SENEVIRATNE AND ANOTHER VS LANKA ORIX LEASING COMPANY LTD

COURT OF APPEAL
WIMALACHANDRA, J.
CALA 191/4
D.C. COLOMBO 36095/MS
JULY 16 AND
AUGUST 24, 2004

Debt Recovery (Special Provisions) Act, No. 2 of 1990 - Amended by Act, No. 9 of 1990 and Act, No. 9 of 1994 - Section 6(2) affidavit - Averment "justly due" absent - Triable issue - Security - Is it imperative ? - Civil Procedure Code, section 705 - High Court of the Provinces (Special. Provisions) Act, No. 10 of 1996, section 2 - Does it oust the jurisdiction of the District Court ? - Bills of Exchange Orinance, sections 27,30, 39(1), 45 and 88(1) provisions not followed - Existence of conditions - Presentment - Previous letters not replied - Is it an admission ?

The plaintiff respondent instituted action in the District Court of Colombo, upon an on demand promissory note under the Debt Recovery (Special Provisions) Act (D.R. Act) to recover a sum of Rs. 4 million with interest. Decree nisi was entered and it was served on the defendants. The defendents filed objections and moved for the dismissal of the action or in the alternative sought leave to appear and defend unconditionally. The trial court directed the defendants to deposit half the sum claimed as a pre-condition to defend the action. It was contended by the defendant petitioner that :

(i) the alleged cause of action falls within the Commercial High Court of Colombo - (High Court of the Provinces (Special Provisions) Act) and hence the District Court has no jurisdiction.
(ii) the affidavit is not valid;
(iii) the plaint and affidavit do not contain averments to the effect that the sum claimed is justly due;
(iv) Provisions of Section 27or Section 28 of the Bills of Exchange ordinance have not been followed.
(v) the plaint does not disclose a valuable consideration; and
(vi) the Promissory Note is not valid.

HELD:

(i) An action instituted under the Debt Recovery (Special Provisions) Act, as amended, falls outside the jurisdiction of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996—section 2(1). The Debt Recovery Act has provided for a special procedure for the recovery of debts by lending institutions.

(ii) It is not essential that the plaintiff should actually use the word "justly" in his affidavit. If the affidavit substantially complies with the requirements of section 705 and if the facts threrein set out show that the sum claimed was rightly and properly due it is in order.

(iii) As regards the objection that there is no averment with regard to the existence of consideration, the defendants had not denied their signature on the Promissory Note. It is never necessary to aver consideration for any engagement on a Bill or Note or to provide the existence of consideration.

(iv) The Promissory Note in question was an on demand Promissory Note; the defendants promised to pay the plaintiff at its registered office in Colombo, the plaintiff by its letter of demand of 8.1.2003, demanded the sums set out in the Promissory Note, to which the defendants did not reply–this amounts to presentment. "In business matters", if a person states in a letter to another, that certain facts exist, the person to whom the letter is written must reply if he does not agree with or means to dispute assertions; if not the silence of the latter amounts to an admission of the truth of the allegations in the letter".

Accordingly, the only possible conclusion, for the failure to reply to the letter of demand is that the amount stated is correct and the defendants have not repaid the sum stated in the Promissory Note.

(v) The defendant pettioners, have not denied the Promissory Note. There is nothing to show that they repaid the sum in the Promissary Note. The defendants have not dealt with the plaintiff's claim on its merit, but have soley depended on the regularity of the procedure and technical objections to the plaintiff's action. As the defendants have not disclosed a triable case, they are not entitled to be heard without obtaining leave to appear and defend.

(vi) The Debt Recovery Act, as amended, does not permit unconditional leave to defend the claim. The minimum requirement is the furnishing of security.

It is imperative that court has to order security, but court can use its discretion to determine the amount of security if the defendants disclose a defence.

APPLICATION for leave to appeal from an order of the District Court of Colombo.

Cases referred to :

1. *Paindathan vs. Nadar - 57NLR 101*
2. *Saravanamuttu vs. de Mel - 49 NLR 429*
3. *Carpen Chetty vs. Manilan - 3 Cey. LR 11*
4. *Mather Saibo vs. Crowther - 3 ey. LR 31*
5. *Sadadeen vs. Meeresa - 3 CLW 138*
6. *People's Bank vs. Lanka Queen Int'l (Pvt) Ltd., (1999) 1 Sri LR 233*
7. *National development Bank vs. Chrys Tea (Pvt) Ltd., and another (2002) 2 Sri L.R. 206*

S. P. Srikantha for defendant petitioner respondents.
Hiran de Alwis for plaintiff respondents respondents.

cur. adv. vult.

February 02, 2005
WIMALACHANDRA, J.

This is an application for leave to appeal from the order dated 19.05.2004 of the Additional District Judge of Colombo.

Briefly, the facts relevant to this application are as follows :

The plaintiff-respondent-respondent (plaintiff) instituted action bearing No. 36095/MS in the District Court of Colombo upon an on demand

promissory note marked "CA3" against the defendant - petitioners - pertitioners (defendants) under the Debt Recovery (Special Provisions) Act, No. 2 of 1990, as amended by Act, No. 9 of 1994, to recover a sum of Rs. 4,000,000 together with interest thereon at 21% and other charges.

The Additional District Judge of Colombo entered decree *nisi* in favour of the plaintiff and it was served on the defendants. The defendants filed objections by way of petition and affidavit, and moved for the dismissal of the plaintiff's action or in the alternative sought leave to appear and defend unconditionally. The learned Additional District Judge by her order dated 19.5.2004 directed the defendants to deposit half the sum claimed by the plaintiff as a precondition to defend the action. The present application to this Court is against the said order of the Additional District Judge.

In this application, the counsel for the defendants in his written submissions took the position that the said order of the learned Judge is erroneous for the following reasons:

(i) the plaintiff cannot have and maintain this action as the alleged cause of action falls within the jurisdiction of the Commercial High Court of Colombo in terms of the provisions of the High Court of Provisions (Special Provisions) Act, No. 10 of 1996 and hence the District Court has no jurisdiction to hear and determine the plaintiff's action.

(ii) the affidavit of the plaintiff is not valid.

(iii) the plaint and the affidavit do not contain averments to the effect that the sum claimed by plaintiff is "justly due".

(iv) the plaintiff has not followed the provisions in sections 27 and 88 of the Bills of Exchange Ordinance.

(v) the plaint does not disclose a valuable consideration.

(vi) the promissory note which is the subject matter of this action is not valid.

The first objection of the defendants is based on the question of jurisdiction. The learned counsel for the defendant submitted that the nature

of the transaction between the plaintiff and the defendants falls within the ambit of a commercial transaction and is for a sum exceeding Rs. 3 million as set out in the schedule to section 2 of the High Court of the Provinces (Special Provinsions) Act No. 10 of 1996.

It is to be noticed that when the learned counsel for the defendants made the aforesaid submission he conveniently disregarded the first schedule to this Act. Section 2(1) of the Act states that every such Provincial High Court, with effect from the date that the Minister may appoint by order published in the Gazette, shall have;

Exclusive jurisdiction and shall have cognizance of and full power to hear and determine, in the manner provided for by written law, all actions, applications and proceedings specified in the first schedule to this Act.

The first schedule reads thus :

(1) all actions where the cause of action arisen out of commercial transactions(including causes of actions relating to banking, the export or import merchandise, services affreightment, insurance, mercantile agency, mercantile usage and the construction of any mercantile document) in which the debt, damage or demand is for a sum exceeding one million rupees or such other amount as may be fixed by the Minister by notification in the Gazette **excluding actions instituted under the Debt Recovery (Special Provisions) Act, No. 2 of 1990** (emphasis added)

One million Rupees referred to in the first schedule has been increased to Three Milion Rupees by the Minister, by order in the Gazette.

Therefore it is very clear that actions instituted under the Debt Recovery (Special Provisions) Act, No. 2 of 1990 as amended by Act, No. 9 of 1994 falls out side the jurisdiction of the High Court of the Provinces Act, No. 10 of 1996. The Debt Recovery (Special Provisions) Act has provided for a special procedure for the recovery of debts by lending institutions.

In the circumstances the learned judge who made the aforesaid order and the District Court of Colombo in which the learned Judge presided, has jurisdiction to hear and determine the plaintiff's action.

The next objection raised by the counsel for the defendants is that the affidavit is not valid. The learned Counsel submitted, as required by section

705 of the Civil Procedure Code, that there is no averment stating that the sum which the plaintiff claims is justly due to him from the defendants. It had been held in earlier decisions, it is not enough that the affidavit in support of the plaint merely states that an amount is due on the instrument sued upon, but it must be stated that the sum claimed is "justly due". However in the case of *Paindathan vs. Nadar*[1] it was held by a Divisional Bench that it is not essential that the plaintiff should actually use the word "Justly" in his affidavit. Upon a persual of the affidavit filed by the plaintiff it appears that the sum claimed by the plaintiff is rightly due. It was also held in the case of *Paindathan Vs. Nadar* (supra) that the affidavit will substantially comply with the requirements of the section 705 of the Code if the facts therein set out show that the sum claimed was rightly and properly due. Accordingly, in my opinion there is no merit in this objection raised by the defendant.

The defendants have taken the objection that there is no avermnet with regard to the existence of consideration. However they have not denied their signature on the promissory note. Section 30(1) of the Bills of Exchange Ordinance states as follows :

> " Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value".

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

> "If a man seeks to enforce a simple contract, he must, in pleadings, aver that it was made on good consideration, and must substantiate that allegation of proof. But to this rule bills and 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 consideration ....."

The learned counsel for the defendants also submitted that the plaintiff has failed to present the promissory note for payment to the defendants as required by section 45 and section 88(1) of the Bills of Exchange Ordiance.

In the promissory note which is the subject matter of this action it states that, on demand the defendants promise to pay the plaintiff at its

registered office in Colombo. Accordingly, the plaintiff by its letter of demand dated 8.1.2003 demanded the sums set out in the promissory note, to which the defendants did not reply. This alone amounts to presentment.

Byles on Bills of Exchange 21st edition at page 220 states that if a bill is accepted payable at a banker's, which banker happens to become the holder at its maturity, that fact alone amounts to presentment, and no other proof is necessary.

The plaintiff duly and properly presented the promissory note for payment along with a demand for payment to the defendants through registered post by letter dated 8.1.2003. There was no reply to the said letter of demand. Further there was no challenge as to the correctness of the promissory note. In this regard I refer to the Supreme Court case of Saravanamuttu Vs. De Mel[2] where Dias, J. held that in business matters, if a person states in a letter to another that certain state of facts exists, the person to whom the letter is written must reply if he does not agree with or means to dispute the assertions. If not, the silence of the latter amounts to an admission of the truth of the allegations contained in the letter. Accordingly, the only possible conclusion for the faliure to reply to the letter of demand is that the amount stated in that letter is correct and that the defendants have not re-paid the sum stated in the promissory note.

It is to be observed that in the petition and the affidavit filed by the defendants in the district Court, the promissory note has not been denied and there is nothing to show that they repaid the sum stipulated in the promissory note. In their petition the defendants have taken several technical objections mainly with regard to the regularity of the procedure.

K.D.P. Wickremasinghe in his book "Civil Procedure in Ceylon" 1971 edition at page 318, citing the cases, *Carpen Chetty Vs. Manilal*[3], *Mather Saibo vs. Crowther*[4] and *Sadadeen Vs. Meerasa*[5] states as follows :

> "In an action under the summary procedure on a liquid claim the defendant cannot be heard or allowed to take any objection, as to the regularity of the procedure, without having first obtained the leave of the Court to appear and defend. A judge cannot dismiss a summary action on a liquid claim on the merits of the case before granting the defendant leave to defend."

In the circumstances, I am of the view that the defendants cannot take objections at this stage as to the regularity of the procedure without first obtaining the leave of Court to appear and defend the action.

It is to be noted that the defendants have not dealt with the plaintiff's claim on its merit and they have solely depended on the regularity of the procedure and technical objections to the plaintiff's action. The defendants have not disclosed a triable issue. Accordingly, the defendants are not entitled to be heard without first obtaining leave to appear and defend.

Section 6(2) of the Debt Recovery (Special Provisions) Act, No. 2 of 1990 was amended by Act, No. 9 of 1994, and section 6(2) of the original Act was repealed and a new subsection was introduced. It reads thus:

> **6(2) The court shall upon the filing by the defendant of an application for leave to appear and show cause supported by affidavit which shall deal specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it, and after giving the defendant an opportunity of being heard, grant leave to appear and show cause against the decree *nisi*, either -**
>
> **(a) Upon the defendant paying into court the sum mentioned in the decree *Nisi* : or**
>
> **(b) upon the defendant furnishing such security as to the court may appear reasonable and sufficient for satisfying the sum mentioned in the decree *nisi* in the event of it being made absolute;or**
>
> **(c) Upon the court being satisfied on the contents of the affidavit filed, that they disclose a defence which is *prima facie* sustainable and on such terms as to security, framing and recording of issues, or otherwise as the court thinks fit".**

The defendants have filed this application against the impugned order of the learned Judge on the basis that they are entitled to unconditional

leave to appear and defend the action. In the case of *People's Bank V. Lanka Queen INT'L Private Ltd* [6] it was held that the amended section 6(2) (amended by Act, No. 4 of 1994) does not permit unconditional leave to defend the claim. The minimum requirement according to section 6(2) (c) is the furnishing of security.

In the aforesaid case De Silva J. has made a comprehensive analysis of section 6(2) as amended by Act, No. 9 of 1994. De Silva, J. observed at 237 and 238 thus :

> **"The new subsection clears any doubt that would have prevailed earlier in respect of the procedure a defendant has to follow in applying for leave to appear and show cause. On an examination of the amendment introduced in subsection 6(2) it is abundantly clear that the word "application" which appeared in the original section has been qualified with the following words : "Upon the filing of an application for leave to appear and show cause supported by affidavit". This shows that -**
>
> **(a) It is mandatory for the defendant to file an application for leave to appear and show cause.**
>
> **(b) such application must be supported by an affidavit which deals specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it.**
>
> **This section does not permit unconditional leave to defend the case as the defendant respondent has requested from the district Court. The minimum requirement according to subsection (c) is for the furnishing of security.**
>
> **If the defendant satisfies (a) and (b) above then the defendant should be given an opportunity of being heard. The court will have to decide on one of the three matters specified in the above section. They are :**

(a) The Court may order the defendant to pay into court the sum mentioned in the decree *Nisi*. Thus, even where the requirements as stated above are complied with, the court has the power and the authority to order the defendant to pay the full sum mentioned in the decree *Nisi* before permitting the defendant to appear and defend.

(b) Alternative to (a) above, the court can order the defendant to furnish security which, in the opinion of the court is reasonable and sufficient to satisfy the decree *nisi* in the event it being made absolute. The difference between this provision and the (a) above is that instead of paying the full sum mentioned in the decree *nisi*, it will be sufficient to the defendant to furnish security, such as banker's draft, and then defend the action.

(c) the third alternative is where the court is satisfied on the contents of the affidavit filed, that they disclose a defence which is *prima facie* sustainable and on such terms as to security; framing of issues or otherwise permit the defendant to defend the action. Thus, it is imperative that before the court acts on section 6(2)(c) it has to be satisfied;

i. With the contents of the affidavit filed by the defendant;

ii. that the contents disclose a defence which is *prima facie* sustainable; And

iii. determine the amount of security to be furnished by the defendant, and permit framing and recording of issues or otherwise as the court thinks fit.

In the case of *National Development Bank* vs. *Chrys Tea (Pvt.) Ltd.* and another [7] this Court held that;

(i) Under Section 6(2) (a) or 6(2)(b) the Court has no discretion to order security which is not sufficient to satisfy the sum mentioned in the decree *nisi*

(ii) Section 6(2)(c) is the only section which permits the Court discretion to order security which would be a lesser sum than the sum mentioned in the decree *nisi*.

It appears to me that it is imperative that even under section 6(2)(c) the Court has to order security, but the Court can use its discretion to determine the amount of security if the defendants disclose a defence. The Court has to be satisfied that the contents of the affidavit filed by the defendants disclose a defence against the claim made by plaintiff which is *prima-facie* sustainable.

In the instant case, the defendants have not disclosed a defence against the claim made by the plaint. The defendants' defence is mainly confined to technical objections and objections to the regularity of the procedure. The defendants have merely denied the plaintiff's claim. In my view mere denial is not sufficient when they have failed to respond to the letter of demand sent by the plaintiff demanding the said sum in the promissory note. In support of this view, I cited above the Supreme Court case of *Saravanamuttu Vs. De Mel* (supra) where it was held that in business matters, in certain circumstances, the failure to reply to a letter amounts to an admission of a claim made therein.

In the instant case the defendants have failed to raise a sustainable defence in their affidavit. That is the defendants have failed to disclose a defence which requires investigation and trial and not one which is summarily disposed of on the affidavits as done by the defendants in this case. The defendants have failed to deal with the plaintiff's claim on its merits. It is my considered view that the defendants have failed to disclose a plausible defence which ought to be tried by Court. It is my further view that the defendants are not entitled to unconditional leave on defences based on mere technical objections and evasive denials which have no strength to stand on their own. In any event, as pointed out by De Silva, J. in the case of *People's Bank vs. Lanka Queen International (Pvt) Ltd.,* (supra) section 6(2) (as amended by Act, No. 4 of 1994) does not permit unconditional leave to defend the claim; the minimum requirement according to section 6(2) (c) is for the furnishing of security determined by Court and the Court can exercise its discretion in determining the amount of security to be furnished by the defendant if he discloses a sustainable defence.

I would therefore affirm the order of the learned Additional District Judge dated 19.5.2004 and dismiss the defendants' application for leave to appeal with costs.

Application dismissed.