

1947

Present : Soertsz S.P.J. and Canekeratne J.

AMARASEKERE, Appellant, and FERNANDO, Respondent.

S. C. 42—D. C. (Inty.) Colombo, 17,216

Civil Procedure Code, ss. 85, 86—Defendant absent—Ex parte trial—Evidence by affidavit.

Evidence in support of the plaintiff's claim at an *ex parte* trial should, as a rule, be given orally, and affidavits should be resorted to only in exceptional cases. Where evidence is given by affidavit, the affidavit should be tendered in open Court and on the day fixed for *ex parte* hearing.

APPPEAL from a judgment of the District Judge. Colombo.

F. A. Hayley, K.C., with *M. M. K. Subramaniam*, for the defendant, appellant.

H. V. Perera, K.C., with *J. Fernandopulle*, for the plaintiff, respondent.

Cur. adv. vult.

December 5, 1947. SOERTSZ S.P.J.—

The sole question that arises on this appeal is whether we ought to set aside the order of the District Judge making absolute a decree *nisi* he had entered against the appellant on the ground that he was not present on the date fixed for answer, and for the *ex parte* trial. I am quite unable to accede to Mr. Hayley's application asking us to admit a document disclosed in an affidavit he produced before us. What is disclosed there is more a matter affecting the ultimate merits of the plaintiff's and the defendant's cases and we are not concerned with that question at the present stage.

The facts relevant for a proper consideration of the matter now before us are that the plaintiff sued the defendant to recover a sum of Rs. 8,077.28 as money due to be paid to him. The Court accepted the plaint and ordered summons for October 4, 1946. About five weeks later the plaintiff's Proctor moved that the returnable date of the summons be advanced "as the defendant is resident in Colombo and there is no difficulty in serving summons on him". This was allowed and the returnable date was advanced to September 20, 1946, and summons was taken out on September 16, 1946, and was on September 21, 1946, reported to have been duly served. The Proctor filed an affidavit of identity, and *ex parte* trial was fixed for October 25, 1946. On September 26, 1946, the plaintiff's Proctor filed an affidavit and moved that decree *nisi* be entered and decree *nisi* was entered returnable on October 25, 1946, which was the date that had been fixed for the *ex parte* trial. Decree *nisi* was issued on October 18, 1946, and was on October 25, 1946, reported to have been served and decree absolute was entered. On November 9, 1946, the plaintiff's Proctor applied for writ. It was issued returnable on November 10, 1947. Property belonging to the

defendant appears to have been seized almost immediately. But this rapid progress in the case was, presently, interrupted. The defendant appeared with petition and affidavit on November 13, 1946, and moved to have the decree absolute set aside on the ground that neither summons nor decree *nisi* had been served on him. As I have already indicated, the District Judge preferred the evidence of the process server and of the plaintiff to that of the defendant and refused to set aside that decree. Mr. H. V. Perera says with much force that we ought not to interfere with a trial Judge's finding on a pure question of fact. Nor would we, unless we are clearly satisfied by an examination of all the circumstances that the evidence preferred is not as good as it may look on the face of it. This, in my view, is definitely the case here. The spoken word is inconsistent with probability. I do not mean to suggest that the mere fact that the testimony of witnesses is improbable is a ground for rejecting it. That must depend on the character of the witness and the occasion on which the evidence is given and the nature of the evidence in the sense of its assessability by cross-examination and other tests. It is difficult to test bald statements such as "I served the summons. He was standing at the gate at the time"; and "I saw the summons served; he was standing at the gate at the time". When we have to deal with such evidence, it is necessary to go behind the scenes, so to speak, and in this case, directly we do that, strange things come to light. We find that a *special* process server was sought and obtained for serving the summons after the date for that step had been advanced. There is no satisfactory explanation of why the date was advanced or a special server sought. It was suggested by Counsel at the hearing of the appeal that when delays and difficulties are thought likely a "special" is, generally, asked for, but that, surely, cannot be the case here because in asking for the date of summons to be advanced the Proctor for the plaintiff declared that "the defendant is resident in Colombo and there is no difficulty in serving summons on him". Next, when we examine the evidence of the process server and compare it with that of the plaintiff, we find unexplainable discrepancies, little straws that seem to indicate the direction of the wind. The process server says that "the day before yesterday defendant spoke to me and asked me to give evidence. He met me and asked me to speak the truth. I did not tell the plaintiff Proctor or plaintiff that he offered me a bribe". The plaintiff, however, says "The Fiscal's peon came and told me that defendant saw him and offered him Rs. 100 to turn tables I did not offer him anything". The incorruptible "special", in the end, testified on the side of the plaintiff *pro deo*, rejecting the defendant's offer of Rs. 100. That is not all. The server says that on the day he served the decree *nisi* he "asked him (*i.e.*, the plaintiff) to come; he said he had some urgent work". The plaintiff's version is "On the second day I did not go with the Fiscal's peon. He said he can serve it. If he asked me to go with him I would have gone". There are other contradictions too. It is also a matter to be taken into account that a "gentleman" called Jinadasa, who is said to have been present when summons was served, was not called to support the plaintiff's case. It would hardly have amounted to an attempt to paint the lily to call him to support

the plaintiff and the "special". Then, there is the evidence of the plaintiff's Proctor. It is calculated to show that the defendant was an elusive "personage". He would not admit the plaintiff's claim; nor would he produce books; and one may presume that such a man would not easily let judgment go against him without striking or, at least, trying to strike a blow, for even an ineffective blow would, if not defeat the antagonist, at least delay him. In regard to the question why the defendant who had been so nonchalant when summons and decree *nisi* were served on him, hustled into activity when writ went to seize his property, Mr. Perera submitted that this was a curious but not unknown trait in the case of not a few litigants. That may be so. But in this case, in the circumstances I have referred to, I am unable to take that view. Then, there is the fact that long before the date fixed for the *ex parte* hearing an affidavit supporting the plaintiff's case was submitted to the Judge, and it was upon this affidavit that decree *nisi* was entered, evidently in Chambers. By itself this may be inconclusive for it is said to be the practice in the District Court of Colombo to prove claims *ex parte* by affidavit. But I should wish to point out that, as a rule, this should be done only in accordance with the terms of the section of the Civil Procedure Code. At any rate, the affidavit should be tendered in open Court and on the day fixed for the *ex parte* hearing. But, truly, now that nearly all the Courts have their stenographers on the Bench, it would be better that evidence in support of the plaintiff's claim be given orally, affidavits being resorted to only in exceptional cases.

An examination of all the matters before me satisfies me that the defendant has made out a case for setting aside the decree and giving him the opportunity of defending the action. I have dealt with this application in this detail, because I thought we ought to do so as we were disturbing a finding of fact by so experienced a Judge. The defendant is entitled to the costs of this application here and below.

CANEKERATNE J.—I agree.

Decree set aside
