1925.

Present: Bertam C.J., Ennis J., and Jayewardene A.J.

TIRUGNASAMBANTHAPILLAI *v.* NAMASIVAYAMPILLAI.

324—C. R. Jaffna, 16,107.

Decisory oath—Agreement regarding the action—Failure to take the oath—Oaths Ordinance, No. 9 of 1895.

Where a party to an action undertakes to take the decisory oath and agrees at the same time that the action should be decided in a particular way according as he takes or does not take the oath.

***Held,* that judgment may be entered in terms of the agreement.**

THIS case was referred to a Bench of three Judges by Jayewardene A. J. by the following judgment:—

JAYEWARDENE A.J.—

This case raises a question of practical importance under the Oaths Ordinance, No. 9 of 1895.

The plaintiff sued the defendant to recover a sum of Rs. 110.29. The defendant denied liability. On the day of trial, the following agreement was come to:—

" It is agreed between the parties that the defendant bring into Court Rs. 100 on or before August 1, 1924, and that the plaintiff take oath at the Kandaswamy temple. If he does so, the plaintiff is to have judgment for the full amount.

" It is also agreed that if the oath be not taken, that the plaintiff's action be dismissed, and defendant have judgment against the plaintiff for Rs. 100, with costs.

" It is also agreed between the parties that if the defendant fails to bring the Rs. 100 into Court, that the plaintiff have judgment for his claim and costs. "

The oath was to be taken on or before August 1, as the case was to be called on that day. On the morning of August 1, the terms of the oath which the plaintiff had agreed to take was recorded, and the oath was to be taken that evening at 6 P.M. at the Kandaswamy temple (*vide* proceedings of August 1). The plaintiff, when the

terms of the oath were reduced to writing, refused to take the oath in those terms. It is unfortunate that the terms of the oath were not recorded in writing on the day the agreement was entered into. However, I find that the plaintiff did agree to take the oath recorded by the Commissioner.

The learned Commissioner, therefore, entered judgment in terms of the agreement of July 25. The plaintiff appeals against this judgment, and it is contended for him that on the refusal of the plaintiff to take the oath, the case should have been heard and decided in due course. It seems to be clear that when a party who agrees to take an oath refuses to do so subsequently, the case must be heard in the usual way (*Iyanohamy v. Carolis Appu*,[1] *Sinnetamby v. Vallinatchy*,[2] *Fernando v. Perera*,[3] *Siman v. Silinduhamy* [4]).

But the difficulty arises when there is an express agreement that if the oath is taken or not taken, the action should be decided in a particular way.

In the cases above cited there was no express agreement that the case should be determined in a particular way on the party who had agreed to take the oath taking it or refusing to do so. However, in *Kuri v. Lapaya*,[5] there was an express agreement that if the plaintiff took the oath, judgment should be entered for him, and that if he did not do so, the action should be dismissed; and on the failure of the plaintiff to take the oath, his action was dismissed. De Sampayo J., after referring to *Siman v. Silinduhamy* (*supra*), held that the case could not be dismissed according to the agreement of the parties, but that it should be heard on the merits. In a subsequent case (*Nonohamy v. Rodrigo*[6]) De Sampayo J., on the analogy of the decision of the Full Bench in *Mamoor v. Peer Mohamadu*,[7] held that if a party expressly agrees to submit to judgment if he does not take the oath, the Court may enter judgment on his failure to carry out his undertaking. I myself followed this judgment in a case which is not reported. In *Fernando v. Perera* (*supra*) and *Siman v. Silinduhamy* (*supra*), although there was no express agreement as to the decision of the action in case, the oath was taken or not taken, there is a strong implication to that effect, and judgment would have followed as a necessary consequence on the taking of the oath or on the failure to do so.

Our Oaths Ordinance is largely a reproduction of the Indian Oaths Act, No. 10 of 1873, with some alterations which are not material for the present purpose. Section 9 of our Ordinance corresponds almost word for word to sections 9-12 of the Indian Act,

[1] *(1900) 4 N. L. R. 781*
[2] *(1906) 10 N. L. R. 62.*
[3] *(1909) 12 N. L. R. 206.*
[4] *(1911) 14 N. L. R. 410.*
[5] *(1919) 6 C. W. R. 261.*
[6] *(1922) I T. C. L. R. 110.*
[7] *(1922) 6 C. L. R. 33.*

and in support of his judgment in *Fernando v. Perera (supra)*, Wood Renton C.J. (then Wood Renton J.) referred to two Indian decisions. In the first of the two cases referred to there (*Majan v. Nathkothi* [1]), the Court was of opinion that the undertaking by the plaintiff that if he failed to make the oath, the suit should be dismissed was not an adjustment of the suit so as to entitle the defendant to judgment if the plaintiff committed a breach of his undertaking. This case followed the earlier case which contains an important exposition of the law on the point. As the question is one of frequent occurrence in our Courts, an authoritative decision is desirable. The questions on which I desire a decision are: (1st) If a party agrees to take an oath, and also agrees at the same time that the action should be decided in a particular way, if he takes or does not take the oath. can judgment be entered in terms of the agreement, or must the action be tried in the usual way? (2nd) Does the addition of further terms to this agreement make any difference. if, for instance, at the same time the defendant undertakes to bring the sum claimed by the plaintiff into Court, and the plaintiff agrees to pay a penalty if he does not take the oath?

I direct that these questions be submitted for argument and decision before a Bench of three Judges.

H. V. Perera, for plaintiff, appellant.—An agreement of the kind in question is outside the scope of section 9 of the Oaths Ordinance. When the party who undertakes to take the oath afterwards declines, the Court is bound to proceed with the action following the directions laid down in sub-section (4).

In India it has been held that an agreement to dismiss an action under similar circumstances is not an adjustment of the action within the meaning of section 408 of the Civil Procedure Code.

It is submitted that consent cannot empower a Court to do what the Civil Procedure Codes does not permit (*1 C. L. R., p. 86*). This is not an immediate adjustment that is capable of being embodied in a decree. Section 408 does not deal with a conditional adjustment, and cites *Konnapalen Uthatchadayan Haje v. Perotto Meloden Ramen Nambiar* [2] and *Moyan v. Pathukutti.* [3]

James Joseph, for defendant, respondent.—An agreement of this kind is usual in our Courts. The parties have agreed to abide by the result of the oath, and there is not reason why they should not be compelled to adhere to its terms. Cites *Suppiah v. Abdulla.* [4]

H. V. Perera, in reply.—The decree under section 200 determines finally the rights of the parties. The decision on the right is not conditional. The payment of the money is the peculiar consequence of the right determined.

1 *(1907) 17 Mad. L. J. 545.*
2 *(1869) 4 Mad. H. C. R. 422.*
3 *I. L. R. 31 Mad. 1.*
4 *(1924) 26 N. L. R. 79.*

February 6, 1925. BERTRAM C.J.—

Upon this reference I have come to the conclusion that the learned Commissioner was in substance right, and that the appeal should be dismissed. It is clear from the authorities set out by my brother Jayewardene in the reference that where a person has undertaken to take a decisory oath under the Oaths Ordinance, he is at any time entitled to draw back, and that all that the Court can do in the circumstances is to take into account his vacillation as an element in the case. But as my brother Jayewardene observes in the reference: "The difficulty arises when there is an express agreement that if the oath is taken, the action shall be decided in a particular way." In this case a most explicit agreement providing apparently for all possible contingencies was drawn up and was submitted to the Court in accordance with the procedure prescribed in section 408. On the face of it this agreement constituted an adjustment of the action.

There are, however, certain very explicit Indian authorities which declare that such an adjustment is not the kind of adjustment which is contemplated by the section. These authorities start with a decision of the Madras High Court in the year 1869 (*Konnapalen Uthatchadayan Haje v. Perotta Meloden Ramen Nambiar* (*supra*)). There it was said: " That what is meant by this language is that the parties should agree upon some terms respecting the subject-matter of the suit which are capable of being embodied in a decree, whereby the suit would be disposed of. In the present case there certainly was no such agreement, but only an agreement that, if the defendant should do certain things, a decree should be passed in favour of one party; and if they should fail to do those things, then in favour of the other party; so that what decree should be passed would depend upon the result of an inquiry, whether subsequently to the agreement certain acts had or had not been performed."

That case was followed by a decision of the Appeal Court of Madras in which Subramania Aiyar J. reduced this question to the form of a small Code embodied in three propositions. See *Vasudeva Shanbog v. Narain Pai.*[1] That authority was further followed in another Madras case (*Etakkott Manmod Kutti's son Moyan v. Etakkott Kuthayi's daughter Pathukutti* (*supra*) *and Majan v. Nathkothi*[2]). Further, the case of *Vasudeva Shanbog v. Narain Pai* (*supra*) was followed in the Allahabad High Court (*Muhammad Zahur v. Cheda Lal.*[3] There the circumstances were somewhat different, but are very interesting. The pleaders on both sides signed and presented to the Court a petition that, if upon a particular bond in the witness's possession it should be stated that certain money was

[1] *I. L. R. 2 Mad. 356 on p. 360.* [2] *I. L. R. 17 Mad. L. J. 545.*
[3] *I. L. R. 14 All. 141.*

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received through the defendant, the Court should decree the suit. otherwise the suit should be dismissed, with costs. There the previous authorities were recited and followed.

This is undoubtedly a series of authorities entitled to high respect. The opinion formed by the learned Judges is expressed in forcible and unqualified terms. I should prefer, if possible, to follow so weighty a chain of authority. But I am unable to appreciate the reasoning on which these expressions of opinion are based, because no explanation is given of that reasoning. I am unable to see where parties have come together and have made an agreement disposing of the subject-matter of the action, subject to a particular contingency, and have agreed that the suit shall be decided with reference to that contingency, and have provided for all alternative results, why this should not be considered an adjustment of the action within the meaning of section 408. It is quite true that there is a convenience in not leaving anything to be worked out when the decree is entered. But it is conceded that an adjustment under the section might well include a provision for accounts and inquiries. If that is so, I cannot see why an adjustment might not also provide for the determination of some question in doubt in a particular way. I cannot help being impressed with the form of the decree provided for in section 200 of the Civil Procedure Code with reference to an action for pre-emption.

Mr. Perera very truly says that there the actual rights of the parties are determined, and the provision for the dismissal of the action upon a contingency relates only to fulfilment of a subsidiary condition. Nevertheless that decree is in such a form that it would not be possible to ascertain which party was entitled to judgment. unless some inquiry was made subsequent to the decree.

For these reasons, I am of opinion that the learned Judge was substantially right. I think, as a matter of fact, that the decree ought to have been entered up at once in pursuance of the learned Judge's order, and that there should not have been a delay until the contingency contemplated was actually determined. That, however, is a question of form. For these reasons, I would dismiss the appeal, with costs.

ENNIS J.

I entirely agree. I know nothing in the Civil Procedure Code which would prevent parties coming to an agreement among themselves for the settlement of their disputes, and by consent having that agreement embodied in a decree of the Court. I also agree that the Indian cases, although strong, are not sufficient authority for limiting the scope of our own section 408.

JAYEWARDENE A.J.—

I agree with the conclusion arrived at by the rest of the Court.

Appeal dismissed.