

1939

*Present : Hearne S.P.J. and Wijeyewardene J.*SENANAYAKE *et al.* v. DE CROOS *et al.*

63—D. C. (Inty.) Negombo 10,531.

*Security for costs—Order made on ground of plaintiff's poverty—Selection of forum to suit plaintiff's convenience—Not to harass defendant or prevent recovery of costs—Civil Procedure Code, s. 416 (Cap. 86).*

The poverty of the plaintiff is not a good ground for ordering him to deposit security for the payment of defendant's costs.

The selection of a particular forum by the plaintiff would be a good ground for making such an order if it was done in order to harass the defendant or to render the recovery of costs difficult.

*Scott v. Mohamadu* (18 N. L. R. 53) followed.

*Cur. adv. vult.*

**A** PPEAL from an order of the District Judge of Negombo.

First petitioner in person.

*Croos DaBrera* (with him *C. T. Olegasegeram*), for defendants, respondents.

August 30, 1939. HEARNE S.P.J.—

The first, second, third, and fourth plaintiffs, who are here the appellants, filed an action in the District Court of Negombo claiming declaration of title, ejectment and damages in respect of certain landed property situated within the jurisdiction of that Court.

<sup>1</sup> (1934) 36 N. L. R. 108.

<sup>2</sup> (1908) 11 N. L. R. 202.

On an application being made by the defendants under section 416, Civil Procedure Code, the plaintiffs were ordered to deposit security for costs on the ground that they lived outside the jurisdiction of the Court. Against this order the plaintiffs have appealed and permission has been given to them by this Court to prosecute their appeal as pauper appellants. The Judge found that the plaintiffs were without means, that the fourth plaintiff lived outside the jurisdiction of the Court and that the first to third plaintiffs had moved to Negombo "for the purpose of avoiding security in this action or on account of the convenience of residence in Negombo for the purpose of this case".

Section 416 is general in its terms and it is desirable that in applying it, the Court should proceed in the exercise of its discretion on definite principles. Litigants would otherwise be encouraged to make applications of this nature in the great majority of cases.

In making his order the Judge appears to have been influenced by the poverty of the plaintiffs which he stresses. But the poverty of a plaintiff is a misfortune, not a fault; and he will not be compelled to give security merely because he is a pauper. That, at any rate, is a principle on which Courts in England act. *Cowell v. Taylor*<sup>1</sup>; *Cook v. Whellock*<sup>2</sup>; *Rhodes v. Dawson*<sup>3</sup>.

The relevant section has been judicially interpreted by this Court. It has been held that an order for security should not be made as a matter of course and that one of the considerations to which the Court should direct its attention is whether the plaintiff has selected a particular forum in order to harass the defendant or to render the recovery of costs by him difficult (*Scott v. Mohamadu*). In the present case the plaint was filed in the District Court of Negombo because the subject-matter in dispute is situated within the jurisdiction of the Court, and according to the finding of the Judge three of the four plaintiffs who normally live outside the jurisdiction of the Court took up residence within its jurisdiction. These are not good reasons for an order requiring security to be given.

Another matter which should be most carefully considered is whether the provisions of section 416 have been oppressively invoked by a defendant. To this the Judge does not appear to have directed his attention at all.

I am satisfied the Judge has wrongly exercised his discretion and that the order he has made cannot stand.

Objection was taken by Counsel for the respondents that as only one of the appellants appeared before the Court, that as the petition of appeal was signed by the appellants but was not taken down by the Secretary of the Court in terms of section 755 of the Civil Procedure Code, and as application had not been made for typed copies within twenty days, the appeal should be rejected with costs. We intimated that the matter appeared to be one which would appropriately be dealt with in revision, and although Counsel for the respondents stated he did not ask that notice be given to him, he pressed that the appeal should be dismissed with the right reserved to the appellants to move in revision if so advised.

<sup>1</sup> 31 Ch. D. 34.

<sup>2</sup> 24 Q. B. D. 658.

<sup>3</sup> 16 Q. B. D. 548.

<sup>4</sup> (1914) 18. N. L. R. 53.

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That is the tenor of the order that has usually been made by this Court in cases where the appellant is not a pauper. In the circumstances of this case, however, I feel that it would be both appropriate and just to make an order in revision at once setting aside the order of the District Judge. The case will be returned to the lower Court for further proceedings to be taken up in due course.

WLJEYWARDENE J.—I agree.

*Set aside.*

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