

Present : Fisher C.J. and Garvin J.

1928.

CONDERLAG *v.* MUTTIAH PULLE.

146—D. C. Colombo, 24,928.

Appeal—Decree absolute for default—Defendant's appearance to show cause—Civil Procedure Code, s. 87.

A decree *nisi* which has been made absolute after the defendant had appeared on the day appointed to show case and had failed to excuse his default is appealable.

*Ceylon Gemming and Mining Company v. Symons*¹ followed.

A PPEAL from an order of the District Judge of Colombo.

Tisseverasinghe, for defendant, appellant.

Ferdinands (with *Wendt*), for plaintiffs, respondents.

September 21, 1928. FISHER C.J.—

In the case the appellant seeks to set aside under section 87 of the Civil Procedure Code a decree absolute entered against him on March 5, 1928. The point was taken that no appeal lay against such a decree. The question of the right construction

¹ 2 N. L. R. 228.

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to be put on the words "decree absolute for default" at the beginning of section 87 of the Civil Procedure Code has been discussed more than once by this Court. I strongly incline to the opinion that the true construction is that which was given it by Bonser C. J. in the *Ceylon Gemming and Mining Company v. Symons*,¹ namely, that those words mean "that the decree is made absolute in consequence of the defendant not having attended to show cause against the decree being made absolute, on notice." There are, however, decisions of this Court in the contrary sense. But assuming that the point is open and that an appeal lies, I do not think the appellant should succeed. The pleadings in this case were closed on October 14, 1927. The order *nisi* was made on December 15, 1927. Yet, when the case came up for the defendant to show cause on March 5, 1928, the appellant merely attempted to show that he had a good reason for not being present when the decree *nisi* was granted. No attempt appears to have been made to show, or to seek to show, that there were any merits in his case, nor was any such attempt made in this Court. Under those circumstances the inference is that the appellant has no defence to the claim of the plaintiff.

The judgment on the claim therefore will stand, and the appeal is dismissed with costs.

GARVIN J.—

For myself, I am in complete accord with the view that the words "decree absolute for default" in the opening clause of section 87 which disallows a right of appeal must be construed as they were construed by Bonser C.J. in *Ceylon Gemming and Mining Co. v. Symons* (*supra*) and that a decree *nisi* which has been made absolute after appearance of the defendant on the day appointed to show cause but because he failed to satisfy the Court that there were reasonable grounds for his original default, is a final order and appealable as of right. But it is of no great importance to a defendant in such a position whether an appeal is allowed from the decree absolute or from what is referred to as the refusal to set aside the decree *nisi* so long as he is permitted to approach this Court by way of appeal to obtain relief from a final judgment entered against him.

In the case before us the defendant has made no serious attempt to purge his default, and I agree that his appeal should be dismissed with costs.

Appeal dismissed.

¹ 2 N. L. R. 228.