

1936

*Present : Dalton A.C.J. and Soertsz A.J.*MATCHER *v.* DE ABREW.

104—D. C. Colombo, 90

*Adjournment of trial—Application by defendant—Absence of plaintiff—Power of Court—Civil Procedure Code, ss. 82 and 84.*

Where at the hearing of an action the plaintiff was absent and the defendant applied for a postponement, the Court is not bound to act under section 84 of the Civil Procedure Code and grant an adjournment.

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

*Gratiaen* (with him *J. A. T. Perera*), for plaintiff, appellant.

*N. E. Weerasooria* (with him *T. S. Fernando*), for defendant, respondent.

June 2, 1936. DALTON A.C.J.—

In this action the plaintiff (appellant) sued the defendant (respondent) to recover the sum of Rs. 500 under a deed of partnership. The defendant denied liability and claimed a sum of Rs. 2,500 in reconvention. The action was instituted on January 22, 1934. The journal entries are very badly made and difficult to decipher, but I gather that the case was fixed for trial on June 20, 1934. On that day the defendant obtained a postponement on the ground that a material witness for the defence was away in England and would not be back until November 15, 1934. There was no appearance for the plaintiff on June 20, although his proctor had received notice of the application which was to be made. The Court also ordered that the case be mentioned on September 24. On that date the case was ordered to be called on January 24, 1935, and it was fixed for trial on February 21, 1935.

On February 21, 1935, when the Court was ready to proceed with the trial, the proctor for the defendant handed in a motion, saying that as the case was likely to be settled, he moved that the case be fixed for another day. This motion was signed by the proctors of both parties. Again neither the plaintiff nor his proctor appeared in Court. They all appear to have assumed that the application made on the day of trial would be granted as of course. The plaintiff's proctor, in my opinion, treated the Court with discourtesy, and neither of the proctors seems to have any regard to the convenience of the Court or of other litigants. It is this sort of conduct which is such a prolific cause of delay in the hearing of cases, and the District Judge had very good cause for complaint. He refused the application, holding that no good ground was shown for allowing a postponement, and expressing the opinion that the application and the statement that the case was likely to be settled were, in the circumstances, only a roundabout method of obtaining a postponement. He accordingly entered decree *nisi* dismissing the plaintiff's action with costs. He also ordered that the claim in reconvention be "similarly" dismissed.

The appeal is from the order refusing the application for an adjournment. It was urged, under the provisions of section 84 of the Civil Procedure Code, that if the plaintiff failed to appear and the defendant consented to an adjournment of the action being heard, the Court was bound to grant the adjournment and appoint another day for the action to be heard, giving notice thereof to the plaintiff.

If the plaintiff or his counsel had also been present, there is no doubt of the power of the Court to refuse the adjournment. Because his counsel was discourteous to the Court, merely signing the motion and keeping away from the Court, it is argued that he could obtain by this conduct what he could not otherwise obtain. It seems to me that those provisions of section 84, upon which the appellant relies, are subject to the general powers of postponement given by section 82 of the Code.

In my opinion, the appeal must fail, and it is therefore dismissed with costs.

We were asked to amend the decree, since there is no reference therein to the dismissal of the claim in reconvention. We were prepared to do so in order to bring it into conformity with the judgment, but counsel before us were not agreed on the meaning to be given to the word "similarly" in the order dismissing the claim in reconvention. Did it mean that that claim was dismissed with costs? In view of this disagreement, the learned District Judge will be the best person to answer this question, and it is open therefore to the parties to apply to him to bring the decree into conformity with the judgment, if either of them so desires.

SOERTSZ A.J.—I agree.

*Appeal dismissed.*