1957 *Present :* **Weerasooriya, J., and T. S. Fernando, J.**

B. NANAYAKKARA, Petitioner, *and* T. S. M. FALEEL and wife, Respondents

S. C. 507—Application for restitutio in integrum in D. C. Colombo, 38,867/M

Civil Procedure—Ex parte *trial—Absence of both parties—Appropriate order for the Court to make—Civil Procedure Code, ss. 84, 88, 823 (4).*

Where, in an action in the District Court, both parties are absent on the date fixed for *ex parte* hearing of the trial, the appropriate order for the Court to make is an order dismissing the action. In such a case, it is open to any party prejudiced to move the Court that made the order in an attempt to have it vacated.

APPLICATION for *restitutio in integrum.*

L. G. Weeramantry, with *N. R. M. Daluwatte*, for the plaintiff-petitioner.

G. Barr-Kumarakulasinghe, for the defendants-respondents.

Cur. adv. vult.

February 7, 1957. T. S. FERNANDO, J.—

The petitioner who is the plaintiff instituted this action for the recovery of a sum of Rs. 1,500 alleged to have been borrowed from her by the defendants, the respondents to this application. On 31st August, 1956, the summons returnable date, both defendants were absent although summons had been served on them. Accordingly, on that date, the case was set down for trial *ex parte* on 28th September, 1956. On that day, when the case was called neither the plaintiff nor her proctor was present in court. The defendants themselves were absent. The learned judge thereupon made the following order :—" Enter D. N. dismissing plaintiff's action ". The record bears a journal entry to show that decree nisi was entered on this day and the decree nisi itself signed by the District

Judge on the 28th September is contained in the record. The decree nisi actually entered was one adapted from the printed form in use for decrees nisi in terms of section 84 of the Civil Procedure Code, the modifications in the form being necessitated by the fact that on the trial date in this case the defendants themselves were neither present nor represented by proctor.

The decree nisi contains a recital that the court had decreed that the action be dismissed unless sufficient cause is shown to the contrary within fourteen days from the date of the decree nisi, viz., 28th September, 1956. On 10th October, 1956, i.e., within fourteen days of the decree nisi, the proctor for the plaintiff, without any notice given to the defendants, appeared before the District Court and stated to the learned District Judge who had ordered the decree nisi to be entered that he was present in the " D " Court (a Court presided over by one of the additional District Judges) and moved that the order for the dismissal of the plaintiff's action be vacated and another date be granted for *ex parte* trial. The learned District Judge thereupon directed the plaintiff's proctor to file an affidavit Although it should have been possible for the proctor to have filed an affidavit within fourteen days of the date of the decree nisi, an affidavit by him was filed only on 27th October, 1956. In this affidavit the proctor has stated that he was under the impression that the *ex parte* trial fixed for 28th September, 1956, would be held in the "D" Court and that he was present with the plaintiff in that court. He has added that when he discovered that the case was listed for trial in the " A " Court he " went into that Court but found that the case had been called and the order for dismissal made ". The inference to be drawn from this affidavit is that the proctor discovered on 28th September, 1956, itself that the action had been dismissed. In the circumstances it is difficult to appreciate why he waited till 12 days had expired to move the Court to vacate the decree nisi. It is more difficult to understand why he took a further 17 days to submit his affidavit to the Court. When the affidavit was finally submitted to Court on 27th October, 1956, and the motion for the vacation of the decree nisi renewed, the learned District Judge recorded that he had no power to vacate the order as the decree nisi had already become absolute on the expiry of the fourteen days specified therein.

No appeal was preferred against either the order of 28th September or of 27th October, but instead on the 26th November, 1956, the plaintiff moved this Court by way of an application for *restitutio in integrum* and seeks to obtain an order vacating the decree absolute and a direction to the District Court to refix the case for *ex parte* trial.

In preparing this application the plaintiff's legal advisers appear to have assumed that the order made by the District Judge on 28th September, 1956, was an order in terms of section 84 of the Civil Procedure Code, but her counsel appearing before us abandoned that position—as it appears to us, correctly—and submitted that section 84 was inapplicable to a case where both plaintiff and defendant were absent from court on the day of trial and therefore a decree nisi in terms of that section could not have been entered by the District Judge. I agree with this submission.

as well as with the further submission that section 88 of the Code is also inapplicable to this case as that section does not provide for the order the Court should make when both parties to a case are absent *on the date of trial*. It does not appear that the Code contains any specific provision as to the course to be followed when both parties to an action are absent from court on the date of the trial. It does not however follow that the Court is powerless to make an appropriate order. There is always, in my opinion, inherent power in a court in circumstances similar to those in the present case to make such order as may be necessary in the interests of justice. In the case of *Carolis Appuhamy v. Sinho Appu*[1] where on the date fixed for trial *ex parte* the plaintiff and the defendant were both absent, the District Judge made order dismissing the action. It will be noted that the judge did not order a decree nisi to be entered. Two months after the dismissal of the action the plaintiff filed an affidavit stating that he had been prevented from attending court on the date fixed for trial on account of his prolonged illness. The District Judge held he had no power to reopen his decree dismissing the action. An appeal was preferred to the Supreme Court, and Lawrie J. in the course of his judgment stated :—

> "As a rule, he (the district judge) has power to open or rescind his own orders made, not *inter partes* but *ex parte*, on being satisfied that the order was made to the prejudice of a party who was unable to attend in consequence of illness or other circumstances over which he had no control. Such power doubtless must be exercised with caution, and only on sufficient materials and within a reasonable time after the *ex parte* decree or order was made."

In the absence of any specific provision in that behalf in the Civil Procedure Code, it seems to me that where both parties to an action are absent on the date fixed for *ex parte* hearing of a trial the appropriate order for the Court to make is an order dismissing the action as was done in the case of *Carolis Appuhamy v. Sinho Appu* (supra), leaving it open to any party prejudiced to move the Court that made the order in an attempt to have it vacated. I believe that it is the usual order made in the District Courts in such circumstances. It is of interest to note that the Code makes specific provision for a judgment to be entered dismissing an action in a Court of Requests where neither party to the action appears on the date fixed for trial—vide section 823 (4). While the more appropriate order that might have been made in the present case appears to me to be one dismissing the action, it is not possible to contend that the Court had no power to order that a decree nisi be entered. Even otherwise, no prejudice seems to have been caused to the plaintiff by the order actually made in the case since the excuse put forward by her proctor for not having appeared on the date fixed for the *ex parte* trial is not one that could have been entertained even had the order in the first instance been one dismissing the action and the plaintiff had thereafter moved the Court to set it aside on the ground of that excuse. Learned counsel for the petitioner has urged that the District Judge acted

[1] *(1901) 5 N. L. R. 75.*

wrongly in entering a decree nisi and that he should have on 28th September, 1956, postponed the trial for another date as appears to have been done in the case of *Carolis Appuhamy v. Sinho Appu* (supra). I am quite unable to agree that the Court is obliged—as has been urged—where parties are absent to postpone the trial. The plaintiff and her proctor have themselves to blame for the situation in which the plaintiff now finds herself. It is impossible to maintain that circumstances are present in this case which would entitle this Court to grant relief by way of *restitutio in integrum*. I would dismiss the application with costs.

WEERASOORIYA, J.—I agree.

Application dismissed.