

WALTER NUTTER & Co. v. MOHAMMADU LEBBE.

D. C., Colombo, 13,813.

1900.  
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*Default of filing answer — Purging of default and tender of answer — Placing of defendant on terms.*

The illness of the defendant is no excuse for his proctor not preparing or filing an answer in time. To justify the acceptance of an answer after its due date, it should be proved that the defendant was so ill that he could not attend to business or see his proctor.

Where the explanation of the delay is unsatisfactory, it is competent for the Court to place the defendant on terms, and in failure thereof to hear and dispose of the case *ex parte*.

THIS action was instituted for the recovery of Rs. 2,416 said to be due by the defendant to the plaintiff on shipments of certain goods which the defendant had undertaken to consign to the plaintiff in consideration of moneys advanced to the defendant on the footing of an agreement set forth in the plaint.

The summons were made returnable on the 31st July, 1900, on which day time was allowed to defendant to file answer on the 13th August. On the 13th August the time was extended to the 16th. On the 16th the court ordered the case to be called the next day. On the 17th the court recorded as follows:—" Case called; answer due yesterday. No answer filed. Mr. Vanderstraaten produces a motion for an extension of time to file answer, consented to by Mr. Narayanaswamy, who is not the proctor for the plaintiffs and who is not in Court. Motion disallowed. Case fixed for *ex parte* trial on the 7th September "

On the 7th September the defendant endeavoured to purge his default to answer by submitting an affidavit and tendered an answer for acceptance, and moved that case be fixed for trial.

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Counsel for plaintiff consented to defendant's motion, provided the defendant gave security for the amount of the plaintiff's claim.

The District Judge ordered as follows:—"The defendant's motion cannot be allowed except on terms. The defendant to give security for Rs. 2,500 on or before the 14th instant. On his giving security his motion will be accepted and the case fixed for trial. If the defendant does not comply with these terms, the case will be heard *ex parte* on the 14th instant.

"The defendant to pay the plaintiff the costs of this discussion."

Defendant appealed against that part of the order requiring security to be given, and ordering the case to be fixed for trial *ex parte* in case security was not given.

*Bawa*, for appellant.—The order as regards security appears to have been made under section 706 of the Civil Procedure Code, but the present action is not under chapter 53 of the Code. The order cannot be justified, nor would section 86 support such an order. If the judge was not satisfied with the explanation given in the affidavit of the defendant's proctor, he might have refused to accept the answer tendered, but here he agreed to accept it on terms which shows that he was satisfied with defendant's explanation as to the delay in filing answer. If the explanation be held good, the defendant ought to have been allowed to file answer unconditionally.

*De Saram*, for respondent.—The reasons given in the affidavit were not satisfactory. Hence the imposing of the terms. If the judge were satisfied, he would have granted another extension of time to file answer under section 74 (*Silva v. Babahamy*, 1 N. L. R. 145). Neither the affidavit of the defendant's proctor nor the medical certificate produced satisfactorily account for the delay.

*Bawa* replied.

BONSER, C.J.—

This is an appeal from an order of the Acting District Judge of Colombo refusing an application for extension of time to file answer except upon certain terms, the terms being that the defendant should give security for the amount of the claim. The action was commenced on the 3rd July of this year. The defendant appeared on the 31st July, and the 13th August was fixed as the date on which he was to put in his answer. On the 13th August, by consent of the plaintiff, the judge extended the time for filing answer to the 16th. On the 16th the case was

called on, but the answer was not ready, and the Additional District Judge, who was then sitting, and before whom it came, ordered the case to stand over till the next day. On the 17th the proctor for the defendant moved for an extension of time, stating that the motion was consented to by a gentleman who was not the plaintiff's proctor on the record. The District Judge disallowed the motion and fixed the case for *ex parte* trial on the 7th September. No step was taken by the defendant between the 17th August and the 7th September, although this Court has held that a defendant might in a case like this come forward with an answer and move to have it accepted. In such a case, if the Court was satisfied with the reasons for the answer not being presented at the proper date, and was also satisfied that the defendant had used due diligence to get his answer ready for filing, the judge might extend the time, notwithstanding he had made an order for *ex parte* hearing. As I said before, no step was taken during all this time by the defendant. But on the 7th September, the day fixed for the *ex parte* hearing, the defendant's proctor produced an answer and an affidavit made by himself, stating the reasons why the answer was not filed on the 16th August, and moved that the answer be allowed to be filed and a day fixed for the trial *inter partes*.

The reasons given by the proctor in his affidavit are these: "Owing to the illness of the defendant, who was ill with fever, I was unable to get full particulars of his defence to file answer till the 16th August. On the last-mentioned date the answer was not ready owing to the continued illness of the defendant." But the proctor does not say when the defendant became able to attend to business, and when he got from him particulars for the answer. He produced at the same time a certificate from a medical practitioner, dated the 7th September, certifying that the defendant had been "confined to his room for the last four weeks with a big carbuncle on the back. He is a little better now, but is still unfit to leave the house."

According to the certificate the defendant had been confined to his room since the 11th August, and was still unable to leave his room on the 7th September. He says nothing about the defendant being ill with fever, as the proctor stated he was, and I consider the affidavit quite unsatisfactory. There is no statement that this defendant was so ill that he was unable to see his proctor, or that he was unable to attend to business, though he could not leave his room. It seems to me that the affidavit does not satisfactorily explain the long delay in the preparation of the answer. The District Judge was apparently also not satisfied

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with it, and, therefore, he placed the defendant on terms. He said in effect, "I have fixed the case for *ex parte* hearing, and it must be so heard unless you choose to accept the terms I impose, and which plaintiff's counsel is willing to accept." I cannot say that it was unreasonable on the part of the District Judge to impose this condition on the acceptance of the answer. If the defendant was unwilling to accept it, then the case would have gone on to trial *ex parte*, and the defendant would then have another opportunity, when he appeared to the notice to make the decree absolute, to show cause why the decree ought not to be made absolute.

But I am of opinion that he has not made out any case at present for our interference.

BROWNE, A.J.—I agree.

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