

makes a person a sharer in the offence. On the other hand, the element of participation in an act is the leading feature of Section 32. Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart¹. Section 32 only comes into operation when there is a substantive charge of an offence having been committed. The section is an interpretative clause included in the chapter of General Explanations (Chapter 2), and should be read into the definitions of substantive offences. Both principals in the first degree and principals in the second degree¹ or accessories are brought within the purview of the section. It does not, as stated previously, create a new offence. The charge in this case was under Section 316, "whoever . . . voluntarily causes grievous hurt". The words "voluntarily to cause hurt" are referred to in Section 312—"whoever does any act . . .", to ascertain the nature and effect of an act one has to resort to the Sections in Chapter 2, e.g., Sections 31, 32. (e.g., Section 170 of the Criminal Procedure Code). There is also nothing in Section 167, or Section 184 or in any other Section in Chapter 17 of the Criminal Procedure Code which tends to show that a reference to Section 32 is necessary. The view taken by some of the Indian decisions, and the view presently held in Ceylon seems to be a common-sense view and nothing that has been urged has shown that it is wrong. The objection urged by Counsel fails. The appeals are dismissed.

Appeals dismissed.

¹ *I. L. R. 52 Calcutta (112)*

1949

Present: Gunasekara J.

WEERASOORIA, Appellant, and CONTROLLER OF ESTABLISHMENTS, Respondent.

S. C. 141—Workmen's Compensation Case No. C 30/6,939/42

Workmen's Compensation—Order nisi dismissing application—Want of appearance—Can it be set aside after fourteen days?—Discretion of Commissioner—Civil Procedure Code—Section 84—Workmen's Compensation Regulations—Regulation 30.

The Commissioner for Workmen's Compensation has jurisdiction to set aside an order *nisi* dismissing an application on the ground of default of appearance. An order setting aside an order *nisi* is, therefore, binding on the parties, unless it is reversed in appeal, and cannot be treated as a nullity even though it may be an erroneous order.

APPEAL from an order of the Commissioner for Workmen's Compensation.

H. W. Jayewardene, for the appellant.

B. C. F. Jayaratne, Crown Counsel, for the respondent.

Cur. adv. vult.

May 10, 1949. GUNASEKARA J.—

This is an appeal from an order made by a Commissioner for Workmen's Compensation dismissing with costs an application for compensation made by the appellant against the respondent.

The order in question was made on December 23, 1948. The Commissioner had on a previous occasion, on November 10, 1947, made an order *nisi* dismissing the application with costs on the ground of the appellant's failure to appear on the day fixed for the hearing. It appears that subsequently, at an inquiry held on December 23, 1947, with notice to the respondent, the appellant satisfied the Commissioner that there were reasonable grounds for his default and the Commissioner made order setting aside the order *nisi* and fixing the application for inquiry. The order of December 23, 1947, is not included in the record that has been transmitted to this court, but the order that is appealed from states, and Counsel for both parties are agreed, that such an order was made. At the subsequent inquiry the respondent's counsel contended that the order *nisi* (which fixed a period of fourteen days for showing cause) had already become absolute before the order of December 23, 1947, was made and even before the appellant made his application to have the order *nisi* set aside, which it appears was made on December 3, 1947. This contention was accepted by the Commissioner and he made the order that is the subject of the present appeal, holding that the order *nisi* had become absolute and that therefore there was "no ground for proceeding with the inquiry".

The main ground of the appeal is that the Commissioner has in effect purported to set aside his own order of December 23, 1947, and that this he was not entitled to do.

Regulation 30 of the Workmen's Compensation Regulations, 1935, provides that, "Save as otherwise expressly provided in the Ordinance or these Regulations" the provisions of Chapter XII of the Civil Procedure Code (and certain other chapters of that Code) "shall apply to proceedings before the Commissioner in so far as they may be applicable thereto." There follow two provisos, one of which is that "the Commissioner may, for sufficient reason, proceed otherwise than in accordance with the said provisions if he is satisfied that the interests of the parties will not thereby be prejudiced." One of the provisions of the Civil Procedure Code applied by this Regulation is section 84, which provides *inter alia* that— :

"If the plaintiff fails to appear on the day fixed . . . for the hearing of the action, and if the defendant on the occasion of such default of the plaintiff to appear is present in person or by Proctor, and does not admit the plaintiff's claim, and does not consent to postponement of the day for the hearing of the action, the court shall pass a decree *nisi* . . . dismissing the plaintiff's action, which said decree shall, at the expiration of fourteen days from the date thereof, become absolute, unless the plaintiff shall have previously, on some day of which the defendant shall have notice, shown to the court good cause, by affidavit or otherwise, for his non-appearance ;"

and that

"In case of such cause being shown, the court shall set aside the decree, and shall fix a day for proceeding with the action"

By the operation of Regulation 30, therefore, the Commissioner has jurisdiction to set aside an order *nisi* made by him dismissing an application on the ground of the applicant's failure to appear on the day fixed for the hearing of the application.

It is well settled, however, that a decree *nisi* entered by a court under section 84 of the Civil Procedure Code becomes absolute automatically at the expiration of fourteen days unless the plaintiff has previously shown good cause for his non-appearance, and that once the decree *nisi* has become absolute the plaintiff has no remedy under that section: *Anamallay Chetty v. Carron* (1921) 3 Rec. 48; *Mohideen v. Marikar* (1940) 41 N. L. R., 249; *de Saram v. de Silva* (1940) 41 N. L. R. 419; *de Mel v. Kodagoda* (1945) 46 N. L. R. 150.

It is contended for the respondent that therefore, when the Commissioner has made an order *nisi* dismissing an application, he has no jurisdiction to set it aside after the expiration of the period within which cause must be shown; and that consequently in the present case every step taken by the Commissioner after November 10, 1947, was a nullity.

I am unable to accept this contention. Not only is the Commissioner empowered to set aside in appropriate circumstances an order *nisi* made by him, but he is vested with a wide discretion as to whether he should proceed otherwise than in accordance with the relevant provisions of the Civil Procedure Code. 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 subject matter of the order, whether that subject-matter is regarded as the application for compensation or the application to have the order *nisi* set aside, was within the Commissioner's jurisdiction, and, as was pointed out in the case of *Hriday Nath Roy v. Ram Chandra Barna Sarma*, A. I. R. 1921 Cal. 34 a distinction must be drawn between the existence of jurisdiction and the exercise of jurisdiction. To quote the words of Sir Asutosh Mookerjee, A. C. J. in that case—

“The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction; and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction

“Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. . . . There is a clear distinction between the jurisdiction of a court to try and determine a matter and the erroneous action of such court in the exercise of that jurisdiction. The former involves the power to act at all, while the latter involves the authority to act in the particular way in which the court does act. The boundary

between an error of judgment and the usurpation of power is this: the former is reversible by an Appellate Court within a certain fixed time and is therefore only voidable, the latter is an absolute nullity. When parties are before the court and present to it a controversy which the court has authority to decide, a decision not necessarily correct but appropriate to that question is an exercise of judicial power or jurisdiction."

It appears to me to be immaterial for the present purpose whether the order of December 23, 1947, was an erroneous order or not. If it was erroneous it was merely voidable and not a nullity, and not having been set aside in appeal it is binding on the parties. (The Crown Counsel has conceded that the respondent had a right of appeal against that order which he did not exercise). It follows that the Commissioner was not entitled to treat it as a nullity.

I set aside the order made by the Commissioner on December 23, 1948, and direct him to proceed with the inquiry. The respondent will pay the appellant Rs. 157.50 by way of costs of appeal.

Order set aside.