

RANASINGHE
v.
GUNERATNE

COURT OF APPEAL
WIGNESWARAN, J.
TILAKAWARDANE, J.
CA NO. 681/89 (F)
DC KURUNEGALA NO. 4663/L
SEPTEMBER 20, 1999
FEBRUARY 08, 14, 2000

Prepayment of costs – Before next date of trial – Routine sittings of Court disrupted – Impossibility of performance.

Plaintiff-respondent instituted action seeking a declaration of title to the premises in question. On 28. 10. 1988 during the trial the defendant-appellant sought an adjournment, the Court allowed the adjournment on the condition that costs were to be prepaid and failure to make payment of the costs before 9 a.m. on the next date of trial i.e. 12. 12 1988, would entitle the Court to enter judgment in favour of the plaintiff-respondent.

The District Court did not sit on 12. 12. 1998 due to civil disturbances. The case had subsequently taken up on 25. 04. 1989, on 07. 04. 1989 the defendant-appellant had obtained a deposit slip to take steps to deposit the said sum, but had failed to make such deposit. On 25. 04. 89 when the case was taken up for hearing objection was taken that there had been non-compliance with the Order for prepayment. The trial Judge held in favour of the plaintiff-respondent.

On appeal –

Held:

- (1) After 12. 12. 1988 there was no date fixed for trial. The defendant still had time until the next date of trial. Although originally the case was fixed for 12. 12 1988, the supervening circumstances that led to the closure of the Courts made prepayment before that date impossible. The case was thereafter not fixed for trial.
- (2) The interpretation of the Order for prepayment would depend on the words of the order as well as the circumstances for the delay. Ultimate determination would be on the facts and circumstances relevant in each case.

- (3) Upon a consideration of all the attenuate facts, especially the then prevailing conditions in the NW Province, during the period the order is unwarranted and unjust.

APPEAL from the judgment of the District Court of Kurunegala.

Cases referred to:

1. *Perera v. Gonaduwa* – 74 NLR.
2. *Velupillai v. Chairman, Urban Council* – 39 NLR 464 at 465.

P. A. D. Samarasekera, PC with *Upali de Almeida* for defendant-appellant.

Faiz Mustapha, PC with *Reza Muzni* for the substituted plaintiff-respondent.

Cur. adv. vult.

March 31, 2000

SHIRANEE TILAKAWARDANE, J.

The original plaintiff instituted this action on 05. 06. 1975, seeking a declaration of title to the premises described in the schedule to the plaint, for the ejectment of the defendant from the premises, and for the grant of consequential reliefs.

During the pendency of the action, the substituted plaintiff-respondent purchased the aforesaid premises and filed an amended plaint dated 12. 06. 1984.

On 28. 10. 1988 during the trial, the defendant-appellant was unable to proceed and had made application for an adjournment to produce a document that he had failed to list. The Court allowed the application and had postponed the trial for 12. 12. 1988, on the condition that the defendant-appellant makes payment of costs in a sum of Rs. 5,000 to the plaintiff-respondent. The Court also made order that the costs were to be prepaid, and failure to make payment of the said costs before 9 a.m. on the next *date of trial* would entitle the District Judge to enter judgment in favour of the plaintiff-respondent. The relevant proceedings in Sinhala are as follows :

*පැමිණිල්ලක් ගාස්තු අයදී. පෙර ගෙවීම් ගාස්තු වශයෙන් රුපියල් 5,000 ක මුදලක්. විත්තිකයන් එයට එකඟ වේ. මෙම මුදල ඊළඟ විභාග දින පෙරවරු 9.00 ට පෙර පැමිණිල්ලට විත්තිකයන්

ගෙවිය යුතු වේ. යම් ගෙයකින් එය ගෙවීමට විත්තිකරු අපොහොසත් වුවහොත් පැමිණිලිය 20
 වාසියට තඩුව තීන්දු කරනවාට විත්තිකරු එකඟ වේ. වැඩිදුර විභාගය සහ පෙර ගෙවීම් ගැන
 1988. 12. 12 යන දිනට.”

Admittedly, the District Court of Kurunegala did not sit on 12. 12. 1988 due to civil disturbances as the routine sittings of the Court had been disrupted. This is borne out by Journal Entry Number 54 of the Record maintained by the Court. the case had subsequently been taken up on 25. 04. 1989. On 7. 04. 1989, the defendant-appellant had purportedly obtained a deposit slip to take steps to deposit the sum determined as costs but had failed to make such deposit. (*vide* J. E. 52).

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On 25. 04. 1989 when the case was taken up for hearing the plaintiff-respondent took up the position that there had been non-compliance with the Order for prepayment. Accordingly, the plaintiff-respondent submitted that judgment be entered in favour of the plaintiff-respondent. The defendant-appellant resisted this application on the basis that there was impossibility of performance due to supervening circumstances. The District Judge by his Order dated 05. 07. 1989 held in favour of the plaintiff-respondent because of non-compliance with the prepayment Order. The defendant-appellant has preferred this appeal against the said Order.

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The Counsel for the plaintiff-respondent contended that the defendant-appellant should have led evidence regarding the impossibility of performance of the agreement for prepayment of costs. However, this fact, that there was an impossibility of performance had not been challenged in the proceedings and the Order is also on the basis that the work of the Courts were disrupted during the relevant period.

We, therefore, find that there was no need for the defendant-appellant to have led evidence either of the impossibility of performance or break down of civil order.

The District Judge made Order that the prepayment of costs was 50
 to be made "*before the next date of trial*". Although originally this was fixed for 12. 12. 1988, the supervening circumstances that led to the closure of the Courts made prepayment before that date impossible. The case was, thereafter, not "fixed for trial". So that a

payment on or before the next date when the case was mentioned, was substantive compliance with the agreement for prepayment of costs as it had been made *before the next date of trial*. In fact, *after* 02. 12. 1988 there was *no date fixed for trial*. The defendant-appellant still had time until the next date of trial.

In the case of *Perera v. Gonaduwa*⁽¹⁾ cited in support of the 60 contention of the defendant-appellant, the date to which the case was fixed was a poya holiday. The parties therefore would have known that the Courts would function on the following working day. However, during the relevant period of civil disturbance it was not possible to determine the next working day, as the Court did not function for an undetermined period. In the circumstances the facts of this case can be distinguished.

The interpretation of the Order for prepayment would depend on the words of the Order as well as the circumstances for the delay. Ultimate determination would be on the facts and circumstances 70 relevant in each case. Upon a consideration of all the attenuate facts of this case, and especially the then prevailing conditions in the North Western Province during this period, we hold that the order of the District Judge dated 05. 07. 1989 was unwarranted and unjust. In the case of *Vellupillai v. The Chairman of the Urban Council*⁽²⁾ at 465, Abraham, C.J. stated that : "If we do not allow the amendment in this case we would be doing a very *grave injustice* to the plaintiff. It would appear as if the shortcomings of his legal adviser, the peculiarities of law and procedure, and the congestion of the Courts have all combined to *deprive him of his cause of action* and I for 80 one refuse to be a party to such an outrage upon justice. This is a *Court of Justice*, it is not an academy of law. I would allow the amendment . . ."

Accordingly, we allow the Appeal and set aside the Order of the District Judge dated 25. 04. 1989. We also Order that the defendant-appellant shall pay the sum of Rs. 5,000 before the next date of trial as determined by the District Judge. We make no order as to costs of this Appeal.

WIGNESWARAN, J. – I agree.

Appeal allowed.