

Present : Wood Renton J.

July 14, 1911

KANDAPPA v. MARIMUTTU.

179—C. R. Batticaloa, 15,872.

Court of Requests—Defendant absent—Statement by proctor that he had no definite instructions—Judgment by default—Civil Procedure Code, s. 823 (2).

In an action in the Court of Requests to recover a sum of money, the defendant was absent at the date of trial. The defendant's proctor, who did not come to Court solely for the purpose of the trial, but who was in Court when the roll for the day was called, in connection with other cases as well, mentioned, when the case was called, that the defendant had asked him to appear in the case, but had given him no definite instructions. The Commissioner therefore gave judgment for the plaintiff, treating the case as one in which there was default of appearance on the part of the defendant.

Held, that the Commissioner was right.

WOOD RENTON J.—It appears to me that cases of this kind turn very largely on questions of fact, and it is not desirable, nor do I propose to attempt, to lay down any general rule in disposing of the appeal.

July 14, 1911 THE facts appear sufficiently from the judgment.

*Kandappa v.
Marimuttu*

Vernon Grenier, for the defendant, appellant.

J. W. de Silva, for the plaintiff, respondent.

Cur. adv. vult.

July 14, 1911. WOOD RENTON J.—

It appears to me that cases of this kind turn very largely on questions of fact, and it is not desirable, nor do I propose to attempt, to lay down any general rule in disposing of the appeal. The plaintiff-respondent sued the defendant-appellant in the Court of Requests of Batticaloa for a sum of Rs. 120, the value of eight amunams of paddy, which he alleged the appellant had agreed to give as ground share for the use and occupation of a certain field. The defendant-appellant filed answer, admitted that he had cultivated the respondent's field, but especially denied that he had to give eight amunams of paddy as alleged in the plaint, and said that what he agreed to give was five amunams. On the day of trial the appellant was not himself present in Court, although it was admitted that he had been duly informed of the date of trial. The learned Commissioner of Requests, acting under the provisions of section 823, subsection (2), of the Civil Procedure Code, thereupon gave judgment in default in favour of the respondent. A few days later the appellant's proctor filed an affidavit, and moved to have the case re-opened. The Commissioner, after cause had been shown on both sides, disallowed the application, and the present appeal is brought from the order of disallowance. As the record itself did not contain a full statement of what had transpired on the day when judgment by default was entered, I directed the Registrar of the Supreme Court, at the last hearing of the appeal, to refer the matter to the Commissioner of Requests by whom the case was decided, and who appears now to be acting as an Assistant Settlement Officer. In his reply he states that, as far as he can remember, the proctor did not come to Court solely for the purpose of the trial, but was in Court, when the roll for the day was called, in connection with other cases as well. When the case in question was called, he rose and mentioned that the defendant had asked him to appear in the case, but had given him no definite instructions. "The attitude assumed by him," says the learned Commissioner of Requests, "was that in the absence of such instructions he was not prepared to take any further steps in the case. He did not even apply for a postponement." On these facts I am not prepared to say that the learned Judge was wrong in holding, as he did, that there had been default on the part of the appellant, and that the respondent was entitled to judgment. The present case is different from that of *Gargial v. Somasundram Chetty*,¹ where the defendant's proctor appeared on

¹ (1905) 9 N. L. R. 26.

the day of trial and moved for a postponement, thereby doing an act in the cause itself. It is very much more analogous to that of *Mohamadu Lebhe v. Kiri Banda*,¹ where the proctor was merely physically present. I think, therefore, that the Commissioner of Requests was right in treating the case as one where there had been a default of appearance, and I do not see anything in the affidavit filed on behalf of the appellant in support of the motion in the Court of Requests to account for that default satisfactorily. The appeal must be dismissed with costs.

July 14, 1911

WOOD
RENTON J.

*Kandappa v.
Marimuttu*

Appeal dismissed.
