· 1956       *Present :*   **T. S. Fernando, J.**

H. K. SENEVIRATNE, Appellant, *and* J. T. GUNARATNE, · Respondent

*S. C. 70—C. R. Colombo, 58,127*

*Civil Procedure Code—Section 823 (3)—Default of appearance of defendant—Opening up of judgment by default.*

     A judgment by default entered against a defendant on account of his failure to appear on the date of trial may be opened up under section 823 (3) of the Civil Procedure Code if the Commissioner is satisfied that the defendant has a good and valid defence on the merits of the case and that he was prevented from appearing in due time for the reason that his Proctor had by *bona fide* mistake noted a wrong date as the date of trial.·

        ¹ *(1944) 45 N. L. R. 457.* :

$A$PPEAL from a judgment of the Court of Requests, Colombo.

*H. W. Jayewardene, Q.C.,* with *C. E. Mendis,* for the defendant-appellant.

*N. C. J. Rustomjee,* with *P. Naguleswaram,* for the plaintiff-respondent.

*Cur. adv. vult.*

August 9, 1956.   T. S. FERNANDO, J.—

On the day fixed for the trial of this case, viz., 6th December 1955, the defendant and his proctor were both absent, and after ex parte proceedings judgment was granted in favour of the plaintiff. Decree was also entered the same day.

On the next day, viz., 7th December 1955, an affidavit of the defendant's proctor was filed and he moved that the decree be vacated and the case refixed for trial. The substance of the affidavit was that on the date on which he filed the defendant's answer, which was the same day on which the date of trial was fixed, he had by some mistake noted the date of trial as the 8th December, instead of the 6th December.

This affidavit of the defendant's proctor was not challenged on behalf of the plaintiff at any time, and the learned Commissioner himself expresses no doubt that the defendant's proctor made a bona fide mistake as to the date.

Counsel for the plaintiff contended before the Commissioner that the decree could not be set aside as the defendant had not shown that he had a good and valid defence on the merits of the case. In regard to this contention, the learned Commissioner has stated that the answer discloses a defence, and although counsel appearing before me for the plaintiff has sought to canvass the correctness of this statement, it seems to me that at this stage of the proceedings it is not possible for me on such material as is before me to disagree with the Commissioner's statement.

Although the learned Commissioner was satisfied that the defendant had a good and valid defence on the merits of the case, he refused to vacate the decree on the ground that the defendant was negligent in not getting ready for the trial, even if the date of trial was assumed to be the 8th December. Section 823 (3) of the Civil Procedure Code does not require a defendant to satisfy the Commissioner that he was making every preparation for the trial before he claims a setting aside of the judgment entered against him. Apart from this consideration, the only reason for stating that the defendant was not getting ready for trial on the 8th December was the fact that he had filed no list of witnesses and

documents as required by section 820 (2) of the Civil Procedure Code. From the failure of a defendant to file a list of witnesses and documents it does not necessarily follow that he was not getting ready for the trial.

In these circumstances, as it is not disputed that the defendant's proctor made a bona fide mistake as to the date of trial, the learned Commissioner should have permitted the defendant an opportunity of contesting the case. I would therefore set aside the order of tho Commissioner of Requests made on 21st February 1956 refusing to set aside the decree entered on 6th December 1955, and substitute therefor the following order :—

The judgment and decree entered on 6th December 1955 are set aside and the case is to be set down for trial on a date to be fixed by the Commissioner of Requests. The defendant will pay to the plaintiff the costs of 6th December 1955. The defendant will be entitled to the costs of this appeal.

*Decree set aside.*