

STERLING MERCHANT INVESTMENT LTD
v
LIYANAGE

COURT OF APPEAL
WIMALACHANDRA, J.
CA 2149/2004.
D.C. NEGOMBO 359/M.
NOVEMBER 8, 2004.

Civil Procedure Code – section 706 – Summary procedure – Leave to appear and defend – Absence of an affidavit – Is it fatal? – Could the discretion under section 706 be exercised? – Security – Could it exceed the principal sum claimed?

When the defendant sought leave to appear and defend, the plaintiff raised a preliminary objection that the affidavit sworn by the Manager of the defendant company is not a valid affidavit. The court ordered the defendant petitioner to deposit the entire sum along with the legal interest due on the said sum and permitted the defendant petitioner to appear and defend the action. The defendant petitioner moved in revision.

Held:

- 1) There is no name, date, address or the seal of the Justice of the Peace before whom the said affidavit is alleged to have been sworn; further the person who is alleged to have administered the oath and his capacity to administer the oath is not known. The resulting position is that there is no proper application before court in the absence of a valid affidavit.
- 2) Accordingly, the court cannot exercise its discretion under section 706 and allow the defendants to appear and defend the action without being called upon to deposit the entire sum claimed by the plaintiff.

Per Wimalachandra, J.

“It is not illegal to order the defendant to furnish security in a sum exceeding the principal sum claimed by the plaintiff as a condition for being allowed to appear and defend, if the sum exceeding the principal sum amounts to the legal interest of the principal sum.”

APPLICATION in revision from an order of the District Court of Negombo.

Case referred to:

Science House (Ceylon) Ltd., v IPCA Laboratories (Pvt) Ltd – 1987 1 Sri LR 185

Chitral Fernando for defendant-petitioner

K. M. Basheer Ahamed with *Kunaseelan* for plaintiff-respondent.

Cur. adv. vult.

November 19, 2004.

WIMALACHANDRA, J.

This is an application in revision to set aside the order dated 4.10.2004 in Case No. 359/MS in the District Court of Negombo made by the learned District Judge, wherein he has permitted the defendant-petitioner, leave to appear and defend the action (hereinafter referred to as 'the defendant') upon depositing in Court a sum of Rs. 500,000/= along with the legal interest due on the said sum of Rs. 500,000/=.

At the outset the learned counsel for the plaintiff-respondent (hereinafter referred to as 'the plaintiff') raised a preliminary objection that in the application for leave to appear and defend, the affidavit sworn by the Manager of the defendant-company is not a valid affidavit for the following reasons:

- (1) There is no name, address or seal of the Justice of Peace before whom the purported affidavit is alleged to have been sworn.
- (2) The person who is alleged to have administered the oath and his capacity to administer the oath is not known.

A copy of the affidavit filed by the defendant seeking leave to appear and defend the action in terms of section 706 of the Civil Procedure Code is produced annexed to the petition marked "P4". In "P4" there is no name, address or seal of the Justice of the Peace before whom the said affidavit is alleged to have been sworn. It is seen that the person who is alleged to have administered the oath and his capacity to administer the oath is unknown, Furthermore the date of the administration of the oath is not stated. For these reasons, I am of the view that there is no valid

affidavit supporting the matters averred in the application for leave to appear and defend the action filed by the plaintiff. The resultant position is that there is no proper application before court in the absence of a valid affidavit.

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Accordingly, in an application for leave to appear and defend, in the absence of a valid affidavit, which amounts to no affidavit, the court cannot exercise its discretion under section 706 of the Civil Procedure Code and allow the defendant to appear and defend the action without being called upon to deposit the entire sum claimed by the plaintiff, as there is no way the court can decide whether the defendant has a *prima-facie* sustainable defence. In this situation the defendant should be required to give security as a condition for being allowed to appear and defend.

The plaintiff has instituted this action under Chapter 53 of the Civil Procedure Code by way of summary procedure to recover money lent and advanced to the defendant on the security of a promissory note dated 3.8.2002, which became due and payable to the plaintiff on 3.8.2003.

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The defendant in its petition marked "P3" (undated) has admitted the following facts:

- (i) the said promissory note (marked "X2" annexed to the plaint)
- (ii) the change of name of the defendant from Pramuka Merchant Corporation Ltd. to its present corporate name.

Accordingly, the genuineness of the promissory note and the amount due on the said promissory note is admitted by the defendant. In the absence of a valid affidavit the Court is unable to consider whether the defendant has a *prima-facie* sustainable defence. In this situation the defendant should be required to give security as a condition for being allowed to appear and defend.

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It is not illegal for the learned Judge to order the defendant to furnish security in a sum exceeding the principal sum claimed by the plaintiff as a condition for being allowed to appear and defend if the sum exceeding the principle sum amounts to the legal interest of the principle sum. [See - *Science House (Ceylon) Ltd. v IPCA Laboratories (Pvt) Ltd*]

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Accordingly, this court sees no reason to interfere with the order of the learned District Judge dated 04.10.2004. The application in revision is dismissed with costs fixed at Rs. 5000/= payable by the defendant-petitioner to the plaintiff-respondent.

Application dismissed.