Present : Fisher C.J. and Drieberg A.J.

SUBRAMANIAM CHETTY *v.* MARIA.

75—D. C. *(Inty.) Kurunegala, 10,264.*

*Judgment by default—Several defendants—Contest by one defendant—
Final judgment against others—Civil Procedure Code, ss. 87
and 90.*

Where one of several defendants in an action appears and
contests the case, the Court has no power to enter final judgment
against the absent defendants without adopting the procedure of
an *ex parte* trial and decree *nisi.*

Section 90 of the Civil Procedure Code merely enables the Court
to defer the *ex parte* trial and the entering of the decree *nisi* against
the default defendants to a later stage of the action.

THIS was an action brought by the plaintiff-respondent for
declaration of title to 16/28 of a land. There were twenty-
three defendants to the action who were co-owners with the plaintiff.
Answer was filed on behalf of the 4th, 5th, and 13th defendants
only, the other defendants did not appear. At the trial only the
5th defendant contested the plaintiff's title. On May 18, 1928,
the Judge entered decree against all the defendants for title as
claimed and damages. The appellant thereafter petitioned the
Court and asked that the decree entered against him be set aside
on the ground that being in default decree *nisi* should have been
entered against him before final judgment could be passed. The
Court made order refusing to set aside the judgment.

Ranawake (with him *Peiris*), for the 10th defendant, appellant.—
Where a defendant in a District Court case fails to appear and
answer, or fails to appear at the trial after due notice, the procedure
to be followed is laid down in strict and unambiguous terms in
section 85 of the Civil Procedure Code. If there are several
defendants and some are absent, then as against these latter the
proceedings are *ex parte*, a decree *nisi* should be passed and notice
of the same should be served personally. This procedure has not
been followed and a final decree has been entered against the
10th defendant.

H. V. Perera (with him *Rajapakse*) for the plaintiff, respondent.—
The procedure laid down in section 85 does not apply where there
are several defendants, and some are in default. In such a case
the procedure laid down in section 90 applies. There is no need

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to proceed by an *ex parte* trial and enter a decree *nisi*. The Court is entitled on pronouncing judgment to enter a final order against the absent defendants as well. A Judge should be allowed this discretion, otherwise proceedings can be unnecessarily protracted and the plaintiff almost harassed, as has happened in this case. Counsel cited *Doorga Churu Sett v. Shamanund Gossain et al.*[1]

Ranawake, in reply.—Under the Indian Code there is no procedure for entering a decree *nisi*. Our section 90 merely provides for postponing the entering of a decree against an absent defendant. If the procedure of the learned District Judge is correct, it would throw open the door to fraud on the part of a scheming plaintiff.

July 3, 1928. DRIEBERG A.J.—

In this action the respondent prayed for declaration of title to 16/28 of a land, making as parties to the action twenty-three defendants who were co-owners with him.

There was appearance by a Proctor for the 4th, 5th, and 13th defendants only ; the other defendants though served with summons did not appear and sanswer.

At the trial it was noted that of these defendants only the 5th defendant contested the respondent's title. On May 18, 1926, the Court entered decree against all the defendants for title as claimed and damages at the rate of Rs. 250 a year from August 25, 1922. The correct procedure of entering decree *nisi* against the defendants who had failed to appear and answer was not followed.

Subsequently the 4th defendant appeared before Court and proved that he had not granted a proxy to the Proctor who represented him, and the Court set aside the decree entered against him and he was allowed to defend the action on terms.

Thereafter the appellant petitioned the Court and asked that the decree entered against him be set aside on the ground that having made default in appearing after service of summons there should have been decree *nisi* and service of the decree *nisi* on him before final judgment could be passed against him. His case is that he is the owner of a 1/28 share under the same title as the respondent, whose right to 16/28 he does not contest. He says that on receiving summons he went to a Proctor, who then told him that he was acting for the respondent and that he formed the impression that as he did not dispute the title of the respondent there was no necessity for him to file answer.

It is clear that the procedure required by section 87 of the Civil Precedure Code was not followed. Mr. H. V. Perera, however, contended that section 87 had no application where some defendants were in default and the others appeared, and that in such a case

section 90 of the Code was applicable, and that under it the Court had the power to enter final judgment against the absent defendants without adopting the procedure of an *ex parte* trial and decree *nisi*. In my opinion this section has not got such an effect. It does nothing more than relieve the Court from proceeding to an *ex parte* trial and decree *nisi* on the failure of some of the defendants to appear on the day fixed for answer or for the hearing of the action when there is one defendant at least who is contesting the action and against whom the action must proceed, and it can defer entering decree *nisi* against the defaulting defendants to a later stage of the action. There is good reason for this, for the defence of the contesting defendant may show to the Court that the plaintiff is not entitled to judgment even as against the absent defendants.

Mr. Perera cited the case of *Doorga Churn Sett v. Shamanund Gossain et al.*[1], which was a judgment in 1869 on section 116 of the early Indian Code, which corresponds to section 106 of the Code of 1882 and is now Order 9, Rule 11, of the present Code. It provides that—

" Where there are more defendants than one, and one or more of them appear and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear ".

Under the Indian Code there is no decree *nisi*, and where a defendant is in default of appearance on service of summons, the Court proceeds *ex parte*, which means that it satisfies itself that a *prima facie* case has been made out, and enters judgment (Order 9, Rule 6).

Our section 90 has been taken over from the provisions of the Indian Code, but with the necessary adaptation to the local requirement of the decree *nisi*, and permits the entering of a decree against an absent defendant to be deferred to a later or a final stage of an action where there is one defendant contesting. But under our Code any decree then entered against the absent defendants must be a decree *nisi*.

The appeal is therefore entitled to succeed, and the appellant should be allowed to appear and defend the action. We do not think that it would serve any useful purpose to require him after this lapse of time to satisfy the Court that he was prevented from appearing and filing answer by accident or misfortune, as required by section 87. Without accepting his explanation in its entirety there is sufficient ground to show that he misunderstood the situation and refrained from defending the action because he did not deny the respondent's title. The procedure required by the Code not having

[1] *(1869) 12 W. R. 376.*

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been followed, the correct order in this case is to set aside the decree against the appellant and allow him to defend the action, and we make order accordingly.

The respondent will pay to the appellant the costs of this appeal and of the proceedings in the District Court consequent on the appellant's petition.

FISHER C.J.—I agree.

Appeal allowed.