FONSEKA *et al. v.* PERERA.

1909.
July 19.

C. R., Panadure. 8,889.

THE plaintiffs sued the defendant to recover a sum of Rs. 104, being balance, principal, and interest due on a promissory note dated March 5, 1903.

The defendant filed answer admitting the making of the note, and pleading payment of the whole amount due on the note.

On the day of trial the following proceedings took place :—

" Mr. Dias, for plaintiff.

" Defendant present.

" Defendant challenges plaintiffs to swear at the Awasa Vihare that he (plaintiff) did not receive the amount of the promissory note. Plaintiff agrees.

" Judgment to follow swearing.

" Court Mudaliyar to administer the oath."

The plaintiff having failed to take the oath, the Commissioner gave judgment for the defendant.

The plaintiff appealed.

Tambayah (with him *H. A. Jayewardene*), for the plaintiff, appellant.

R. L. Pereira, for the defendant, respondent.

Cur. adv. vult.

July 19, 1909. WOOD RENTON J.—

The appellants sued the respondent to recover a balance of Rs. 104, alleged to be due on a promissory note for Rs. 311·75, made by the respondent in their favour. The respondent pleaded payment, the burden of proving which, of course, rested on him. At the hearing, however, he challenged the first appellant to swear at the Awasa Vihare that he had not been paid in full. The first appellant agreed. The journal entry adds : " Judgment to follow the swearing," and the first appellant signed the entry to that effect. There was here, therefore, an offer by the respondent to be bound by the result of, and an agreement by, the first appellant to take, the oath proposed, and if that agreement had been carried out, the evidence given would no doubt have been immediately decisive of the case. The first appellant, however, failed to take the oath, and on the evidence I am prepared to infer that his default was wilful ; and on proof of the fact the Commissioner of Requests at once gave judgment for the respondent. Counsel on both sides agreed that the fate of this case should be governed by my decision in

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the case of *Fernando v. Perera*.[1] For the reasons that I have given in my judgment in that case, I set aside the decree now under appeal. The parties were acting, and must be taken to have been purporting to act, under "The Oaths Ordinance, 1895." Under that Ordinance the refusal, or failure under circumstances tantamount to refusal, of a party challenged to take the judicial oath is not in itself a ground for deciding the suit against him. It is a circumstance to be recorded and weighed in disposing of the case on the merits. This view was taken by the High Court of Madras in *Majan v. Pathukutti*,[2] a case in which there was a far stronger agreement than can be alleged here. While setting aside the decree, however, I merely send the case back for further inquiry and adjudication on the merits. The evidence already taken, including that as to the appellant's default to abide by his agreement, may stand. All costs must be costs in the cause.

Appeal allowed ; case remitted.