

1940

Present : Soertsz and Nihill JJ.

MOHIDEEN *et al.* v. MARIKAR.

133—D. C. Colombo, 9,042.

Decree nisi—Application by plaintiff to set aside made in time—Decree set aside after 14 days—Validity of order—Civil Procedure Code, s. 84 (Cap. 86).

A plaintiff who seeks to set aside a decree *nisi* for default entered against him under section 84 of the Civil Procedure Code must show cause within 14 days of the decree, which becomes absolute, automatically, on the expiration of the period.

Annamaly Chetty v. Carron (3 C. L. Rec. 48) followed.

A PPEAL from an order of the District Judge of Colombo.

S. J. V. *Chelvanayagam*, for plaintiffs, appellants, and for petitioners.

N. *Nadarajah* (with him *Renganathan*), for defendants, respondents.

Cur. adv. vult.

February 19, 1940. SOERTSZ J.—

In this action the plaintiffs sued the defendants to recover a sum of Rs. 534.90 and interest. The defendant filed answer stating that only a sum of Rs. 89.38 was due, and he prayed that the plaintiffs' action in excess of this sum be dismissed with costs. Trial was fixed for April 5, 1939. On that day, the plaintiffs were absent when the case was called. The defendant was present and admitted that Rs. 89.89 was due, and the learned Judge entered decree *nisi* dismissing the plaintiff's action in excess of that amount with costs.

On April 6, 1939, the plaintiffs' proctor swore an affidavit explaining how it came about that neither he nor any one of his clients was present when the case was called on April 5, and moved to have the decree *nisi* vacated. On that motion, the trial Judge made order on April 13, 1939, "Notice defendant for 22. 5. 1939, and move". The journal entry of May 22, 1939, shows that the notice ordered on the defendant had been served. The matter was fixed for inquiry, and when the plaintiffs proctor's motion came up for discussion on July 25, Counsel appearing for the defendant took the objection that by operation of section 84 of the Civil Procedure Code, the decree had become absolute and that there was no longer any question of vacating the decree *nisi*. He relied on the case of *Annamaly Chetty v. Carron*¹. Plaintiff's Counsel asked for time to meet this objection and to furnish authorities in regard to it. He was given this opportunity and he was heard on a later day, and the learned Judge made order upholding the objection and refusing the plaintiff's application. The appeal is from that order.

When, at the hearing of the appeal, I was informed of the decision which compelled the trial Judge to refuse the application, my immediate reaction was a feeling of surprise for it seemed to me that a great burden was imposed on the plaintiffs in this case, and on plaintiffs generally, if they are required by law to give notice to the defendants and to show cause for the decree *nisi* being vacated, all within fourteen days of its being entered. But a careful examination of section 84 convinces me that the ruling in the case I have referred to contains a correct interpretation of section 84 of the Code, if I may say so with great respect. As pointed out in that case, the decree *nisi* becomes absolute automatically at the expiration of fourteen days, and once that period elapses, a plaintiff can obtain no relief under that section of the Code. The word "previously" occurring where it does, makes that quite clear. At one stage of the argument, I inclined to the view that what a plaintiff was required to do within fourteen days was to begin proceedings to have the decree set aside, that is to say, I felt that "show good cause" must be understood to mean to make out a good *primâ facie* case for setting aside the decree *nisi* by submitting an affidavit, for instance, as was done in this case. But the

¹ 3 C. L. Res. 48.

latter part of section 84 which reads "in case such cause being shown the Court shall set aside the decree" debars me from construing the same words when they occur in the earlier part of the section in the manner I suggested. It seems quite clear that the setting aside of the decree must be obtained, if at all, by good cause being shown, not merely by good cause being attempted to be shown, within fourteen days. In that view of the matter, the appeal fails and must be dismissed with costs.

In regard to the application for *restitutio in integrum*, I find it impossible to entertain it, for to do so would be to set at nought a clear requirement of the law of Civil Procedure.

NIHILL J.—I agree.

Appeal dismissed.
