APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Holmwood.

MARIANNISSA
v.
RAMKALPA GORAIN.*

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Jan. 16.

Civil Procedure Code (Act XIV of 1882) ss. 102, 103, 157 and 158—Adjourned hearing—Want of instructions to the pleader—Dismissal of suit for want of prosecution—Remedy.

At an adjourned hearing of a suit, witnesses on behalf of the plaintiff not being in attendance, the plaintiff applied for issue of a warrant against one of them.

The Court refused the application, and the pleader for the plaintiff thereupon intimated that he had no further instructions to appear; and the suit was dismissed. Subsequently an application was made under s. 103 of the Civil Procedure Code to set aside the order of dismissal. On objection by the defendant that, inasmuch as the dismissal was under s. 158 of the Code, the remedy of the plaintiff was by way of an application for review.

Held, that the suit was dismissed under s. 102 read with s. 157, and that the application was maintainable under s. 103 of the Code of Civil Procedure.

APPEAL from original order, by the plaintiff, Mariannissa *alias* Daman Bibi.

The plaintiff brought a suit against the defendant. After several adjournments, the plaintiff's witnesses not being present, she applied for issue of a warrant for arrest against one of them, and the application being granted, the 10th of March 1905 was fixed for the final hearing of the suit. On that day, however, the plaintiff's pleader made another application for issue of a warrant for arrest against the same witness. The learned Subordinate Judge rejected the application and proceeded to decide the suit forthwith. The plaintiff's pleader thereupon withdrew; and the suit was dismissed for non-prosecution.

On the 15th March 1905 the plaintiff made an application for an order to set aside the dismissal under s. 103 of the Civil Procedure Code; and the defendant took a preliminary objection that the petitioner's only remedy was an application for review of

* Appeal from Original Order No. 524 of 1905.

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judgment under s. 624 of the Code of Civil Procedure. The learned District Judge of Birbhum gave effect to this objection and dismissed the plaintiff's application.

Against this decision the plaintiff appealed to the High Court.

Babu Nalini Ranjan Chatterji (with him *Babu Rajendra Chandra Chuckerbutty*) for the appellant.

Babu Lalit Mohan Ghose for the respondents.

Jan. 21.

MOOKERJEE AND HOLMWOOD JJ. The substantial question of law, which we are invited to determine in this case, is whether an application made by the appellant in the Court below to set aside an order of dismissal of the suit, in which he was the plaintiff, could be maintained under section 103 of the Civil Procedure Code. The action was commenced on the 22nd February, 1904. The issues were framed on the 14th May, 1904. After various adjournments, the case came on for hearing on the 10th March 1905. In the meantime the plaintiff had asked for and obtained processes against his witnesses, but as they did not appear on the date fixed for trial, the plaintiff prayed for the issue of a warrant for arrest of one of them. This application was refused. The pleader for the plaintiff thereupon intimated to the Court, that he had no further instructions to appear in the case, and the Subordinate Judge accordingly dismissed the suit for want of prosecution. Three days later, on the 13th March, 1905, the plaintiff made an application for an order to set aside the dismissal under section 103 of the Civil Procedure Code. The defendants took a preliminary objection that the suit had been dismissed, not under section 102 of the Civil Procedure Code, but under section 158, and consequently the remedy of the plaintiff was by way of an application for review under section 623, and not by way of an application for restoration of the suit under section 103. The District Judge has given effect to this objection and dismissed the application without any investigation into the merits. The plaintiff has appealed to this Court, and on her behalf the decision of the Court below has been assailed on the ground that the suit was dismissed under section 102 read with

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section 157 and that the application was accordingly maintainable under section 103. In our opinion this contention is manifestly sound and must prevail.

Section 102 of the Civil Procedure Code describes the consequence of the appearance of the defendant and non-appearance of the plaintiff. Section 157, which finds a place in the Chapter on adjournments, provides, that if, on any day, to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Chapter VII, or make such other order as it thinks fit. The effect of this section is to make section 102 applicable to adjourned hearings of cases, *Jonardan Dobey* v. *Ramdhone Singh*(1). Section 158 then provides that, if any party to a suit, to whom time has been granted, fails to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary to the further progress of the suit for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the case forthwith. It is obvious that the scope of section 157 is quite distinct from that of section 158. Section 158 appears to contemplate a case in which the Court has materials before it to enable it to proceed to a decision of the suit. As pointed out by the learned Judges of the Allahabad High Court in *Sitara Begam* v. *Tulshi Singh*(2), what section 158 provides is, that the mere fact of a party making default in the performance of what he was directed to do would not lead to the dismissal of the plaintiff's suit, if he was the party in default, or the decreeing of the claim against the defendant, if the defendant was the person, who made the default; the words "notwithstanding such default" clearly imply that the Court is to proceed with the disposal of the suit in spite of the default, upon such materials as are before it. Section 157, on the other hand, speaks of the disposal of the suit, and undoubtedly includes cases in which there might not be any materials before the Court to enable it to pronounce a decision on the merits, for instance, if the event contemplated in sections 97, 98, 99, cl. (*a*) and 102 happens, although, if the contingency mentioned in section 100, cl. (*a*) happens, there would be materials

(1) (1896) I. L. R. 23 Calc. 738. (2) (1901) I. L. R. 23 All. 462.

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before the Court, and a decision on the merits. It is not necessary therefore to lay much stress upon the difference in phraseology between sections 157 and 158, one of which speaks of the *disposal* of the suit, and the other of the *decision* of the suit. It is clear, however, that the contingency contemplated in section 157 may happen in a case which falls within the letter of section 158. It may well happen, for instance, that a plaintiff to whom time has been granted to produce evidence, not only fails to do so, but also fails to appear. In such a case, if there are no materials on the record, the appropriate procedure to follow would be that laid down in section 157, but if there are materials on the record, the Court ought to proceed under section 158 [*Ningappa Virtappa Yelloor* v. *Gowdappa, son of Tamappa*, etc.(1), *Badam* v. *Nathu Singh* (2)], though even in such a case section 157 has been held applicable: *Maharaja of Vizianagaram* v. *Lingam Krishna Bhupati*(3). Thus, in the case before us, the plaintiff failed to cause the attendance of his witnesses. He appeared at the adjourned date of hearing. The Court might, therefore have proceeded under section 158 to decide the suit forthwith. The Court, however, did not do so and did not at all proceed to decide the merits of the case. Meanwhile, the pleader for the plaintiff informed the Court that he had no instructions to proceed further with the suit and withdrew from it. The result, therefore, was that from that moment, there was no appearance on behalf of the plaintiff, and consequently section 102 read with section 157 became applicable. The order of the Court makes it quite clear, that the suit was dismissed for non-prosecution, and the order was in substance, as it was in form, an order under section 102. It was not a dismissal for want of evidence, which might be regarded as a decision on the merits, but was a dismissal for want of prosecution. The plaintiff was consequently entitled to apply under section 103. The view we take is supported by the decision of the Bombay High Court in *Shrimant Sagajirao, Khanderav Naik Nimbalkar* v. *S. Smith*(4).

On behalf of the respondent, reliance was placed upon two cases in the Madras High Court decided under Act VIII of 1859;

(1) (1905) 7 Bom. L. R. 261.
(2) (1902) I. L. R. 25 All. 194.
(3) (1902) 12 M. L. J. 473.
(4) (1895) I. L. R. 20 Bom. 736.

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Comalammal v. *Runga Sawmy Iyengar*(1) and *Rangasamy Mudelliar* v. *Sirangan*(2). We are unable to adopt the reasoning which underlies these decisions, which appear to us not to recognise fully the distinction between the language of sections 147 and 148 of Act VIII of 1859. If this view were adopted, section 147 which corresponds to the present section 157 would become superfluous. As we have already explained, the scope of the two sections is quite distinct, and there is no justification for applying section 158 to a case to which section 157 is more appropriately applicable. Section 157 clearly contemplates two things, first that the original suit is pending, and secondly that one or other of the parties does not appear. If these conditions are satisfied, the Court may dispose of the suit in the mode directed by Chapter VII, when one or other of the parties does not appear, even though any of the contingencies contemplated by section 158 has happened. Reliance was also placed upon the cases of *Mahomed Azeemoollah and Mussamat Furzana* v. *Ali Buksh*(3) and *Kashi Parshad* v. *Debi Das*(4), which are both distinguishable on the ground that the parties were represented on the adjourned date of hearing, and the suits were dismissed, not for default of appearance, but for want of evidence. Reference was also made to the cases of *Sriraja Venkata Ramaya Apparau Bahadur* v. *Anumukonda Rangaya Nayudu*(5) and *Alwar Ayyangar* v. *Seshammal*(6) neither of which, however, lend any support to the contention of the respondents. In the first case, a suit was adjourned on the application of the defendant, and on the date, to which the case was adjourned, the plaintiff was absent and the suit was dismissed; it was held that the dismissal must be treated as one under section 102 read with section 157. In the second case, a suit was adjourned on the joint application of the plaintiff and the defendant, and on the date to which the hearing had been adjourned, as neither party appeared, the suit was dismissed. It was held that the order of dismissal was under section 98, read with section 157, and not under section 158, because, if the latter section applied, the Court would be bound to decide the case, which it did not. These cases,

(1) (1868) 4. Mad. H. C. 56.
(2) (1869) 4. Mad. H. C. 254.
(3) (1873) 5. All. H. C. 74.
(4) (1875) 7. All. H. C. 77.
(5) (1883) I. L. R. 7. Mad. 41.
(6) (1887) I. L. R. 10. Mad. 270.

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therefore, so far as they go, rather tend to support the contention of the appellant. We may further point out that an examination of the order sheet in the present case shows that on the previous occasion, time had not been granted to the plaintiff expressly for the purpose of causing the attendance of her witnesses; the adjournment, which was granted, was rather an adjournment by the Court in order to give effect to the processes which it thought fit to issue to compel the attendance of the witnesses; to such a case. Section 158 could have no possible application. See *Pearee Mohun Bera* v. *Shama Churn Mytee*(1). On these grounds, we must hold that the order of dismissal of the suit was one made not under section 158, but under section 102 read with section 157, and that consequently the application for restoration made by the plaintiff was maintainable under section 103.

The result therefore is that this appeal must be allowed, the order of the District Judge reversed, and the case remitted to him for consideration of the application, presented by the plaintiff, on the merits. The appellant is entitled to her costs in this Court. The costs in the lower Court will abide the result.

Appeal allowed.

Case remitted.

S. C. G.

(1) (1872) 19 W. R. 34.