1924.

Present: Bertram C.J. and Schneider J.

CAROLIS APPUHAMY *v.* PETER SINGHO *et al.*

107—D. C. (Inty.), Colombo, 51,798.

Civil Procedure Code, s. 145—Postponement of trial for the production of evidence—Party in default—Dismissal of action—Powers of Court.

Where a party to an action has been granted time to produce certain evidence and fails to do so at the hearing, the court has no power to dismiss the action. It must proceed to hear such other evidence as may be tendered on behalf of the party in default and decide the action forthwith.

APPEAL from an order of the District Judge of Colombo, dismissing the plaintiff's action. The action had commenced in 1918, but no steps had been taken to prepare the case for trial, when under a peremptory order of the learned Judge, it was fixed for hearing on May 28. The case had been adjourned from time to time to enable the plaintiff to obtain a survey of the subject-matter of the action and a report by an impartial expert witness. When the case came on for hearing, the learned District Judge finding that the necessary evidence was not available refused a motion for another adjournment and dismissed the action.

Samarawickreme (with him *Arulanandan*), for the plaintiff, appellants.

R. L. Pereira (with him *Navaratnam*), for the defendant, respondents.

October 3, 1954. BERTRAM C.J.—

This is an appeal against an order of the learned Judge dismissing the action on the ground that, after repeated delays, and after a prolonged course of a most dilatory procedure, the plaintiff was, in the opinion of learned Judge, not in a position effectively to prove his case, and that it would be a waste of time to allow him to attempt to do so. I have the greatest sympathy with the impatience which the learned Judge displayed. I think he was most justified in his impatience. It is very much to be regretted that at some earlier period in these proceedings a peremptory order was not made.

The action was commenced in 1918, and nothing effective had been done to prepare the case for trial when under a peremptory order of the learned Judge, it was fixed for hearing on May 28 of this year. It had been clearly realized throughout the case that it was most desirable that there should be a survey of the subject-matter of the action and a report by an impartial expert witness. The case had been adjourned time after time because this evidence was not available, and the plaintiff had not taken the necessary steps to make it available. When the case came on for hearing, there was yet another motion for adjournment, which was refused. The case was thus exactly in the position provided for by section 145 of the Civil Procedure Code, which says that if any party to an action to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary for the further progress of the action for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the action forthwith.

It seems to me that what that section contemplated was that when the Court found itself in such a position it should hear what other evidence available that might be tendered on behalf of the party in default, and should then decide the action. It does not say that in such a case the Court may dismiss the action. If such a special proceeding has been contemplated by the framers of the Code, I think that they would have inserted an express provision on this very point in the Code.

This question has in another form come up before this Court in more than one case, and in particular in the case of *Mamnoor v. Mohamed*, [1] which is a decision of three Judges of this Court. The Court there carefully considered a previous decision—*Sumanasara Unnanse v. Seneviratne*, [2] and the principle enunciated in that case

[1] *(1923) 23 N. L. R. 493.*

[2] *(1912) 15 N. L. R. 375.*

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was that in the case of an order finally dismissing an action it is necessary that a Judge should act under some specific power given to him under the Code. That principle was unanimously approved in *Mamnoor v. Mohamed* (*supra*), and it appears to me that it applies to the present case. The reason why the learned Judge took this step was that in his opinion the evidence of an impartial and trustworthy surveyor was absolutely essential, and that the evidence which the plaintiff proposed to tender was bound to have been entirely unsatisfactory, and would have involved a waste of public time.

These reasons appear hardly to justify the learned Judge in taking a step not warranted by any express provision of the Code. The learned Judge may no doubt have been right in his anticipation that the evidence would have been unsatisfactory. I think he was probably quite right in feeling that it would be quite impossible for him to estimate the damages in the case without expert evidence which was not available, and that he would be reduced, in the most favourable prospect of the case, to the position of having to guess the damages. Nevertheless, I think he was bound to proceed with this irksome and unsatisfactory process. He does not say that the plaintiff in calling the evidence he proposed to tender would be guilty of an abuse of the process of the Court. It is quite possible that that position may arise. It is possible that he made it quite clear that any continued calling of evidence by a party in the case would be a clear abuse of the process of the Court. If that situation arose, I have no doubt that the inherent powers of the Court would be sufficient to deal with it. But the learned Judge does not put the case as high as that, and in the absence of any express authorization, I think that this order cannot be supported. I would, therefore, allow the appeal with costs in this Court, and remit the case for further hearing. I trust that it will then be finally and expeditiously disposed of.

SCHNEIDER J.—I agree.

Appeal allowed.