APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra.

GAJENDRA SHAH (DEFENDANT-APPLICANT) *v.* RAM CHARAN (PLAINTIFF-OPPOSITE-PARTY).* 1929 *January*, 11.

Costs of adjournment, awarding of—Oudh Civil Rules, rule 68—Costs of adjournment awarded should not be in the nature of penalty or punishment but should be commensurate with costs likely to be incurred owing to the adjournment—Small Cause Court suits—Written statement whether necessary to be filed in a Small Couse Court suit—Court, whether justified in awarding costs of adjournment for not filing written statement in a Small Cause Court suit

The awarding of the costs of adjournment is entirely at the discretion of courts, yet such award must not be arbitrary but should be exercised according to principles of justice and equity. The principle which the court awarding the costs should always bear in mind is that it should order the payment of a sum commensurate with the costs, which in the opinion of the court the party ready to proceed will have to incur owing to the adjournment. The amount to be awarded should not be one in the nature of penalty or punishment. It is this very principle that is underlying rule 68 of the Oudh Civil Rules, which deals with the costs of adjournment.

Where in a Small Cause Court suit in which the summons issued to the defendant did not call upon him to file a written statement the court on the date for hearing called upon a defendant's Counsel to file a written statement which he could not do as his client was not present and then at the Counsel's request the court granted him time to file the written statement but ordered him to pay very heavy costs, *held*, that the suit being a Small Cause Court one it was not necessary for the defendant to file a written statement in the case and if he court called upon the defendant to file a written statement which necessitated an adjournment the court was not justified in awarding any costs of adjournment.

*Section 25 Application No. 41 of 1928, against the order of M. Ahmad Karim, Subordinate Judge of Kheri, dated the 16th of November, 1928, decreeing the plaintiff's suit.

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Mr. *Murli Manohar*, for the applicant.

Mr. *P. N. Rozdon*, for the opposite Party.

MISRA, J. :—This is an application for revision of the decree passed by the learned Subordinate Judge, Kheri, sitting on the Small Cause Court side, on the 16th of November, 1928.

The facts of the case are that the plaintiff instituted the present suit for recovery of a sum of Rs. 75 on the ground that he was a mason by profession and that he had worked for defendant No. 1 from the 26th of July, 1926, to the 8th of February, 1927. The rate at which he was engaged was stated by the plaintiff to be Re. 1-8-0 per diem. The plaintiff alleged that the total number of the days for which he worked at the place of defendant No. 1 was 173, and his wages for that period amounted to Rs. 259-8-0 out of which he had been paid Rs. 174-8-0 and that the amount that was still due to him was Rs. 75 for which he claimed a decree. The suit was instituted principally against one Raja Gajendra Shah, taluqdar of Khutar. There was another person named Bhupali, who was impleaded as defendant No. 2 on the allegation that at the instance of the defendant No. 1 he had gone to fetch the plaintiff to work at the place of the defendant No. 1. The suit was instituted on the 11th of July, 1928.

The defence put forward in the case on behalf of the defendant No. 1, who is now the applicant before me, was to the effect that the plaintiff had been paid his dues in full and nothing was now due to him. It was also contended that the suit was barred by limitation.

It appears that the suit was adjourned several times owing to the absence of defendant No. 2, who could not be served. The last date fixed in the case was the 5th of November, 1928. On that date also the defendant No. 2 was absent, but the court directed the defendant No. 1 to file his written statement, which could not be

done, because defendant No. 1 was not present in person on that date, but was present only through a pleader. The Court granted defendant No. 1 time to file the written statement but ordered him to pay a sum of Rs. 50 as costs of the adjournment. The case was then ordered to be put up on the 16th of November, 1928, on which date the defendant No. 1 put in his written statement and also put in an application asking the court to give him time to deposit the money, which he had been ordered to deposit as the costs of the adjournment. The court refused to grant him time and proceeded to try the case *ex parte*, rejecting the written statement filed on behalf of defendant No. 1.

The learned Subordinate Judge, who tried the suit on the Small Cause Court side as stated above, proceeded to try the case *ex parte* and granted the plaintiff a decree for Rs. 75. This is the decree against which the defendant No. 1 has applied for revision to this Court.

In revision it is contended that the learned Judge of the Small Cause Court was not justified in calling upon the defendant No. 1 to file a written statement that very day and in ordering that failing to do so he was to pay a sum of Rs. 50 as costs of adjournment which, it is contended, was a very heavy sum and was not justified by the circumstances of the case. It is, therefore, prayed that the *ex parte* decree passed by the learned Judge of the court below should be set aside and that the order for payment of costs should also be cancelled.

After hearing the parties in the case and after going through the record I am of opinion that there was no justification for the Judge of the Small Cause Court to award any costs from defendant No. 1, in any case, he was not justified in passing an order as to costs like the one which he passed in the present case.

I now proceed to give my reasons for having arrived at this conclusion.

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From the facts which I have stated above it is clear that the case had been adjourned several times owing to the absence of defendant No. 2. It is argued on behalf of the plaintiff opposite party that it was at the instance of the defendant No. 1 that defendant No. 2 did not put in his appearance. That may be so, but I do not find any material on the record to support the statement. There is no doubt that defendant No. 2 is alleged by the plaintiff to be the servant of defendant No. 1, but that circumstance alone cannot be a ground for holding that defendant No. 2 was being kept out of the way of defendant No. 1. If on the 5th of November, 1928, which was the last date for hearing fixed in the case, the defendant No. 2 was not present and the court wanted to proceed with the case in his absence, he should have recorded the statement of the pleader Babu Murari Lal, who appeared on behalf of defendant No. 1, to show what was the defence of defendant No. 1 in the case. I may state that it was not necessary for defendant No. 1 to file a written statement. The summons which was issued to defendant No. 1 did not call upon him to file any written statement. In Small Cause Court suits it is not necessary as a rule for the defendant to file a written statement. The court trying the case ordinarily takes down the defence of the defendant as set up before him orally by the defendant in person or by his pleader if he is represented. I do not think that under these circumstances it was necessary for the defendant No. 1 to have filed his written statement. In any case even if the court desired that the defendant No. 1 should file a written statement it should have granted him the time which was asked for the purpose by the pleader, who appeared on his behalf before the court. It is clear that the written statement could not be filed that very day because defendant No. 1, I gather from the record, was not present in court. I am, therefore, of opinion that when

the court ordered defendant No. 1 to file the written statement and when he had to adjourn the case at the request of the pleader of defendant No. 1, because it was not possible for him to file the written statement that very day, the court was not justified in awarding any costs of adjournment to the plaintiff. Nothing appears from the record showing any misconduct on the part of the defendant No. 1 and the order directing the payment of costs seems to me to be an order, which was quite uncalled for.

Apart from the fact that the order of the payment of costs was not justified under the circumstances of the case I must express my sense of disapproval at the proceedings of the learned Subordinate Judge, so far as the amount of costs awarded by him was concerned. The amount of claim for which the suit had been brought was Rs. 75 and the amount of legal costs to which the plaintiff could have been entitled was only Rs. 3-12-0. I find from the certificate on the record that the pleader who appeared on behalf of the plaintiff received a sum of Rs. 7 as his fee for conducting the entire case from beginning to end. If the legal fee in the case was Rs. 3-12-0 and if the pleader for the plaintiff was engaged for the whole case on a lump sum of Rs. 7 I fail to understand the justification for awarding a sum of Rs. 50 on account of costs of adjournment. The subordinate courts should realize that though the awarding of the costs of adojurnment is entirely at their discretion, yet such award must not be arbitrary but should be exercised according to principles of justice and equity. The principle which the court awarding the costs should always bear in mind is that it should order the payment of a sum commensurate with the costs, which in the opinion of the court the party ready to proceed will have to incur owing to the adjournment. The amount to be awarded should not be one of the nature of penalty or

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of punishment. It is this very principle that is underlying rule 68 of the Oudh Civil Rules, which deals with the costs of adjournment. I am, therefore, of opinion that in any circumstances of the case a sum more than Rs. 3 or Rs. 4 should not have been awarded as costs of adjournment in the present case.

Misra, J.

I am also of opinion that when defendant No. 1 failed to deposit the heavy costs, which had been awarded by the court below against him, more time should have been given to him to make arrangement for the payment of the said sum and that in any case the case should not have been tried *ex parte*. I find from the record that defendant No. 1 did actually file the written statement and that ought to have been enough to indicate to the court the lines on which the defendant contested the case. Under these circumstances the order passed by the court below that the trial of the suit should proceed *ex parte* against defendant No. 1 was not a just order, which can be maintained.

I, therefore, accept this application, set aside the decree passed by the learned Judge of the Court of Small Causes, dated the 16th of November, 1928, and also the order for costs passed by him on the 5th of November, 1928, and direct that the case should be tried on the merits. The order directing the trial of the suit *ex parte* will also be set aside, and the court should now reinstate the suit on its original number, and should proceed to try it on the merits. The learned Judge may take the written statement, which has already been filed by defendant No. 1, as his defence in the case. If he does not wish to take it into consideration, he might call upon the pleader for defendant No. 1 to state orally what his defence in the case is.

Costs of the revision will be costs in the case.

Case remanded.