

1971 *Present : Sirimane, J., and Samerawickramo, J.*

D. K. RANASINGHE, Appellant, *and* N. A. ALGIN and another,
Respondents

S. C. 49/69 (Inty)—D. C. Badulla, 4298/B

Civil procedure—Postponement—Application for postponement on behalf of a party on basis of a medical certificate—Finding by Court on a subsequent date that the medical certificate was not genuine—Whether order for ex parte trial may be made.

Where, when a case comes up for trial, the defendant is absent and his Proctor tenders a medical certificate about the defendant's illness and applies for a postponement, but there is no agreement as to what should take place if it is found at some future date that the medical certificate is not genuine, an order for *ex parte* trial should not be made if it is found on a subsequent date that the medical certificate was not genuine.

APPEAL from an order of the District Court, Badulla.

Bala Nadarajah, with *K. K. Pathmanathan*, for the 1st defendant-appellant.

Nimal Senanayake, with *Miss S. M. Senaratne*, for the plaintiff-respondent.

2nd defendant-respondent unrepresented.

September 10, 1971. SIRIMANE, J.—

This was a divorce case in which the plaintiff (who is the husband), sued his wife, the 1st defendant-appellant, for a divorce on the ground of adultery.

After several dates, when the case came up for trial on the 3rd of October, 1968, the 1st defendant was absent and her Proctor moved for a date tendering a medical certificate from an Ayurvedic Physician. He did *not* say that in the event of his application being refused he would be unable to carry on with whatever evidence he had, or that he was not appearing.

When the genuineness of the medical certificate was challenged, the Court issued a commission to the J. M. O. to examine the 1st defendant. Such a step is really effective only if the J. M. O.'s finding can be ascertained on the very same day. There was no agreement as to what should take place if it was found at some future date that the medical certificate was in fact a frivolous one.

The learned District Judge having issued this commission, held an inquiry on the 13th of November, 1968, and by his Order dated 20th November, 1968, held that the medical certificate tendered by the 1st defendant was not a genuine one. He then fixed the case for *ex parte* trial.

In the circumstances of this case we are unable to say that the 1st defendant agreed either expressly or by implication to her defence being struck off in the event of her application for a postponement being refused. We set aside the Order setting down the case for *ex parte* trial. The case can now be fixed for trial on a date as early as possible, as this is a very old case.

The order for costs made in favour of the plaintiff on the 20th of November, 1968 will stand.

There will be no costs of this appeal.

SAMERAWICKRAME, J.—I agree.

Order set aside.