

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

Mahadura Chandradasa Thabrew alis
Mahadura Chandrasiri Weerawardena,
Allen House, No 47, Upostharama Road,
Pinwatta, Panadura.

Plaintiff

Vs.

C.A. No. 360 / 2000 F

D.C. Panadura No. 1263 / L

Sirisena Liyanage,
No. 19/4, Kuruppu Mawatha,
Gorakapola,
Panadura.

Defendant

And Now Between

Sirisena Liyanage (deceased),
Manoj Priyankara Liyanage
No. 19/4, Kuruppu Mawatha,
Gorakapola,
Panadura.

Substituted Defendant Appellant

Mahadura Chandradasa Thabrew alis
Mahadura Chandrasiri Weerawardena,
Allen House, No 47, Upostharama Road,
Pinwatta, Panadura.

Plaintiff – Respondent

BEFORE : UPALY ABEYRATHNE, J.

COUNSEL : P.K. Prince Perera with Asantha
Dissanayake for the Substituted Defendant
Appellant
V. Thevasenathipathi with L. Ashan for the
Plaintiff Respondent

ARGUED ON : 27.08.2013

DECIDED ON : 04.11.2013

UPALY ABEYRATHNE, J.

The Plaintiff instituted the said action against the Defendant in the District Court of Panadura seeking for a declaration of title to the land described in the schedule to the plaint. The Defendant filed an answer praying for a dismissal of the Respondent's action and for a declaration of title to the land described in the schedule to the answer.

On 12.11.1999 when the case was taken up for trial the Attorney At Law for the Defendant has tendered papers for revocation of the proxy filed by the Defendant and has filed a new proxy given by the Defendant and has moved for a date for trial. The Plaintiff has moved for costs. Accordingly the trial has been postponed subject to a prepayment of costs of Rs. 3000/- before 10.00 a.m. on 08.03.2000. The Defendant, agreeing to the said prepayment of costs of Rs. 3000/- has signed the case record.

On 08.03.2000, when the case was taken up for trial at 1.45 in the afternoon the Plaintiff has brought to the notice of Court that the costs of Rs. 3000/- has not been prepaid by the Defendant and has moved court to enter a judgment in favour of the Plaintiff. Accordingly the learned District Judge has made an order to enter a judgment in favour of the Plaintiff. Being aggrieved by the said order dated 08.03.2000 the Defendant has appealed to this Court.

The learned counsel for the Defendant Appellant submitted that the Defendant was ready to pay the costs ordered but the Plaintiff refused to accept it. I have perused the said order dated 08.03.2000 and also the previous Journal Entry dated 12.11.1999. It is seen from the said Journal Entries that on the date of trial the Defendant has obtained postponement on agreeing that if the costs of Rs. 3000/- was not prepaid before 10.00 a.m. on 08.03.2000 a judgment should be entered in favour of the Plaintiff. The defendant has signed the case record. He has admitted the said agreement. It was also an admitted fact that the Defendant has not prepaid the said cost of Rs.3000/- before 10.00 a.m. on 08.03.2000.

I have carefully examined the proceedings of the relevant dates. Both parties have been properly represented by their Attorneys at Law. The Defendant agreeing to the pre-payment of costs of Rs. 3000/- before 10.00 a.m. on 08.03.2000 has signed the case record. Hence the Defendant has no option but to make sure the pre-payment of costs before 10.00 a.m. on 08.10.2000. As pointed out in *Mamnoor vs. Mohamed (1922) 23 NLR 493* when one party applies for a postponement, it is open to the judge to inquire whether the other party consents to it being granted; if the latter says 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 former agrees to this, the order as to the decision of the case becomes a consent order, and

will therefore bind the former; but if the party seeking a postponement does not consent to that condition, it is open to the court to refuse the postponement and to proceed with the trial.

In the case of Piyaseeli vs Prematilake (1986) 1 Sri L.R. 47 Collin Thome, J. observed that "A Full Bench of the Supreme Court held in Mamnoor vs. Mohamed that "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 Defendant Appellants contention was that on the said date at 1.45 p.m. when the case was taken for trial he was ready to pay the costs ordered. It is apparent from the Journal Entry dated 08.03.2000 that at 1.45 p.m. the Defendant has sought permission of court to pay costs but the Plaintiff has not agreed to accept it. Thereafter the learned District Judge has entered a judgment in favour of the Plaintiff.

This is the common reason put forward when parties fail to comply with an order for prepayment of costs. Parties no doubt wait till the last moment to make these payments, but that is not a circumstance the Court can take into consideration, and if at the last moment they are prevented by accident or otherwise from doing so, they must be prepared to take the consequences. This rule, must, however, not be regarded as inflexible, it would have to yield in cases where performance of the agreement has become absolutely impossible. In this case it has not been shown that it had become impossible for the Appellant to comply with the terms of the agreement.

In the case of Mohideen Ali vs. Hassim 62 NLR 457, on 30th April 1959 Counsel who appeared for the defendant obtained postponement on agreeing that if the costs of the day were not pre-paid to the other side before 10 a.m. on the next trial date judgment should be entered for the plaintiff as prayed for. On the next trial date, evidence was led for the plaintiff that costs were not paid as agreed. The evidence was not contradicted by the defendant. Thereupon judgment was entered in favour of the plaintiff. It was contended in appeal that the authority of the Proctor of a party to a suit as limited by the terms of the instrument of appointment and that as section 24 of the Civil Procedure Code provided that an Advocate instructed by a Proctor represents the Proctor in Court the Advocate's authority could never be greater than that given to the Proctor.

It was held that “despite the restricted terms of the proxy, the plaintiff was entitled to judgment in his favour in terms of the consent given by the defendant's Counsel. An extension of the written authority contained in the proxy could be given orally or be inferred from the client's conduct.”

In the said circumstances I see no reason to interfere with the said order of the learned District Judge dated 08.03.2000. Therefore I dismiss the appeal of the Appellant with costs.

Appeal dismissed.

Judge of the Court of Appeal