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Therefore, in my opinion, on the best consideration I can give to this very difficult case the ship must be condemned as lawful Prize. This decision whether reversed or upheld on appeal still leaves open the question whether the transfer to the claimant was made in good faith.

Order accordingly.

Solicitor for the plaintiff: Mr. J. C. G. Bowen.

Solicitors for the claimant: Messrs. Mirza, Mirza & Mangaldas.

G. G. N.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

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July 21.

PILASRAI LAXMINARAYAN (PLAINTIFF APPELLANT) v. CURSONDAS
DAMODARDAS (DEFENDANT RESPONDENT).^o

Civil Procedure Code (Act V of 1908), Order IX, Rules 8 and 9—Dismissal of suit for plaintiff's non-appearance—Inherent jurisdiction of Court to restore a suit for ends of justice—Defendant protected in the matter of costs on restoration of plaintiff's suit.

On the 7th January 1919, a suit was called on for hearing when counsel for the plaintiff finding that his client was not in Court to give evidence asked for an adjournment. The defendants appeared and opposed the application which was refused and the suit was dismissed under Order IX, Rule 8. Subsequently the plaintiff applied for the restoration of the suit, stating in his affidavit that at about 11 a. m. of the day of hearing he had gone to the premises of his principal witness to bring him to the Court, that as the latter was away from the premises he waited for his return till about 12-30 noon, and that soon after he came to the Court with the witness and found that the suit was called on and dismissed. The plaintiff submitted that as the suit was fourteenth on the Board List for the day he did not

^o O. C. J. Appeal No. 13 of 1919.

expect it to be called before 1 p. m., but that he was ready and willing to pay the defendant's costs of the day on which the suit appeared on board for hearing. The trial Judge dismissed the application on 23rd January 1919, holding that no "sufficient cause" under Order IX, Rule 9 of the Civil Procedure Code was shown by the plaintiff. The plaintiff appealed:—

Held (reversing the order of the trial Judge), that the case was one in which, whether there was sufficient cause or not, the Court should exercise its inherent jurisdiction to restore the suit for the ends of justice, provided the defendant was amply protected in the matter of costs.

Lalta Prasad v. Ram Karan⁽¹⁾, followed.

APPEAL from the order of Pratt, J. dismissing the suit for plaintiff's non-appearance.

The plaintiff filed the suit against the defendants for the recovery of the sum of Rs. 2,682-13-0 as damages in respect of the defendant's breach of a contract to deliver to the plaintiff 11 bales of Grey Shirting purchased by the plaintiff from the defendant.

The suit came on board on the 7th January 1919 as a short cause for hearing and the same was called on at about 12-45 p. m. The plaintiff was not present in the Court at the time and the plaintiff's counsel applied for an adjournment. Mr. Justice Pratt refused the adjournment and the suit was dismissed for the plaintiff's non-appearance under Order IX, Rule 8.

The plaintiff subsequently applied for restoration of the suit on the grounds mentioned in his affidavit, dated the 21st January 1919.

The following was the affidavit of the plaintiff:—

(1) That this suit was filed by me against the defendant for damages in respect of the defendant's breach of the contract mentioned in the plaint...

(2) That on the 7th day of January instant the suit appeared on the board for that day of short causes and it was called on for hearing at about 12-45 p. m., but that as I was not present in the Court house at the time, it was dismissed with costs and the adjournment asked for by my counsel owing to my absence was refused.

⁽¹⁾ (1912) 34 All, 426,

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(3) I say that soon after the said suit was called on and dismissed and at about 1 p.m. I came to the Court and found that the suit was dismissed.

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(4) I say that I could not attend the Court in time as I had been that morning to the firm of Messrs. Sadasukh Gambhirehand to bring with me to Court Mr. Revamal Kasturchand the Moonim of the said firm who is my principal witness in the suit. I had been to the said firm to fetch the Moonim at about 11 a. m., but was told that the Moonim was out and would soon return. As I was told that he would soon return I waited for him. The said Moonim returned at about 12-30 noon and soon after he returned I came with him to the Court but I found that the suit was called on and dismissed. As the suit was fourteenth on the Board List for that day I did not expect it to be called on before 1 p.m.

(5) I say that I have a good and valid claim against the defendant in the suit and the whole of this claim is defeated by the dismissal of this suit owing to my late attendance in Court. I am ready and willing to pay the defendant's costs of the said day when the suit appeared on board for hearing.

(6) After the dismissal under the circumstances aforesaid my attorneys applied to the defendant's attorneys to consent to this suit being restored for re-hearing and offered to pay the defendant's costs of that day but they have refused to consent.

(7) I therefore pray that this Hon'ble Court will be pleased to make an order to restore the above suit on the board for re-hearing on such terms as to this Hon'ble Court may seem just.

The application came on for hearing on 23rd January 1919 when Mr. Justice Pratt dismissed the same with costs, delivering the following judgment:—

PRATT, J.:—This is a motion by the plaintiff in suit No. 1664 of 1918 under Order IX, Rule 9.

On the suit being called on for hearing on the 7th January, counsel applied for an adjournment on the ground that the plaintiff had not appeared. Counsel could give no reason for plaintiff's absence and suggested that he might have succumbed to the prevailing epidemic. The adjournment was refused. Counsel asking for an adjournment is not an appearance

(*Hinga Bibee v. Munna Bibee*⁽¹⁾); and counsel admitted that he did not appear in the suit.

The suit was accordingly dismissed under Order IX, Rule 8.

Plaintiff now prays for restoration on the ground that not expecting the suit to be called on so soon he went to fetch a witness. He says he returned a quarter of an hour after the suit was disposed of.

I do not think this is "sufficient cause" under Order IX, Rule 9. The plaintiff knew the suit was on the board for the day and took the risk of its being called on in his absence. I feel bound by the precedent in this Court of the very similar case: *Manilal Dhunji v. Gulam Husein Vazeer*⁽²⁾.

If the plaintiff had moved the Court the same day or asked me to note his presence in Court that day, I might have considered whether there was a case for an order under the inherent jurisdiction of the Court, but he did not do so.

I dismiss the motion with costs.

The plaintiff appealed.

Desai, for appellants.

Bahadurji, for respondents.

MACLEOD, C. J.:—This suit was called on for hearing on the 7th of January 1919, when counsel, who had been instructed on behalf of the plaintiff, finding that his client was not in Court to give evidence, asked for an adjournment. The defendant appeared and opposed the application, which was refused, and thereafter the suit was dismissed under Order IX, Rule 8. The plaintiff then asked for the restoration of the suit on

⁽¹⁾ (1903) 31 Cal. 150.

⁽²⁾ (1888) 13 Bom. 12.

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the grounds mentioned in his affidavit of the 21st of January 1919. In paragraph 4 he said :

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"I say that I could not attend the Court in time as I had been that morning to the firm of Messrs. Sadasukh Gambhirchand to bring with me to Court Mr. Revamal Kasturchand the Moonim of the said firm who is my principal witness in this suit. I had been to the said firm to fetch the Moonim at about 11 a.m. but was told that the Moonim was out and would soon return. As I was told that he would soon return I waited for him. The said Moonim returned about 12-30 noon and soon after he returned I came with him to the Court but I found that the suit was called on and dismissed. As the suit was fourteenth on the Board List for that day I did not expect it to be called on before 1 p.m."

The learned Judge did not think that the facts alleged in that affidavit provided sufficient cause under Order IX, rule 9, and he said he was bound by the precedent in the case of *Manital Dhunji v. Gulam Husein Vazeer*⁽¹⁾. But it is difficult to see how a decision of one Judge on the facts before him that sufficient cause has not been shown for the restoration of a suit, can provide a precedent for other Judges on similar applications. On questions of fact or matters of discretion there can be no precedent. Each Judge is entitled to come to the conclusion he thinks right on questions of fact and in matters of discretion. Apart from that I agree with the remarks of the learned Judges in *Lalta Prasad v. Ram Karan*⁽²⁾. Their Lordships say :

"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

⁽¹⁾ (1888) 13 Bom. 12.

⁽²⁾ (1912) 34 All. 426 at p. 428.

other than sufficient cause for non-appearance. Order IX, Rule 2 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."

I am of opinion that this is a case in which, whether there was sufficient cause or not, we should exercise the inherent jurisdiction of the Court for the ends of justice, provided the defendants are amply protected in the matter of costs.

The plaintiff must pay the costs of the adjournment and any costs caused to the defendants by his non-appearance including the costs of his application of the 23rd of January 1919. Those must be paid before the suit can be restored. Then he must deposit Rs. 1,000 for the security of defendant's costs, and on those costs being paid and the security given, the suit must be restored.

The costs of this appeal to be costs in the cause.

The security to be furnished within three weeks.

HEATON, J.:—I concur.

Solicitors for the appellant: Messrs. *Dubash & Co.*

Solicitors for the respondent: Messrs. *Little & Co.*

Appeal allowed.

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