

**SRI LANKA CO-OPERATIVE SOCIETY
vs
SUSAI**

COURT OF APPEAL
WIMALACHANDRA. J
BASNAYAKE. J
CALA 380/2001 (LG)
DC COLOMBO 35813/MS
JANUARY 12, 22, 2004

Civil Procedure Code - Section 703, Section 704(2) liquid claims dishonouring of cheques - Jurisdiction - which Court? - English Law, or Roman Dutch Law applicability? - Leave to appear and defend unconditionally - When?

The plaintiff complained that the defendant had issued 5 cheques and the cheques were dishonoured by the bank. The plaintiff resided in Colombo, the transaction took place in Colombo, the defendant resided in Nuwara Eliya, the trial Judge granted leave unconditionally. It was contended that the cheques were drawn on banks situated outside the jurisdiction of the District Court of Colombo and therefore the District Court of Colombo has no jurisdiction.

On leave to appeal being sought-

Held:

- (1) In the absence of express agreement as to the place where the plaintiff is to be paid, the English Law will apply, accordingly as to the place of payment, the debtor must seek out the creditor in the absence of an express agreement with regard to payment.

The cheques were issued, from the banks at Nuwara Eliya, Hanguranketa and Padiyapalalla, payments were made in Colombo, the plaintiff resides in Colombo and the cheques were dishonoured in Colombo. It is the District Court of Colombo which has jurisdiction.

- (2) Judge can order such a deposit if he considers the defence is not prima facie sustainable or not bona fide. Section 704 (2) does not say that if the Judge accepts the defence outlined as bona fide he must necessarily give leave to appear and defend unconditionally.
- (3) The defendant's affidavit indicates that his defence is not prima facie sustainable. A reasonable doubt exists as to the honesty of the defence set up by the defendant. The alleged defences are not sufficient to grant unconditional leave to appear and defend, there are reasonable doubts about the good faith of the defendant.

APPLICATION for leave to appeal with leave being granted.

Cases referred to:-

1. *Ponnaihi vs. Kanagasabai* 35 NLR 128
2. *Sirimanne vs. New India Assurance Company Ltd* 35 NLR 413
3. *Seneviratne vs. Thaha* 65 NLR 184
4. *Sebastian vs. Kumarajeewa* 1978 - 80 NLR 264 at 268
5. *Supramaniam Chetty vs. Kristnasamy Chetty* 10 NLR 327
6. *Issadeen & Company vs. Wimalasuriya* 62 NLR 299
7. *Vailiappa Chettiar vs. Viswanathan* 66 NLR 481

Kuvera de Zoysa with *Senaka de Saram* for plaintiff-respondent-petitioner
V. Puvitharan for defendant-petitioner-respondent

Cur.adv.vult

July 25, 2008

WIMALACHANDRA, J.

The plaintiff-petitioner (plaintiff) has filed application for leave to appeal against the order of the learned Additional District Judge of Colombo granting the defendant-respondent (defendant) leave to appear and defend this action unconditionally, under summary procedure.

The plaintiff states that the defendant had issued five cheques marked "P1 - P5", for Rs.669,000/= and these

cheques were dishonoured by the bank on presentation. The plaintiff claims the said sum of money from the defendant for supplying 'seed potatoes' to the defendant. It is common ground that the plaintiff resides in Colombo and the said transaction had taken place in Colombo. Summons were issued in terms of section 703 of the Civil Procedure Code and defendant moved for leave to appear and defend the action mainly on the following grounds:

- (i) The District Court of Colombo has no jurisdiction to hear and determine this action.
- (ii) Only the cheque marked 'A1' is given by the respondent and cheques marked 'A2' to 'A5' were not endorsed by the defendant in favour of the plaintiff.

When the matter was taken up for inquiry both parties agreed to dispose of the defendant's application for leave to appear and defend the action by way of written submissions. Accordingly, the parties filed written submission and invited the Court to decide the matter on the written submission filed by them. Thereafter, the learned Judge made order on 11.10.2001 allowing the defendant to appear and defend the action unconditionally. It is against this order the plaintiff has filed this application. The Court of Appeal granted leave to appeal on 25.07.2003.

It is not in dispute that the aforesaid cheques were issued by the defendant as payments for goods sold and delivered to him by the plaintiff. It is also not in dispute that the aforesaid cheques were dishonoured when presented for payment.

It is obvious that the defendant had issued the aforesaid cheques for the seed potatoes bought from the plaintiff and payments were to be made in Colombo upon the aforesaid

cheques being deposited in the plaintiff's bank in Colombo. The defendant in his petition dated 17.02.2001 filed in the District Court specifically admits in paragraph four that this action is based on the aforesaid dishonoured five cheques. The plaintiff in his petition filed in the District Court has pleaded that the parties had agreed that payment is not denied by the defendant. The main defence of the defendant is that the said cheques were drawn on banks situated outside the jurisdiction of the District Court of Colombo and therefore the District Court has no jurisdiction to entertain the plaintiff's action. However, the defendant does not deny that these cheques were not given by him to the plaintiff. It was the main contention of the defendant that the said cheques were drawn from banks situated outside the jurisdiction of the District Court of Colombo.

There is no dispute that the transaction took place in Colombo within the jurisdiction of the District Court of Colombo.

In an action to recover money on a negotiable instrument, the English law applies and hence the debtor must seek out the creditor. In such cases the cause of action, the failure to pay arises where the claimant resides.

In the case of *Ponnaiih vs. Kanagasabai*⁽¹⁾, where a promissory note made by the defendant in favour of the plaintiff was silent as to the place of payment, the Supreme Court held that an action may be brought on the note in the Court within whose jurisdiction the plaintiff resides as the debtor must seek out the creditor at his place of residence or place of business. Similarly, in the case of *Sirimanne Vs New India Assurance Company Limited*⁽²⁾ the Supreme Court held that in an action to recover money due under a policy of fire insurance the principle of English law applies and that the debtor must seek out the creditor. In such a case the cause of action, that is the failure to pay, arises where the claimant resides.

The defendant relied on the case of *Seneviratne Vs. Thaha*⁽³⁾ In this case the defendant, who was residing at Panadura, drew a cheque in favour of the plaintiff payable at the Panadura Office of the Bank of Ceylon, the cheque was dishonoured at Panadura, the plaintiff instituted proceedings in the District Court of Colombo for the recovery of the amount of the cheque. It was held that the cause of action arose in Panadura and the District Court of Colombo had therefore no jurisdiction to hear the case.

However, the facts of the present case is different from the above mentioned case of *Seneviratne Vs. Thaha*(*supra*). In the present case, the transaction took place in Colombo, where the plaintiff resides and payments were made in Colombo by the said cheques marked 'P1 to P5' and they were dishonoured when presented to the plaintiff's bank in Colombo. The cheques P1 to P5 are "crossed, account payee" issued from the banks at Nuwara-Eliya, Hanguranketha and Padiyapalalla. Accordingly, they can only be deposited in the plaintiff's (payee's) account and the plaintiff has deposited those cheques in his account at Bank of Ceylon, Metropolitan Branch, in Colombo. In the case of *Seneviratne Vs. Thaha* (*supra*) the cheque was dishonoured in Panadura and the action was filed in Colombo. Hence the facts of *Seneviratne Vs. Thaha* (*supra*) is different from the facts from the instant case.

In the absence of express agreement as to the place where the plaintiff is to be paid, the English law will apply. Accordingly, as to the place of payment, the debtor must seek out the creditor in the absence of an express agreement with regard to payments.

Section 704(2) of the Civil Procedure Code states thus:

"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 be prima facie sustainable, or feels reasonable doubts as to its good faith”

Thus it will be seen that the Judge can order such a deposit if he considers the defence is not prima facie sustainable or not bona fide. In the same way section 704(2), certainly, does not say that if the Judge accepts the defence outlined as bona fide he must necessarily give leave to appear and defend unconditionally. (See- *Sebastian Vs. Kumarajeewa*⁽⁴⁾ at 268, - per- Gunasekara, J.)

In the case of *Supramaniam Chetty Vs. Kristnasamy Chetty*⁽⁵⁾, it was held that where there are reasonable grounds for doubting the good faith of the defense, the defendant should only be allowed to defend action if he deposit in Court the amount of the claim or gives security for it.

In the case of *Sebastian Vs. Kumarajeewa (Supra)* the Supreme Court refused to follow the decision in the case of *Issadeen & Company Vs. Wimalasuriya*,⁽⁶⁾ where it was held that even if the defence was not prima facie sustainable or that it lacked ‘good faith’ the defendant should in law be permitted to defend the action unconditionally.

Gunasekara, J. in *Sebastian Vs. Kumarajeewa (supra)* at 269, said:

“I am therefore of the view that the rule enunciated in the case of *Issadeen & Company (supra)* that the judge is bound to allow unconditional leave if the whole or even part of the defence is accepted as bona fide is incorrect and should not be followed. To some extent this was made manifest in the later case of *Valiappa Chettiar Vs. Visuwanathan*, where the claim was on three cheques each of Rs. 8,400/- and no bona fide defence was available in respect of two of them and the learned

District Judge had ordered security to be given in a sum of Rs. 16,000/-. The same Counsel who appeared for the Appellant in the *Issadeen & Company (supra)* case understandably argued before Weerasooriya, J. that in keeping with the earlier decision the bona fides of the defence to a part of the claim having been established the Defendant should have been permitted to answer unconditionally. Weerasooriya, J. rejected this submission and affirmed the Order of the learned District Judge saying that the earlier decision could be distinguished on the ground that "there is no admission of any liability by the Appellant and what he seeks to obtain is leave to appear and defend the action in its entirety." If these facts create an exception to the rule enunciated in the *Issadeen & Company (supra)* case it must be observed that in the instant case too there is no admission of liability by the Appellant and the Appellant seeks to defend the action in its entirety. But both before the decision in the *Issadeen & Company (supra)* case as is shown in *Valiappa Chettiar's (supra)* case Judges of our Courts have always exercised their discretion in terms of section 706 in cases where they considered the Affidavit of the Defendant 'satisfactory' and often ordered the Defendant to deposit part of the sum claimed in the plaint.

In the instant case, there are reasonable doubts about the good faith of the defence. It is the defendant who had given the said cheques for the goods supplied by the plaintiff. Now he states that he was only an agent and bought goods for others. But he admits that he gave the aforesaid cheques to the plaintiff. The alleged defences are not sufficient to grant unconditional leave to appear and defend. The defendant's affidavit indicates that his defense is not prima facie sustainable. A reasonable doubt exists as to the honesty of the defence set up by the defendant. Admittedly,

the defendant has not even made any attempt to pay the plaintiff. In the circumstances, I am of the view that the defences raised by the defendant were not *bona fide* but a sham.

For these reasons the impugned order of the Additional District Judge dated 11.10.2001 is set aside. The defendant is directed to deposit the full sum claimed by the plaintiff in Court as a condition precedent, before the defendant is permitted to appear and defend. This sum shall be deposited within three months from the date of this Judgment, failing which the decree will be entered as prayed for by the plaintiff.

The appeal is accordingly allowed with costs.

BASNAYAKE, J. - I agree

Appeal allowed.

Defendant directed to deposit the full sum claimed.