Original Suit No. 597 *of* 1865; *Appeal No.* 36.

HARDATRA'I SHRIKISONDA'S.. *Plaintiff and Appellant.*
VICTORIA FINANCE AND
BULLION ASSOCIATION.. *Defendants and Respondents.*

Judgment by default—Appeal from rejection of application to set aside.

On appeal from the rejection of an application made, under Sec. 119 of Act VIII. of 1859, to set aside a judgment by default:—

Held that, in order to satisfy the Court "that the plaintiff was prevented by any sufficient cause from appearing," it was enough to show that there had been a *bonâ fide* mistake, which was not unreasonable.

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THIS was an appeal from the rejection by Mr. Justice ANSTEY, on the 12th of September 1865, of an application made on behalf of the plaintiff, under Sec. 119 of the Civ. Proc. Code, for an order to set aside a judgment passed against the plaintiff by default on the 8th of September preceding.

The cause originally came on for hearing on the 11th of August and was then postponed, by order of the Court, to enable the defendants to file a written statement, which they were directed to do and to furnish a copy to the plaintiff's attorney within three weeks. The case was to appear again in the daily list of causes on the expiration of one month. No such statement was filed, nor was a copy of it furnished to the plaintiff's attorney according to the order of the Court, and the attorney was under the impression that, a calendar month being meant by the order, the cause could not come on for hearing again until the 11th of September. It happened, however, that it was erroneously put down in the list of causes for trial on the 8th of September, and was called on in its turn on that day. No one appeared for the plaintiff; and, on the motion of the defendants' counsel, the Judge gave a decree against the plaintiff by default.

On this fact coming to the knowledge of the plaintiff's attorney he instructed counsel the same day. The Judge was applied to under Sec. 119 of the Civ. Proc. Code, and

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on an affidavit by the plaintiff's attorney, Mr. Crawford, for an order to restore the cause to the list, and to set aside the decree which had been passed against the plaintiff. The Judge found fault with the affidavit as being vague, equivocal, and unsatisfactory, and refused to make an order on the motion, until another affidavit should be submitted to him. On the 9th of September counsel again moved the Court on behalf of the plaintiff, on a second affidavit made by Mr. Crawford. That affidavit stated that the previous one of the 8th was made and placed in the hands of counsel about 1 P.M. that day, and within half an hour of the time Mr. Crawford ascertained that the cause had been erroneously set down on the board. The clerk who attended to the suit, under Mr. Crawford's directions, had been ill for several days, or in all probability the circumstance of the cause being on the board would have come to Mr. Crawford's notice as soon as the Court sat, and he would have instructed counsel earlier than he did. He (Mr. Crawford) did not personally attend in Court, because he knew there should have been no suit on the day's list which required his attendance. The Judge declared this second affidavit to be also equivocal. Mr. Crawford expressed his willingness to be examined upon oath in Court; but the Judge remarked that the affidavit being untrustworthy and equivocal, another one must be filed before he could grant the motion. On the 11th of September the matter was again brought under the notice of the Court by counsel for the plaintiff, when a third affidavit by Mr. Crawford was submitted. The learned Judge considered it to be eminently unsatisfactory; and ordered the matter to stand over to give the defendants' counsel an opportunity of being heard. On the 12th of September the matter was again mentioned to the Court by *Bayley*, as counsel for the plaintiff, who begged to be informed whether the Court granted or refused the motion. The Judge inquired whether another affidavit had been made by Mr. Crawford, and the answer being in the negative, he said he would make no order on the motion; and this was understood to be tantamount to a refusal of the motion.

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The grounds of appeal were as follow:—1, that the Judge ought to have held, upon the affidavits and the certificate of the Deputy Registrar filed in support of the application, that it was proved to the satisfaction of the Court that the plaintiff had been prevented by sufficient cause from appearing when the suit was called on for hearing; 2, that the Judge ought to have passed an order to set aside the judgment by default, and appointed a day for proceeding with the suit; 3, that the rejection of the application to have the cause restored was contrary to justice and right.

The appeal came on for hearing this day before COUCH, C. J., and WESTROPP, J.

Bayley and *Marriott* for the appellant.

The Honorable J. S. White and *Green*, for the respondents, admitted that there had been a *bonâ fide* mistake on the part of the plaintiff's attorney, and that in consequence thereof he did not instruct counsel on the 8th of September.

COUCH, C. J., said that the Court concurred in thinking that the affidavits filed by the plaintiff's attorney were not unsatisfactory. Considering the various instances in which a month is considered to be a calendar month, and that such a practice had been in force in the Master's office, the Court thought the excuse given in the affidavit was a good one. It was enough to say that there had been a *bonâ fide* mistake—which was not unreasonable—and that was sufficient to entitle the plaintiff to have the case restored to the list. Ultimately, the matter resolved itself into a question of costs. The defendants' conduct on the 8th of September disentitled them to costs.

The Court reversed the order of the Judge made on the 12th of September, rejecting the application; and also set aside the decree of the Judge of the 8th of September. Each party to pay its own costs of the appeal; the defendants to have the costs of the hearing of the 8th of September, if ultimately successful. The case was ordered to be set

down on the board on Thursday, the 15th of February: the defendants to file and give a copy of a written statement to the plaintiff on or before the 8th of February. 1866. January 22. Appeal No. 36.

Appeal allowed.

NOTE.—In Appeal No. 39, *Vandrávandás Jamnádás* v. *Victoria Finance and Bullion Association*, a decree by default having been given against the plaintiff on the same day and under circumstances exactly similar to those of the above case, and the grounds of appeal being also the same, the respondents' counsel consented to a similar order being made.—ED.

Original Suit No. 581 *of* 1864; *Appeal No.* 32.

BHIMJI' GIRDHAR..... *Defendant and Appellant.*

W. J. MORGAN ..... *Plaintiff and Respondent.*

Appeal—Judge's notes—Security for costs.

A certified copy of the Judge's notes not having been filed; and there being no certificate from the Prothonotary that security had been given for costs;—the appeal was dismissed for non-compliance with the Rules of the Court.

THIS was an appeal from the decision of Mr. Justice COUCH, who gave judgment for the plaintiff, on the 7th of September 1865, for Rs.17,625 for damages and costs, by reason of the defendant's breach of a contract for the delivery of cotton. January 27.

This was the day fixed for hearing the appeal.

Marriott now applied for leave to file a certified copy of the Judge's notes, which, owing to a misapprehension, had not been filed in accordance with the Rule of the Court in that respect. There was an affidavit by a clerk of the appellant's attorney, who deposed that he was under the impression, until within the last day or two, that the notes had been filed. It would be sufficient punishment to the appellant to have to pay the costs of an adjournment of the hearing of the appeal, which was now asked for.