

Original Suit No. 715 of 1865; Appeal No. 29.

DA'DA'BHA'I, NAOROJI' & Co....*Plaintiffs and Appellants.*
SORABJI' CA'WASJI'*Defendant and Respondent.*

Motion for commission and to adjourn suit—Application to withdraw.

The plaintiffs' attorney being under the misapprehension that one of the plaintiffs—who was a material witness—was in Bombay, when in fact he was in England, and an application to consent to a commission having been made to the defendant's attorney and refused on the eve of the hearing;—an application was made to the Judge in chambers, on the morning of the day fixed for the hearing, and supported by an affidavit, for the issuing of a commission and for an adjournment of the suit; and the Judge declining to make an order in chambers, the application was renewed in Court, when the Judge refused to take notice of what had occurred before himself in chambers, and made a note that the application for a commission was made upon no affidavit; and as the affidavit (presented in chambers) had been sent to the office of the plaintiffs' attorneys, for a copy to be made and served upon the defendant, and was not then in Court, the application for a commission and to adjourn the hearing was refused; and plaintiffs' counsel not being instructed to proceed with the hearing, and leave to withdraw the suit having been also refused, the suit was dismissed:—

Held that the Judge was wrong in refusing to postpone the case for the production of the affidavit in Court; and that there was no legal ground whatever for the refusal to withdraw the suit, which was accordingly restored to its place in the list, and remanded in order to be tried.

THIS was an appeal from a decree made, on the 8th of September 1865, by Mr. Justice ANSTEY, then an Acting Judge of the High Court.

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The plaintiffs are Parsí merchants carrying on business in London and Liverpool; and they claimed in their plaint Rs. 1,20,578, being the aggregate amount due by the defendants on five bills of exchange, drawn by the plaintiffs and accepted by the defendants.

Mr. Lynch was the attorney for the plaintiffs, and it appeared that he was under the impression that one of the plaintiffs, Mánekjí Cursetjí Cámá, a material witness in the case, who was then in England, was in Bombay. Mr. Lynch left for England before the cause was heard, and it was not dis-

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covered until after his departure that Cama was not in Bombay. Dr. Dallas, the partner of Mr. Lynch, wrote to the defendant's attorney, asking him to consent to the issue of a commission to England to take the evidence of Cama. A reply, refusing to consent, was received by Dr. Dallas on the 7th of September 1865.

The suit was fixed for hearing on the 8th of September; and on the morning of that day an application was made to Mr. Anstey, in chambers, for the issue of a commission to England to examine Cama. The application was based upon an affidavit made by Jamsetji Palanji, one of the plaintiffs, in which it was stated that the plaintiffs could not safely proceed to a hearing of the suit without the testimony of Cama; and an adjournment of the suit was asked for. Mr. Anstey declined to make any order in chambers; and the cause appeared in that day's list. The application was renewed in Court. The minutes of the Judge as to what occurred on the occasion, were as follows:—

“ Mr. Taylor, for the plaintiffs, before this cause is called on, moves for a commission to go to London to take the evidence of Manekji Cursetji Cama, one of the plaintiffs, *but upon no affidavit*. Mr. Hayllar (for Mr. Howard) opposes. I refuse the application. The cause is then called. Mr. Taylor applies for leave to withdraw the suit and file a fresh one. I refuse the application. Mr. Taylor *submits to have the suit dismissed*. Decree to dismiss accordingly with costs.”

Appeal No. 29. The appeal came on for hearing this day before COUCH, C. J., and WESTROPP, J.

The Acting Advocate General (Honorable J. S. White) and Taylor for the appellants.

Mayhew and Marriott for the respondent.

Taylor:—It was not strictly correct to say that I made the application “upon no affidavit.” I reminded the learned Judge that the affidavit of Mr. Jamsetji Palanji had been shown to him in chambers; and mentioned that it was sent to the attorney's office for a copy to be made, for the pur-

pose of being served on the defendant, and that it had been sent for by Dr. Dallas, and was being brought to the Court. In fact, the affidavit was brought into the Court immediately after. The Judge declined to hear the application, because the affidavit was not then before him; and said that he could not take notice of what had occurred in chambers. The first nine cases on the list were then gone through very rapidly; and the plaintiff's case, which was not expected to come on for hearing so soon, and which stood the tenth on the list, was called on for hearing. I was told to go on with the suit, when I stated that I was not instructed for the hearing, and applied for leave to withdraw the suit. In answer to the learned Judge, I admitted that I appeared alone on the motion: whereupon the Judge said that, having regard to the rule of the Bar, he refused the application.

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White, on the same side.—The Judge refused to dispose of the application for a commission in chambers, and adjourned it into Court. It being necessary to serve a copy of the affidavit on the other party, no time was lost by the plaintiffs' attorneys; and although the Judge was informed of this fact when the motion was made in Court, and was perfectly aware that the affidavit had been already made, and, further, that every effort was being used to get it before the Court, he refused the application for a commission. It was true that, when the matter came before the Court, the affidavit was not literally before the eyes of the Judge. A Judge could hardly be said to have exercised a wise discretion, if he did not allow a momentary delay for the interests of justice. The counsel was at the mercy of the Judge, and, in his difficulty, he applied to be allowed to withdraw the suit. This application was refused on the ground that Mr. Taylor appeared alone, and that a rule of the Bar had not, therefore, been complied with. [Couch, C. J.—I do not think the Judges have anything to do with a rule of the Bar, or with Bar etiquette.] There is nothing to show that the objection to Mr. Taylor appearing alone, was raised by counsel on the other side.

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The decree was not *submitted to* by the plaintiffs' counsel, although it is so stated in the Judge's notes. It could not have been under Sec. 110 of the Code that the decree was made, because both the parties were present. The decree says :—“ This suit being this day called on for hearing and final disposal, Mr. Taylor being counsel for the said plaintiffs, and Mr. Hayllar (for Mr. Howard) counsel for the defendants, Mr. Taylor applies for leave to withdraw the suit and bring a fresh one, which application being refused, this Court doth order and decree that this suit do stand dismissed.” The suit should not have been peremptorily dealt with ; as there was not the slightest pretence that the application for a commission was not a *bonâ fide* one. I, therefore, ask the Court to set aside the decree.

Mayhew, for the respondent, was instructed to admit the accuracy of the statements made by the counsel for the appellants ; but contended that the respondent should not be saddled with the costs of the appeal.

COUCH, C. J.—In this case it would appear, from the facts stated by Mr. Taylor, and acquiesced in by Mr. Mayhew, that an application was made to the learned Judge in chambers for the issuing of a commission to England, to take the evidence of a material witness in the case, on which occasion an affidavit of one of the plaintiffs was produced ; but that the affidavit not being in Court when the motion was made by Mr. Taylor, the learned Judge refused the application on that ground. If an application had been made to me under such circumstances, I should have postponed the case for a short time to allow the party to produce the affidavit, and I should not have considered myself justified in refusing the application on such a ground. I think the learned Judge did not exercise a wise discretion in refusing the application because the affidavit was not actually before him.

That having been done, Mr. Taylor applied for leave to withdraw the suit under the circumstances. Supposing even that the plaintiffs had come into Court unprepared, and

without an affidavit, I should have thought that I ought in justice to grant the application to withdraw the suit, subject to the penalty of costs, and not to debar them for ever from recovering any portion of their claim, which is a very large one. Viewing their conduct in the most unfavourable light, I think they ought to have been allowed to withdraw the suit.

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The learned Judge refused it for a reason which to my mind is quite insufficient,—that Mr. Taylor was the sole counsel. There is no rule of law that a suitor may not be represented by one counsel. It is a matter between counsel themselves, and it must rest between them and the public. It does not appear that there was any legal ground whatever for the learned Judge's refusal to allow the suit to be withdrawn with leave to file a fresh one.

After the explanation given, and regarding the way in which the decree was drawn up, the Court sees no ground to suppose that it was given with the consent of plaintiffs' counsel. The learned counsel was in a helpless condition at the time—whether he submitted or not, makes no difference. The error arose from a previous proceeding. The learned Judge was wrong in refusing to postpone the cause until the affidavit could be produced; and he was also wrong in refusing leave to withdraw the suit.

We, therefore, reverse the decree and remand the suit: each party to pay its own costs of the appeal; the plaintiffs to pay the costs of the motion on the 8th of September.

WESTROPP, J.—I quite concur.

Appeal allowed.