

1962

Present : Sinnetamby, J., and Herat, J.

M. RAJENDRA (Permanent Secretary to the Ministry of Transport and Works) and another, Appellants, and PARAKRAMAS LTD., Respondent

*S. C. 95 (Inty.) of 1960—D. C. Colombo, 50767/M*

*Summary procedure—Interlocutory order—Right of respondent to appear by Proctor—Statement of objections in writing—Permissibility—Civil Procedure Code, ss. 24, 143, 377 (b), 383, 384.*

When, in an application of summary procedure, the respondent is noticed to appear under section 377 (b) of the Civil Procedure Code, there is no objection to a Proctor appearing on his behalf and obtaining, on good cause shown, a date on which to file or state his objections.

*Kanagasabai v. Kirupamoorthy* (1959) 62 N. L. R. 54, considered.

**A**PPEAL from a judgment of the District Court, Colombo.

*A. C. Alles*, Deputy Solicitor-General, with *H. L. de Silva*, Crown Counsel, for the Respondents-Appellants.

*C. Thiagalingam*, Q.C., with *K. Jayasekera*, for the Petitioner-Respondent.

*Cur. adv. vult.*

February 19, 1962. SINNETAMBY, J.—

In this case, the petitioner-respondent filed in the District Court of Colombo papers under Section 696 of the Civil Procedure Code praying that an award made by an arbitrator in a dispute between the respondent company and the appellants, which had been referred to arbitration without the intervention of the court, be filed in court. Although originally, the procedure adopted was not summary in terms of Section 697, it was subsequently so altered and an interlocutory order was in terms of Section 377 of the Code made appointing the 28th of October, 1960, as the date for a determination of the matter. This order was made on 1st September, 1960, but was served by the summons being left with the chief clerk of the Attorney-General's department on 13th October, 1960. On 28th October, 1960, both respondents-appellants, namely the Attorney-General and the Permanent Secretary to the Ministry of Transport and Works, were absent but the Crown proctor Mr. Dimbulane appeared, filed a proxy on behalf of both, and applied for a date to file objections. The petitioner who was represented by Counsel objected and pointed out that "the respondents on whom the interlocutory order was served were absent and that there is no provision under the Code for a date to be granted to enable the respondents to file objections". In support of this proposition he cited the case of *Kanagasabai v. Kirupamoorthy*<sup>1</sup>. The learned trial judge apparently felt himself bound by the

<sup>1</sup> (1959) 62 N. L. R. 54.

observations made in the case cited and called upon Mr. Dimbulane to state what his objections were and to state whether he could lead any oral or documentary evidence. It would appear that at this stage Counsel for the petitioner said that the petitioner had not been given notice of any documents upon which the respondents relied. He obviously was referring to the provisions of Section 384 which precludes a party noticed from reading, without leave of court, documents in support of his objections unless 48 hours notice has been given to the other side. The proceedings of 28th October, 1960, make it clear that the learned trial judge felt himself obliged to follow the procedure laid down in *Kanagasabai v. Kirupamoorthy* (supra) and to make the order absolute in the absence of the respondents in person. Mr. Thiagalingam, who had appeared for the petitioner-respondent in the lower court and also represented him in the appeal, contended at first that Section 383 requires the respondents-appellants to appear in person and that it is not open for a proctor to apply on his behalf for a date to state his objections. He, further, contended that the objections should be stated orally. It is, therefore, necessary to consider the legal position in regard to respondents who are unable to appear on the date fixed to show cause against the granting of the prayer of the petition. Section 384 states that on that day if the petitioner and the respondent appear "the proceedings on the matter of the petition shall commence by the respondent in person or by his proctor stating his objections, if any, to the petitioner's application". It will thus appear that the section itself permits a respondent's proctor to state objections on his behalf. Objections need not necessarily be stated orally. I can see no reason why they should not be stated in writing. Indeed, it is more desirable that objections should be in writing as in that case it can be stated with greater clarity and precision and would leave the Petitioner in no doubt as to the grounds on which the Respondent opposes the petitioner's application. The only question which requires consideration, therefore, is whether it is necessary that on the date mentioned in the order made under Section 377 (b) the respondent should be present in person. In *Kanagasabai v. Kirupamoorthy* (supra) My Lord the Chief Justice took the view that the respondent should appear in person when he is so noticed. With great respect I find myself unable to agree with this view. My Lord came to that conclusion after considering the terms of Section 383 only. Section 383 declares what the consequences would be if on the date fixed the petitioner appears and "the respondent does not appear", and the learned Chief Justice construed the word "appear" to mean appear in person. In the course of his judgment no reference is made whatever to Section 24 which expressly authorises appearance by a proctor and one can conceive of cases in which it will be impossible for the party noticed to appear in person: he, for instance, may be too ill. In such a case we can see no objection whatever to a proctor appearing on his behalf and either stating or asking for a date to file or state his objections. The implications of provisions of Section 384 which expressly authorises a party noticed to state his objections by his proctor were not considered. Furthermore, Section 24 requires personal

appearance only when by law personal appearance is expressly required and Section 383 does not expressly require personal appearance. Later in the course of argument Mr. Thiagalingam was prepared to concede that an appearance under Section 383 may be made through a proctor but he stated that the proctor should state his objections immediately. Even this he later modified by stating that on good cause shown a proctor may obtain a date to state his client's objections. Even though no express power is given to the Court under Sections 383 and 384 to grant postponements, the Court, in my view, has an inherent power to do so on good cause shown even if the view is taken that Section 143 of the Civil Procedure Code has no application to proceedings under Chapter 24. Perhaps, it would be appropriate, in this connection, to refer to Chapter 53 of the Code. Although there is no express provision under that chapter for an adjournment of the date within which a party defendant is required to obtain leave to appear and defend, this court has held that in appropriate cases the court has the power to grant an extension of time within which such application may be made. I am, therefore, of the view that it is always open to a party noticed under Section 377 (b) of the Code in summary proceedings to appear by proctor and on good cause shown to obtain a date on which to file or state his objections.

In the present case, the court does not appear to have asked the Crown proctor what the grounds are on which he desired a date. Apparently, the learned trial judge thought it was unnecessary in view of the ruling in *Kanagasabai v. Kirupamoorthy* (supra). It must be remembered that the point which arose for decision in that case was not whether a person noticed can appear by proctor on the returnable date but whether, where a proctor who had been instructed by his client to appear failed to do so through oversight, the client is on that ground entitled to reopen the matter under the provisions of section 389 of the Code. The observations, therefore, of My Lord the Chief Justice were obiter and the matter does not appear to have been fully argued before the court. Mr. Thiagalingam asked that we send the case back so that the court may inquire into the validity of the grounds on which Mr. Dimbulane asked for a date. We, however, do not think that any useful purpose will be served by doing so, particularly, in view of the long delay already involved.

We would, accordingly, set aside the order of the learned District Judge and send the case back to the District Court with directions that the District Judge do, with notice to both sides, appoint a day on which the respondents-appellants will appear in court and state their objections to the petitioner-respondent's application. Thereafter, the Court will proceed to deal with the matter in the manner provided in Section 384 *et seq.* of the Civil Procedure Code. The petitioner-respondent will be entitled to the costs of 28th October, 1960, but the respondent-appellants will be entitled to the costs of the appeal.

HERAT, J.—I agree.

*Order set aside.*