[FULL BENCH.] 1922.

Present: Ennis, De Sampayo, and Schneider JJ.

MAMNOOR *v.* MOHAMED.

377—C. R. Colombo, 81,233.

Postponement on application of defendant—Order that if costs be not paid before next date, judgment would be entered for plaintiff—Power of Court to make order without consent of parties—Civil Procedure Code, ss. 143 and 821.

Apart from consent of parties, the Court has no power to order when granting an adjournment that if costs be not paid before the adjourned hearing, judgment will be entered against the party failing to pay costs.

THE facts are set out in the judgment of Schneider J.

Keuneman (with him *Schokman*), for defendant, appellant.—The order of the Commissioner is not authorized by the Code. He could have ordered that the costs should be paid before the next date of trial, and if the costs were not paid, the plaintiff could have issued writ. But he had no authority to add a further condition that if the costs were not paid before the next date of trial, judgment should be entered in favour of the plaintiff. *Ran Etana v. Appu*[1] and *Summanasara Unnanse v. Seneviratne.*[2] It has been held that he could impose this condition if the defendant consented (*Pieris v. Wijesinghe*[3]). The words of section 143 of the Code are not wide enough to authorize such an order. The Judge could impose terms about the amount of costs, or name the party by whom they are to be paid.

[SCHNEIDER J.—Section 143 has no application. In Courts of Requests, section 821 of the Code applies.]

Even this section does not authorize a dismissal of the action. The only authority given is to make an order about the costs. The learned Commissioner should have heard the action, and, if necessary, taken evidence, before entering judgment.

Croos-Dabrera (with him *Peri Sunderam*), for the plaintiff, respondent.—Section 143 of the Code is wide enough to enable a Judge to make an order which has been entered in this case. It gives him full power to make any order as to costs. In this case he has imposed a condition that if the costs are not paid before the next date of trial, judgment should be entered in favour of the plaintiff. No objection was taken by the defendant to this order. Under section 156 of the Indian Code, which is the same

[1] *(1901) 4 N. L. R. 185.* [2] *(1913) 15 N. L. R. 375.*
[3] *1 C. L. R. 86.*

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as section 143 of our Code, it has been held that it was competent to a Judge to impose a condition that the hearing on the adjourned date would be conditional on the payment of costs. (*Dhanu Ram Mahto v. Murli Mahto.*[1]) In the case of *Virabhadrappa v. Chinnamma,*[2] it was conceded that it was open to a Judge to make a specific order making the payment of costs a condition precedent to the hearing of the evidence. The Indian cases clearly show that the construction put upon the Code recognizes the right of a Judge to make the order appealed from. Section 143 speaks of "such order as it thinks fit with respect to the costs occasioned by the adjournment," but this is an action in the Court of Requests, and is governed by section 821 of the Code. This section is wider in its scope. It clearly empowers the Commissioner to adjourn the trial "upon such terms as the circumstances of the case may render necessary." This section is based on the English rules and orders, under which it was open to a Judge to make any order he thought fit. It has been held that the Appellate Court should not interfere with the discretion exercised by a Judge in making an order of postponement. There may be cases where one party may be applying for a date with a view to harass and annoy the other party, and the latter not in a position to recover his costs. In such cases the Judge should be given a discretion to impose any terms he thinks proper regarding the payment of costs or to grant the adjournment subject to certain conditions.

Keuneman, in reply.

July 11, 1922. ENNIS J.—

This is a reference to a Court of three Judges on a point of law, viz., whether a Commissioner of Requests could lawfully make an order under section 821 of the Civil Procedure Code (which enacts the special procedure for Courts of Requests) when granting an adjournment that if costs be not paid before the adjourned hearing, judgment would be against the party failing to comply.

In the present case it does not appear that the order was made by consent as in the case of *Pieris v. Wijesinghe* (*supra*). I can see no objection to a case being dismissed by consent.

In the case of *Ran Etana v. Appu* (*supra*) it was held that a Court of Requests could not make such an order, and in *Summanasara Unnanse v. Seneviratne* (*supra*) it was held that a District Court could not make such an order under section 143 of the Civil Procedure Code.

Section 821 of the Code enacts that a Court of Requests may make an order adjourning the trial of an action upon such terms as the circumstances of the case render necessary. Under the Code an action may be dismissed on admission, on default of appearance,

[1] *I. L. R. 31 Cal. 566.* [2] *I. L. R. 21 Mad. 403.*

or after hearing, but there is no provision for an action being dismissed for non-payment of costs. Section 827 expressly enacts that the Commissioner "shall hear and determine the action according to law," and there is no law which enables him to avoid such a hearing and determination on a failure to pay costs. No local authority for such a proceeding has been cited to us, and we are unable to examine the English case of *Boucicault v. Boucicault* given in the reference, as we have not got the report in which it is contained (*4 Times Reports, 195*). So we are not in a position to know what the order in that case was.

I see no occasion to follow the expression of opinion found in the Indian cases, as this case depends upon an interpretation of the Ceylon Code.

In the circumstances, I am of opinion that the Court had no jurisdiction to make the order and pass judgment without hearing all the evidence available. I would accordingly set aside so much of the order appealed from as makes the costs payable by a particular date, and I would set aside, with costs, the decree appealed from, and send the case back for further hearing.

DE SAMPAYO J.—

The point of procedure referred to this Bench has arisen in a Court of Requests case, but I think it is as well to consider the question as a whole. In *Summanasara Unnanse v. Seneviratne* (*supra*), which was a District Court case, Lascelles C.J., who delivered the judgment of the Court, observed that to enable a Judge to dismiss an action without hearing it, he should act under some specific power given to him under the Code. This is the principle governing this matter, and it applies equally to a case where judgment is to be entered for the plaintiff if the defendant makes default in the payment of the costs in accordance with a previous order. The question then is whether the Code provides for the exercise of such a power. Section 143 empowers the Court, when fixing a day for the further hearing of the action, to make such order as it thinks fit "with regard to the costs occasioned by the adjournment." This has reference to the matter of costs only, and enables the Court to give costs or not to give costs, or to limit the amount as it thinks fit. It certainly does not specifically confer power to dismiss the action, or to give judgment for the plaintiff, as the case may be, if the condition of paying costs is not fulfilled. The only other section of the Code requiring attention is section 821, which has special reference to actions in the Court of Requests. It empowers the Commissioner to adjourn the trial of an action "upon such terms as the circumstances of the case may render necessary." These, undoubtedly, are larger words than those in section 143, but I do not think they have a greater significance with regard to the point under consideration. Here, too, no specific power is given to dismiss an action or

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give judgment without any hearing if some condition which the Commissioner has purported to impose has not been complied with. If a jurisdiction of this extraordinary character was intended to be conferred, the Code would have used plainer language. I, therefore, think that neither of the sections above referred to justifies such an order as was made in this case. The case of *Pieris v. Wijesinghe* (*supra*) cannot be cited as an authority to the contrary, because there I specially based my judgment on the fact that the defendant had agreed to the condition, and that the order was, in fact, a consent order. Just as a defendant may consent to judgment being entered against him at once, so he may consent to judgment being so entered at a future date, if in the meantime he has not done something. Nor can any clear guidance be derived from the Indian case (*Virabhadrappa v. Chinnamma* (*supra*)), which has been cited on behalf of the respondent. That was a decision not on section 156 of the Indian Code corresponding to our section 143, but on section 158 corresponding to our section 145. The decision was that, in the absence of a specific direction making the payment of costs, a condition precedent to the hearing of the evidence of the party in default, the failure to pay the costs was not a failure " to perform any other act necessary to the further progress of the suit for which time has been allowed " within the meaning of section 158. The other Indian case cited is *Dhanu Ram Mahto v. Murli Mahto* (*supra*). There the subordinate Court had ordered immediate payment of costs as a condition of an adjournment. The Appellate Court no doubt said that in the circumstances of the case the Court might have adjourned the case to a subsequent date, and made the hearing on that date conditional on payment of the costs before that date. But the particular provisions of the Code were not analyzed or discussed, and the real point decided appears to be that sufficient opportunity was not given to the plaintiff to enable him to carry out the order of the Court and to produce his evidence. I cannot regard either of these cases as a direct authority on the question, whether a specific direction of the kind mentioned would be within the power of the Court and operative. I think we must put our own interpretation on the provisions of our Code.

I therefore agree with my learned brothers that this appeal should be allowed, with costs, and the case sent back for hearing in due course.

SCHNEIDER J.—

In this action the plaintiff claimed a sum of Rs. 230 as balance of salary due to him. The defendant denied this claim, and counter-claimed a sum of Rs. 296·74 as due to him. In a replication the plaintiff traversed the denials as to his claim, and denied the defendant's counter-claim.

The trial was fixed for December 1, 1921. On that day the record is: "Parties present and ready. Mr. Nagalingam, for defendant, states he is not ready, as his witnesses have not appeared. He asks for warrants against them. Issue warrant for December 5. Defendant to pay Rs. 15 costs of plaintiff to-day. If not paid before December 5, judgment for plaintiff. Trial, December 5."

The record shows that the defendant had issued summons for the appearance of his witnesses, and that the summonses had been served. The defendant, therefore, was not to blame for their non-appearance at the trial on December 1, but the learned Commissioner was within his rights in ordering warrants against them, and in casting the defendant in the costs of the day, for the reason that the plaintiff was not to suffer for the default of the defendant's witnesses.

Strangely, instead of the Commissioner's order being carried out that warrants should issue against the defendant's witnesses, it would appear that on December 2 subpœnas were issued for the attendance of the defendant's witnesses on December 5. As to the happenings on this day there is no record that the parties were present, but there is a record that the same counsel appeared, and that the plaintiff moved (that, I take it, means plaintiff's counsel) that "he obtain judgment against defendant, as latter tenders last day's costs to-day only, and quotes *Pieris v. Wijesinghe* (*supra*)."

The Commissioner records that that decision appears to govern the case. He, therefore, ordered judgment to be entered for the plaintiff, with costs, and for defendant's claim in reconvention to be dismissed. He also records that defendant's counsel desires him to record that the money was tendered on that day, but that the plaintiff had refused to accept it. It is not disputed that the money was tendered, but it appears that the plaintiff's counsel contended that the tender was too late, as the order was for payment before that date. The defendant has appealed from the order of the Magistrate of December 5. The appeal raises a simple question, but one of much importance in practice.

The plaintiff's counsel and the Commissioner were wrong in thinking that the case of *Pieris v. Wijesinghe* (*supra*) had any application to this case. It was also a Court of Requests case, and was decided by my brother De Sampayo. But the facts are different. There the defendant's application for an adjournment of the trial was opposed by the plaintiff, and the defendant's counsel agreed to an order being made that the plaintiff should have judgment unless his costs were paid before the adjourned date of trial. The Commissioner thereupon entered an order according to this agreement. As my brother pointed out in his judgment, that "was a consent order," and consequently bound the defendant. He, therefore, thought that the case of *Summanasara Unnanse v. Seneviratne* (*supra*) did not apply.

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The facts of the latter case were these. It was a case in the District Court of Kalutara. The plaintiff moved to amend his plaint; when that was allowed, the defendant stated that his answer would have to be amended in consequence, and applied to have his costs deposited in Court before the next day of trial. The District Judge thereupon made order that, in the event of the costs not being deposited before the next day of trial, the plaintiff's action would be dismissed, with costs. Against this order the plaintiff appealed. Lascelles C.J. held that the District Judge had no jurisdiction to make the order as to the dismissal of the action. He said that "no section of the Code had been cited which invested the District Judge with any such power, and that he thought that in the case of an order finally dismissing the action, it was necessary that a Judge should act under some specific power given to him under the Code."

There is one good reason why this case should not be regarded as an authority which should wholly govern the decision of the present case, and that is the fact that it was a case in a District Court, whereas this is a Court of Requests case. That was an adjournment granted under the provisions of section 143 of the Civil Procedure Code, whereas in this case the order for the adjournment was under section 821. But that decision is useful as pointing out that the dismissal of an action must be justified under some specific power conferred upon a Judge by the Civil Procedure Code.

The only section under which the Commissioner could make the order for adjournment in this case is section 821. The words of that section material to this case are these: "Whenever the Commissioner shall be satisfied that either party is not ready to proceed to trial by reason of the absence of any material witness, it shall be lawful for the Commissioner to adjourn the trial of the action to a time fixed by the Commissioner *upon such terms as the circumstances of the case may render necessary*." Even if the words "upon such terms as the circumstances of the case may render necessary" be considered by themselves, I am of opinion that they are insufficient to empower a Court to make an order that unless the costs of the adjournment are paid by a stated date, the action is to be decided in favour of the plaintiff or the defendant. But, on the contrary, there is a very good reason why those words should not be given that interpretation. It is this. The Code has express provisions as to circumstances under which an action may be disposed of. An action may be disposed of (1) upon the admissions of the parties (sections 809 to 812 and 823); (2) upon the default of appearance of parties (section 823); and (3) after trial. In the last of these cases it is enacted that "the Commissioner shall hear and determine the action according to law (section 827)." What is meant by according to law is indicated in section 184 of chapter XX. That section is applicable to Courts of Requests (section 830).

It was argued that the order in this case might be regarded as one made under section 143 as well as under section 821. That argument is not sound. Part X. of the Procedure Code provides a special procedure for Courts of Requests, and by section 801 that special procedure must be taken as limiting and controlling the general provisions, so far as such provisions are expressly or impliedly applicable to Courts of Requests. The general provisions are to apply to Courts of Requests whenever they are not inconsistent with the special procedure. Sections 821 and 822 provide a special provision as the adjournments. Hence, the general provisions on the same subject in sections 143 to 145 cannot apply to Courts of Requests. Again, the language of the two sections is not identical. Under section 143 in granting an adjournment the Court "may make such order as it thinks fit with respect to the costs occasioned by the adjournment." I have already quoted the words of the other section (821). It was also argued that section 143 of our Code was identical with section 156 of the now repealed Indian Code of Civil Procedure, and that it has been held that it was competent for a Judge to impose a condition that an action shall be disposed of in a particular way, unless costs ordered are paid by a given date. Two cases said to be reported in *Indian Law Reports, 36 Cal. Series 566 and 21 Mad. Series 403*, were cited. Whatever be the view taken in India, I am unable to uphold the contention that it is competent for a Judge to impose such a condition. Where a penalty may be imposed for non-payment of costs, the Code makes express provision (sections 416–418).

It was argued that a Judge should have the power to impose a condition that the action should be decided in a particular way if the costs are not paid by a named date. To this there are many answers which I need not enumerate. I do not think he should be given such a power. But indirectly he has that power in his hands as shown in the case of *Pieris v. Wijesinghe* (*supra*) already referred to. When an adjournment is applied for, it is open to him to inquire whether the other party consents to its being granted, and if the latter party states he would agree to a postponement, only on the condition that the action shall be decided in a particular way if the costs are not paid, and the other party agrees to this, the order as to the decision of the action becomes a consent order, and will, therefore, bind him. But if a party does not consent to take an adjournment upon that condition, it is open to the Court to act under the proviso to section 821 and to proceed with the trial.

I would, therefore, hold that the learned Commissioner had no power to impose the condition that judgment should be entered for the plaintiff upon non-payment by the defendant of the costs of the day of adjournment. The order appealed from should be set aside, with costs, payable by the plaintiff both of the lower Court and of this Court.

Sent back.