

1960 *Present* : K. D. de Silva, J., and H. N. G. Fernando, J.

PERERA, Appellant, *and* KARUNANAYAKE, Respondent

S. C. 27—D. C. Matara, 1489/M

Liquid claim—Action by summary procedure—Summons on defendant—Time within which defendant must obtain leave to appear and defend—Computation—Civil Procedure Code, ss. 703-706, Schedule I, Form No. 19.

Where, in an action by summary procedure on a liquid claim, summons under Chapter 53 of the Civil Procedure Code was ordered by Court to be issued directing the “defendant to appear within seven days of service of summons” —

Held, that in computing the period of seven days a Sunday could not be excluded.

Held further, that when the Judge had directed the defendant to appear “within” seven days the Secretary of the Court, when issuing the summons in Form No. 19 of Schedule I of the Civil Procedure Code, had no authority to compute the period of seven days to include the day of service. When an act has to be done “within” a specified period from a certain date, in computing that period the day of that date must be excluded.

APPEAL from a judgment of the District Court, Matara.

Robert Silva, for the plaintiff-appellant.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the defendant-respondent.

Cur. adv. vult.

October 21, 1960. K. D. DE SILVA, J.—

The plaintiff instituted this action on August 24, 1959, under Chapter 53 of the Civil Procedure Code to recover from the defendant appellant a sum of Rs. 10,000 with legal interest thereon alleged to be due on a

cheque. On the same day the Court accepted the plaint and ordered the issue of summons under Chapter 53 C. P. C. directing the “defendant to appear within seven days of service of summons”. Accordingly summons was issued on the defendant directing him to “obtain leave from the Court within 7 days from the service hereof *inclusive of the day of such service* to appear and defend. . . .”. This summons was in form No. 19 in the First Schedule. It was served on the defendant on September 4, 1959. On September 11, 1959, Messrs. Weeratunga and Karunadasa, Proctors, filed proxy from the defendant together with his affidavit and moved for permission to file answer unconditionally. In this affidavit the defendant averred that he gave this cheque to one K. G. J. Weerasingha the employer of the plaintiff as security for a money lending transaction which originated in June 1958 and that he had paid interest to the said Weerasingha at the rate of Rs. 400 a month from that date, on the sum of Rs. 10,000 borrowed. His position was that he gave a cheque for Rs. 10,000 at the time of the original transaction and this cheque was renewed every month on the payment of interest. He also averred that this matter was pending before the Debt Conciliation Ordinance No. 39 of 1941.

When the application of the defendant for leave to appear and defend came up for consideration the Counsel for the plaintiff objected to such leave being granted on the ground that the application was made out of time. It was contended on behalf of the plaintiff that the last day the defendant was entitled to make the application was 10th September, 1959. The learned District Judge however held that as the period of seven days included a Sunday that day should be excluded and therefore the defendant was within time. I am unable to agree with the reasons given by the learned Judge for excluding the Sunday from this period of seven days.

The defendant is, however, entitled to succeed on another ground. As I observed earlier the order made by the Judge when he accepted the plaint was that the defendant should “appear *within* seven days of service of summons”. In that order he did not say that the period of seven days was to include the day of service. The Judge is entitled to fix the period within which the defendant was to appear. In this instance he directed the defendant to appear “within” seven days. The summons in Form 19 was signed by the Secretary of the Court. When the Judge had directed the defendant to appear “within” seven days the Secretary had no authority to compute the period of seven days to include the day of service. When an act has to be done “within” a specified period from a certain date in computing that period the day of that date must be excluded. It was so held in *Kailayar v. Kandiah*¹. That being so, the defendant in making this application on 11th September was not out of time. I would therefore dismiss the appeal with costs.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.

¹ (1957) 59 N. L. R. 117.