

CAROLIS APPUHAMY v. SINGHO APPU.

D. C., Kandy, 14,056.

1901.

April 29 and  
May 8.

*Ex parte trial.—Illness and absence of plaintiff on trial day—Dismissal of case—Motion to vacate order of dismissal—Power of Court to rescind orders made ex parte—Right of plaintiff to relief.*

Defendant not appearing, the case was fixed for trial *ex parte*. Plaintiff was absent and the trial was adjourned to another day, when too the plaintiff was absent. His case was dismissed. Two months afterwards he filed affidavit averring that his absence on the trial day was due to severe illness for more than six weeks, during which time he was quite unable to attend to any business, and moved that the order of dismissal be vacated.

*Held* that the District Judge had power to open or rescind any order made *ex parte*, on being satisfied that it was prejudicial to a party through no fault of his.

*Held* further, that, whether the Court below had power or not to rescind its decree, the circumstances of the case justified the decree being set aside by the Supreme Court and the case being remitted for trial in due course.

**A**CTION on a mortgage bond. Defendant did not appear, and the case was fixed for *ex parte* hearing on 31st October, 1900. On that day plaintiff did not appear, and the trial was adjourned for 30th November. On that day too plaintiff was absent. His proctor moved for a postponement, which was refused and the case was dismissed. Thereafter the plaintiff appeared and explained that owing to his illness and removal to Colombo he could not attend Court on the 31st October and 30th November, and moved that the order of dismissal be vacated. In his affidavit he averred that he fell ill on 20th October and was laid up till the 1st December, 1900; that during that period he was suffering from bronchitis and severe asthma; that he was unable to attend to any business and was removed while ill to Colombo on 25th October, where Dr. H. M. Fernando attended on him; and that his proctor's letter addressed to his usual place of residence at Kotmale did not reach him till 3rd December.

1901. The District Judge (Mr. J. H. de Saram) ruled as follows:—  
*April 29 and* " I asked Mr. Beven whether he can point to any provision in  
*May 8.* " the Procedure Code which enables me to allow this motion. He  
" said he could not. I refuse the motion, as I am of opinion I have  
" no power to grant it ".

Plaintiff appealed.

*Van Langenberg*, for appellant.—The order dismissing the case was wrong. The hearing should have been adjourned. *Brampy v. Peris* (3 N. L. R. 35). When an order *ex parte* has been made to the prejudice of a suitor, the proper course is not to appeal but to apply to the Court to set it aside. The District Judge has an inherent power to vacate an erroneous order, *Muttiah v. Muttuswami* (1 N. L. R. 25). Appellant was too ill to write to his proctor. The case should be remitted to be proceeded with in due course.

*Cur. adv. vult.*

8th May, 1901. LAWRIE, J.—

This action on a mortgage bond was brought as an ordinary money suit, not under the chapter of the Code regarding mortgage actions.

The defendant did not appear and the Court ordered the case to be put down for *ex parte* hearing. The plaintiff was absent and an extension of time was allowed, even then the plaintiff was again absent. The learned Judge dismissed the action.

Two months afterwards the plaintiff filed an affidavit that he had been continuously ill for some months and had been unable to attend Court on the days fixed for the *ex parte* hearing.

The judge does not say whether he considers the affidavit credible or sufficient. He said he had no power to re-open his decree dismissing the action. Hence this appeal. As a rule, he has power to open or rescind his own orders made, not *inter partes* but *ex parte*, on being satisfied that the order was made to the prejudice of a party who was unable to attend in consequence of illness or other circumstances over which he had no control.

Such power doubtless must be exercised with caution, and only on sufficient materials and within a reasonable time after the *ex parte* decree or order was made.

I am inclined to the opinion that it was within the District Judge's power to have rescinded the *ex parte* decree dismissing the action, but whether he had that power or not, I think that in the circumstances of this case the plaintiff may be allowed another opportunity of adducing such *ex parte* proof as the judge may think necessary.

In the case of an action on a bond notari- ally attested, which is 1901.  
produced with the plaint and comes from the custody of the creditor, very little evidence is necessary, on the footing that the facts stated in the affidavit are true. I would set aside both the refusal to re-open the decree and the decree itself, and I would remit to the District Court for further proceedings according to law.

*April 29 and  
May 8.*  
LAWRIE, J.

MONCREIFF, J.—

I agree, on the footing that the facts stated in the affidavit are true.

