Referred Case.

NENBAI, widow and administratrix &c.... *Plaintiff.*
HAIM MUSA'JI and his wife, DA'DI ..... *Defendants.*

1867. August 9.

Small Cause Courts' Act, No. IX. of 1850, *Secs.* 42 *and* 46—*Personal attendance of Parties—Women of Rank—Practice—Construction.*

Held that Sec. 42 of Act IX. of 1850 does not necessitate the personal attendance of the plaintiff in court in the first instance; but that the plaintiff may appear by such other person as may, by the Rules of the Court, appear for a party in a cause.

When, however, the personal attendance of the plaintiff appears to the Judge to be necessary for the proper investigation of the cause, he may require it; unless the case comes within the privilege given by Sec. 46 of the Act.

CASE stated for the opinion of the High Court of Judicature, pursuant to the provisions of Sec. 55 of Act IX. of 1850 and Sec. 7 of Act XXVI. of 1864, by John O'Leary, Acting First Judge of the Bombay Court of Small Causes :—

"This was a summons to recover Rs. 963, amount of defendants' joint and several promissory notes, with interest; and was called on before me on the 10th of April 1867.

"Mr. Macfarlane, Solicitor, appeared for the plaintiff. Mr. Hormasji, Pleader, appeared for the defendants. Haim Musáji was personally present in court; the other party was not present.

"When Mr. Macfarlane was about to state the plaintiff's case, Mr. Hormasji objected to my proceeding with the case, and required me to strike the case out of the list, under Sec. 42 of Act IX. of 1850. In answer to me, Mr. Hormasji stated that he was not instructed that the evidence of the plaintiff was material in the case.

"Mr. Macfarlane objected to produce his client on two grounds :—(1) That she was a Khojá lady of a rank in life which rendered her appearance in a Court of Justice contrary to the customs of her religion and community; (2) that she could give no evidence in the case, the transaction in question having been carried on through her agent and son-in-law, Mír Alí Dharamsi.

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"Mír Alí Dharamsi, being affirmed, stated that the plaintiff was his mother-in-law; that he managed her business, and held a general power of attorney from her; and that she was not present when the money was advanced to the defendants. He further stated that he had known the plaintiff for about twelve years: that she was a lady of rank in the Khojá community; that her husband had been a merchant and a seṭiá amongst the Khojás: that during the time he had known her she had had several suits in the High Court, and in the Court of Small Causes, and that she had never attended personally in court: that he had managed these cases for her; and that it was contrary to the custom of the Khojás for a lady of the plaintiff's position to appear in court; that she went out in a carriage, and did not put on a *paḍadá*: that she went to dinners of her own community, but not to those of others; and that it was forbidden by the rules of the community that she should come to court.

"Haim Musáji (the defendant), being sworn, stated that there are no *paḍadá* ladies among the Khojás, and that he first knew the plaintiff about eighteen months ago; that he knew of the plaintiff going to the bazár to purchase articles for the household. He further stated that it was the plaintiff herself who gave him the money; that she was a wealthy woman, but he did not know that she was of high rank in the caste. He stated that his wife, the second defendant, could not come to court as long as he, her husband, was alive. This witness is a Jew.

"I find that the plaintiff in this case is a lady of rank in the Khojá community; that it is not her custom to appear personally in court; and that her evidence is not material in the present case.

"The practice of the court I find to be, to require the personal attendance of the plaintiff whenever it is required by the defendant; except in the case of native traders not resident in Bombay, who trade here by means of their Munims, in which cases the Munim is allowed to appear for the plaintiff on the record. And, subject to the opinion of the High

Court on the question whether, under these circumstances, I should have required the attendance of the plaintiff, I give the following judgment:—

"*Case struck out, for non-attendance of the plaintiff, under Sec.* 42 *of Act IX. of* 1850. *No costs to either party.*

"And I request the opinion of the High Court as to whether I was right in so doing."

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

Howard, for the plaintiff:—Sec. 42 of the Small Cause Court Act (No. IX. of 1850) was relied upon as requiring the personal attendance of the plaintiff; but that section (*a*) was taken almost *verbatim* from Sec. 79 of 9 & 10 Vic., c. 95, the English County Courts' Act. The Rules of the Small Cause Court in Bombay regulate the fees to be allowed to Barristers and Attorneys and to Pleaders, who appear for parties; and there is no reason for requiring the plaintiff's personal attendance; unless the evidence of the plaintiff should, in the opinion of the Judge, be necessary; and even then a lady of rank is exempt from attendance, under Sec. 46 of the Act. (*b*)

The Advocate General (*Hon'ble L. H. Bayley*), for the defendant:—The question here is what is the law laid down

(*a*) "If, upon the day of the return of any *summons*, or at *any continuation* or adjournment of the said Court, or of the cause for which the said summons shall have been issued, the plaintiff shall not appear, the cause shall be struck out; and if he shall appear, but shall not make proof of his demand to the satisfaction of the Court, the Judges may nonsuit the plaintiff or give judgment for the defendant; and, in either case, where the defendant shall appear and shall not admit the demand, may award to the defendant, by way of costs and satisfaction for his trouble and attendance, such sum as they, in their discretion, shall think fit: and such sum shall be recoverable from the plaintiff by such ways and means as any debt or damage ordered to be paid by the same Court can be recovered: provided always, that if the plaintiff shall not appear when called upon, and the defendant, or some one duly authorised on his behalf, shall appear, and admit the cause of action to the full amount claimed, and pay the fees payable in the first instance by the plaintiff, the Court, if it shall think fit, may proceed to give judgment, as if the plaintiff had appeared."

(*b*) "On the hearing or trial of any action, or any other proceeding, under this Act, the parties thereto, their wives, and all other persons, may be examined, on behalf of either the plaintiff or defendant, subject nevertheless to the Acts and Regulations in force, with respect to the examination of women of a rank and situation in life which, according to the customs of the country, would render it improper to compel them to appear in a Court of Justice."

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in Sec. 42 of the Act. Some effect must be given to the words "the defendant, or some one duly authorised on his behalf." Sec. 91 of the County Courts' Act provides as to who may appear for a party to the suit. There is no such provision in the Small Cause Court Act, except as to the defendant, in Sec. 42.

COUCH, C.J. :—I am of opinion that the plaintiff is not bound by the Act to appear in person. If the words of the Act were, "If the plaintiff shall not appear *in person*, the cause shall be struck out," we should, notwithstanding the inconvenience, be bound to give effect to the language of the Legislature; but as the words used are consistent with a more reasonable construction of the Act, and as that construction is also more convenient, I have no hesitation in adopting it. I think, then, that the words of Sec. 42 mean that the plaintiff may appear in person, or by such other person as may, by the Rules of the Court, appear for a party in a cause.

With reference to the alternative words used in the latter part of the section: "Provided always, that if the plaintiff shall not appear when called upon, and the defendant, *or some one duly authorised on his behalf*, shall appear, and admit the cause of action to the full amount claimed, &c.," I think sufficient effect is given to them, if it is considered that this is a special provision, by which the defendant, though not appearing in person, is to be bound by *an admission* of the cause of action to the full amount claimed, when made by *some other person* on his behalf. The "some one duly authorised" in such a case need not, and in very many cases, probably, would not, be a professional representative of the defendant; and therefore the Legislature requires due proof of the authority to admit the claim.

Where the personal attendance of the plaintiff in court appears to the Judge to be necessary for the proper investigation of the case, he may require the plaintiff's attendance; unless the case is within the privilege given by Sec. 46 of the Act.

WESTROPP, J. :—I quite concur. The learned First Judge of the Court of Small Causes acted under the feeling which every judicial officer ought to act—namely, that where he found a long established court practice, he must take it to be the law of the court until it was overruled by a higher tribunal, or by the Legislature. In conformity with that principle, he decided that this case ought to be struck out of the list; but, with the view of having such an inconvenient practice canvassed, he sent the case up to this court, in order that if the practice be wrong it should be set right. And that it was wrong there could be no doubt. Unless the language of the Act were imperative, it could not be a proper course to insist upon the presence of a plaintiff who knew nothing about the case. And this appeared to be the position of the plaintiff in this case. It might be a question, too, whether she would not have been entitled to the privilege given by the 46th section of the Act; but the Judge did not raise that question; possibly he refrained from doing so, in order to raise the general question.

If the evidence of a plaintiff appeared to be necessary, it was in the power of the Judge to require his attendance, and adjourn the case until the appearance of the party, or until his appearance was rendered unnecessary,—for instance, by his admitting the fact which the defendant desired to elicit from him on examination. If the plaintiff's appearance be or become unnecessary, it would be a vexatious thing to compel him to attend. The Judge was not bound to depend on the *ipse dixit* of the defendant as to the necessity for the plaintiff's presence. He ought to satisfy himself, by reasonable inquiry, that it was necessary that the plaintiff should attend, before insisting upon such attendance. Of course, if he arrived at the conclusion that the plaintiff was absenting himself improperly from the trial, and evading a necessary examination, the Judge might adjourn the hearing, and eventually, if necessary, and after reasonable notice to attend had been given, strike out the case.

It would be an extreme inconvenience to hold that in every case the plaintiff must appear; merchants or other

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persons in Europe or elsewhere had many dealings, through their Bombay agents, with residents of Bombay, of which transactions the agents and their servants alone were cognisant, and the absent parties, in Europe or elsewhere, knew nothing whatever, and could not shed a single ray of light upon the case. It would under such circumstances be an idle and vexatious denial of justice to prevent them from suing unless they appeared in person in the Court of Small Causes, for no other purpose than to lend the grace of their presence to the scene.

Neither in the 38th or 42nd sections of Act IX. of 1850, nor in any other part of that Act, was there any language so peremptory as to necessitate the adoption of a construction which would entail so much injustice. To the phrase "appear" applied to a party in a suit, the ordinary legal meaning given, unless the context forbade it, was that he shall appear either in person or by attorney or counsel.

The answer which this Court should give to the learned First Judge was that which he was anxious to receive, namely, that the case ought not to have been struck out under the circumstances mentioned by him, and ought to be restored to his list. It would be the reverse of a kindness to defendants owing small sums of money, to hold that they must be put to the greater expense of a suit in the High Court, if the plaintiffs were unable personally to appear in the Court of Small Causes.

NOTE.—The practice of requiring the attendance of the plaintiff in the Small Cause Court was not a uniform practice prevailing since the establishment of the Court; but it was sanctioned for some years by the late First Judge, Mr. Hore, whose opinion in the matter the majority of the other Judges followed.—ED.