

1960

*Present* : Weerasooriya, J., and T. S. Fernando, J.ISSADEEN & COMPANY LTD., Appellant, and WIMALASURIYA,  
Respondent*S. C. 105—D. C. Matara, 1355**Civil Procedure Code—Action by summary procedure on a liquid claim—Disclosure of prima facie defence in regard to part of claim—Defendant's right to defend unconditionally—Sections 704 (2), 706.*

Plaintiff filed action by way of summary procedure under Chapter 53 of the Civil Procedure Code for the recovery of a sum of Rs. 20,000. The Court did not consider as lacking in good faith the defence that only a sum of Rs. 7,600 was due to the plaintiff.

*Held*, that the defendant was entitled to be allowed to appear and defend the action without being called upon to furnish any security at all. There is nothing in section 704(2) of the Civil Procedure Code which precludes its application to a case where a prima facie sustainable defence is disclosed in regard to only a part of the claim while the rest of it is admitted.

**A**PPPEAL from a judgment of the District Court, Matara.

*C. Ranganathan*, with *D. R. P. Goonetilleke*, for the Defendant-Appellant.

*S. D. Jayasundera*, for the Plaintiff-Respondent.

*Cur. adv. vult.*

May 27, 1960. WEERASOORIYA, J.—

The plaintiff-respondent filed this action by way of summary procedure under Chapter L111 (Sections 703-711) of the Civil Procedure Code for the recovery of a sum of Rs. 20,000/00 alleged to be due on two cheques drawn by the defendant-appellant for Rs. 18,000/- and Rs. 2,000/- the payment of which was subsequently stopped by the drawer.

In the affidavit filed in support of the defendant's application for leave to appear and defend the action, it was stated, *inter alia*, that the two cheques were given as security for a loan of Rs. 10,000/- from the plaintiff, that out of this loan a sum of Rs. 2,400/- was deducted in advance as interest and a like amount was subsequently paid by the defendant in reduction of the principal, leaving only Rs. 7,600/- owing to the plaintiff on the transaction. The defendant did not bring into Court the sum admitted to be due on the ground that the plaintiff was not yet entitled to it as the period in respect of which interest was deducted in advance had not elapsed. The affidavit is, however, silent as to what that period

is, or at what rate interest was deducted in advance, nor does it state that the defendant holds any receipt or other documentary evidence in support of the deduction of interest or part payment of principal as alleged.

After inquiry, the District Judge made order allowing the defendant leave to appear and defend, subject to security being given in a sum of Rs. 7,000/- in cash or double that amount in land. It is against this order that the defendant has filed the present appeal.

No reasons have been given by the District Judge for requiring security to be given, nor has he stated how the amount of the same was arrived at. Notwithstanding, however, the somewhat unsatisfactory nature of the affidavit filed by the defendant, the order of the learned Judge would appear to indicate that he did not consider as lacking in good faith the defence that only a sum of Rs. 7,600/- is due to the plaintiff. The short point that arises for decision on this appeal is, therefore, whether in the circumstances the defendant should not have been allowed to appear and defend the action without being called upon to furnish any security at all.

Mr. Ranganathan who appeared for the defendant-appellant, relied on Section 704(2) of the Civil Procedure Code which reads as follows :—

“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 to be prima facie sustainable, or feels reasonable doubt as to its good faith.”

Mr. Ranganathan submitted that there is nothing in Section 704(2) which precludes its application to a case where a prima facie sustainable defence is disclosed in regard to only a part of the claim while the rest of it is admitted. Assuming that the learned District Judge had no reasonable doubt about the good faith of the defence disclosed in the present case, I think that Mr. Ranganathan's submission is entitled to prevail. Under the corresponding provisions of the law in England (see Order XIV, rule 4) judgment may be given in favour of the plaintiff for a part of his claim which is admitted, and the defendant allowed to defend as to the residue of it. We have no such provision in Chap. LIII. But, in my opinion, this does not mean that where as against a part of the claim a prima facie sustainable defence is disclosed, the good faith of which is not in doubt, the defendant should be ordered to deposit the sum which is admitted to be due, or give security in respect of it, as a condition precedent to his filing answer. As pointed out by Mr. Ranganathan, such an order would virtually prevent the defendant from defending himself unconditionally, as he is entitled to do under section 704(2), against that part of the claim in respect of which he has a

prima facie sustainable defence. I am fortified in the view I have taken by the decision in *Annamalay Chetty v. Ali Marikar*<sup>1</sup> where, of two promissory notes sued on, the claim on one of them was admitted by the defendant who, however, pleaded that the other had been discharged by the grant of a fresh note which had then not matured. It was held in appeal that the defendant was entitled to defend the action unconditionally.

As regards the Indian case of *Alla Venkata Kistnaya v. Allapati Ramaswami*<sup>2</sup> cited by Mr. Jayasundere who appeared for the plaintiff-respondent, where the defendant was ordered to bring into court the amount admitted by him as due to the plaintiff although as against the rest of the claim he appeared to have a good defence, it is to be noted that the relevant law in India (which is Order 37, rule 3) has nothing corresponding to Section 704(2) of our Civil Procedure Code which expressly prohibits a defendant from being put on terms unless his defence is not prima facie sustainable or unless the Court feels reasonable doubt as to its good faith. Order 37, rule 3 of the Indian Civil Procedure Code, on the other hand, appears to confer a wide discretion in the Court to impose conditions even where a valid defence is disclosed and is similar in its terms to section 706 of our Code. Mr. Jayasundere contended that section 704(2) should be read subject to section 706, and that under the latter section the Court has a discretion to impose conditions even in a case where there is a defence which is prima facie sustainable and as to the good faith of which there is no reasonable doubt. But regarding this same argument Hutchinson, C.J., stated nearly half a century ago in *Rengasamy v. Pakeer*<sup>3</sup> that it was too late to urge it, in view of two previous decisions to which he referred, one of them being *Annamalay Chetty v. Ali Marikar* (*supra*).

The order appealed from is set aside and the defendant is allowed to file answer without giving security. The defendant will be entitled to his costs of appeal and of the inquiry in the Court below.

T. S. FERNANDO, J.—I agree.

*Order set aside.*

<sup>1</sup> (1901) 2 *Browne's Reports* 267.

<sup>2</sup> (1935) *A. I. R. Madras* 302.

<sup>3</sup> (1911) 14 *N. L. R.* 190.