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ORIGINAL CIVIL.

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Before Mr. Justice Sale.

HINGA BIBEE *v.* MUNNA BIBEE AND OTHERS.*

[30th November, 1903.]

Suit, Restoration of—Limitation—Dismissal of Suit—Adjournment—Civil Procedure Code (Act XIV of 1882) *ss.* 102, 103, 155—*Limitation Act (XV of* 1877), *Sch. II, Art.* 163—*Notice of motion—"Sufficient Case."—Practice.*

Where a suit is dismissed for want of prosecution, an application for its restoration must be made within 30 days of such dismissal; and a notice that the application would be made on a future date does not prevent limitation from running.

Khetter Mohun Singh v. *Kassy Nath Sett* (1) followed.

Where the long vacation intervenes, to save limitation the matter must be mentioned on the first day after the reopening of the Court—that is the first day on which the Court sits.

Semble : An appearance by counsel on the calling on of a case merely to ask for an adjournment, is not such an appearance in the suit as will necessarily render ss. 102 and 103 of the Civil Procedure Code inapplicable.

[**Ref.** 46 P. R. 1905=178 P. L. R. 1905; 34 Cal. 403 F. B.=11 C. W. N. 329=5. C. L. J. 247=2 M. L. T. 123 ; 10. Bom. L. R. 904. **Diss.** 17 M. L. J. 215.]

MOTION.

This was an application made on behalf of the plaintiff for the restoration of a suit which had been dismissed by HARINGTON, J. on the 10th of August 1903 under the following circumstances :—

On the 29th of July 1903, the suit appeared on the peremptory list and was not called on for hearing until the 10th of the **[151]** August following. On the morning of the 10th of August an application was made by counsel to HARINGTON, J., in whose list the case was, for an adjournment on the ground that the plaintiff's husband who was a material witness in the case had been taken ill on the 31st of July last, and was incapable of leaving his bed.

The application was supported by a certificate of the family doctor, Bonomali Roy, but was refused.

Subsequently when the case was called on for hearing another counsel appeared for the plaintiff and repeated the application for adjournment already made on the same grounds. This application also was refused and the suit dismissed with costs.

Notice was given, on the 29th of August 1903, to the defendants that the present application would be made on the 3rd of September following. But the application was not made then, nor was the matter mentioned until a day after the day on which the Court reopened after the long vacation, which was the first motion-day according to the usual rules of practice.

The matter was then adjourned, and the application finally made on the 30th of November 1903, supported by an affidavit by the said medical practitioner, Bonomali Roy. The affidavit was in the following terms :—

"I, Bonomali Roy, L.M.S., Assistant House Surgeon of Ezra Hospital, in the town of Calcutta, solemnly affirm and say as follows :—

(1) That I have known Moulvi Ashrufuddeen Ahmed, husband of Musumut Hinga Bibee, of No. 5 College Square, in the said town of Calcutta, for the last two or three years.

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* Application in Original Civil Suit No. 239 of 1900.

(1) (1893) I. L. R. 20 Cal. 899.

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(2) That during the said period I have been treating the members of the said Ashrufuddeen's family and am regarded as his family-doctor.

(3) That on the 31st of July 1903 I visited him at his house, the said No. 5 College Square, and found him suffering from malarial fever, and treated him for the same.

(4) That on the 4th of August 1903, on having examined his condition thoroughly and having found him suffering from high fever, I certified to this effect, that the said Moulvi Ashrufuddeen Ahmed on account of his serious illness could not go out of his house, and that it would take the said Moulvi Ashrufuddeen Ahmed one month to be completely cured of the illness.

(5) That what I have stated in my certificate, dated 4th August 1903, given to the said Ashrufuddeen Ahmed, was correct, in my opinion."

"The 25th November, 1903."

[152] Mr. *L. P. Pugh* (Mr. *Garth* with him), for the applicant, after stating the nature and facts of the case, asked for the restoration of the suit, and tendered in support of his application an affidavit (set forth above) by Bonomali Roy, the family doctor; and referred to the Annual Practice (1902), p. 823.

Mr. *R. Mitra*, for defendants Nos. 8 and 9 (*contra*), submitted that an application to set aside a dismissal for default must be made within 30 days, and as this had not been done, the application was barred: see Limitation Act, Sch. II, Art. 163. That the plaintiff should have applied on the very day the Court reopened after the long vacation; that notice under s. 103 of the Code of Civil Procedure did not prevent limitation from running; and that, inasmuch as there was an appearance on the calling on of the suit, ss. 102 and 103 of the Code of Civil Procedure did not apply: *Muzaffar Ali Khan* v. *Kedar Nath* (1). And he further submitted that, considering the facts of the case, the suit was barred by limitation: *Dattagiri* v. *Dattatraya* (2).

Mr. *Chakravarti*, for the defendant No. 10, supported Mr. Mittra's argument and submitted that the application was barred by limitation: *Khetter Mohun Sing* v. *Kassy Nath Sett* (3).

Mr. *A. C. Banerji*, Mr. *H. D. Bose* and Mr. *Mehta*, on behalf of defendants Nos. 11, 12 and 13, adopted the contentions of Mr. Mittra and Mr. Chakravarti.

Mr. *Godfrey* on behalf of the last four defendants submitted that if the dismissal by HARINGTON, J. fell under s. 155 of the Code of Civil Procedure this was a proper subject-matter for an appeal, and not a motion; that the evidence in support of the present application went no further than that before HARINGTON, J., and the Court had absolute discretion under s. 156 of the Code in refusing adjournments: *Simon Elias* v. *Jorawar Mull* (4); that in any event this application was barred.

Mr. *Pugh* (in reply). The dismissal by HARINGTON, J. under ss. 102 and 103 was no "first hearing" to bring it under s. 155 of the Code. The first day after the long vacation for mentioning an [153] application means the first motion-day which happened to be, on this occasion, the day after the reopening of the Court.

SALE, J. This is an application on behalf of the plaintiff for restoration of a suit which was dismissed by Mr. Justice Harington on the 10th August last.

Notice of the present application was given on the 29th August 1903, and the date on which the application was intended to be brought

(1) (1898) I. L. R. 20 All. 266.
(2) (1902) I. L. R. 27 Bom. 363.
(3) (1893) I. L. R. 20 Cal. 899.
(4) (1875) 24 W. R. 202.

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on as mentioned in the notice was the 3rd of September. The application was not made then, nor was it mentioned at any time until a day after the day on which the Court reopened after the long vacation, that is, on the 19th November 1903. The Court reopened on the 18th, but motion-day, according to the usual rules of practice, was the 19th ; therefore it has been suggested that the first day after reopening of the Court means the first day on which the Court in the ordinary course takes motions.

I am not able to accept that interpretation of the rules. It seems to me necessary that the application should have been made on the 18th November, the first day after the reopening of the Court, and if the Court was unable to hear it on that day, the usual course would be to adjourn it to another convenient day.

The first question which arises in this matter is whether the application is barred by the law of limitation. Art. 163 of the Limitation Act has been referred to, which provides that an application by a plaintiff to set aside an order of dismissal for default is to be made within thirty days from the date of dismissal. What appears to have taken place before Mr. Justice Harington is this : The present suit was on the peremptory list for hearing first on the 29th July. It was not called on for hearing until the 10th August. On the morning of the 10th August an application was made for an adjournment on the ground that the plaintiff's husband who was a material witness was ill. That application was not granted. Subsequently when the case was called on, another learned counsel appeared for the plaintiff. That counsel, as appears from the minute-book, stated that he had no instructions to go on with the case. I take it that the learned counsel was not instructed on the second occasion to go on with the case, but he was **[154]** only instructed to obtain an adjournment which had already been applied for on the earlier occasion and had been refused. I think, therefore, the present application falls within sections 102 and 103 of the Civil Procedure Code. If the application did not fall within those sections, I fail to see what power this Court of Original Jurisdiction has to set aside an order of dismissal made by another learned Judge also exercising original Jurisdiction. If the case does not fall within sections 102 and 103 it might possibly fall within section 155, in which case the procedure to be adopted by the plaintiff would be to appeal against the order of dismissal.

As in my opinion the case falls within sections 102 and 103, this Court has the power to set aside an order of dismissal, provided the plaintiff was prevented by sufficient cause from appearing when the case was called on for hearing.

It seems to me there are two difficulties in the way of the applicant : *first*, the application is barred under Article 163 of the Limitation Act because it was not made within thirty days from the order of dismissal. The notice of motion which was given on the 29th August 1903 does not prevent the Law of Limitation from applying. That is laid down in the case of *Khetter Mohun Singh* v. *Kassy Nath Sett* (1) ; and inasmuch as the thirty days expired within the period of the vacation, the only course open to the plaintiff to avoid limitation was to mention the matter to the Court on its reopening day, which, as I have said, was not done. Further, even if the Law of Limitation is not a bar to the plaintiff, the materials before me are not sufficient to satisfy me that she was

(1) (1893) I. L. R. 23 Cal. 899.

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prevented by sufficient cause from appearing at the hearing. The plaintiff elected merely to apply for an adjournment and to take the risk of that application being rejected. The reason assigned for the plaintiff not being in a position to proceed with the case was that her husband was ill, but the evidence failed to show that he was so ill as not to be able to be present on the day the casewas called on. As to that the evidence is in effect the same as it was before Mr. Justice Harington. 31 C. 150=8 C. W. N. 97.

The affidavit by the medical practitioner in support of the certificate which was granted by him and which was produced before the learned Judge on the first occasion, was not affirmed until the [155] 25th November instant, that is to say, a date long subsequent to that on which the application ought to have been ready. In my opinion, therefore, the plaintiff was not prevented by any sufficient cause from appearing when the case was called on for hearing.

For these reasons I must refuse the present application with costs.

Application refused.

Attorney for the plaintiff : *Mahomed Sultan Alum.*

Attorney for the defendants : *C. C. Bose, N. L. Mallick, G. H. Mookerjee, N. C. Bose,* and *Sanderson & Co.*

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APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Geidt.

KISHORI LAL GOSWAMI *v.* RAKHAL DAS BANERJEE.*

[19th August, 1903.]

Evidence—Secondary evidence, admissibility of—Objection to reception of secondary evidence in appellate Court—Evidence Act (1 *of* 1872), *ss.* 61, 65 *&* 66.

No objection should be allowed to be taken in the appellate Court as to the admissibility of a copy of a document which was admitted in evidence in the Court below without any objection.

Kameswar Pershad v. *Amanutulla* (1) dissented from.

[Ref. 59 I. C. 461; 63 I. C. 968, Foll. 14 I. C. 539.]

SECOND APPEAL by Kishori Lal Goswami, the defendant No. 1.

This appeal arose out of an action brought by the plaintiff to recover possession of a certain plot of land. The allegation of the plaintiff was that the plot of land, described as *Ka* in the [156] plaint, belonged to his maternal grandfather, Ananda Chandra Mukerji who had a 12 anna share, and to his brother Mahesh who had a 4-anna share only ; that after the death of Mahesh, the plaintiff's mother purchased the said 4-anna share of Mahesh from his heirs ; that since the death of his mother the plaintiff was in possession of that share ; that after Ananda's death his son Rakhal succeeded him, and after his death his widow Tarini Debi succeeded to the property, and after her death the plaintiff and his mother's sister's sons, Mohendra Nath Banerji and Kedar Nath Banerji, each taking one-third share of the property in suit, and so the

*Appeal from Appellate Decree No. 377 of 1901 against decree of Jogendra Nath Roy, Additional Subordinate Judge of 24-Parganas, dated Jan. 4, 1901, modifying the decree of Srigopal Chatterjee, Munsif of Barasat, dated Feb. 23, 1900.

(1) (1898) I. L. R. 26 Cal. 53.