CALISTUS PERERA
v.
NAWANGE

SUPREME COURT
M. D. H. FERNANDO, J.
AMERASINGHE, J. AND
DHEERARATNE, J.
S.C. APPEAL NO. 75/94
C.A. APPEAL NO. 90/92
D.C.COLOMBO NO.7331/RE
SEPTEMBER 27, 1994

Civil Procedure – Postponement – Prepayment order without consent – Sections 82, 91A and 143 of the Civil Procedure Code.

Held:

Sections 82 and 143 of the Civil Procedure Code confer only a judicial discretion and the scope of that discretion - even if seemingly unfettered – is limited by the purpose for which it was conferred; to compensate for the expense, delay and inconvenience occasioned by the postponement; but not to affect the substantive rights of the parties in the subject matter of the litigation. Section 91 A introduced by Law, No. 20 of 1977 does not grant, even by implication, a power to the Court to dispense with adjudication. The section is a general provision intended to deal with various acts and steps in the proceedings.

Nowhere does the Code confer on a judge the power to give judgment against a party merely because he fails to pay costs without an adjudication on the merits – because adjudication is the essence of judicial duty, the purpose for which courts exist.

Where the court allows a party's application for a postponement of the trial on the terms that he shall pre-pay costs before the next trial date, the court has no power to implement an order that judgment will be entered against him if he fails to pay those costs where he has not consented to such order.

Where a party applies for a postponement, it is open to the judge to inquire whether the other party consents to it being granted; if the latter says he would agree to a postponement only on the condition that the action shall be decided in a particular way if the costs are not paid, and the former agrees to this, the order as to the decision of the case becomes a consent order and will therefore bind the former; but if the party seeking a postponement does not consent to that condition, it is open to the court to refuse the postponement and to proceed with the trial. Section 91A cannot be approached on the assumption that the legislative intent was to confer on the court the power to give judgment without adjudication even where there was no consent to the order of pre-payment.

The trial judge had no jurisdiction to give judgment for the plaintiff merely because the defendant had failed to pre-pay the costs ordered without the defendant's consent.

Cases referred to :

1. *Asilin Nona v. Perera* (1945) 46 NLR 109.
2. *Rang Etena v. Appu* (1899) 4 NLR 185.
3. *Sumanasara Unnanse v. Seneviratne* (1912) 15 NLR 375.
4. *Pieris v. Wijesinghe* (1919) 1 C.L. Rec. 86.
5. *Mamnoor v. Mohamed* (1922) 23 NLR 493.
6. *Pujaseeli v. Pematilake* (1986) Sri LR 47.
7. *Blackpool Corporation v. Starr Estate Co. Ltd.* (1922) AC 27, 34.

APPEAL from judgment of Court of Appeal.

H. L. de Silva, P.C. with *L. V. P. Wettasinghe* and *Sanath Jayatilleka* for defendant-appellant-appellant..

S. Mahenthiran for plaintiff-respondent-respondent.

Cur. adv. vult.

October 14, 1994.
FERNANDO, J.

The question for decision in this appeal is whether a trial judge who allows a party's application for a postponement of the trial, on the terms that he shall pre-pay costs before the next trial date, has the power to make and implement an order that judgment will be entered against him if he fails to pay those costs, even where he has not consented to such order.

The Plaintiff-Respondent-Respondent ("the Plaintiff") instituted action for ejectment against the Defendant-Appellant-Appellant ("the Defendant"). On the trial date, 28.11.91, an application for a postponement was made on behalf of the Defendant, by an Attorney-at-Law retained for that purpose; retained counsel was not present. The stated ground was that because the registered Attorney had gone abroad, retained Counsel had not been able to obtain instructions. In two documents subsequently filed in the Court of Appeal, it was stated that this application had been made on personal grounds as the registered Attorney had gone to Australia **for the Law Asia conference;** in the petition seeking special leave from this Court it was added that the registered Attorney had been accompanied by his wife **and was held up due to his wife's illness** – suggesting for the first time an element of unforeseen personal difficulty. But all this – assuming it to be true – was not stated to the trial judge, who very correctly observed that the need to go abroad had not arisen suddenly, and that the registered Attorney should have taken steps to ensure that the trial would proceed despite his absence, or that at least he should have given prior notice to the other side; specially because this Court had directed by its order dated 9.9.91 that the case should be expeditiously disposed of. He also added that he could not disagree with the Plaintiff's contention that the Defendant was attempting to prolong the proceedings in order to continue in possession, thus indicating doubt as to the *bona fides* of the application.

In these circumstances, I would have regarded the refusal of a postponement as a proper exercise of the discretion of the trial judge. In this connection, the Court of Appeal (Appellate Procedure) Rules, 1990, are instructive; although not binding on trial judges, they provide useful guidelines in regard to postponements on "personal grounds", and how postponements should be applied for. Rule 6 provides:

> ... Personal grounds shall mean illness of such a nature which prevents an Attorney-at-Law from getting ready for or from appearing at, the hearing; illness of a close family member of such a nature, or in such circumstances, as to reasonably prevent him from appearing; travel abroad for medical, official or professional reasons; a bereavement in the family; an important family social occasion; and other like circumstances which are both personal and urgent.

(3) An application for a postponement, on any ground, shall be made as soon as the need for such postponement becomes known, and shall be made (as far as practicable) with notice to the other parties, together with dates convenient for the postponed hearing."

Unfortunately, the postponement was granted, and the trial was refixed for 27.1.92. Learned President's Counsel who appeared for the Plaintiff requested an order for pre-payment of costs in a sum of Rs. 10,000/-. Without any consideration of the need for the Defendant's consent, the trial judge ordered such pre-payment, stating that if costs were not paid before 9.30 a.m. on 27.1.92, judgment would be entered for the Plaintiff.

A further complication then occurred. These proceedings had taken place in court No. 2, and in due course the case would have been taken up in that court on 27.1.92. However, a few days before 27.1.92 the Defendant was informed by a notice (X3) dated 10.1.92 issued by the District Court that the case would be called at 9.30 a.m. on 27.1.92 in open Court in court No. 8 (the roll court), for further steps; the notice stated that he should be present in court at that time. Although at the leave to appeal stage learned Counsel for the Plaintiff strenuously disputed the genuineness of this notice, at the hearing of this appeal he conceded its genuineness. This notice had been sent in consequence of the dismissal, by the Court of Appeal, of an interlocutory appeal filed by the Defendant in regard to the issues; this reason was not stated, and hence would not have been known to the Defendant. The Defendant claims that, as required by this notice, he waited in court No. 8, having brought with him the sum ordered as costs; the case was not called, and he went in search of his Attorney-at-Law; and he then learnt that the case had been taken up in Court No. 2. His Attorney-at-Law had been present in that court, and had conceded that the costs had not been paid, but had stated that he was ready for trial. However, the trial judge chose to give affect to his order of 28.11.91, and gave judgment for the Plaintiff, without any evidence, hearing, or adjudication. The orders of 28.11.91 and 27.1.92 did not purport to be based on the Defendant's consent, and at no stage was there any suggestion that such consent had been given. Against the order made on 27.1.92 the Defendant appealed to the Court of Appeal.

It was possible for that appeal to have been heard without appeal briefs being prepared; however, the prevailing procedure and practice requires appeal briefs. Before the briefs were ready, the plaintiff's registered Attorney filed a motion dated 12.10.93 in the Court of Appeal, seeking the rejection of that appeal, and incorrectly stating, *inter alia*, that:

> "...the court of **consent** by the Defendant directed that Rs. 10,000/- be prepaid before 9.30 a.m. on the next trial date of 27.1.92 with the sanction of judgment being entered [against the] Defendant, and ...
>
> Whereas the Defendant has now purported to appeal against [a] **consent judgment ...**"

On that motion, the appeal was taken up on 2.12.93. In its judgment delivered the same day, the Court of Appeal referred to a preliminary objection by learned Counsel for the Plaintiff that there was no right of appeal against the order of 27.1.92, and that the Defendant's remedy was by way of leave to appeal against the order of 28.11.91; and to a submission that there was no necessity to obtain consent to a prepayment order in view of section 91A of the Civil Procedure Code "which gives ample power to order costs including prepayment and therefore the earlier view [requiring consent] is no longer good law". Without any discussion of this important question of law and practice, the matter was then decided in the following terms:

> "Section 91A...gives the District Judge ample power to make any order as it may seem proper including an order for costs. Section 91A (3) refers to costs or otherwise, but Section 91A (1) refers to any such terms. It appears that the learned Judge is empowered to make an order for prepayment of costs, even if the party does not consent to such payment. For the foregoing reasons, we reject the appeal with costs. [The] Registrar is directed to send the original record back to the District Court forthwith along with a copy of this judgment."

The Defendant was ejected from the premises within a few days. The Court of Appeal refused leave to appeal. This Court, however, granted special leave to appeal upon the following questions:

> 1. Has the District Court power, under sections 82, 91A,143 or any other provision of the Civil Procedure Code, to make an order for prepayment of costs, against a defendant; and to impose the condition that the failure to pay such costs will result in the plaintiff being granted the relief prayed for, except with the consent of the defendant?
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> 2. Was the defendant precluded from appealing against the order made on 27.01.1992, because he had failed to appeal against the order made on 28.11.1991, ordering prepayment of costs and imposing a sanction for non-payment?
>
> 3. Was the defendant entitled to relief in respect of the order of 27.01.1992, on the ground that his failure to pay costs within the stipulated time was due to a mistake caused by the act of the Court, namely, the notice X3 dated 10.01.1992?"

The relevant provisions of the Civil Procedure Code are as follows:

> 82. When any case is in its turn called on for hearing upon the day appointed therefor, the court may, for sufficient cause to be specified in its written order, direct that the hearing be postponed to a day which shall be fixed in the order, upon such terms as to costs or otherwise as the court shall think fit:
>
> Provided that the court may in its discretion take and deal with a case out of its order in the cause list on any day for good reason to be adjudicated upon and recorded by the court before entering upon the case.
>
> 91A (1) Where a day is fixed or time appointed for doing any act or taking any proceeding by a party to the action, the court may, from time to time, upon the motion of such party and if sufficient

cause is shown, fix another day or enlarge or abridge the time appointed, upon such terms, if any, as to it may seem proper...

(3) The court may, for sufficient cause, either on the application of the parties or of its own motion, advance, postpone or adjourn the trial to any other date upon such terms as to costs or otherwise as to it shall seem proper.

143(1) The court may, if sufficient cause be shown, at any stage of the action grant time to the parties, or to any of them, and may from time to time adjourn the hearing of the action.

(2) In all such cases the court shall fix a day for the hearing of the action, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment...

821. [now repealed] Whenever the Commissioner shall be satisfied by affidavit or otherwise that either party is not ready to proceed to trial by reason of the absence of any material witness (such witness not being kept away by collusion), or for other sufficient cause, it shall be lawful for the Commissioner to adjourn the trial or the action to a time fixed by the Commisioner, once or oftener, upon such terms as the circumstances of the case may render necessary...

1. Nowhere does the Code confer on a judge the power to give judgment against a party merely because he fails to pay costs, without an adjudication of the merits – because adjudication is the essence of judicial duty, the purpose of which courts exist. Counsel for the Plaintiff submitted that such a power is implied in section 91A(3). In considering this contention it is significant that in some cases the Code expressly authorises judgment without adjudication. Thus if a plaintiff fails to comply, with an order to furnish security for costs (sections 416 - 417), the court is required to dismiss the action (section 418) ; and the failure to comply with orders regarding interrogatories, discovery, production or inspection, results in similar orders (section 109). In matrimonial actions, if a plaintiff-husband fails to comply with an order for payment of costs of action of alimony

pendente lite to the wife, the court has no power to dismiss the action, but only to stay proceedings – and that too because the plaintiff's default amounts to a contempt of court *Asilin Nona v. Perera* [1]. On the other hand, if a defendant fails to appear, or to file answer in time, the judge is required to hear evidence in support of the plaintiff's claim before giving judgment in his favour.

This question was considered and settled in a series of cases commencing nearly a century ago, and this resulted in a settled practice in the trial courts. In *Rana Etena v. Appu* [2], a Commissioner of Requests, when allowing a postponement, directed the plaintiff to pay costs; on the next date the Commissioner upheld the defendant's contention that the trial could not proceed because the costs had not been paid. It was held that if the Code had intended that an action be dismissed for non-payment of costs, it would have said so in so many words. In *Sumanasara Unnanse v. Seneviratne* [3], a District Judge made a similar order, adding that if such costs were not deposited in court before the next date the plaintiff's action would be dismissed. It was held that the Judge had no jurisdiction to make that order; "in the case of an order finally dismissing the action it is necessary that a Judge should act under some specific power given to him under the code". This decision was considered in *Pieris v. Wijesinghe* [4], there the postponement was objected to, unless the costs of the day were deposited; and the Commissioner of Requests ordered prepayment on the terms that ortherwise the plaintiff should have judgment as prayed for. *Sumanasara Unnanse's* case was distinguished because the journal entry showed that this was a **consent** order. Notwithstanding these decisions, apparently doubts persisted. The same question again arose and was referred to a Full Bench in *Mamnoor v. Mohamed* [5]. Although the point arose in a Court of Requests case, De Sampayo, J., considered the question as a whole. He observed that the governing principle was that for "a judge to dismiss an action without hearing it, he should act under some specific power given to him by the Code". When section 143 empowered the court to make an order "with regard to the costs occasioned by the adjournment", this referred to the matter of costs only – to give costs, or not to give costs, or to limit the amount, but not to dismiss the action. Although the corresponding words in

section 821 – "upon such terms as the circumstances of the case may render necessary" – were undoubtedly "larger words than those in section 143", they did not have a greater significance with regard to the power to give judgment without adjudication. Indian decisions to the contrary were not followed. Thus by 1922 the law was settled that, apart from consent of parties, the court has no power to make an order, when granting an adjournment, that of costs be not paid before the adjourned hearing, judgment will be entered against the party failing to pay costs. This interpretation was approved in *Piyaseeli v. Prematilleke* [6], in a matter arising after section 91A had been introduced by Law No. 20 of 1977; however, that section was neither referred to nor considered.

Section 82 was not considered in any of those decisions. Having regard to the principle recognized in those decisions, I do not think that section 82 can be differently interpreted. Although the words "upon such terms as to costs or otherwise as the court shall think fit" in that section are wider than the corresponding phrase in section 143 ("with regard to the costs occasioned by the adjournment"), yet they are not materially different to the language of the repealed section 821: "upon such terms as the circumstances of the case may render necessary". They do not confer a specific power to dismiss a case without adjudication. All these provisions confer a judicial discretion, and the scope of that discretion – even if seemingly unfettered is limited by the purpose for which it was conferred: to compensate for the expense, delay , and inconvenience occasioned by the postponement; but not to affect the substantive rights of the parties in the subject matter of the litigation.

The question then is whether section 91A has changed the law. Learned Counsel for the plaintiff strenuously contended that having regard to the delays in litigation and the abuses that prevail in regard to postponements, we should regard section 91A as having been intended to give courts much wider powers in respect of postponements. But judges already have the necessary powers: difficulties arise, as in the present case, because those powers are either not used, or not used correctly. As pointed out in *Mamnoor v. Mohamed*, when one party applies for a postponement, it is open to

the judge to inquire whether the other party consents to it being granted; if the latter says he would agree to a postponement only on the condition that the action shall be decided in a particular way if the costs are not paid, and the former agrees to this, the order as to the decision of the case becomes a consent order, and will therefore bind the former; but if the party seeking a postponement does not consent to that condition, it is open to the court to refuse the postponement and to proceed with the trial. I therefore cannot approach section 91A on the assumption that there was some such legislative intention.

Examination of the language of section 91A too does not reveal any legislative intention to confer the power to give judgment without adjudication. The Court of Appeal seems to have thought that the phrase "upon such terms, if any, as to it may seem proper" (in section 91A(1)) was significantly wider than the phrase "upon such terms as to costs or otherwise as to it may seem proper" (in section 91A(3)). Considering that it was a judicial discretion (i.e. to do what was considered proper) that was being conferred, I am unable to agree that those words were sufficient to grant, even by implication, a power to dispense with adjudication. The legislature must be presumed to have been aware of the principle laid down in the cases I have referred to, that such a power must be specifically conferred; and it refrained from granting such a power.

Further, section 91A is a general provision, intended to deal with various acts and steps in the proceedings. The other sections are special provisions: conferring only the power to postpone or adjourn (but not to advance) the trial; and that power, at least in the case of section 82, can only be exercised on the trial date (and not before). Even if that general provision had been stated in much wider terms, yet a general principle laid down in a later statute "is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is specially declared" (*Blackpool Corporation v. Starr Estate Co. Ltd.* [7]), because *generalia specialibus non derogant.*

2. In *Sumanasara Unnanse's* case an appeal was filed against the prepayment order; the respondent objected, saying that the appellant was in a great hurry to bring the appeal, and had cried out before he was hurt, but this Court decided the question of jurisdiction. So it is clear that the Defendant was entitled to challenge the order of 28.11.91. But he was not bound to. It was open to the trial judge on the next day, if he had by then realised his mistake, to proceed with the trial. Thus the operative order was that which gave judgment for the Plaintiff, and the Defendant was entitled as of right to appeal against it.

3. Learned Counsel for the Plaintiff submitted that the Defendant was not entitled to take the notice X3 at face value; that the record should have been checked to ascertain why it was being called in court No. 8, whereupon the Defendant would have realised that the trial was to be in court No. 2; and that in any event it was well known to litigants that court No. 8 was only the "roll" court. To accept these submissions would be to impose an unduly heavy burden on a litigant; and even on lawyers. He also submitted that the Defendant was not being truthful when he claimed that he was ready with the money. But because I hold that the trial judge did not have jurisdiction to give judgment for the Plaintiff merely because the Defendant had failed to prepay the costs ordered on 28.11.91, and that the Defendant was entitled to challenge that order in this appeal, it is unnecessary to decide this question.

For these reasons, the appeal is allowed, and the order of the District Court made on 27.1.92 and the judgment of the Court of Appeal are set aside. The order for costs in favour of the plaintiff in a sum of Rs. 10,000/- will stand. The District Court is directed to restore the Defendant to possession forthwith, and to dispose of this case as expeditiously as possible. Having regard to the circumstances in which the Defendant applied for and obtained a postponement on 28.11.91, he will not be entitled to costs in this Court or in the Court of Appeal.

AMERESINGHE, J. – I agree.

DHEERARATNE, J. – I agree.

Appeal allowed.