

PIYASEELI
v.
PREMATILLEKE

SUPREME COURT.
COLIN-THOMÉ, J., RANASINGHE, J. AND TAMBIAH, J.
S.C. APPEAL No. 46/85.
S.C. SPECIAL LA/51/85.
C.A. No. 1610/84.
D.C. KULIYAPITIYA No. 6729/M.
NOVEMBER 29, 1985.

Costs – Order to prepay costs – Dismissal.

An order that the action would be dismissed if the plaintiff failed to pay nominated costs before a fixed date and time if made without consent of the parties does not entitle the Court to dismiss the action where such costs are not paid as stipulated.

Case referred to :

Mamnoor v. Mohamed (1922) 23 NLR 493.

APPEAL from the Court of Appeal.

Petitioner present in person.

Respondents are absent and unrepresented.

November 29, 1985.

COLIN-THOMÉ, J.

The petitioner filed an application for damages in a sum of Rs. 1 lakh in D. C. Kuliypitiya, Case No. 6729/M. The case was fixed for trial on 18.07.84 and according to journal entry No. 21, which was the first journal entry for that date, it was recorded that the petitioner was absent and unrepresented. On that basis the action was dismissed. Journal entry No. 22, the second entry made on the same day states that she appears in court and files a motion and moves that the case be called. Thereafter she has filed an affidavit and the matter was fixed for inquiry.

After inquiry on 5.9.84 the learned District Judge made order permitting the petitioner to continue with the case provided she paid a sum of Rs. 750 as costs to the defendant on or before 5.11.84 at or before 10.00 a.m. The Judge made further order that if this payment

was not paid the earlier order dismissing the action was to stand. The case was called on 6.11.84 and it was brought to the notice of the Court that the costs ordered had not been paid by the petitioner. The petitioner was present in court on that date and refused to pay any sum of money as costs and the learned District Judge dismissed the action accordingly.

The plaintiff-appellant-petitioner appealed from this order to the Court of Appeal by way of revision and the Court of Appeal refused notice and dismissed her application.

A Full Bench of the Supreme Court held in *Mamnoor v. Mohamed* that "Apart from consent of parties, the Court has no power to order when granting an adjournment that if costs be not paid before the adjourned hearing, judgment will be entered against the party failing to pay costs". Neither the District Court nor the Court of Appeal has considered this judgment.

Having regard to the principle set out in *Mamnoor v. Mohamed (supra)* and in regard to the circumstances in this case, we set aside the judgment of the Court of Appeal and also the order of the District Judge dated 6.11.84 and order the District Court of Kuliyaipitiya to continue with the trial from where it was adjourned on 16.01.84. There will be no costs.

RANASINGHE, J. – I agree.

TAMBIAH, J. – I agree.

Appeal allowed.
