

1913.

*Present* : Pereria J.

PALANIAPPA *v.* SINNATAMBY.

71—C. R. Colombo, 30,113.

*Decisory oath—Oath not taken by accident—Party challenging cannot withdraw from undertaking to be bound by oath.*

If the party who has consented to take an oath designedly or negligently omits to do so at the time and place fixed, the opposite party may be allowed to refuse to continue to be bound by his undertaking ; but where the omission is due to pure accident or to unforeseen causes over which the party has no control, it will be manifestly unreasonable, and, indeed, it will lead to an undesirable evasion of a solemn agreement entered into in open Court, to allow the opposite party to withdraw from his undertaking to be bound by the oath. The Court should in all cases adjudicate upon the soundness of the reasons given for the omission.

THE facts appear sufficiently from the judgment.

*Arulanandam*, for plaintiff, appellant.—The Commissioner was wrong in refusing to adjudicate upon the circumstances which led to the plaintiff's failure to take the oath. Supposing plaintiff was

run over by a motor car while on his way to the temple to take the oath, he had a reasonable excuse for failing to attend at the temple. The Commissioner ought to be satisfied before proceeding to trial that the plaintiff kept away from the temple by design. Here there is no such finding. Counsel cited *Ram Naran Singh v. Babu Singh*.<sup>1</sup>

*Jayatileke*, for the defendant, respondent.—The respondent went to the temple on the appointed day, but did not find the appellant there to take the oath agreed. The defendant was not thereafter bound by the challenge. [Pereira J.—Would he not be bound if the plaintiff was prevented by accident?] Even then the defendant may withdraw from the challenge, as the parties agreed to take the oath on a specified day, at a specified hour, and at a specified place. [Pereira J.—That would be so if there was such an agreement. But here there is nothing more than a mere agreement to be bound by the oath.] The Commissioner has fixed a date. [Pereira J.—But the parties did not make that a term of the agreement.]

*Cur. adv. vult.*

April 24, 1913. PEREIRA J.—

In this case it appears that the defendant offered to be bound by an oath to be taken by the plaintiff in a Hindu temple at Kotahena. The plaintiff failed to take the oath, and thereupon the Commissioner proceeded with the trial in spite of objection taken thereto by the plaintiff's counsel. The contention in the Court below was the same as that pressed in appeal, namely, that the omission of the plaintiff to take the oath was due to accident. The appellant's counsel has stated, without contradiction by the other side, that he moved the Commissioner to decide, before proceeding with the trial, the question whether the plaintiff's omission to take the oath was due to accident, but that the Commissioner thought that the question was irrelevant. It appears from the judgment that the Commissioner was of opinion that, whether the omission was due to accident or design, the so-called commission issued to some officer of the Court to administer the oath having expired, the defendant ceased to be liable to be bound by the plaintiff's oath. I cannot assent to that proposition. When a party to a judicial proceeding agrees to be bound by an oath to be taken by another party, he cannot be allowed to withdraw from his undertaking, except for reasons which the Court considers to be sound. The case of *Ram Naran Singh v. Babu Singh*<sup>1</sup> cited by the appellant's counsel is in point. If the party who has consented to take an oath designedly or negligently omits to do so at the time and place fixed, the opposite party may be allowed to refuse to continue to be bound by his undertaking; but where the omission is due to pure accident or to unforeseen causes over which the party had no control, it will be

<sup>1</sup> (1896) I. L. R. 18 All. 46.

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manifestly unreasonable, and, indeed, it will lead to an undesirable evasion of a solemn agreement entered into in open Court, to allow the opposite party to withdraw from his undertaking to be bound by the oath. The Court should in all cases adjudicate upon the soundness of the reasons given for the omission. The order on this appeal will be that the case do go back to enable the Commissioner to adjudicate upon the soundness of the reason given by the plaintiff for his omission to make oath as agreed upon at the time and place appointed for the purpose. If he rules in his favour, and the plaintiff makes oath thereafter, the judgment appealed from will be vacated by the Commissioner and judgment entered up in terms of the agreement of December 3, 1912. Otherwise the present judgment will stand. The appellant will have his costs of appeal.

*Sent back.*