

RUHUNU AGRO FERTILIZER CO. LTD

v.

KAPILA

COURT OF APPEAL

J.A.N. DE SILVA, J.

JAYAWICKRAMA, J.

CALA No. 119/98

CA 701/98

DC ANURADHAPURA No. 16297/MS

16TH AUGUST, 1999.

Civil Procedure Code, S. 53, S. 704(2), S. 705(1) (2), S. 706 - Summary Procedure - Liquid claims - Leave to defend - Without security - Triable issues - Notice of dishonour - Should it be given - Discretion of Court - Bills of Exchange Ordinance S. 73, S. 73(1), S. 75 - Countermand of payment - Debt Recovery Act, No. 2 of 1990, S. 25.

The Plaintiff Petitioner instituted action for the recovery of a certain sum with interest under Section 53 Civil Procedure Code claiming that the Respondent had issued ten cheques in favour of the Petitioner Company without funds. The Court permitted the Defendant Respondent to file answer unconditionally.

On Appeal, it was contended that Court had erred in law by coming to the conclusion that it was necessary to ascertain the reasons for the Defendant Respondent to countermand the cheques and also to ascertain whether there were funds in the Bank to meet the payments on the ten cheques. It was further contended that it was not necessary for the Plaintiff Respondent to give Notice of Dishonour.

The Defendant Respondent contended that the Plaintiff Petitioner has violated S. 705 (1), Civil Procedure Code and that Notice of Dishonour had not been given, and that, he had in fact raised a triable issue.

Held :

(1) In terms of S. 705(1) Civil Procedure Code the condition precedent to the issue of summons is that the documents on which the action is based must on presenting the plaint, be produced to Court, and that the Plaintiff must make an affidavit that the sum which he claims is justly due. The documents marked are only copies and they are unstamped. Court could not have issued summons under S. 705(2).

(2) The legislature had intended to give the Judge the discretion as to imposing terms with which the appeal Court should not interfere. The Defendant has raised a triable issue - non-issuance of the Notice of dishonour by the Plaintiff Petitioner and in such an event leave must be given unconditionally.

Per Jayawickrama, J.

“On a consideration of S. 704(2), 706 of the Civil Procedure Code it appears that when the Defendant who swears to a fact which, if true constitutes a good defence, he must be allowed to defend unconditionally unless there is something on the face of the proceedings which lead the Court to doubt the bona fides of the Defendant.”

(i) S. 704(2) Civil Procedure Code should not be made use of as a punishment for not honouring one's obligations and the words 'unless the Court thinks his defence not to be prima facie sustainable or feels reasonable doubt as to his good faith, - "means that the Court has the discretion to decide the question whether the Defendant should be allowed to appear and defend without security.

(ii) It is not clear whether the cheques were drawn without sufficient funds in the Bank as the drawer had stopped payment regarding certain cheques on the basis that the Plaintiff Petitioner refused to continue the supply of fertilizer. In such a situation the drawer is entitled to notice of dishonour unless such notice is excused or waived.

APPLICATION for Leave to Appeal from the order of the District Court of Anuradhapura.

Cases referred to :

1. *Wijestinghe vs. Perera* - 2 C. L. W. 506
2. *Paintathain vs. Nadar* - 37 NLR 101
3. *Ramaswamy Chetty vs. U. L. Marikkar* - 5 NLR 310
4. *Isadeen & Co., vs. Wimalasuriya* - 62 NLR 299

Chula Bandra with *T. De Silva* for Petitioner.

H. M. P. Herath with *J. A. Wimalasena* for the Defendant Respondent

Cur. adv. vult.

October 29, 1999.

JAYAWICKRAMA, J.

This is a leave to appeal application against the order dated 19. 05. 98 of the learned District Judge of Anuradhapura permitting the respondent to file his answer on or before 29. 06. 98 without security.

The plaintiff petitioner instituted an action praying for Judgment and decree in favour of the plaintiff petitioner for the recovery of Rs. 155,935/- with interest calculated at the rate of 25% on the said sum. The petitioner filed this action under section 53 of the Civil Procedure Code claiming that the respondent had issued ten cheques in favour of the petitioner company as averred in the plaint for the fertilizer supplied to the respondent during the period commencing from 19. 06. 96 to 04. 12. 96.

On 21. 01. 98 the learned District Judge having been satisfied with the plaint, affidavit and documents of the petitioner issued summons returnable on 19. 03. 98. On 17. 03. 98 the respondent had filed an affidavit seeking permission from court to appear and defend the action. At the inquiry parties made oral and written submissions and thereafter learned District Judge made his order on 19. 05. 98 permitting the respondent to file his answer on or before 29. 06. 98 without paying to court the sum mentioned in the summons or giving any security there for. The reasons for the order of the learned District Judge is as follows: "වර්තමාන නඩුවේ තත්ත්වය බැලීමේ දී දැනට පැමිණිලිකරු විසින් ඉදිරිපත් කර ඇති වෙක්පත් වල මතුපිට බැඳු බැල්මට යම් යම් වෙනස් කිරීම් කර ඇති බව පෙනී යන බැවිනුත්, එම වෙනස් කිරීම් සහ එහි සඳහන් කෙටි යෙදුම් වලින් ගිණුමේ මුදල් නොතිබූ බවට කෙලින්ම අදහසක් ගැනීමට නොහැකි බැවිනුත්, මේ අවස්ථාවේ දී ගිණුමේ මුදල් නොතිබිය දී විත්තිකරු විසින් මෙම වෙක්පත ලියා ඇති බවට එක විටම නිගමනයට පැමිණිය නොහැක. මෙම තත්ත්වයන් විත්තිකරුට අගරුවීමේ දැන්වීම නොයැවීමක් විභාග කළ යුතු විසඳනාවක් (triable issue) යන තත්ත්වයන් සැලකීමේ දී වර්තමාන නඩුවේ දී විත්තිකරුට කොන්දේසි විරහිතව මෙම නඩුවට ඇතුළුව විත්ති වාචික ඉදිරිපත් කිරීමට

ඉඩදීම යුක්ති සහගත බව පෙනේ. මේ අනුව කොන්දේසි විරහිතව මෙම නඩුවේ උත්තර ගොනු කිරීමට විනිතිකරුව ඉඩ දීමට මම නිරණය කරමි.”

Learned counsel for the plaintiff petitioner submitted that the plaintiff petitioner presented ten cheques for payment to the Sampath Bank, Anuradhapura branch and some of the cheques were returned to the plaintiff petitioner with the endorsement “Refer to Drawer” and some cheques were returned with the endorsement “Payment stopped by Drawer” and another cheque was returned with the endorsement “Effects not Realised”. It is to be noted at this stage that some of the cheques which were dated 19.06.96 were tendered for payment on 14.11.96 i. e. about five months after the dates stated on these cheques. Some cheques which were dated 20.06.96 were tendered for payment on 01.11.96. Another cheque dated 06.07.96 was tendered for payment on 25.10.96. Likewise most of the cheques were tendered for payment long after the dates given in the cheques. Although the plaintiff petitioner in his plaint averred that these cheques had been returned by the Bank indicating the non-availability of money in the account of the defendant respondent, five cheques were returned with the endorsement “Payment stopped by the Drawer”. Learned counsel for the plaintiff petitioner submitted that it was not necessary for the plaintiff petitioner to give notice of dishonour to the defendant respondent, as required under section 48 of the Bills of Exchange Ordinance. The learned counsel contended that the learned District Judge had erred in law by coming to the conclusion that it was necessary to ascertain the reasons for the defendant respondent to countermand the cheques and also to ascertain whether there were sufficient funds in the Bank account to meet the payments on the ten cheques and thereby learned District Judge had decided to inquire into the merits of the defendant respondent’s affidavit. Learned counsel further submitted that the issuance of cheques without funds in the account has now been declared an offence punishable under section 25 of the Debt Recovery (Special Provisions) Act No. 2 of 1990 and clearly it has indirectly amended the relevant provision of the Bills of Exchange Ordinance, namely sections 48 and 75.

Learned counsel for the defendant respondent submitted that in the instant case according to the journal entries of the District Court what had been produced are photocopies of documents violating section 705 (1) of the CPC and none of these documents have been served on the defendant. It was further contended that the plaintiff company had not stated that the sum claimed is justly due and that the plaint did not accompany an affidavit to the effect that the instruments were produced and therefore has acted in violation of the above section. He contended that the non compliance with the above imperative provisions are fatal to the issue of summons. He further submitted that the important triable issue is whether the notice of dishonour was given to the defendant and as this requirement had not been complied with leave to defend should be given.

Learned counsel for the defendant respondent submitted that the plaintiff petitioner has not complied with rule 3(1) of the Supreme Court rules, in that all the relevant proceedings had not been filed and that there is no proper affidavit by the plaintiff filed with the plaint.

According to section 705 (1) of the Civil Procedure Code the condition precedent to the issue of summons is that the documents on which the action is based must on presenting the plaint, be produced to the court and that the plaintiff must make an affidavit that the sum which he claims is justly due to him from the defendant. In the instant case the documents marked as P1 to P12A are only the copies of the documents on which this action is based and further a minute on the first page of the case record of the District Court states that stamps have not been tendered to court. The minute is as follows:-

ඉදිරිපත් කර ඇති ලේඛණවලට, දිවුරුම් පෙන්වීමට මුද්දර සපයා නැත. සපයන්න. රු. 6000/-.

Further although in the plaint it is stated that the documents marked (පැ 1 - පැ 12 අ) are being tendered along with the plaint, according to a minute in the record, only

photostats of P1 to P11 have been tendered. The relevant minute is as follows:-

“ඡායා පිටපත් පැ 1 - පැ 11 ලෙස ඉදිරිපත් කරයි.”

P12 and P12A had not been tendered.

In view of the above mentioned facts, it is abundantly clear that the plaintiff had not complied with the imperative provisions in section 705 (1) of the Civil Procedure Code. As the instruments had not been properly stamped, the court should not have issued summons under section 705 (2).

It was held in *Wijesinghe vs. Perera*⁽¹⁾ that in order to entitle a person to sue under Chapter 53 of the Civil Procedure Code, it is not sufficient to set out in the affidavit in support of the plaint merely that an amount is due on the instrument sued upon, but it must be stated that the sum claimed is “justly due”. In *Paintathain vs. Nadar*⁽²⁾ it was held that it is sufficient if the facts set out in the affidavit show that the sum claimed was rightly and properly due.

In an action by way of summary procedure the defendant has no right to appear or defend the action unless he obtains leave from the Court for the purpose. If he defaults in obtaining leave to appear the plaintiff is entitled to a decree for any sum not exceeding the sum mentioned in the summons, with interest up to the date of the payment and costs.

According to section 704 (2) of the Civil Procedure Code the defendant cannot be required as a condition of his being allowed to appear and defend, to pay 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 his good faith. In *Ramaswamy Chetty vs. U. L. Marikar*⁽³⁾ it was held, where the defence set out by the defendant appears on the face of his affidavit to be good in law and no reasonable doubt exists as to the *bona fides* of the defence, it is the duty of the court to permit him to appear and defend without security.

In *Izadeen & Co. vs. Wimalasuriya* ⁽⁴⁾ it was held, that the defendant was entitled to defend the action unconditionally, where of the two promissary notes sued on the claim, one of them was admitted by the defendant who, however, pleaded that the other had been discharged by grant of a fresh note which had not matured.

In the instant case the learned District Judge has given his reasons for allowing the defendant to defend the action unconditionally. On a perusal of the provision of the Civil Procedure Code it is clear that the legislature had intended to give the Judge in every such case the discretion as to imposing terms with which the Appeal Court should not interfere.

In the instant case the defendant respondent has stated that he countermanded payment as the plaintiff petitioner refused to continue the supply of fertilizer. Whether the defendant respondent issued these cheques without sufficient funds in his account is a matter to be determined by the court.

The learned District Judge held that the verification of the defendant respondent's current account to ascertain whether there was sufficient funds to meet the payments in respect of the ten cheques is a matter to be ascertained by the court and therefore that it was necessary to know reasons for the defendant respondent to countermand payment on the said cheques. Therefore the learned District Judge held that the non-issuance of the notice of dishonour by the plaintiff petitioner to the defendant respondent was a triable issue under section 706 of the Civil Procedure Code and it permitted the defendant respondent to appear and defend his case unconditionally.

On a consideration of section 704 (2) and 706 of the Civil Procedure Code, it appears that when the defendant who swears to a fact which, if true, constitutes a good defence, he must be allowed to defend unconditionally unless there is something on the face of the proceedings which lead the court to doubt the *bona fides* of the defendant. According to section

73 of the Bills of Exchange, a cheque is a Bill of Exchange drawn on "Banker payable on demand." Sections 74 (1) states that, where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the Banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such Banker to a larger amount than he would have been had such cheque been paid. According to Section 74 (2), in determining what is a reasonable time regard shall be had to the nature of the instrument the usage of the trade and of Bankers, and the facts of the particular case. In the instant case taking into consideration the defence taken by the defendant respondent that the plaintiff petitioner refused to continue the supply of fertilizer and the delay in presenting some of the cheques for payment, one might come to the conclusion that it being a business transaction that there is a good defence to be triable by court.

According to section 75 of the Bills of Exchange the duty and authority of a Banker to pay a cheque drawn on him by his customers are determined by (a) countermand of payment; (b) notice of the customer's death. In the instant case it is not clear whether the cheques were drawn without sufficient funds in the Bank as the drawer had stopped payment regarding certain cheques on the basis that the plaintiff petitioner refused to continue the supply of fertilizer. In such a situation the drawer is entitled to notice of dishonour unless such notice is excused or waived. In view of the defence taken by the defendant, one cannot come to the conclusion whether the dishonour is due to the absence of effects in the Banker's hand or whether payment has been countermanded due to the refusal to continue the supply of fertilizer. Further there is no material to conclude that there was an agreement between the parties on the mode of presenting the cheques for realization. It may be that the plaintiff-petitioner should present the

cheques for realization only after he supplied the fertilizer to the defendant-respondent and in such case evidence could be led only at the trial stage.

When one considers the above facts it is clear that the defence has raised a triable issue and in such an event leave must be given unconditionally. In the instant case the learned District Judge has exercised his discretion on sound judicial grounds. One cannot say that he has exercised his discretion arbitrarily. In such an event an appeal will not be entertained by the Court of Appeal. On a perusal of the reasons given by the learned District Judge one cannot say that he has exercised his discretion arbitrarily or perversely.

It is true that the issuing of cheques without funds in the account had been declared an offence punishable under section 25 of the Debt Recovery (Special Provisions) Act No. 02 of 1990. The question whether the cheques were issued without funds in the account is a triable issue where the learned District Judge has to come to a conclusion on the evidence led before him. It should be mentioned here that the provision under section 704 (2) of the Civil Procedure Code should not be made use of as a punishment for not honouring one's obligation and the words "unless the Court thinks his defence not to be *prima facie* sustainable or feels reasonable doubt as to his good faith" means that the learned trial Judge has the discretion to decide the question whether the defendant should be allowed to appear and defend without security.

In the instant case the learned District Judge has exercised his discretion on valid grounds. I would therefore affirm the order of the learned District Judge and dismiss the Leave to Appeal and the application for revision with taxed costs payable by the plaintiff-petitioner to the defendant-respondent.

J. A. N. DE SILVA, J. - I agree.

Application dismissed.