

Present : De Sampayo and Dalton JJ.

1925.

SOCKALINGHAM CHETTY v. MUTTIAH PULLE.

54—D. C. Colombo, 13,869.

Summons—Action by way of summary procedure—Order to appear and defend within ten days—Mistake in summons issued.

Where, in an action by way of summary procedure, the Court ordered summons on the defendant to appear and defend within ten days of the service, but the summons itself, by a mistake, required him to appear within seven days; and where judgment was entered against him before the expiry of ten days.

Held, that the defendant was not entitled to have the judgment set aside as of right.

AN action on a promissory note by way of summary procedure under chapter LIII. of the Civil Procedure Code. The District Judge accepted the plaint and ordered summons on October 25 requiring the defendant to appear within ten days of the service of the summons. The special form of summons, however, which was issued provided that the defendant should appear and obtain leave to appear and defend within seven days of service of summons. The plaintiff obtained judgment on November 12, 1924, less than ten days after the service of the summons. On January 5, 1925, the defendant appeared and moved to vacate the decree on the ground that the judgment had been entered prematurely. The District Judge refused the application.

Cooray, for defendant, appellant.

Samarawickreme, for plaintiff, respondent.

May 11, 1925. DE SAMPAYO J.—

This is an action upon a promissory note. The plaintiff, when he instituted the action, adopted the summary procedure on liquid claims provided in chapter LIII. of the Civil Procedure Code. The District Judge accepted the plaint and ordered summons on October 25, by which the defendant was required to appear within ten days of the service of the summons. The special form of summons, however, which was issued, provided that the defendant should appear and obtain leave to appear and defend within seven days of the service of summons. It is obvious that the defendant had at

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this stage of the matter no knowledge of the order of the Court providing for ten days and not for seven days. Anyway the defendant did not appear within the seven days or within the ten days of service, but the plaintiff relying upon the form of summons moved for and obtained judgment on November 12, 1924, that is to say, less than ten days, but more than seven days after the service of summons. Later on January 5, 1925, the defendant appeared with a petition and affidavit, and moved that the decree entered on November 12 be set aside, the ground for this motion being that in his view the judgment had been entered prematurely, before the expiration of ten days of the service of summons as provided in the original order of Court. The District Judge, however, refused this motion, and appeared to say that his original minute of October 25 was a mistake, he having intended in fact to mention seven days as the period within which the defendant was to appear. I say so, because I find the District Judge when the discussion took place altered his record from ten days to seven days, but after all the Code does not lay down any period in respect of summary procedure on liquid claims for the defendant to appear. It is entirely left to the Court in the summons itself, to provide for the time within which the defendant was to appear, the governing fact in this procedure being the form of special summons and not the mere minute of the Court's action in the first instance. The defendant had the summons, and he was not misled by any mistake or other error which appeared in the original record. Mr. Cooray for the defendant has cited to us as authority the case of *Anlabay v. Practorious*.¹ That case related to the analogous procedure in the English rules in the case of endorsed summons, but theirs is distinct from the Ceylon procedure. The rule of Court itself provided that the defendant was to appear within ten days of the service of the statement of claim. In that particular case, however, the judgment was entered by Court before the expiration of ten days from the delivery of the statement of claim. Consequently, the Court held that in entering judgment as it did, the Court acted without jurisdiction and contrary to the express provision of the law. The case therefore is quite distinguishable from the present case. Our law, as I have already indicated, does not lay down a particular time which should be allowed to the defendant in all cases to appear and defend. I can say from my own previous experience that in the Colombo District Court seven days is the usual time allowed, unless for some special reason a longer time is required. In the present case, as I have said, the Court apparently wished to act according to the usual practice of that Court and made a slip in entering the order, but in the summons the practice was strictly adhered to, and it would appear that the Court did really intend to act in terms of the summons which was actually issued. In my opinion there is no

¹ 20 Q. B. D. 754.

reason to hold that the defendant is entitled *ex debito justitiæ* to have this judgment set aside and the case opened up for his defence. He may, indeed, have some other ground for extension of time which, if he put before the District Court at the proper time and proper form, probably would have been considered by the Court, but at present it seems the District Judge is right, and the judgment should be affirmed with costs.

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DALTON J.—I concur.

Appeal dismissed.

