

Present : Wood Renton C.J. and De Sampayo J.

1917.

SCRIVEN & CO. v. PERERA.

78—D. C. Colombo, 46,417.

Civil Procedure Code, s. 406—Leave to institute fresh action after paying costs to defendant—Fresh action instituted before paying costs—Subsequent payment of costs.

Where a plaintiff was allowed to withdraw an action with liberty to institute another on condition that he paid the defendant his costs before instituting a fresh action, and where the plaintiff instituted a fresh action and subsequently paid the defendant his costs of the previous action,—

Held, that the action was not maintainable, as the condition was not complied with.

*Abdul Aziz Molla v. Ebrahim Molla*¹ disapproved of.

THE facts are set out in the judgment.

A. St. V. Jayewardene and H. H. Bartholomeusz, for defendant, appellant.

Drieberg, for plaintiffs, respondent.

August 6, 1917. WOOD RENTON C.J.—

This appeal raises an interesting and hitherto unsettled point of practice. The plaintiffs sued the defendants in D. C. Colombo, No. 43,740 for damages for breach of contract. On June 27, 1916, they moved, under section 406 of the Civil Procedure Code, for leave to withdraw that action and to institute another. The following order was made on the motion: "Allowed on condition the plaintiffs pay the defendant his costs of this action before instituting

¹ (1904) I. L. R. 31 Cal. 965.

1917.
 WOOD
 RENTON C.J.
 Scriven & Co.
 v. Perera

a fresh action." The plaint in the fresh action, with which we are now concerned, was filed on October 26, 1916. The costs of D. C. Colombo, No. 43,740, were paid partly on December 23, 1916, and as regards the residue on January 29, 1917. In these circumstances the question arises, and has been expressly raised by a plea in the answer, whether the present action is maintainable, in view of the failure of the plaintiffs to comply with the condition imposed by the District Court in its order of June 27, 1916. The learned District Judge has answered that question in the affirmative, on the authority of a decision of the High Court of Calcutta in *Abdul Aziz Molla v. Ebrahim Molla*¹ under section 373 of the old Indian Code of Civil Procedure, which is practically identical with section 406 of our own Civil Procedure Code. In that case the Judges of the High Court of Calcutta purported to follow the practice in England. There is, however, this wide difference between the English practice and our own, and, for that matter, the Indian also, that Order XXVI., rule 4, of the Rules of the Supreme Court of Judicature enacts by necessary implication that the failure of a litigant to pay previous costs in such a case as the present is not necessarily a fatal irregularity. With all respect, I am not prepared to accept *Abdul Aziz Molla v. Ebrahim Molla*¹ as an authority that ought to be applied in Ceylon. In my opinion the effect of section 406 of the Civil Procedure Code is to make any such condition as to the prepayment of the costs of a previous action, as we have here to do with, a condition precedent to a fresh action being instituted. To construe the law in any other sense might work great practical hardship to individuals, and would certainly embarrass the business of the courts of first instance. In the present case, however, the plaintiffs are, I think entitled to some indulgence. The point is now taken for the first time, and the costs were paid without any formidable delay.

I would set aside the order appealed from on the issue of law as to whether or not the action can be maintained, and send the case back in order that the District Judge may consider whether or not upon the merits, and in view of all the circumstances, the plaintiffs should be allowed to proceed with the present action as if it had been duly instituted, or whether, in order to preserve any right that the defendant may have to set up a plea of prescription, the present action should be dismissed, with leave to institute another. The defendant is entitled in any event to the costs of this appeal, and also of the argument in the District Court on the issue of law. All other costs I would leave to the discretion of the District Judge.

DE SAMPAYO J.—I agree.

Set aside and sent back.

¹ (1904) I. L. R. 31 Cal. 965.