

1943

Present : Keuneman and Wijeyewardene JJ.

WEERASINGHE, Appellant, and BARLIS, Respondent.

185—*D. C. Matara, 83.**Date of Trial—Postponement of case—Payment of costs on or before next date of trial—Payment in course of the day—Regularity of payment.*

Where a case was postponed owing to the absence of the defendant on the following terms :—“If costs are not paid on or before the next date of trial, of consent, judgment to be entered for plaintiff”,—

Held, that the payment of costs in the course of the date of trial would be sufficient to satisfy the terms of the order.

A PPEAL from a judgment of the District Judge of Matara.

H. V. Perera, K.C. (with him *C. J. Ranatunga*), for defendant, appellant.

N. E. Weerasooria, K.C. (with him *L. A. Rajapakse*), for plaintiff, respondent.

Cur. adv. vult.

September 22, 1943. KEUNEMAN J.—

In this case, on November 19, 1941, the defendant was absent and the following order was made :—

“In view of the medical certificate I allow a date. Defendant to pay Rs. 105 as plaintiff’s costs of the day.

151 L. T. 154.

If costs are not paid on or before next date of trial, of consent, judgment to be entered for plaintiff, as prayed for with costs. Trial, January 12, 1942."

On January 12, 1942, the Journal entry is as follows :—

"Trial case called—Defendant and Proctor absent. Enter judgment for plaintiff as prayed for with costs—*Vide* order of November 19, 1941."

The facts are as follows, and are borne out in the record. The defendant went to the office of the plaintiff's proctor on January 12, 1942, to tender the sum of Rs. 105. The plaintiff's proctor was not there, and the defendant then went to the resthouse to instruct his own Counsel, who had come from Galle, and was with his Counsel when the case was called in Court. He arrived in Court a few minutes after the case was called and disposed of. The sum of money was immediately tendered to the plaintiff's proctor, who refused to accept it, and the money was then immediately deposited in Court, and the defendant moved that the order be vacated. This application was refused, and the defendant appeals from that order.

Counsel for the defendant-appellant argues that the District Judge had no power to enter the order of January 12, 1942, inasmuch as the defendant had time, under the consent order of November 19, 1941, to tender the sum of Rs. 105 during, at any rate, the ordinary working hours of January 12, 1942. He argued that the defendant was not in default, when the order of January 12, was made. The District Judge, however, thought that the words "on the date of trial" meant "when the case is taken up on the date of trial" and not at any time on that day.

No case has been cited to us, nor have I been able to find an authority, which is exactly in point. In *Fernando v. Wimalatissa*¹ the order was that the costs should be paid "by the next date". Payment made on the actual date of trial, but before the trial, was held to be a sufficient compliance with the order. Bertram A.C.J. held that the phrase "by the next date" would ordinarily be interpreted as meaning "on the next date", and added :

"If I promised a person that I will let him have a book by Monday, he does not generally understand that he is going to get the book on Sunday, but would consider that my promise was perfectly complied with if I let him have the book in the course of Monday."

In this case, however, there was a further condition. In the judgment the condition is set out as follows : "that the costs were to be paid in evidence". This is clearly an error, and I think that the amendment suggested by both Counsel, viz., "in advance" is most likely. In any event it was the further condition, that induced Bertram A.C.J. to hold that the sum was payable before the case came for hearing.

I think this case supports the proposition that payment of costs in the course of the date of trial is sufficient.

¹ 5 G. W. R. 243.

My brother Wijeyewardene has also referred me to the case of *Schrader v. Joseph*¹, which involved the construction of section 823 (2) of the Civil Procedure Code :—

“If upon the day specified in the summons or upon any day fixed for the hearing of the action, the defendant shall not appear or sufficiently excuse his absence, the Commissioner . . . may enter judgment by default against the defendant.”

It was held that these words referred to default at the time, if any, when the defendant was required to attend, and if no time was fixed, at the time when the case is called for hearing. There were two reasons given (1) that the section refers to default on the part of the defendant in doing something which he ought to do, and that in the absence of any rule of procedure to the contrary, it is the duty of the defendant to appear either at the time the case is fixed for hearing, or when the case is called on. (2) The practical inconvenience if a contrary interpretation was given is emphasised. This case overruled two previous cases viz., *Marikar v. Colombo Municipal Council*² and *Hadjar v. Kunjie*³.

In the present case, I do not think there is any recognised rule of procedure which requires that payment should be made before the case is taken up for trial. There are, of course, practical inconveniences, which have been emphasised before us, but these can always be weighed beforehand by the Judge who makes the order and by the parties who consent to it, and it is in the power of the Judge, if he thinks it desirable to order that the payment be made before the case is taken up, to make that point clear in his order. Where, however, the order made permits the payment to be made on the date of trial, I do not think we should impose any restriction which prevents the party from making the payment during the course of that day, and at any rate during the ordinary working hours of that day. In my opinion the case of *Schrader v. Joseph (supra)* is a special case and can be differentiated. I hold that the defendant was in time in tendering and depositing the amount of costs on January 12, 1942.

No doubt it was within the power of the District Judge, when the defendant was absent at the time the case was called, to have fixed the matter for *ex parte* hearing. But this was in fact not done, and I do not think that in the face of the defendant's explanation we should make that order now.

I allow the appeal with costs, and send the case to the District Judge for trial in due course. The plaintiff will be entitled to the sum of Rs. 105 deposited by the defendant. Costs in the Court below will be in the discretion of the District Judge.

WIJEYWARDENE J.—

This is an action for declaration of title to a land. When the case was taken up for trial on November 19, 1941, the defendant's proctor tendered a medical certificate and applied for a postponement on the ground of the defendant's illness. The journal entries show that the

¹ 15 N. L. R. 111.

² 2 Br. 240.

³ 1 A. C. R. 3.

plaintiff objected to a postponement as "expenses had been incurred in connection with the trial". The judge thereupon, made the following order :—

"In view of the medical certificate I allow a date. Defendant to pay Rs. 105 as plaintiff's costs of the day. If costs are not paid on or before next date of trial, of consent, judgment to be entered for plaintiff as prayed for with costs. Trial, January 12, 1942."

On January 12, 1942, the defendant and his proctor were absent when the case was called and the Judge entered judgment for the plaintiff referring to the order made by him on the previous date. On the same day the defendant filed an affidavit and moved for a notice on the plaintiff to show cause why the judgment should not be vacated.

According to that affidavit the defendant went to the office of the plaintiff's proctor about 8.30 A.M. on January 12 to tender the sum of Rs. 105. He found the proctor's office closed and he then attended a consultation between his proctor and Counsel who had come down from Galle. After the consultation he came with his lawyers to the Courts at 10.5 A.M. and his proctor tendered the day's costs to the plaintiff's proctor which the latter refused to accept as judgment had been entered a few minutes earlier.

The facts as stated in the defendant's affidavit are not disputed. The District Judge refused to vacate the judgment as he thought that the defendant had failed to tender the sum of Rs. 105 within the time mentioned in the order of November 19.

The order of November 19 states that the payment should be made "on or before the next date of trial". If these words are given their natural meaning a payment made "on the next date of trial" would be in compliance with the order.

It was argued for the respondent that the words should be interpreted as if they were "at or before the commencement of the trial". The effect of the order in question is to create a situation where a judgment affecting the rights of the parties to a land will be given without an adjudication by a Court of law, and I think, therefore, that such an order should be construed strictly against a party seeking to oust the ordinary jurisdiction of a Court. Moreover, I do not think that the words could be interpreted in the way suggested by the respondent's Counsel. The position becomes clear if one considers a case where an order is made that the payment should be made "before the next trial date". If the respondent's contention is entertained, that order would mean that the payment could be made "before the commencement of the trial" and the order would therefore justify a payment being made even on the trial date before the case is taken up for trial. It cannot possibly be the case that when a party is requested to make a payment before a certain date, he would be entitled to make the payment during a certain period of that day. Moreover, if this interpretation is accepted there would be no appreciable difference between an order for payment "on or before the next date of trial" and an order for payment "before next date of trial".

It should be noted that the order did not contemplate a payment into Court. The payment could, therefore, be made at any reasonable time within the period fixed by the order and need not necessarily be made during the time that the office of the District Court is open. As indicated in *Simon Sinno v. William Appuhamy*¹ different considerations would apply when the money had to be deposited in Court. I would refer to the case of *Schrader v. Joseph*² though it was not cited at the argument. I do not think the reasoning in that case could be adopted in this case. In that case the Court had to construe the words of a statute with regard to the performance of a judicial act. Here we are concerned with interpreting an agreement entered into between the parties, with reference to an act to be performed by one of the parties, though, no doubt, an order of Court is based on that agreement.

The respondent's Counsel referred to difficulties that may arise if the words in the order are given their natural meaning. What is going to happen, asked he, if the defendant fails to pay the money at the commencement of the trial and the Judge then hears the case and decides in favour of the defendant on the merits and the defendant does not pay the money on the trial date even after the judgment? Such difficulties, however, could be avoided easily if the parties take the trouble to express clearly the terms agreed upon.

I agree that the order proposed by my brother should be made in the case.

Appeal allowed.
