

*Present* : Schneider and Garvin JJ.

1923.

RAMANADEN CHETTY *v.* FERNANDO *et al.*

161—D. C. Colombo, 15,415

*Failure of defendant to pay costs of the day before next date of trial—  
Agreement that judgment should be entered in plaintiff's favour  
in failure of such payment.*

The defendants failed to pay the costs of the day Rs. 75, and a further sum of Rs. 6.50 to the plaintiff "before the date of trial." On the date of trial defendants tendered this sum, but plaintiff refused to accept it, and claimed judgment in terms of the agreement. The District Judge held that defendants were under no obligation to carry out their part of the agreement, inasmuch as the plaintiff's proctor had failed to file a memorandum of the cost of stamps, or render a bill to defendants.

*Held*, that plaintiff was entitled to judgment in terms of the agreement.

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THE facts are set out as follows in the petition of appeal:—

On October 12, which was a trial date in the above case, the defendant-respondents' proctor filed a motion applying for a postponement of the trial date, consenting to pay Rs. 75 as appellant's costs of the day before the next date of trial, and agreeing to the entering of judgment in appellant's favour in failure of such payment. The appellant consenting, the District Judge made order postponing the trial to October 23, 1922, with the condition that, if the respondent failed to pay Rs. 75 as appellant's costs before the said postponed date of trial, judgment should be entered for plaintiff as prayed for, with costs.

On October 18 the respondent made another application for a further postponement for the alleged reason that his counsel was not able to be present on October 23. The appellant opposed the said application, but the District Judge granted the application postponing the date of trial to November 2, 1922, and without vacating the order for costs made on the previous date made the further order with the respondents' consent that if the respondents failed to pay the costs of the previous date and any further stamps incurred before the said November 2, judgment should be entered for the plaintiff as prayed for, with costs.

The respondents failed to pay the Rs. 75 before October 23, or the Rs. 75 and the further stamp costs before November 2, whereupon the appellant on November 2 made the application that order be made for entry of judgment in favour of the appellant as agreed.

The respondent resisted the said application on the ground that the appellant had not given him previously to November 2 a memorandum showing the further stamp costs, and on the further ground that he had brought the money for payment on that day.

The learned District Judge made order holding that the non-payment was due to the appellant's default, and made order on the said November 2 disallowing the application of the appellant.

*H. J. C. Pereira, K.C.* (with him *Rodrigo* and *H. V. Perera*), for plaintiff, appellant.—The defendants agreed to pay Rs. 75 and cost of stamps before next date of trial. In default they consented to judgment being entered against them. The defendants failed to pay the costs before the next date of trial. They tendered them only a few minutes before the trial. They could have ascertained the cost of stamps by looking at the journal entries. The learned District Judge should have acted on the agreement and entered judgment against the defendants when they made default.

*Croos-Da Brera*, for defendants, respondents.—The parties understood the order to mean that the costs were to be paid before trial. The defendants were therefore within time. The plaintiff has

himself made default in not submitting a statement of costs incurred. It was his duty to do so. There is no section of the Code which justifies judgment being entered on a consent order such as this. Even if the defendants are to be bound down to such an order, it is submitted that the Court can grant equitable relief. The consent is something in the nature of a contract. A judgment is a contract of record. There is nothing to differentiate it from an ordinary contract, and the parties are entitled to have recourse to the usual equities. The consent to judgment is in the nature of a penalty. The primary obligation is to pay a small sum on account of costs, and the penalty is harsh and excessive as the judgment is for Rs. 4,000. Under these circumstances the Courts can always grant relief. The plaintiff is only entitled to actual damages sustained by the default.

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February 7, 1923. SCHNEIDER J.—

The only point involved in this appeal is whether the plaintiff is to have judgment because the defendants failed to pay a sum of Rs. 75, and a further sum of Rs. 6.50 to the plaintiff as costs "before the date of trial." The trial was fixed eventually for November 2, 1922. On that day the defendants tendered this sum, but the plaintiff refused to accept it and claimed judgment in terms of the agreement of October 12, 1922, and October 18, 1922.

The learned District Judge was of opinion that the defendants were under no obligation to carry out their part of that agreement, inasmuch as the plaintiff's proctor had failed to file a memorandum of the cost of stamps, or render a bill to the defendants or their proctor, stating the exact amount that had to be paid. It appears to me that no such obligation lay upon the plaintiff's proctor in this case. The sum of Rs. 75 was agreed upon as costs. The further sum of Rs. 6.50 could have been ascertained by looking into the record. Apart from this, it was the defendants' duty to have tendered the money, and if they had done so the precise amount could have been ascertained when the money was tendered.

I think the plaintiff is entitled to the benefit of the order consenting to judgment in his favour. I would therefore set aside the order of the learned District Judge appealed from, postponing the case for trial *sine die*, and give judgment for the plaintiff as prayed for, with costs. Plaintiff is also entitled to costs of this appeal.

GARVIN J.—I agree.

Set aside.