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MUTTAIYA CHETTY *v.* ARUMUGAM.

D. C., Kandy, 15,301.

Civil Procedure Code, chapter 53—Action on promissory note—Summons to appear, with liberty to obtain leave to defend within fourteen days—Application for such leave made out of time—Right of Court to impose terms in giving leave to defend.

Where, in an action on a promissory note brought under chapter 53 of the Civil Procedure Code, a defendant did not apply in time for leave to appear and defend the suit, the Court is entitled, under section 706 of the Code, to put him on terms as a person in default as regards the defence of the suit.

The effect of the decisions of the Supreme Court in *Arunasalam Chetty v. Assina Marikar* (2 *Browne*, 295) and *Davies & Co. v. Perera* (*ib.* 297) explained.

IN this case two defendants were sued on a promissory note, and summons issued against them under chapter 53 of the Civil Procedure Code to appear and obtain leave to defend within fourteen days. The Fiscal reported that the summons was served

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on the second defendant on 16th May, 1902. On the 31st May he applied for leave to defend, but his application was refused as he was two days out of time. He renewed his application on the 5th June, and explained in his affidavit that summons was served on him only on the 21st May, and that his defence was that he did not make the note. The Court ordered him to submit proof of the date of service of the notice to the plaintiff. The defendant failed to give such notice. Later on his counsel cited to the Court the case of *Arunasalam Chetty v. Assena Marikar* (*2 Browne, 295*) and moved for leave to appear and defend, when the District Judge (Mr. G. A. Baumgartner) allowed the motion, on condition that he gave security.

His reasons were communicated as follows to the Registrar of the Supreme Court in a letter, in reply to an order of the Supreme Court calling upon him to state his reasons:—

"The second defendant's application for leave to defend was out of time according to the Fiscal's return of service of summons on him. The Fiscal reported that summons was served on him on 16th May. The second defendant, however, in his affidavit of 4th June asserted that he was served on 21st May. If that were so, he was in time. He was ordered to notice the plaintiff and to prove the date of the service in his presence. As he failed to comply with that order, I regarded him as out of time, and as not entitled as a matter of right, whatever his defence might be, to enter upon that defence.

"*Mr. Beven*, for the second defendant, cited *2 Browne's Reports, 295*, without offering any further proof than the second defendant's affidavit to contradict the Fiscal's return. I considered that strictly I might have refused leave to defend, as the second defendant had not proved the Fiscal's return to be incorrect. As an indulgence I gave him leave to defend on the terms that he should give security."

The second defendant appealed.

F. M. de Saram, for the appellant, cited *Arunasalam Chetty v. Assena Marikar* (*2 Browne, 295*) and *Davies & Co. v. Perera* (*ib. 297*), and contended that it was open to a defendant, sued on a liquid claim by way of summary procedure, to come in and apply for leave to defend at any time before decree was entered, and that he should not have been put on terms as regards his defence.

Bawa, for the plaintiff, was ruled not entitled to be heard, as the plaintiff was not a respondent to the appellant. But the Court heard him as *amicus curiæ*.

Cur. adv. vult.

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16th June, 1903. WENDT. J.—

The two defendants were sued under chapter 53 of the Civil Procedure Code on a promissory note, and were required by the summons to appear and obtain leave to defend within fourteen days of service. The first defendant was granted leave to defend upon giving security to meet plaintiff's claim. An application for leave to defend, made by second defendant on the same day (31st May, 1902), was refused on 4th June, because he was out of time and had made no affidavit in support of his application. (The Fiscal's return was that second defendant had been served on 16th May, 1902. The last day for his application was therefore the 29th May.) On 5th June the second defendant renewed his application for leave to defend, presenting an affidavit, in which he deposed that the summons had in fact been served upon him only on 21st May, and that he had not made the note sued on. In view of this contradiction of the Fiscal's return, the Acting District Judge directed second defendant's proctor to give notice to plaintiff with a view to an inquiry as to the true date of service. This notice was not given, but after the lapse of a week second defendant's proctor again moved the Court *ex parte*, citing the case of *Arunasalam Chetty v. Assena Marikar* (*2 Browne, 295*), and the Court, without stating any reasons, allowed second defendant leave to defend upon the same terms as those imposed on first defendant, and second defendant has appealed.

Being requested by us to state his reasons, the Acting District Judge says that, as second defendant failed to give plaintiff notice and prove the alleged true date of service, he "regarded him as out of time and as not entitled as a matter of right, whatever his defence might be, to enter on that defence," that strictly leave might have been refused because not asked for in time, but that as an indulgence such leave was granted on the terms of finding security.

Appellant's counsel argued before us, as was apparently contended in the Court below, that the effect of the decision in *Arunasalam Chetty v. Assena Marikar* was that, until a decree was actually entered against him, a defendant sued by way of the summary procedure on liquid claims, could come in and ask for leave to defend, no matter how long he was out of the time limited in the summons. This amounts to allowing a defendant under the special procedure, which is intended to expedite the recovery of claims on promissory notes and other such instruments, greater latitude than is permitted under the regular procedure. For surely a defendant in a regular action, who appears after the day named

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in the summons, is not as a matter of course entitled to file answer (as though he had appeared on the due date), merely because no *ex parte* hearing has yet taken place, nor a decree *nisi* been entered; he surely must first purge his default by explaining why he did not appear in time, and the practice in regular actions in the District Court of Colombo is, we are informed, in accordance with this view.

But in truth the case referred to did not decide what is now contended for. What that case, and the earlier case of *Davies v. Mathes Perera*, reported at page 297 of the same volume of Reports, decided was, that, so long as a decree has not been entered, the Court is not precluded by the lapse of the time named in the summons from granting leave to defend, it being of course understood that the defendant purges his default, in addition to showing that he has a good defence, as he would have had to do had he appeared in time. These decisions are in accordance with chapter 53 of the Code, section 706, which regulates the giving of leave to defend, does not make it a condition precedent that the application shall be made within the time allowed by the summons. After decree, however, section 707 comes into play and requires defendant to show special circumstances. Once it is recognized that a defendant who does not appear in time is in default, the right of the Court to impose terms upon him must be allowed, apart from the defendant's liability to such terms where the Court on the merits considers his defence *prima facie* not sustainable or doubts its good faith (section 704). In *Ulaganathan Chetty v. Vavassa* (*3 N. L. R. 52*), Lawrie, A.C.J., expressed it in this way: "Something was said at the hearing 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."

In the present case the District Judge's view is right. He was entitled under section 706 to put the defendant upon terms, quite apart from such terms as might have been called for by the nature of the defence, and it cannot be said that the terms imposed were unreasonable. The defendant, even on the footing that the service was effected on 21st May, was out of time on the 5th June, and his affidavit contains not one word in explanation or extenuation of his default.

I think the appeal should be dismissed with costs.

GRENIER, A.J.—I am of the same opinion.