

In the High Court of Judicature at Bombay.

O. O. C. J.  
—

Suit No. 256 of 1907.

Esmail Ebrahim . . . . . Plaintiff

vs.

Haji Jam Mahomed } Defendant.  
Haji Mahomed. }

—  
24<sup>th</sup> August 1908.

Coram: Russell J.

Judgment.— This case raises a point, which, having regard to the way, we know, business is sometimes done in these Courts, is a matter of importance.

The

(2)

The Plaintiff filed the suit to recover a large sum of money from the Defendant, and at the time of the hearing, when the case was called on, neither of his Counsel was present. However, to enable them to come and appear, Defendant's Counsel raised 22 issues. At the end of that time, I announced that I would give a limited time - I think I said five minutes - for the Plaintiff to appear, of course meaning thereby obviously, either by himself <sup>or by</sup> his Counsel. Then a Counsel got up and said he was instructed to apply for an adjournment but was not instructed on the hearing, and I refused the adjournment. The Plaintiff's Counsel did not turn

(3)

up within the 5 minutes - in fact  
he did not turn up till nearly  
about 20 minutes late - and  
accordingly I dismissed the suit.

Now, it is admitted that  
this is an application under Section  
103 of the Civil Procedure Code for  
the restoration of the suit and it  
is necessary to see what the  
section says. The material por-  
tion of the section is: "But the  
Plaintiff may apply for an order  
to set the dismissal aside, and  
if it be proved that he was  
prevented by any sufficient  
cause from appearing when the  
suit was called on for hearing,  
the Court shall set aside the  
dismissal upon such terms etc.

What does appearance mean?  
You find in the notes to Section

(44.)

96 in the latest edition of O'Kinealy  
as to what is not "appearance" and  
what is "appearance". It is not an  
"appearance" by Counsel merely  
to ask for an adjournment, 31 Cal.,  
150. It is an "appearance" when a  
party is present in person and asks  
for an adjournment which is re-  
fused or a vakeel is present and  
says he had no time to prepare.

The case that has been  
referred to in 13 Bom. page 12,  
seems to me to be exactly in  
point and it seems to me that  
I am bound by it. It is a judg-  
ment of a court of coordinate  
jurisdiction. In that case the  
Plaintiff did attend the Court on  
the day fixed for the hearing and  
waited for sometime ~~until~~ <sup>as they</sup> the Judge  
happened to be sitting on that day at first in  
~~some back room~~ <sup>the</sup> Appeal Court.

Belgiving  
Wheat

~~When the judge returned the~~  
~~case was called out.~~ Believing

that a part-heard case would be  
 proceeded with and would occupy  
 some time the Plaintiff left the

Court-house and went to assist

his employer who had sent for  
 to explain some matters connected with a recent transaction,  
 him, and returned in about half

an hour and found that in his

absence his suit had been called

on and dismissed under Section

102 of the Code. It was held,

refusing the application, that

the above circumstances did not

amount to "sufficient cause" for

his non-appearance ~~of~~ when his

suit was called out for hearing.

He was not taken unawares. He was

under no compulsion to leave the

Court nor was his absence due

(6.)

to any weighty cause. He accepted the risk of the case being called on in his absence.

That is a case, one would think, of a severe way of treating the Plaintiff in that case. But in this case the Plaintiff was actually present in Court and he heard everything that had been done. It is admitted he had his attorney's clerk with him. The attorney's clerk should have heard ~~that~~ <sup>that</sup> I said that I would give time until his Counsel came in. Now, under these circumstances, was he prevented by sufficient cause from appearing, when he himself was here with his attorney's clerk, and does not take any steps

(7)  
steps to appear or make his case  
known to the Court? In case  
if he had appeared himself  
and insisted on reading the Pleint  
slowly until his Counsel ap-  
peared I could not prevent  
him from doing so, or in reading  
the 22 issues slowly until his  
Counsel came.

With regard to the  
case in 26 Mad, it seems to  
me I am bound by the deci-  
sion of Mr. Justice Gardine  
in 13 Bom. and I confess <sup>that</sup> if  
I were to give effect to the  
judgment in 26 Mad. in that  
way, it would be the section far  
beyond its scope.

I must refuse the  
application

(3.)

application with costs.

2. 3. 4. review or appeal

There are other remedies, as have been pointed out, which may be open for the Plaintiff, and it will be for his advisers to say whether he should take advantage of any of those remedies.

But I am glad to say that I have had an opportunity of saying that I do hope that this case will be some warning to Counsel that ~~in my opinion~~ it is not the duty of both the Counsel to be absent.

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in cases where they are <sup>permitted</sup> to appear in Court for their clients without making arrangements by asking other Counsel to appear for them. In that <sup>the</sup> respect <sup>at all points</sup>, therefore, I think this is an important case and I hope the Bar and everyone <sup>the</sup> will <sup>properly</sup> <sup>generally</sup> recognize it as such.

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A. D. Souza,  
 Shorthand Writer,  
 High Court, O. J.  
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High Court, Bombay

O. O. C. J.  
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Haji Akhomed } ...

Oral Judgment  
delivered by Russell  
on the 24<sup>th</sup> August

1908

Approved by ...  
L. P. D. 1908