1888
JUNE 18.
ORIGINAL CIVIL.
13 B. 7.

and evading the payment of costs in case the plaintiff failed in the claim. When the fact of minority is a *bona fide* question of evidence, and the defendant's allegation is found correct, then the usual course is to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend: see *Beni Ram Bhutt* v. *Ram Lal Dhukri* (1): Chitty's Practice, Vol. 2, p. 1017; and other authorities cited by Mr. Starling.

Now, in this case, the father of the plaintiff was, no doubt, the instigator of the suit. But the suit does not appear, on the face of it, to be a vexatious one. He states on oath that he believed his daughter was of age. Her horoscope does not seem to have been in his possession. She was, as a matter of fact, some sixteen months under age. Mr. Jardine argued that it was impossible to believe that a father could honestly have made such a blunder. I [12] am inclined to doubt whether parents all the world over follow the ages of their children with the accuracy Mr. Jardine ascribes to them. I think the blunder may have been honestly made. At any rate, in presence of the statement under oath, I will not decide that knowledge of the true age was fraudulently concealed, especially as the father expressed his willingness at once to be placed upon the record as his daughter's next friend. I will not, therefore, strike off the plaint. Still the father was guilty of gross carelessness. He must have known a horoscope was in existence, and he ought to have consulted it. I can only admit him on the record as next friend on his payment of all the costs of the present application, as I think the defendant was justified in coming to the Court.

Attorney for the plaintiff:—Mr. *Moreshvar Lakshmanji*.

Attorneys for the defendants:—Messrs *Payne, Gilbert, and Sayani*.

---

13 B. 12.

ORIGINAL CIVIL.

Before Mr. Justice Jardine.

MANILAL DHUNJI (*Plaintiff*) *v.* GULAM HUSEIN VAZEER (*Defendant*).* [12th July, 1888.]

Practice—Procedure—Civil Procedure Code (Act XIV of 1882), s. 103—*Application to set aside order of dismissal made under s.* 102—*Sufficient cause for non appearance of plaintiff when suit called on for hearing.*

The plaintiff duly attended the Court on the day fixed for the hearing of his case, and waited for some time as the Judge happened to be sitting on that day at first in the appeal Court. Believing that when the Judge took his seat in his own Court 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 him to explain some matters connected with a mercantile transaction. The plaintiff returned to the Court in about half an hour, and found that in his absence his suit had been called on for hearing and dismissed under s. 102 of the Civil Procedure Code (Act XIV of 1882). On application under s. 103 to set aside the order of dismissal,

Held, refusing the application, that the above circumstances did not amount to "sufficient cause" for his non-appearance when his suit was called on for hearing. He was not taken unawares. He was under no compulsion to leave the Court, nor was his absence due to any weighty cause. He accepted the risk of the case being called on in his absence.

---

* Suit No. 25 of 1888.

(1) 13 C. 189.

[F., 10 Bom. L.R. 904 (905); R., 23 C. 991 (997); 14 Ind. Cas. 823=22 M.L J. 284= (1912) M.W.N. 332=11 M.L.T. 280.]

1888
JULY 12.

ORIGINAL CIVIL.

13 B. 12.

[13] APPLICATION by the plaintiff under s. 103 of the Civil Procedure Code (Act XIV of 1882) to set aside an order dismissing the suit made under s. 102, on the 29th June 1888.

In an affidavit filed in support of his application the plaintiff swore that he had attended the Court every day on which the suit had appeared on the cause list, and waited for his case to be called on; that on the day in question he came to Court at 11 o' clock; that there was a part-heard case which had precedence of his suit; and that on enquiry he was informed by the parties to that case that it would not be finished for two days more; that he nevertheless sat in Court until 12 o'clock, when he received an urgent message from his employer requiring his presence in his office; that as at that time the Judge had not yet taken his seat (being then engaged on the appellate side of the Court) and believing that the part-heard case would proceed at the sitting of the Court, he went to see his master at the office; that he returned to the Court at a quarter to one o'clock, and found that the Court had risen, and that his suit had been called on and had been dismissed.

The statements in the plaintiff's affidavit were corroborated by an affidavit made by the plaintiff's employer.

The plaintiff appeared in person.

There was no appearance for the defendant.

JUDGMENT.

12*th July* 1888. JARDINE, J.—The matter for decision is one of general importance to suitors whose cases appear on the daily lists. One of the plaintiffs applies, under, s. 103 of the Civil Procedure Code, for an order to set aside a dismissal under s. 102. The applicant has filed three affidavits. Assuming, as I do, that the facts therein stated are true, I have to determine whether "he was prevented by any sufficient cause from appearing when the suit was called on for hearing." He was in the court-house on the appointed day, and waited for some time, as the Judge happened to be sitting on the appellate side. Then, thinking that a part-heard case standing above his suit on the list would take up time, he left the court-house and went to assist his employer, who had sent a messenger to call him to explain [14] some part of some mercantile transaction. When the applicant returned in about half an hour, he found that his suit had been called on for hearing and dismissed. It is the practice of my Court to leave all the cases on the day's list to be called on at any time during the day, unless an order is made on motion, or unless and until the Court announces that certain cases will not be taken up that day. The affidavit of the applicant shows clearly that he was aware of the continuing liability of his case to be called on during the day. I am of opinion that the cause of his failure to appear was not such as can be called a *bona-fide* mistake, and that the cases of *The Oriental Finance Corporation, Limited* v. *The Mercantile Credit and Finance Corporation, Limited*(1), and *Haradatrai Shrikisondas* v. *Victoria Finance and Bullion Assocation* (2) do not apply in his favour to the facts of this case, which are also different to those in *Burgoine* v. *Taylor* (3). But in *Poyser* v. *Minors* (4), at page 333, Lord Justice Lush,

(1) 2 B. H.C. R. 267.
(2) 3 B.H.C. R. O.C. J. 60.
(3) L. R. 9 Ch. Div. 1.
(4) L.R. 7 Q.B. Div. 329 (333).

1888
JULY 12.
ORIGINAL CIVIL.
13 B. 12.

in dealing with the causes for which a non-suit may be set aside, quotes the words "in any case of mistake, surprise or accident" as "large enough to embrace every contingency to which the failure may be attributed which reasonably entitles the plaintiff to have the validity of his demand effectually tried." I will put the question, whether there is any ground for relief on account of surprise or accident, which were the grounds of relief in two cases in the reports, *viz.*, *Rowley* v. *Carter*(1) and *Attorney-General* v. *Fellows* (2). I think not. The applicant was not taken unawares. What happened was due to his own rashness, (Story's Equity Jurisprudence, s. 250, note). No accident intervened such as a sudden event, or illness, or stoppage of means of communication. The applicant was under no compulsion to leave the Court-house : nor was his absence due to any weighty cause, as in *Hale* v. *Lewis* (3), where the affidavit states that the plaintiff's solicitor was compelled, on the day upon which the cause came on to be heard, to attend at the trial of an indictment involving the life of a person. I am of opinion that in leaving the Court-house[15] as he did, the applicant accepted the risk of the case being called on in his absence, that he was not "prevented" from appearing when the suit was called on for hearing, and that he was absent by his own act. I therefore refuse to make an order to set aside the dismissal of his suit.

Application refused.

---

13 B. 15.

ORIGINAL CIVIL

Before Mr. Justice Scott.

NUSSERVANJI JEHANGIR KHAMBATA (*Plaintiff*) *v.* VOLKART BROTHERS (*Defendants*).* [26th and 27th July, 1888.]

Contract to deliver—Suit for non-delivery—Agreement exempting from liability in case of loss of carrying ship—Necessity for declaring name of carrying ship to purchaser—Loss of ship, what is a—July—August shipment, what amounts to.

The defendants agreed to sell to the plaintiff 500 tons of coal *per* steamer July-August shipment. The last clause of the agreement was as follows :— "In the event of the ship being lost, this contract to be null and void." The coal was put on board the S. S. *Rubens* by the defendants at Sunderland on the 30th and 31st August. On the 1st September the *Rubens* was sunk by collision in dock, and remained at the bottom in twenty-three feet of water for sixteen hours, when she was raised and her cargo discharged. The coal was pronounced unfit for a voyage to Bombay. Extensive repairs to the ship were found necessary, and she was useless untill the 6th October. The plaintiff sued for damages for non-delivery of the coal. The defendants relied on the last clause of the agreement as exempting them from liability.

Held, that the defendants were not liable. The *Rubens* was lost for the purpose for which she was required under the contract, *viz.*, for a voyage in fulfilment of a July-August shipment, and the defendants, having proved that the coal had been duly shipped on board the vessel so lost, were exempt under the last clause of the agreement from liability for non-delivery.

It was argued that until the name of the carrying ship was declared to the plaintiff as purchaser neither the ship nor the coal was assigned to the contract, and therefore the loss could not be within the contract.

---

* Suit No. 486 of 1887.

(1) 1 Y. & J. 511. (2) 6 Madd. 111. (3) 2 Keen, 318.