1947 *Present :* **Wijeyewardene S.P.J.**

HABEBU MOHAMEDU, Appellant, *and* LEBBE MARIKAR *et al.*, Respondents.

S. C. 123—C. R. Kandy, 1,845.

Court of Requests—Summons—Tamil-speaking defendant—served in English—Judgment by default—Set aside—Order not appealable—Civil Procedure Code, ss. 55, 801, 806, 823 (2)—Courts Ordinance, ss. 36, 78.

A summons served on a Tamil-speaking defendant in a Court of Requests need not be in Tamil. It is sufficient if it is in English.

An order made by a Commissioner of Requests setting aside a judgment entered for plaintiff by default is not an appealable order.

An action brought in the Court of Requests for recovery of damages for wrongful possession of a land involves "the right to possession of a land," and, in case of default of appearance of the defendant, the Commissioner must fix the case for *ex parte* hearing in terms of the proviso to section 823 (2) of the Civil Procedure Code.

APPEAL from a judgment of the Commissioner of Requests, Kandy.

H. W. Thambiah (with him *S. Sharavananda*), for the plaintiff, appellant.

S. R. Wijayatilake, for the defendants, respondents.

Cur. adv. vult.

July 28, 1947. WIJEYEWARDENE S.P.J.—

The plaintiff claimed in this action a sum of Rs. 300 as damages suffered by him by reason of the defendant's wrongful possession of a land described in the schedule at the foot of the plaint. The Court issued summons returnable on August 23, 1946. On that date the defendants were absent though it was reported that they were served with summons "on being pointed out". On August 30, 1946, the plaintiff filed an affidavit stating that he pointed out the defendants to the process server for service of summons, and the Court, thereupon, entered judgment by default against the defendants. On September 12, the defendants filed an affidavit and moved to have the judgment set aside on the grounds, (1) that they were not served with summons and (2) that "the summons issued had been in the English language and is not in conformity with the provisions of the Civil Procedure Code". They stated, further, that they were not in possession of any land belonging to the plaintiff. At the inquiry evidence was led to show that the first defendant did not "know English", and the second defendant could not "read or write Tamil or English". The Commissioner held against the defendants with regard to the service of summons but set aside the judgment entered by default, as the summons served on each of the defendants was in English. The plaintiff appeals against that order.

I am unable to uphold the view of the Commissioner that the summons served on a Tamil-speaking defendant under section 806 of the Civil Procedure Code should be in Tamil. That section states merely that the summons shall state "therein the names and residence of the parties, the substance of the claim and the number of the case" and "shall be in form No. 16 in the First Schedule". The section does not provide for a translation. That section applies to Courts of Requests, and by reason of section 801, the earlier general provisions in the Code regarding summons would not be applicable to Courts of Requests where such general provisions are inconsistent with the special provisions of section 806. A Bench of Three Judges expressed the view that even section 55 which is one of the sections containing the "general provisions" referred to in section 801 did not require the duplicate of the summons to be in any language other than English (see *Victoria v. The Attorney-General*[1]). In view of the contrary opinion favoured in certain decisions, I directed the Registrar to ascertain the practice followed in the Courts of Requests, Colombo, Galle, Kegalla, and Kandy. From the replies received, it is found that in Colombo a translation of the summons is not served on the

[1] *(1920) 22 New Law Reports 33*

defendant; in Kandy and Galle no translation is served "but there have been instances in which this has been done when the (plaintiff's) Proctor submits the summons in the language of the defendant". In Kegalla a somewhat strange practice seems to have grown up. There, a Sinhalese translation of the summons is served on a Sinhalese-speaking defendant but the Tamil-speaking Tamil or Moor is served only with a summons in English.

I hold that the summons served on the defendants need not have been in Tamil.

There are however other matters to be considered. Though the plaintiff's claim is one for recovery of damages, it involves "the right to possession of a land". The plaintiff cannot succeed in his claim for damages unless his right to the possession of the land is proved by him or admitted by the defendants. The affidavit of the defendants states that the defendants are not in possession of any land belonging to the plaintiff. The Court would have to decide (*a*) whether the plaintiff was entitled to the land, (*b*) whether the defendants were in wrongful possession of that land, and (*c*) what damages have been caused to the plaintiff. In such circumstances, even where the defendants are absent, the Commissioner must fix the case for *ex parte* hearing and then give judgment "on such merits as justice shall require, and without reference to the default that has been committed"—*vide* Proviso to section 823 (2). The Commissioner did not follow that procedure in this case. It was urged by the appellant's Counsel that, in these circumstances, the proper order to be made would be to send the case back for the Commissioner to hear evidence *ex parte*. But, in S. C. No. 154, C. R. Badulla, 1,444 (*vide* S. C. Minutes of May 30, 1913), when a similar question arose, de Sampayo J. vacated the judgment by default and sent the case back directing the Commissioner "to allow the defendant to file answer and enter upon his defence" (see also *Amarasekere v. Mohamadu Uduma*[1]).

In this case, moreover, the journal entries do not show that the plaintiff was present on the summons returnable date. The Commissioner could have dismissed the plaintiff's action in spite of the default of the defendants, if the plaintiff did not "sufficiently excuse his absence"—*vide* section 823 (1).

Though the point was not argued before me, I cannot ignore the question whether the order appealed against is an appealable order. This question has to be answered in the negative in view of the provisions of sections 36 and 78 of the Courts Ordinance (see *Baron Appuhamy v. Tivanahamy*[2] and *Perera et al. v. Silva et al.*[3]).

I dismiss the appeal with costs.

Appeal dismissed.

[1] *(1929) 31 New Law Reports 36.* [2] *(1938) 40 New Law Reports 149.*
[3] *(1940) 42 New Law Reports 143.*