1937

Present : **Poyser S.P.J. and Soertsz J.**

MENCHINA HAMINE *v.* JAMES APPU.

367—D. C. Colombo, 296.

Ex parte *trial—Defendants present—No right to take part in proceedings—Proper order—A decree* nisi.

In an action for declaration of title to land, the defendants were present on the returnable date of summons and were given time to file answer.

On that date the first defendant alone was present but no answer was filed. The case was then fixed for hearing. The plaintiff and all the defendants were present on that day. The defendants, who were not represented by Counsel, were permitted to cross-examine the plaintiff and his witnesses, the first defendant alone availing himself of this opportunity.

Held, that the defendants were not entitled to take part in the proceedings.

Held further, that the proper decree that should be entered after such a trial was a decree *nisi*.

Brampy v. Peris (3 N. L. R. 34) followed.

APPEAL from an order of the District Judge of Colombo.

L. A. Rajapakse (with him *J. R. Jayawardene*), for plaintiff, appellant.

February 19, 1937. SOERTSZ J.—

The plaintiff-appellant has clearly made out his title to the land in question in this case and he is entitled to a decree.

His case was that this land belonged to one Samel Appu, who by a deed of sale, dated August 6, 1910, conveyed it to the third defendant. The latter mortgaged it with him and later sold it to him in payment of the amount due on the mortgage. The deed of sale in his favour was dated January 28, 1933. The plaintiff averred that the first and second defendants, who are the nephew and niece of his vendor the third defendant, were disputing his right to the land and he, therefore, brought this action

[1] *3 N. L. R. 34.*

for declaration of title and ejectment. He made the third defendant a party on his covenant to warrant and defend the title he had sold. On the summons returnable date the three defendants were present. The Court fixed September 25, 1935, for their answer. No answer was filed on that date. The first defendant was present, but not the second and third defendants. The Court fixed the case for trial on November 13.

On that day the plaintiff and all defendants were present. The plaintiff appeared by Counsel and proctor. The defendants were unrepresented. The case went to trial and the proceedings show that the defendants were given an opportunity to cross-examine the plaintiff and his witnesses, and that the first defendant availed himself of that opportunity. At the close of the case for the plaintiff the trial Judge delivered judgment dismissing the plaintiff's action on the ground that evidence called for the plaintiff showed that the defendants "have been in possession of a portion of the land and have acquired a prescriptive title thereto".

Assuming this to be a correct finding on the evidence, there does not appear to be any justification for a dismissal of the plaintiff's action in its entirety. On that finding, the plaintiff should have been declared entitled to the other portion of the land. In my opinion, however, the evidence in the case does not support the District Judge's finding. The identity of the land is beyond question. The deeds produced by the plaintiff show that the title to this land must be in him unless it has been defeated by a prescriptive title acquired by the first and second defendants. Now, all that the evidence shows is that these defendants have resided on a portion of the land for many years. They are, however, the nephew and the niece of the third defendant. The third defendant in the course of his evidence stated that he "allowed the first and second defendants to possess a portion 3 roods 16 perches in extent". This makes it quite clear that the possession of these two defendants was purely permissive.

The two deeds of lease given by the third defendant to one Edwin of the portion claimed by the defendants were produced. One lease is still current and the lessee has deposed to the fact that he possessed this portion and took all the produce on it. The Police Headman gave evidence and corroborated the lessee, but he added that "these defendants lived on the land and plucked the nuts stealthily". As against all this evidence on the side of the plaintiff, there was no evidence tendered by the defendants at all. The burden of proving a prescriptive title was unequivocally on them. They had filed no answer setting up a prescriptive title nor did they offer to adduce any evidence in proof of such a title. In that state of things, I think there was no alternative but to enter a decree for the plaintiff.

The next question that arises is whether the decree to be entered for the plaintiff should, in the circumstances of this case, be a decree *nisi* or a decree absolute in the first instance. The answer to that question must, I think, depend on the answer to another question, namely, whether the proceedings of November 13, 1935, were "ex parte" or "inter partes". Ostensibly, they were "inter partes" proceedings. The defendants were present and were allowed to cross-examine the plaintiff and his witnesses. In the case of *Brampy v. Peris*[1], Lawrie A.C.J. said, "The

[1] *3 N .L. R. 34*

defendant . . . . got time till August 16 to file answer. He failed to do so. On August 18, on plaintiff's motion a day was fixed for the 'ex parte' hearing of which notice was given by the Court to the defendant. Why this notice was given I do not know. Of course a defendant who has not answered may, like all the rest of the world, attend a public Court, but he has no right to take part in an 'ex parte' hearing. If he is cited and takes part the hearing ceases to be 'ex parte' and becomes 'inter partes'". Tested by this view expressed in the concluding sentence of the passage I have cited, the hearing in this case was an "inter partes" hearing and the plaintiff was entitled to a decree absolute.

The plaintiff-appellant, however, has only asked for a decree *nisi* against the defendants, and, in the circumstances of this case, I think a decree *nisi* is the better course.

On August 21, 1935, the defendants were present and were given time to file answer. The journal entry of September 25, 1935, which was the answer due date, shows that the first defendant was present and the second and third defendants were absent. No answer was filed. There is nothing to show whether the plaintiff was present or absent on that date. If the plaintiff was absent the proper course was under section 84 of the Civil Procedure Code ; if he was present under section 85. The District Judge, however, fixed the case for trial and in the context that means for ex parte trial. The proper decree to be entered after such a trial is a decree *nisi*. In the words of Lawrie A.C.J., in the case I have referred to "the defendant who had not answered . . . . had no right to take part in the trial".

I would, therefore, set aside the decree entered in this case and send the case back for a decree *nisi* to be entered in favour of the plaintiff, declaring him entitled to the land as against the first and second defendants and ejecting the first and second defendants therefrom. The plaintiff will have costs here and below.

POYSER J.—I agree.

Appeal allowed.