

1964 Present : Basnayake, C.J., and G. P. A. Silva, J.

N. M. SALLY, Appellant, and M. A. NOOR MOHAMED, Respondent

S. C. 38/63 (Inty.)—D. C. Colombo, 1024/ZL

Civil Procedure Code—Sections 85 and 86 (2)—Failure of defendant to file answer on due date—Order made by Court fixing date for ex parte trial—Incapacity of Court to set aside such order.

Where a case is fixed for *ex parte* trial in terms of section 85 of the Civil Procedure Code, the reasons for the default of the defendant cannot be considered by Court before the *ex parte* trial is held.

Perera v. Alwis (69 N. L. R. 260) not followed.

APPPEAL from an order of the District Court, Colombo.

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

No appearance for Defendant-Respondent.

January 22, 1964. BASNAYAKE, C.J.—

This is an appeal from an order of the learned Additional District Judge of Colombo setting aside the order fixing this case for *ex parte* trial and giving the defendant a date to file answer in an action in which the defendant failed both to appear on the day fixed to file answer and also to file answer on that date.

¹(1961) 63 N. L. R. 322.

Shortly the facts are as follows : On 9th October 1962 the plaintiff instituted an action against the defendant in which he stated that he was the proprietor of the business carried on under the business name of " Mubarak Hotel " at No. 103 Messenger Street, and the defendant, who had no manner of right or title to the premises in which the business was carried on or to the said business or to its furniture and fittings, was threatening to enter the premises and forcibly take over the said business and its possession and appropriate all the assets of the plaintiff. He further alleged that the defendant was threatening bodily harm to him and his life was in danger. He asserted that by reason of the action of defendant, there had accrued to him a cause of action to sue him in order that he may be quieted in possession of his property. He asked for an interim injunction restraining the defendant and his servants from interfering in his business. An interim injunction was issued by the Court to be served on the defendant and it was served on him ; and on the day fixed for the appearance of the defendant and for him to file answer, a proxy given to Mr. Sambandan by him was filed by another proctor, but the journal entry incorrectly shows that the proxy of the defendant was filed by Mr. Sambandan. On that date the defendant and his proctor were absent and the case was fixed for *ex parte* trial on 25th January 1963, and on that date Mr. Sambandan filed a petition and an affidavit and moved that the defendant be allowed to file answer. In his petition, which is subscribed to by proctor Sambandan, it is stated that owing to an oversight his proctor had taken down the date as 10th February 1963 instead of 10th December 1962, and that when he applied for the record to check up the date, he noticed the error. He stated that he had a good and valid defence in the case and that irreparable loss and damage would be caused to him if the case was fixed for *ex parte* trial. The learned District Judge fixed the matter for inquiry on 6th February 1963 and on that date proctor Sambandan gave evidence and read the petition and the affidavit dated 25th January 1963, and explained that he himself was not present on 19th November 1962, but the proctor to whom he had entrusted the work of filing the proxy had taken down the wrong date while he (proctor Sambandan) was in another Court. After hearing the evidence of proctor Sambandan the learned District Judge made order setting aside the order fixing the case for *ex parte* trial and gave the defendant time to file answer till 11th March, 1963.

Section 85 of the Civil Procedure Code reads :

“ 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 for the filing of the replication, or on the day fixed for the hearing of the action, and if the court is satisfied by affidavit of the process server, stating the facts and circumstances of the service, or otherwise, that the defendant has been duly served with summons, or has received due notice of the day fixed for subsequent filing of answer, or of replication, or of the day fixed for the

hearing of the action, as the case may be, 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 a decree *nisi* in favour of plaintiff in the form No. 22 in the First Schedule or to the like effect, or, in the case of a hypothecary action, a decree absolute in the form No. 22A in the First Schedule or to the like effect, and shall issue to the defendant a notice of every such decree *nisi*. Such notice shall be served personally unless the court, for sufficient cause to be assigned by it, direct some other mode of service.”

The Court has no power to take a course of action other than that prescribed in section 85 of the Civil Procedure Code when the defendant fails to appear on the day fixed for the subsequent filing of his answer. The course prescribed is that “the Court shall proceed to hear the case *ex parte* and to pass a decree *nisi* in favour of the plaintiff in the form No. 22 in the First Schedule or to the like effect”. The learned Judge was therefore wrong in setting aside the order fixing the date for *ex parte* trial as he had no power to do so.

Our attention has been drawn to the case of *K. A. Perera and another v. H. E. Alwis and another*¹ where it was held that where, on default of appearance of the defendant on the day fixed for appearance and answer, a date was fixed for *ex parte* trial, the reasons for the default of appearance may be considered by Court before the *ex parte* trial is held.

We are unable to agree with that view. The defendant is not without a remedy because section 86 of the Civil Procedure Code provides for it. Section 86 (2) reads—

“If, however, the defendant shall satisfy the court that there were reasonable grounds for the default upon which the decree *nisi* was passed, then the court shall set aside the decree and shall order the case to be proceeded with as from the stage at which the default was committed, upon such terms as to costs, notices, or otherwise as the court shall deem fit.”

We accordingly set aside the order of the learned District Judge and direct the Court to proceed to hear the case *ex parte*.

The appellant is entitled to the costs of appeal.

G. P. A. SILVA, J.—I agree.

Order set aside.