1911.

Present : Lascelles C.J. and Middleton J.

SENANAYAKE *v.* COORAY.

123—D. C. Ratnapura, 1,763.

Appearance—Defendant absent—Proctor present in Court—No instructions—Civil Procedure Code, ss. 85 and 86.

On the day fixed for the trial of a case the defendant was absent, and his proctor on the record, who was present in Court, stated he had no instructions.

Held, that the physical presence of the proctor in the Court, coupled with what he said on the trial day, did not constitute an appearance for the defendant which would give the proceedings the character of an *inter partes* trial which would enable the Judge to enter final decree.

MIDDLETON J.—It is somewhat difficult to say in such a case what is the principle upon which a Court should act in deciding whether there is an appearance or not, but I think each case must be determined upon its own circumstances.

THE facts are fully set out in the judgment.

van Langenberg (with him *Sampayo, K.C.*), for the first defendant, appellant.—The mere mention by the proctor that he had no instructions does not constitute an appearance. *Mohamado Lebbe v. Kiri Banda.*[1]

Bawa (with him *Samarawickrame* and *Jayatileke*), for the plaintiff, respondent.—The proctor was present in Court, and said he had no instructions. That is an appearance. See *Gargial et al. v. Somasundram*,[2] *Perumal Chetty v. Goonetilleke.*[3]

van Langenberg, in reply—In *Gargial et al. v. Somasundram*[2] and in *Perumal Chetty v. Goonetilleke*[3] the proctor applied for a postponement; the proctor, therefore, appeared for his clients in those cases.

Cur. adv. vult.

August 30, 1911. MIDDLETON J.—

This was an action for declaration of title, damages, and injunction in respect of a half share of plumbago land against the first defendant, the plaintiff allotting to the second defendant the other half share in the land.

[1] *(1907) 3 Bal. 200; 2 A. C. R. 169.* [2] *(1905) 9 N. L. R. 26.*
[3] *(1908) 4 Bal. 2.*

Upon the acceptance of the plaint, the Court ordered an injunction to issue returnable forthwith, and on March 8, 1910, it was ordered to be issued, but I can find no copy of it or any proof that it was served on the first defendant in the record.

The first defendant's answer denied the title of the plaintiff, and alleging title in himself sought the dismissal of the action, and claimed damages in reconvention for unlawful restraint from mining for plumbago. The replication, it was alleged, did not traverse the 7th paragraph of the answer.

On April 25, 1911, an application by the proctors on both sides for an adjournment of the trial day was refused, and the case came on for trial on May 4. On that date the first defendant was absent, and his proctor on the record, who was present in Court, stated he had no instructions, but the District Judge proceeded to hear the plaintiff's case, and entered a final judgment for the plaintiff as claimed.

On May 17, 1911, an application and affidavit by the first defendant were filed, and motion made to set aside the decree "from the step of default," and notice having been served on the plaintiff the question was discussed, and the first defendant cross-examined on his affidavit on July 5, and the application to re-open the judgment dismissed with costs on July 6. Against that order the first defendant now appeals, and the main question for our decision is whether the physical appearance of the first defendant's proctor in the Court, coupled with what he said on the trial day, constituted technically an appearance for the first defendant, which would give the proceedings the character of an *inter partes* trial, and so enable the District Judge to enter a final decree.

The cases of *Gargial et al. v. Somasundram Chetty*[1] and *Ahamado Lebbe v. Kiri Banda*[2] were cited by counsel, and it seems to me that those cases are quite reconcilable, and afford good bases for the decision of the question now before us. In the former case the circumstances as detailed by Chief Justice Layard showed that a proctor whose position was questioned did in fact and law appear, while in the latter it was clear that he did not. It is somewhat difficult to say in such a case what is the principle upon which a Court should act in deciding whether there is an appearance or not, but I think each case must be determined upon its own circumstances. In the present case it seems to me that the first defendant's proctor was casually present in Court, but, probably through his client's negligence, without any instructions to represent his client at the trial, and I would hold that is not an appearance so as to make the trial an *inter partes* one, and enable the Court to enter final judgment.

I think also that the application to the District Court decided on July 6 was rather an application to set aside the judgment entered,

[1] *(1905) 9 N. L. R. 26.*

[2] *(1907) 2 A. C. R. 170.*

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on the ground that it was wrongly entered in a final character, than an application to set aside a decree nisi, which the learned counsel for the respondent argued was the case. It is true, I think, that the affidavit made by the first defendant, or his cross-examination on it, does not afford by any means a sufficient excuse for his absence, or his failure to instruct his counsel to appear for him and summon the witnesses mentioned in his list. I think also it is clear, from the pleadings and on the evidence adduced for the plaintiff, that it was an extremely hazardous thing for the District Judge to enter a final judgment for the plaintiff in a matter of title to immovable property as he did. In my opinion, therefore, the appeal should be allowed, and the order and judgment of the District Court set aside, with the direction to try the case *de novo*.

The first defendant ought to have the costs of his appeal, but I would order him to pay his own costs of the application and all the plaintiff's costs incurred by the abortive trial on May 4 as between proctor and client, as he has adduced no sufficient reason why he did not instruct his proctor to appear and defend his case on the day he knew was fixed for the trial of the case. As regards the injunction, although it was prayed for in the plaint, and apparently granted as a matter of course, it seems to me that if it was granted there should have been a copy of it with proof of service on the first defendant to be found in the record, and in the absence of this it is difficult to say if it was in fact issued. The argument *ad misericordiam* on the ground of the magnitude of the damages accumulated against him on the judgment may therefore have some foundation.

I take occasion also to suggest, with reference to the learned Judge's observations on the character of the defendant, that although it is inevitable that a District Judge who has been long stationed in one district must become acquainted with the idiosyncrasies of the litigants frequenting his Court, it is advisable not to introduce into a judgment facts within his knowledge applying to them, which have not been specifically elicited in evidence in the particular case before him. The appeal is allowed.

LASCELLES C.J.—

I entirely agree in the judgment and order poposed by my brother Middleton.

Appeal allowed.