1926.

Present: Garvin and Lyall Grant JJ.

SCHARENGUIVEL *v.* ORR.

170—D. C. (Inty.) Kalutara, 12,817.

Default of appearance—Proctor's failure to inform the client of date of trial—Absence of client—No excuse for default—Civil Procedure Code, s. 84.

Where a judgment is entered against a party by default, it is not a sufficient excuse for his absence that his proctor had failed to inform him of the date of trial.

Per LYALL GRANT J.—It has never been held that a Proctor for a plaintiff who had received a proxy and instructions for the preparation of a plaint is entitled to avoid a final judgment against his client merely by stating on the date fixed for trial that he had received no instructions.

Senanayake v. Cooray[1] considered.

APPEAL from an order by the District Judge of Kalutara.

H. V. Perera, for plaintiff, appellant.

November 19, 1926. LYALL GRANT J.—

This is an appeal from an order of the District Judge of Kalutara disallowing an application by the plaintiff to re-open a case. The plaintiff-appellant had brought an action for the recovery of a sum of Rs. 1,500. For the purposes of the action he gave a proxy to a certain Proctor who filed the plaint. The plaint was signed by the Proctor. Summons was issued and served and answers were field. On February 2, 1926, the defendant's issues were filed and the date of trial fixed for June 16. When the date was fixed neither

[1] *(1911) 15 N. L. R. 36.*

the Proctor nor the plaintiff was present in Court. On June 16 the case came on for trial, when the Proctors for both parties were present.

The Proctor on behalf of the plaintiff then stated that he had no instructions from his client. Thereupon, on the motion of the defendants, the case was dismissed, with costs.

On June 22 Messrs. de Abrew & Jayasundere filed a proxy from the plaintiff with cancellation of his proxy to his former Proctor, together with an affidavit from the plaintiff, and asked that the decree be set aside and the case fixed for trial.

After inquiry, the learned District Judge found that the plaintiff was not ignorant of the date of trial, and disallowed the application.

The proceedings to set aside the decree were brought under section 84 of the Civil Procedure Code on the assumption that the decree dismissing the action was entered in default of the plaintiff's appearance.

The actual decree passed was in form an ordinary final decree. but the learned District Judge in the subsequent proceedings treated it as a decree *nisi* and held an inquiry under section 84 of the Civil Procedure Code. He found that the failure to appear was due to the plaintiff's own negligence, and refused to re-open the case.

On appeal there was a good deal of discussion on the point whether the plaintiff had or had not failed to appear on the date of trial inasmuch as his Proctor was present, and accordingly whether the decree could not or could be treated as a decree *nisi* under section 84 of the Civil Procedure Code.

The District Judge does not appear to have dealt with this aspect of the case. He gives the appellant the benefit of any doubt there may be on the point and treats the decree as one made in his absence. He finds, however, that the plaintiff has not shown good cause for his non-appearance. On the question of whether the failure to appear was due to his own personal fault or to that of his Proctor, he finds that it was due to the fault of the plaintiff himself.

To my mind the facts indicate that there was negligence on the part of the Proctor, and not personal negligence on the part of the plaintiff.

That, however, is immaterial. The plaintiff must suffer for his Proctor's negligence. This is clearly laid down by Bonser C.J. in *Pakir Mohideen v. Mohamadu Cassim.*[1] There the defendant, after filing answer, took no steps to get ready for trial. The case proceeded *ex parte* and a decree *nisi* was entered against him.

The Proctor appeared in Court and said he had no instructions and withdrew from the case. The defendant said that he had mistaken the date of trial.

[1] *(1900) 4 N. L. R. 299.*

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LYALL GRANT J.

Scharenguivel v. Orr

It was held that it was the duty of the Proctor to have informed the defendant of the proper date of the trial and to have asked for instructions, and that as the Proctor did not appear to have done his duty he was to blame for the absence of the defendant, and the defendant must suffer for the fault of his Proctor.

In that case Bonser C.J. said:—

> "The Proctor knew that the trial was coming off on June 27, and I cannot find any excuse for a Proctor so forgetful or neglectful of the interests of his client as to fail to inform him of the date of trial which was rapidly approaching or even to ask for instructions in the matter. If the Proctor did not do his duty he is to blame for the absence of the defendant, and the defendant must suffer for the fault of his Proctor."

With the exception that in the present case the party asking to have the case re-opened is the plaintiff and not the defendant, the relevant circumstances of that case appear indistinguishable from those now before us.

That is sufficient to dispose of the appeal. The District Judge was entitled to hold that the plaintiff had not showed cause why the case should be relisted.

I am, however, not at all satisfied that in the circumstances the decree was not a decree *inter partes*. It has never been held that a Proctor for a plaintiff who has received a proxy and instructions for the preparation of a plaint is entitled to avoid a final judgment against his client merely by stating on the date fixed for trial that he has received no instructions.

Prima facie it is his business to obtain instructions. Cases have been cited where it has been held that the mere fact of a Proctor for a defendant stating to the Court that he had no instructions from his client did not necessarily constitute an appearance. The leading case is *Senanayake v. Cooray* (*supra*). There the Proctor was casually in Court and had no instructions to represent his client at the trial. One of the reasons given for the decision—the grounds for which are not very clear—was that the case dealt with title to immovable property.

In *Perera v. Gunatileke*,[1] where the circumstances were somewhat similar, the decision was followed.

Another case similarly decided was *Kandappa v. Marimuttu*.[2]

On the other hand, where a defendant's Proctor appeared on the date of trial and moved for a postponement on the ground that owing to the absence of his client from Ceylon he was unable to get ready for the trial and the postponement was refused, that was held to be such an appearance as to make the trial one *inter partes* and the judgment a final one. (*Gargial v. Somasundaram Chetty*.[3])

[1] *(1917) 4 C. W. R. 6.* [2] *(1911) 14 N. L. R. 395.*
[3] *(1905) 9 N. L. R. 26.*

The *ratio decidendi* of *Senanayake v. Cooray* (*supra*) and *Perera v. Gunatileke* (*supra*) is not easily discernible, but all that they decide is that there may be circumstances in which the presence of a Proctor does not constitute an appearance for his client.

They do not, to my mind, justify the conclusion that a Proctor can convert what would otherwise be a final decree into a decree *nisi* merely by stating that he has no instructions from his client.

I should like to see the point authoritatively decided in a suitable case.

The appeal is dismissed.

GARVIN J.—

I agree to the order proposed by my brother, and I share his view that when a suitable opportunity presents itself the judgments in *Senanayake v. Cooray* (*supra*), *Perera v. Gunatileke* (*supra*), and *Kandappa v. Marimuttu* (*supra*) should be reviewed and the point settled by an authoritative decision.

Appeal dismissed.