1974 *Present :* **Walgampaya, J., Weeraratne, J., and Vythialingam, J.**

L. S. J. DE SILVA, Appellant, *and* T. T. DE SILVA, Respondent.

S. C. 182/72 (Inty)—D. C. Kalutara 1149/D

Civil Procedure Code—Sections 85 and 86—Summons served on defendant—Defendant absent and unrepresented—Case fixed for ex parte trial—Defendant moves to vacate order for ex parte trial before the date fixed for ex parte trial—Court vacates order fixing the case for ex parte trial—Legality of such order.

In a divorce action summons was served on the defendant for 22.5.72 but she was absent and unrepresented on that date and ex parte trial was fixed for 14.6.72. On 5.6.72 the defendant filed papers setting out the reasons for her absence on 22.5.72 and moved that the order for ex parte trial be vacated and that she be given a date to file her answer.

Held, (i) that it was not open to the defendant to show cause for her default before ex parte trial was held and decree nisi was entered ;

(ii) that it is an imperative provision of law that where the defendant is in default the court should proceed to trial ex parte as the next step and enter decree nisi or dismiss the plaintiff's action if he fails to prove his case.

"The scheme of the ordinance is that, where the defendant is absent on the day fixed for his appearance and answer, trial ex parte should be held either immediately or as the next step."

K. A. Perera Vs. H. E. Alwis, 60 *N. L. R.* 260 and *Edirisinghe Vs. Gunasekere,* 68 C.L.W. 110 not followed.

N. M. Sally Vs. M. A. Noor Mohamed, 66 N. L. R. 175 and *The Board of Directors of Ceylon Savings Bank Vs. R. Nagodavitane,* 71 N. L. R. 90 followed.

D. R. P. Goonetilake for the Plaintiff-appellant.

M. L. de Silva for the defendant-respondent.

Cur. adv. vult.

November 24, 1974. VYTHIALINGAM, J.—

The plaintiff filed this action against the defendant for a divorce on the ground of malicious desertion and/or constructive malicious desertion. Summons was served on the defendant for 22.5.72, but she was absent and unrepresented on that date and ex parte trial was fixed for 14.6.72. On the following day the defendant's proctor filed his proxy and moved that the order for Ex Parte Trial be vacated and that a date be given to the defendant to file her answer. The case was mentioned in open Court on the following day and the defendant was ordered to file proper papers and move.

On 5.6.72 the defendant filed petition and an affidavit setting out the reason for her absence on 22.5.72 and moved that the order for ex parte trial be vacated and that she be given a date to file her answer. Order was made to mention this matter on 14.6.72, the day fixed for the ex parte trial. Objection was taken by Counsel for the plaintiff and, after inquiry, the learned Judge reserved his order for 3.7.72. On that date he made order vacating the order fixing the case for ex parte trial and allowed the defendant an opportunity to file answer and defend the action.

The plaintiff appeals against this order. The grounds on which the defendant sought to excuse her absence on 22.5.72 are substantially the same as those set out by her proctor in his motion filed on 23.5.72. The reason was that there had been radio and newspaper announcements that the cases fixed for 22.5.72 would not be taken up, but would be postponed as it was the day fixed for the promulgation of the new Republican Constitution. The District Judge accepted this as true and that there were reasonable grounds for the default. He also stated that it is a fact that on this date all cases were called and postponed for a subsequent date. This is belied by the order he himself made in this case on that date, for he did not postpone the case but fixed the case for ex parte trial.

Be that as it may, the objection taken up by learned Counsel for the plaintiff is a purely legal one. His submission is that once the case is fixed for ex parte trial owing to the absence of the defendant, the District Judge had no power to vacate it, but should have gone on to hold the ex parte trial. It is only after that is done that the defendant can come in and show cause why the decree nisi should not be made absolute. It is not open to the defendant to do so at any earlier stage in view of the express provisions of section 85 of the Civil Procedure Code.

That section omitting words which are not material for the present purpose is as follows: "If the defendant fails to appear on the day fixed for his appearance and answer ..... and if the Court is satisfied by affidavit of the process server stating the facts and circumstances of the service or otherwise that the

defendant has been duly served with summons ..... and if on the occasion of such default of the defendant the plaintiff appears, then the Court shall proceed to hear the case ex parte and to pass a decree nisi in favour of the plaintiff ..... and shall issue to the defendant a notice of every such decree nisi."

Section 86 affords an opportunity to the defendant, on the decree nisi being served on him, to cure his default by satisfying the Court that there were reasonable grounds for the default upon which the decree nisi was passed. If he succeeds in doing so, then the decree nisi will be set aside and the case would be proceeded with as from the stage at which the default was committed. If he fails to so satisfy Court, then decree absolute would be entered. The question is whether it is open to the defendant to do so at a stage anterior to that which is provided for in section 86, that is before the Court has proceeded to ex parte trial and entered decree nisi. On this point there are conflicting decisions.

In the case of *K. A. Perera v. H. E. Alwis* (60 N. L. R. 260), H. N. G. Fernando J., Sinnethamby J. agreeing, held that where on default of appearance of the defendant on the day fixed for his appearance and answer, a date is fixed for ex parte trial under section 85, the reason for the default of appearance may be considered by Court before ex parte trial is held. This case was followed by Abeysundera J. and Sri Skanda Rajah J. in *Edirisinghe v. Gunasekera* (68 C. L. W. 110). Abeysundera J. said at page 111 : "We hold that the defendant was entitled at any time before the day fixed for ex parte trial to satisfy the Court that there were reasonable grounds for his absence."

Basnayake C.J. and G. P. A. Silva J. took a different view in the case of *N. M. Sally v. M. A. Noor Mohamed* (66 N. L. R. 175) and held that where a case is fixed for ex parte trial in terms of section 85 of the Civil Procedure Code, the reasons for the default of the defendant cannot be considered before the ex parte trial is held. Basnayake C.J., in refusing to follow the case reported in 60 N. L. R. 260, said : "The Court has no power to take a course of action other than that prescribed in section 85 of the Civil Procedure Code when the defendant fails to appear on the day fixed for the subsequent filing of his answer". In the case of *The Board of Directors of Ceylon Savings Bank v. R. Nagodavitane* (71 N. L. R. 90), Siva Supramaniam J. with Tennekoon J. (as he then was) agreeing, agreed with the above observations of Basnayake C.J. that the direction that the next step after the default of appearance was the fixing of trial ex parte and that it was imperative.

The scheme of the ordinance is that, where the defendant is absent on the day fixed for his appearance and answer, trial ex parte should be held either immediately or as the next step. In the case of *Wickremasinghe* v. *Mudiyanse et al* (31 N. L. R. 344), Garvin J. said at page 345 : " The Code does not contemplate the appointment of a day for the ex parte hearing of the plaintiff's case ; it assumes that it will be heard immediately on the day on which the defendant makes default (vide section 85). This, however, is not the only respect in which it has been found impracticable to adhere closely to the procedure in the Code and it is now the inveterate practice to put off the ex parte hearing for a day appointed by the Court. "

Siva Supramaniam J. did not think that the fixing of a day for ex parte trial was a departure from the express provisions of the Code, for he said in Nagodavitane's case at page 92 : " This section (85) does not require that the Court shall proceed immediately to hear the case ex parte. One of the Dictionary meanings of the word ' proceed ' is ' make it one's next step '. The words ' shall proceed to hear the case ex parte ' therefore mean that *the next step the Court shall take is to hear the case ex parte*. The hearing need not necessarily be on the same day. " The emphasis is not mine.

Affording the defendant an opportunity to purge his default cannot then also be the next step. Siva Supramaniam J. went on to say : " The direction, however, in regard to the next step is imperative and the Court is not empowered to entertain any application for relief from the defendant until the ex parte trial has been held and decree has been entered in terms of section 85 of the Civil Procedure Code. I agree, with great respect, with the observation of Basnayake, C.J. in *Sally v. Noor Mohamed* (supra) that " the Court has no power to take a course of action other than that prescribed in section 85 of the Civil Procedure Code when the defendant fails to appear on the day fixed for the subsequent filing of his answer ".

In K. A. Perera's case (supra), H. N. G. Fernando J. recognised that this was the scheme of the Ordinance for he said at page 261 : " In effect the Code contemplated that a decree nisi after ex-parte hearing would be entered so expeditiously that there would be neither time nor opportunity for the absent defendant to intervene before entry of the decree : hence, the only appropriate form of relief was the provision in section 86 (2) for showing cause against the decree being made absolute ". But he thought that because of the " inveterate practice " of fixing a date for ex parte trial the defendant should be allowed to avail himself of the time and opportunity thus provided to show cause and thus avoid a trial which might well prove to be abortive. He also thought that this " inveterate practice " was derived not from the Code but from the inherent powers of Court and that

"equally inherent would be the power to vacate such an order on appropriate grounds, and no grounds can be more appropriate than those on which a decree nisi may be set aside in the course of strict adherence to the provisions of the Code."

For one thing, as I have shown, the fixing of a date for ex-parte trial is derived not from the inherent powers of Court, but from the imperative provisions of the Code as the next step, and for another the inherent powers of Court cannot be invoked to violate the express provisions of the Code-vide *Kamala v. Andris* (41 N. L. R. 71). So that where the Code states that the next step shall be an ex parte hearing, the Court cannot in the exercise of its inherent powers, take some other step. Moreover, the inconvenience of an abortive trial is only apparent and not real. The evidence led in an ex parte trial is of the barest minimum and seldom takes more than a few minutes. In some cases this is done by means of an affidavit, a practice approved of in *Amerasinghe* v. *Weeraratne* (44 N. L. R. 383) but frowned upon, except in exceptional circumstances, in *Amerasekera v. Fernando* (49 N.L.R. 60).

On the other hand, a far greater difficulty would be created by a departure from the strict provisions of the Code. Where a defendant is permitted to appear and show cause for his default before entering the decree nisi, then if the Court holds that he had no reasonable grounds for the default it would proceed to ex parte trial and enter decree nisi. In terms of section 85 this has to be served on the defendant and he can come in and again show cause as to why the decree nisi should not be made absolute, and the Court would probably have to go through the same inquiry all over again.

It is true that a decision on a matter at one stage of a proceeding is binding between the same parties at every subsequent stage of the case, *Nagalingam v. Ledchumipillai* (55 N. L. R. 280). But here, in spite of that, the express provisions of section 86 have to be complied with. This difficulty seems to have been envisaged in *Edirisinghe's* case (supra). In that case, after inquiry, the Judge refused the application because he was of the view that on his own showing the defendant's absence was not due to any unavoidable cause. But the District Judge went on to say that the application was premature and that the defendant would be entitled, only after the decree nisi was entered, to show cause. The Supreme Court held that the District Judge was wrong in taking this view. But to avoid the difficulty created by section 86, the Supreme Court directed that no further opportunity should be given to the defendant to show cause for his absence on the summons returnable date. But this direction was quite contrary to the express provisions of section 86 and was therefore not justified in law.

For these reasons I hold that it was not open to the defendant to show cause for her default before ex parte trial was held and decree nisi was entered, and that it is an imperative provision of law that where the defendant is in default, the Court should proceed to trial ex parte as the next step and enter decree nisi or dismiss the plaintiff's action if he fails to prove his case. The order dated 3.7.1972 made by the District Judge is set aside and he is directed to proceed to ex parte trial. If, thereafter decree nisi is entered against her, it will be open to the defendant to purge her default at that stage. The provisions of section 85 apply to divorce proceedings as well—*Annamah v. Subramaniam* (51 N. L. R. 547) and *Christina v. Cecilin Fernando* (65 N.L.R. 274).

There will be no order for costs either here or in the Court below.

WALGAMPAYA, J.—I agree.

WEERARATNE, J.—I agree.

Order set aside.