REVISIONAL CIVIL.

Before Mr. Justice Jai Lal.

1928

Oct. 4.

ABDUL AZIZ (DEFENDANT) Petitioner

versus

THE PUNJAB NATIONAL BANK, LTD. (PLAINTIFF) Respondent.

Civil Revision No. 321 of 1928.

Civil Procedure Code, Act V of 1908, Order III, Rule 4 (2) —Legal Practitioner — appointment of — Vakalatnama—*ordinarily in force until the proceedings in the case are ended—Order IX, Rules 8 and 9: Dismissal in default—Application for restoration—grounds for.*

Held, that Counsel may be engaged to conduct a suit, to prosecute or defend an appeal and to execute the decree, by one power of attorney. There may, on the other hand, be cases in which a counsel is engaged for one hearing or for a limited purpose, as distinguished from a general power to conduct a suit to its conclusion in the trial and the appellate Courts, his authority being dependent upon the terms of the power of attorney, if any, granted by his client; and, in the absence of such an authority, on the intention of the parties, express or implied; and that the general practice in such cases is a good indication of implied authority.

Piroj Shah v. *Qarib Shah* (1), *Wiru Ram* v. *Amar Chand* (2), *Lal Chand-Mangal Sen* v. *Behari Lal-Mehr Chand* (3), and *Bipin Behari Shah* v. *Abdul Barik* (4), distinguished.

Held further, that ordinarily, Counsel's engagement for the prosecution or the conduct of a suit includes all proceedings till its final decision in the Courts concerned.

Thus, where a suit is dismissed in default of appearance, counsel so engaged does not require a fresh power of attorney for the purpose of applying for the restoration of the case.

Raghunath Singh v. *Raghubir Sahai* (5), followed.

In the matter of a Pleader (6), distinguished.

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(1) (1926) I. L. R. 7 Lah. 161.
(2) 1926 A. I. R. (Lah.) 344.
(3) (1924) I. L. R. 5 Lah. 288 (F. B.).
(4) (1917) I. L. R. 44 Cal. 950.
(5) 1892 All. W. N. 222.
(6) 1892 All. W. N. 78.

Civil Procedure Code, Order III, Rule 4 (2), referred to.

Held also, that there is no rigid rule as to whether a suit should or should not be restored if it has been dismissed in default of appearance by counsel. The question is one requiring the exercise of a judicious discretion, dependent upon the particular facts of each case, due regard being had to the exigencies of the professional duties of counsel.

Biru Ram v. *Roda Mal* (1), *Khushi Muhammad* v. Mst. *Barkat Bibi* (2), *Saif Ali* v. *Chiragh Ali* (3), *Chuni Lal, Official Receiver* v. *Gandu Mal* (4), *Muruga Chetty* v. *Rajasami* (5), *Balmokand* v. *Wazir Chand* (6), and Mussammat *Gauran* v. *Brij Raj Saran* (7), referred to.

Application for revision, under section 44 of Act VI of 1918, of the order of Lala *Diwan Chand, Subordinate Judge, 1st class, Lahore, dated the 26th March 1928, setting aside the dismissal in default of a suit, etc.*

CARDEN-NOAD and OBEDULLAH, for Petitioner.

JAGAN NATH AGGARWAL and QABUL CHAND, for Respondent.

JUDGMENT.

JAI LAL J.

JAI LAL J.—This is a petition by the defendant for revision of an order passed by the Subordinate Judge, 1st class, Lahore, on the 26th of March 1928, setting aside the dismissal in default of a suit for Rs. 15,930-12-0 instituted by the Punjab National Bank, Limited, against the petitioner Abdul Aziz.

It appears that the case was fixed for the production of evidence by the parties on the 29th of June 1926, and was taken up by the Court at about two in the afternoon and the plaintiff not being

(1) 1927 A. I. R. (Lah.) 224.
(2) 1927 A. I. R. (Lah.) 622.
(3) 1923 A. I. R. (Lah.) 97.
(4) (1927) 101 I. C. 444.
(5) (1912) 14 I. C. 823.
(6) (1920) 5 Lah. L. J. 89.
(7) 53 P. R. 1919.

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represented before the Court, it was dismissed under Order IX, rule 8 at 2-2 P.M. An application for restoration was made the same day at 2.14 on the ground that the counsel engaged by the plaintiff was busy in another case in the District Judge's Court; that his clerk, who was watching the case, immediately on its being called, went to call another counsel to appear for his master; and that *Lala* Gobind Ram, Advocate, went to appear for the plaintiff, but on reaching the verandah of the Court-house he was informed that the suit had been dismissed in default. An application for restoration was thereupon made at 2.14 and was fixed for hearing on the 2nd of December 1926, but was again dismissed in default on that day.

An application was then made at 10-30 A.M. on the 2nd December 1926 for restoration of the suit, and the application for restoration which had been presented on the 29th of June 1926, in which it was alleged that the plaintiff's counsel was appearing in another Court in the same building and had left his clerk in the Court concerned to inform him as soon as the case was called and that the moment it was called the clerk went to inform the counsel but before the latter reached the Court the application had already been dismissed. This must have taken only a few minutes. It appears from a note made by the Judge on the same day at the instance of the plaintiff's counsel that he immediately appeared in Court after the case had been dismissed and that the application was dismissed because the defendant's counsel declined to wait.

The application made on the 2nd of December 1926, was granted by the Subordinate Judge and the suit restored, but on an appeal by the defendant the

proceedings were remanded to the Senior Subordinate Judge by Broadway J. on the 25th of November 1927, and the trial Court was directed to decide whether the application of the 2nd December, 1926, included a prayer for the restoration of the first application, dated the 29th June, 1926, as well, or whether it was merely an application, as contended by the defendant's counsel, to restore only the suit, and secondly, whether there was any justification or excuse for the absence of the counsel on the 29th of June and the 2nd of December 1926, respectively. Thereupon, the learned Subordinate Judge after hearing the parties passed a detailed order which is the subject of the present petition. He held that the application of the 2nd December 1926, contained a prayer both for the restoration of the application of the 29th of June 1926, and the suit, and further that there was a reasonable excuse for the absence of the counsel on both occasions.

Mr. Carden-Noad, who appeared for the petitioner, raised three points before me ; firstly, that the application of the 2nd of December, 1926, did not contain a prayer for the restoration of the application of the 29th of June 1926 ; secondly, that the application of the 2nd of December 1926, was not made by an authorised person : although it was signed not by the plaintiff but by the counsel who had been originally appointed by the plaintiff to conduct the suit, it was contended that the duties of the counsel ended as soon as the suit had been dismissed by default and, therefore, that he was not competent to file the application for restoration without a fresh power-of-attorney from his client ; and thirdly, that the facts disclosed did not amount to a reasonable cause for the absence of the plaintiff on both occasions.

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Now with regard to the first objection an examination of the application shows that the view of the learned Subordinate Judge is quite correct. The application clearly states that it is for the restoration of the suit *and* the application for restoration.

The main contention of the learned counsel, however, was that a fresh power-of-attorney was necessary and in this connection he urged that Mr. Amin Chand was engaged for the conduct of the suit and that as soon as the suit had been dismissed, for whatever reason, his duties came to an end. In support of his contention counsel relied upon *Piroj Shah* v. *Karib Shah* (1), *Wiru Ram* v. *Amar Chand* (2), *Bipin Behari Shah* v. *Abdul Barik* (3) and also on the Rules and Orders of this Court, Volume I, Chapter XXXI.

In the first two cases mentioned above it was held by a learned Judge of this Court that a suit terminates when it is dismissed in default or decreed *ex-parte* unless it is revived, and that an application to set aside its dismissal or the *ex-parte* decree is a 'case' and, therefore, an application for revision lies from an order refusing to restore a suit or to set aside an *ex-parte* decree. These judgments purported to interpret a judgment of a Full Bench of this Court in *Lal Chand-Mangal Sen* v. *Behari Lal-Mehr Chand* (4), in which it was held that no application for revision lay to this Court from an interlocutory order. Mr. Justice Campbell, who decided both the cases cited, held that they were not covered by the Full Bench case because the orders concerned were not interlocutory orders. In my opinion, these

(1) (1926) I. L. R. 7 Lah. 161.
(2) 1926 A. I. R. (Lah.) 344.
(3) (1917) I. L. R. 44 Cal. 950.
(4) (1924) I. L. R. 5 Lah. 288 (F.B.)

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cases are no authority for the proposition that the authority of the counsel ends with the dismissal of the suit by default or with the passing of the *ex-parte* decree. Similarly in *Bipin Behari Shah* v. *Abdul Barik* (1), it was held that proceedings to set aside an *ex-parte* decree have to be registered as a separate case. But that again is no authority for the proposition propounded by the learned counsel. The authority of a counsel depends on the terms of the power-of-attorney, if any, granted by his client, and in the absence of such an authority on the intention of the parties express or implied and the general practice in such cases is a good indication of implied authority.

It is incontrovertible that a counsel may be engaged to conduct a suit, to prosecute or defend an appeal and to execute the decree by one power-of-attorney. There may, on the other hand, be cases in which a counsel is engaged for one hearing or for a limited purpose as distinguished from a general power to conduct a suit to its conclusion in the trial and the appellate Courts. In my opinion ordinarily the prosecution or the conduct of a suit includes all proceedings till its final decision in the Courts concerned. I put it to the learned counsel, whether, if the suit had been decreed *ex-parte* and an application had been made by the defendant to set aside the *ex-parte* decree, it would have been necessary for the plaintiff's counsel to produce a fresh power-of-attorney before he could appear to oppose that application, and the learned counsel was inclined to admit that in such a case no power-of-attorney would be necessary.

(1) (1917) I. L. R. 44 Cal. 950.

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Chapter XXXI of the first volume of the Rules and Orders of this Court was relied upon to show that a fresh power-of-attorney is not necessary for a cross-appeal ; that again does not, in my opinion, help us in the determination of the question before me. The learned counsel sought to draw an inference from this that, as it was found necessary by this Court to lay down by rules that no power-of-attorney would be necessary to enable the respondent's counsel to file a cross appeal, but for such rule, a power-of-attorney would have been necessary, and from this it follows that the authority of the counsel does not ordinarily extend to doing everything in connection with the appeal. I do not think that this result necessarily follows from the rule referred to, which might have been made in order to remove any doubt on the subject.

The only case cited on behalf of the petitioner in which the question of power-of-attorney was discussed was *In the matter of a Pleader* (1). That was a case under the Legal Practitioners' Act in which a pleader had filed a *vakalatnamah*, which to his knowledge was not the *vakalatnamah* executed by the person on whose behalf he withdrew some money from the Court and in the course of the judgment it was stated by the learned Judges that " a *vakalatnamah* is an important and solemn document. By it frequently extensive powers are entrusted to vakils and others, and every pleader ought to know that those powers should be specified in the document before it is executed by any party to it. The signature of a party to a *vakalatnamah* authenticates the fact that the person in whose favour the *vakalatnamah* is drawn up is authorised by the person signing it

(1) 1892 All. W. N. 78.

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to do the act specified in the document." This case, in my opinion, does not decide the precise point that is involved in the present case.

On the other hand another case, *i.e.*, *Raghunath Singh* v *Raghubir Sahai* (1), is reported in the same volume in which it was held that where a *vakil* had been duly empowered by a *vakalatnamah* drawn in the customary form to file and conduct an appeal in the High Court and that appeal had been dismissed for default, the *vakil* was competent without filing a fresh *vakalatnamah* to present an application for the restoration of the said appeal to the list of pending appeals. The following observations made in that case by the learned Judges materially bear on the question before me:—

"It is also manifest that if we set aside the decree of dismissal and re-instate the appeal, it will not be a fresh appeal, but will be an appeal to which the *vakalatnamah* already filed applies and it would seem strange if under these circumstances it were necessary to file a special *vakalatnamah* for the simple purpose of enabling the appellant to have, not a new appeal entered, but his original appeal re-instated and proceeded with. In our opinion no fresh *vakalatnamah* was necessary."

This authority fully covers the present case.

Reference may also be made to Order III, rule 4 (2), Code of Civil Procedure which provides that "every such appointment, when accepted by a pleader, * * * * shall be considered to be in force * * * until all proceedings in the suit are ended so far as regards the client" In my opinion these words are wide enough to cover the case of an application for

(1) 1892 All. W. N. 227.

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restoration of a suit dismissed in default, as all proceedings in the suit are not ended so far as regards the client, merely by its dismissal in default or by an *ex-parte* decree, when these latter proceedings are liable to be set aside on an application and the case restored to its original number. Mr. Amin Chand's power-of-attorney in the present case authorises him generally to do all acts necessary for the prosecution of the suit ; and the general practice in this province is not to produce a fresh *vakalatnamah* in similar circumstances. I hold, therefore, that a fresh power-of-attorney was not necessary in this case.

This brings me to the question whether the learned Subordinate Judge was right in holding that there was reasonable cause for the absence of the counsel on both occasions. A number of authorities were cited before me by the learned counsel in support of his contention that the negligence of the counsel is no reason for the restoration of a suit, as for instance, *Biru Ram* v. *Roda Mal* (1), *Khushi Muhammad* v. *Mst. Barkat Bibi* (2), *Saif Ali* v. *Chiragh Ali* (3), *Chuni Lal, Official Receiver* v. *Gandu Mal* (4). The last of these cases relates to the absence of counsel on the ground that he was engaged in another Court. It is not, however, possible to lay down any general rule in cases like this. Each case must necessarily depend upon its peculiar facts. There are authorities in which some Judges have taken a very strict view of the matter, while there are others in which quite a contrary view has been taken. Reference may for instance be made to *Muruga Chetty* v. *Rajasami* (5), a Madras case, in which it

(1) 1927 A. I. R. (Lah.) 224.
(2) 1927 A. I. R. (Lah.) 622.
(3) 1923 A. I. R. (Lah.) 97.
(4) (1927) 101 I. C. 444.
(5) (1912) 14 I. C. 823.

was held that "the failure of a pleader to appear for his client is distinguishable from negligent performance of his duties; when he has been retained to appear and conduct the case but by negligence he fails to appear at the hearing, it cannot be said that he represents his client in not appearing." Opinion was further expressed that if a pleader was guilty of such gross negligence as would in law amount to fraud, he cannot bind his client and the Court has power to restore an appeal dismissed for such conduct. I have merely given this as an instance of an extreme view on the other side.

While I am not prepared to go to the extent of holding that in every case, where the dismissal of the suit in default is due to the negligence of the counsel, the plaintiff is entitled as of right to have it restored; at the same time I am not prepared to take the extreme opposite view that in every case where the suit is dismissed owing to the default of the counsel to appear, the application for restoration should be dismissed. Each case must be decided on its own merits and the question to be considered must be whether there was a *bona fide* and reasonable attempt by the counsel to put in an appearance within a reasonable time of its being called. In this connection due regard must be had to the nature of the duties of the counsel towards his other clients and the other Courts, but the Court cannot be expected to give unlimited or unreasonable latitude to counsel in this respect. Counsel is ordinarily expected to be ready in Court when the case is called on, and it is no good excuse to say that he was busy elsewhere. The matter, therefore, is one of the exercise of judicious discretion in each case. Too rigid an adherence to either view

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is likely to lead to inconvenience and injustice on the one hand and dislocation of Court's work on the other.

In the present case it is quite clear that every attempt was made by the counsel to appear in the Court with all possible expedition. He was engaged in another case and appeared immediately on information being conveyed to him that the case had been called. On the first occasion the Court did not give sufficient time for the appearance of the counsel and on the second occasion it did not give any time at all. In this connection reference may be made to *Balmokand* v. *Wazir Chand* (1), where Broadway J. restored a case because the plaintiff's counsel appeared in Court soon after it had been dismissed. In *Mussammat Gauran* v. *Brij Raj Saran* (2) the same learned Judge restored a case because there was a mistake as to the date of the hearing in the pleader's diary and the pleader appeared on the wrong date entered in his diary and found that it had been dismissed on a previous date.

In each case the question that is to be determined is whether the absence of the pleader or the party was excusable and in determining this question due regard must be had to the exigencies of the professional duties of a pleader. If the Court is of opinion that there was a reasonable attempt by the pleader to appear or be represented but that he was unable to do so because of causes which he could not reasonably control, then it must be held that there is a good case for restoration.

I hold that in the present case the absence of the pleader on both occasions was excusable as held by

(1) (1920) 5 Lah. L. J. 89. (2) 53 P. R. 1919.

the Subordinate Judge and I, therefore, dismiss this application with costs.

N. F. E.

Revision dismissed.

APPELLATE CIVIL.

Before Mr. Justice Harrison and Mr. Justice Tek Chand.

1928

Oct. 18.

PAHALWAN KHAN (PLAINTIFF) Appellant

versus

BAGGA AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 1815 of 1924.

Custom — Alienation — Ancestral land — Muhammadan Gujars *of* tahsil *Jhelum—will by sonless proprietor—in favour of associated collaterals to exclusion of other collaterals.*

Held, that the plaintiff on whom the *onus* lay, had succeeded in proving that a custom exists among Muhammadan *Gujars* of tahsil Jhelum, whereby a sonless proprietor has a right to bequeath his ancestral land to an associated collateral to the exclusion of other collaterals of the same degree.

The *Riwaj-i-am* of the Jhelum district (1901), commented upon.

Wazira v. Mst. *Maryan* (1), and *Labh Singh* v. Mst. *Mango* (2), referred to, also *Nur Husain* v. *Ali Sher* (3), and Mussammat *Bano* v. *Fatteh Khan* (4).

Second appeal from the decree of L. Middleton, Esquire, District Judge, Jhelum, dated the 24th March 1924, reversing that of Muhammad Sher Nawab Khan, Subordinate Judge, 4th class, Jhelum, dated the 15th February and dismissing the plaintiff's suit.

MUL CHAND, for GHULAM RASUL, for Appellant.

N. C. MEHRA, for Respondent.

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(1) 84 P. R. 1917.
(2) (1927) I. L. R. 8 Lah. 281.
(3) 33 P. R. 1905.
(4) 48 P. R. 1903 (F. B.)