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October 3.

Present: Sir Charles Peter Layard, Kt., Chief Justice, and Mr. Justice Wood Renton.

GARGIAL *et al.* *v.* SOMASUNDRAM CHETTY

D. C., Kandy, 16,391.

Proctor refusing to take part in trial—Appearance—Judgement inter partes —Ex parte order—Appeal.

Where the defendant's proctor appeared on the day of trial and moved for a postponement on the ground that, owing to the absence of his client from Ceylon, he was unable to get ready for the trial, and on the District Judge refusing to grant the application, retired from the case and declined to take part in the proceedings, and the District Judge after hearing some evidence for the plaintiff entered judgment in his favour—

Held, that the proctor for the defendant must be taken to have appeared for his client at the trial and that the judgment must be considered as pronounced *inter partes* and not *ex parte*.

LAYARD, C.J.—A party aggrieved by an *ex parte* order should not appeal, but should move the Court which passed the order to vacate it.

THE plaintiffs instituted this action for a declaration of title to a certain land; the defendant denied the title of the plaintiffs and claimed the property by virtue of a Fiscal's transfer dated 18th July, 1873. On the day fixed for the trial of the case the defendant's proctor moved for a postponement on the ground that his client was ill in India, and also that he had taken away the title deeds on which he relied. The learned District Judge having refused the motion, the defendant's proctor declined to take any part in the proceedings.

After hearing one witness called by the plaintiff, the District Judge gave judgment for the plaintiff as prayed with costs. The defendant appealed.

H. A. Jayewardene, for appellant.

F. J. de Saram (jr.), for respondent.

Cur. adv. vult.

3rd October, 1905. LAYARD C.J.—

The whole of the argument in this case by the appellant's counsel was based on the assumption that the judgment now under appeal was an *ex parte* judgment, and that there was no appearance in the court below either by the defendant or by his pleader. In support of that argument he cited to us a large number of Indian cases. The judgments in those cases are not binding on us, but even if they were there is a great distinction to be drawn between our Code and the Indian Code. The Indian Code provides that where a summons is issued the defendant should be called upon to appear and to answer the claim " in person or by a pleader duly instructed and able to answer all material questions relating to the suit, or by a pleader accompanied by some other person able to answer all such questions." There is no similar provision in our Code, which merely directs that the summons to the defendant should require him to appear and answer the plaint either in person or by his pleader, and in our Code it is distinctly explained that " a party appears in court when he is there present in person to conduct his case or is represented there by a Proctor or other duly authorized person." As far as I can understand, the reasons the Indian Courts gave in the cases cited to us appear to be that when a pleader or vakil appears in court in view of the provision of section 64 of the Indian Code of Civil Procedure, it is necessary that the court should not only be satisfied with the physical appearance of the pleader, but that he is duly instructed and able to answer all material questions relating to the suit, and that in any case, unless a pleader states that he is duly instructed, his physical appearance in court is not treated as an appearance under the Indian Code. If he says, " Although I am here in court to-day I have received no instructions in the matter of this case, " or if he says " Although I apper in court to-day I am instructed merely to move for a postponement of the case," he cannot be treated as having made any appearance in the first case, and in the second his appearance has amounted to the purpose of the action made by him. Some of the Indian decisions seem to disclose that where a pleader appears and says, " I hold a brief, but I have not had time to read it " the court

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must treat the physical appearance of such person as an appearance, because holding a brief shows that he was duly instructed. Now, in the present case there is absolutely no material before the court upon which this court could hold that Mr. Jonklaas was not duly instructed, even if it adopted the view that the physical appearance of a proctor duly appointed is not a good appearance in our court unless he is fully instructed. There is nothing to show that Mr. Jonklaas, the defendant's proctor, did not receive instructions sufficient to enable him to conduct the defence, had there been evidence available to put before the court. He had repeatedly, throughout the course of the proceedings, moved for postponements on different grounds, and on the occasion in question he did not move for a postponement on the ground that he had not been instructed, but on the ground that certain evidence was not forthcoming, namely, certain deeds which were necessary to establish the title of the defendant, and also that certain witnesses had not been summoned. Counsel says that Mr. Jonklaas was not to blame for those witnesses not being summoned, and that his client was to blame both for the deeds not being before the court and for the witnesses not being there on the day of trial. If Mr. Jonklaas, according to our Code, did appear on that day, then he was, I think, in exactly the same position as if the defendant himself had appeared on that day, because he was the duly appointed proctor of the defendant, and was authorized by his proxy to be present in court and to represent the defendant in every stage in which the defendant himself could appear and make an application.

Now, if the defendant had been present that day in court and had said, " I at some time posted my deeds to India, and I have not summoned my witnesses, and I want time to get my deeds back and to summon my witnesses, " surely it could not be said the defendant had not appeared in court; he did appear but was not ready, and having appeared in court the court would be at liberty to say. " I am not going to grant you a postponement because you have not got ready; you must go on with the case ; " and if the court had made that order the defendant could not rush out of court and say, " I never appeared at the trial, " and then, judgment having gone against him, appeal to this court saying, " it is an *ex parte* order and I wish this court do set it aside. " Now, if this was an *ex parte* order, I cannot understand how an appeal can be entertained by this court. The ordinary principle is that, where parties are affected by an order of which they have had no notice, and which had been made behind their back, they must apply in the first instance to the court which made the *ex parte* order to rescind the order, on the ground that it was improperly passed against them. The appellant's

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argument is, " I am not bound by the judgment of the District Judge, because I was not in court and I was not represented in court. " That point had been dealt with by Bonser, C.J., in the case of *Habibu Lebbe v. Punchi Etana*, reported in 3 *C. L. R.* 84. He there recognized the power of a judge of first instance to open up a judgment given in the absence of one of the parties, and he stated that it had long been the practice—and a practice which had been expressly approved by this court—that in cases of that sort application should be made in the first instance to the court which pronounced the judgment, and that there should be an appeal to this court only if the judge of the court of first instance refused to set it aside. There is no doubt in my mind that that had been the practice of this court for the last thirty years at least, and I believe that it existed prior to that date.

I agree with Bonser C.J. in thinking that that is the most convenient course to pursue and that this court should always insist upon its adoption, particularly because the Court of Appeal in England in the case of *Vint v. Hudspith* (1), lays down, that although the Court of Appeal in England may possibly have jurisdiction to hear an appeal from a judgment given by default, yet that it is not desirable that the court of appeal should encourage such appeals to be brought before the application has been made to the court or original jurisdiction. If therefore Mr. Jayewardene for the appellant had convinced me that there was no appearance, and that Mr. Jonklaas's presence in the District Court on the day of trial did not amount to such an appearance as would enable the court to proceed on with the case and hear it, as though *inter partes* and to give a final judgment in it, still I should have dismissed the appeal on the ground that the application must be made by the appellant in the first place to the District Court. I may say that in Chief Justice Bonser's judgment he seems to recognize that the appearance of a proctor who has been authorized to appear in the District Court for his client would be a good appearance even though the proctor stated that he had no instructions, because in that case he held that it was not competent for one proctor to instruct another proctor to appear for him to make an application in court, and therefore that the plaintiff, in a case in which his own proctor had instructed another proctor to appear for him, could not be considered to be there in person or in the person of his proctor who was not there at all. I gather from the reasoning of Chief Justice Bonser that, if the plaintiff's own proctor had appeared the case would be different. I have given my view of these points, because I have been expressly asked to do so by the parties.

(1) (1885) 29 *Ch. D.* 322

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I now turn to the application made by Mr. Jayewardene that we should treat the judgment of the District Court as a judgment *inter partes*, and, as an indulgence in view of Mr. Jayewardene's statements that he holds in his hands a deed which, if it had been produced before the District Judge, would, on the issues framed by the judge at the trial, have entitled the defendant to a judgment on those issues, grant him a new trial on terms. It would be hard to deprive the defendant of his land, if it is really true that he has got a good title to it. Therefore, purely as an indulgence, it is ordered that in the event of the defendant paying into court, within a fortnight of this record being returned to the District Court, a sum of Rs. 500 on account of costs, with liberty to the plaintiff on taxing his bill of costs for all the proceedings up to date in the District Court and of this appeal to draw such amount of that sum of Rs. 500 as would cover his bill of costs so taxed, and in the further event of defendant being prepared to go to trial four weeks from the date of the receipt of this record in the District Court, without permission to the court to grant any postponement at the defendants' instance in the District Court, then the decree of the District Court dated the 21st June, 1905, will be deemed set aside, and the case will be proceeded with as a new trial with liberty to the parties to settle fresh issues, but in no event to read in evidence the evidence recorded as taken at the first trial.

WOOD RENTON J.—

I entirely agree with what my lord the Chief Justice has said, and concur in the order he has made.