

1939

*Present : Wijeyewardene and Nihill JJ.*KHAN *v.* SALLY *et al.*

69—D. C. Colombo, 3,026.

Liquid claim—Action on promissory note—Leave given to appear and defend—Failure to deposit money in time—Delay on the part of Proctor—Civil Procedure Code, s. 707.

In an action on a promissory note defendant was given leave to appear and defend on December 14, 1938, and ordered to file answer on giving security in Rs. 200 by January 16, 1939.

When the case was called on January 17, it was found that the money was not deposited and judgment was entered for the plaintiff.

Held (in an application to set aside the judgment), that dilatoriness on the part of the proctor which resulted in his failure to comply with an order of Court within the time fixed did not amount to proof of such special circumstances as are contemplated by section 707 of the Civil Procedure Code.

A PPEAL from an order of the District Judge of Colombo.

N. E. Weerasooria, K. C. (with him *M. J. Molligodde*), for plaintiff, appellant.

P. Tiyagarajah (with him *S. A. Marikar*), for defendant, respondent.

September 29, 1939. WIJEYWARDENE J.—

The plaintiff instituted this action under chapter 53 of the Civil Procedure Code for the recovery of a sum of money on a promissory note. The judge accepted the plaint and issued summons with a direction to the defendants to appear in Court, within ten days of its service and obtain leave to defend the action. Service was effected on the first defendant on December 5, 1938, and on the second defendant on December 3, 1938. Mr. Kamer Cassim filed a proxy from both the defendants and their affidavit on December 14 and moved for leave to appear and defend the action. The District Judge thereupon made the following order:—

“Allowed to file answer on giving security in Rs. 200 by January 16, 1939.”

The journal entry dated January 16, 1939, is as follows:—

Answer of the defendant filed.

Proctor will deposit Rs. 200 to-day.

Call 17.1.

When the case was called on January 17, it was found that the money was not deposited and the Judge entered judgment for the plaintiff. On the same day, but after judgment was entered, Mr. Kamer Cassim filed an affidavit and a Kachcheri receipt for Rs. 200 dated January 17, 1939, and moved to set aside the decree.

The relevant statements of fact made by Mr. Cassim in his affidavit are not disputed by the defendants. These statements show:—

- (i.) that it was only on January 13 that Mr. Cassim “tried to get an order to deposit”;

- (ii.) that the record of the case "was not available to Mr. Cassim on January 13".
- (iii.) that on January 16, Mr. Cassim "offered to hand over Rs. 200 to the plaintiff's proctor" but the latter refused to accept it;
- (iv.) that the order to deposit was not given to Mr. Cassim's clerk by the court clerk before 4.30 P.M. on January 16;
- (v.) that the sum of Rs. 200 together with the order to deposit was sent to the Kachcheri on January 17.

On these facts the District Judge made an order under section 707 of the Civil Procedure Code setting aside the decree and against that order the present appeal has been filed.

The scope of section 707 has been considered by this Court in a number of cases. In *Silva v. Goonesekera*¹, *Wendt and Middleton JJ.* held that the failure on the part of the defendant's proctor to inform the defendant of the order of Court to furnish security before a certain date was not a "special circumstance" within the meaning of section 707. In *Latiff et al. v. Saibu*², the plaintiff while filing the plaint under chapter 53 of the Code applied to the Court and obtained a warrant of arrest and a mandate of sequestration of the defendant's property before judgment. The defendant had to appear in Court within five days of the service of summons on him and obtain leave to defend the action. The summons was served on the defendant on March 19, 1926, and on the same day he was brought under arrest before the Court. The defendant thereupon filed an affidavit through his proctor who then applied for his release and the withdrawal of the mandate for sequestration. The Court granted the application on the defendant depositing a sum of Rs. 750 as security. As no application was made to Court for leave to appear and defend the action the plaintiff's proctor moved for judgment on March 25, and the Court entered decree in favour of the plaintiff on March 30. The defendant and his proctor filed a joint affidavit stating that the defendant had given the necessary instructions to the proctor to obtain leave to appear and defend and that the proctor drew the affidavit for the express purpose of basing such an application upon it but by pure oversight failed to make the necessary application. On an appeal from the order of the District Judge setting aside the decree, *Garvin A.C.J.* (with whom *Dalton J.* agreed) said: "This is not a case in which the defendant has established the existence of special circumstances within the meaning of section 707. It is a hard case particularly when it is borne in mind that there has already been deposited in Court a sum of money sufficient to meet any judgment which might be entered in favour of the plaintiff. However that may be, if the defendant is to succeed he must bring himself within the provisions of section 707 to show that he is entitled to the relief which he claims. This he has failed to do.

In the present case the failure to deposit the money by January 16, 1938, was undoubtedly occasioned by the defendant's proctor failing to take any steps until January 13. The defendant's proctor who has been practising his profession in Colombo for a number of years should have known the difficulty of obtaining a record and securing an order

¹ (1907) 1 *Appeal Court Reports* 100.

² (1926) 8 *C. L. Rec.* 10.

to deposit at short notice at the beginning of the year when there is a considerable congestion of work owing to the closing of the offices of the Court for the Christmas vacation. He must also have been aware that the office of the District Court would not be open on January 14 which was a public holiday and on January 15 which was a Sunday. He should have realized that he was taking a serious risk in delaying so long to take the preliminary steps for the deposit of the money. If he chose to take such a risk he cannot plead for relief against the consequences of his own by Judges of this Court in considering applications for relief made by Court within the time fixed by the Court.

In this connection reference may be made to certain observations by Judges of this Court in considering applications for relief made by parties to regular actions in respect of decrees passed against them upon a breach of their undertaking to pay costs on a particular date.

In *Punchi Nona v. Peiris*¹, the case was fixed for trial on October 16, 1923, but as the defendants were not ready, the trial was refixed for December 20, 1923, on the defendants agreeing to judgment being entered against them in the event of their failing to pay a certain sum by way of costs before December 20. The defendants made default and when the case was called on December 20 the defendant's proctor offered to pay the costs that day pleading that his clients were prevented by floods from making payment before that date. The District Judge held that the defendants had committed a breach of their undertaking and entered judgment for the plaintiff. In appeal Bertram C.J. and Jayawardene A.J. affirmed the order of the District Judge and refused to entertain a plea for equitable relief. In the course of his judgment Jayawardene A.J. cited with approval the following extract from the judgment of West J. in *Bulprasad v. Dharnidhar Sakharam*²:—

“the admission of a power to vary the requirements of a decree once passed would introduce uncertainty and confusion . . . and the courts would be overwhelmed with applications for modification, on equitable principles of orders made on a full consideration of the case which they were meant to terminate. It is obvious that such a state of things would not be far removed from a judicial chaos”.

Dealing with the facts of the particular case before him Jayawardene A.J. said—

“The defendant says he was prevented by floods from paying the sum fixed as costs; but he had more than two months within which to pay the amount and it could not be said that he was prevented by floods from paying the sum he agreed to pay during the whole of that period. 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”.

In *Siman Sinno v. William Appuhamy*³ the defendant was granted a postponement upon a consent order that he should pay the costs of the day on or before a certain day which was subsequently found to be a Sunday

¹ (1924) 26 N. L. R. 411.

³ (1925) 6 C. L. Rec. 99.

² Vide 10 Bombay 435.

Bertram C.J. and Schneider J. held that the payment by the defendant on the following Monday was not a payment in compliance with the order of Court and stated that impossibility of performance "whether through circumstances outside the control of the party affected or otherwise did not extend the time within which the payment may have been made".

The present case is admittedly a hard case. I do not think, however, that Courts should encourage any laxity in the due compliance with an order of Court unless of course the defendants can show that they are entitled to claim the benefit of such special circumstances as are contemplated by section 707. The defendants in this action failed to prove the existence of such circumstances.

I would therefore set aside the order appealed against and allow the appeal with costs. The plaintiff will also be entitled to the costs of the inquiry in the District Court.

NIHILL J.—I agree.

Appeal allowed.

