1930

Present: Fisher C.J. and Garvin J.

WICKREMASURIYA *v.* MUDIANSE *et al.*

376—D. C. Kurunegala, 12,031

Ex parte *trial—Non-appearance of plaintiff—Dismissal of action—Court's power to vacate order—Application by plaintiff—Reasonable time—Good cause shown—Civil Procedure Code, s. 144.*

An order dismissing an action for failure of plaintiff to appear on the day appointed for *ex parte* hearing may be vacated on terms if an application is made within a reasonable time and good cause shown for default of appearance.

APPEAL from an order of the District Judge of Kurunegala.

L. A. Rajapakse, for plaintiff, appellant.

No appearance for defendant, respondent.

March 25, 1930. GARVIN J.—

This was an action for declaration of title. The defendants who were duly served with summons appeared in Court. The second and third defendants disclaimed title ; the first defendant took time to file answer. Further time was granted to him on application. On June 21, 1928, the day ultimately appointed for the filing of his answer the first defendant was absent and his proctor intimated to the Court that he had no instructions. The District Judge fixed July 12, 1928, *ex parte* trial.

On that day the plaintiff and his proctor were absent and there was no appearance for the defence. The District Judge thereupon made order dismissing the plaintiff's action.

On June 17, 1929, plaintiff filed a petition and affidavit explaining his default and prayed that " the case be restored to the roll to enable plaintiff to proceed with his action. "

Notice of this application was given to the first defendant, and the matter fixed for inquiry on September 12, 1929. On that day the District Judge dismissed the application without inquiry, holding that he had no jurisdiction to vacate his order of July 12, 1928, dismissing the plaintiff's action.

The plaintiff appeals.

Chapter XII. of the Civil Procedure Code which is entitled " of the consequences and cure (when permissible) of default in appearing or pleading " sets out the procedure to be followed when there has been a default of appearance on the part of the parties or any of them.

Section 84 contemplates the case of the absence of the plaintiff, the defendant being present, " on the day fixed for the appearance and answer of the defendant, or the day fixed for the filing of the answer, or for the hearing of the action, " and provides that unless the defendant admits the plaintiff's claim or consents to a postponement " the Court shall pass a decree *nisi* . . . . dismissing the plaintiff's action. "

Section 85 deals with the converse case of the appearance of the plaintiff and the absence of the defendant, and provides that if the defendant fails to appear on the day fixed for his appearance and answer, or on the day fixed for the subsequent filing of his answer, or for the filing of the replication, or on the day fixed for the hearing of the action, the Court shall proceed to hear the case *ex parte* and to pass a decree *nisi* in plaintiff's favour.

Section 88 prescribes the procedure to be followed when neither party is present " on the day appointed to appear and answer, or for the subsequent filing of the answer, or for the filing of the replication." The proper order to be made in such a case being to direct that the case be struck off the roll of pending cases. The section, it will be noticed, makes no provision for the case of the absence of both parties on the day fixed for the hearing of the action. It was suggested by Counsel for the appellant that inasmuch as the case for the plaintiff was not heard *ex parte* on the day the defendant failed to appear and file his answer and the hearing was put off for a later date, the case under consideration was governed by section 144 of the Code.

That section is as follows: " If on any day to which the hearing of the action is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the action in one of the modes directed in that behalf by chapter XII., or make such other order as it thinks fit."

The word adjournment generally means the appointment of another day for the continuation of that which has already commenced in contradistinction to postponement, which means the putting off of that which was appointed to be done on a specified day for a later day. An examination of the other sections of chapter XVIII. confirms the view that adjournment throughout that chapter is used in the sense indicated. This was the view taken in *Habibu Mohammadu v. Mohideen Pitche.*[1]

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).

[1] *2 Browne 283.*

1930.

GARVIN J.

Wickremasuriya v. Mudianse

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.

In such a case the hearing may be said to be postponed: it cannot in my opinion be said to be adjourned within the meaning of section 144.

In view of this opinion it is perhaps unnecessary to consider whether the words " the hearing of the action " are used in a sense which includes the *ex parte* hearing of the plaintiff's case. But there are reasons for thinking that the adjournments contemplated are adjournments of the hearing of the case after the close of the pleadings, that is to say, of trials *inter partes*.

It would seem that the Code does not contemplate the postponement of the *ex parte* hearing of the plaintiff's case and consequently has made no provision for the case of the absence of the plaintiff on the day appointed for the hearing. In this situation, which is the consequence of a departure from the procedure contemplated by the Code, the District Judge made order dismissing the plaintiff's action. In form it is an order which finally determines the action; it was made for default of appearance, and in a case for which no provision is made in the Code. There is no evidence of the existence of any practice in force in our Courts relating to such a case. The matter is at large, and it is competent for this Court to consider what order a Court should make in such a case and what effect should be given to the order, whatever form it may take, and deal with the matter accordingly.

The order in this case was not one made *inter partes;* it was not even made *ex parte*. I realize that some order is necessary, but with due regard to the necessities of the case I am not prepared to give to this order any greater effect than that it will bar the further prosecution of the case until it is set aside.

The provisions of the Code relating to the consequences of default of appearance by one of the parties nowhere contemplate the making in the first instance of an order finally determining the action. In every instance an opportunity is afforded a party who is in default to cure his default. On his failure to do so the order made against him is made absolute and final (*vide* sections 84 and 85).

Where both parties are in default, the order which the Court is empowered to make is to direct that the action be struck off the file of pending cases—section 88. This section, as I have already pointed out, does not contemplate a case such as the one under consideration.

The broad principle which underlies these provisions is that the order made in consequence of a failure of one or both the parties to appear at any stage of an action should be one which the Court may vacate if good and sufficient cause is shown within a specified period or a period which under all the circumstances is considered reasonable.

There can be no justification for an order which places the plaintiff in a worse position than he would occupy if an order of abatement had been passed.

The form of the order to be made by the Court in a case such as the one under consideration is a matter of no great importance so long as its effect is clearly defined, and I am not therefore disposed to interfere with the terms of the order entered in this case. But in my judgment an order dismissing an action for the failure of the plaintiff to appear on the day appointed for the *ex parte* hearing of his case is one which the Court which made it may, upon the application of the plaintiff, and if, within a period which under all the circumstances appears to the Court reasonable, he shows good cause for his non-appearance, vacate upon such terms and conditions as it shall think fit, and continue the proceedings as from the stage at which the order of dismissal was entered.

The plaintiff has made such an application. For the reasons which I have given I think the learned District Judge was wrong in his view that it was not within his power under any circumstances to vacate the order which the plaintiff invited him to vacate.

The plaintiff has allowed nearly a year to elapse since the dismissal of his action before he made this application. This is a very considerable delay. Nevertheless the plaintiff is entitled at least to an opportunity to satisfy the Court if he can that his application is made within a period which under all the circumstances is reasonable and that he has good cause for his failure to appear on the day appointed for the *ex parte* hearing.

I would therefore set aside the order under appeal, and remit the matter to the Court below to enable the Court to decide whether the plaintiff is entitled to any relief. Under the circumstances I would make no order as to costs.

FISHER C.J.—I agree.

Set aside.