

ORIGINAL CIVIL.

Before Chief Justice Scott and Mr. Justice Batchelor.

ESMAIL EBRAHIM (APPELLANT AND PLAINTIFF) v. HAJI JAN
MAHOMED HAJI MAHOMED (RESPONDENT AND DEFENDANT).*

1908.

November 16.

Civil Procedure Code (Act XIV of 1882), sections 102, 103, 117—Suit dismissed owing to absence of Counsel—Plaintiff present with his witnesses—Rule allowing costs of two Counsel—Junior Counsel should return brief if neither Counsel able to be present—Practice.

Sections 102 and 103 of the Civil Procedure Code do not apply when the plaintiff is present in Court. Notwithstanding the non-appearance of the plaintiff's Counsel the Court can under section 117 of the Code ask the plaintiff questions relating to the suit and can examine his witnesses or suggest that he should instruct some other Counsel to examine the witnesses.

The rule of allowing the costs of two Counsel on each side in taxation was introduced by the Judges in order to obviate the dislocation of the business which might result from cases being called on at the same time in two or more Courts in which the same Counsel was engaged. This rule has always been supplemented by the unwritten rule of the Bar that one or other Counsel must return his brief in good time if there is a chance of neither being able to attend when the case is called on, and that in case of dispute it is the duty of the junior to return the brief or to make arrangements for some other Counsel to attend until he can come in.

THESE were two appeals from the orders of Mr. Justice Russell dated the 24th day of August 1903, the first refusing the application of the plaintiff to have the suit restored to the board and the second against the decree dismissing the suit with costs.

The plaintiff filed this suit to recover certain monies from the defendant in respect of certain Hoondies drawn by the plaintiff in favour of the defendant. The suit was called on before Russell, J., on the 17th August 1908, at a time when neither of the plaintiff's Counsel could attend the Court. The defendant raised issues and then another Counsel was instructed on behalf of the plaintiff to apply for a postponement. This was refused and the suit was dismissed with costs. An application was made under section 103 of the Civil Procedure Code for the restoration of the suit but this was refused with costs.

* Appeals Nos. 43 and 44 of 1908; Suit No. 256 of 1907.

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The plaintiff thereupon filed these two appeals.

Jinnah and Setalvad for appellant.

The suit was called on very unexpectedly on August 17th. On that day there were two long causes and one commercial cause down for trial before this suit. These earlier suits suddenly collapsed and this suit was called on at 12-15 o'clock. At that moment both the plaintiff's Counsel were engaged addressing other Courts. The plaintiff was physically present in Court. The question then arises whether where a plaintiff has instructed Attorneys and has signed a warrant in their favour authorising them to appear and conduct the case on his behalf and his Attorneys have instructed Counsel and have duly briefed them the mere fact of the plaintiff's physical presence in Court can be said to be an appearance under section 102. See *Gopala Row v. Maria Susaya Pillai*⁽¹⁾, Sir Arnold White's judgment. According to that case the mere fact of the party's physical appearance in Court does not mean that he appeared under section 102. The words 'appear in person' have a well defined meaning, *viz.*, when a party appears to conduct his own case without any Attorneys or Counsel. The fact that another Counsel was instructed to apply on behalf of the plaintiff for a postponement does not mean that there was any appearance on behalf of the plaintiff. See also *Shibendra Narain Chowdhuri v. Kinoo Ram Dass*⁽²⁾, *Manilal Dhunji v. Gulam Husein Vazeer*⁽³⁾.

The defendant brought into Court Rs. 207-8. The Court ought to have in any event passed a decree for this amount in favour of the plaintiff under section 102 which says that if the defendant appears and the plaintiff does not appear the Court shall dismiss the suit unless the defendant admits the claim or part thereof in which case the Court shall pass a decree against the defendant upon such admission.

Lowndes and Strangman, Advocate-General, for the respondent.

SCOTT, C. J.—In this case the plaintiff sued the defendant for eight thousand three hundred rupees. The defendant put in a

(1) (1906) 30 Mad. 274 at p. 276.

(2) (1883) 12 Cal. 605.

(3) (1888) 13 Bom. 12.

written statement admitting the claim to the extent of Rs. 207 only which he brought into Court. The suit was called on on the 17th August and the plaintiff was present in Court with his Attorneys' clerk and his witnesses ready to proceed with the hearing of the suit, but the two Counsel whom he had instructed were both absent. The defendant's Counsel appeared and raised issues and another Counsel was instructed by the plaintiff's Attorneys' clerk to apply for an adjournment which, however, was not granted. The Court after waiting for some time for the plaintiff's regularly instructed Counsel to appear, on their non-appearance, dismissed the suit with costs.

It is clear that the order of dismissal cannot stand because the plaintiff was entitled to a decree for the sum of Rs. 207 brought into Court, and as it is necessary for us to pass a decree for that amount at least, we think it is open for us to reconsider the whole case.

The plaintiff has filed two appeals, the first an appeal against the order which was made under section 103 of the Civil Procedure Code and the second an appeal against the decree dismissing his suit.

In our view sections 102 and 103 of the Code do not apply because the plaintiff was present in Court. He did appear and he was ready to go on with his suit as far as his own evidence and that of his witnesses was concerned, and the Judge notwithstanding the non-appearance of the plaintiff's Counsel could under section 117 of the Code have asked the plaintiff questions relating to the suit and could have examined his witnesses or suggested that he should instruct some other Counsel to examine the witnesses. We do not think that it can be reasonably contended that the plaintiff did not appear, and if he did appear then there is no case for the application of sections 102 and 103.

We think, however, that having the case now before us in consequence of the Judge's error in not passing a decree for the plaintiff for the sum of Rs. 207 brought into Court, we ought in the interests of justice to set aside the decree and direct a new trial.

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In making this order, however, it is necessary that we should protect the defendant from loss in consequence of the expenses that he has been put to. The plaintiff must, therefore, pay the costs of the day incurred on the 17th August, the costs of the order passed on the application under section 103, the costs of and incidental to the drawing up of the decree dismissing the suit and the costs of both these appeals.

The result will be heavy costs upon the plaintiff owing to the neglect of his Counsel. In this connection it seems necessary to remind the Bar that the rule of allowing the costs of two Counsel on each side in taxation was introduced by the Judges shortly after the establishment of the High Court when several Divisional Courts sat simultaneously on the Original Side. The rule was introduced in order to obviate the dislocation of the business which might result from cases being called on at the same time in two or more Courts in which the same Counsel was engaged. This rule has always been supplemented by the unwritten rule of the Bar that one or other Counsel must return his brief in good time if there is a chance of neither being able to attend when the case is called on, and that in case of dispute it is the duty of the junior to return the brief or to make arrangements for some other Counsel to attend till he can come in. If members of the Bar disregard their obligations in such cases the justification for the two Counsel rule will cease to exist and the rules for taxation between party and party will have to be revised by the Judges.

The payment of the costs, which we have ordered, will be a condition precedent to the hearing of the suit, the defendant undertaking to have his costs taxed and the allocatur served within three weeks.

Attorneys for the appellant: *Messrs. Wadia, Gandhi & Co.*

Attorneys for the respondents: *Messrs. Payne & Co.*

B. N. L.