

1976 Present: Deheragoda, J., Wijesundera, J. and
Ismail, J.

CANDIAH THAMOTHARAMPILLAI, 3rd Defendant-Appellant
and

EHAMPARAM SOMASUNDERAM, Plaintiff-Respondent

S.C. 22/74 (Inty)—D.C. Point Pedor 9761/P

Costs—Order for pre-payment under Partition Act—Non-compliance—Consequences thereof—Partition Act (Cap. 69), section 63 (3).

An order for pre-payment of costs was made against a defendant in a partition action when the trial had to be postponed owing to his illness. In default his statement of claim was to be struck off. The order was made under section 63(3) of the Partition Act, and required him to pay a sum of Rs. 157.50 before 10 a.m. on the next date of trial. A sum of Rs. 140 was so paid but the balance Rs. 17.50 was tendered after 10 a.m. though on the next date of trial. The said defendant's statement of claim was accordingly struck off and so also his evidence which had been partly recorded.

Held: (Wijesundera, J. dissenting) :

That on a failure to comply with an order for the pre-payment of costs made under section 63(3) of the Partition Act of 1951, the Court was not empowered to make such an order against the defendant concerned. The consequence of such default would be that the party aggrieved could take immediate steps to enforce that order without waiting till the end of the case to do so.

Cases referred to :

Peiris v. Wijesinghe, 1 C.L. Rep. 86.

Sumanasara Unnanse v. Seneviratne, 15 N.L.R. 375.

Mahmoor v. Mohamed, 23 N.L.R., 493.

Punchi Nona v. Peris, 26 N.L.R., 411.

Simon Singho v. William Appuhamy, 26 N.L.R., 408.

Rajapakse v. Peiris Appuhamy, 79 (1) N.L.R. 457.

Perera v. Gonaduwa, 74 N.L.R. 207.

APPPEAL from a judgment of the District Court, Point Pedro.

K. Thevarajah, for the 3rd defendant-appellant.

C. Ranganathan, for the plaintiff-respondent.

Cur. adv. vult.

October 11, 1976. DEHERAGODA, J.

In this action filed under the Partition Act by the plaintiff-respondent, the 3rd defendant-appellant filed a statement of claim, praying that the plaintiff's action be dismissed and that he be declared entitled to the land depicted in the survey plan surveyed for the purpose of the case. The journal entries in the case show that the case was fixed for the continuation of the

trial on 7.5.74 and that on that date, the cross-examination of the 3rd defendant-appellant was due to take place. He was absent and his counsel submitted a medical certificate stating that he was ill and was unable to attend court. The learned Judge made order postponing the case, but in his own words, "availing himself of section 63(3)" of the Partition Act, he ordered the 3rd defendant to pre-pay costs fixed at Rs. 157.50 on or before 10 a.m. on the next date namely, 20.5.74 "as the plaintiff had been put to heavy expense by a postponement at this stage." At the request of counsel further hearing was fixed for 3.6.74. It was further ordered that in default of pre-payment as ordered, the 3rd defendant's statement of claim was to be struck off. Appellant paid a sum of Rs. 140 to the plaintiff's attorney-at-law on 15.5.74 and obtained a receipt for that payment which was filed of record, and promised to pay the balance before 10 a.m. on 20.5.74.

On 20.5.74, the appellant brought to court the balance sum of Rs. 17.50 to be paid to the plaintiff's attorney-at-law, but as the court started sitting at 9.30 a.m. and the plaintiff's attorney-at-law was busy "calling cases", the appellant was not able to pay him the balance sum of Rs. 17.50. When the case was called at 10.15 a.m. the appellant's attorney-at-law tendered the balance sum of Rs. 17.50 to the plaintiff's attorney-at-law, but, he refused to accept the same.

The learned District Judge thereupon made the following order :—

"Part-payment of costs Rs. 140 out of Rs. 157.50 paid by the 3rd defendant, vide J.E. 70. As the 3rd defendant-appellant has failed to pay the balance amount of Rs. 17.50—it is now 10.15 a.m.—the S.C. (meaning "Statement of Claim") of the 3rd defendant is rejected. Mr. Jayasingham states that his client and attorney-at-law were ready with the money. But as the plaintiff's attorney-at-law was busy at the motion, he waited to offer the money after the roll. It is now 10.24 a.m. As the plaintiff's attorney had accepted Rs. 140 it is unfair to refuse to accept the balance. Mr. Shivapathasunderam states that it was at 10.24 a.m., that the balance sum of Rs. 17.50 was tendered to the attorney-at-law of the plaintiff. The 3rd defendant promised to pay the balance Rs. 17.50 before 10 a.m. today. He has failed to do so though my attorney was present in court from 9.30 a.m. when the court started sitting. He therefore moves that in terms

of the order of 7.5.74, the defendant's S.C. be struck off. S.C. of the 3rd defendant struck off and all evidence of his.

Judgment 5.6.74.

Docs. for 27.5.74.

Sgd. N. A. RAJARATNAM,
Act. D. J."

The 3rd defendant-appellant now appeals from this order. Section 63 of the Partition Act (Chapter 69 of the revised Legislature Enactments 1956) runs as follows:—

"63(1) Where the trial of a partition action is postponed or adjourned it shall be lawful for the court at any stage of the partition action to order any party to give security for costs if the Court is of opinion that the party has been guilty of unreasonable delay in presenting or prosecuting his claim, or for other good and sufficient cause.

(2) Where any party to a partition action who is ordered under subsection (1) of this section to give security for costs fails to give such security within the time allowed therefor by the court, then—

(a) where that party is the plaintiff, the court may dismiss the action or may permit any defendant to prosecute the action and may substitute him as plaintiff for that purpose ; or

(b) where that party is a defendant, the court may reject his claim.

(3) Where the trial of a partition action is postponed or adjourned in consequence of such delay on the part of a party to the action as is referred to in subsection (1) of this section, the court may order that any costs payable by that party because of the postponement or adjournment shall be pre-paid."

The Partition Act, therefore enables the court to order pre-payment of costs in granting a postponement even though the party asking for the postponement has not agreed to pre-pay costs.

Mr. Ranganathan for the plaintiff-respondent referred to section 63 (3) of the Act which makes special provision enabling the Judge to make an order *ex-parte* for pre-payment without the necessity for an agreement to pre-pay by the party asking for a postponement, and the only consequence that could flow from a failure to comply with a pre-payment order is to strike off the name of that party and not permit him to take part in any further proceedings. According to him, if a party who is ordered to pre-pay costs by a certain date waits till the last moment to do so, he does so at his own risk. In support of this proposition, he cited a series of cases and among them the cases of *Punchi Nona v. Peiris*, 26 N.L.R. 411, *Simon Singho v. William Appuhamy*, 26 N.L.R. 408. This case was followed in *Perera v. Gonaduwa*, 74 N.L.R. 207, and in the unreported case of *Hemamala Rajapakse, v. Peiris Appuhamy*, S.C. 149/Inty of 1971, D. C. Kegalle 12384 (vide Supreme Court minutes of 19.2.75). The facts of *Punchi Nona v. Peiris* reported in 26 N.L.R. 411, are as follows :—

In an action for a declaration of title to a land the defendants were not ready on the date fixed for trial. The case was postponed upon the defendants agreeing to pay costs of the day fixed at Rs. 52.50 before the next date of trial. They also expressly agreed that if costs be not paid before the due date judgment should be entered for the plaintiff with costs. The defendants failed to pay the costs before the due date and when the case was called, their Proctor stated that the costs could not be paid owing to floods and moved to pay them. The Judge thereupon entered judgment for the plaintiffs.

Jayawardena, A.J. stated at page 414 :—

“ The defendant says that he was prevented by floods from paying a sum fixed as costs ; but he had more than two months within which to pay the amount, and it could not be said that he was prevented by floods from paying a sum he had agreed to pay during the whole of that period. Parties no doubt wait till the last moment to make these payments but that is not a circumstance the court can take into consideration, and if at the last moment they are prevented by accident or otherwise from doing so, they must be prepared to take the consequences. This rule must, however, not be regarded as inflexible, it would have to yield in cases where performance of an agreement has become absolutely impossible.”

The facts of *Simon Singho v. William Appuhamy* reported in 26 N. L. R. at page 408, are as follows :—

An application was made for a postponement on the ground of the defendant's illness. Of consent, court made order postponing the case and the defendant to pay Rs. 86 as costs of the day on or before a certain date. If not paid judgment for the plaintiff and the defendant's claim in re-convention to be dismissed. The date fixed happened to be a Sunday and the defendant's counsel offered to make the payment on Monday morning. It was held that the defendant had failed to comply with the order and judgment was entered for the plaintiff.

Bertram, C. J. states at page 410 :—

“A person under such an obligation is entitled to wait till the last possible moment for its performance. In doing so, he, of course, takes a risk, and he may find it impossible to perform his obligation at the time. But, he is entitled to take that risk.”

This case has been referred to in *Perera v. Gonaduwa*, reported in 74 N. L. R. at page 207. The facts of that case are that the defendant's application for postponement was allowed upon the following terms :—

“Trial re-fixed for 11.9.69. Defendant to pre-pay Rs. 75 before 11. 9. 69. If not so paid, of consent judgment for plaintiff as prayed for.”

Samerawickrema, J. following the case reported in 26 N. L. R. page 408, held that the failure to make payment on the due date “brought into operation the consequences provided in the agreement” and dismissed the application.

In the unreported case of *Hemamala Rajapakse v. Peiris Appuhamy* the plaintiff sued for damages for wrongful sequestration of goods. Counsel for the defendant consented to plaintiff being granted a date for substitution of the executor of the estate of the original defendant, who had died pending the action, on condition the plaintiff pre-paid a sum of Rs. 105 on or before the next date, which was given for filing fresh papers, and that if he failed to do so, his action would be dismissed with costs. Upon failure to pay the costs before the due date, when defendant's counsel moved that the plaintiff's action be dismissed as agreed, the plaintiff's counsel moved to call evidence to satisfy

Court that he had a sufficient excuse for not making the payment in time, and he was so allowed. The District Judge held on the evidence that the plaintiff had sufficiently excused himself and ordered that the case be fixed for trial.

On appeal to this court, Udalagama, J. following *Punchi Nona v. Peiris*, 26 N.L.R. 411, held that the plaintiff had failed to prove that the reason he was unable to perform his part of the agreement was that it had become absolutely impossible for him to do so, and, setting aside the District Judge's order dismissed the plaintiff's action.

Mr. Ranganathan submits that the *ratio decidendi* to be drawn from these cases is that if a person waited till the last moment to comply with an order for pre-payment, he does so at his own risk and that unless there was impossibility of performance during the whole period within which the payment was allowed we should not give the party who is guilty of such failure any relief. Unless, therefore, the instant case can be distinguished from these cases on the facts or on the law there is little doubt that the appellant cannot succeed.

Mr. Thevarajah invited our attention to the special circumstances of this case where almost 9/10th of the costs to be pre-paid had been already paid and only a little more than 1/10th was due as balance and also that it had been brought into Court by the appellant who did not desire to inconvenience the plaintiff's attorney-at-law by offering the money to him while he was attending to the roll, His case is that the balance money had been brought almost "up to the door step," so to say, and that the appellant should be granted some relief. He also points out that this was a pre-payment order made under section 63(3) of the Partition Act and is distinguishable from the pre-payment orders referred to in the cases cited by Mr. Ranganathan, in that in all those cases the parties asking for a postponement had agreed to pay, coupled with an agreement that judgment should go against them upon default, while in the instant case, the order for pre-payment has been made by the Judge *ex parte* and that, therefore, those cases do not apply. According to him, whenever in the past an attempt had been made to impose an *ex parte* condition that judgment should go against a party in the event of a default in pre-payment of costs it had been successfully resisted. A further argument advanced by Mr. Thevarajah is that where a defendant fails to provide security for costs under subsection (1) the court may under subsection (2) reject his

statement of claim ; but where a defendant is ordered to pre-pay costs under subsection (3), there being no specific provision therein to reject his claim, the court has no jurisdiction to do so upon a failure to pre-pay costs.

Let us now examine the validity of Mr. Thevarajah's contention. In support of his first contention, he cites a number of cases and among them the case of *Mahmoor v. Mohamed* reported in 23 N.L.R. at page 493. In that case, the defendant's counsel stated to court on the date fixed for trial that his witnesses had not appeared and moved for warrants against them. While ordering the issue of the warrants for December 5, the Judge minuted "Defendant to pay Rs. 15 costs of plaintiff today. If not paid before December 5, judgment for plaintiff. Trial December 5." Through some mistake *subpoenas* had been issued instead of warrants and the witnesses having not turned up on December 5, plaintiff's counsel moved for "judgment against the defendant as the latter had tendered last day's costs today only," and judgment was entered for the plaintiff with costs. In appeal, distinguishing this case from the case of *Peiris v. Wijesinghe*, 1 C.L.R. 86, where a consent order for pre-payment was made, Schneider, J. citing Lascelles, J. (15 N.L.R. 375) said "No section of the Code had been cited which invested the District Judge with any such power and that he thought that in the case of an order finally dismissing the action, it was necessary that a Judge should act under some specific power given to him under the Code."

This case and the case cited in that case were governed by section 821 and section 143 of the now repealed Civil Procedure Code respectively, the terms of both these sections being sufficiently wide to warrant an order for pre-payment of costs ; but Schneider, J. held that the words of section 821 were "insufficient to empower a court to make an order that unless the costs of the adjournment are paid by a stated date, the action is to be decided in favour of the plaintiff or the defendant" (at page 498). That being a Court of Requests' case, he cites certain other instances in the Code, where specific provision is made for such a course of action as in (a) sections 809 to 812—upon admissions of parties (b) sections 823—upon default of appearances of parties and (c) after trial. In the same case De Sampayo, J., agreeing with Schneider, J., said, "If a jurisdiction of this extraordinary character was intended to be conferred, the Code would have used plainer language." Ennis, J. also

agreeing with Schneider, J. and De Sampayo, J. said that "Section 827 expressly enacts that the Commissioner shall hear and determine the action according to law, and there is no law which enables him to avoid such a hearing and determination on a failure to pay costs."

There is, therefore, a clear distinction drawn between a pre-payment of costs ordered of consent and that ordered *ex parte* by a court. The *ratio decidendi* to be gathered from this case is that unless the legislature has stated in clear and unmistakable terms that a failure to comply with an order for pre-payment of costs will result in the dismissal of an action of the plaintiff or the rejection of a defendant's claim, no such result can ensue.

Mr. Ranganathan seeks to meet this argument by saying that section 63(3) of the Partition Act expressly empowers the Judge to make an order for pre-payment of costs while the Civil Procedure Code does not expressly provide for it and that an order for pre-payment necessarily implies that if the costs are not so paid the party concerned cannot proceed with his claim. I do not agree. If the Legislature preferred to confer on the court the power to make an order for the payment of costs before the next date of trial (and that is what pre-payment means) and refrained from expressly stating what consequences should follow upon a failure to comply with that order, I should think that the only inference that could be drawn is that upon such default the party aggrieved could take immediate steps to enforce that order by invoking the process of court without waiting till the end of the case to do so. I am, therefore, of the view that notwithstanding the specific reference to pre-payment in section 63 (3) of the Partition Act, the principles enunciated by Schneider, J. and the other two Judges of this court, who concurred with him relating to the consequences which flow from an *ex parte* order for pre-payment of costs purported to be made under the now repealed Civil Procedure Code apply to an order made under section 63 (3) of the Partition Act as well.

Mr. Thevarajah's second contention is even stronger than his first. Section 63(1) and 63(2) provide for an order on a party to give security for costs if he is guilty of unreasonable delay in presenting or prosecuting his claim or for other good and sufficient cause; and upon failure to provide such security, if such party is the plaintiff, his action can be dismissed; if such party is the defendant, his claim can be rejected.

Subsection (3) provides another course of action when a case has to be postponed in consequence of such delay as is mentioned in subsection (1) and that is the court may order pre-payment of costs as a condition for granting a postponement. While the consequences of failure to give security for costs are expressly stated in subsection (2) the consequences of failure to pre-pay costs are not set out in subsection (3). The only inference to be drawn is that the legislature advisedly refrained from stipulating in subsection (3) that the same consequences that flow from a failure to comply with an order for security for costs should flow from a failure to comply with an order for pre-payment of costs. One has to attribute to the Legislature the knowledge of the judicial decision reported in 23 N.L.R. 493, relating to *ex parte* orders for pre-payment of costs at the time it enacted section 63(3) of the Partition Act, and I refuse to read into that subsection anything more than what it says. I am fortified in my view by section 657 (6) of the Administration of Justice Law which replaces section 63 of the Partition Act and which expressly provides for the dismissal of plaintiff's action or the rejection of the defendant's claim, as the case may be, in the event of failure to give security for costs as well as on a failure to pre-pay costs. I am, therefore, of the view that the appellant is entitled to succeed on this ground, too.

I, accordingly, set aside the order of the learned District Judge dated 20.5.1974, ordering the 3rd defendant's statement of claim and all his evidence to be struck off. The action will now proceed from the stage immediately before that order was made with the 3rd defendant continuing to participate in the proceedings.

The 3rd defendant-appellant is entitled to the costs of this appeal to be recovered from the plaintiff-respondent.

ISMAIL J.—I agree.

WIJESUNDARA, J.

I have read the reasons given by Deheragoda, J. (Ismail, J. agreeing with him). But, with respect, I would dismiss the appeal for reasons I will state briefly.

This partition action was instituted in September 1967 by the plaintiff respondent, referred to as the plaintiff, who prayed for the partition or the sale of a land in extent 14 lachams. The 3rd defendant-appellant, referred to as the appellant intervened in January 1969. The appellant gave evidence and his cross-examination was fixed for the 7th of May, 1974. On that date he

was absent and his attorney produced a medical certificate. The plaintiff alleged that he saw the appellant in the market the previous morning and that the medical certificate was false. Apparently there had been postponements before. The court then made an order under section 63(3) of the Partition Act, *inter alia*—"3rd defendant to pay the plaintiff 157/50 before 10 a.m. on the next date of trial. If not paid the 3rd defendant's statement of claim and his case to be struck off", and fixed the next date of trial for 20th May, 1974. By that date the appellant had paid only a sum of Rs. 140. On that date when the case was taken up he alleged that when he came at 9.30 a.m. with the money, he found the attorney for the plaintiff in court attending to the roll and therefore he could not pay the balance. But the court made order rejecting the claim of the appellant. The appellant now appeals.

The orders made by the court on the last two dates are : (a) an order for pre-payment of costs, and (b) an order for rejecting the claim in case of default of pre-payment of costs, and the subsequent rejection of the claim because of the default. The Partition Act gives the court the power to order pre-payment of costs, section 63(3). A court is entitled to reject a claim in case a party intervening does not appear or delays to pursue his claim. On the 7th of May if the court accepted that the appellant was sick, I do not think that there would have been any order of pre-payment of costs. It is obvious that the court paid no regard to the medical certificate. The court could then well have rejected the claim. Without making such an order the court made the order rejecting the claim conditional, viz., on failure to pre-pay costs. It is in effect a combination of two orders both of which a court is empowered to make. An order to pre-pay contemplates some sanction in case it is not complied with. The court has ordered that that shall be the rejection of the claim in view of the circumstances under which the case had to be postponed. To my mind this is perfectly legal and within the powers given to a court by the Partition Act.

Secondly, section 63(2) states that a court can order the dismissal of the action if security for costs has not been furnished as ordered under subsection (1), i.e., where a party has been guilty of unreasonable delay in presenting his claim, or for other good reason. Section 63(1) contemplates a wide category of instances where a court can order security to be furnished. The postponement of a trial contemplated in section 63(3) is in

consequence of the type of delay contemplated in subsection (1). Then but for subsection (3) in such cases also the court can order security for costs to be furnished, resulting in the dismissal of the action in case of failure to comply with the order. Then the legislature could only have intended that the failure to comply with an order of pre-payment should be attended with the same consequences as the failure to comply with an order to furnish security for costs.

Mr. Ranganathan submitted that it is implicit in the word pre-pay that before a party is permitted to present his case on the postponed or adjourned date he must pay the costs ordered. In fact it is only in this subsection that the word pre-pay is used. The power to order pre-payment under the subsection implies the power to grant the adjournment or postponement subject to the condition that costs should be paid before a date to be fixed by the court. This power necessarily implies that if there is a default the party concerned cannot proceed with the action.

If it be correct that the only remedy on failure to comply with an order of pre-payment of costs is to take out writ, then an order of pre-payment is the same as an order to pay costs. Because in the case of an ordinary order to pay costs, writ can be taken out soon after the order unless complied with.

The Administration of Justice Law has in section 657(6) specifically provided for the dismissal of the action or the rejection of the claim for failure to comply with an order of pre-payment. But, with respect, that does not mean that the power did not exist prior to that.

There is no provision in the Civil Procedure Code which empowered a court to order pre-payment. There is nothing in section 63 of the Partition Act which requires the consent of parties before any party is ordered to pre-pay costs. The question of consent then has no relevance. The appellant was represented by his attorney when the court made the order in question. The attorney must have known that it was open to the court to order pre-payment when he was instructed to produce the medical certificate. He did not at any stage point out that the court had no power to make the order it did. After the order was made, on the application of the two attorneys the trial was fixed for another date as well. So that the order made on the 7th of May cannot be equated to an order made *ex parte*. With respect,

it is futile then to look into the cases decided under the Code to ascertain in what circumstances pre-payment of costs can be ordered or what is to happen in case of default.

The only other question left is the consideration of the reason given by the appellant for his failure to pre-pay costs. The circumstances have been set out earlier. However, I cannot but ask the question : Was the appellant trying to make a bargain ? Whatever be the answer, he waited till the last moment and he must bear the consequences. I would therefore affirm the order of the learned District Judge and dismiss the appeal with costs.

Appeal allowed.