1950 *Present:* **Dias S.P.J. and Gunasekara J.**

SUPPAMMAL, Appellant, *and* THEVAR *et al.*, Respondents.

S. C. 28—D. C. (Inty.) Colombo, 18,223/M.

Appeal—Decree nisi *entered against defendant—Failure to show cause—Decree made absolute—Right of appeal—Civil Procedure Code, s. 87—Abandonment of action by Counsel—Client's right of appeal.*

A decree *nisi* which is made absolute after the defendant has appeared and failed to show cause against it is not appealable.

Silva v. Grero (1895) 1 N. L. R. 67 and *Mohamed Aliar v. Segu Mohamado Marikar (1928) 30 N. L. R. 1 followed.*

Conderlag v. Muttiahpulle (1928) 30 N. L. R. 73 not followed.

Per Dias S.P.J.—"It cannot be denied that the law on this point is in an extremely unsatisfactory state, and needs the immediate attention of the Legislature."

One Full Court cannot over-rule the decision of another Full Court.

Where decree is entered against a party by reason of the abandonment of the action by the counsel whom he retained, no appeal lies against such decree.

APPEAL from a decree of the District Court, Colombo.

A. C. Nadarajah, with *V. K. Kandasamy*, for the 2nd defendant appellant.

H. W. Jayewardene, for the plaintiff respondent.

Cur. adv. vult.

June 21, 1950. DIAS S.P.J.—

Counsel for the plaintiff respondent took two preliminary objections to the hearing of this appeal. If either of these objections proves successful, this appeal would have to be dismissed. We, therefore, decided to deal with these preliminary objections in the first instance.

The relevant facts are as follows: The plaintiff sued the 1st defendant as the maker of a promissory note. It is alleged that the 1st defendant indorsed the note to one Kumarasamy Chettiar who indorsed the note to the plaintiff. The 2nd defendant-appellant is the widow of the indorsee. Summons were served on both defendants. On August 25, 1947, they appeared in Court and filed proxies and were ordered to file answers on September 15, 1947. On that date the 1st defendant filed answer, but the 2nd defendant failed to do so. Threupon, the District Judge fixed the case for *ex-parte* trial against her. The plaintiff having filed an affidavit, the Court entered decree *nisi* against the 2nd defendant and made it returnable on October 20. On that day the decree *nisi* having been reported to have been served on the attorney of the 2nd defendant, he obtained time to show cause on November 3. On that day the attorney filed objections and the matter was fixed for inquiry on November 25, 1947.

On November 25, 1947, the record reads:

" Mr. Advocate Chellappah for 2nd defendant. 2nd defendant's attorney is said to be ill. Mr. Advocate Chellappah asks for a date on that ground. There is no evidence of illness submitted to Court. I cannot accept a statement only to that effect. The attorney is said to be in India. Mr. Kumaravetipillai (proctor for the plaintiff) objects to a date. Mr. Chellappah states that he is unable to proceed with the inquiry. Application to set aside decree (*nisi*) is dismissed and the decree *nisi* is made absolute ".

The decree absolute which was entered reads as follows:—

" The above decree *nisi* coming for final order before N. Sinnetamby, Esquire, Additional District Judge, Colombo, this 25th day of November, 1947, being the day appointed in the said decree for showing cause against it, of which decree the 2nd defendant received notice as appears by the affidavit of the Fiscal's server dated 24.9.47, and the plaintiff appearing by proctor, and the 2nd defendant appearing by counsel ; and no cause having been shown to the contrary, the above decree is made absolute.

(Sgd.) N. SINNETAMBY,
Additional District Judge ".

The first question for decision is whether this is an appealable order ?

The facts of this case are identical with the facts on which the Full Court of the Supreme Court (at a time when the Supreme Court consisted of only three Judges) held that no appeal lies from an order made absolute under such circumstances—see *Silva v. Grero* [1]. The Full Court followed with approval the case of *Nachchiappa Chetty v. Muttoo Kangani* [2]. In the latter case, the defendant failed to appear on the date fixed for his appearance. A decree *nisi* was entered against him, and on the returnable date he appeared and endeavoured to show that summons had not been served on him. This plea was rejected by the District Judge, and a decree absolute was entered against him. It was held by Withers and Lawrie JJ., that no appeal lies from the order entering decree absolute. In *Silva v. Grero* [1] the facts are the same. The decree *nisi* entered in that case is almost identical with that entered in the present case. It was held by the Full Court (Lawrie A.C.J. and Withers J., Browne J. dissenting) that no appeal lay.

The effect of a decision of the Full Court of the Supreme Court is referred to in the dissentient judgment of Bonser C.J. in *Emanis v. Sadappu* [3]. In *Jane Nona v. Leo* [4], which is a decision of the Full Bench (when the Supreme Court consisted of five Judges), it was laid down that the decision of a Collective Court is a Judgment delivered when all the Judges constituting the Supreme Court are present. A judgment of three Judges at a time when four Judges constituted the Supreme Court is not the judgment of a Full Court. A Full Court may over-rule the decision of such a Bench. It, therefore, follows that one Full Court

[1] *(1895) 1 N. L. R. 67.*
[2] *(1892) 2 C. L. R. 110.*
[3] *(1896) 2 N. L. R. 261.*
[4] *(1923) 25 N. L. R. 241.*

cannot over-rule the decision of another Full Court—see also the observations of Hearne J. in *Fernando v. Fernando* [1]. In the case of *Williams v. Glasbrook Brothers, Ltd.*[2] it was laid down that the fact that the English Court of Appeal has misinterpreted a previous decision of the House of Lords cannot be established in a later case in the Court of Appeal, the House of Lords being the only Court competent to rectify the mistake. Such a misinterpretation would not justify a later Court of Appeal in refusing to follow the earlier decision of that Court.

The position, therefore, is that, unless *Silva v. Grero* [3] can be distinguished from the present case, we are bound to follow it, because it is the decision of a Full Bench of the Supreme Court and is binding on a Bench of two Judges. This was the view taken by Dalton J. in *Mohamed Aliar v. Segu Mohamado Marikar* [4] in circumstances almost identical with the facts of the present case. Dalton J. was there considering whether the decision in *The Ceylon Gemming & Mining Co. v. Symons* [5] (also the decision of a Full Court at a time when the Supreme Court consisted of three Judges) had over-ruled the earlier Full Court decision in *Silva v. Grero* [3]. Dealing with the observations of Bonser C.J. in the later case, Dalton J. said: " This opinion, although it be expressed with some misgiving, is, having regard to the source whence it came, not to be lightly disregarded, *if the matter is open for discussion;* but it is *obiter*, and on a matter upon which there is a decision—that is *Silva v. Grero* [3], *binding upon this Court.* Mr. Perera is not prepared to argue that *Silva v. Grero* [3] and *Nachchiappa Chetty v. Muttu Kangani* [6] have been over-ruled by the judgment in *Ceylon Gemming & Mining Co. v. Symons* [5], as is stated in a footnote on page 262 of Volume 1 of the first edition of *Pereira's Institutes of Ceylon* to which he has called our attention. That note would appear to be incorrect. It would seem further that the decision in *Silva v. Grero* [3] has not been questioned since 1896, but has generally been accepted as correctly interpreting the law on the point. *The question then being settled for this Court, it is not necessary to go further.* I would only call attention to the confusion, incongruity and inconvenience, although that, of course, would not of itself decide the matter of interpretation, which would necessarily be occasioned by a different decision on this question ". Jayawardene (E. W.) J. in a separate judgment agreed. In that case it was held that where a decree *nisi* was made absolute after the defendant had appeared and shown cause against it was not appealable. It is curious that in *Conderlag v. Muttiahpulle* [7] it was held following *Ceylon Gemming & Mining Co. v. Symons* [5], and without reference either to *Mohamed Alliar v. Segu Mohamadu Marikar* [4] or *Silva v. Grero* [3] that a decree *nisi* which has been made absolute after the defendant had approved on the day appointed to show cause and had failed to excuse his default is appealable.

It cannot be denied that the law on this point is in an extremely unsatisfactory state, and needs the immediate attention of the Legislature.

[1] *(1937) 39 N. L. R. p. 147.*
[2] *(1947) 2 A. E. R. 884.*
[3] *(1895) 1 N. L. R. 67.*
[4] *(1928) 30 N. L. R. at. p. 4.*
[5] *(1896) 2 N. L. R. 226.*
[6] *(1892) 2 C. L. R. 110.*
[7] *(1928) 30 N. L. R. 73.*

The opening words of section 87 of the Civil Procedure Code declare that "No appeal shall lie against any decree *nisi* or absolute for default". It then proceeds to provide that, if the defendant against whom a decree absolute for default shall have been passed, he shall within a reasonable time after such decree appear and satisfy the Court upon notice to the plaintiff, by good and sufficient evidence that he was prevented from appearing to show cause against the notice for making the decree absolute by reason of accident or misfortune or by not having received due information of the proceedings that there were reasonable grounds for the default, an appeal lies against the order made under such circumstances. If the question was at large, there would be good ground for holding that the cases where no appeal lies are confined to cases where the decree absolute has been passed in the absence of the physical presence of the defendant before the Court, and that an appeal lies (as it would do in the case of all inter *partes orders* in the District Court [1]) where the decree has been made absolute when the defendant physically came before the Court, or under section 87 endeavoured unsuccessfully to plead that his original default was due to accident, misfortune, &c.

My difficulty, however, is the same which confronted Dalton J. in *Mohamed Alliar v. Segu Mohamadu Markar* [2]. I am unable to distinguish the case before me from the facts in *Silva v. Grero* [3] which, being the decision of a Full Court, is binding under similar circumstances upon succeeding Full Courts, and *a fortiori* on a Bench of two Judges. The first preliminary objection, therefore, must succeed, and this appeal must be rejected, although I say so with regret.

In view of the foregoing, it is unnecessary to deal with the second objection. However, as the matter has been fully argued, I shall deal with it. It is contended that the appellants counsel having abandoned the case, no appeal can lie against the order made.

In *Warnasuriya v. Lucy Nona* [4] a Divisional Bench held that counsel by reason of his retainer has complete authority over the suit and the mode of conducting it. Therefore, an abandonment of the action by him would be binding on his clients. In that case, counsel for the plaintiff, while the trial was proceeding, endeavoured to produce a document. To this objection was successfully taken by the defence. Counsel for the plaintiff then asked for a postponement of the trial. When this was refused, counsel thought it inadvisable to press the case any further and stated that he could not proceed with the case. It was held that the dismissal of the action under such circumstances was right. In the case before me, when counsel asked for a date on the ground that the appellant's attorney was unwell, the Court refused the application. Thereupon counsel stated that he was unable to proceed with the inquiry. I am of opinion that this amounts to "an abandonment" of the case by the counsel. For this reason also, no appeal lies from the order of the District Judge.

[1] *See* Lokumenika v. Selunduhamy (*1947*) *48 N. L. R. 353 where this principle is fully discussed.*
[2] *(1928) 30 N. L. R. at p. 4.* [3] *(1895) 1 N. L. R. 67.* [4] *(1948) 49 N. L. R. 313.*

An application has been filed for revision of the proceedings. In the circumstances I see no reason to order that notice should issue on the plaintiff. Even if the case is dealt with in revision, the same objections will debar the appellant from obtaining relief.

The appeal is dismissed with costs.

GUNASEKERA J.—I agree.

Appeal dismissed.