

1965 Present : Abeyesundere, J., and Manicavasagar, J.

H. R. CALDERA, Appellant, and **L. S. P. PERERA**,
Respondent

S. C. 33/1964 (Inty.)-D. C. Colombo, 25702/S

Civil procedure-Postponement of trial-Condition of pre-payment of costs before a fixed date-Payment by cheque-Effect of acceptance thereof.

Parties agreed to the postponement of a case on condition that, if the costs of the day were not paid by the plaintiff to the defendant at or before 10.00 a.m. on 28th February, the action should be dismissed. On 27th February, at 1.30 p.m., the defendant's Proctor was content to receive payment by cheque.

Held, that there was due payment of costs by the plaintiff even if there was insufficient time for the cheque to be realised before 10 a.m. on the 28th February.

APPEAL from an order of the District Court, Colombo.

H. W. Jayewardene, Q.C., with N. S. A. Goonetilleke, for the defendant-appellant.

G. T. Sameramckreme, Q.C., with S. Sharavananda, for the plaintiff-respondent.

August 5, 1965. **ABEYESUNDERE, J.-**

This action was, of consent by the parties, fixed for trial on 20.1.64. On that date, it appears that Counsel for the plaintiff was unable to proceed with the trial as the plaintiff was ill. A medical certificate was submitted on behalf of the plaintiff. It was agreed by Counsel for the plaintiff and defendant that the plaintiff should pay Rs. 630/- as costs of the day at or before 10 a.m. on 28.2.64, that if that sum was not so paid, the plaintiff's action should be dismissed with costs and judgment be entered in favour of the defendant for his claim in re-convention, and that if that sum was to be paid the trial would be held on 12.3.64.

On 28.2.64 an inquiry was held by the learned Additional District Judge to ascertain whether or not the said sum of Rs. 630/- had been duly paid by the plaintiff to the defendant. Mr. Shinya, who appeared for the defendant, stated that the plaintiff had handed a cheque for Rs. 630/- drawn by the plaintiff's Proctor on his personal account on 27.2.64 at 1.30 p.m. That cheque was returned to the defendant after the conclusion of the said inquiry. At the inquiry, Mr. Shinya also stated that the delivery of the cheque was not in compliance with the order made on 20.1.64 as the cheque could not be realised before 10 a.m. on 28.2.64. At that stage the Proctor for the plaintiff undertook to pay the said sum in cash and the learned Additional District Judge made order holding that the plaintiff's Proctor's assurance to pay the said sum in cash was sufficient payment and that the trial of the action should commence on 12.3.64.

We are unable to agree with the learned Additional District Judge in regard to his view that the assurance given by the plaintiff's Proctor to pay the said sum in cash is sufficient payment, but we are of the view that the learned Additional District Judge's order to hold the trial on 12.3.64 can be upheld on the ground that there was due payment by the plaintiff to the defendant of the said sum of Rs. 630/-. It is clear from the statement made by Mr. Shinya that a cheque for Rs. 630/- had been handed by the plaintiff's Proctor to the defendant's Proctor. From that fact it is reasonable to infer that the defendant's Proctor was content to receive payment by cheque. The return of the cheque by the defendant's Proctor to the Plaintiff's Proctor did not occur till after the order was made by the Additional District Judge after the conclusion of the aforesaid inquiry. The sum due to the defendant was paid by the plaintiff's Proctor in cash on the day of the inquiry but after the order was made by the learned Additional District Judge. Mr. Shinya's statement at the inquiry did not disclose any objection to payment by cheque. It only indicated to Court that money on the cheque could not be realised before 10 a.m. on 28.2.64 as there was insufficient time to present the cheque for payment at the bank. If the defendant's Proctor was unwilling to receive payment by cheque, he should have returned the cheque in time to enable the plaintiff's Proctor to make the payment in cash within the time allowed therefor. Having regard to all the facts, we are unable to agree with the Counsel for the defendant-appellant that there has been no due payment of the costs awarded to the defendant-appellant. We uphold the order of the learned District Judge to hold the trial on 12.3.64 not for the reason given by him in his order but for the reason given by us in this judgment. We direct that the trial of this action be proceeded with in due course. Having regard to all the circumstances in this case, we are of the view that no costs should be awarded to the plaintiff-respondent.

MANICAVASAGAR, J.-I agree.

Appeal dismissed.

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