) 2 B. & Ad., 772.
(2) (1833) 5 B. & Ad., 78.
(3) (1842) 9 M. & W., 657.
(4) (1880) L. R., 5 Exch. D., 280.
(5) (1899) I. L. R., 23 Mad., 441.
(6) Weekly Notes, 1901, p. 14.
(7) (1898) I. L. R., 26 Calc., 241.
(8) (1820) 3 Barn. & Ald., 288; 22 R. R., 390.