

**RANASINGHE**  
**v.**  
**ZUBAIR AND OTHERS**

COURT OF APPEAL  
JAYASINGHE, J. AND  
UDALAGAMA, J.  
CALA NO. 89/2000  
DC BANDARAWELA NO. 69/MS  
OCTOBER 04 AND 20, 2000

*Civil Procedure Code – S. 703, 704 (1) (2), 705 (1), 706 – Liquid claims – Is it imperative to annex to the plaint the original of the instrument which he is suing? – Triable issue?*

At the inquiry the defendant-respondents took up the objection that the original cheque was not produced in Court at the time of presenting the plaint as required under s. 705 (1) (Photocopy of the dishonoured cheque was annexed). The trial Judge held that the failure to produce the instrument on which the plaintiff relies as required by s. 705 (1) gave rise to a triable issue and the defendant-respondents were granted leave to appear and defend the action unconditionally.

On leave being sought.

**Held:**

- (1) It is unnecessary to annex the original of the instrument to the plaint. However, the plaintiff shall set out in his affidavit why the original instrument is not annexed to the plaint.

*Per Jayasinghe, J.*

"It must be had in mind that when the Civil Procedure Code was enacted in 1889, photocopying and other duplicating machines were unknown to Court. There has now arrived for Courts to recognise the scientific and technological progress and assimilate such progress into archaic legislation wherever possible so that such legislation will remain compatible with the emerging trends and to deal with complex and varied transactions."

- (2) A *prima facie* sustainable defence must be independent of the requirement set out in S. 705 (1) for S. 704 (2) and S. 705 (1) are distinct and independent of each other.

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

**Cases referred to :**

1. *Esquire (Garments) Industry Ltd. v. Sadhwani (Japan) Ltd.* – 1983 2 Sri LR. 242. (Not followed).
2. *Thilagaratnam v. Edirisinghe* – 1982 1 Sri LR 57.
- S. *Mahenthiran* with S. *Srikantha* for the plaintiff-petitioner.

*Faiz Musthapha*, PC with M. A. *Sumanthiran* for the defendant-respondent.

*Cur. adv. vult.*

March 02, 2001

**JAYASINGHE, J.**

The plaintiff-respondent-petitioner instituted action in the District Court of Bandarawela on 20. 04. 1999 against the defendant-petitioners-respondents on a cheque in terms of section 703 of the Civil Procedure Code. The respondents on 15. 06. 1999 sought leave of Court to appear and defend the plaintiff's action unconditionally. At the inquiry the respondents took up the objection that the original cheque was not produced in Court at the time of presenting the plaint as required under section 705 (1) of the Civil Procedure Code. The learned District Judge by order dated 24. 03. 2000 held that the failure on the part of the petitioner to produce before Court the instrument on which the plaintiff relies as required by section 705 (1) gave rise to a triable issue and accordingly the respondents were granted leave to appear and defend the action unconditionally. It is common ground that the cheque was not presented along with the plaint. However, the plaint filed on 20. 04. 1999 did have as an annexure a photocopy of the dishonoured cheque marked "A". Upon the action being journalised, the learned District Judge directed the original cheque to be tendered and it appears according to the journal entry of 11. 06. 1999 the plaintiff

has complied with the direction of Court by tendering the original cheque by way of a motion and also moving that the cheque be kept <sup>20</sup> in safe custody. According to the journal entry of 11. 06. 1999, Court has directed that summons be issued on the defendant-respondents in form 19.

**Section 703** provides that –

"All actions where the claim is for a debt or liquidated demand in money arising upon a bill of exchange, promissory note, or cheque, or instrument or contract in writing for a liquidated amount of money, or on a guarantee where the claim against the principal is in respect of such debt or liquidated demand, bill, note, or cheque, may, in case the plaintiff desires to proceed under this <sup>30</sup> Chapter, be instituted by presenting a plaint in the form prescribed by this Ordinance, but the summons shall be in the form No. 19 in the first Schedule, or in such other form as the Supreme Court may from time to time prescribe."

**Section 704 (1)** provides that –

"In any case in which the plaint and summons are in such forms respectively, the defendant shall not appear or defend the action unless he obtains leave from the court as hereinafter mentioned so to appear and defend; and in default of his obtaining such leave or of appearance and defence in pursuance thereof, <sup>40</sup> the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons, together with interest to the date of the payment, and such costs as the Court may allow at the time of making the decree."

**Section 704 (2)** provides that –

"The defendant shall not be required, as a condition of this being allowed to appear and defend, to pay into Court the sum

mentioned in the summons, or to give security thereof, unless the Court thinks his defence not to be *prima facie* sustainable, or feels reasonable doubt as to its good faith." 50

Once the plaintiff is before Court under section 703, section 704 (1) provides that the defendant shall not appear and defend the action unless he obtains leave from Court and 704 (2) allows the defendant to appear and defend unconditionally provided he could satisfy Court that there is a *prima facie* sustainable defence or is able to establish absence of good faith on the part of the plaintiff. Mr. Sumanthiran relied heavily on a judgment of G. P. S. de Silva, J. in *Esquire (Garments) Industry Ltd. v. Sadhwani (Japan) Ltd.*<sup>(1)</sup> where his Lordship G. P. S. de Silva, J. has held that –

"In any event the failure to produce the originals of the 60 documents at the time of the presentation of the plaint raises a triable issue . . . and the defendant should have been granted leave to appear and defend the action unconditionally."

It appears, however, that on a perusal of section 703 and section 704 that there is no requirement to produce the instrument along with the plaint. Form 19 provides that –

"Whereas the above named plaintiff has instituted an action against you in this Court under chapter . . . of the Civil Procedure Code for . . . rupees principal and interest (or . . . rupees, balance of principal and interest) due to him as payee (or indorsee) of a bill of exchange (or as the case may be: state the instrument on which the claim is made) ; of which a copy is hereto annexed." 70

The question for determination by this Court is whether there is an imperative requirement on the plaintiff to annex to the plaint the original of the instrument upon which he is suing.

**Section 705 (1)** provides that –

"The plaintiff who so sues and obtains such summons as aforesaid must on presenting the plaint produce to the Court the instrument on which he sues, and he must make affidavit that the sum which he claims is justly due to him from the defendant thereon." 80

It is pertinent at this stage to consider whether there is a nexus between 705 (1) and 704 (2). 704 (2) allows the defendant unconditional leave provided the defendant could satisfy Court that he has a defence *prima facie* sustainable and 705 (1) provides that – the plaintiff. . . must on presenting that plaint produce to the Court the instrument on which he sues. Can it be said that the failure to annex the original could be availed of by the defendant to come within 704 (2) on the basis that he has a *prima facie* sustainable defence. G. P. S. de Silva, J. in *Esquire Garments* assumed it to be so. 90

It is also necessary to mention that section 705 sets out two requirements. The requirements of section 705 is not satisfied by the plaintiff merely annexing to the plaint the instrument upon which he is suing. Additionally, he must make an affidavit stating that the sum which he claims is justly due to him from the defendant. It is, therefore, seen that the cause of action is set out in the affidavit and the instrument is only proof of what is set forth in the affidavit.

Mr. Mahenthiran submitted that the wording used in section 708 viz "any proceedings under this chapter the Court may" connotes that after the action has moved at a later stage the Court can call for 100 the original document and thus chapter 53 does not make a call for the instrument to be annexed when action is filed and submits that the phrase "Court may" invest in Court the discretion to summon the plaintiff to deposit the instrument in Court on a later date. Section 708 will have no meaning if there was a requirement to annex to the plaint the original of the instrument at the time action is instituted. "*Prima facie* sustainable" defence in section 704 (2) cannot import the requirement of producing the instrument as set out in section 705

(1) as a *prima facie* sustainable defence. A *prima facie* sustainable defence must be independent of the requirement set out in section 705 (1) for section 704 (2) and section 705 (1) are distinct and independent of each other.

It is also relevant to consider the application of section 706. Whilst section 704 (2) allows the defendant to appear and defend unconditionally provided he can satisfy Court that he has a *prima facie* sustainable defence or satisfies Court the absence of good faith on the plaintiff, section 706 deals with when leave to defend may be granted. Section 706 has two limbs. Firstly, the Court shall upon the application by the defendant grant leave to appear and defend the action upon the defendant paying into Court the sum mentioned in the summons or alternatively grant leave to appear and defend on such terms as to security . . . or otherwise as the Court thinks fit. Under section 706 a discretion is vested in Court as to whether or not to grant security while section 704 (2) allows a defendant to appear and defend unconditionally upon the defendant being able to satisfy Court that he has a *prima facie* sustainable defence. The requirement for tendering the instrument on presenting the plaint is found in section 705 (1) and as stated before it is proof of the amount due to the plaintiff. The plaintiff is required to make an affidavit stating that the sum which he claims is justly due. It is unnecessary to annex the original of the instrument to the plaint. However, the plaintiff shall set out in his affidavit why the original instrument is not annexed to the plaint.

It must be had in mind that when the Civil Procedure Code was enacted in 1889, photocopying and other duplicating machines were unknown to Court. Time has now arrived for Courts to recognise the scientific and technological progress and assimilate such progress into archaic legislation wherever possible so that such legislation will remain compatible with the emerging trends and to deal with complex and varied transactions Courts are called upon to adjudicate. L. H. De Alwis, J. in *Thilagaratnam v. Edirisinghe*<sup>(2)</sup> obliquely recognised the

fact that "instrument on which he sues" in section 705 (1) includes a photocopy when he stated. "The learned Judge has evidently come to the conclusion that the failure to annex the cheque or give its contents in the summons in form 19 is not a very material omission and I see no reason to disagree with him. For the petitioner always had the opportunity of examine the cheque or the photostat copy annexed to the plaint after it has been filed in Court and could not have been prejudiced."

It must also be stated with due respect to His Lordship<sup>160</sup> G. P. S. De Silva, J. that a *prima facie* sustainable defence as found in section 704 (2) and section 706 ought to be a defence which entitles the defendant to urge Court to dismiss the plaintiff's action and not a mere technicality which is curable. Section 708 allows Court the discretion "to order the instrument on which the action is founded to be forthwith deposited with an officer of Court." His Lordship in *Esquire Garments* sought to enlarge the scope of section 704 (2) and section 705 (1).

I am of the view that the requirements of section 705 would be satisfied if the plaintiff upon presenting the plaint annex to it a<sup>170</sup> photocopy of the dishonoured cheque and tenders it to Court under section 708 at a later stage. The plaintiff shall nevertheless aver why the original instrument is not annexed.

For the foregoing reasons I set aside the order of the learned District Judge dated 24. 03. 2000 and allow the appeal with costs fixed at Rs. 5,250.

**UDALAGAMA, J.** – I agree.

*Application allowed.*