1975 *Present* : **Udalagama, J., Vythialingam, J., and Ratwatte, J.**

M. R. HEMAMALA RAJAPAKSE, Defendant-Appellant

and

U. P. A. PEIRIS APPUHAMY, Plaintiff-Respondent

S. C. 149/71 (Inty)—D. C. Kegalle No. 12384

Costs—Order for pre-payment—Failure to comply therewith—Effect.

An order was made on 25th May, 1967, that the plaintiff should pre-pay costs in a sum of Rs. 105 on or before 10 a.m. on 24th July, 1967. It was agreed that if the plaintiff did not so pay this sum the plaintiff's action was to be dismissed with costs. The plaintiff did not pay these costs before 10 a.m. on 24th July, 1967, and counsel for the defendant moved that the plaintiff's action be dismissed.

On an application by counsel for the plaintiff to lead evidence in order to satisfy Court that there were circumstances which prevented the plaintiff from paying the costs, the matter was inquired into and after evidence was led the learned District Judge held that the plaintiff had satisfied him that he was prevented from tendering the money in due time and that he had sufficiently excused himself. Accordingly he made order to have the case called on 4th October, 1971, to enable it to be re-fixed for trial. The defendant appealed.

Held : That on the evidence in the case the plaintiff had failed to satisfy the Court that he was unable to perform his part of the agreement in regard to paying the costs as payment had become absolutely impossible. On the contrary the evidence showed that he had nearly 2 months to pay this sum but had failed to do so. In terms of the order made of consent the plaintiff's action must accordingly stand dismissed with costs.

Punchi Nona v. Peiris, 26 N.L.R. 411 followed.

APPEAL from an order of the District Court, Kegalle.

H. W. Jayewardene, Q.C., with *Ranil Wickremasinghe* and *Miss S. Fernando,* for the substituted defendant-appellant.

D. R. Goonetilleke, with *M. B. Peramuna,* for the plaintiff-respondent.

February 19, 1975. UDALAGAMA, J.

The plaintiff in this case sued the defendant for damages in a sum of Rs. 20,000 for wrongful sequestration of his shop goods. In the course of the case the defendant died and his daughter was substituted in his place as executor *de son tort,* of the estate of the defendant.

When the case came up for trial on 25.5.67, counsel appearing for the substituted-defendant raised an issue as to whether the cause of action survived against the substituted-defendant, and if so, to what extent ? In consequence of this issue being raised, counsel for the plaintiff moved Court to permit him to file papers,

substituting the defendant as executor of the estate of the original defendant, as she had since been so appointed, in the testamentary proceedings of the original defendant. Counsel for the defendant had consented to a date being granted on terms. The terms were, that the plaintiff-respondent would pre-pay a sum of Rs. 105 on or before 10.00 a.m. on the next date which was the date for filing fresh papers—namely 24.7.1967. It was further agreed between the parties that if the plaintiff did not pay Rs. 105 as agreed the plaintiff's action to be dismissed with costs. On 24.7.67 the plaintiff failed to pay the costs before 10.00 a.m. as agreed. When the case came up for trial subsequently, counsel for the defendant-appellant moved that the plaintiff's action be dismissed in terms of the order made on 27.5.67.

Counsel for the plaintiff moved to call evidence in order to satisfy the Court that there were circumstances which prevented the plaintiff from paying the costs that was agreed upon on the 24th of July, 1967. The Court permitted the application and the matter came up for inquiry on 9.9.71 on which date evidence was led and the learned District Judge delivered order holding that the plaintiff had satisfied him (the Judge) that he (the plaintiff) was prevented from tendering money in due time but had sufficiently excused himself and overruled the objection of the defendant-appellant and made order to have the case called on 4.10.71 to enable the trial to be fixed.

The defendant-appellant now appeals to this Court from the order of the learned District Judge. According to the agreement that was arrived at on 27.5.67, the plaintiff had to pre-pay the sum of Rs. 105 on or before 10.00 a.m. on the next date—namely—24.7.67 and if the plaintiff failed to pay this Rs. 105 this action was to be dismissed with costs.

In the case of *Punchi Nona v. Peiris*, 26 N.L.R. 411, Jayewardene, A. J., in the course of his judgment, in that case stated :—

> "Parties no doubt wait till the last moment to make these payments, but that is not a circumstance, the Court can take into consideration, and if at the last moment they are prevented by accident or otherwise from doing so, they must be prepared to take the consequences.
>
> This rule, must, however, not be regarded as inflexible, it would have to yield in cases where performance of the agreement has become absolutely impossible."

We have examined the evidence that was led by the plaintiff at the inquiry, and we are not satisfied that the plaintiff had brought himself within the dictum enunciated by Jayewardene,

A. J. in *Punchi Nona v. Peiris.* He has failed to satisfy us that he was unable to perform his part of the agreement as it had become absolutely impossible. On the contrary, the evidence shows that the plaintiff-respondent had nearly two months to pay this sum. In fact, the proctor for the plaintiff had filed papers on 9.6.67 in regard to the appointment of the defendant in place of the original defendant who had died, in her capacity as executor of the estate of the original defendant. The plaintiff could very well have deposited this sum on that date, but, has failed to do so.

Furthermore, the evidence also shows, that he lives only 30 yards away from the house of Mr. Everad Perera, proctor for the defendant-appellant. If he had only made a diligent effort even on the morning of the 24th July, 1967, to pay this sum to Mr. Everad Perera, before the stipulated time limit, we are unable to see what difficulty he would have encountered. The consequences that were to follow from his failure to pay the money within the stipulated time, were no doubt serious from his point of view. He stands to have his action dismissed with costs ; but then, that is his default and he must blame himself for the situation he now finds himself.

I allow the appeal and set aside the order of the learned District Judge dated 9.9.71 and hold that the plaintiff-respondent had failed to abide by the agreement entered into on 27.5.67. In the result, the plaintiff-respondent's action stands dismissed with costs.

Defendant-appellant is entitled to the costs of this appeal.

VYTHIALINGAM, J.—I agree.

RATWATTE, J.— I agree.

Appeal allowed.