

1961 Present : Basnayake, C.J., Gunasekara, J., and T. S. Fernando, J.

NANAYAKKARA and another, Appellants, and PAIVA,
Respondent

S. C. 48/60—D. C. Colombo, 22734/S

Summary procedure—Action on a liquid claim—Application for leave to appear and defend—Computation of time limit—Civil Procedure Code, ss. 703, 704, 706—Interpretation Ordinance, ss. 2, 8 (3), 11.

Where, in an action on a liquid claim under Chapter LIII of the Civil Procedure Code, the summons in Form No. 19 required the defendants to cause an appearance to be entered for them within seven days from the service thereof, inclusive of the day of such service—

Held (BASNAYAKE, C.J., dissenting), that, in computing the period within which the defendants were required to make an application for leave to appear and defend the action, Sundays and public holidays should be excluded, in terms of section 11, read with section 8 (3), of the Interpretation Ordinance.

APPEAL from an order of the District Court, Colombo.

Nimal Senanayake, with *Desmond Fernando* and *S. Wickremasinghe*, for 1st and 2nd Defendants-Appellants.

T. Arulananthan, for Plaintiff-Respondent.

Cur. adv. vult.

December 20, 1961. BASNAYAKE, C.J.—

This appeal comes for hearing before a bench composed of three Judges because the bench composed of two Judges before which it came up for hearing in the ordinary course was unable to agree as to the decree that should be passed by the Court.

The question for decision is whether, in computing the time prescribed in a summons in Form No. 19 within which the defendant is required to obtain leave from the Court to appear and defend the action on a liquid claim under Chapter LIII of the Civil Procedure Code, Sundays and Public Holidays should be excluded.

The relevant portion of the summons in the instant case which, as required by section 703, is in Form 19 of the Forms in the Schedule to the Civil Procedure Code reads :

“ You are hereby summoned to obtain leave from the Court within seven days from the service hereof, inclusive of the day of such service to appear and defend the action, within such time to cause an appearance to be entered for you. ”

The summons was served on 1st December 1959. On 8th December the proctor of the defendants appears to have tendered to the Court office a proxy and an affidavit signed by them together with a motion dated the same date to the following effect :—

“ I file my appointment from the defendants together with their affidavit and for the reason stated therein move that the defendants’ application be fixed for inquiry. ”

On the next day—9th December—when the matter came up in open Court, the learned District Judge made the following order :— “ Mr. T. G. de Silva to support the application as it appears to me Defendants are out of time. ” No application for leave to appear and defend was filed along with the affidavit or even later. Section 706 requires that there should be an application by the defendant for leave to appear and defend the action. It reads—

“ The court shall, upon application by the defendant, give leave to appear and to defend the action upon the defendant paying into court the sum mentioned in the summons, or upon affidavits satisfactory to the court, which disclose a defence or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the court may deem sufficient to support the application and on such terms as to security, framing, and recording issues, or otherwise, as the court thinks fit. ”

The learned Judge appears to have treated the affidavit as an application. But even in the affidavit there is no prayer for leave to appear and defend. The last sentence of it which contains a request for relief reads—“ We beg that the Court be pleased in view of the above facts to dismiss the plaintiff’s action with costs. ”

Learned counsel relies on section 8 (3) of the Interpretation Ordinance for his submission that Sundays and Public Holidays are to be excluded in the computation of the time prescribed in a summons in Form 19 of the Schedule to the Civil Procedure Code issued under section 703. That provision reads :

“ Where a limited time not exceeding six days from any date or from the happening of any event is appointed or allowed by any written law for the doing of any act or the taking of any proceeding in a court or office, every intervening Sunday or public holiday shall be excluded from the computation of such time. ”

Written law is defined in section 2 thus :

“ (v) “ written law ” shall mean and include all Ordinances, and all orders, proclamations, letters patent, rules, by-laws, regulations, warrants, and process of every kind made or issued by any body or person having authority under any statutory or other enactment to make or issue the same in and for the Island of Ceylon or any part thereof, but it shall not include any Imperial Statute extending

expressly or by necessary implication to the Island of Ceylon, nor any Order of the King in Council, Royal Charter, or Royal Letters Patent ; ”

Learned counsel submits that summons is a process and falls within the ambit of the expression “ written law ”. Assuming that a summons is written law, the time appointed in the summons in the instant case is seven days and not six. Section 8 (3) applies to a case where time appointed does not exceed six days. It does not therefore apply to the summons in the instant case.

There is no universal rule for the computation of time when an act is required to be done within a given number of days. In a case such as the one we have before us where the defendant is required to make application for leave to appear and defend within seven days from the date of service of the summons he would be within time if he appeared and made his application on the very day the summons was served. But in arriving at the last day for making such an application it is usual, and there are decisions which so hold, that the first day is excluded from the computation unless the context, as in the instant case, requires its inclusion. Where the expression “ clear days ” is used, both terminals are excluded. See *Nallan v. Ossen*¹ and *Hassen v. The Ceylon Wharfage Co.*². The former is a case on this very form of summons and it has been held that Sundays and Public Holidays are not excluded in the computation of the seven days.

As 1st December, the date on which the summons was served, must in accordance with the instruction as to computation given in the summons itself be reckoned for the purpose of computing the seven days the seventh day was 7th December. The words “ inclusive of the day of the service hereof ” are inserted to leave no room for misunderstanding as to the method of computation and to enable the defendants, if they wish to do so, to appear on the very day the summons is served.

The learned District Judge was therefore right in holding that the application for leave to appear and defend, if application there was, and I am inclined to think there was not such an application as is contemplated by section 706, was out of time.

The appeal is dismissed with costs.

GUNASEKARA J.—

I regret I am unable to agree with the judgment of my lord the Chief Justice.

The period specified as seven days from the service of the summons inclusive of the day of such service is identical with a period of six days from that event exclusive of the day of service. Section 11 of the Interpretation Ordinance provides that for the purpose of excluding the first in a series of days or any period of time it shall be deemed to

¹ (1897) 2 N. L. R. 381. ² (1910) 13 N. L. R. 101 [F. B.]

have been and to be sufficient to use the word "from". The period in question is therefore identical with a period of six days from the service of the summons. That is to say, a period of six days from the service of the summons is allowed for the taking of the proceeding in court which is indicated in the summons, and therefore, in terms of section 8 (3) of the Interpretation Ordinance, the intervening Sunday must be excluded from the computation of the time allowed.

The case of *Nallan v. Ossen*¹, which is cited by the Chief Justice, was decided on the 5th August 1897, before the Interpretation Ordinance came into force.

The only matter that was argued before us was the question as to the computation of the time specified in the summons. It was assumed in the argument of the appeal and it has been assumed in the proceedings before the district court and in the learned district judge's order that there was before that court an application by the defendants for leave to appear and defend the action. The order under appeal must be set aside and the case must go back for an order to be made by the district court upon the footing that the 8th December 1959 was within the time specified in the summons. The appellants must have their costs of appeal.

T. S. FERNANDO, J.—

In this action of summary procedure on a liquid claim instituted against the defendants on 19th October 1959, the District Judge made order on 28th October 1959 as follows:—

"Defendant to appear within seven days from the date of service."

A summons was issued following on this order, and this summons, as required by section 703 of the Civil Procedure Code, was in the form No. 19 prescribed by the Code and contained in the First Schedule thereto. It required the defendants to obtain leave from the court within seven days from the service thereof, inclusive of the day of such service.

The day on which this summons was served on the defendants was 1st December 1959. The proctor for the defendants filed in court on 8th December 1959 proxy from the defendants together with affidavit and moved that the application of the defendants be fixed for inquiry. The filing of these papers was treated by the learned District Judge as an application by the defendants for leave to appear and defend within the meaning of section 704 of the Code, and no argument was raised either in the District Court or before us that it did not constitute such an application.

The plaintiffs contended in the District Court that the defendants' application could not be entertained by the court as it was out of time. The learned District Judge held with the plaintiffs on this question. Hence this appeal.

Section 11 of the Interpretation Ordinance (Cap. 2) enacts that, in all Ordinances, for the purpose of excluding the first in a series of days

¹ (1897) 2 N. L. R. 381.

or any period of time, it shall be deemed to have been and to be sufficient to use word "from". In accordance with that section, in computing the period of time during which the defendants in this case were required to apply for leave to appear and defend, the 1st day of December 1959 had to be excluded. Therefore, when they applied on 8th December 1959 they were, in my opinion, within the time allowed by law.

Apart from section 11, learned counsel for the defendants relies on section 8 (3) of the same Ordinance. He contends that, the summons that issued from the court being "written law" within the meaning of section 2 of the Interpretation Ordinance, section 8 (3) operates to exclude the intervening Sunday (December 6th) from the computation of the time allowed. By section 8 (3) where a limited time not exceeding six days from any date or from the happening of any event is appointed or allowed by any written law for the doing of any act or the taking of any proceeding in a court or office, every intervening Sunday or public holiday shall be excluded from the computation of such time. It will be seen that if the first day is excluded as required by section 11 then the time ("within seven days from the service hereof, inclusive of the day of such service") that has been allowed in the summons for an appearance by the defendants is a time not exceeding six days. If so, section 8 (3) also operates to prevent the Sunday that intervened in this case being included in the computation of time allowed. I am, therefore, of opinion that the contention on behalf of the defendants is correct. I would allow the appeal with costs and remit the case back to the District Court for action to be now taken on the basis that the defendants applied within time for leave to appear and defend the action.

I should add that a similar point came up for consideration recently in *Perera v. Karunanayake*¹ before a Bench of Two Judges, but the question of the application of the Interpretation Ordinance does not there appear to have received consideration. Mr. Senanayake, however, relied on the decision embodied in the last paragraph of the judgment in that case where the Court refused to interfere with an order of the District Court in favour of the defendant because it held that while the District Judge, in accepting the plaint, ordered that the defendant should "appear within seven days of service of summons", the Secretary of the District Court had no authority to compute the period of seven days to include the day of service. We have precisely the same situation here. In view of the fact that on the question argued before us I have reached a conclusion in favour of the defendants it is hardly necessary to say anything further. I would like, however, to add that had I, on the question argued, reached a conclusion in favour of the plaintiffs, I would have been prepared to apply in favour of the defendants the decision embodied in the last paragraph of the judgment in *Perera v. Karunanayake* (supra).

Appeal allowed.

¹ (1960) 62 N. L. R. 423.