

1912.

*Present:* Lascelles C.J.

MUDALIHAMY v. PUNCHI BANDA.

15—C. R. Gampola, 219.

*Action on a promissory note—English procedure not introduced by Ordinance No. 5 of 1852—Judgment by default against one of several makers of a note is no bar to proceeding against the other defendants.*

Section 2 of Ordinance No. 5 of 1852 does not introduce any part of the English procedure into actions on bills of exchange and promissory notes. These actions, like others, are regulated by the Civil Procedure Code.

A judgment by default against one of several joint makers of a note does not prejudice the plaintiff's right to proceed with the action against the other defendants.

<sup>1</sup> (1908) 11 N. L. R. 171.

THE facts appear from the judgment.

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*A. St. V. Jayewardene*, for the plaintiff, appellant.—Even according to the English law now in force (see Order XIII., Rule 4) a plaintiff who sues the makers of a joint promissory note may continue an action against one defendant, although judgment by default had been entered against the other. But there is nothing in the Civil Procedure Code which prevents an action such as this being maintained even after judgment by default had been obtained against one defendant. English rules of procedure are not in force in Ceylon. Counsel referred to *Mamel Istaky v. Sinnatamby*,<sup>1</sup> *McLeod v. Power*,<sup>2</sup> *Babapilla v. Raja Ratnam*.<sup>3</sup>

No appearance for the respondent.

*Cur. adv. vult.*

February 28, 1912. LASCELLES C.J.—

The plaintiff in this case sues as the endorsee of a note given by the defendant. On October 21, 1911, summons was reported served on the first defendant, and the second defendant was reported not to be found. The first defendant being absent, order was made entering judgment against the first defendant, and striking the action off as against the second defendant.

On October 3 the order against the first defendant was vacated, and he was allowed to file answer. On October 20 the parties were present, and the second defendant, on whom notice had been served, was allowed to file answer before October 31. On the 31st the second defendant was absent, and had not filed answer. Thereupon judgment was entered against her by default. On December 19 the learned Commissioner held that the note was a joint one, and that the judgment which already had been entered against the second defendant was a bar to the claim against the first defendant, and the action was accordingly dismissed as against her.

Now, even if section 2 of the Ordinance No. 5 of 1852 be construed so as to make the English rules of procedure as well as the English law applicable to actions on promissory notes, the judgment could not be supported, for by Order XIII., Rule 4, of the Rules of the English Supreme Court the plaintiff is allowed, where one of several defendants fail to appear, to enter final judgment against those who have not failed, without prejudice to his right to proceed with his action against those who have appeared. But I think that section 2 of the Ordinance No. 5 of 1852 cannot be construed as introducing any part of the English procedure into actions on bills of exchange and promissory notes. These actions, like others, are regulated by the Civil Procedure Code. There is no provision in the

<sup>1</sup> (1910) 13 N. L. R. 284.

<sup>2</sup> (1898) L. R. 2 Ch. 295.

<sup>3</sup> (1900) 5 N. L. R. 1.

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Civil Procedure Code to the effect that a judgment by default against one of several joint defendants prejudices the plaintiff's right to proceed with the action against the other defendants. Section 90 of the Civil Procedure Code provides that where there are several defendants the Court shall not be obliged to pass a decree for default against a defendant for failing to appear provided that one defendant at least appears.

The decree against the second defendant in this case appears to have been entered at the instance of the Commissioner, and not at the instance of the plaintiff; and it would be unreasonable and unfair that the plaintiff should be deprived of his remedy against the first defendant, because the Judge, in a matter within his discretion, elected to order judgment to be entered against the second defendant.

I set aside the judgment dismissing the action against the first defendant, and direct the action to proceed against him in the ordinary course.

The appellant is entitled to the costs of the appeal.

*Set aside and sent back.*

