1962 *Present :* **Sansoni, J.**

S. ESWARALINGAM, Appellant, *and* N. SIVAGNANASUNDARAM (District Judge), Respondent

S. C. 20 of 1962—Application under Section 42 of the Courts Ordinance for an Order in the nature of Writ of Prohibition and Mandamus on N. Sivagnanasundaram, Esquire, District Judge of Point Pedro

Civil procedure—Money lying in Court—Order of payment made by Court per incuriam*—Inherent power of Court to take action to prevent any injustice—Failure to obey summons—Power of Court to order attachment and bail—Civil Procedure Code, ss. 137, 138, 141, 219, 839.*

A Judgo is entitled to notice a party to appear before him in order that an inquiry might be held into any matter pending beforo him.

An order of payment of a certain sum of money deposited in Court by the 3rd defendant was made by Court *per incuriam* in favour of the 1st and 2nd defendants. The 3rd defendant then applied to the Court to order the 1st and 2nd defendants to bring back the money into Court.

Held, that it was the duty of the Court to summon the 1st and 2nd defendants and to require them to deposit in Court the money which had been paid out to them, until such time as the rights of the parties could be ascertained. If the 1st and 2nd defendants failed to obey the summons, the Court was entitled to enforce obedience by issuing an attachment against them and to order them, under section 138 of the Civil Procedure Code, to give bail to ensure their attendance.

APPLICATION for writs of prohibition and mandamus against the District Judge, Point Pedro.

Nimal Senanayake for Petitioner.

H. L. de Silva, Crown Counsel, for Respondent.

Cur. adv. vult.

July 30, 1962. SANSONI, J.—

This is an application for Writs of Prohibition and Mandamus by the Petitioner (1st Defendant in D. C. Point Pedro Case No. 5279) against the Respondent, who is the District Judge of Point Pedro. It arises out of the following circumstances. Case No. 5279 is a pre-emption action filed by one Annapillai against the Petitioner, his wife (2nd Defendant), and one Velan Kanapathy (3rd Defendant) impugning a deed of transfer executed by the 2nd Defendant in favour of the 3rd Defendant. As part consideration for that transfer, the 3rd Defendant had executed a Mortgage Bond in favour of the 2nd Defendant in a sum of Rs. 3,000.

After trial the District Judge gave judgment for the plaintiff and decreed that the plaintiff should deposit a sum of Rs. 3,500 in Court as the value of the land which he was seeking to pre-empt, and that sum was accordingly deposited. Subsequently, the 1st and 2nd Defendants moved for an order of payment in their favour for the sum of Rs. 3,500 to be applied in part satisfaction of the principal and interest due on the Mortgage Bond, and an order of payment was issued to them for that sum on 15th November 1961.

On 16th December 1961 the widow and children of the 3rd Defendant who had, meanwhile, been substituted in place of the deceased 3rd Defendant, applied to the Court to order the 1st and 2nd Defendants to bring back into Court the sum of Rs. 3,500 drawn by them. The Court ordered notice to issue on all three Defendants and the Plaintiff. The notice required the 1st and 2nd Defendants (1) to bring into Court the sum of Rs. 3,500 as the payment to them had been made *per incuriam*, and (2) to appear in person on the 22nd December 1961 in respect of the application of the substituted Defendants.

Notice was admittedly served on the 1st and 2nd Defendants, but they did not appear in Court on the notice returnable day or deposit the money. The Judge on that day thought that they should be brought into Court on attachment to show cause why they should not bring into Court the money drawn by them. An attachment was accordingly issued. On the 23rd December the 1st Defendant appeared in Court in Fiscal's custody. The Judge explained to him (1) that the payment order had been issued to him by error, (2) that it should not have been issued as there was no decree on the Mortgage Bond in favour of him and his wife, (3) that he and his wife should bring back the money into Court, and (4) that the money will not be returned to any party without due consideration of their rights.

The 1st Defendant explained that he had been advised that the money could be drawn by way of a motion and that is how he came to withdraw it. The Judge then ordered the 1st Defendant to give security in Rs. 3,500 in cash to appear on 26th December. As he did not furnish security he was remanded to Fiscal's custody.

On 30th December there is a journal entry which reads: "The 1st and 2nd Defendants now wish to bring into Court the sum of Rs. 3,500 vide para 3 of proceedings dated 23.12.61. (1) Issue D. N. for Rs. 3,500
(2) Enlarge him on furnishing personal bail in a sum of Rs. 500."

Further entries show that this sum of Rs. 3,500 was actually deposited within the next day or two. Before any further proceedings could take place this application was filed in this Court.

Mr. Senanayake for the petitioner submitted that the Judge had no right to insist on the attendance in Court of the 1st and 2nd Defendants; and that, in any event, he had no right to issue the order of attachment

or to order security to be furnished for their appearance. Crown Counsel referred to Sections 137 and 138 of the Civil Procedure Code and he relied on the judgment in *Narayan Chetty v. Jusey Silva* [1]. He also urged that since the money had been paid out to the 1st and 2nd Defendants on an ex-parte application made by them, which the Judge subsequently thought had been allowed *per incuriam*, it was open to the Judge under his inherent powers to inquire into the matter, and for that purpose to summon the 1st and 2nd Defendants and any other persons whose presence the Judge thought necessary in order to inquire into the matter.

In my view there was a clear case for inquiry. Money had been paid out, as the Judge thought *per incuriam*, which was claimed by the substituted Defendants as due to them. It was the duty of the Judge to inquire into their complaint and for that purpose to summon the 1st and 2nd Defendants, and to require them to deposit in Court the money which had been paid out to them, until such time as the rights of the parties could be ascertained. If the Judge failed to take steps to this end, a grave injustice might have been done to the substituted Defendants. It was undoubtedly the duty of the Judge to take action to prevent any injustice, especially where such injustice arose from the action of the Judge himself.

In the case of *Narayan Chetty v. Jusey Silva*, Wendt J. said : " The Court has an inherent right to summon a party before it, and, if that summons be disregarded without lawful excuse, to enforce obedience by warrant. . . . . I would add that the defendant's proctor ought, at the very least in courtesy to the Court, to have explained the non-appearance either of himself or of his client, and given the Court an opportunity, if so advised, to recall the order for the warrant before he presented an appeal to this Court ". Middleton J., who agreed, thought that that Sections 137 and 141 of the Code justified the issue of a warrant when a party who had been summoned to appear before the Court failed to appear. In that case the party in default was the Defendant who had been noticed under Section 219 of the Code. The Court then ordered a warrant to be issued for his arrest, and an appeal was filed against that order.

Mr. Senanayake submitted that this case was no authority, because under Section 219 (2) there is express provision for the issue of a warrant on a debtor who has been summoned to appear. I cannot accept this argument, because it overlooks the provisions of Section 219 as it stood when this judgment was given. Sub-section (2) to Section 219 is a later addition. It was not originally in the Code, and it had not been enacted in 1903 when this case was decided, nor is it to be found even in the 1907 edition of the Enactments. I cannot say when it was added, for there is no marginal note of the date in the new edition of the Legislative Enactments. I see no reason to limit the application of the dicta in that case.

[1] *(1903) 8 N. L. R. 162.*

Further authority in support of the right of a Judge to notice a party to appear before him, in order that an inquiry might be held into any matter pending before him, will be found in *Edirisinghe v. District Judge of Matara* [1]. There the District Judge had issued notice on a party, against whom a complaint of obstruction was made by a Commissioner appointed to conduct a sale in a partition action, to appear in Court. A similar application to the present one was then made by the party to this Court, on the ground that the Judge had no jurisdiction to inquire into the alleged obstruction, or to make an order requiring the party to furnish bail for his future appearance in Court. Basnayake J. held that the Judge was entitled to ascertain the true facts by inquiry in order to decide what action, if any, he should take in respect of the alleged obstruction. He also referred to section 839 of the Code, which saved the inherent powers of the Court. He accordingly refused the application for the writ of prohibition.

Similarly, in this case I would hold that the Judge was entitled to hold an inquiry into the complaint of the substituted Defendants, and for that purpose to notice the 1st and 2nd Defendants to appear, as they were the persons who had drawn out the money which the substituted Defendants said had been wrongly drawn out. When they failed to obey the notice, the Judge was entitled to enforce obedience to it by issuing an attachment against them.

The next question that arises is whether he was entitled to order the petitioner to give bail, when he was arrested and produced before the Court to ensure his attendance on 26th December. I think Section 138 of the Code enables the Judge to do this, for it provides that a person arrested and brought before the Court for non-compliance with a summons may be required to give bail or other security for his appearance, and when such bail or security is given, he may be released. Basnayake J. in the case I have just cited said that he could find no authority for the order made in that case by the District Judge that bail should be furnished. Perhaps, if his attention had been drawn to Section 138, he might have taken a different view. I therefore see nothing wrong in the orders made by the learned District Judge in the present case with regard to the issue of notices, attachments, and the orders to furnish security.

There is one other matter which Mr. Senanayake referred to, and that is the journal entry of 30th December 1961 referring to the deposit of Rs. 3,500. He submitted that this sum was deposited solely in order to obtain the release of the 1st Defendant-Petitioner, and not as a refund of the money withdrawn from Court. This is a matter which the 1st and 2nd Defendants should raise in the lower Court with notice to the other parties. I reserve this right to them, and I direct that the inquiry into this matter be held by another District Judge.

For the reasons I have given, I refuse the application for writs of prohibition and mandamus. The parties will bear their own costs.

Application refused.

[1] *(1949) 51 N. L. R. 549.*