1897.
October 28 and November 3.

ULAGANATHAN CHETTY *v.* VAVASSA *et al.*

D. C., Colombo, 10,347.

Action under chapter LIII. of the Civil Procedure Code—Promissory note insufficiently stamped—Extension of time stated in summons referred to in Form 19 of the second Schedule to the Code—Plaintiff's right to demand entry of judgment after expiry of time stated.

A plaintiff suing on an insufficiently stamped promissory note is not entitled to the privileges afforded by chapter LIII. of the Civil Procedure Code.

At the expiration of the time stated in a summons issued in the Form 19 contained in the second Schedule to the Civil Procedure Code requiring a defendant to appear and defend, a plaintiff is not by right entitled to demand entry of judgment in his favour, but he has a right to move for it.

A District Court can, however, in its discretion, extend the time stated in such summons if the justice of the case requires it.

PLAINTIFF sued defendant under chapter LIII. of the Civil Procedure Code for the recovery of a sum of Rs. 1,216·43 and interest due on a promissory note payable on a specified date and bearing a stamp of 50 cents. He obtained a summons in the Form 19 contained in the second Schedule to the Civil Procedure Code, calling upon the defendants to obtain leave to appear and defend the action within seven days from the service of such summons. The Fiscal reported to the Court that summons was served on both the defendants on the 19th August, 1897. But the defendants swore an affidavit to the effect that summons was served on them on the 21st and 22nd August, 1897, respectively, and on the 26th August, 1897, they moved for leave to appear and defend the action.

The Acting District Judge (Mr. Felix Dias) inquired into the matter of the service of summons, and, after hearing evidence, refused defendants leave to appear and defend the action, adding: "My attention has been called to the stamp on the "promissory note sued upon. It is clearly insufficient. I will "not enter judgment now, but plaintiff will be at liberty to cure "its defects and move for judgment hereafter."

The defendants appealed.

Morgan, for appellant.

Dornhorst, for respondent.

3rd November, 1897. LAWRIE, A.C.J.—

In my opinion the plaintiff is not entitled to the privilege afforded by the 53rd chapter, that the action must be treated

as an ordinary action to which the defendants are, as of right, entitled to appear and defend.

The instrument was not properly stamped, and that is a complete answer to the plaintiff's demand for judgment under this chapter.

That being my opinion I need not discuss the question (which is impliedly decided in the negative by the District Judge) whether the Court may not extend the time mentioned in the summons within which the defendant must come in and ask for leave to appear and defend.

Neither the Ordinance nor the form of summons fix either a maximum nor a minimum time: that is left to the Court, and if the Court in its discretion can fix the time, it can in the exercise of the same discretion extend that time if justice requires an extension.

Something was said at the hearing in appeal of the right of the plaintiff to demand that judgment be entered when the time expressed in the summons has expired. He has a right to move for judgment, but not to demand it, and the Court has, in my opinion, the duty laid on it of allowing a defendant to come in on terms at any time before the decree is signed.

I would set aside this decree and remit for further procedure as in an ordinary action not under chapter LIII.

BROWNE, A.J.—

Defendant was summoned under chapter LIII., Civil Procedure Code, to obtain leave to appear and defend within seven days from the date of service. Summons was issued on the 12th August, returnable on the 20th August, but on that morning no return was made to the Court, apparently because (as it now appears) it was not served till the afternoon of the previous day. The Court therefore ordered the matter to stand over for six days to enable return to be procured by the plaintiff and produced to it. On the 26th the two defendants appeared, and as against the Fiscal's return of service made on the 19th made affirmation they were served on the 20th and 21st. Subsequently they adduced evidence to corroborate their assertion, but the learned District Judge did not credit such evidence as against that of the process server, who had record in writing of the time when he had finished the service and reported the same to the Fiscal. The defendants were therefore refused leave to appear because they had not applied within the time allowed them, and by reason of their apathy plaintiff had become entitled to his decree. Defendants have not sought to explain why they delayed till the 26th to

1897. *October 28 and November 3.*

BROWNE, A.J.

obtain leave. I hold the order was so far right. The matter must be judged of apart altogether from the fact and order of " to stand " over " from the 20th to 26th, which did not operate in defendant's favour, but was made solely for the purpose I have mentioned. Section 74 is not applicable to chapter LIII. Defendants also desired when they came into Court to object to the allowance of this summary procedure because the note had not been duly stamped. They had no right to be heard thereon, as they had not obtained leave to appear (*3 C. L. R. 11 and 31*). But the District Judge's attention was so called to the matter, however irregularly, and he at once intimated he would not give final judgment till it had been stamped. I should hold the course he has pursued was not correct. The Code allows summary procedure to be given when a note is produced, and appears to be so in order, and otherwise not open to suspicion. Doubtless this note did then appear to be in order, though this was incorrect in fact, and so the summons in this form was issued. But as soon as the learned District Judge discovered the error in fact, I hold he should have ruled plaintiff had never been entitled to this extraordinary remedy, and should have remitted the matter to ordinary procedure.

I would therefore remit for further procedure, but without costs.