

ESQUIRE (GARMENTS) INDUSTRY LTD.
v.
SADHWANI (JAPAN) LTD.

COURT OF APPEAL

TAMBIAH, J. & G. P. S. DE SILVA J.,

C.A. (LA) APPLICATION NO. CA 136/82.

REV. APPLICATION NO. C.A. 1313/82.

D.C. COLOMBO NO. 32699/5

MARCH 21, 22, 23, 24, 25, 30, 31, AND

JUNE 01 AND 02, 1983.

Civil Procedure Code — Summary procedure in liquid claims — Bills of Exchange — Civil Procedure Code s. 703 — Unconditional leave to appear and defend — Acceptance of Bills — Triable issue.

In a suit filed in terms of s. 703 C.P.C. the District Judge had issued summons although the originals of the Bills of Exchange had not been filed. The defendant in asking for leave to appear and defend unconditionally had claimed that the Bills were not properly accepted or accepted by directors who had been removed.

Held —

The correct question is whether a triable issue arose on the affidavits and documents before Court.

The failure to produce the originals of the documents at the time of the presentation of the plaint raises a triable issue. The failure of the defendant to plead this question should not be held against him because he could have discovered this only after the inquiry commenced. Further none of the bills had been stamped.

Sections 704 and 706 C.P.C. are relevant to the question of granting leave to appear and defend unconditionally. The Court should have considered the defence and if it was prima facie sustainable or it feels reasonable doubt as to its good faith, given leave to appear and defend unconditionally.

At this stage, the Court is not called upon to adjudicate upon the merits of the defence.

The question whether these bills had been signed by two directors at a time when they were removed from office also raises a triable issue.

Cases referred to :

1. *James Lamont & Company Ltd., v. Hyland Ltd.* [1950] 1 All ER 929.

2. *Meyappah Chetty v. Yusuf* 5 NLR 265.
3. *Santosh Kumar v. Bhai Mool Singh* AIR 1958 SC 321.
4. *Jacobs v. Booth's Distillery Company* 85 Law Times Reports 262.

APPEAL from order of the District Judge of Colombo.

H. W. Jayewardene, Q.C. with *K. Kanag-Iswaran* and *Rohan de Alwis* for defendant-appellant

K. N. Choksy, S.A. with *S. A. Parathalingam, Miss R. Rajapakse* and *Nimal Fernando* for plaintiff-respondent.

Cur. adv. vult

15 July, 1983.

G. P. S. DE SILVA, J.

The defendant is a private company incorporated under the provisions of the Companies Ordinance while the plaintiff is a company incorporated in Japan. The shareholders of the two companies belong to the Sadhwani family. At all material times there appear to have been serious disputes amongst the directors who are members of the same family. The plaintiff instituted this action by way of summary procedure on liquid claims (Chapter 53 of the Civil Procedure Code) on six bills of exchange marked 'A', 'B', 'C', 'D', 'E' and 'F'. The drawer of each bill of exchange is the plaintiff and the drawee is the defendant. It is the case for the plaintiff that the defendant had duly accepted each of the bills of exchange. The total amount claimed in the action was Rs. 9,457,179/17.

The defendant was served with summons in Form No. 19 prescribed by section 703 of the Civil Procedure Code, requiring the defendant to appear within 14 days and obtain leave to appear and defend. Copies of the plaint and affidavit together with photostat copies of the bills of exchange marked 'A', 'B', 'C', 'D', 'E' and 'F', were annexed to the summons. The defendant filed its affidavit together with the annexes marked X₁ to X₁₁(c), and moved for unconditional leave to appear and defend the action.

The District Judge held an inquiry into the defendant's application for unconditional leave to appear and defend the

action, heard submissions of Counsel and arrived at the finding that "the defence set out is not prima facie sustainable". Accordingly, the defendant was given leave to appear and defend the action only upon depositing in Court as security a sum of Rs. nine million. It is against this order that the defendant has now appealed, having obtained the leave of this Court.

By its affidavit, dated 6th May, 1982, filed in the District Court, the defendant averred, inter alia :—

- (a) that it is not liable on the bills marked 'A' and 'B' for the reason that only one director had purported to sign signifying acceptance whereas two directors should have signed the bill in terms of the resolution of 18th August, 1980, marked X₂;
- (b) two persons, namely, Deepu Sadhwani and his wife Mrs. P. Sadhwani, purporting to be directors of the defendant-company, had signed the bills marked 'D' and 'E' on 25th March, 1981 when they had been removed as directors on 21st March, 1981 in terms of the resolution marked X₆;
- (c) that the bills 'C' and 'F' relate to the manufacture and export of goods by the defendant-company during the time the defendant-company was under the sole control and management of K. N. Sadhwani, the Chairman of the plaintiff-company and his son Deepu Sadhwani; no explanation was offered by K. N. Sadhwani and Deepu Sadhwani as to why these bills were not met. This is the subject matter of a probe by the defendant-company and its auditors.

Apart from these facts set out in the defendant's affidavit to show that there was no due acceptance of the bills by the defendant-company, it was discovered in the course of the inquiry before the District Judge on 21st July, 1982, that the plaintiff had failed to produce the originals of the six bills of exchange at the time of presenting the plaint to Court. It

appeared that the Court had ordered the issue of summons in Form No. 19 without having before it the originals of the documents sued upon.

The District Judge in his order requiring the defendant to deposit Rs. nine million in court as a condition precedent to appearing and defending the action, held :—

- (i) That since the defendant has not averred in his affidavit, the failure to produce the originals of the bills of exchange, the question whether the plaintiff has complied with the provisions of section 705, does not arise for consideration; that before the defendant can be heard to object to procedure, he must obtain leave of court to appear and defend; that the defendant having appeared on summons issued in Form 19, cannot take up any defence on the alleged irregularity in the issue of summons.
- (ii) As regards the defendant's plea that there has been no valid acceptance of the bills, the District Judge rejected this defence for the reason that "the defendant-company having had the benefit of the goods imported under the said bills of exchange, cannot now repudiate its obligations on the ground that the said bills have not been signed by the defendant-company".

The principal submission of Mr. Jayewardene, Counsel for the defendant-appellant, was that the approach of the District Judge to the matters that arose for decision on the application of the defendant for leave to appear and defend the action unconditionally, was completely erroneous in law. Mr. Jayewardene referred us to the provisions of section 704(2) and section 706 of the Civil Procedure Code and contended that all that the District Judge had to consider at that stage was, whether on the material placed before court, a triable issue arose, Mr. Jayewardene urged that the District Judge instead of approaching the matter in this way, proceeded to hear and determine the issues of fact and law.

On the other hand, Mr. Choksy, Counsel for the plaintiff-respondent, submitted that Chapter 53 provides a special procedure designed to ensure a speedy and effective remedy for a plaintiff who sues upon a particular class of documents where the law presumes consideration — type of documents drawn in the normal course of trade and commerce. The provisions of this chapter places certain restrictions on the right of a party-defendant to be heard. It was Counsel's contention that at the stage of an application for leave to appear and defend, the court has to balance the claim of the plaintiff as against the defence disclosed in the affidavit and other documents filed by the defendant. It was Mr. Choksy's submission that Chapter 53 gives the court a wide discretion as to whether the defendant should appear and defend unconditionally or subject to conditions and that this court would not interfere with the exercise of that discretion unless the District Judge has exercised it on a wrong principle or has failed to exercise it judicially.

I shall first deal with Mr. Choksy's submission in regard to the question of due acceptance of the bills of exchange. As regards bills 'A' and 'B', Mr. Choksy submitted that since the Memorandum of Association gives the defendant-company power to accept bills of exchange, the fact that the bills were signed by one director only, does not make the acceptance of such bills ultra vires the company. Counsel argued that if it could be shown that the defendant-company had obtained the benefit on the contracts, then the company is bound by the contracts even though there is a procedural irregularity for the reason that only one director has signed the bill. Mr. Choksy further submitted that in law, there is a presumption of consideration in respect of each of the bills of exchange. Counsel pointed out that there is a statement in the bills, to the effect that specified materials have been shipped. There is also an averment in the plaint in respect of each cause of action that the bills were "for value received by the defendant" — an averment which Counsel contended, had not been denied by the defendant in its affidavit. Mr. Jayewardene, on the other hand, argued that the question,

whether the defendant had the benefit of the goods imported, could be decided only after trial. In regard to the bills 'D' and 'E', however, Mr. Choksy did not seriously contend that the position of the defendant that these bills were signed by the two directors at a time when they had been removed from office, did not raise a triable issue.

The position of the defendant in regard to the other two bills 'C' and 'F' was that there was a counterclaim in regard to the moneys due on these bills — Vide paragraph 17 of the affidavit of the defendant (R₂). Mr. Choksy relying on the case of *James Lamont & Company Ltd. v. Hyland Ltd.* (1) urged that a counterclaim is not a defence in this type of action. Counsel submitted that the defendant must set up a defence to the claim and that sections 704 and 706 of the Civil Procedure Code, do not contemplate a claim in reconvention as a prima facie sustainable defence. Mr. Jayewardene, on the other hand, relied on the following statement in the judgment of Bonser, C.J., in *Meyappah Chetty v. Yusuf*, (2) :—

“It has been held by this court that such a state of things, a cross claim, is a defence which can be set up to an action on a promissory note under Chapter 53.”

I turn now to the question of the production of the originals of the documents sued upon. It is common ground that the plaintiff had failed to produce the originals of the bills of exchange at the time of the presentation of the plaint. Mr. Choksy submitted that the object in producing the originals of the documents is evidenced on a reading of section 705(2) of the Civil Procedure Code. Counsel further pointed out that the first date of inquiry in the District Court was 21/7/82 and that the originals of the bills of exchange were submitted to court on 26/7/82. Thereafter, the inquiry was continued in the District Court on 10/8/82 and 12/8/82. Although the originals of the documents were produced in court long before the inquiry concluded, Mr. Choksy submitted that at no stage did the defendant take up the position that the documents were not stamped or that the documents

were not genuine. Counsel, therefore, contended that the failure to produce the originals of the documents sued upon has caused no prejudice whatever to the defendant. In other words, the contention was that on this ground, there was no prima facie sustainable defence.

On the other hand, Mr. Jayewardene submitted that the provisions of section 705 of the Civil Procedure Code are mandatory and go to the jurisdiction of the court. Mr. Jayewardene urged that the law imposes on the court, an imperative duty to examine the documents before issuing summons in Form 19 and this, the District Judge, has failed to do. Therefore, it was argued that the issue of summons in Form 19 was without jurisdiction.

On a consideration of the above submissions, it would appear that fairly substantial issues of fact and law arose for decision. Was the trial Judge right, then, in refusing the defendant's application to appear and defend the action unconditionally? In this context, sections 704 and 706 of the Civil Procedure Code, are the relevant provisions. On the affidavits and the documents placed before the court, the primary question to which the District Judge had to address his mind in this case was whether the defence was prima facie sustainable or "feels reasonable doubt as to its good faith". At this stage, the court is not called upon to adjudicate upon the merits of the defence. It is to be noted that section 704(2) speaks of a prima facie sustainable defence. In other words, the trial Judge need not, at that stage, be satisfied that the defence will ultimately succeed. What the District Judge has to consider is whether a triable issue (and not a sham issue) arises upon the material placed before him.

These principles which govern the exercise of the trial Judge's discretion in granting leave to appear and defend the action, unconditionally or subject to conditions, have been considered in the Indian and English cases where the statutory provisions are very similar to those in our Civil Procedure Code. Indeed, Mr. Choksy, conceded that the statutory provisions in India and in England, are very similar to those in our Code.

Mr. Jayewardene relied strongly on the case of *Santosh Kumar v. Bhai Mool Singh*, (3). Bose, J., in the course of his judgment, stated thus :—

“It is always undesirable, and indeed impossible, to lay down hard and fast rules in matters that affect discretion. But it is necessary to understand the reason for a special procedure of this kind, in order that the discretion may be properly exercised Taken by and large, the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of trade and commerce. In general, therefore, the test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established, there would be a good or even a plausible defence on these facts.”

A similar view was expressed by Lord James in *Jacobs v. Booth's Distillery Company* (4) :—

“The view which I think ought to be taken of Order XIV is that the tribunal to which the application is made, should simply determine, ‘Is there a triable issue to go before a jury or a court?’ It is not for that tribunal to enter into the merits of the case at all.”

On a reading of the order of the District Judge, it seems to me that he has not directed his mind to the correct question, namely, whether any triable issues arose on the affidavits and documents before him. On the contrary, the trial Judge has prematurely arrived at findings against the defendant on important issues which should properly have been adjudicated upon at the stage of the trial. In my view, on the question whether the acceptance of the bills ‘A’, ‘B’, ‘D’ and ‘E’ was valid and binding on the defendant, a triable issue arose. Even on the question whether a

counterclaim is a defence to the claims on the bills, the authorities cited before us, do not appear to speak with one voice. In any event, the failure to produce the originals of the documents at the time of the presentation of the plaint, raises a triable issue. The District Judge was in error when he took the view that the defendant should have averred in its affidavit, the failure of the plaintiff to produce the originals of the bills of exchange. This was not a matter which the defendant could have averred in the affidavit as it was discovered only after the inquiry commenced. It is right to add that we called for the originals of the bills of exchange from the District Court and we observed that no stamps were affixed or impressed on any of the bills marked 'A' to 'F'. After we reserved judgment, Mr. Choksy confirmed the fact that none of the bills were stamped.

I accordingly hold, that upon the material placed before the trial Judge and the submissions made, there arose triable issues and the defendant should have been granted leave to appear and defend the action unconditionally. I, therefore, set aside the order of the District Judge, dated 17/9/82, and grant the defendant-appellant unconditional leave to appear and defend this action. The plaintiff-respondent must pay to the defendant-appellant, the costs of the appeal and of the inquiry in the District Court.

At the request of Counsel, this appeal was taken up for hearing along with the connected application in revision (C.A. No. 1313/82). Counsel agreed that the order made in the appeal would be binding in the connected application in revision. Accordingly, in the revision application, too, the order of the District Judge, dated 17/9/82, is pro forma set aside, and the defendant is pro forma granted unconditional leave to appear and defend the action. There will be no costs in the revision application.

The Registrar is directed to return forthwith the record together with the originals of the bills of exchange marked 'A' to 'F', to the District Court.

TAMBIAH, J. — I agree.

Appeal allowed