Hinga Bibee Vs. Munna Bibee and ors.

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SooperKanoon Citation : sooperkanoon.com/852974

Court : Kolkata

Decided On : Nov-30-1903

Reported in : (1904)ILR31Cal150

Judge : Sale, J.

Appellant : Hinga Bibee

Respondent : Munna Bibee and ors.

Judgement :

Sale, J.

1. This is an application on behalf of the plaintiff for restoration of a suit which was dismissed by Mr. Justice Harington on the 10th August last.

2. Notice of the present application was given on the 29th August 1903, and the date on which the application was intended to be brought on as mentioned in the notice was the 3rd of September. The application was not made then, nor was it mentioned at any time until a day after the day on which the Court reopened after the long vacation, that is, on the 19th November 1998. The Court reopened on the 18th, but motion day, according to the usual rules of practice, was the 19th; therefore it has been suggested that the first day after reopening of the Court means the first day on which the Court in the ordinary course takes motions.

3. I am not able to accept that interpretation of the rules. It seems to me necessary that the application should have been made on the 18th November, the first day after the re-opening of the Court, and if the Court was unable to hear it on that day, the usual excuse would be to adjourn it to another convenient day.

4. The first question which arises in this matter is whether the application is barred by the law of limitation. Article 163 of the Limitation Act has been referred to, which provides that an application by a plaintiff to set aside an order of dismissal for default is to be made within thirty days from the date of dismissal. What appears to have taken place before Mr. Justice Harington is this: The present suit was on the peremptory list for hearing first on the 29th July. It was not called on for hearing until the 10th August. On the morning of the 10th August an application was made for an adjournment on the ground that the plaintiff's husband who was a material witness was ill. That application was not granted. Subsequently when the case was called on, another learned Counsel appeared for the plaintiff. That counsel, as appears from the minute-book, stated that he had no instructions to go on with the case. I take it that the learned Counsel was not instructed on the second occasion to, go on with the case, but he was only instructed to obtain an adjournment which had already been applied for on the earlier occasion and had been refused. I think, therefore, the present application falls within Sections 102 and 103 of the Civil Procedure Code. If the application did not fall within those sections, I fail, to see what power this Court of Original Jurisdiction has to set aside an order of dismissal made by another learned Judge also exercising Original Jurisdiction. If the case does not fall within Sections 103 and 103 it might possibly fall within Section 155, in which case the procedure to be adopted by the plaintiff would be to appeal against the order of dismissal.

5. As in my opinion the case falls within Sections 102 and 103, this Court, has the power to set aside an order of dismissal, provided the plaintiff was prevented by sufficient cause from appearing when the case was called on for hearing.

6. It seems to me there are two difficulties in the way of the applicant: firsts the application is barred under Article 163 of the Limitation Act because it Was not made within thirty days from the order of dismissal. The notice of motion which

was given on the 29th August 1903 does not prevent the Law of Limitation from applying. That is laid down in the case of Khetter Mohun Sing v. Kassy Nath Sett (1893) I.L.R. 20 Calc. 899; and-inasmuch as the thirty days expired within the period of the vacation, the only course open to the plaintiff to avoid limitation was to mention the matter to the Court on its reopening day, which, as I have said, was hot done. 3?urther, eve$ if the Law of Limitation is not a bar to the plaintiff, the materials before me are not sufficient to satisfy, me that she was prevented by sufficient cause from appearing at the hearing. The plaintiff elected merely to apply for an adjournment and to take the risk of that application being rejected. The reason assigned for the plaintiff not being in a position to proceed with the case was that her husband was ill, but the evidence failed to show that he was so ill as not to be able to be present on the day the case was called on. As to that the evidence is in effect the came as it was before Mr. Justice Harington.

7. The affidavit by the medical practitioner in support of the certificate which was granted by him and Which was produced before the learned Judge on the first occasion, was not affirmed until the 25th November instant, that, is to say, a date long subsequent to that on which the application ought to have been ready. In my opinion, therefore, the plaintiff was not prevented by any sufficient cause from appearing when the ease was called on for hearing.

8. For these reasons I must refuse the present application with cost.