

1961 Present : H. N. G. Fernando, J., and Tambiah, J.

E. VELUPILLAI, Appellant, and C. SIVASITHAMPARAM,  
Respondent

*S. C. 593/59—D. C. Jaffna, 1069/M*

*Default in filing amended answer—Power of Court to fix case for ex parte trial—Scope—Civil Procedure Code, ss. 85, 93.*

There is no section in the Civil Procedure Code which empowers the Court to fix a case for *ex parte* trial because of default of the defendant to comply with an order of the Court to file an amended answer in reply to a plaint which is amended in terms of section 93. In such a case, the penal provisions of section 85 are not applicable.

**A**PPEAL from a judgment of the District Court, Jaffna.

*S. Nadesan, Q.C.*, with *S. Sharvananda*, for defendant-appellant.

*H. W. Jayewardene, Q.C.*, with *S. Shanmugalingam*, for plaintiff-respondent.

*Cur. adv. vult.*

June 21, 1961. H. N. G. FERNANDO, J.—

The plaint in this action was filed on 6th November 1958 and answer was filed thereafter. On 19th June 1959 the plaintiff's counsel moved to file an amendment to the plaint. Counsel for the defendants stated that he had no objection and also that he did not move for costs. The District Judge ordered amended plaint to be filed on 16th July 1959. Ultimately an amended plaint was filed on 20th July 1959 on which date the Judge presumably in the presence of the Proctor for the defendants made order "amended Answer on 25.8.59". On the last-mentioned date neither the defendant nor his Proctor was present in Court, and the learned Judge fixed the case for *ex parte* trial on the 10th of September 1959. Trial was held *ex parte* on 10th September 1959 but was adjourned for addresses (? the address of plaintiff's counsel) to 7th October 1959. On October 5th 1959 the defendant moved the Court to vacate the order setting down the case for *ex parte* trial and asked that he be allowed to file answer and take part at the subsequent trial.

I would uphold the contention for the appellant that *section 85 of the Civil Procedure Code* contains no reference to the failure of a defendan

to comply with an order of the Court to file an amended answer in reply to a plaint which is amended in pursuance of *section 93*. While being aware that the practice relating to amendment of pleading is not exactly that which *section 93* contemplates, namely that the Judge himself should consider and incorporate proposed amendments, it does seem that a departure from the strict requirements of *section 93* can create avoidable difficulties. In fact the difficulties which have arisen in this particular case have been due partly to the circumstance that the learned Judge accepted without demur an amended plaint in which the plaintiff sets out a cause of action quite distinct from that which was pleaded in his original plaint. If it is a practice thus to accept an amended plaint without consideration of the question whether the amendment is in order or not, it should also be the practice invariably to afford to a defendant the opportunity to raise objections to the amendments.

The learned District Judge fixed the case for *ex parte* trial because of default of the defendant in complying with the order to file an amended answer. There is no section in the Code which empowers the Court to make such an order, and a defendant might well be content to go to trial with his original answer unamended. Since he was not bound to file an amended answer there was no such default as would bring the penal provisions of *section 85* into operation, and the only lawful order the Judge could have made on 25th August 1959 was to fix a date for trial. That being so the *ex parte* trial was wrongly held and the decree passed thereon has to be set aside in exercise at least of the powers of this Court in revision.

Although as I think the proper step would have been to fix the date of trial and although this step must now be taken, when the record returns to the District Court the defendant will not be precluded from moving to amend his answer on such terms as the Court may consider appropriate. The defendant is partly at least to blame by his absence on 25th August 1959, for the fact that *ex parte* trial was ordered. In those circumstances I would order that the defendant must bear the costs of 25th August 1959 and of the Inquiry held on 18th November 1956.

The plaintiff must pay to the defendant the costs of this appeal.

TAMBIAH, J.—I agree.

*Decree set aside.*