1948 *Present :* **Dias and Basnayake JJ.**

CHELLIAH, Appellant, and ARON, Respondent.

S. C. 26—D. C. Colombo, 6,864/S

Civil Procedure Code, Chapter 53—Action on promissory note—Summary procedure—Defendant's affidavits—Leave to appear and defend unconditionally—Fixed for inquiry—Defendant absent—Judgment for plaintiff.

Plaintiff sued defendant under Chapter 53 of the Civil Procedure Code and affidavit was filed by defendant's brother on defendant's behalf asking for leave to appear and defend unconditionally. The matter was fixed for inquiry but on that date the defendant was absent and his proctor asked for a postponement. The judge refused a postponement and entered judgment for the plaintiff.

Held, that the order entering judgment for the plaintiff was wrong. The Judge should have, in spite of the defendant's absence, inquired into his application for leave to defend on the affidavit before him.

APPEAL from a judgment of the District Judge, Colombo.

C. Renganathan, for the defendant, appellant.

P. Navaratnarajah, for the plaintiff, respondent.

Cur. adv. vult.

February 23, 1948. DIAS J.—

The plaintiff-respondent sued the defendant-appellant in summary procedure to recover a sum of Rs. 1,005·50 alleged to be the balance principal and interest due on a promissory note given by the defendant.

The Court ordered summons to issue under Chapter LIII of the Civil Procedure Code and directed the defendant to appear within ten days from the date of the service of the summons. The summons was served on the defendant at Talaimannar on June 25, 1946. Therefore the ten days allowed to the defendant would expire on July 4, 1946.

On July 1, 1946, that is to say before the time allowed to the defendant had expired, the case was called in Court as the Fiscal had reported that summons had been served. As the time had not expired, the Court ordered the case to be called on July 8, 1946, which probably was the next date when the roll of summary cases would be called before the District Judge.

On that day the defendant's proctor filed his proxy and a motion. The motion asks for two weeks time in which to file the defendant's affidavit to appear and defend the action unconditionally. It was pointed out that the summons had been served on the defendant at Talaimannar where the defendant was then residing. This appears to be an *ex parte* motion. There is nothing on the record to show that it was made with notice to the plaintiff, or that the plaintiff in any way acquiesced in it. The learned Judge made order calling for the defendant's affidavit on July 22.

On July 22 an affidavit was filed, not from the defendant but which was sworn by his brother V. Sithambaranpillai. The Judge then made order fixing the matter for inquiry on August 20, 1946.

What was it that was fixed for inquiry? Obviously, it was defendant's claim to appear and defend this action unconditionally after the Judge had studied the plaintiff's affidavit and the affidavit filed on behalf of the defendant, and after hearing what the legal advisers of the parties had to urge. This being a proceeding in summary procedure and on affidavit evidence, there was no necessity whatever for the presence of the defendant who had filed no affidavit at that inquiry.

The journal entry dated August 20, 1946, reads as follows :—

> " Defendant is absent. His proctor tenders telegram which does not disclose any reason. Mr. Sivaprakasam (the proctor for the plaintiff) objects to a postponement. I refuse a postponement. Judgment for plaintiff as prayed for."

The telegram was from defendant from Talaimannar which reads :—

> " Extend date. Unable to send affidavit today. Will post tomorrow. '

It is, therefore, obvious, that although the defendant's proctor well knew that there was no necessity for the defendant to be present or to file an affidavit, and that the case had been specially fixed for inquiry on that day for a consideration of the affidavit which had been already filed, he moved for a date. In my opinion, in making that application for another date, he acted wrongly.

The learned District Judge who made the order dismissing the defendant's action was not the same Judge who had made the earlier orders in the case. It may be that in the hurly burly of the motion roll in a busy Court, the learned Judge failed to note that the case had been fixed for the consideration of the affidavit evidence which was

already before him, and that in spite of the application of the defendant's proctor for a date there was no necessity to postpone the consideration and decision of a simple matter, *i.e.*, whether the defendant was to be allowed to defend the action unconditionally, or whether he was to be put on terms—see the observations of Garvin A. C. J. in *Ramanathan v. Fernando*.[1]

This is not a case where, because the defendant's proctor by refusing to participate in the inquiry, it was impossible for the Judge to act otherwise than but give judgment against the defendant. All the material which the defendant relied on in support of his claim to appear and defend unconditionally was before the Court. If the affidavit filed for the defendant disclosed a good defence, it was the duty of the Court to give him unconditional leave to defend the action. On the other hand, if there was something in the papers before him to throw a doubt on the *bona fides* of the defendant, he would not give judgment for the plaintiff, but allow the defendant to defend on terms, *e.g.*, on giving security, or on bringing into Court the sum claimed or some portion thereof.

I do not think the defendant is debarred from relief because he did not obtain leave to defend on or before July 4, 1946. In the first place, that was not the ground on which judgment was entered against the defendant. In the second place, the authorities show that even in cases where the defendant appeared before the Court after the time limit fixed but before decree was entered, it is open to the Court to consider his application for leave to appear and defend—see *Arunasalam Chetty v.Assena Marikar*[2]; *Davies and Co. v. Mathes Perera*[3]; *Ulaganathan Chetty v. Vavassa*[4]; *Muttiah Chetty v. Arumugam*[5]; *Meyappa Chetty v. Kretser*[6]; *Silva v Ludvis*[7]. In the third place, when the case was called in Court on July 1, 1946, the time limit had not expired. The District Judge directed the case to be called on July 8, and on that day the defendant's proctor filed proxy and asked for time, giving as his reason that his client was in a distant place. This application was allowed for July 22, and on that day the proctor filed the affidavit on which the defence relied. There is nothing to show that the proctor for the plaintiff took any steps to bring to the notice of the Court that the defendant was out of time. I think it is too late at this stage for the plaintiff to urge that the defendant being out of time, that, therefore, the order of the District Judge is right.

In my opinion the order appealed against should be set aside and the case sent back to the District Court to enable the Judge to hold the inquiry which was ordered on July 22, 1946, *i.e.*, whether on the material before the Court the defendant should be allowed to appear and defend this action unconditionally or on terms. As it was the act of the defendant's proctor in asking for an unnecessary postponement which caused all this trouble, I agree to the order of my brother Basnayake in regard to costs.

[1] *(1930) 31 N. L. R. at p. 498.*
[2] *(1901) 2 Browne 295.*
[3] *(1899) 2 Browne 297.*
[4] *(1897) 3 N. L. R. at p. 53.*
[5] *(1903) 6 N. L. R. at p. 305.*
[6] *(1915) 3 B. N. C. 28.*
[7] *(1920) 7 C. W. R. 186.*

BASNAYAKE J.—

The facts of this case are stated in the judgment of my brother Dias. On August 20, 1946, the learned District Judge should, after he refused the application for a postponement, have considered the motion and affidavit filed by the defendants Proctor on July 22, 1946, and given his decision thereon.

I agree that the order appealed against should be set aside and the case sent back for consideration for the defendants' application for leave to appear and defend and for any further proceedings that may be necessary thereafter.

This action was instituted on April 9, 1946, under Chapter LIII of the Civil Procedure Code, which is designed for the speedy adjudication of the class of claims specified in section 703 of that Code. Summons was served on the defendant on June 25, 1946, but even on August 20, 1946, he was unable to furnish his affidavit. After nearly three months the action is still at the initial stages. The defendant's lack of diligence is responsible for the delay.

I wish to mark my disapproval of the tardiness by ordering that the appellant do pay the respondent the costs of this appeal and the costs of the proceedings on August 20, 1946, in the District Court.

Appeal allowed.