

1942

*Present : Jayetileke J.*JAMIS *v.* DOCHINONA.

101—C. R. Balapitiya, 23,011.

*Court of Requests—Judgment by default against defendant—Summons not served—Application to set aside judgment—Defendant not bound to satisfy the Court that he has a good and valid defence—Civil Procedure Code, s. 823 (3).*

Where, in the Court of Requests a defendant moves to set aside a judgment entered against him by default on the ground that he was not served with summons, he is not bound to satisfy the Court he has a good and valid defence on the merits of the case.

**A** PPEAL from an order of the Commissioner of Requests, Balapitiya.

L. A. Rajapakse (with him O. L. de Kretser, Jnr.), for appellant.

R. C. Fonseka for plaintiff, respondent.

*Cur. adv. vult.*

September 7, 1942. JAYETILEKE J.—

The plaintiff instituted this action against the appellant for a declaration of title to a land called Yatagalakanda Addara Delgahawatta and for damages. The Fiscal's officer to whom the summons was entrusted for service reported to Court that he served the summons on the appellant on being pointed out by the plaintiff. On the summons returnable date the appellant was absent and the learned Commissioner fixed the case for *ex parte* hearing on January 27, 1942, on which date, after hearing the evidence of the plaintiff as to title and damages, he entered judgment in plaintiff's favour as prayed for in his plaint with Rs. 3 a month as damages.

Three days later, the appellant moved to have the judgment vacated on the ground that he was not served with the summons. The learned Commissioner dismissed his application on the ground that under section 823 (3) of the Civil Procedure Code he had to satisfy him not only that he had not received sufficient notice of the proceedings but also that he had a good and valid defence on the merits of the case. He pointed out that in the appellant's affidavit there was no indication as to what his defence was.

I do not think that the order of the learned Commissioner can be supported. Section 823 (3) applies when the defendant on being served with the summons fails to appear on the appointed date but appears later and asks the Court to grant him the indulgence of defending the action.

The appellant does not ask for any indulgence under section 823 (3). He says that the summons was not served on him and that the Court acted without jurisdiction in entering judgment against him under section 823 (2). I think he is right. Before entering judgment it was the duty of the Court to have called for proof that the person on whom the summons was reported to have been served was the appellant.

I would set aside the order appealed from and all the proceedings subsequent to January 20, 1942. The appellant is entitled to the costs of this appeal and the costs of the inquiry.

*Appeal allowed.*

