1956 *Present :* Sansoni, J., and H. N. G. Fernando, J.

SYADU VARUSAI *et al.*, Appellants, *and*
T. WEERASEKERAM *et al.*, Respondents

S. C. 399—D. C. Colombo, 2,874

Postponement—Refusal by Court—Withdrawal of Counsel from proceedings—Propriety—Civil Procedure Code, s. 82.

When an application for a postponement is refused it is the duty of the Counsel, who made the application, to continue to appear for his client and to conduct the case which has been entrusted to him. The only instance where a withdrawal by him from the proceedings is permissible, and then too only with the leave of Court, is where he has been retained only for the limited purpose of making the application for postponement and such application is refused by the Court.

APPEAL from a judgment of the District Court, Colombo.

S. J. V. Chelvanayakam, Q.C., with *C. Chellappah*, for the defendants-appellants.

Cyril E. S. Perera, Q.C., with *S. W. Jayasuriya*, for the plaintiffs-respondents.

Cur. adv. vult.

February 9, 1956. SANSONI, J.—

This is a partition action which was instituted in May, 1943. The first trial took place in February and March, 1947 upon certain points of contest which were raised between the plaintiffs and the 8th and 9th

defendants, and a decree for the sale of the premises in dispute was entered in May, 1947. The 8th and 9th defendants appealed against that decree and on September 5th, 1950, this Court set aside the judgment of the District Judge and sent the case back in order that a certified copy of a last will upon which the plaintiffs relied, and a certified copy of an account filed in a testamentary case which the 8th and 9th defendants moved to read in evidence, might be admitted. It was also ordered that the parties would be entitled to lead any further evidence if they wished to do so.

When the case went back to the District Court it came up for trial on October 2nd, 1951. The plaintiffs' Counsel moved for a postponement on the ground that the witness who had given evidence on the title at the previous trial had not been summoned, as it was thought that the evidence already recorded would be acted upon. He asked for an opportunity to cite that witness, and stated that he was ready with the other witnesses. The points in dispute were recorded afresh by the trial judge and the evidence of one witness was led. In view of the reasons given by the plaintiffs' Counsel, the defendants' Counsel did not object to a postponement and the Judge allowed it for those reasons. The points of contest framed were substantially the same as those which had been framed at the previous trial.

Eventually the case came up for trial again on June 6th, 1952. Counsel for the 8th and 9th defendants then produced a medical certificate and asked for a postponement on the gound that the 8th defendant, who was said to be a material witness, was ill in India. The plaintiffs' counsel objected to the application and led the evidence of a witness who stated that the 8th defendant had been seen in Colombo on 2nd June, after the medical certificate was said to have been issued. If this evidence was believed there was every reason to suspect that the 8th defendant was not in fact ill. The trial judge refused the application for a postponement and directed that the trial should proceed. According to the record of the proceedings, Counsel for the 8th and 9th defendants then said that he was unable to take part in the further proceedings as he had no instructions with regard to the conduct of the case, and he would not be leading any evidence on behalf of the 8th or 9th defendants. The plaintiffs' Counsel then led afresh the evidence of the witness who had given evidence on the question of title at the first trial. This witness was not cross-examined. Documents were read in evidence by the plaintiffs' Counsel, including a certified copy of the last will which this Court had by its order directed should be admitted. No evidence was tendered on behalf of the 8th and 9th defendants. The District Judge then gave his judgment which was in the same terms as the judgment given after the first trial.

The 8th and 9th defendants have appealed from this order. It was submitted on their behalf (1) that the learned Judge should have granted the application for a postponement, and (2) that he should have taken into consideration the evidence which had been recorded at the first trial. It was not suggested that on the fresh evidence led before him the learned Judge could have come to any other conclusion; nor was it suggested that

his findings would have been different even if he had considered the evidence led at the first trial. But, these considerations apart, the attitude adopted by Counsel for both parties in the lower Court was that evidence should be led *de novo*, and the trial Judge had approved of this procedure. It is, therefore, not open to the 8th and 9th defendants to argue now that the Court should have considered the evidence led at the first trial. I am therefore unable to see that there is any substance in the second point taken in appeal.

With regard to the first point, I do not think that the learned Judge on the materials placed before him when the application for a postponement was made, could have made any other order in regard to the application. It must be borne in mind that the case was sent back by this Court for a special purpose, namely, to enable each party to put in a specified document, and to lead any further evidence if they wished to do so. The 8th defendant had already given evidence at the first trial on the same points of contest. No application was made that such evidence should be taken into consideration. If further evidence was available, it should have been led at the trial, and the particular document which the 8th and 9th defendants had sought to read in evidence should have been tendered at the trial. None of these things was done or sought to be done. The only reaction of the 8th and 9th defendants' Counsel to the refusal of the application for a postponement was a withdrawal from the proceedings. He did not even cross-examine the only witness called to give evidence for the plaintiffs. It is too late now to complain if the Court decided the dispute on the evidence then placed before it. It seems to me that the application for a postponement was unnecessary in the circumstances, and if it had been granted the final decision of this action would have been postponed for an utterly inadequate reason.

The duty lies on the Court to see that a postponement is not allowed except "for sufficient cause to be specified in its written order", as directed by S. 82 of the Civil Procedure Code; and an Appeal Court will be very slow to interfere with an order refusing or allowing a postponement, since the question of a postponement is a matter entirely within the discretion of the trial Judge : see *In re Yates' Settlement Trusts* [1]. Many cases have come before us recently where applications for the postponement of trials have been made and where, when such applications have been refused, the advocate or proctor making the application has, as a matter of course, withdrawn from the proceedings. Such conduct, it seems to me, is disrespectful to the Court and displays a lack of a due sense of responsibility. Another objection to such conduct is that the client, whom the advocate or proctor was retained to represent, and whose interests he was in duty bound to protect, finds that his cause has been abandoned.

This Court has consistently said that "when an application for a postponement is refused the party affected should nevertheless proceed to call what evidence is available to him, one reason being that after this evidence is recorded it may emerge in a stronger way to the tribunal that a postponement should be granted"— per Cannon J. in *Ramapillai v.*

[1] *(1954) 1 W. L. R. 564.*

Zavier [1]. The learned Judge also quoted with approval a passage from the judgment of Layard C. J. in *Fernando v. Andiris* [2] where the learned Chief Justice said: "After the District Judge had refused to grant a postponement the plaintiff's proctor should have called such evidence as was available on behalf of the plaintiff, and should not have declined to call any evidence. There being no evidence the order of the District Judge dismissing the plaintiff's claim is right. It would never do for this Court to encourage parties in the Court below to decline to proceed with a case simply on the ground that the District Judge had refused to grant a postponement". Hutchinson C.J. and Wood Renton J. laid down the same rule in *Woutersz v. Carpen Chetty* [3]. They pointed out that when a postponement has been refused Counsel who made the application has no right to withdraw from the case without the consent of the Judge, and that it is his duty as an advocate to proceed as far as he can with this examination of the witnesses called on the other side, and to adduce all the evidence he has on his own side, and if it then transpires that the evidence of a particular witness whose absence was the cause of the application being made was material, the trial Judge may at that stage allow a postponement.

As was pointed out by de Kretser J. in *de Mel v. Gunasekera* [4], when an advocate or a proctor applies for a postponement on behalf of a party, the proceedings become *inter partes* because there is no such thing as a limited appearance, whether by Counsel or proctor or party. Counsel, therefore, or a proctor, should not withdraw from the proceedings once he has appeared, because the consequences to his client will be far-reaching if it be held ultimately that the application for a postponement was rightly refused. His clear duty is, as has been laid down by this Court on many occasions, to continue to appear for his client and to conduct the case which has been entrused to him. The only instance where such a withdrawal by Counsel is permissible, and then too only with the leave of Court, is where Counsel has been retained only for the limited purpose of making an application for a postponement and such application is refused by the Court. But such a position should not have arisen in the action with which this appeal is concerned because it had come up for trial previously and the same Counsel had appeared for the 8th and 9th defendants on previous trial dates. If the 8th and 9th defendants' proctor failed to instruct Counsel adequately on the trial date in question, he should have been prepared to conduct the case himself when the judge ordered that the trial should proceed. His failure to do so cannot place his clients in a better position as regards the plaintiffs.

For these reasons I would dismiss this appeal with costs in both Courts.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.

[1] *(1946) 47 N. L. R. 281.*
[2] *(1905) 2 A. C. R. 140.*
[3] *(1907) 3 Bal. 197.*
[4] *(1939) 41 N. L. R. 33.*