

1968 Present: Siva Supramaniam, J., and Tennekoon, J.

THE BOARD OF DIRECTORS OF CEYLON SAVINGS BANK,  
Appellant, and R. NAGODAVITANE, Respondent

S. C. 19/66—D. C. Colombo, 9255/M.B.

*Hypothecary action—Failure of defendant to file answer on due date—Omission to purge default—Incapacity of Court to grant extension of time to pay the mortgage debt—Ex parte hearing of case—It need not be on date of defendant's default—Mortgage Act (Cap. 29), ss. 48 (1), 59—Civil Procedure Code, ss. 85, 87 (1).*

A defendant in a hypothecary action who absents himself on the date on which he is due to file answer is not entitled thereafter, without purging his default, to obtain relief under the proviso to section 48 (1) of the Mortgage Act. In such a case, the Court is not empowered to entertain any application for relief from the defendant until the *ex parte* trial has been held and decree has been entered in terms of section 85 of the Civil Procedure Code.

Section 85 of the Civil Procedure Code does not require that the Court shall proceed immediately to hear a case *ex parte* when the defendant is in default in respect of any matter mentioned therein. The words "shall proceed to hear the case *ex parte*" mean that *the next step the court shall take is to hear the case ex parte*. The hearing need not necessarily be on the same day.

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

*H. W. Jayewardene, Q.C.*, with *D. S. Wijewardene*, for the plaintiff-appellant.

*N. Kasirajah*, for the defendant-respondent.

*Cur. adv. vult.*

June 26, 1968. SIVA SUPRAMANIAM, J.—

The question that arises for decision in this appeal is whether a defendant in a hypothecary action who had absented himself on the date on which he was due to file answer is entitled thereafter, without purging his default, to obtain relief under the proviso to s. 48 (1) of the Mortgage Act (Cap. 89).

The Board of Directors of the Ceylon Savings Bank instituted this action for the enforcement of a mortgage bond granted by the defendant in its favour. In terms of the bond the principal along with the accrued interest was payable on demand. But the defendant was permitted by the plaintiff to pay the principal amount in fifteen equal annual instalments, provided each instalment was paid on the specified date. The defendant, however, made default in the payment of the instalments and the plaintiff claimed the full outstanding balance in terms of the bond.

In answer to the summons served on him by substituted service, as the Fiscal was unable to effect personal service, the defendant appeared by a Proctor and moved for time to file answer. He was allowed time till 20th May 1965. He failed to file answer on that date and was allowed further time till 24th June 1965. On that date too the answer was not filed and the defendant as well as his Proctor were absent. The Court, thereupon, fixed the case for *ex parte* trial on 5th August, 1965.

The defendant appeared in court on 5th August 1965 and tendered an affidavit in which he admitted the claim subject to certain payments made by him to the plaintiff after the institution of the action. He set out no grounds whatsoever for his default on the earlier date, but prayed that he be granted six months' time to pay the arrears of the instalments and also be allowed to pay the balance in annual instalments as agreed upon between him and the plaintiff at the time of the execution of the bond. The prayer for relief was presumably under the proviso to s. 48 (1) of the Mortgage Act. The plaintiff objected to the defendant being heard until he had purged his default but the learned trial judge found that the court was entitled to consider his application before the *ex parte* trial was held and granted the defendant the relief he had prayed for. He erroneously stated, however, that the instalments ordered were "according to the terms of the bond". The plaintiff appeals against that order.

In regard to the question whether, after a case has been fixed for trial *ex parte* by reason of the default of appearance of the defendant, the defendant is entitled to appear and purge his default before the *ex parte* trial is held, conflicting views have been expressed by this court. In *Perera v. Alwis*<sup>1</sup> H. N. G. Fernando J. (as he then was) and Sinnnetamby, J. decided that the reasons for the default of appearance may be considered by the court before the *ex parte* trial is held. But in the later case of *Sally v. Noor Mohammed*<sup>2</sup> Basnayake C.J. and G. P. A. Silva J. disagreed with that view and declined to follow that decision. That question, however, does not arise for consideration in the instant case as the defendant at no stage made any application to purge his default.

It was argued by counsel for the defendant that, despite the default of the defendant on the date fixed for the filing of his answer, the court is entitled to grant him relief under the proviso to s. 48 (1) of the Mortgage Act, so long as no decree has been entered. S. 48 (1) provides as follows:—

"Where in a hypothecary action the court finds that the mortgage ought to be enforced, the decree shall, in relation to the mortgaged land, order that the land shall be sold in default of payment, within a period of two months of the date of the decree, of the moneys due under the mortgage :

<sup>1</sup> (1957) 60 N. L. B. 260.

<sup>2</sup> (1964) 66 N. L. B. 176.

Provided, however, that the court may, in its discretion and subject to such conditions including the making of specified payments on specified dates as it thinks fit, on application made in that behalf before the entry of the decree and after consideration of the circumstances of both the mortgagor and mortgagee, fix, in lieu of the aforesaid period of two months, such longer period as the court may consider reasonable.”

It should be noted that, under the above proviso, the court is empowered to grant the relief, not *ex moro motu*, but on application made in that behalf by the defendant.

S. 59 of the Mortgage Act makes it clear that s. 85 of the Civil Procedure Code is applicable to hypothecary actions. S. 85 (omitting parts not relevant for the point under consideration) reads as follows :—

“ If the defendant fails to appear on the day fixed for his appearance and answer, or if he fails to appear on the day fixed for the subsequent filing of his answer . . . . . or if the defendant shall fail to file his answer on the day fixed therefor, and if on the occasion of such default of the defendant the plaintiff appears, then the court shall proceed to hear the case *ex parte* and to pass . . . . . in the case of a hypothecary action, a decree absolute . . . . .”

This section does not require that the court shall proceed *immediately* to hear the case *ex parte*. One of the Dictionary meanings of the word “ proceed ” is “ make it one’s next step ”. The words “ shall proceed to hear the case *ex parte* ” therefore mean that *the next step the court shall take is to hear the case ex parte*. The hearing need not necessarily be on the same day.

The direction, however, in regard to the next step is imperative and the court is not empowered to entertain any application for relief from the defendant until the *ex parte* trial has been held and decree has been entered in terms of s. 85 of the Civil Procedure Code. I agree, with great respect, with the observation of Basnayake C.J. in *Sally v. Noor Mohammed* (supra) that “ the court has no power to take a course of action other than that prescribed in s. 85 of the Civil Procedure Code when the defendant fails to appear on the day fixed for the subsequent filing of his answer ”.

The learned judge was wrong in considering the affidavit tendered by the defendant on 5th August 1965 before he heard the case *ex parte* and passed a decree absolute as required by s. 85 of the Civil Procedure Code. Had a decree absolute been entered in terms of that section, the defendant could not have made an application for relief under s. 48 (1) of the Mortgage Act until he had that decree vacated by making an application under s. 87 (1) of the Civil Procedure Code and satisfying the court that there were reasonable grounds for the default upon which the decree

absolute was passed. As stated earlier, the defendant in this case made no attempt whatsoever to purge his default and the court had therefore no power to grant him relief under s. 48 (1) of the Mortgage Act.

I allow the appeal and set aside the judgment and decree of the lower court and direct that a fresh decree absolute be entered in the form No. 22A in the First Schedule to the Civil Procedure Code or to the like effect as required by s. 85 of the Code.

The appellant will be entitled to its costs in both courts.

TENNEKON, J.—I agree.

*Appeal allowed.*

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