SILVA *v.* GRERO.

D. C., Colombo, 5,601.

Civil Procedure Code, ss. 86 and 87—Appeal against decree absolute for default —"Appearance" in Court—Decree made absolute after appearance and showing of insufficient cause.

Held, per LAWRIE, A.C.J., and WITHERS, J. (BROWNE, J., *dissentiente*), that a decree *nisi* made absolute in the presence of a defendant, who appeared and attempted to show cause against it, is nevertheless a decree absolute for default, and hence not appealable.

Held, per LAWRIE, A.C.J., that the mere bodily presence of a defendant in court is not "appearance." It must be an appearance on the proper day, and if being absent on that day he comes into Court either personally or by Proctor on a later day, his non-appearance on the proper day must be accounted for, before the late coming can be accounted an "appearance" in the legal sense.

Held, per BROWNE, J. (*dissentiente*), that the term "appear" in sections 85–87 of the Civil Procedure Code means the first formal presentation of himself by the defendant to the Court in person or by proxy; and that "decree absolute for default" in section 87 means "for entire default of appearance prior to entry thereof."

D. C., Badulla, 370, *Natchiappa Chetty v. Muttu Kangany* (*2 C. L. R. 110*), considered and followed.

IN this action, summons having been reported duly served on the defendant, and the defendant not having entered appearance on the returnable day, the case was heard *ex parte* in due course and decree *nisi* entered in favour of plaintiff. On the day fixed for making the decree absolute, defendant appeared by Proctor, and for reasons mentioned in his affidavit moved to have the decree *nisi* set aside, and to be allowed to file answer. After argument, the District Judge held that the defendant had not established his right to have the decree set aside on the ground of irregularity, and that he had failed to excuse his default. The decree *nisi* was made absolute against him.

The defendant appealed.

Van Langenberg, for plaintiff respondent, took the preliminary objection that an appeal did not lie, and cited *Natchiappa v. Muttu Kangany* (*2 C. L. R. 110*).

Pereira, for defendant appellant, submitted that the case cited deserved to be re-considered.

Their Lordships ordered the case to be listed for argument before the Collective Court.

Pereira, for defendant appellant. A decree absolute for default is a decree made absolute, in consequence of the default of a defendant to show cause against a decree *nisi*. Against such a decree absolute, the Code, section 87, enjoins there shall be no appeal. But the decree in the present case is not a decree absolute for default. The defendant appeared and showed cause against the decree *nisi* being made absolute; the plaintiff was heard *contra;* and the decree made absolute. That was an order *inter partes*, and the defendant could not move the Court below to set it aside. His only remedy was by appeal, and an appeal lay under section 75 of the Courts Ordinance. There is a distinction drawn in section 87 of the Code between a decree absolute for default and a decree absolute after cause shown. That section provides for the setting aside, on the motion of the defendant, of a decree absolute for default, by the very Court which passed such decree, and it also provides for an appeal from an order setting aside or refusing to set aside such decree. The decree absolute for default contemplated by the Code is therefore decree entered *ex parte*, but the present decree was entered after both parties were heard, and it was not therefore a decree absolute for default. If no appeal is allowed from a decree such as the present, a defendant who deliberately absents himself after service on him of notice of decree *nisi* would be in a better position than one who appears to

such notice and shows cause. The latter will have no remedy against the Court's order making the decree absolute, while the former might move to set aside such order and appeal against a refusal of the Court to do so.

If the word default in section 87 referred to the original default for which the decree *nisi* was entered, then there would be the absurdity of every decree absolute being a decree absolute for default.

Van Langenberg, for plaintiff respondent, *contra.*

Cur. adv. vult.

28th February, 1895. LAWRIE, A.C.J.—

This is an appeal from a decree in these terms: "The decree "*nisi* coming on for final order before . . the District Judge of "Colombo, on the 12th day of June, 1894, being the day appointed "to show cause against it, of which decree the defendant received "notice, as appears by the affidavit of . . , server, dated "2nd June, 1894. and the plaintiff, appearing by his Proctor, and "the defendant, and no cause being shown to the contrary, the "decree *nisi* is made absolute."

Is it possible to read this decree otherwise than as a decree absolute for default? If it be a decree absolute for default, then the Code is explicit no appeal shall lie.

If I understand the argument of the appellant aright, he contends that the fact of the appearance of the defendant in the District Court, mentioned in the decree, showed that it was not a decree absolute for default, but that it was a final decree *inter partes*, against which an appeal lies.

If that be the argument of the appellant, I am against him.

It seems to me that the mere bodily presence of a defendant in court is not an appearance.

It must be an appearance on the proper day, and if being absent on that proper day he comes to Court either personally or by Proctor on a later day, his non-appearance on the proper day must be accounted for before the late coming can be accounted an appearance in the legal sense.

The defendant in the present case was in Court, but he did not "appear" on the day when the decree under appeal was pronounced. If on that day he tried to be heard, if he presented affidavits, if he tendered proof, the decree is silent; but the record shows that he made an attempt to show that his default to appear on the proper day was reasonable, but the same record shows that the Court held these reasons to be unreasonable; the District Judge

treated the coming to Court as no appearance ; he made the decree *nisi* absolute—why ? Because the defendant was in default.

Therefore it seems to me that it is impossible to treat this decree otherwise than as a decree absolute for default, against which no appeal lies. I am unable to draw a distinction between this case and that reported in *2 Ceylon Law Reports, 110.* It is indeed admitted that the facts are the same, but that was decided by my brother WITHERS and me, whereas this comes before a Full Court, and we were ready to re-consider the point. As I gave a silent concurrence with my brother on the former occasion, it is right that I should give my reasons now.

Dealing then with this appeal as against the decree of the 12th June, I am of the opinion that that was on a decree absolute for default, and that no appeal lies.

I am not sure that an appeal would not lie against a District Judge's finding that the cause shown was not reasonable. If the Judge had first adjudicated on the grounds stated and supported by the defendant, and had distinctly and separately found that these were unreasonable, and ordered that a decree be entered, I am not sure that an appeal would not lie against that finding and order. I reserve my judgment, should an appeal from such a finding or order come before me. An appeal might lie, but it is not likely that the Appellate Court would upset the decision of the District Court. Unfortunately in cases where a defendant has merely to show reasonable grounds for his default, he usually states grounds which are abundantly reasonable, but which on investigation turn out to be untrue ; I think the discretion given to the Judge to adjudicate on the reasonableness and truthfulness of cause shown can safely be left with him.

I am for rejecting this appeal, as an appeal from a decree absolute for default. I adhere to the judgment in the case reported in the second volume of the *Ceylon Law Reports, 110.*

WITHERS, J.—

I quite feel the force of Mr. W. Pereira's argument that the Civil Procedure Code in the 86th and 87th sections passes over the case of an order *nisi* made absolute in the presence of the party who has appeared to show cause against the order *nisi* for default being made absolute, and leaves it to be regulated by the 75th section of Ordinance No. 1 of 1889, which enacts that "subject to the provisions "in that behalf in the Criminal Procedure Code or any Ordinance "amending the same, provided any party who shall be dissatisfied "with any judgment, decree, or order pronounced by a District

"Court, may (excepting when such right is expressly disallowed) "appeal to the Supreme Court against any such judgment, decree, or "order, &c., from any error in law or in fact committed by such "Court," &c., but I am confronted by the words "no appeal shall lie against any decree *nisi* or absolute for default," which form the first sentence of the 87th section of the Civil Procedure Code. They expressly disallow an appeal from any decree *nisi* or absolute for default.

It cannot be denied that an order *nisi* made absolute for default is none the less a decree absolute for default because it has been made after hearing cause shown by the party in default.

The default is the ground both of the order and the decree.

No doubt that the 87th section goes on to say that, in the event of a decree being made absolute in the absence of a party who has or should have had notice of the order *nisi*, the party aggrieved may apply to have the decree set aside for the grounds assigned in the section, and that either party may appeal from the final order on that application. But this is the only relaxation of the provision that "no appeal shall lie against any decree *nisi* or absolute for default." So I still understand the provision of this section, and I abide by my former opinion in the case of *Nachippa Chetty v. Muttoo Kangani*, reported in *2 Ceylon Law Reports, 110.*

Thus the preliminary objection of Mr. Van Langenberg succeeds, and the appeal must be dismissed.

BROWNE, J.—

I am free to consider and take part in the decision of the preliminary objection raised for the respondent that no appeal lies from the order which, as District Judge, I made in this action on the 12th June last, for the question of right to appeal could not have been, and never was raised before me. And I have the greater satisfaction in holding, as I am prepared to do, that the objection is untenable, in that thereby it is made possible to have my order considered in appeal. Defendant failed to appear to summons, and I heard the case *ex parte*, receiving plaintiff's evidence, and entered decree *nisi*. When plaintiff moved to make it absolute, Mr. Perera for defendant sought both to satisfy me that there had been reasonable ground for default, and to show grounds why plaintiff, on the material before the Court, was not entitled to have decree entered in his favour. Over-ruling his objection I made the decree absolute, and from my decision he claims to have right to appeal, desiring to have reconsidered the decision of this Court in *370, D C., Badulla* (*2 Ceylon Law Reports*,

110), which is quite in point, pronounced by the other members of this Court, who have acceded to his desire.

The view I take I base upon the use of the term "appear" in sections 85 to 87, which I take to mean the first formal presentation of himself by the defendant to the Court in person or by proxy. Section 86 is clearly to be divided into two parts, according as to whether the defendant does or does not appear upon service of the decree *nisi*, and I would construe it and section 87 as if they were thus written :—

86 If having appeared to the notice defendant shall fail to satisfy the court, &c., then the court shall make the decree absolute, &c., as is in this Ordinance provided. If, however, the defendant shall satisfy the court there were reasonable grounds, &c., the court shall set aside the decree, &c., as the court shall deem fit.

87 (*a*) If the defendant does not appear on the day appointed in the decree *nisi* for showing cause, and if the court is satisfied that notice of the decree has been duly served, then the court shall make the decree absolute, &c., Ordinance hereinafter provided.

(*b*) No appeal shall lie against any decree *nisi* or absolute for default, but if any defendant against whom a decree absolute for default shall have been passed shall within a reasonable time appear and satisfy the court, &c., the court may set aside the decree or refuse to do so, which order shall be liable to appeal.

A defendant, I take it, cannot ordinarily "appear" twice in an action. Hence the provisions of the present section 87 apply only to the case when he first appears after decree absolute entered, and show that the "decree absolute for default" in its first line means "for entire default of appearance prior to entry thereof." When he appears upon service of decree *nisi*, and fails to obtain grace, the order made is one *inter partes*, and the court would not allow him to appear again under section 87 and re-discuss its previous ruling. Hence no special provision has been made to enable him to challenge the ruling of the Court other than the ordinary procedure of appeal.

He is surely entitled to it. If he delayed to appear till after decree absolute were entered, and then appeared and was unsuccessful, section 87 gives him a procedure whereby he can win a right of appeal therefrom. Why then, when he comes earlier into Court, should he be more hardly treated by being refused any appeal at all from an order like the present ? For, as I have said, the Court would not allow him to re-appear and re-argue under section 87, and thereby win an entrance through the gate of appeal which a greater defaulter has provided for him.

Dividing the sections as I have done, I would hold that my section 86 is entitled to be supplemented by the ordinary appeal right in section 75 of the Courts Ordinance and procedure, my section 87 (*a*) being specially supplemented by the provisions in it enabling appeal.

I would therefore hold that the defendant is entitled to have this appeal heard.