

PAKIR MOHIDIN v. MOHAMADU CASIM.

D. C., Galle, 5,643.

1900.

October 16.

*Practice—Failure to get ready for trial—Ex parte trial—Application to vacate judgment—Negligence of proctor—Inadmissibility of affidavit sworn to before a Justice of the Peace, who was defendant's own proctor.*

Where defendant, after filing answer, took no steps to get ready for trial, so that the case proceeded *ex parte* and a decree *nisi* was entered against him, and he applied a fortnight afterwards to vacate the judgment on the ground that he was not present in court when the date of trial was fixed, and that his proctor's clerk subsequently gave a date which he mistook for the 27th July, whereas the proper date was the 27th June, with the result that he failed to instruct his proctor in due time,—

*Held*, it was the duty of his proctor to have informed him of the proper date of trial and to have asked for instructions, and that as the proctor did not appear to have done his duty, he was to blame for the absence of the defendant and the defendant must suffer for the fault of his proctor.

An affidavit sworn by the defendant before his own proctor is not, according to the practice of English Courts, admissible in evidence, and such practice should be followed here.

THIS was an appeal from an order of the District Judge refusing to set aside a decree *nisi*. It appeared that the action was filed on the 27th October, 1899, against the defendant under

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section 247 of the Civil Procedure Code; that on the 10th January following the defendant filed his proxy, and a week afterwards his answer. The trial was fixed for the 27th June, on which day the defendant failed to appear when the case was called. His proctor having withdrawn from the case for want of instructions from the defendant, the case proceeded *ex parte*, and a decree was entered against him on the same day.

On the 5th July the proctor for the defendant presented a petition praying that the judgment signed against him be vacated and a new trial had, on the ground that the defendant had mistaken the date of trial.

The defendant's petition was supported by an affidavit sworn to before his own proctor, Mr. N. Dias Abeyesingha, who is a Justice of the Peace.

The District Judge refused the defendant's application.

Defendant appealed.

*Bawa*, for defendant, appellant.

*H. J. C. Pereira*, for respondent.

16th October, 1900. BONSER, C.J.—

The defendant is a trader residing in the Galle Fort. The action was commenced on the 27th October, 1899, and was an action under section 247 of the Code by an execution-creditor against a successful claimant, who resisted the execution of a decree. On the 10th January, 1900, the defendant filed his proxy and a week afterwards his answer. On the latter day the trial of the action was fixed for the 27th June, which gave more than five weeks to the parties to prepare their case. When the case was called on, the defendant's proctor appeared and said he had no instructions whatever from his client, and that he withdrew from the case. Thereupon the case proceeded *ex parte* in the usual way, and a decree was entered up on the same day. On the 5th July, nearly a fortnight afterwards, the proctor for the defendant presented a petition praying that the judgment be vacated and a new trial had, on the ground that the petitioner had mistaken the date of trial. This petition was supported by an affidavit made by the defendant.

This affidavit ought not to have been received by the District Judge, for it was sworn before the deponent's own solicitor, Mr. Abeyesingha. The practice in England has been uniform, that an affidavit sworn under such circumstances will not be received, and we think that the English practice should be followed here, and I have in previous cases so held.

The explanation given by the defendant of his mistake is this. He was not present in Court when the date of the trial was fixed. Subsequently, he asked his proctor's clerk, and he gave a date which he mistook for the 27th July, whereas in fact it was the 27th June; that "a day after that he was in Colombo, when " he was informed by his proctor that judgment had been entered " against him in his absence, and he forthwith took steps to have " the judgment vacated."

The District Judge says that he is not satisfied with this affidavit, and I think if he had been satisfied with it, he would have been too easily satisfied. Nothing could be vaguer or more unsatisfactory. No explanation is given how it was that no preparations had been made for the trial of the case on the part of the defendant. No list of witnesses was filed, apparently no steps whatever were taken in the case. The defendant does not say what occurred at the interview between him and the clerk; and I must say that it seems strange to me that, if there was a *bonâ fide* intention to defend this action, no steps were taken by the defendant's proctor in the matter. It does not appear from the affidavit what communications took place between the proctor and his client, the defendant. The proctor knew that the trial was coming off on the 27th June, and I cannot find any excuse for a proctor so forgetful or neglectful of the interests of his client as to fail to inform him of the date of a trial which was rapidly approaching, or even to ask for instructions in the matter. If the proctor did not do his duty, he is to blame for the absence of the defendant, and the defendant must suffer for the fault of his proctor.

I see no reason whatever for reversing the judgment of the District Judge.

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