

Present: De Sampayo J.

SAMARASINGHA v. ATCHY *et al.*

244—C. R. Galle, 397.

1916.

*Civil Procedure Code, s. 416—Plaintiff residing outside the jurisdiction of the Court—Order to give security for costs of defendant—Discretion.*

An order calling upon a plaintiff living outside the jurisdiction of the Court to give security for the payment of all costs likely to be incurred by the defendant should not be made *ex parte*.

The Court should exercise its discretion when called upon to make an order to give security for payment of costs.

**T**HE facts are set out in the judgment.

A. St. V. Jayewardene, for plaintiff, appellant.

September 27, 1916. DE SAMPAYO J.

The plaintiff, who is described in the caption of the plaint as a resident of Colombo, sued the defendants in the Court of Requests of Galle. Summons having been served on the defendants, the proctor for the defendants filed proxy on July 11, and moved, in terms of section 416 of the Civil Procedure Code, that the plaintiff be ordered to give security for the payment of all costs—

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likely to be incurred by the defendants. The plaintiff was absent on that day, and had no notice of that motion, but the Commissioner made an order requiring the plaintiff to furnish security by July 18. On July 18 the plaintiff was absent, and as no security had been tendered, the Commissioner at once dismissed the case. I do not think either the original order for security or the order dismissing the action can be supported. Section 416 of the Civil Procedure Code no doubt gives jurisdiction to the Court, either of its own motion or on the application of a defendant, to order the plaintiff to give security for costs, but it does not follow that such an order can, or should, be made behind the back of the plaintiff. Certainly, if he has no notice of the order to give security, it is impossible for him to comply with it by giving security within the time limited. My opinion is that the provision of section 416 implies that the application and the order should be made in the presence of, or with notice to, the plaintiff. Mr. A. St. V. Jayewardene, for the appellant, was good enough to refer me to the case of *Scott v. Mohamadu*,<sup>1</sup> where Pereira J. incidentally expressed an opinion that the order under section 416 might be *ex parte*, but in the very judgment he stated that it was not clear that the order in that case was, in fact, *ex parte*, and there were other grounds for the decision of the Court. I concurred in that decision, but I may say I did not mean thereby to assent to any opinion that under section 416 an order may be made *ex parte*. However that may be, it is surely the duty of the Court, as was pointed out in *Scott v. Mohamadu*,<sup>1</sup> and, as the provision itself expressly says, to exercise a discretion in making an order. That necessarily means that sufficient facts should appear which would assist the Court in coming to the conclusion that security for costs should be given by the plaintiff. In this particular case I do not see any special reason why the plaintiff in a small case like this should have been ordered to give security. He sued on a lease executed at Galle with reference to certain lands situated in the same district. It appears that at the time of the institution of the action the plaintiff happened to reside in Colombo. The processes of the Court run throughout the Island, and there is no difficulty in executing a writ for the recovery of costs from the plaintiff though resident in Colombo. I think there was no sufficient ground for the order requiring plaintiff to give security. As regards the dismissal of the action, there was still less reason for it, because, as I have pointed out, the plaintiff had no notice that he had to give security by July 18.

I set aside the order appealed from, and send the case back to be proceeded with in due course. As the orders in question were made at the instance of the defendants, they should pay the costs of the appeal.

*Set aside.*