

1959 *Present* : Basnayake, C.J., and Sansoni, J.

WIJESUNDERA, Appellant, *and* WEERAWADIWAKARA,
Respondent

S. C. 112 (Inty.)—D. C. Galle, 1808/S

Liquid claim—Summary procedure—Time limit for obtaining leave to appear and defend—Civil Procedure Code, ss. 704 (1), 707.

In an action by summary procedure on a liquid claim, if the defendant does not obtain leave to appear and defend within the time prescribed in the summons served on him, the Court has no power to grant an extension of the time, and is bound under section 704 of the Civil Procedure Code to grant a decree in favour of the plaintiff.

APPPEAL from an order of the District Court, Galle.

N. E. Weerasooria, Q.C., with M. L. S. Jayasekera, for Plaintiff-Appellant.

Hannan Ismail, for Defendant-Respondent.

October 7, 1959. BASNAYAKE, C.J.—

This is an action instituted under Chapter LIII of the Civil Procedure Code for the recovery of a sum of Rs. 1,880 due or a cheque for a sum of Rs. 2,000 which has been dishonoured by the Bank. The plaintiff avers that Rs. 120 of that sum has been paid by the defendant. With the plaint the plaintiff filed an affidavit and the learned District Judge made the following order :

“ The defendant to appear and obtain leave of Court to defend the action within seven days of the service of summons on him. ”

The summons was served on the defendant on 13th August 1958. The summons reads as follows :

“ Whereas the above-named plaintiff has instituted an action against you in this Court under Chapter LIII of the Civil Procedure Code for Rs. 2,000 less Rs. 120 paid being balance principal due to him or cheque A/1 67297 of 12.2.57 of which a copy is hereto annexed. You are hereby summoned to obtain leave from the Court within seven days from the service hereof inclusive of day of such service to appear and defend the action and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such seven days to obtain a decree for any sum not exceeding Rs. 1,880 and the sum of Rs. 105/90 for costs. ”

This summons is in the prescribed form No. 19 in the First Schedule to the Civil Procedure Code. On 21st August the defendant was absent although the summons had been served on him. On that day the proxy of the defendant was filed with his affidavit and the defendant's proctor contended that the defendant was within time, while the plaintiff's proctor contended that the defendant was not within time. The case was then fixed for inquiry for 23rd October. In his affidavit the defendant did not explain the delay in appearing and obtaining permission to defend the action. At the inquiry counsel for the defendant submitted that the time given was insufficient for the defendant to appear and obtain leave to defend as he resided outside the jurisdiction of the District Court of Galle, about 60 miles away from Galle, and he asked for an extension of time. He further submitted that it was in the discretion of the court to grant an extension of time and he relied on the case of *Ulaganathan Chetty v. Vavassa et al.*¹. The learned District Judge held that by virtue of that decision he had the discretion to extend the time for the appearance of the defendant to obtain leave to defend. He also took into account the fact that the defendant was only one day late. It is submitted by counsel for the appellant that the provisions of Chapter LIII do not permit the granting of an extension of the time prescribed in the summons. Section 704 of the Civil Procedure Code reads :

“ (1) In any case in which the plaint and summons are in such forms respectively, the defendant shall not appear or defend the action unless he obtains leave from the court as hereinafter mentioned so to appear

¹ (1897) 3 N. L. R. 52.

and defend ; and in default of his obtaining such leave or of appearance and defence in pursuance thereof, the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons, together with interest to the date of the payment, and such costs as the court may allow at the time of making the decree.”

Except in the case provided in section 707 there is no provision^f which empowers the court to allow the defendant leave to appear and defend after the date prescribed by the summons. That provision reads :

“ After decree the court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to appear to the summons and to defend the action, if it seem reasonable to the court so to do, and on such terms as the court thinks fit. ”

In our opinion if a party does not appear within the prescribed time and obtain leave to appear and defend, the plaintiff is entitled to a decree which the court is bound to grant and it is not free to entertain an application for further time. It is only after the decree that the defendant can seek relief under section 707.

Learned counsel for the respondent has referred us to a number of decisions of this court in which leave to appear and defend had been granted after the prescribed time. Those decisions do not appear to give effect to the imperative terms of section 704, but take into account the circumstances of each case in which the default had occurred. We are unable to regard those decisions as authority for the proposition that under section 704 a Judge has power to grant an extension of the time prescribed in the summons. It is an established rule of construction that the court cannot extend the time prescribed by a statute or statutory instrument for the performance of any act unless it is so empowered by that or some other statute (*Sulama Levai v. Iburai Naina*¹). The appeal must therefore be allowed. We accordingly set aside the order of the learned District Judge and allow the appeal.

We direct the learned District Judge to enter a decree as provided for under section 704 of the Civil Procedure Code in favour of the plaintiff for a sum of Rs. 1,880 as prayed for in his plaint.

The appellant is entitled to the costs of the appeal.

SANSONI, J.—I agree.

Appeal allowed.

¹ (1910) 2 *Current Law Reports* 183.