

1890

AUG. 12.

ORIGINAL
CIVIL.

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[160] ORIGINAL CIVIL.

Before Mr. Justice Farran.

HIS HIGHNESS SYED ALI, SULTAN OF ZANZIBAR (*Plaintiff*) v. A. ADIB
(*Defendant*).^{*} [12th August, 1890.]

Suit for damages—Summons not served on defendant—Arrest of defendant before judgment under s. 477 of Civ. Pro. Code (Act XIV of 1882)—Subsequent application by plaintiff under s. 373 of Civil Procedure Code (Act XIV of 1882) for leave to withdraw suit—Right of defendant to appear at hearing although summons not served upon him—Compensation for arrest—Civil Procedure Code (Act XIV of 1882), ss. 97, 373, 477, 491—Rule of Court No. 64—Practice—Procedure.

The plaintiff sued the defendant in Bombay for damages for breach of contract. The suit was filed on the 13th May, 1890. The summons was not served on the defendant, but on the 16th May the plaintiff's agent procured his arrest before judgment. On that day he was brought before a Judge of the High Court, and was at once discharged. When the case subsequently came on for hearing, the plaintiff applied, under s. 373 of the Civil Procedure Code (Act XIV of 1882), for leave to withdraw the suit, with liberty to file a fresh suit on the same cause of action. The defendant's counsel objected, and claimed either that the plaintiff should continue his suit to a hearing, or that the suit should be dismissed with costs, and that compensation for his arrest should be awarded to the defendant under s. 491 of the Civil Procedure Code (Act XIV of 1882). The plaintiff contended that inasmuch as the summons had not been served on him, the defendant was not entitled to appear, and that no compensation could be awarded to him.

Held—

(1) that inasmuch as the plaintiff had by a legal process brought the defendant before the Court, the defendant had the right to appear at the hearing of the case, although no summons had been served upon him, and that he was entitled to object to the suit being dismissed under Rule of Court No. 64;

(2) that under the circumstances the defendant was entitled to compensation for his arrest under s. 491 of the Code of Civil Procedure (Act XIV of 1882);

(3) that the plaintiff might withdraw the suit under s. 373 of the Civil Procedure Code (Act XIV of 1882) with liberty to bring a fresh suit on payment of the costs incurred by the defendant in the present suit.

THE plaintiff filed this suit claiming the sum of Rs. 2,980 as damages for the defendant's failing to take delivery of a certain steam-ship alleged to have been sold by the plaintiff to the defendant.

The plaintiff stated that in January, 1890, the defendant, who was then at Alexandria, agreed to purchase the said steam-ship which was on a voyage from Zanzibar to Bombay, for Rs. 35,000. [161] The plaintiff by letter directed his agents in Bombay to receive the purchase-money and to give possession of the steamer to the defendant.

The defendant arrived in Bombay on the 12th February, 1890. He, however, failed to take delivery of the steam-ship, which was subsequently sold by auction. The plaintiff now sued to recover Rs. 2,980 as damages.

The suit was filed on the 13th May, 1890. The summons was not served, but on the 14th May the plaintiff's agent filed an affidavit, stating that the defendant was about to abscond and leave the jurisdiction of the High Court, with a view to avoid execution of any decree that might be passed against him. Upon this affidavit a warrant for arrest before judgment was issued on the 15th May. On the following day (the 16th

^{*} Suit No. 289 of 1890.

May) the defendant was arrested, but on being brought before Birdwood, J., was discharged.

The case now came on for hearing, and *Lang* for the plaintiff applied to be allowed to withdraw the suit, with liberty to file a fresh suit on the same cause of action.

Macpherson, (Acting Advocate-General), and *Robertson*, for the defendant.—We ask either that the plaintiff be required to continue his suit to the hearing, or that the suit be dismissed with costs, without liberty to bring a fresh suit, and that compensation be awarded to the defendant under s. 491 of the Civil Procedure Code (Act XIV of 1882) for his arrest.

Even if the plaintiff's application be granted, the defendant is entitled to compensation under the Civil Procedure Code (Act XIV of 1882), s. 491. The defendant is clearly entitled to that. It is true the defendant has not been served with a summons in the suit, but he has been served with a process in the suit, *viz.*, the warrant of arrest, and under it he has been arrested and kept in custody for seven hours. The fact that the plaintiff has now elected not to continue the suit cannot deprive the defendant of the compensation to which he is entitled under the Civil Procedure Code (Act XIV of 1882), s. 491. Counsel cited *Newcomen v. Coulson* (1).

[162] *Lang* in reply.—The defendant's arrest was justified under s. 477 of the Civil Procedure Code (Act XIV of 1882). He was going to Egypt, and his absence there would necessarily delay the execution of a decree against him. The defendant is not entitled to appear on this application at all. No summons has been served on him. The suit should be dismissed under Rule 64 of the High Court Rules, as the summons has not been served. If it be held that defendant is entitled to appear, we apply to withdraw the suit under s. 373 of the Civil Procedure Code (Act XIV of 1882). We cannot be compelled to continue what we believe will be an abortive suit, the defendant now being in Egypt where it would be difficult for us to enforce a decree against him.

Macpherson in reply.—Section 97 of the Civil Procedure Code (Act XIV of 1882) contemplates a defendant appearing before service of the summons. Under s. 373 the Court has a discretion to refuse leave to withdraw. I ask the Court to hear evidence with regard to the circumstances of the defendant's arrest.

Evidence of the arrest was then given.

JUDGMENT.

FARRAN, J.—The first point which arises here is whether the defendant has a right to appear at the hearing of the case, although he has not been served with a summons. I am of opinion that he has a right to appear. It is not necessary for me to decide and I do not decide whether, if a plaintiff were merely to lodge a plaint and take no proceedings upon it against a defendant, the latter in such a case would have a right to appear; but where, as in the present case, a plaintiff by a legal process brings the defendant before the Court, then I think he has the right to appear at the hearing of the case although no summons has been served upon him. The Civil Procedure Code (Act XIV of 1882) gives a defendant who has been improperly arrested a right to damages; and that right he is

(1) L.R. 7 Ch. D. 764.

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entitled to assert at the hearing. The plaintiff might always prevent him from asserting it by refusing to serve the summons upon him if the non-service of the summons precluded him from appearing. So, also, where an *interim* injunction is granted against a defendant, the plaintiff [163] is required by the rules of Court to give security which may be realized by the defendant in case he sustains injury by the injunction. But that rule would be nugatory if the non-service of the summons prevented the defendant from appearing. I, therefore, hold that the defendant in this case has a right to appear although no summons has been served upon him, and that the defendant is entitled to object to the case being dismissed under Rule of Court No. 64.

The next question is whether the defendant is entitled to any damagss for his arrest. Appearing here, as I hold he is entitled to appear, he claims compensation under s. 491 of the Civil Procedure Code (Act XIV of 1882). That section provides that in any suit in which an arrest has been effected, reasonable compensation may be awarded to the defendant if it appear that the arrest was applied for on insufficient grounds. On this point I feel some difficulty. It is a fact that the defendant was about to leave the jurisdiction of the Court when he was arrested. The Judge, no doubt, before whom he was brought after his arrest, discharged him, being of opinion that his case did not fall within s. 477 of the Code. That circumstance, however, would not justify me in giving compensation. I can only give compensation if I find that the arrest "was applied for on insufficient grounds." The question, then, is had the plaintiff sufficient grounds for his application? In order to ascertain this we must look at the affidavits. If the plaintiff had contented himself with setting out the bare facts of his case and with stating that the defendant was about to leave Bombay, I should have made no order, but the plaintiff in his affidavit has gone beyond the facts, and has, I think, stated matters which he did not know to be true, in order to obtain the order for which he applied. Those statements colour the whole of the plaintiff's affidavit, and I think justify me in holding that he applied for the arrest on insufficient grounds, and that, therefore, I may order compensation to the defendant. The application for compensation is now made for him by his counsel. He does not appear to make it or support it himself. There is no affidavit setting forth the damage he has sustained by his arrest or the pain of body or of mind which it has caused him. Still it is unquestionably an injury to be [164] publicly arrested as he has been and detained for some time by the Sheriff, and I award him Rs. 10 compensation.

The last point I have to decide is whether the plaintiff is to be allowed to withdraw this suit under s. 373 of the Civil Procedure Code (Act XIV of 1882). I think I ought to allow him to do so. He brought this suit believing that he could have the defendant detained in Bombay, or at all events that he could compel the defendant to give security to answer any decree that might be passed against him. It would be unjust now to compel him to go on with it when it is clear that he could not possibly obtain satisfaction of any decree he might obtain. I shall, therefore, give him leave to withdraw this suit, with liberty to bring a fresh suit, but he must pay the costs incurred in this suit by the defendant.

Attorneys for plaintiff:—Messrs. *Thakoredas, Dharamsi and Cama.*
Attorneys for defendant:—Messrs. *Payne, Gilbert and Sayani.*