

1929

Present : Akbar J.

CANNON v. TELESINGHE.

350—C. R. Chilaw, 23,723.

*Court of Requests—Absence of defendant—Appearance of Proctor—
Judgment by default—Civil Procedure Code, s. 823 (2).*

In a Court of Requests where the defendant is absent but his Proctor appears for him the Commissioner should not proceed as in a case of default.

A PPEAL from an order of the Commissioner of Requests, Chilaw.

Samarawickrama, for the defendant, appellant.

Ranawaka, for plaintiff, respondent.

February 25, 1929. AKBAR J.—

This appeal raises a question of law on the proper construction of section 823 (2) of the Civil Procedure Code. On the date of trial the defendant was absent, but he was represented by his Proctor on the record. At the instance of the Counsel for the plaintiff, the Commissioner has ruled that the defendant's absence on the trial date entitled him to enter judgment by default against the defendant. The sub-section states that "if, upon the day fixed for the hearing of the action, the defendant shall not appear or sufficiently excuse his absence, the Commissioner—may enter judgment by default against the defendant."

By section 801 it is laid down that the subsequent sections under Chapter LXVI. are to be taken as limiting and controlling the applicability of the general provisions, contained in the preceding sections, to Courts of Requests only so far as such provisions are either expressly or impliedly applicable to such Courts. Section 24 of the Civil Procedure Code authorizes a Proctor duly appointed to appear for his client and do any act which his client is required to do, unless there is an express law to the contrary: This section would, therefore, apply to Courts of Requests. *Primâ facie*, therefore, the words "the defendant shall not appear or sufficiently excuse his absence" can only mean the defendant shall not appear in person or by Proctor or sufficiently excuse his absence when he does not so appear. On the ground of convenience, a defendant might prefer to contest a case and instruct his Proctor to cross examine the witnesses for the plaintiff on certain lines, and absent himself

from Court, being perfectly content to rest his case on the plaintiff's case alone, subject to cross-examination by his Proctor. Mr. Ranawaka, however, referred me to a case reported in 3 *Browne's Reports* 1. It is true that Browne A.J. construed the word "appearance" as meaning "being personally present," but it will be seen from his judgment that his remarks are really *obiter*.

I, therefore, prefer to follow the later judgment of Hutchinson C.J. reported in 4 *Balasingham's Reports* 2, where he expressly held the contrary. There is an authority in similar terms reported in 1 *Supreme Court Reports*, p. 67.

I, therefore, set aside the order of the Commissioner giving judgment for the plaintiff, and send the case back for trial in due course. The appellants will get his costs of appeal.

Appeal allowed.

1929

AKBAR J.

*Cannon v.
Telesinghe*

