Before Mr. Justice Walsh and Mr. Justice Ryves.

1919
June, 13.

SUKKHU KOERI (PLAINTIFF) *v.* RAM LOTAN KOERI AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *order XVII, rule* 3—*Procedure—Suit partially heard, but dismissed as for default because the plaintiff was not in a position to continue it—Appeal—Inherent powers of High Court.*

A plaintiff whose case had been partly heard failed to continue the prosecution of it, not because he wished to do so, but because, owing to various difficulties connected with the absence of his pleader and of some of his witnesses, he thought that he was unable to proceed further with it. Thereupon the Court passed an order dismissing the suit "for default."

Held that the Court should not have dismissed the suit "for default," but should have decided it as best it could on the merits and on the materials then before it. *Badam* v. *Nathu Singh* (1) referred to.

The circumstances of the case constituted a *casus omissus* so far as the of Code Civil Procedure was concerned, but the High Court had inherent power to entertain an appeal against the decision of the Court below, though none was specifically provided for.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *B. E. O'Conor* and Munshi *Gokul Prasad*, for the appellant.

Maulvi *Iqbal Ahmad*, Maulvi *Mukhtar Ahmad* and Babu *Piari Lal Banerji*, for the respondents.

WALSH and RYVES, JJ. :—This case seems to be a chapter of obstinacy and misfortune. It is difficult to imagine it happening in any other country and one is not surprised that the Code, which in some respect has gone out of its way to provide elaborate provisions for default, failure to appear and so forth, has not foreseen what in fact happened in this particular case in the year 1916, and there is really nothing to guide the courts in the present position. But every court has inherent powers, so far as it is not limited and prohibited by express provisions, to do what is right to both parties when there has been some failure or miscarriage, and to impose appropriate terms where that failure or miscarriage is clearly shown to be the fault of one party, so that any injury to the other party may be avoided.

*Second Appeal No. 704 of 1917, from a decree of G. O. Allen, Subordinate Judge of Jaunpur, dated the 6th of March, 1917, confirming a decree of Alakh Murari, Additional Munsif of Jaunpur, dated the 23rd of September, 1916.

(1) (1902) I. L. R., 25 All., 194.

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The plaintiff filed this suit some time in the month of February, 1916, making a claim which in substance turned upon the question whether he was a member of a joint or separate Hindu family, which does not in itself seem a very difficult point for a man in person to explain to a Judge. A written statement was put in, and, either in July or September, we have it under the Munsif's own signature that it happened in July, the plaintiff went into the box, apparently at that time being looked after by a pleader, and told his story with conciseness and clearness and was partially cross-examined by the pleader for one of other defendants. From that it must be inferred that, at any rate up to that stage, the plaintiff had a *bonâ fide* belief in his own case which he wished to pursue. The cross-examination was not completed, apparently, judging from the Munsif's notes, by arrangement between the pleaders. Therefore it may be assumed that the plaintiff's evidence was not completed that day in order to suit the convenience of the pleaders. The 22nd of September, 1916, was fixed for the renewed hearing. The plaintiff on that occasion appears to have been in a double difficulty. His pleader was absent and some of the witnesses who had been summoned were not in attendance. The court treated him with consideration. It gave him time till next day. It told him to go on with such witnesses as were present and to arrange to summon others by warrant at a fresh date to be fixed for their appearance. The adjournment for the next day was clearly to enable the plaintiff to provide himself with another pleader or make arrangements for conducting the case. On the next day he was present in person. He said that he had, secured a vakil who had a criminal case pending against him. Whether that was a moral objection to the vakil, or a physical objection in the sense that his bodily presence was required elsewhere does not appear very clearly, but the net result was that the plaintiff was confronted with the choice of going on as best he could without any legal assistance. Here he seems either to have lost his head or to have shown unnecessary obstinacy. It would probably have been better if he had put his witnesses in the box, but he declined either suggestion. He did not in our opinion withdraw the suit, but merely confessed his inability to go on any further.

The position at that stage was just as though a gentleman of the Bar arguing a case before one of us suddenly sat down; it would be our business to deliver judgment. And if a litigant finds himself unable to proceed further, we think that it is the business of the court to dispose of the case on the materials before it, and that the learned Munsif, who obviously was in considerable difficulty with this series of misfortunes, was wrong in saying that the plaintiff did not want to prosecute the case. That was just what he did, but he did not wish to do it in the way in which he was invited to do. We think the Munsif had no alternative but to dispose of the case. The plaintiff at that stage put himself hopelessly in the wrong. After the Munsif had treated him with consideration and given him every opportunity, the plaintiff declined to call the witnesses who were available and even to engage another vakil. The Munsif in disposing of the case purported to dismiss it for default. An appeal was brought from that judgment and the learned Subordinate Judge practically adopted what the Munsif had done, and even put it in stronger language, holding that the plaintiff had abandoned his suit. As we have said, we cannot agree that this is the correct view. This appeal is now brought by the plaintiff, who wants his case heard. An objection is raised to the appeal upon the ground that the suit was dismissed for default and that no appeal lies from such order either to the lower appellate court or to ourselves. So far as that is concerned, the nearest rule applicable to the circumstances we have described is order XVII, rule 3, of the Code of Civil Procedure, and there is a decision binding upon us that where that rule applies the duty of the trial court is to dispose of the suit on the merits and not to dismiss it for default; *Badam* v. *Nathu Singh* (1). And the view taken in that case at any rate is that the unsuccessful party has a right of appeal for what it is worth. We, therefore, hold that we are bound to entertain this appeal. On the other hand, there being no express rule exactly applicable we think we ought in the exercise of our inherent jurisdiction to do what appears to us most nearly to meet the ends of justice. As we have said, the plaintiff was entirely at fault and the defendant had a right to have the suit disposed of on the merits.

(1) (1902) I. L. R., 25 All., 194.

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We think the proper order to make under the circumstances is that the plaintiff shall, at any rate as a condition of having his suit tried at all, put the defendant in the same position as if this miscarriage had never occurred, that is to say, he must pay in cash into the court of the Munsif a sum of Rs. 3,692-9-0, representing the costs due to the three defendants in the two courts as set out in the decree of the lower appellate court, unless of course any of these costs have already been paid, in which case credit for such payment must be given. He must also deposit, in cash or security sufficient in the opinion of the Munsif, a sum of Rs. 250 as security for the future costs of the suit in the trial court only, that is to say, whatever the costs in the trial court for the future hearing may be, the plaintiff will be entitled to any surplus between that amount and the sum of Rs. 250. Upon the payment of the first sum in cash into the Munsif's court and the deposit of the second sum either in cash or in some other form of security by way of security for the future costs within three months from this date, we allow the appeal, set aside the orders of both the courts below and remand the case under order XLI, rule 23, of the Code of Civil Procedure, to the court of first instance through the lower appellate court with directions to readmit the suit under its original number in the register of civil suits and proceed to determine it according to law. The costs of this appeal will abide the ultimate result of the suit. If at the expiration of three months those sums have not been either paid or deposited, the plaintiff's suit and this appeal will stand dismissed with costs.

Appeal decreed.

Before Mr. Justice Walsh and Mr. Justice Ryves.

1919
June, 16.

KHUB SINGH (DEFENDANT) *v.* RAMJI LAL AND OTHERS (PLAINTIFFS).*

Construction of document—Will—Bequest to person described as the adopted son of the testator—Adoption not proved—Intention of testator.

One N, a separated Hindu, brought up in his house K, who was the son of his wife's brother. N provided for K's marriage, and later, by a deed of gift made over to K most of his zamindari property. Ultimately N made a will

* Second Appeal No. 702 of 1917, from a decree of Sitla Prasad Bajpai, Additional Judge of Meerut, dated the 30th of March, 1917, modifying a decree of Manmohan Sanyal, Additional Subordinate Judge of Meerut, dated the 10th of February, 1916.