Present: Bertram C.J. and Jayewardene A.J. 1924.

PUNCHI NONA *et al.* *v.* PEIRIS *et al.*

50—D. C. Colombo, 7,538.

Agreement to pay costs—Consent order—Postponement of trial—Breach of undertaking—Court's power to grant relief.

Where a case was postponed on condition that the defendants paid the plaintiff a certain sum of money by way of costs before the date of trial, and where it was further agreed that on failure thereof, judgment should be entered for the plaintiffs.

Held, that the Court had no power to grant relief to the defendants against the breach of their undertaking to pay costs in terms of the agreement.

APPEAL from a judgment of the District Judge of Colombo. This was an action for declaration of title to land. The case was fixed for trial on October 16, 1923, but as the defendants were not ready, it was postponed for December 20 on terms. The defendants agreed to pay the costs of the day, which were fixed at Rs. 52.50 before the date of trial, and also expressly agreed that, if the costs be not paid before December 20, judgment be entered for the plaintiffs with costs. The defendants failed to pay the costs before December 20, and when the case was called on that day their proctor stated that the costs could not be paid owing to the floods, and moved to pay them. The learned District Judge thereupon entered judgment for the plaintiffs. The defendants appealed.

J. S. Jayewardene, for defendants, appellants.

E. W. Perera, for plaintiffs, respondents.

October 10, 1924. JAYEWARDENE A.J.—

In this case the defendants appeal against an order directing that judgment be entered for the plaintiffs as prayed for with costs. It is a land case, and the plaintiffs sued them for declaration of title, ejectment, and damages. Originally the defendants were in default, and the case was heard *ex parte*, but it was reopened on their application. The case was fixed for trial on October 16, 1923, but the defendants were not ready, and the case was postponed for December 20, on terms. By these terms the defendants agreed to pay the costs of the trial date which were fixed at Rs. 52.50 before December 20, and the defendants also expressly agreed that, if the costs be not paid before December 20, judgment be entered for the plaintiffs as prayed for with costs. The defendants failed to pay the costs as agreed before December 20, and when the case was called on that day their proctor stated that the costs could not be paid owing to floods, and moved to pay them.

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The learned District Judge made the following order:—

"I cannot vary Mr. de Saram's order, nor do I see any reason to do so. I enter judgment for plaintiffs as prayed for with costs."

The defendants say that they were within time in offering to pay before the trial of the action on December 20, and that their failure to pay (if any) has been sufficiently excused. I think there has been a breach of the terms of the agreement entered into on October 16, as their undertaking was to pay before December 20. The question is whether the Court has the power to give the defendants' relief against the consequences of their breach of the undertaking by allowing them to pay on a date later than the date fixed by its order. The agreement here was not an agreement entered into by the parties under section 408. It contained the terms on which the Court was prepared to grant a postponement, and section 82 of the Civil Procedure Code empowers the Court to postpone the trial of a case "upon such terms as to costs or otherwise as the Court shall think fit."

In *Ramanaden Chetty v. Fernando*,[1] a similar agreement was held binding on the defendant, and judgment was entered for the plaintiff in terms of the agreement. There the defendant obtained a postponement of the trial date consenting to pay Rs. 75 before the next date of trial, and agreeing to judgment being entered in the plaintiff's favour on failure of such payment. The case was after another postponement fixed for trial on a particular date. The defendant failed to pay the Rs. 75 before that date, but offered to pay the money on the trial date. The Court allowed the payment to be made, and disallowed the plaintiff's application for judgment in his favour in terms of the agreement. This Court set aside the order, as it thought that the plaintiff was entitled to the benefit of the order consenting to judgment in his favour in case of default, and gave judgment for the plaintiff as prayed for with costs.

No reasons are given for this ruling, except that there was no default on the part of the plaintiff in not submitting a memorandum of the costs payable. This, it was thought, was unnecessary, as the amount of costs had been fixed. But the principles which ought to govern the Court in a case of this kind are to be found in a judgment of West J. in *Balprasad v. Dharnidhar Saikharam* given as a footnote to the report of the case of *Shirekuli Tima ' Pa ' Hedga ' v. Maha' Blya.*[2]

In that case the decree was based on an agreement made between the parties, by which the defendant agreed to pay a sum of Rs. 881 within two months, and, failing such payment, to pay a sum of Rs. 2,740. It became impossible to pay the money through the Court, as the Court was closed on the last two days of the second month. The Courts reopened about six weeks later, and the day after the Courts reopened, the money Rs. 881 was paid. The

[1] *(1923) 24 N. L. R. 411.*

[2] *(1886) 10 Bom. 435.*

plaintiff refused to accept this sum in satisfaction of the decree, but the lower Courts held that as payment of the money on the last two days of the period fixed was impossible and payment on the day the Court reopened was prevented by accident, the intention of the decree would be satisfied by the payment made. West and Nanabhai JJ., in setting this order aside, said:—

> "The principles which govern the enforcement of contracts and their modification, when justice requires it, do not apply to decrees which, as they are framed, embody and express such justice as the Court is capable of conceiving and administering. The admission of a power to vary the requirements of a decree once passed would introduce uncertainty and confusion. No one's rights would, at any stage, be so established that they could be depended on, and the Courts would be overwhelmed with applications for the modification, on equitable principles, of orders made on a full consideration of the cases which they were meant to terminate.
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> "It is obvious that such a state of things would not be far removed from a judicial chaos; and as ordinary decrees are thus unchangeable, so, we think, are those in which, through a special provision for the convenience of parties, their own disposals of their disputes are embodied. The doctrine of penalties is not applicable to such a class of cases; and those who, with their eyes open, have made alternative engagements and invited alternative orders of the Court must, if they fail to perform the one, perform the other, however greatly severe its terms may be.
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> "In the present case the order was not to pay on April 21, but on or before that date. The defendants had two months, minus two days, in which to execute the order of the Court. Its vacation was duly announced, so that they had the means of knowing that payment could not be made on the last two days of the month. According to the case of *Mayer v. Harding* [1] where the law requires something to be done within a given time, it must equally be done within that time, though performance during some part of the time is impossible. The command of the law thus expressed, and its command proceeding from the mouth of a Judge, are strictly analogous; and the judgment-debtors here being prevented, as they knew, from paying on April 20 or 21, could avoid incurring the alternative liability only by payment before the former date. They failed to pay in time, and thus part of the decree being no longer applicable they must pay according to its other command."

[1] *L. R. 2 Q. B. 410.*

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There the decree was based on an agreement entered into between the parties, here the Court had made an order embodying, it may be, the terms on which the plaintiff suggested he was prepared to consent to a postponement, but it is none the less an order of the Court. The reasoning in the judgment just cited would, therefore, apply with even greater force to the present case. The defendant says he was prevented by floods from paying the 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 the 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 the agrement has become absolutely impossible. I may, however, mention that it has been held by a Full Bench of the Bombay High Court following certain decisions of the Madras High Court that the principle laid down by West J. in *Balprasad v. Bharnidhar Sakharam* (*supra*) does not apply to cases where a party is seeking to enforce by regular action a right to forfeiture contained in a consent decree in terms of a compromise entered into under section 375 of the Indian Civil Procedure Code (section 40 of our Code), and that in such cases the Court in the exercise of its equitable jurisdiction is not precluded from granting such relief against forfeiture as it might have granted had the agreement arisen from contract or custom. It adopted the observations of Baron Parke in *Wentworth v. Bullen* [1] cited with approval in *Lievesley v. Gilmore* [2] that " the contract of the parties is not the less a contract and subject to the incidents of a contract, because there is superadded the command of a Judge: " *Krisnabai v. Hasi Govind.*[3]

In this case it has not been shown that it had become impossible for the defendant to comply with the terms of the agreement, and the appeal must accordingly be dismissed with costs.

BERTRAM C.J.—I agree.

Appeal dismissed.

[1] *(1829) 1 Barn. and Cres. 850.* [2] *(1866) 1 C. P. 370.*

[3] *(1906) 31 Bom. 15.*