

1929.

Present : Dalton J.

AMARASEKERE v. MOHAMADU UDUMA.

96—C. R. Dandagamuwa, 515.

*Court of Requests—Action for rent and ejectment—Interest in land—
Primâ facie proof of plaintiff's case—Judgment by default.*

In an action in the Court of Requests for house rent and ejectment, judgment by default cannot be entered against the defendant without *primâ facie* proof of the plaintiff's claim.

A PPEAL from an order of the Commissioner of Requests.
Dandagamuwa.

Deraniyagala, for defendant, appellant.

L. A. Rajapakse (with *Wendt*), for plaintiff, respondent.

June 24, 1929. DALTON J.—

This is an appeal from an order of the Commissioner who refused the application of the defendant in the action to reopen the case and to set aside the judgment which had been obtained against him by default. His application to have the judgment set aside was based upon the allegation that summons had not been served upon

him, that the house in respect of which rent and possession were claimed by plaintiff had not been occupied by him since December, 1927, that he had paid the rent due up to that date, and that he had a good and valid defence on the merits of the case. At the inquiry the Commissioner found as a fact that the summons had been duly served and he refused the application.

A fresh matter has now been raised before me in the argument on the appeal for the first time, namely, that inasmuch as the Commissioner failed to comply with the provisions of section 823 (2) his judgment cannot stand. The plaintiff's action is to recover rent for and possession of certain premises, a right to the possession of land was in dispute, and therefore by sub-section (2) the Commissioner cannot enter judgment by default without hearing evidence in support of plaintiff's claim. He failed to take any evidence at all, nor did he direct plaintiff to adduce any evidence, treating the case as one apparently that came under the first part of the sub-section.

After hearing the evidence, the Commissioner may give "such judgment" as justice shall require, and it is "such judgment" that may be reopened under the provisions of sub-section (3). The ground now urged for setting aside the judgment is not one that is provided for in sub-section (3), but it is urged that the judgment entered does not for the reason I have given come within the meaning of the words "such judgment" as used in sub-section (3). If not, what is defendant's remedy? The matter is not without considerable difficulty. There is however a precedent in a similar case which I propose to follow. In *Meedin v. Meedin*¹ Middleton J. set aside the judgment of the Commissioner which had been obtained without the Court hearing any evidence in support of plaintiff's claim. He held that the requirements set out in the proviso to sub-section (2) are substantive law and cannot be waived as a matter of procedure. With that conclusion I agree, although I must admit I should have some difficulty in deciding what is defendant's remedy in case of failure to observe the law as laid down in the proviso. I shall however follow the precedent, set aside the judgment, and send the case back for the admission of defendant's answer, but on the following conditions:—Defendant must pay to plaintiff the sum of Rs. 50 (the sum agreed to by Counsel) as the amount of costs the plaintiff has wasted in the lower Court as a result of defendant's default, and also file his answer; payment and filing of answer to be within fourteen days of the record reaching the lower Court. If he fails to comply with either of these conditions the judgment obtained against him will stand, and his appeal will be dismissed with costs; if he comply with them both within the time limited the judgment will be set aside, but without costs.

Set aside.

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 DALTON J.
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Amarasekera
v.
Mohamadu
Ulluma