

1963

Present: Sansoni, J., and H.N.G. Fernando, J.W. JOHANIS APPUHAMY, Appellant, and
V. H. CARLINCHO, Respondent*S. C. 230—D. C. Galle. 5750/L**Civil procedure—Non-appearance of defendant on the adjourned date of hearing of action—Resulting position—Civil Procedure Code, ss. 85, 144.*

After the plaintiff had closed his case and the defendant had called a witness, the case was put off for further hearing. On the adjourned date the defendant and his Proctor were absent.

Held, that, in the circumstances, the only course which the Court could have adopted was to enter a decree *nisi* in favour of the plaintiff in terms of section 85 of the Civil Procedure Code. In such a case, the Court cannot give judgment for the plaintiff on the basis that the defendant did not intend to lead any further evidence.

APPEAL from a judgment of the District Court, Galle.

C. Ranganathan, with *M. T. M. Sivardeen*, for the Defendant-Appellant.

G. G. Mendis, for the Plaintiff-Respondent.

October 25, 1963. SANSONI, J.—

In this case the trial proceeded to the stage where, the plaintiff having closed his case, the defendant called a witness and the case was put off for further hearing. On the next date the defendant and his proctor were absent. The learned District Judge has given judgment for the plaintiff on the basis that the defendant did not intend to lead any further evidence. The question that arises is whether in these circumstances the learned District Judge had the power to give judgment as if the case had been heard *inter partes*, as he did in this case, or whether he should have entered only a decree *nisi* in the plaintiff's favour.

Under section 144 of the Code, where any party is absent on the day to which a hearing is adjourned, the Court may proceed to dispose of the action in one of the modes directed by Chapter 12, or make such other order as it thinks fit. Chapter 12, of course, deals with the course to be adopted where a party is absent. The Court in this case has disposed of the action, but not in one of the modes directed by Chapter 12. Does the judgment given by the District Judge come under the words "make such other order as it thinks fit"? I do not think so, because those words seem to contemplate some order such as giving notice to the absent party, or putting the case by, short of an order disposing of the action. We think that in this case the only course the learned District Judge could have adopted was to enter a decree *nisi* under section 85. If the defendant wishes to purge his default he will then have an opportunity to do so.

We therefore set aside the decree entered in this case and direct that a decree *nisi* be entered in the plaintiff's favour in terms of section 85 of the Code. The appellant is entitled to the costs of this appeal.

H. N. G. FERNANDO, J.—I agree.

Decree set aside.