1959 *Present* : **Basnayake, C.J., and de Silva, J.**

KANAGASABAI, Appellant, *and* KIRUPAMOORTHY, Respondent

S. C. 93—D. C. Jaffna, AW/79

Summary procedure—Service of interlocutory order on respondent—Duty of respondent to appear in person—Failure of Proctor to appear, by "oversight"—"Accident or misfortune"—Proceedings where both parties appear—No provision for filing written objections—Affidavits—Duty to comply with rules governing them—Civil Procedure Code, ss. 181, 377 (b), 383, 384, 389, 437, 696, 697, 698.

Where, in an application of summary procedure, the respondent fails to appear in person as required by the interlocutory order served on him under section 377 (*b*) of the Civil Procedure Code, he must suffer the consequences of his non-appearance. It is not open to him to say that he gave a proxy to a Proctor and that the Proctor failed to appear by an "oversight". In such a case, the failure of the Proctor to appear (assuming that he has a right to appear) is not an accident or misfortune within the meaning of section 389.

Even in proceedings where both parties appear, section 384 of the Civil Procedure Code does not provide for the filing of written objections.

When affidavits are filed in the course of civil proceedings, it is the duty of Judges, Justices of the Peace and Proctors to see that the rules governing affidavits in sections 181, 437, &c., of the Civil Procedure Code are complied with.

APPEAL from an order of the District Court, Jaffna.

H. W. Jayewardene, Q.C., with *C. Ranganathan*, for Petitioner-Appellant.

S. Nadesan, Q.C., with *A. Nagendra* and *D. W. Abeykoon*, for Respondent-Respondent.

Cur. adv. vult.

October 30, 1959. BASNAYAKE, C.J.—

The appellant made in the manner prescribed by section 697 of the Civil Procedure Code an application under section 696 of the Code that the award made in a dispute between him and the respondent, referred to arbitration without the intervention of a court, be filed. In his petition he prayed—

(*a*) that the award dated 25th February 1958 be filed in court ;

(*b*) that the award be enforced as a decree of court ;

(*c*) that an interlocutory order in terms of section 377 of the Civil Procedure Code appointing a day for the determination of the matter of his petition be entered intimating that the respondent will be heard in opposition on a day appointed by court why the respondent should not pay to the petitioner Rs. 49,070/50 with legal interest thereon from the date thereof and deliver to the appellant the vallam known as Namo Narayana.

The District Judge made the following " Interlocutory Order " upon the appellant's application :—

" This matter coming on for disposal before N. Sivagnanasunderam Esquire, Additional District Judge, Jaffna, on the 19th June 1958 in the presence of Mr. R. N. Sivapiragasam, Proctor, on the part of the Petitioner, and the Affidavit of the Petitioner dated 19th June 1958 having been read.

" It is ordered that the Award marked A dated 25th February 1958 filed of record be made a rule of court and that the said Award be given effect to and enforced in terms of section 698 of the Civil Procedure Code as a decree of court—unless sufficient cause be shown to the contrary—on the 7th August 1958.

" It is further ordered that the 7th day of August 1958 be and the same is hereby appointed for the determination of the matters in the said Petition contained and that the said Respondent be heard in opposition to the prayer of the same if he appear before this court on the said day.

" It is further ordered that the Respondent do pay to the Petitioner his costs of, and occasioned by the Application. "

On 7th August 1958 the respondent was absent although the interlocutory order had been served on him. The District Judge made the following order " Award made rule of Court ". Later, on the same day, Proctor Selvarajah filed the proxy of the respondent and moved for a date for objections. The Judge thereupon made the following order : " Notice plaintiff's Proctor and move ".

On 12th August 1958 the respondent filed a petition in which he prayed—

(*a*) that the order dated 7th August 1958 making the Award a Rule of Court be vacated ;

(*b*) that the respondent be allowed to file objections and defend the application.

In the respondent's affidavit, which is undated, filed along with the application the respondent stated—

" (*a*) I had granted a proxy to Messrs. Selvarajah and Mahesan, Proctors, to appear for me on 7.8.58 and obtain time to file objections to the application ;

(*b*) Mr. Selvarajah, who was a partner of the said firm of Proctors, was present in court on 7.8.1958 but by an oversight he failed to tender the proxy and obtain a date to file objections when the case was called ;

(*c*) Soon thereafter he realised that the case had been called and that he had failed to file the proxy ;

(*d*) Immediately he applied to court and tendered the proxy and applied to have the order making the Award a Rule of court vacated and that a date be granted to file objections. "

On 1st October 1958 the District Judge held an inquiry into the respondent's petition. No evidence was taken but the respective counsel for the appellant and respondent addressed the Judge. Counsel for the appellant submitted—

(*a*) that the application was not in accordance with the provisions of section 389 ;

(*b*) that the application was not of the same date as the respondent's affidavit and that it was only supported by the Proctor's affidavit ;

(*c*) that on 7.8.58 the respondent was absent and there was no Proctor for him on record ;

(*d*) that it was after the award was made absolute that the proxy was filed and the present application made.

Counsel for the respondent submitted that the interlocutory order served under section 377 (*b*) is not a proper interlocutory order complying with form 66 of the Code.

The District Judge allowed the respondent's application and set aside his order of 7th August 1958. This appeal is from that order.

Learned counsel for the appellant did not challenge the correctness of the procedure adopted by the District Judge in making his order on the appellant's application.

The District Judge made an interlocutory order under section 377 (*b*) which was duly served on the respondent but he did not appear. Now section 383 states what the Judge is to do if the respondent does not appear and the petitioner appears on the day appointed in an order made under section 377. It provides—

> ". . . if the court is satisfied by the affidavit of the serving officer, stating the fact of the service, or by oral evidence, that the order has been duly served upon the respondent in time reasonably sufficient to enable him to appear, then if the order is an order *nisi* made under (*a*) of section 377, the court shall make it absolute, and shall pass no other order adverse to the respondent, but otherwise it shall make such order within the prayer of the petition as it shall consider right on the facts proved : "

The requirement of the interlocutory order was that the respondent should " appear " not by Proctor but in person. The respondent failed to comply with that order. The learned Judge was right in making order on 7th August 1958 granting the petitioner his prayer. Once the order under section 383 was made the District Judge had no power to set it aside except in the circumstances stated in section 389. That section provides :

> " No appeal by a respondent shall lie against any final order which has been made, in the case of the respondent's non-appearance, on the footing of either an order *nisi* or an interlocutory order in the matter of a petition ; but it shall be competent to the court, within a reasonable time after the passing of such order, to entertain an application in the way of summary procedure instituted by any respondent against whom such order has been made, to have such final order set aside upon the ground that the applicant had been prevented from appearing after notice of the order *nisi* or interlocutory order by reason of accident or misfortune, or that such order *nisi* or interlocutory order had never been served upon him. And if the ground of such application is duly established to the satisfaction of the court, as against the original petitioner, the court may set aside the final order complained of upon such terms and conditions as the court shall consider it just and right to impose upon the applicant, and upon the final order being so set aside, the court shall proceed with the hearing and determination of the matter of the original petition as from the point at which the final order so set aside was made. "

The affidavit of the respondent does not show that he was prevented from appearing after notice of the interlocutory order had been served on him on any of the grounds mentioned in the section. In fact it would appear that he was not prevented from appearing. He deliberately refrained from appearing because he had given a proxy to his Proctors Selvarajah and Mahesan to appear for him. That is not a ground on which section 389 empowers the District Judge to set aside the final order made by him. Where, as in this case, the party is required to

appear in person and he does not do so then he must suffer the consequences of his non-appearance. It is not sufficient to say that he gave a proxy to a Proctor and that the Proctor failed to appear by an " oversight ". The Proctor's explanation is as follows :

" 3. When the case was called I had by an oversight failed to tender the proxy and apply for a date to file objections.

" 4. Soon thereafter I realised that the case had been called and that I had failed to file the proxy. "

Even if in the instant case the Proctor's appearance had been sufficient compliance with the interlocutory order served on the respondent, and I do not think it is, his failure to be attentive to the proceedings in court and appear when the case was called is not a ground which comes within the expression " accident or misfortune " in the section. Besides it must be remembered that the interlocutory order served on the respondent stated that 7th August was appointed for the determination of the matters in the petition of the appellant and that the respondent would be heard in opposition to the prayer if he appeared before the court on that day. The respondent was therefore ill-advised in not being present in person and his Proctors were wrong in assuming that they need not do anything more than file the respondent's proxy and obtain a date to file objections. They should have known that the notice stated that the respondent would be heard in opposition to the prayer of the petitioner if he appeared before the court on 7th August.

The practice of Proctors not being prepared with their cases on the appointed day is becoming far too common and should stop. It not only involves their clients in additional expense but also prolongs legal proceedings and adds to the work of the court. The Civil Procedure Code does not provide for the filing of written objections. Section 384 reads :

" If on such day both the petitioner and the respondent appear, the proceedings on the matter of the petition shall commence by the respondent in person, or by his proctor, stating his objections, if any, to the petitioner's application ; and the respondent shall then be entitled to read such affidavits or other documentary evidence as may be admissible, or by leave of the court to adduce oral evidence in support of his objections, or to rebut and refute the evidence of the petitioner ; "

The procedure which the respondent's Proctor meant to adopt on 7th August is not warranted by the Code.

The learned Judge's order in the instant case was—" Award made a rule of Court. " It is not clear why he used this phraseology. Section 698 provides that the order to be made is that the award be filed. Upon that order being made the award takes effect as an award made under the provisions of Chapter LI. Judges of first instance should studiously observe the requirements of the Code in making their orders.

Before I part with this judgment I wish to point out that the respondent's affidavit is undated. It is the duty of the Justice of the Peace

before whom an affidavit is sworn to see that the jurat is properly made. It reads : " Affirmed to the truth and correctness hereof and signed at . . . . this . . . . day of August 1958. " This is not the only defect in this affidavit. It violates the rule governing affidavits in section 181 of the Civil Procedure Code. That section provides :

> "Affidavits shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to, except on interlocutory applications, in which statement of his belief may be admitted, provided that reasonable grounds for such belief be set forth in the affidavit. "

Paragraphs 4, 5 and 6 are not matters within the declarant's own knowledge because they relate to what took place in court at a time when he was not there. The affidavit does not show that it was made before a Justice of the Peace within the local limits of whose jurisdiction the deponent was at the time residing (s. 437 Civil Procedure Code). I have referred to these matters to ensure that Judges, Justices of the Peace, and Proctors will in future see that affidavits filed in civil proceedings fulfil the requirements of the Code.

The order made by the District Judge on 1st October 1958 is set aside and the order that the award be filed is affirmed. The appellant is entitled to costs both here and below.

DE SILVA, J.—I agree.

Order set aside.