

CHANDRARATNE
VS
WIJETILAKE

COURT OF APPEAL,
AMARATUNGA J,
WIMALACHANDRA J,
CALA 408/2002 (LG),
D.C. NEGOMBO 290/SM,
MARCH 23, 2004,
JUNE 24, 26, 2004.

Civil Procedure Code - Cap. 53-Section 704-Summary Procedure-Leave to Appear and defend-Doubt exists as to the - Security to be Ordered - Not averred for what valuable consideration the cheques were issued-Acceptability - sustainable defence.

The Plaintiff Respondent instituted action against the Defendant Petitioner under Cap. 53 of the Civil Procedure Code for the recovery of a certain sum of money due on 5 cheques. The defendant moved to file Answer unconditionally. The trial Judge refused the application for unconditional leave and allowed the Petitioner to appear and defend upon depositing the entire amount claimed.

The Defendant sought leave to appeal with leave being granted it was contended that—

- (a) the Plaintiff had failed to disclose the circumstances in which the said cheques were issued.
- (b) That although the Plaintiff has stated that the said cheques were given for valuable consideration he has not stated what the said consideration was.

HELD;

1. Although the Plaintiff has not averred in the plaint for what consideration the cheques were issued, the Plaintiff has stated that the cheques were given for valuable consideration. He may prove this at the trial by establishing that value has been given for the cheques.
2. Defence raised by the Defendants cannot be believed. No credibility can be attached to it. Even where there appears to be a defence, if

court is doubtful of its genuineness, the defendant may be ordered to give security.

APPLICATION for Leave to appeal; with leave being granted from an order of the District Court of Negombo.

Cases referred to :

1. *C. W. Mackie and Co. Ltd., Vs. Transilanka Investments Ltd., 1995 2 Sri LR 6*
2. *De Silva vs De Silva - 49 NLR 219*
3. *Walling Ford vs The Mutual Society - 1880 5 App. Cap. 704*

Sunil A Carray for Defendant Petitioner.

Chandradasa Mahanama for Plaintiff Respondent.

September 10, 2004

Wimalachandra J.

Cur.adv.vult

AMARATUNGA J.

I agree.

Appeal dismissed.

L. K. WIMALACHANDRA J.

The plaintiff-respondent (hereinafter referred to as the plaintiff) instituted action against the defendant-petitioner (hereinafter referred to as the defendant) in the District Court of Negombo under chapter 53 of the Civil Procedure Code for the recovery of a sum of Rs. 200,000 due on five cheques marked 'X1', 'X2', 'X3', 'X4', and 'X5' annexed to the plaint, each to the value of Rs. 40,000. The petitioner moved to file answer unconditionally.

After inquiring, the learned District Judge on 01.10.2002 made order refusing the petitioner's application for unconditional leave and allowed the petitioner to appear and defend upon depositing Rs. 200,000 which is the entire amount claimed by the respondent upon the aforesaid five cheques. It is against this order the petitioner has filed this leave to appeal application.

When this application was taken up for inquiry on 23.03.2000, it was agreed between the parties that proforma leave to appeal be granted and the appeal be decided on the written submissions and documents that would be filed by the parties. Accordingly both parties tendered written submissions.

The defendant filed a petition and affidavit dated 12.03.2002 to obtain leave to appear and defend. The Court is required by Section 704 of the Civil Procedure Code, to consider the petition and affidavit with any documents filed, and decide whether the defendant has a *prima facie* sustainable defence or a reasonable doubt exist as to the *bona fide* of the defence. If the Court is of the opinion that a reasonable doubt exists as to its good faith, the defendant may be ordered to give security before being allowed to appear and defend.

It must be noted that, at this stage the Court is not called upon to inquire into the merits of the case of either party.

By his affidavit the defendant admits that he issued the said five cheques to the plaintiff, but states that the said five cheques were issued to meet certain urgent financial requirements of the plaintiff (*vide* paragraphs 15 and 16 of the affidavit). The defendant states that he owes nothing, as those cheques were issued on the condition that they were never to be encashed (paragraph 16 of the affidavit). Then in several paragraphs he averred about a cheetu transaction and stated that the only money that was due to the plaintiff was under a cheetu transaction. In any event it appears that the cheetu transactions referred to in the affidavit were separate transactions which had no connection to the issue of the five cheques to the plaintiff.

This defence raised by the defendant cannot be believed. No credibility can be attached to it.

In the case of *C. W. Mackie and Co. Ltd. V. Translanka Investments Ltd.*(1) it was held that even where there appears to be a defence, if Court is doubtful of its genuineness, the defendant may be ordered to give security. Ranaraja, J. at page 11 said :

"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, Vs.

De Silva quotes⁽²⁾ Lord Blackburn, (in Wallingford V. The Mutual Society⁽³⁾ 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 there are facts which make it reasonable that you should be able to raise that defence"

The learned counsel for the defendant submitted that the plaintiff has failed to disclose the circumstances in which the said cheques were given. Although the plaintiff has stated that the said cheques were given for valuable consideration, he has not stated what the said valuable consideration was.

Byles on Bills of Exchange, 21st edition, at page 132 states thus ;

"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 or 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.....In the case of other simple contracts, the law presumes that there was no consideration till a consideration appears ; in the case of contracts on bills or notes, a consideration is presumed till the contrary appears or at least appears probable"

As regards the nature of the consideration for a bill, the Bills of Exchange Ordinance 1927, section 27, states that valuable consideration for a bill may be constituted by-

- (a) any consideration which by the law of England is sufficient to support a simple contract ;
- (b) an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

Weeramantry in his Treatise on the Law of Contract Volume 1 at page 225, states as follows :

“It will be observed that the expression, ‘antecedent debt or liability’ covers past consideration, so that, for example, a plaintiff suing upon a negotiable instrument may prove valuable consideration by showing that value had once been given for it. He is under no obligation to prove that he himself has again furnished consideration for it.”

In the circumstances there is no merit in the submission made by the learned counsel for the defendant that the plaintiff has not averred in the plaint for what valuable consideration the said five cheques were issued, though the plaintiff has states that the said cheques were given for valuable consideration. However, he may prove this at the trial by establishing that value has been given for the said cheques.

It is to be noted that the Court has to decide whether the defendant has a sustainable defence by perusing his affidavit. On an examination of the affidavit we cannot see any triable issue or a sustainable defence. The learned Judge had correctly addressed his mind when he held that there was no sustainable defence.

It is also to be noted that the defendant has drawn the said cheques after the account had been closed, as such he knew at the time the cheques were issued the bank would not honour them. It appears that the defendant has committed a fraud on the plaintiff by issuing the said cheques after he closed his account in the Bank.

In these circumstances, it is our considered view that the order of the learned District Judge should not be disturbed.

For the reasons stated in this judgement we dismiss the appeal with costs fixed at Rs. 5,000.

Judge of the Court of Appeal

GAMINI AMARATUNGE J. - I agree

Judge of the Court of Appeal.