

Present : Lascelles C.J. and Ennis J.

1912.

SUMANASARA UNNANSE v. SENEVIRATNE.

108—D. C. Kalutara, 4,774.

Order to deposit costs of the day before the next date of trial—Has Court jurisdiction to order that action be dismissed if costs are not paid?

Where the Judge made an order that in the event of the defendant's taxed costs not being deposited in Court before the next day of trial the plaintiff's action would be dismissed with costs—

Held, the Judge had no jurisdiction to make the order.

THE facts are set out in the judgment.

H. A. Jayewardene, for plaintiff, appellant.—The order allowing a postponement was wrong. The defendant was not taken by surprise by the issue suggested by the appellant. His answer shows that the question at issue was with regard to the management of the school, and not to the ownership of the building. The District Judge had no power to order the appellant's action to be dismissed in the event of his failure to deposit the respondent's costs before the next date of trial. The Civil Procedure Code nowhere gives such power. See *Rang Etena v. Appu*¹ and *Goonewardene v. Don Lewis Monakulasuria*.²

J. Joseph, for respondent.—This appeal is premature. It would be proper time for the appellant to come to this Court when his case is dismissed for failure to pay costs; but the order as it now stands is one for payment of costs, and the Supreme Court will not interfere with the order unless it is manifestly wrong (*Government Agent, Uva, v. Banda*³). The appellant cannot be said to be prejudiced by the order as it now stands. If he pays the costs before the next date of trial his action will not be dismissed.

September 6, 1912. LASCELLES C.J.—

In this case there was a discussion as to the issues that were to be fixed in the action, and at the close of the discussion Mr. V. M. Fernando, who appeared for the plaintiff, move to amend his plaint. The amendment was allowed. Then Mr. de Abrew, who appeared for the defendant, moved to amend his answer in order to meet the amended issue, and applied to have the costs of the day; and he also asked for an order that the costs should be deposited

¹ (1899) 4 N. L. R. 185.

² (1900) 1 Br. 21.

³ (1910) 13 N. L. R. 341.

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in Court before the next day of trial. He gave his reasons for his application that the plaintiff was a Buddhist priest, and that if the defendant succeeded he would be unable to recover the costs from him. I think that Mr. de Abrew's forebodings were not entirely without ground, as is shown by the present appeal. The Judge then made order that in the event of the defendant's taxed costs not being deposited in Court before the next day of trial the plaintiff's action would be dismissed with costs. Against this order the plaintiff now appeals, and contends that the District Judge had no jurisdiction to make an order that the action would be dismissed in the event of the defendant failing to deposit the costs of the day before hearing. For the respondent it is pointed out that the appellant has been in a great hurry to bring this appeal; that he has cried out before he has been hurt; and that no order has yet been made dismissing the action. However, we have been asked to decide on the question as to whether the District Judge had jurisdiction to make an order that he would dismiss the plaintiff's action after he failed to pay the costs in Court. No section of the Code has been cited to us which invests the District Judge with any such power, and I think that, in the case of an order finally dismissing the action, it is necessary that a Judge should act under some specific power given to him under the Code. We have been referred to the case of *Rang Etena v. Appu*.¹ Though the facts of that case are not exactly the same as the facts here, they are very similar. There the opinion of Mr. Justice Withers inclines to the view that in a similar case the District Judge had no power to dismiss the action. We, therefore, think that so much of the order as states that the action will be dismissed on failure to pay the costs into the Court must be expunged. In the circumstances of the case we do not propose to make any order as to the costs of the appeal.

ENNIS J.—I. agree.

Appeal allowed.

¹ (1899) 4 N. L. R. 185.