1967 *Present :* **Samerawickrame, J., and Tennekoon, J.**

AMIN JRAI and others, Appellants, *and* M. M. HADJI OMAR & CO. LTD., Respondent

S. C. 505/62—D. C. Colombo, 48423/M

Civil Procedure Code—Sections 100 and 109—Interrogatories—Plaintiff's failure to answer them—Absence of contumaciousness—Dismissal of action—Invalidity.

Postponement—Refusal by Court—Procedure thereafter.

The penalty of dismissal of an action under section 109 of the Civil Procedure Code can only be imposed on a party who is guilty of wilful or contumacious refusal to carry out an order to answer interrogatories.

The 3rd plaintiff, who was a resident in Beirut, failed to comply with an order to answer interrogatories because the time given for carrying out the order was not sufficient even to communicate the order to him.

Held, that the 3rd plaintiff could not be said to have been guilty of contumacious or wilful refusal to carry out the order. Therefore, the order dismissing the action in terms of section 109 of the Civil Procedure Code should be set aside.

Obiter : Where a party is refused a postponement of trial on the ground that another party or a material witness is not available, he must be given an opportunity of placing such evidence as is available to him before the trial Court and renewing his application for a postponement.

APPEAL from a judgment of the District Court, Colombo.

C. Ranganathan, Q.C., with *V. J. Martyn*, for the plaintiffs-appellants.

H. V. Perera, Q.C., with *Vernon Wijetunge* and *Sepala Munasinghe*, for the defendant-respondent.

Cur. adv. vult.

February 19, 1967. SAMERAWICKRAME, J.—

The 1st, 2nd and 3rd plaintiffs-appellants who carry on business in partnership, filed this action for recovery of a sum of Rs. 293,226/66 alleged to be due to them from the defendant-respondent. The defendant-respondent filed answer admitting that a sum of Rs. 10,468/74 was due from him to the plaintiffs-appellants and prayed that the action in excess of that amount be dismissed with costs.

On 26.7.62, Proctors for the Defendant Company obtained leave of Court to tender interrogatories to be answered by the 2nd or 3rd plaintiffs within ten days of service. On the same day, Proctors for the plaintiffs moved for a month's time to answer interrogatories, and time for answering the interrogatories was subsequently extended to the 20th August, 1962. On 23.8.62, Proctors for the defendant, stating that the 3rd plaintiff had omitted to answer the interrogatories, moved for an order under Section 100 of the Civil Procedure Code on him to answer the said interrogatories within three days of service of notice of such order. He also moved to serve notice of the order on the Proctors for the plaintiffs. This was allowed. On 28.8.62, Proctors for the plaintiffs filed certain documents and moved for an extension of time for answering the interrogatories as well as for compliance of the order under Section 100 of the Civil Procedure Code. On 29.8.62, Proctors for the Defendant Company moved under Section 109 of the Civil Procedure Code that plaintiffs' action should be dismissed with costs. An inquiry was held into this application on the 31st August, 1962 and order was put off for the 3rd September. It was the date fixed for trial in the action.

On the 3rd September, 1962, Counsel for the plaintiffs said that he was not ready for trial. Thereupon Counsel for the defendant moved that before the Court considered the matter of the order on his application under Section 109 of the Civil Procedure Code, the question of the plaintiffs' application for a postponement of the trial should be considered. Counsel for the plaintiffs then moved for a postponement of the trial on the ground that the 3rd plaintiff was ill. After an inquiry, in the course of which the plaintiffs' Proctor gave evidence, the learned Judge made order refusing the application of the plaintiffs for a postponement. He further made order under Section 109 of the Civil Procedure Code dismissing the plaintiffs' action with costs.

Mr. C. Ranganathan, Q.C., appearing for the plaintiffs-appellants submitted that the learned Judge had no power to dismiss the action of the 1st and 2nd plaintiffs-appellants by reason of the default on the part of the 3rd plaintiff-appellant to comply with the order made on him to answer interrogatories and he also submitted that in any event, the order under Section 109 dismissing the action was not justified in the circumstances of the case. Section 109 provides that a plaintiff shall be liable to have his action dismissed for want of prosecution if he fails to comply with an order under this Chapter. It has been held in the case of *Namasivayam Chetty v. Ragsoobhoy* [1] that an order under Section 109 could only be made for non-compliance with an order to answer interrogatories under Section 100 and could not, therefore, be made merely for failure to answer interrogatories in the absence of a peremptory order in terms of Section 100 of the Civil Procedure Code. In this case, the order under Section 100 of the Civil Procedure Code was made on the 23rd August, 1962 and the 3rd plaintiff-appellant was required to comply with that order within three days of the service of that order on his Proctors. The 3rd plaintiff-appellant is resident in Beirut and it is unlikely that the order could even have been communicated to him by his Proctors within three days. It has been held in the case of *Appu Singho v. Jusey Appuhamy* [2] that the penalty of dismissal of the action under Section 109 would only be imposed on a party who is guilty of wilful or contumacious refusal to carry out the order. This case has been followed in *Karuppen Chetty v. Narayan Chetty* [3]. I do not think that a party who fails to carry out an order where the time given for carrying out an order is such that the order could not even be communicated to him can be said to be guilty of contumacious or wilful refusal to carry out the said order. In view of my finding, it is unnecessary to consider Mr. Ranganathan's submission that in any event the Court had no power to dismiss the actions of the 1st and 2nd plaintiffs-appellants.

I, therefore, set aside the order for dismissal of the action made in terms of Section 109 of the Civil Procedure Code.

Learned counsel for the plaintiffs-appellants, in applying for a postponement for the case on the 3rd September, 1962, submitted a medical certificate which the learned Judge has found unsatisfactory. It would appear that on an earlier trial date too, in April, an application for a postponement had been made on the same ground of illness of the 3rd plaintiff, but on that day no medical certificate had been produced and it also transpired that on that date no preparation had been made by the plaintiffs-appellants for trial. A postponement was granted on terms by reason of an agreement between parties and the trial was specially fixed for the 3rd and 4th September. The matter of a postponement of a trial is within the discretion of the trial Judge and I do not think that we should interfere with his finding that a postponement was not justified.

[1] *(1944) 46 N. L. R. 12.* [2] *(1910) 5 A. C. R. 135.*
[3] *(1920) 2 C. L. Rec. 173.*

Mr. H. V. Perera, Q.C., who appeared for the defendant-respondent submitted that upon the refusal of the postponement, the plaintiffs' action should have been, in any event, forthwith dismissed. Mr. Ranganathan submitted that the learned Judge has not in fact purported to dismiss the action upon his refusal of a postponement and that the proper course for a Judge who refuses a postponement is to call upon the plaintiff to lead his evidence. In this case, the defendants had admitted that a sum of Rs. 11,268/74 was due and had issues been framed, there is no doubt that the plaintiffs-appellants would have obtained judgment at least for that sum. Further, this Court has laid it down that where a party is refused a postponement on the ground that a material witness is not available, it is the duty of that party to place before Court evidence that he has available and thereafter to renew his application for a postponement. Had the learned Judge made order dismissing the plaintiffs-appellants' case on his refusal of a postponement, plaintiffs-appellants would have been deprived of a decree in a sum of Rs. 11,268/74 and also would have been deprived of the opportunity of placing such evidence as was available to them before the trial Court and renewing their application for a postponement; but as stated above, the learned Judge did not in fact dismiss the action upon his refusal of the application for a postponement.

I, therefore, set aside the order of the learned District Judge and send the case back for trial in due course. If the defendant-respondent desires to have answer to the interrogatories served on the 3rd plaintiff-appellant, he may apply to the District Court to fix a date for an affidavit of the 3rd plaintiff-appellant to be filed and the District Judge will fix a date which will be an extended date for compliance with the order under Section 100 of the Civil Procedure Code made against the 3rd plaintiff-appellant. In fixing the date, the District Judge should have regard to the fact that the 3rd plaintiff-appellant is resident abroad and give reasonable time to enable his legal advisers to communicate with him and obtain an affidavit.

If the learned Judge had made a correct order in respect of the application under Section 109 of the Civil Procedure Code, the plaintiffs-appellants will yet have been under the necessity of applying for a postponement after perhaps some evidence had been led. Trial had been specially fixed for the 3rd and 4th September, 1962 and I think that the defendant-respondent must be compensated by way of costs in respect of those two dates. The plaintiffs-appellants succeed in the appeal and have a claim to some costs in respect of the appeal. Taking into consideration all these matters, I direct that the plaintiffs-appellants do pay to the defendant-respondent a sum of Rs. 1,050 as costs in respect of the trial dates on the 3rd and 4th September, 1962. I make no order in regard to costs of appeal.

TENNEKOON, J.—I agree.

Order set aside.