

1946

*Present : Rose J.*

JAMEELA UMMA, Appellant, and ABDUL AZEEZ,  
Respondent.

242—C. R. Colombo, 97,751.

*Court of Requests—Default of appearance of plaintiff—Plaintiff granted permission to institute fresh action—Pre-payment of costs of previous action—Condition precedent—Civil Procedure Code, s. 823 (5).*

Where, in an action in the Court of Requests, the plaintiff having failed to appear when the case was called the action was dismissed but upon subsequent application being made the Commissioner in the exercise of his powers under section 823 (5) of the Civil Procedure Code ordered that a fresh action might be instituted upon the plaintiff paying the costs of the previous action—

*Held*, that the pre-payment of the costs of the previous action was a condition precedent to the institution of the fresh action.

**A** PPEAL from an order of the Commissioner of Requests of Colombo.

*H. W. Thambiah*, for the plaintiff, appellant.

*S. Mahadevan*, for the defendant, respondent.

*Cur. adv. vult.*

February 1, 1946. ROSE J.—

In this case the plaintiff-appellant instituted an action against the defendant-respondent for arrears of rent and ejection. The plaintiff having failed to appear when the case was called the action was dismissed but upon subsequent application being made the learned Commissioner in the exercise of his powers under section 823 (5) of the Civil Procedure Code ordered that a fresh action might be instituted upon the plaintiff paying the costs of the previous action.

The plaintiff duly instituted a fresh action and the matter came up for hearing on June 19, 1945, when upon objection being taken by the defendant-respondent the learned Commissioner dismissed the action on the ground that the condition precedent to its institution had not been complied with. It is against that order that the plaintiff now appeals.

It is common ground that the defendant's costs relating to the previous action have not been taxed. It is further admitted that the plaintiff neither requested the defendant's proctor to expedite taxation nor moved the Court of Requests in the matter; nor was payment made into Court of an amount equivalent in the appellant's own estimation to what the defendant's taxed costs were likely to be or of any sum.

The appellant contends in the first place that the wording of section 823 (5) which reads as follows:—“ . . . the Commissioner may grant to the plaintiff permission to institute a fresh action upon payment into court of the amount (if any) due to the defendant as costs in the previous action ” does not mean that the payment into Court must necessarily precede the institution of the fresh action. With that contention I am unable to agree. Not only in my opinion is it clear from the wording of the section itself that the payment into Court is a condition precedent to the institution of the action but that view has already been expressed by Soertsz J. in *Perera et al v. Silva et al*<sup>1</sup> where the learned Judge says “ The Commissioner is required by that section to direct that the plaintiffs shall pay into Court the amount of the costs incurred by the defendants in the previous action before instituting the fresh action ”.

The appellant contends in the alternative that the learned Commissioner's order was not in the terms of the section and therefore—not having been appealed from—should be interpreted according to the meaning of the words actually used. The order in question stated that a fresh action may be brought “ on plaintiff paying costs of action ”. Having regard to the fact that in the present circumstances the only authority for the Commissioner to permit the institution of a fresh action is supplied by section 823 (5) it seems to me that it is my duty if possible to reconcile the wording of the order actually made with the wording of the section. In my opinion not only is it possible to reconcile the wording of his order but the natural interpretation to be given to it is that he intended the payment into Court to be a condition precedent to the institution of the action.

<sup>1</sup> 42 N. L. R. at page 143.

Counsel for the appellant referred me to one or two cases relating to section 406 of the Civil Procedure Code and its corresponding section in India—section 373 of the (Indian) Civil Procedure Code. In my opinion, however, they are of no assistance to the appellant because under section 406 a discretion is vested in the court to impose such terms as to costs or otherwise as it may think fit. Each case, therefore, under that section must depend upon the actual terms of the order made, which may or may not impose as a condition the prior payment of the defendant's costs in the earlier action.

For these reasons, I am of opinion that the appeal fails and must be dismissed with costs.

*Appeal dismissed.*

---