

1960 Present : Basnayake, C.J., and T. S. Fernando, J.

ALIM, Appellant, and AMARASINGHAM, Respondent

*S. C. 30—D. C. Batticaloa, 1310*

*Decree nisi passed on account of absence of plaintiff—Power of Court to set it aside on good cause shown—Date on which decree nisi becomes absolute—Computation.—Conditions precedent to entering of decree—Civil Procedure Code, ss. 84, 184, 188.*

Even if good cause is shown for the absence of the plaintiff, a decree *nisi* passed in terms of section 84 of the Civil Procedure Code cannot be set aside once it becomes absolute after the expiry of fourteen days from the date on which the Court passed the order. The date, for the purpose of computing the fourteen days, is the date on which formal decree in terms of Form No. 21 in the First Schedule to the Civil Procedure Code is in fact signed by the Judge.

*Austin de Mel v. Kodagoda* (1945) 46 N. L. R. 150, followed.

Before a Judge passes a decree *nisi* under section 84 he should expressly state that the defendant (a) is present in person or by proctor, (b) does not admit the plaintiff's claim and (c) does not consent to a postponement.

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

*C. Ranganathan*, with *R. Rajasingham*, for Plaintiff-Appellant.

*E. Gooneratne*, with *C. Navaratnarajah*, for Defendant-Respondent.

*Cur. adv. vult.*

March 22, 1960. BASNAYAKE, C.J.—

This is an appeal from an order refusing to set aside a decree *nisi* passed under section 84 of the Civil Procedure Code.

On 26th February 1957 the plaintiff instituted this action against the defendant praying that he be declared entitled to an undivided three-fourth share of a paddy field called "Puliyadipothanai" and that the defendant be ejected therefrom. The defendant did not admit the plaintiff's claim and filed answer denying it and claiming compensation for improvements in the event of the plaintiff being declared entitled to it. The plaintiff thereupon filed a replication, praying that the defendant's claim for compensation be dismissed.

On 11th September 1957, the day fixed for the hearing of the action, the plaintiff failed to appear either in person or by Proctor, and the District Judge made order "Enter decree nisi dismissing plaintiff's

action with costs". The record does not show whether the defendant was present in person but it appears that his counsel and proctor were present.

On 13th September 1957 the plaintiff's Proctor filed a petition and affidavit and moved that the decree *nisi* be set aside. Notice was issued on the defendant for 15th October 1957. On that date both parties were present and the learned Judge made the following order : " Objections of the defendant on 12.11.57 ". The defendant did not file his objections on that day and he was given time till 3rd December 1957, when they were filed, and the inquiry was fixed for 29th January 1958, on which day the inquiry was commenced but not completed. It was adjourned for 14th February 1958 and the order against which the appeal has been taken was made on 7th March 1958. He held that there was good cause for the absence of the plaintiff, but that he was powerless to set aside the decree *nisi* as it had become absolute as fourteen days had expired from the date on which the Court made the order. Although the order " Enter decree nisi dismissing the plaintiff's action with costs " was made on 11th September 1957, the decree in Form No. 21 was not signed by the Judge till 25th September 1957. Section 84 of the Civil Procedure Code provides *inter alia* that " if the plaintiff fails to appear on the day fixed for the hearing of the action, and if the defendant on the occasion of such default of the plaintiff to appear is present in person or by Proctor, and does not admit the plaintiff's claim, and does not consent to postponement of the day for the hearing of the action, the Court shall pass decree *nisi* in Form No. 21 in the First Schedule, or to the like effect, dismissing the plaintiff's action . "

In the instant case the minute the Judge made on 11th September 1957, the date fixed for the hearing of the case, is as follows :

" Case No. 1310/L

11.9.57

D. C. Batticaloa

Mr. Adv. Kanagasunderam instr. by Mr. Navaretnarajah for defd.  
Plaintiff and proctor—absent.

Enter decree nisi dismissing the plaintiff's action with costs.

Intd. Jos. J. David

A. D. J.

11.9.57 ."

Section 84, the relevant part of which is cited above, lays down certain conditions precedent to the entering of a decree *nisi*. They are :

- (a) if the defendant on the occasion of such default of the plaintiff to appear is present in person or by proctor, and
- (b) does not admit the plaintiff's claim, and
- (c) does not consent to postponement of the day for the hearing of the action.

The record does not show that the learned District Judge addressed his mind to the requirements of the section before making the order of 11th September 1957.

It is important that there should be a record of the fact that the order was made in accordance with the requirements of the section under which it is made. For, the power conferred by the section is conditional.

The main contention of learned counsel for the appellant is that there was no decree *nisi* in the instant case as the decree had been signed as of the date on which the order "Enter decree nisi" was made, though in fact it was signed by the Judge on the 25th September—14 days afterwards. I am unable to agree that there is no decree, for if there is no decree then there has been no refusal to set aside the decree and there can be no appeal (section 87 (1)). An appeal lies only from an order refusing to set aside the decree (section 87 (2)).

If learned counsel's contention is right he is not entitled to appeal.

Assuming that the conditions precedent were observed, and learned counsel does not contend that they were not, there is a valid decree entered in the case. The main question that was argued is whether the date on which the order was made or the date on which the formal decree in Form No. 21 was in fact signed is to be taken for the computation of the fourteen days.

Now what the section requires is that upon the conditions therein coming into existence the Court should obtain the prescribed form, fill it up, and sign it instantly. But the practice now seems to be for the Court to make a minute in the journal "Enter decree nisi" and for the form to be written up by a clerk of the Court and signed by the Judge later but dated as of the date on which the order was made. The material words of the section are "the court shall pass a decree *nisi* in the Form No. 21 in the First Schedule, or to the like effect, dismissing the plaintiff's action, which said decree shall, at the expiration of fourteen days from the date thereof, become absolute". It appears from the words quoted that the date for the purpose of computing the fourteen days is the date of the decree in Form No. 21.

Now what is the date of the decree in Form No. 21? Is it the date on it entered *nunc pro tunc* or the date on which it is actually signed? The answer to that question depends on whether in the case of a decree in Form No. 21 the Judge has the power to give it a date other than the one on which he signs it. In the case of a formal decree drawn up and signed in Form No. 41 as required by section 188 of the Civil Procedure Code it is provided by that section that it should bear the same date as the judgment. I am of opinion that that requirement applies only to formal decrees drawn up to give effect to such judgments as are contemplated in section 184 and not to a decree in Form No. 21 passed under section 84. The Judge has therefore no power to give a decree in Form No. 21 any date other than the date on which he signs it. The fourteen

days should therefore be computed from 25th September, the date on which the decree was in fact signed. The decree did not therefore become absolute till the expiration of fourteen days from that date. But in the instant case the appellant's application was not heard and decided till 7th March 1958 long after the expiration of fourteen days from the date on which the decree in Form No. 21 was signed. The learned District Judge was therefore right in refusing the application as the decree *nisi* had by then become absolute.

The view we have taken of the method of computing the 14 days is not new and has been expressed in the case of *Austin de Mel v. Kodagoda*<sup>1</sup>. The learned District Judge should therefore have held the inquiry and decided the matter before the expiration of 14 days from 25th September. The plaintiff has suffered by his failure to do so.

Judges of first instance should bear in mind the interpretation placed by this Court on section 84 and hold the inquiry and decide the application under section 84 (2) before the expiration of 14 days so that a plaintiff who, as in this case, has good cause to show will not be deprived of his rights.

The appeal is dismissed with costs.

T. S. FERNANDO, J.—I agree.

*Appeal dismissed.*

