

1946

*Present : Cannon J.*RAMAPILLAI, Petitioner, and ZAVIER *et al.*, Respondents.*Application for Revision in C. R. Jaffna, 16,674.**Postponement—Absence of witness on trial date—Application for postponement refused—Right of appeal of aggrieved party—Duty of party affected to have called what evidence was available.*

Where, on the date of trial, an application for adjournment made by a party on the ground that a material witness was absent was refused by Court—

Held, that the party affected should nevertheless have proceeded to call such evidence as was available to him.

Held, further, that the proper remedy against the order of Court was by way of appeal.

A PPLICATION for revision of an order of the Commissioner of Requests of Jaffna.

V. K. Kandasamy, for the plaintiff, petitioner.

G. Thomas, for the defendants, respondents.

May 17, 1946. CANNON J.—

This was an action for Rs. 300 brokerage, and paragraph 2 of the plaint stated that the defendants made a contract with the plaintiff through their agent, S. M. Aboobucker, Proctor of Jaffna. On December 17, 1945, the trial was fixed to take place on January 28, 1946. On the latter date Counsel for the plaintiff asked for an adjournment because a material witness for the plaintiff had not been served with summons to attend. The Commissioner refused the application which was opposed. Counsel for the plaintiff thereupon stated that it was not possible for him to conduct his case without the evidence of Mr. Aboobucker, whom he described as his chief witness and that he was not calling any evidence. The Commissioner therefore dismissed the action with costs and in his reasons stated that the defendant had come to Jaffna all the way from Colombo and that the plaintiff had not applied for a summons on Mr. Aboobucker until January 19, 1946. On January 25, 1946, the

Fiscal reported that the summons could not be served. The Commissioner proceeds "Constant postponements on grounds like these only mean that the civil administration of the Court cannot be effectively carried on. I therefore refused the date asked for which the Proctor for the plaintiff appeared to think he was entitled to get if he paid costs. If I accede to that proposition a case can be indefinitely postponed from coming to trial. The burden is on the plaintiff to prove his case. He has refused to call evidence. I have therefore no alternative but to dismiss his action with costs".

For the petitioner it is submitted that the Commissioner should have granted the application for a postponement on terms. The matter comes before this Court by way of revision. Now, it is a fact that in the interval between December 17 and January 28, the Courts Christmas Vacation took place. It is also a fact that Mr. Aboobucker lives and practises at Jaffna, and Mr. Kandasamy urges that those facts should have moved the Commissioner to grant the application for a postponement. It is to be noted, however, that Counsel for the plaintiff declined to call any evidence and it has been said in this Court on a number of occasions that when an application for a postponement is refused the party affected should nevertheless proceed to call what evidence is available to him, one reason being that after this evidence is recorded it may emerge in a stronger way to the tribunal that a postponement should be granted. In this case the record does not satisfy me that Mr. Aboobucker was the plaintiff's chief witness or that the case could not have been proved without his presence, for I notice in the list of documents and witnesses filed by the plaintiff the following:—"Plaintiff to produce letters, post cards and telegrams sent by defendant".

I would adopt in deciding this case the language of Layard C.J. in *Fernando v. Andiris*¹: "There was no material before the District Court, neither is there any material before this Court, to show that the evidence of the plaintiff was essentially necessary for the purpose of the plaintiff continuing this action. It may be that the plaintiff was not in a position to establish his case by other evidence than that of the plaintiff. After the District Judge had refused to grant a postponement the plaintiff's Proctor should have called such evidence as was available on behalf of the plaintiff and should not have declined to call any evidence. There being no evidence, the order of the District Judge dismissing the plaintiff's claim is right. It would never do for this Court to encourage parties in the Court below to decline to proceed with a case simply on the ground that the District Judge had refused to grant a postponement. I am not satisfied that the plaintiff's evidence was material for the successful conduct of the case by his legal adviser". But apart from this question as to whether the Commissioner exercised his discretion properly, the fact remains that this case should have been brought before this Court by way of appeal and again the above-mentioned volume of the Appeal Court Reports comes to the assistance of the respondent, for in the case of *Gunawardene v. Orr* at page 172 Hutchinson C.J. says—"I see an expression of opinion by Acting Justices Pereira and Grenier in 2 Bal. p. 86, which I think I ought to follow. The effect of it is that the

¹ (1905) 2 A. C. R. 141.

practice is not to exercise the power of revision under section 753 where the remedy of appeal is open". This practice is subject to the qualification that the Court would nevertheless deal with the matter in revision in an exceptional case. The case which is now being considered does not appear to me to have any matter of such exceptional merit as to warrant a departure from the practice of the Court.

For both the above reasons the application is dismissed with costs.

Application dismissed.

