

1945

*Present: Wijeyewardene J.*

CHARLES SINGHO, Petitioner, and SIMEON SINGHO,  
Respondent.

*In Revision C. R. Avissawella, 19,241.*

*Court of Requests—Failure of notice to parties of date of trial—Absence of plaintiff on trial date—Effect of—Reference to arbitration—No application in writing—Entry not signed by plaintiff nor endorsed "allowed" by Court—Validity of the reference—Civil Procedure Code, ss. 823 (1), 823 (5) and 676.*

Where, in a case in a Court of Requests, the absence of the plaintiff and his Proctor on the trial date was due to their not having notice of trial—

*Held*, that the Commissioner's order dismissing the plaintiff's action was one made *per incuriam* and should not be regarded as an order made under section 823 (1) of the Civil Procedure Code. The Commissioner was therefore right in vacating the order of dismissal and setting down the case for trial instead of adopting the procedure laid down in section 823 (5) of the Civil Procedure Code.

<sup>1</sup> (1882) 21 Ch. Div. at p. 266.

The parties having agreed to refer all the matters in dispute to arbitration the Court made the following entry:—"Parties move that all matters in dispute be referred to the inspection and arbitration of [Mr. J.]". There was, however, no application in writing as required by section 676 of the Civil Procedure Code. Further, the journal entry was not signed by one of the parties, and there was nothing to show that the Court "allowed" the agreement.

*Held*, that there was no valid reference to arbitration.

**T**HIS was an application for revision in respect of an order of the Commissioner of Requests, Avissawella.

*M. D. H. Jayewardene*, for the defendant, petitioner.

*L. A. Rajapakse, K.C.* (with him *S. S. Kulatileke*), for the plaintiff, respondent.

*Cur. adv. vult.*

September 12, 1945. WIJEWWARDENE J.—

The plaintiff filed this action for cancellation of a lease and damages. On February 5, 1944, the parties agreed to refer all matters in dispute to the arbitration of Mr. D. L. Welikala and the Commissioner made an entry to that effect which was signed by the Commissioner and the parties. The case was called on March 9, 1944, to ascertain whether the arbitrator's fees had been deposited and it was then found that Mr. Welikala was unwilling to act as arbitrator. The Commissioner thereupon made the following entry on that date:—

"Parties move that all matters in dispute be referred to the inspection and arbitration of Mr. J. de Jacolyn".

There was no application in writing as required by section 676 of the Civil Procedure Code either on this date or the earlier date. It has, however, been held in *Menike v. Ukku Amma*<sup>1</sup> that where an agreement for reference to arbitration has been "allowed" by the Commissioner and the agreement has been authenticated by the relative journal entry being signed by the Commissioner and the parties, such "allowance" and authentication would be regarded as constituting "an application to the Court as will satisfy the letter, and certainly the spirit, of section 676 of the Civil Procedure Code". In the present case, however, there is no entry to show that the Commissioner has "allowed" the agreement on March 9, 1944. Moreover, the journal entry has not been signed by the plaintiff. The two signatures which appear at the foot of the entry are—*දොන් ඒබ්‍රහැම් දියස්* (Don Abraham Dias) and *චලෝ සිංහො* (Chalo Sinno). The second signature is undoubtedly the signature of the defendant. But the first signature cannot possibly be the signature of the plaintiff whose name is Senadirapatirage Semeon Singho. Moreover, the proxy given by him to his Proctor bears his signature as *සිමියොන් සිංහො* (Semeon Singho). Therefore, the order made by the Commissioner referring the matter to Mr. Jacolyn's arbitration cannot be regarded as a good order.

<sup>1</sup> (1915) 18 N. L. R. 413.

As Mr. Jacolyn was unable to commence the arbitration proceedings for various reasons, the Commissioner extended on several occasions the time for filing the award. The last entry with regard to an application for extension of time is as follows:—

“ 5.10.44. Award due. Arbitrator begs for six weeks' time Allowed. Extend order for 16.11.44.”

The arbitrator wrote to the Commissioner on November 16, 1944, that the Commission had not been re-issued to him and stating that he “ would wish if the commission is not re-issued ” to him. He also forwarded a letter written to him by the plaintiff's Proctor on October 22, 1944, stating that the plaintiff was unwilling to have the matter decided by an arbitrator. I have examined the “ Order of Court referring matter to arbitrator ” filed of record and I find that the last endorsement made on it was on June 22, 1944, extending the time till August 1, 1944.

On November 16, 1944, the Commissioner “ vacated ” the reference to arbitration and fixed the case for trial on December 6, 1944, in the absence of the plaintiff and his Proctor.

Neither the plaintiff nor his Proctor was present in Court on December 6, 1944, and the Commissioner purporting to act under section 823 (1) dismissed the plaintiff's action with costs.

The plaintiff's Proctor, Mr. R. C. Perera, filed an affidavit on December 15, 1944, stating that he and his client were absent on the trial date as they had no notice of that date of trial. Paragraphs 5 and 6 of the affidavit are as follows:—

*Paragraph 5.*—Later the plaintiffs did not want to go on with the arbitration and requested the arbitrator to return the case to Court to be tried by the Judge and requested the arbitrator to let (him) know the trial date.

*Paragraph 6.*—The plaintiff from time to time saw the arbitrator and every time he said that a date had not been fixed and that he would write to me when the trial date is fixed.

At the inquiry held on this affidavit the defendant did not dispute the truth of these allegations. On April 6, 1945, the Commissioner vacated his order of December 6, 1944, and fixed the case for trial in due course, as he thought the plaintiff should have been given notice that the case was fixed for trial on December 6, 1944.

The defendant seeks to canvass that order of the Commissioner by moving this Court by way of revision. His Counsel contended—

- (i) that the plaintiff or his Proctor should have been present on November 16, 1944, when the trial date was fixed and that no duty was cast on the Court to give the plaintiff notice of the trial date,
- (ii) that in any event the only order the Commissioner could have made in the case was to grant permission to the plaintiff under section 823 (5) to institute a fresh action upon payment of the defendant's costs in this action.

As pointed out by me there has been no valid reference to arbitration. Moreover, there has been no re-issue of the Commission to the arbitrator fixing November 16, 1944, as the returnable date of the Commission. The plaintiff and his Proctor were, therefore, under no obligation to attend Court on November 16, 1944, and they cannot consequently be expected to know the trial date fixed on that day by the Commissioner in their absence and without any notice to them. It is not necessary for me to consider in these circumstances whether the statements made in Mr. Perera's affidavit afforded a good and sufficient reason for the absence of Mr. Perera and the plaintiff on December 6, 1944. As their absence on the trial date was due to their not having notice of trial, the Commissioner's order of December 6, 1944, dismissing the plaintiff's action was an order made *per incuriam* and should not be regarded as an order made under section 823 (1). The Commissioner was therefore right in vacating that order and setting down the case for trial instead of adopting the Procedure laid down in section 823 (5).

I refuse the application for revision. The respondent is entitled to the costs of this application.

*Application refused.*

---