1944 *Present:* **Keuneman and Cannon JJ.**

NAMASIVAYAM CHETTY, Appellant, *and* RAGSOOBHOY, Respondent.

62—D. C. (Inty.) Colombo 14,638.

Interrogatory—Failure to answer—Order striking off defence—Powers of Court—Civil Procedure Code, ss. 100 and 109.

Failure to answer interrogatories does not make a defendant liable to have his defence struck off under section 109 of the Civil Procedure Code.

In order to make the defendant liable to the penalty it is necessary that a peremptory order should be made under section 100.

The Court has a discretion to grant an indulgence in a case under section 109.

Karuppen Chetty v. Narayan Chetty [1] (*2 C. L. Rec. 173*) followed.

APPEAL from an order of the District Judge of Colombo. The facts appear from the argument.

N. Nadarajah, K. C. (with him *V. A. Kandiah* and *S. Handy Perimpanayagam*) for the defendant, appellant.—The plaintiff instituted this action claiming damages for breach of a contract. Defendant filed

answer, and trial was fixed for September 27, 1943, on which date it was postponed for March 2, 1944. On November 24, 1943, the plaintiff obtained leave *ex parte*, under section 94 of the Civil Procedure Code, to deliver certain interrogatories on the defendant. Thereafter, on application by plaintiff, the trial was again postponed for June 12, 1944. On January 21, 1944, the defendant, through his attorney filed affidavit asking for extension of time to answer the interrogatories. Time was accordingly extended to March 17, 1944. On that date application was made on behalf of the defendant for a further extension of time for answering the interrogatories. The learned Judge, without exercising his discretionary power, refused the application, struck out the defendant's answer and fixed the case for *ex parte* trial for May 5, 1944. The present appeal is in respect of the order made on March 17, 1944.

The relevant sections of the Civil Procedure Code are 94, 99, 100 and 109. They correspond to sections 121, 126, 127 and 136 of the former Indian Code and to order 11, rules 1, 8, 11 and 21 of the present Indian Code. In the present case no order was obtained by the plaintiff under section 100 of the Code. An order under section 109, striking out the defence, could have been passed only if an order had been previously made under section 100—*Rampat Saran v. Habib Ullah Khan* [1]; *Prem Sukh Chunder v. Indro Nath Banerjee* [2]. Further, the penalty under section 109 would be imposed only at the discretion of Court and on a party who is guilty of contumacious conduct—*Karuppen Chetty v. Narayan Chetty* [3]; *Appu Singho v. Jusey Appuhamy* [4]; Chitaley and Ras's Commentary on the Indian Civil Procedure Code (2nd ed.) Vol 2, p. 1503.

H. V. Perera, K. C. (with him *N. K. Choksy* and *P. Navaratnarajah*), for the plaintiff, respondent.—It cannot be argued that no order was made at any time to answer interrogatories by a certain date. Such an order was made on January 21, 1944, and the interrogatories were to be answered on March 17, 1944. Under section 99 power is given to Court *in the first instance* to fix a time-limit longer than 10 days. In the present case the Court had in the first instance, fixed such a longer time-limit. Where there is a failure to perform a duty imposed by an order made under section 99, section 100 empowers the Court to order the person interrogated to answer by a certain date. The order of January 21, 1944, was an order which was made under section 100 and not under section 99. On failure to comply with it on March 17, 1944. the Court could *ex mero motu*, under section 109, strike out the defence. On March 17, 1944, there were two defaults on the part of the defendant— (1) the failure to comply with a statutory duty, (2) the failure to comply with the order of Court. The order striking out the defence was, therefore, a valid one.

Cur. adv. vult.

November 16, 1944. KEUNEMAN J.—

This appeal is taken by the defendant, appellant, against an order of the District Judge that his answer should be struck off and that he should be treated as in default under section 109 of the Civil Procedure

[1] *A. I. R. 1926 All. 553.*
[2] *I. L. R. 18 Calc. 420.*
[3] *(1920) 2 C. L. Rec. 173.*
[4] *(1910) 5 A. C. R. 135.*

Code for failure to answer interrogatories. It is clear that the plaintiff-respondent, obtained the leave of the Court to deliver interrogatories and actually did deliver interrogatories. But failure to answer interrogatories served under section 94 does not make a person liable to have his defence struck off. In order that he should become liable to this penalty it is necessary that an order should have been made under section 100 requiring him to answer or to answer further either by affidavit or by *viva voce* examination. Mr. Nadarajah for the appellant contends that in this case there is no order made under section 100 of the Civil Procedure Code. Mr. H. V. Perera for the respondent contended that an order under section 100 had been made on January 21, 1944. On that date, which was the date originally fixed for the answering of the interrogatories, the defendant himself moved the court for an extension of time for answering the interrogatories. It is clear, as the District Judge himself says, that his application amounted to an application for an extension of time. In the journal entry of that date there appear the words " answers to interrogatories 17.3." Now, Mr. Perera contends that this was an order made on the footing that the defendant had omitted or refused to answer the interrogatories. There is no evidence in the record that any application was made by the plaintiff on that date for an order under section 100 and in my opinion, the language used by the District Judge, " Answers to interrogatories 17.3 " may very well be regarded as a mere extension of time for the answering of the interrogatories. I think it is clear that under section 99 of the Civil Procedure Code the District Judge had power to extend the time for the answering of the interrogatories. It is very difficult from the words used by the District Judge to say that this was a peremptory order made under section 100. Where a peremptory order of that kind is made, I think it should be made clearly and specifically and be obvious to everybody that it is an order under section 100. In this case the fact that the District Judge may have made an order extending the time has no bearing upon the present appeal. I do not think there was any order made under section 100. Section 109 can only come into operation where an order has been made under section 100, and in view of my holding that there has been no order under section 100 at all, I think the defendant did not become liable to have his defence struck off. On that ground alone the judgment of the District Judge must be set aside. I may add that the District Judge appears to have been under the impression that he had no discretion to grant any indulgence in a case under section 109 when objection was taken to such indulgence by the other side. This is certainly not the law. I would direct the attention of the Judge to the cases reported in *2 Ceylon Law Recorder, page 173* and *5 Appeal Court Reports page 135.*

In all the circumstances I set aside the order of March 17, 1944, and send the case back to the District Court for any further proceedings that may be necessary in the case. The appellant is entitled to the costs of appeal.

CANNON J.—I agree.

Appeal allowed.