

1957 Present ; H. N. G. Fernando, J., and Sinnetaimby, J.

K. A. PERERA and another, Appellants, and H. E. ALWIS and another, Respondents

*S. C. 91 (Inty.)—D. C. Kandy, 6405/M. R.*

*Civil Procedure Code—Sections 85, 86 (2)—Default of appearance of defendant—Ex parte trial—Procedure.*

Where, on default of appearance of defendant on the day fixed for appearance and answer, a date is fixed for *ex parte* trial in purported pursuance of section 85 of the Civil Procedure Code, the reasons for the default of appearance may be considered by Court before the *ex parte* trial is held.

**A**PPPEAL from an order of the District Court, Kandy.

*T. B. Dissanayake* for the 1st and 2nd defendants-appellants.

*P. Somatilakam*, for the plaintiff and 3rd defendant, respondents.

*Cur. adv. vult.*

February 7, 1957. H. N. G. FERNANDO, J.—

In this action for the recovery of certain monies alleged to be due upon a contract of service, summons was served on the three defendants returnable on 29th February 1956. They failed to appear on that date and the District Judge made order fixing 13th March 1956 for *ex parte* trial.

On 8th March, a proxy was filed on behalf of the first two defendants, who are the present appellants, together with an affidavit setting out reasons for the non-appearance of the appellants on 29th February and a petition requesting the vacation of the order for an *ex parte* trial. The Judge's order upon this petition was "Mention on 13th March". On this latter date, the Proctor for the appellants moved that the order for *ex parte* trial be vacated and that leave be allowed to file answer. The learned Judge refused this application in these words:—"To substantiate these averments in the affidavit defendants have not even come to Court today. To my mind the application made by the defendants is not *bona fide*". Trial was therefrom held *ex parte* and decree was entered in favour of the plaintiff.

The ground upon which the application of the appellants was held not to be *bona fide* is clearly not maintainable. The order of the 8th March had been only "Mention on 13th March", and was no indication to the appellants that their petition of 8th March would be taken up for inquiry on 13th March or that their presence was required on that day; it was on the contrary the familiar means of indicating that an order fixing a date for consideration of the appellants' petition would be made on 13th March. Counsel for the respondent concedes that the absence of the appellants on 13th March did not justify the refusal of their application, but he has attempted on other grounds to support the decision of the Judge to hold the *ex parte* trial.

The order of 29th February was made by the Judge in purported pursuance of section 85 of the Code as the defendants had failed to appear "on the day fixed for appearance and answer". The section provides that in that event "the Court shall proceed to hear the case *ex parte* and pass a decree *nisi*", and that notice of the decree *nisi* shall issue to the defendant. Section 86 (2) then provides that, if on the day appointed in the decree *nisi* for showing cause (against the decree being made absolute), the defendant satisfies the Court that there were reasonable grounds for his default of appearance, the decree will be vacated and the case proceeded with as from the stage of the default. In effect the Code contemplated that a decree *nisi* after *ex parte* hearing would be entered so expeditiously that there would be neither time nor opportunity for the absent defendant to intervene before entry of the decree: hence the only appropriate form of relief was the provision in section 86 (2) for showing cause against the decree being made absolute. But the provision in the Code for an immediate *ex parte* trial has not been adhered to in recent times, and an "inveterate practice", recognised by this Court (Vide *Wickremesuriya v. Mudianse et al.*<sup>1</sup>), has been established whereby the

<sup>1</sup> (1930) 31 N. L. R. 344.

*ex parte* hearing is put off for a day appointed. In the result there is in nearly every case, between the date of default of appearance and the day appointed for trial, an interval during which there is actually time and opportunity for the defendant to explain his absence on or before the date fixed for the *ex parte* trial. The question which arises is whether, despite the availability of the time and opportunity, an *ex parte* trial, which might well turn out in the event to be abortive, need necessarily be held before the reasons for default of appearance are considered.

The power of the Court to make an order fixing a date for the *ex parte* trial is an inherent one, derived not from the Code but from the "inveterate practice"; equally inherent would be the power to vacate such an order on appropriate grounds, and no grounds can be more appropriate than those on which a decree *nisi* may be set aside in the course of strict adherence to the provisions of the Code. Indeed the learned trial Judge would undoubtedly have considered whether or not to exercise that inherent power, but for his mistaken assumption that the absence of the appellants from Court on 13th March showed a lack of good faith on their part.

We hold therefore that the *ex parte* trial should not have been held before consideration was given to the appellant's petition filed on 8th March 1956. The decree *nisi* is set aside and the case will be remitted to the District Court for consideration of that petition and for an order to be made thereon. A second trial *ex parte* will be held only if the prayer in that petition is not granted by the Court. The plaintiff will pay to the appellants the costs of this appeal and will bear their own costs of the former *ex parte* proceedings.

SINNETAMBY, J.—I agree.

*Decree set aside.*

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