

1952

Present : H. A. de Silva J.

ADDITIONAL CONTROLLER OF ESTABLISHMENTS,
Appellant, and CORNELIS FERNANDO, Respondent

S. C. 776—Workmen's Compensation, C 30/7434/45

Workmen's Compensation Ordinance (Cap. 117), s. 54—Regulation 30—Scope of discretionary power of Commissioner—Decree nisi entered under Civil Procedure Code, s. 84—Power of Commissioner to set it aside ex parte.

Although, by virtue of section 30 of the Regulations made under section 54 of the Workmen's Compensation Ordinance, some discretion is vested in the Commissioner in the application of the provisions of the Civil Procedure Code, the Commissioner is not entitled to set aside a decree *nisi*, which was entered under section 84 of the Civil Procedure Code, without due notice being given by the plaintiff to the defendant of the application to set aside the decree *nisi*. He cannot make an order *ex parte* where the legal procedure requires that the order setting aside the decree *nisi* should be made *inter partes*.

APPEAL from an order made by a Deputy Commissioner for Workmen's Compensation.

D. Jansze, Crown Counsel, for the respondent appellant.

M. A. M. Hussein, for the applicant respondent.

Cur. adv. vult.

February 8, 1952. H. A. DE SILVA J.—

This is an appeal from an order made by a Deputy Commissioner for Workmen's Compensation, setting aside a decree *nisi* entered by him dismissing the application of the applicant-respondent.

The facts briefly are these:—The applicant-respondent made an application for compensation and the appellant, the Additional Controller of Establishments, was made respondent to the application. Mr. R. L. Nelson was appointed by the applicant by writing as his representative. The inquiry was taken up on November 28, 1950, on which date the applicant was present with his approved representative, namely, Mr. Nelson. The respondent was represented by Crown Counsel. On that day the applicant applied for a date which was granted. On February 19, 1951, the inquiry was taken up. The applicant and his representative were present. The respondent was represented by Crown Counsel. The matter was partly heard and the inquiry was adjourned to April 17, 1951. The matter again came up for inquiry on April 21, 1951, on which date the applicant was present and Crown Counsel representing the respondent was also present. The applicant obtained an adjournment of the inquiry by paying taxed costs. The

matter again came up for inquiry on May 19, 1951, on which date both the applicant and his approved representative were present and also Crown Counsel appearing for the respondent. The inquiry proceeded and was adjourned for June 2, 1951. On June 2, 1951, the parties were present and the inquiry proceeded. On that day the inquiry was adjourned for June 20, 1951. On June 6, 1951, Mr. Nelson, the representative of the applicant, made an application for a postponement as he had to attend the Colombo South Magistrate's Court on June 20, 1951. With the consent of the Crown Counsel the inquiry was adjourned for July 4, 1951. It must be noted that this application for an adjournment was made by the applicant's representative which was granted. On July 4, 1951, when the matter was taken up for inquiry, both the applicant and his representative were absent. Crown Counsel appearing for the respondent was present. He did not admit the claim nor did he consent to an adjournment. Thereupon, the Deputy Commissioner passed decree nisi dismissing the application with costs. His order runs thus, "I pass the decree nisi dismissing the application with costs". On the same date, namely July 4, 1951, the Deputy Commissioner entered the decree nisi giving the applicant twenty-one days within which to show cause against the decree nisi being made absolute. On July 25, 1951, the following record has been made by the Deputy Commissioner: "Mr. Nelson present. Respondent absent. Two affidavits have been submitted. It appears that the applicant has been in hospital since June 21, 1951, and that he did not receive notice of the inquiry. In the circumstances I set aside the decree nisi. This matter should be refiled for inquiry." It is against this order that the respondent has appealed. It will be noticed from the record above quoted that the respondent was absent when this order was made. In the petition of appeal filed it is stated that the applicant-respondent's representative handed in at the office of the respondent-appellant on July 25, 1951, at about 4 p.m. a letter marked A5 to which was attached a document marked A6. A5 runs thus, "Sir, I beg to attach a copy of my further affidavit dated July 25, 1951, submitted to the Commissioner, to have the decree nisi set aside, signed Cornelis Fernando". The document attached to A5 is A6 which is an affidavit affirmed to by Cornelis Fernando. In this affidavit he has referred to an affidavit of July 13, 1951, in which he is alleged to have explained his failure to attend the inquiry fixed for July 4, 1951. He further says in this affidavit that he received no fresh notice intimating to him the next date of inquiry. He has also stated that he entered hospital and that his representative's letter did not reach him.

It is contended by appellant's Counsel that the order made by the Deputy Commissioner was wrong for various reasons. He contends firstly, that no notice of the application to set aside the decree nisi was served on the appellant before 4 p.m. on July 25, 1951. As a result of the notice not having been given in time to the appellant, he was not in a position to be present before the Deputy Commissioner on July 25, 1951, to show cause against the decree nisi being set aside. Secondly, the decree nisi became automatically absolute on July 25, 1951.

The procedure to be followed is provided by section 30 of the Regulations made in pursuance of section 54 of the Workmen's Compensation Ordinance (Cap. 117). Provisions of various chapters of the Civil Procedure Code including Chapter 12 have been made applicable to proceedings before the Commissioner. Section 84 of the Civil Procedure Code provides for the procedure to be followed in a case where the applicant is absent on the date of inquiry. Section 30 of the Regulations has made the following provisions :—

- (a) For the purpose of facilitating the application of the said provisions, the Commissioner may construe them with such alterations not affecting the substance as may be necessary or proper to adapt them to the matter before him ;
- (b) the Commissioner may, for sufficient reason, proceed otherwise than in accordance with the said provision if he is satisfied that the interests of the parties will not thereby be prejudiced.

Section 84 of the Civil Procedure Code which is made applicable requires that when a decree nisi dismissing the plaintiff's action is entered he had to show good cause, by affidavit or otherwise, for his non-appearance within fourteen days. The Deputy Commissioner has, when entering the decree nisi, given the applicant twenty-one days within which to show cause against the decree nisi being made absolute acting under section 30 (a) and (b) of the Regulations, Chap. 117. It will thus be seen that the Commissioner has construed the provisions of Chap. 12 of the Civil Procedure Code with such alterations as he thought were necessary or proper to adapt to the matter before him. No objection has been taken by learned Counsel for the appellant to the extension of the time given by the Deputy Commissioner from fourteen days to twenty-one days. It is an imperative provision of the law that the respondent should have been given notice of the application made to set aside the decree nisi previous to the expiration of fourteen days. Thus it was obligatory on the applicant to have given before the expiry of the twenty-one days notice of his application to the respondent. The notice of this application was given only on July 25, 1951, at about 4 p.m. That was the last day for showing cause and it cannot be said that notice was given previous to the expiration of the period.

The Deputy Commissioner has purported to set aside the decree nisi on July 25, 1951, in the absence of the respondent-appellant, who undoubtedly does not seem to have had notice before the order was made. It is not clear whether the order setting aside the decree nisi was made before or after 4 p.m. on July 25, 1951. Whether it be before or after 4 p.m. it would have been absolutely impossible for the respondent-appellant to have met the allegations made by the applicant in his affidavit on July 25, 1951, when he, the appellant, received the notice only on that day at about 4 p.m.

The provisions of section 84 of the Civil Procedure Code are rigid. This section has received judicial interpretation in many decisions of this Court. Vide *Annamali Chetty v. Carron*¹, *Mohideen v. Marikkar*²,

¹ (1921) 3 C. L. Rec. 48.

² (1940) 41 N. L. R. 249.

*Saram v. de Silva*¹, *Austin de Mel v. Kodagoda*². The principle enunciated in all these cases is that the application to set aside the decree nisi with notice to the defendant must be made within two weeks and the showing cause has to be done within that period. The application of the above principle to this particular case demands that the applicant should have shewn cause with notice to the other side before the expiration of the twenty-one days originally given, which clearly the applicant has failed to do. Vide *Weerasooriya v. Controller of Establishments*³. Gunasekara J. has thus observed :—“ It has been contended that in the present case he did not decide to proceed otherwise than in accordance with those provisions and that therefore his order of November 10, 1947, became absolute upon the expiration of fourteen days. That may be so, and in consequence, the Commissioner’s order of December 23, 1947, may have been a wrong order against which the respondent could have successfully appealed. It does not follow, however, that the order was a nullity.” The Deputy Commissioner clearly made a wrong order when he set aside Rule Nisi without notice to the respondent-appellant and without his being given an opportunity of being heard. He has made an *ex parte* order which he was not in law entitled to do. Section 30 of the Regulations, Chap. 117, no doubt gives the Commissioner some discretion in the application of the relevant provisions of the Civil Procedure Code, but can it be said that he has the right to make an order *ex parte* where the legal procedure requires that the order setting aside the decree nisi should be made *inter partes*? He had to consider the interests of not only the applicant, but also of the respondent-appellant. It was not in the mouth of the applicant to say that his representative did not inform him of the date of inquiry. The application for a date was granted on the application of his own representative, who had notice of the adjourned date of inquiry. Notice to the applicant’s agent or representative is notice to him.

The appeal is allowed. The order setting aside the decree nisi is set aside and the decree nisi is made absolute. The applicant-respondent will pay the respondent-appellant the costs of this appeal and of the inquiry before the Deputy Commissioner.

Appeal allowed.

¹ (1940) 41 N. L. R. 419.

² (1945) 46 N. L. R. 150.

³ (1949) 51 N. L. R. 189.

