C. W. MACKIE & CO., LTD.
v.
TRANSLANKA INVESTMENTS LTD.

COURT OF APPEAL
SARATH SILVA, J. (P/CA)
RANARAJA, J.
C.A. REVISION 590/94
C.A./L.A. 205/94
D.C. COLOMBO 34941/MS
FEBRUARY 20, 1995.

Civil Procedure – Civil Procedure Code Cap. L III – Leave to defend conditionally or unconditionally – Debt Recovery (Special Provisions) Act, No. 2 of 1990, S. 25 – Civil Procedure Code S. 704 – Bills of Exchange Ordinance, SS. 27, 30, 75 and 92 – Notice of dishonour – Sustainable defence – Good faith.

The plaintiff-petitioner instituted action in terms of Cap. L III of the Civil Procedure Code for the recovery of Rs. 69,837,650/- on 93 causes of action based on 93 cheques. The defendant-respondent sought and obtained leave to defend unconditionally. The plaintiff seeks to revise that Order.

Held:

(1) Under S. 704, court is required to consider the Petition and Affidavit together with any documents filed and decide whether there is a *prima facie* sustainable defence.

(2) Even though there appears to be a defence, if Court is doubtful of its genuineness, the defendant may be ordered to give security.

(3) There is no obligation on the plaintiff to produce any documents in support of the averments regarding Notice of Dishonour, at the time of filing of plaint.

(4) If no adequate funds are in the Bank Account to meet the cheque, at the time it was drawn, it is an offence under Section 25 of Act 2 of 1990.

Quare:

Whether non-compliance with Section 48 of the Bills of Exchange Ordinance could be construed now as a sustainable defence, in view of S. 25 of Act 2 of 1990.

(5) It is not necessary to give Notice of dishonour to a person who draws a cheque without adequate funds – Section 75 of the Bills of Exchange Ordinance?

(6) Where Court feels a reasonable doubt exists as to the honesty of the defence, it is entitled to order a defendent to appear and defend – conditionally.

Cases referred to:

1. *De Silva v. De Silva* 49 N.L.R. 219.
2. *Wallingford v. the Mutual Society* (1880) 5 App. Cas. 704.

APPLICATION for Revision of the order of the District Court of Colombo.

Romesh De Silva, P.C. with *H. Amarasekera* for petitioner.
S. Sivarasa, P.C. with *K De Alwis* for respondent.

Cur. adv. vult.

March 10, 1995.
RANARAJA, J.

The plaintiff-petitioner, (Petitioner) instituted action against the defendant-respondent, (respondent) in terms of Chapter L III of the Civil Procedure Code, for the recovery of a sum of Rs. 69,837,650/- on ninety-three causes of action, based on ninety-three cheques. On summons in form 19 being served, the respondent applied to Court by way of petition and affidavit for leave to appear and defend the action. Court allowed an application by both parties to have the matter decided on written submissions. On 29.7.94, Court made order permitting the respondent to appear and defend the action unconditionally. This application in revision is from that order.

Section 704 of the Civil Procedure Code Provides:

> "The defendant shall not be required, as a condition of his being allowed to appear and defend, to pay into Court the sum mentioned in the summons, or to give security therefor, unless the Court thinks his defence not to be *prima facie* sustainable or feels reasonable doubt as to its good faith."

The Court is required by this section, to consider the petition and affidavit together with any documents filed, and decide whether the defendant has a *prima facie* sustainable defence. Even though there appears to be such a defence, if Court is doubtful of its genuineness, the defendant may be ordered to give security before being permitted to appear and defend. At this stage Court is not called upon to inquire into the merits of the cases of either party.

The petitioner complains that the learned District Judge has misdirected himself in law when he held that no notice of dishonour had been given by the petitioner to the respondent, on the basis that the petitioner had failed to provide any proof in support of that fact. The learned Judge has commented that the petitioner had been vague in his pleadings on the question of notice of dishonour. What is required of a plaintiff under the provisions of Chapter LIII, is that he should state that he has given notice of dishonour or that he was excused from doing so. Whether the allegation is true or false will be matter of evidence at the trial proper. There is no obligation on the plaintiff to produce any documents in support of the averment of notice of dishonour at the time of filing the plaint. In any event, on the face of the cheques which have been produced with the plaint there is no doubt that ninety-three cheques have been returned with the following endorsements: "Exceeds Arrangements" (51), "Not Arranged for" (20), "Refer to drawer" (12), "Account Closed" (6), "Effects not Realised" (4).

Paragraph 10(a) of the petition filed in the District Court by the respondent states:

> "Pursuant to the agreement between the parties the defendant-petitioner issued cheques to the plaintiff-respondent to cover the value of the plaintiff-respondent's goods sold by the defendant petitioner to third persons, which cheques were to be held by the plaintiff-respondent and presented for payment only after the defendant-petitioner had received payment and upon the defendant-petitioner intimating that fact to the plaintiff-respondent."

The respondent has thereby admitted the receipt of the sugar from the petitioner and that the ninety-three cheques were issued to cover the value therefor, while there were no adequate funds in its bank accounts at the time the cheques were drawn, to the value of those cheques. Section 25 of the Debt Recovery (Special Provisions) Act No. 2 of 1990 makes such conduct on the part of a drawer of a cheque an offence. In the circumstances, the question arises whether non-compliance of Section 48 of the Bills of Exchange Ordinance, which is an enactment prior to the Debt Recovery (Special Provisions)

Act, could now be strictly construed as a sustainable defence, on the principle that a person should not be permitted to benefit by his own crimes. In this context, it is also relevant to consider Section 75 of the Bills of Exchange Ordinance, which states:

> "The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by:
>
> (a) countermand of payment
> (b) notice of customer's death.

This Section is identical to Section 75 of the Bills of Exchange Act of 1882 of the United Kingdom. Byles on Bills of Exchange (26th Ed: at Pg. 293) commenting on that Section states:

> "The drawer of a cheque is, equally with the drawer of a bill, entitled to notice of dishonour unless such notice is excused or waived; but notice will not be necessary when the dishonour is due, as is usually the case, to absence of effects in the bankers hands or when payment has been countermanded."

Thus it is seen, a person who draws a cheque without sufficient funds in his bank account to meet the cheques drawn, need not be given notice of dishonour, as such person would in any event be aware at the time the cheques are issued, that the bank would not honour them. In these circumstances, the learned District Judge has, it appears, prematurely decided the question of the absence of notice of dishonour in the respondent's favour.

The petitioner submits that the learned District Judge has not considered the fact that the respondent had received sugar to the full value of the cheques. The respondent on the other hand asserts that Court was correct in holding that the delay in the petitioner presenting the cheques after a lapse of time was due to an arrangement between the parties, namely, to present the cheques to the bank, upon ascertaining from the respondent whether third parties to whom the sugar was distributed by the respondent, had made payments for the supplies.

Section 27 of the Bills of Exchange Ordinance states:

> "Valuable consideration for a bill may be constituted by:
>
> (a) any consideration which by law of England is sufficient to support a simple contract:
> (b) an antecedent debt or liability, such as a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future date."

This Section is again similar to section 27(1) of the Bills of Exchange Act of the United Kingdom. Byles on Bills of Exchange (at Pg:2 243) referring to this Section says:

> "If a man seeks to enforce a simple contract he must, in pleading, aver that it was made on good consideration, and must substantiate that allegation by proof. But to this rule bills and notes are an exception. It is never necessary to aver consideration for any engagement on a bill or note, or to prove the existence of such consideration, unless a presumption against it is raised by evidence of the adverse party, or unless it appears that injustice will be done to the defendant, or the law violated, if the plaintiff recovers. In the case of simple contracts the law presumes that there was no consideration till consideration appears; in the case of contracts on bills or notes, a consideration is presumed till the contrary appears or at least appears probable."

This conclusion necessarily follows from Section 30 of the Bills of Exchange Ordinance which states:

> "(1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.
>
> (2) Every holder of a bill is *prima facie* deemed to be a holder in due course, but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of a bill is affected with fraud, duress or force and fear, or illegality, the burden of proof is shifted unless and until the holder proves

> that subsequent to the alleged fraud or illegality value has in good faith been given for the bill."

It is clear the learned District Judge could have concluded that the presumption in favour of the petitioner was rebutted, if only the respondent established that there was an agreement between the parties on the mode of presenting the cheques for realisation. The presumption in favour of the petitioner on consideration cannot be lightly rebutted. The burden lay on the respondent to do so, on cogent evidence, which at any rate was not available to the learned Judge at the time he made the order. Such evidence could be led only at the trial stage. Thus it was incorrect to hold that the respondent had a sustainable defence on the lack of consideration, on the basis of the alleged agreement between the parties, at the time it sought leave to appear and defend.

It is submitted on behalf of the petitioner that in any event, the defence adduced by the respondent lacks good faith and is in fact a sham, which disentitles it from being permitted to appear and defend unconditionally. In this context, it is relevant to advert to what the Bills of Exchange Ordinance itself means by the words "good faith". Section 92 defines "good faith" as "what is in fact done honestly." Where Court feels a reasonable doubt exists as to the honesty of the defence, it is entitled to order a defendant to appear and defend, only on condition of depositing in Court the sum of money for which he is being sued. Howard, C.J. in *De Silva v. De Silva* [1], quotes Lord Blackburn, (in *Wallingford v. The Mutual Society*) [2] where he explains thus:

> "It is not enough to say "I owe nothing", he must satisfy the judge that there is reasonable ground for saying so. It is difficult to define it, but you must give such an extent of definite facts . . . as to satisfy the judge that those are facts which make it reasonable that you should be allowed to raise that defence."

What is the basis of the respondent's defence ? Simply that the persons to whom it sold the sugar had failed to pay on time. Admittedly, the respondent has not paid one cent of the amount claimed by the petitioner. Nor is there even a bare averment in the

petition filed by the respondent, that it had made attempts unsuccessfully to recover the monies due from the persons to whom it sold the sugar. Is it then possible in the circumstances, to say, that Court was satisfied or felt that the defence raised by the respondent was honest or *bona fide ?* With respect, I think not. The respondent's defence is nothing but a sham.

For the reasons given, the order of the learned District Judge dated 29.7.94 is set aside. The respondent is directed to deposit the full sum claimed by the petitioner in Court as a condition precedent, before it is permitted to appear and defend. This sum will be deposited on or before 28.4.95, failing which decree will be entered for the total sum claimed by the petitioner.

Counsel for both parties agreed that the order in this application will bind them in the connected leave to appeal application No. CALA 205/94. They also agreed that this order will bind the parties in the revision application No. CA 682/94 and the connected leave to appeal application No. CALA 234/94 from the order dated 16.9.94 in DC Colombo case No. 34953/MS, against the same respondent, where the sum claimed is Rs. 15,082,500/- with interest.

The application is therefore allowed with costs.

S. N. SILVA, J. – I agree.

Application allowed.