

1936

*Present : Dalton S.P.J. and Koch J.**SILVA et al. v. WEERASURIYA.**184—D. C. Galle, 34,359.*

Liquid claim—Action on promissory note payable on demand—Endorsement on note by payee—Agreement not to sue for two years—Defence prima facie sustainable—Civil Procedure Code, ss. 705 and 706.

Where a promissory note payable on demand contained an endorsement on the back signed by the payee to the following effect :

“This promissory note is given on the condition that the same shall not be filed in Court or sued upon by the payee or any holder thereof within a period of two years from the date thereof, and I undertake not to do so till the expiration of the said period.”—

Held (in an action on the note under the provisions of Chapter LIII. of the Civil Procedure Code), that leave to defend should be granted unconditionally.

APPEAL from an order of the District Judge of Galle.

N. Nadarajah, for defendants, appellants.

Keuneman K.C. (with him *C. Ismail*), for plaintiff, respondent.

Cur. adv. vult.

July 9, 1936. DALTON S.P.J.—

The plaintiff sought, under the provisions of Chapter LIII. of the Civil Procedure Code, to recover from the defendants, husband and wife, the sum of Rs. 10,117.50, being principal and interest alleged to be due on a promissory note for Rs. 9,000, dated July 8, 1933, signed by the defendants in favour of the plaintiff, and further interest at 15 per cent. from the date of the action.

The promissory note is in the following terms, and bears a 5-cent stamp duly cancelled :—

Galle, 8th July, 1933.

Rs. 9,000.

On demand we, the undersigned G. T. E. de Silva and B. Florence de Silva of Magalle in Galle, promise to pay to William Weerasuriya of Magalle or order, the sum of Rupees Nine Thousand only.

Currency for value received, with interest thereon at the rate of 15 per centum per annum from the date thereof.

Witnesses :

T. Weerasuriya
(and another)

(Sgd.) G. T. E. de Silva.
(Sgd.) B. Florence de Silva

On the back of it is written the following sentence, apparently in the first defendant's handwriting, and signed by the payee, the plaintiff :—

“This promissory note is given on the condition that the same shall not be filed in Court or sued upon by the payee or any holder thereof within a period of two years from the date hereof, and I undertake not to do so till the expiration of the said period. The said period of two years shall be counted from the date hereof.

“ (Sgd. in Sinhalese) William Weerasuriya.
8. 7. 33.”

The defendants applied to the Court for leave to defend and filed affidavits in support thereof. The first defendant admitted signing the note, and states he gave it in renewal of a debt he owed the plaintiff. Certain payments have been made thereon. He states further that the sum mentioned in the note includes interest on the sum that was due; the plaintiff was therefore seeking to recover compound interest. He further alleged that the plaintiff could not maintain the action as the note was not properly stamped.

The second defendant admitted signing the note, but denied she had received any money on it from the plaintiff, nor had she made any payments as alleged by him. She further alleged that the note was not properly stamped and that it was a fictitious note within the meaning of the Money Lending Ordinance, No. 2 of 1918.

The learned District Judge granted each defendant leave to defend, on each giving security in the sum of Rs. 5,000. They now appeal from that order.

The chief matter dealt with in the order of the Court below is the nature and effect of the statement signed by the plaintiff endorsed on the back of the note. If the effect of it is that the note is not a note payable on demand, then a question immediately arises as to the sufficiency of the stamp upon it, and if it is not duly stamped, whether it is admissible in evidence. In my view of the matter, the nature and effect of that endorsement to some extent depends upon evidence, for example, as to how and when the endorsement came to be made, which must be put before the Court. It must appear of course to the Court, under the provisions of section 705 of Chapter LIII., that the instrument on which the plaintiff sues is properly stamped, before summons is ordered to be served on the defendants, but the learned Judge by his order here is of course not acting under the provisions of that section. He has in these proceedings under section 706, merely from a perusal of the note and the endorsement, made certain presumptions and says he is inclined to hold that the payee could have disregarded his endorsement. He holds in this way that the note is an "on demand" note and is properly stamped.

He does not deal with the other defences raised in the affidavits under the provisions of the Money Lending Ordinance, and he nowhere in his order states that he does not think the defences or any of them are not *primâ facie* sustainable. Nor does he say that he feels any doubt as to the good faith of the defences raised.

The provisions of section 706 of the Civil Procedure Code must be read with the terms of the proviso to section 704. The latter may have been overlooked, in view of what I have said above.

So far as the question of the stamping of the note is concerned, it is no part of the functions of this Court to decide in this proceeding whether or not the note was properly stamped. Several of the authorities cited to us may no doubt be of assistance to one side or the other in the course of a trial. There is here a matter which, in my opinion, entitles the defendants to leave to defend. The only question to be decided by us is whether or not the Court is of opinion that that defence or other defences raised is *primâ facie* sustainable. As the question of the

admissibility or otherwise in evidence of the promissory note must be decided by the trial Judge in the event of a trial, it is desirable, in the circumstances, since, in my opinion, leave to defend unconditionally must be allowed, for this Court to say no more than this that it is impossible to say on the plaint and promissory note filed that the Court thinks that the defences or some of them are not *primâ facie* sustainable. There is further no suggestion as to the want of good faith of the defences raised.

In my opinion, therefore the learned trial Judge was not, in the circumstances, justified in granting leave to defend, only upon the defendants giving security, as set out in his order. Leave to defend should, on the plaint, promissory note, and affidavits, have been granted unconditionally.

The appeal must therefore be allowed with costs, and the application will be granted.

KOCH J.—I agree.

Appeal allowed.
