

1941

Present : Keuneman J.

JAYASEKERA *v.* BETOHAMY *et al.*

159—C. R. Balapitiya, 21,989.

Date of trial—Agreement to prepay costs before the next date of trial—Trial postponed—Payment on the date to which the trial was postponed.

A trial was postponed on an agreement entered of consent that the defendant should prepay the costs of the day on or before the next date of trial. Thereafter the trial was fixed for January 30, but before that date arrived the trial was postponed till May 3.

Held, the next date of trial meant the date fixed for trial and that payment on May 3 was a sufficient compliance with the terms of the agreement.

A PPEAL from a judgment of the Commissioner of Requests, Balapitiya.

L.A. Rajapakse (with him *V. F. Gunaratne*), for defendants, appellants.

N. Nadarajah, for plaintiff, respondent.

Cur. adv. vult.

May 21, 1941. KEUNEMAN J.—

In this case on October 24, 1939, after issues had been framed, the following agreement was arrived at :—

“The defendants agree to prepay on or before the next date of trial Rs. 25 as costs of to-day . . . Defendants agree to consent to judgment for plaintiff as prayed for with costs if costs are not so paid.”

Thereupon a postponement was allowed on this agreement and the trial refixed for January 30, 1940. On January 25, 1940, Proctor for defendants moved that the trial of the case fixed for the 30th be postponed owing to the illness of fourth defendant, and further moved that a date be given in May to suit his Counsel. This was apparently consented to on the part of the plaintiff, and was allowed by the Commissioner, on January 25. The case was however ordered to be called on the 30th and on that date the trial was fixed for May 3, 1940.

Subsequently on April 30, 1940, a further application was made for a postponement on behalf of the defendants, and the defendants undertook on similar terms to pay on or before May 3 the sum of Rs. 25 originally ordered to be paid, and a further sum of Rs. 25 on or before July 5, 1940. It is clear however that the plaintiff was not a consenting party to this order.

On May 3 the Proctor for defendants offered to pay the sum of Rs. 25 but the proctor for plaintiff refused to accept the money, which was then deposited in the Kachcheri. Similarly on July 5, 1940, a further sum of Rs. 25 was deposited.

I am of opinion that the Commissioner is right in holding that the consent order of October 24, 1939, was binding on the defendants. But the question arises as to what the defendants consented to. Mr. Rajapakse emphasizes the fact that the agreement was not to pay on or before January 30, 1940, but "on or before the next date of trial". It is true, he says, that after the agreement was entered into January 30, 1940, was fixed as the date of trial, but before that date arrived a postponement had been granted, and January 30 ceased to be a date of trial, and May 3, the next date fixed, the money was tendered and refused, and subsequently deposited.

He further argued that the "date of trial" was the date when the trial was actually taken up. On this point I do not agree with him. I incline to think that the term "date of trial" as used in this case may be regarded as the date fixed for the trial. There is however I think substance in Mr. Rajapakse's earlier argument. No doubt at one stage January 30 was the date fixed for the trial, but by virtue of the order of court dated January 25, 1940, in consequence of the consent motion, January 30, 1940, ceased to be the date fixed for trial, and when that day arrived, it was not "a date of trial".

The next "date of trial" was May 3, and on that date the money was duly deposited.

I hold that the defendants have acted strictly according to the terms of their agreement dated October 24, 1939, and that there has been no breach of this agreement. I set aside the order that the plaintiff is entitled to judgment as prayed for with costs and send the case back for trial in due course. The defendants are entitled to costs of the argument on July 5, 1940, and of this appeal. Other costs will be in the discretion of the Commissioner.

Appeal allowed.