

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Beaman.

1913.
June 26.

BAI KASHIBAI WIDOW OF SHIDLINGAPA (ORIGINAL DEFENDANT 1),
APPLICANT, v. SHIDAPA ANNAPA AND OTHERS (ORIGINAL PLAINTIFF AND
DEFENDANTS 2 AND 3), OPPOSITIONS.*

*Civil Procedure Code (Act V of 1908), Order XXIII, Rule 1—Trial of a suit—
Close of the trial after recording all evidence produced by both parties—Time
given to the plaintiff to produce more documents—Plaintiff's application to
withdraw the suit with permission to bring a fresh one—Grant of the permission
for fresh suit—Material irregularity in the exercise of jurisdiction.*

After the case for both the plaintiff and the defendant had been closed and all their witnesses had been examined, the Court gave time to the plaintiff to adduce documents to counteract the effect of the documents already produced by the defendant. On the plaintiff's inability to adduce the documents on the appointed day, he applied for leave to withdraw from the suit with permission to file a fresh one on the same cause of action and the Court having passed an order granting the leave,

Held, setting aside the order, that the Court acted with material irregularity in the exercise of its jurisdiction. The hearing was finished and it was improper to allow plaintiff to try and produce documents to counteract the defendant's documents. The plaintiff's failure to produce the documents was not a sufficient ground to put the defendant to the trouble and annoyance of a fresh suit.

APPLICATION under the extraordinary jurisdiction, (section 115 of the Civil Procedure Code, Act V of 1908), against an order passed by K. B. Natu, Subordinate Judge of Athni in the Belgaum District, granting the plaintiff leave to withdraw his suit with permission to bring a fresh one on the same cause of action.

In a suit filed in the Court of the Subordinate Judge of Athni in the Belgaum District, after the case for the plaintiff and the defendant had been closed and all their witnesses had been examined, the plaintiff applied to the Court for permission to adduce documentary evidence to counteract the effect of the documents put

* Application No. 55 of 1913 under extraordinary jurisdiction.

in by the defendant. The Court gave permission to the plaintiff to adduce his documents on a particular day, but owing to the inability of the plaintiff to produce the documents on that day, he applied to the Court for leave to withdraw the suit with permission to bring a fresh one on the same cause of action. The Court granted the leave under Order XXIII, Rule 1 of the Civil Procedure Code (Act V of 1908), on condition of the plaintiff's paying into Court the costs incurred by the defendant within a certain time.

Against the order granting the leave the defendant presented an application under the extraordinary jurisdiction, (section 115 of the Civil Procedure Code, Act V of 1908), urging *inter alia* that the grounds stated in the plaintiff's application were not proper grounds for making the order, that the Court was wrong in not specifying the grounds which it considered sufficient for giving the leave, that the hearing of the case having been closed the permission should not have been given, that the plaintiff's suit being likely to fail for want of evidence the Court erred in granting leave to bring a fresh suit and that the circumstance that the plaintiff was not ready with his evidence and wanted to adduce more documentary evidence were no adequate grounds for giving him the leave. A *rule nisi* having been issued calling upon the plaintiff to show cause why the said order granting the leave to bring a fresh suit should not be set aside,

G. K. Parekh appeared for the applicant (defendant) in support of the rule.

K. H. Kelkar appeared for the opponent (plaintiff) to show cause.

SCOTT, C. J. :—In this case the Subordinate Judge of Athni, after the case of both the plaintiff and the defendant was closed and all their witnesses had been examin-

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ed, gave time to the plaintiff from the 13th to the 27th of September to adduce documents to counteract the effect of documents filed on the 13th by the defendant. Then on the 27th, on the application of the plaintiff and the allegation that the documents had not yet been obtained, although no specific documents were mentioned, the learned Judge allowed the plaintiff to withdraw from the suit with liberty to institute a fresh suit on the same subject-matter on payment of the defendant's costs. The permission was given under Order XXIII, Rule 1, which enables the Court to give such permission if it is satisfied that the suit must fail by reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. Having the grounds of the order before us, we are of opinion, that the learned Subordinate Judge has acted with material irregularity in the exercise of his jurisdiction. The hearing was finished and it was a very ill-advised order which permitted the plaintiff to try and produce documents to counteract the documents filed by the defendant after all the witnesses had been examined. His failure to produce such documents was not sufficient ground for allowing him to put the defendant to the trouble and annoyance of a fresh suit. The case is very much the same as one which came before the Calcutta High Court: *Hira Lal Mitra v. Uday Chandra Dey*⁽¹⁾. We make the rule absolute with costs. We set aside the order of withdrawal and direct that the suit be proceeded with.

Rule made absolute.

G. B. R.

⁽¹⁾ (1912) 16 Cal. W. N. 1027.