APPELLATE CIVIL.

Before Mr. Justice Devadoss.

D. K. KANNISA (DEFENDANT), PETITIONER,

v.

DEVICHAND (PLAINTIFF), RESPONDENT.*

1912, April 23.

Presidency Small Cause Courts Act (XV of 1882), O. XXXVII, rr. 1 and 2—Summons form 13, Appendix I— Ultra vires.

Rules framed under statutory powers must be just and reasonable; otherwise they are *ultra vires*. By rules framed under the Presidency Small Causes Courts Act, the form of summons in a summary suit on a negotiable instrument required every defendant to apply for leave to defend three clear days before the day of hearing. But there were no rules prescribing any penalty for not so applying or compelling the service of the summons sufficiently early so as to enable a defendant to apply in time. Nor was there any power in the Court to extend the time in cases requiring extension.

In the particular case the summons was not served sufficiently early and the defendant's application for leave to defend, filed only two clear days before the hearing, was dismissed by the Judge as out of time.

Held that the dismissal was illegal and that the direction in the summons was *ultra vires*.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of C. R. TIRUVENKATA ACHARIYAR, Chief Judge of Small Cause Court at Madras, in U.C.S. No. 22 of 1922.

The facts are given in the judgment.

S. Venkatarama Ayyar for petitioner

P. C. Sundaram Ayyangar (amicus curiae) for respondent.

JUDGMENT.

This is an application under section 115 of the Code of Civil Procedure to revise the decree of the Court of Small Causes, Madras, in U.C.S. No. 22 of 1922.

* Civil Revision Petition No. 397 of 1922.

KANNISA v. DEVICHAND.

The facts are these.—The plaintiff brought a suit on a promissory note executed by the defendant. Summons in Form No. 13 was served upon the defendant on 3rd May 1922. He applied for leave to defend on 5th May 1922. The hearing of the case was fixed for the 8th May 1922. The learned Chief Judge rejected the application for leave to defend on 8th May as not having been filed three clear days before the date of hearing and decreed the plaintiff's suit. The defendant has preferred the civil revision petition.

The plaintiff does not appear to oppose the petition. It is contended that the direction contained in the summons is *ultra vires* and the decision, therefore, of the learned Judge is without jurisdiction. The direction in the summons is :

"Leave to appear may be obtained on application to the Court supported by affidavit showing that there is a defence to the suit on the merits or that it is reasonable that he should be allowed to appear in the suit. The day——— of ——— 19 . . . is fixed for your appearance before . . . . . Judge of this Court and the said application and affidavit must be filed in the office of the Registrar and copies thereof must be served on the plaintiff or his pleader not later than three clear days before the said date."

Order XXXVII, rule 1 (1) of the rules of the Court of Small Causes, Madras, reads thus :

"All suits upon bills of exchange, hundis or promissory notes, may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed. The summons shall be in Form No. 13 in Appendix I and it shall not be necessary to serve a copy of the plaint on the defendant."

Rule 2 (1) is

"The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application."

The question now is whether the direction in the summons that an application for leave to defend must be

filed in the office of the Registrar and copies thereof must be served on the plaintiff or his pleader not later than three clear days before the said day is valid or not. In the first place, there is no provision that summons should be served upon the defendant sufficiently early to enable him to apply three clear days before the date of hearing. If the summons be served on the morning of the day of hearing giving no opportunity to the defendant to comply with the direction contained in the summons, could his right to apply for leave to defend be taken away? There is nothing in the rules which prescribes the penalty for not applying within the time fixed. In the case of an application coming under article 159 of the Limitation Act, the period is ten days, and the time begins to run from the date of the service of summons. But in this case the rule makes no reference to the date or to the time of the service of the summons, but insists upon an application for leave to defend being filed three clear days before the date of hearing. There is no remedy open to the defendant if he is not served so as to give him sufficient time to apply three clear days before the date of hearing. Though Form No. 13 is sanctioned by Order XXXVII, rule 1, yet one has to see whether a direction given in the summons or a time fixed for doing an act by the Court is reasonable or unreasonable. If the rules provide for an extension of time for proper reasons, the direction would not be unreasonable; but where it gives no option to the Court to give relief in cases of real hardship where the defendant is not to blame, it cannot be held to be reasonable. No doubt, in the case of small causes expedition and saving of time are aimed at in framing the rules: but the rules should not be such as to make it impossible of compliance in some cases however honest and *bona fide* may be the attempt on the part of the defendant to comply with the rule. As the

KANNISA v. DEVICHAND.

plaintiff did not appear, I asked Mr. Sundaram Ayyangar to argue the case as *amicus curiae* for the respondent, and he did his work very satisfactorily. He has drawn my attention to the cases reported in *Stiles* v. *Galinski*, *Nokes* v. *Islington Corporation* (*No.* 2)(1), *Arlidge* v. *Islington Corporation*(2), *Johnson* v. *The Mayor of Croydon*(3). Those are the cases in which the Court held that Rules and Bye-laws made by statutory bodies should be reasonable; otherwise they would be *ultra vires* and void. In the case of rules framed for the guidance of Courts of Justice one should look for a greater degree of reasonableness and fairness. He drew my attention to *Quazie Mahmudar Rohman* v. *Sarat Chandra Dutt*(4) in which STANELY, J., sitting as a single Judge, held that he had no power to extend the time prescribed for filing an application for leave to defend a suit under chapter XXXIX of the Civil Procedure Code of 1882. The learned Judge quoted section 4 of the old Limitation Act and held that he had no power to extend the time. He distinguished a case decided by PONTIFEX, J., in which that learned Judge extended the time for filing an application for leave to defend on the ground that, as the defendant lived at Peshawar, the time within which the defendant might obtain liberty to appear and defend should have been 28 days instead of 10 days, the time contained in the Form described in the 4th schedule to the Code. In *The British India Steam Navigation Co.* v. *Sharafally*(5) a Bench of this Court held that, as the Small Cause Court was open on certain days during the vacation for the receipt of plaints, petitions and other papers, the Court could not be treated as closed and an application for appeal to the Full Bench which could have been filed on the days

(1) [1904] 1 K.B., 615.
(2) [1909] 2 K.B., 127.
(3) (1886) 16 Q.B.D., 708.
(4) (1900) 5 C.W.N., 259.
(5) (1923) 44 M.L.J., 100.

the Court was open, could not be filed after the close of the vacation. Though section 148 of the Code of Civil Procedure, which is a new section giving power to a Court to extend any period of time fixed or granted by the Court for doing any act prescribed or allowed by the Code has been extended to the Small Cause Court, yet, the learned Judge had no jurisdiction to extend the time fixed in the summons by the Court for filing an application for leave to defend by reason of the definition of the word "code" in Order I (*a*), rule 4 (2). Though form B is according to rule 1 of Order XXXVII, it cannot be said to form part of the rules. If the direction as regards the filing of an application for leave to defend is intended to be made part of Order XXXVII, rule 1, it should have been made clear and a provision should have been made to meet cases where the defendant could not possibly have three clear days owing to the service on him within three days of hearing. Taking all the circumstances into consideration I hold that the direction in the summons is unreasonable and therefore *ultra vires* and the Court by complying with an illegal rule has acted without jurisdiction.

I, therefore, set aside the order of the learned Chief Judge and direct him to restore the case to his file and to receive the application for leave to defend and to dispose of it according to law.

The costs of this application will be borne by the plaintiff.

N.R.