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Present : Dalton J. and Jayewardene A.J. 1928.

MOHAMED ALLIAR *v.* SEGU MOHAMADO MARIKAR.

245—D. C. Colombo, 11,091.

Appeal—Decree nisi made absolute after hearing defendant—Refusal to set aside order nisi—Civil Procedure Code, ss. 86 and 87.

Where a decree *nisi* was made absolute after the defendant had appeared and shown cause against it,—

Held, that the decree absolute so entered was not appealable.

An appeal lies from the order refusing to set aside the decree *nisi*.

Silva v. Grero[1] followed.

APPEAL from an order of the District Judge of Colombo. The facts appear from the judgment of Dalton J.

H. V. Perera (with *Tisseverasingham*), for 1st to 4th defendants, appellants.

Hayley, K.C. (with *Weinman* and *Rutnam*), for plaintiff, respondent.

July 27, 1928. DALTON J.—

The present appellants are the 1st to 4th defendants in the action. This action was commenced in February, 1924. On an earlier appeal this Court had ordered, on June 2, 1926, that the partnership be terminated and the 1st, 2nd, 3rd, and 4th defendants be declared entitled to the business and that an account be taken in respect of

[1] *N. L. R. 67.*

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the business carried on in partnership between the plaintiff and the defendants up to and as at May 3, 1926, and the amounts due to or payable by the plaintiff and the 5th and 6th defendants to the 1st to 4th defendants be ascertained and determined on the basis of that account.

On July 13, 1926, plaintiff moved in the lower Court that the account be filed by defendants in conformity with the above order. This was done on August 28, 1926, when the Court directed that all books and papers be handed over to plaintiff's proctor before September 6, and that objections to the accounts, if any, be filed on October 11. On that date plaintiff filed his objections and hearing was fixed for November 9, that date being fixed by consent of both parties. When that date arrived and the case was called, a further adjournment was allowed until March 4, 1927. No reason is given on the record, but we are informed that the reason for this long postponement was due to the fact that the 1st to 4th defendants had left Ceylon for India.

On March 4 the case came up again, defendants' proctor asking for a further adjournment as he stated the defendants were in India, that he had no instructions from them, did not know their address, and did not know whether they were returning to Ceylon. Plaintiff objected to any further postponement and the District Judge refused the application as no adequate grounds were put forward to justify further postponement of what he describes as " this already long outstanding case ". The inquiry was then fixed for March 7, on which date the case was called, defendants being in default of appearance and evidence by affidavit being led on behalf of plaintiff. Thereupon the trial Judge made order as follows: " Enter decree *nisi* for March 10 for service on proctor of 1st to 4th defendants. Allowed. Call case this Court on 10th March." The case was then called on March 10, when defendants' proctor appeared and stated he did not know the address of his clients to communicate with them with regard to the decree *nisi*. He asked for time to enable him to try and get into communication with them. This request the Judge allowed, making the following order :—

> " Mr. Bartlett asked for time to enable him to try and get into communication with his clients. I think this application a reasonable one. I will allow time till April 8 to show cause. If cause is to be shown evidence must be led on that date. If no cause is shown on April 8 the decree will be made absolute."

This order appears to have had an immediate effect in discovering the defendants, in producing them in Colombo, and in stirring them into action. On April 8 they appeared to show cause, evidence

was led, and the 1st defendant himself went into the witness box. On the same date the Judge made the decree absolute, holding that no cause had been shown by defendants why the decree *nisi* should be vacated. He gives his reasons for this decision at length, and calls attention to the apparent ease with which communication was effected with defendants so soon as it appeared the decree might be made absolute.

The defendants now appeal to this Court, first of all against the order refusing to set aside the decree *nisi*, and secondly against the decree absolute.

With regard to the second point, the appeal against the decree absolute, it is urged for the appellants that there is here no decree "absolute for default", but against this it is argued for the respondent (plaintiff) that there is no appeal against the decree absolute under the provisions of section 87 of the Civil Procedure Code. This point is covered by authority. In *Silva v. Grero*,[1] a case directed to be argued before the Full Court (as it was in 1895), the majority of the Court held that a decree *nisi*, made absolute in the presence of a defendant who appeared and attempted to show cause against it, is nevertheless a decree absolute for default and is not appealable. Lawrie A. C. J. says :—

> "The defendant in the present case was in Court but he did not 'appear' on the day when the decree under appeal was pronounced; . . . . the record shows that he made an attempt to show that his default to appear on the proper day was reasonable, but the same record shows that the Court held these reasons to be unreasonable. The District Judge held the coming to Court as no appearance; he made the decree *nisi* absolute. Why? Because the defendant was in default."

And Withers J. says that it cannot be denied that an order *nisi* made absolute for default is none the less a decree absolute for default because it has been made after hearing cause shown by the party in default. The majority of the Court followed the earlier decision in *Nachchiappa Chetty v. Muttoo Kankani*.[2]

Mr. Perera has argued, however, that a doubt has been thrown upon the correctness of the decision in *Silva v. Grero* (*supra*) by certain *obiter dicta* of Bonser C.J. in *Ceylon Gemming and Mining Co. v. Symons*.[3] The appeal in that case was from an order refusing to set aside the decree *nisi*, and the Court held that such an appeal did lie to the defendant. In the course of his judgment Bonser C.J. deals with the provisions of section 87 and points out that there

[1] *N. L. R. 67.* [2] *C. L. R. 110.*
[3] *2 N. L. R. 226.*

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has been some difference of opinion as to the meaning of the words " absolute for default ". He adds—

> " For my own part I cannot help thinking, though in differing from my brother Withers I do so with misgiving, that the true construction of ' decree absolute for default ' is that the decree is made absolute in consequence of the defendant not having attended to show cause against the decree being made absolute, on notice."

This opinion, although it be expressed with some misgiving, is, having regard to the source whence it came, not to be lightly disregarded, if the matter is open for discussion, but it is *obiter*, and on a matter upon which there is a decision, that is *Silva v. Grero* (*supra*), binding upon this Court. Mr. Perera is not prepared to argue that *Silva v. Grero* (*supra*) and *Nachchiappa Chetti v. Muttoo Kankani* (*supra*) have been overruled by the judgment in *Ceylon Gemming and Mining Co. v. Symons* (*supra*), as is stated in a footnote on *p. 262 of Vol. I. of the 1st Edition of Pereira's Institutes of Ceylon*, to which he has called our attention. That note would appear to be incorrect. It would seem further that the decision in *Silva v. Grero* (*supra*) has not been questioned since 1896, but has generally been accepted as correctly interpreting the law on this point.

The question then being settled for this Court, it is not necessary to go further. I would only call attention to the confusion, incongruity, and inconvenience, although that of course would not of itself decide the matter of interpretation, which would necessarily be occasioned by a different decision on this question. This has been fully dealt with in an analogous case by Straight J. and is also referred to by Stuart C.J. in *Lal Singh and others v. Kunjan and others*.[1] That was a case in which a defendant, against whom a decree had been entered *ex parte* and who had not got the decree set aside as provided by section 108 of the Indian Civil Procedure Code, appealed from the decree under the general provisions of the code.

With respect to the first point, the appeal against the order refusing to set aside the decree *nisi*, the trial Judge has given reasons for his refusal which seem to me to be amply supported by the material before him. Having obtained a dissolution of the partnership and the departure of the plaintiff from the business, the appellants burke any inquiry into the matter of accounts by leaving for India and keeping their whereabouts unknown to their proctor. The trial Judge finds they purposely kept out of the way, even keeping out of the way of their own proctor, in order to hold up the inquiry into the accounts as long as possible. The ease with which

[1] *4 Allahabad 388.*

they were discovered as soon as there was a probability of the decree *nisi* being made absolute is remarkable. It is urged, however, that the decree *nisi* might have been set aside on terms, but what they might be has not been suggested. This litigation was commenced in 1923, and the action of the appellants since June, 1926, has shown a most deliberate attempt to prevent a decision being come to in respect of their accounts. In my opinion the trial Judge was correct, on his view of the material before him, in holding that the appellants had not shown cause for setting aside the decree *nisi*.

For these reasons the appeal must be dismissed with costs.

JAYEWARDENE A.J.—

The Civil Procedure Code came into operation on August 1, 1890. In 1892 the effect of section 87 was considered by the Supreme Court in *Nachchiappa Chetty v. Muttoo Kankani.*[1] Withers J. held that section 87 took away the right of appeal against a decree *nisi* for default and that section 86 gave a remedy, in case the decree had been improperly obtained, by showing cause against it in the Court below, but if it was made absolute there was no appeal against the decree absolute. Lawrie J. agreed with this judgment. The question of the right of appeal was considered by the Full Court, in *Silva v. Grero*[2] in 1895, and it was held that a decree *nisi*, made absolute in the presence of a defendant, who appeared and attempted to show cause against it, is nevertheless a decree absolute for default and hence not appealable. Lawrie and Withers JJ. adhered to their former opinions, but Browne J. dissented. In *Ceylon Gemming and Mining Co. v. Symons*[3] it was held that an appeal lay from an order refusing to set aside a decree *nisi*. Bonser C.J. did not seem to agree with the opinions of Lawrie and Withers JJ. in *Silva v. Grero* (*supra*).

In *Habebu Lebbe v. Punchi Ettana,*[4] Bonser C.J. observed, "I am informed by my learned brother (Withers J.) that it has long been the practice—and a practice which has been expressly approved by this Court—that application should be made in the first instance to the Court which pronounced the judgment, and if the Court refuses to set aside, then and then only should there be an appeal from that refusal. That course appears to me to be a most convenient one, and furthermore it is in accordance with the practice of the Appeal Court in England."

In *Gargial v. Somasunderum Chetty*[5] Layard C.J. in 1905 had no doubt in his mind that that had been the practice of the Supreme Court for thirty years at least, and he believed it existed prior to that date.

[1] *(1892) 2 c. L. R. 110.*
[2] *(1895) 1 N. L. R. 67.*
[3] *(1896) 2 N. L. R. 226*
[4] *(1894) 3 C. L. R. 84.*
[5] *(1905) 9 N. L. R. 26.*

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In *Letchiman Chetty v. Hadjiar*[1] it was held that on an application to vacate a decree *nisi* and on an appeal from a refusal to allow the defendant to come in and defend, the Court was not concerned with the merits of the case.

Bertram C.J. in *Weeraratna Bros. v. Secretary, D. C., Badulla*,[2] (de Sampayo J. agreeing) cited with approval the dictum in the previous cases, that the appeal should be from the order refusing to set aside the judgment and that the practice was a long established one.

On principle a Court of Appeal must not be called upon to decide on the merits, where a case has only been heard *ex parte*. To my mind it may work great hardship on the plaintiff. Where the defendant is absent, the plaintiff places before the Court the minimum of evidence, and the defendant must not be permitted to assail the plaintiff's case for the first time in appeal.

I would dismiss the appeal with costs.

Appeal dismissed.