

1940

Present : Soertsz J.

PERERA *et al.* v. SILVA *et al.*

25—C. R. Negombo, 43,861

Court of Requests—Judgment entered by default—Decree vacated—No appeal—Order for costs—Civil Procedure Code, s. 833A.

Where an action in the Court of Requests on a money claim was dismissed in the absence of the plaintiff and where the Court, on the plaintiff subsequently excusing his default vacated the decree and gave him liberty to institute a fresh action,—

Held, that the order vacating the decree was not appealable as it was not a final order within the meaning of section 833A of the Civil Procedure Code.

Held, further, that such an order can only be made subject to the payment of defendant's costs.

A PPEAL from an order of the Commissioner of Requests, Negombo.

M. C. Abeywardene, for defendants, appellants.

A. L. J. Croos da Brera, for plaintiffs, respondents.

Cur. adv. vult.

June 25, 1940. SOERTSZ J.—

The plaintiffs sued the defendants "upon a tobacco contract and the defendants filed answer setting up a claim in reconvention" (para. 1 of the petition of appeal). There was great delay in bringing the case to trial occasioned by move and counter move by the parties. There were several trial dates fixed, but one side or the other was not ready. August 31, 1939, appears to have been one of these trial dates. The journal entry of that date is as follows:—"Proctors for defendants move that the trial of this case be postponed for some other date convenient to Court. Proctor for the plaintiffs consents. Trial September 20, 1939". But on September 20, 1939, the plaintiffs and their proctors were absent. Counsel and proctor representing the defendants were present. The defendants restricted their claim in reconvention to Rs. 300. They had claimed Rs. 624. The third defendant was called into the witness box and gave evidence in repudiation of the plaintiffs' claim and in support of their claim in reconvention. Thereupon the Commissioner made order dismissing the plaintiffs' action and entering judgment against second

plaintiff and in favour of the defendants for Rs. 300 and costs of the action. Decree bearing the date September 20, 1939, was entered in terms of the judgment, but wrongly stating that judgment was entered in the presence of the proctor for the plaintiffs.

On September 25, 1939, the plaintiff's proctor filed an affidavit averring that on the defendants application for a postponement of the trial made on August 31, 1939, he (the plaintiffs' proctor) obtained September 28 as the trial date, not September 20, and that the absence of the plaintiffs was due to the fact that he had informed them that the trial of the case was due to take place on September 28. He moved that the decree entered be vacated and the case fixed for trial.

The Commissioner by his order dated October 25, 1939, "vacated the decree with liberty to plaintiff or defendant to institute a fresh action. The cost of this trial will abide the result of the fresh action".

The appeal is from that order. Now, I must say at once that, in my opinion, no appeal lies in a case of this kind. The plaintiff's claim as well as the defendant's claim in reconvention falls within the words of section 833A of the Civil Procedure Code, "any action for debt, damage or demand", and that section gives a right of appeal upon a matter of law in an action of that kind only from "a final judgment or any order having the effect of a final judgment. The order appealed from here is not such an order. But, I do not think it would be right for me merely to dismiss the appeal on that ground. It seems to me that this is peculiarly a case for the exercise of my revisionary powers. A part of the order of the Commissioner violates the requirements of section 823 (5) of the Civil Procedure Code. The Commissioner is required by that section to direct that the plaintiffs shall pay into court the amount of the costs incurred by the defendants in the previous action before instituting the fresh action. He has not done that but has made the costs of this trial abide the result of the fresh action. I set aside that part of the order and direct that plaintiffs shall pay all costs incurred by the defendants, before instituting the fresh action.

In regard to the defendants' claim in reconvention, they are in the position of plaintiffs', so that the relevant sections are sections 823 (2) and (3) which provide for a case in which the defendants are absent. Under section 823 (2), judgment was rightly entered against the present plaintiffs who, as I have observed, were in the position of defendant's in regard to the claim in reconvention. The Commissioner's order, however, indicates that he was disposed to relieve them under section 823 (3), but the order he made seems to require the defendants in this case to institute a fresh action in respect of their claim. I would vary that part of the order and direct that the defendants shall be free either to set up their claim by way of reconvention in any fresh action instituted by the plaintiffs, or institute a fresh action in respect of it.

Mr. Abeywardene's contention that the case of the plaintiffs does not fall within the words "accident, misfortune or other unavoidable cause" does not arise for consideration as his appeal is rejected for the reasons I have given.

I make no order for costs of the appeal.

Varied.