

1961 Present : Weerasooriya, J., and H. N. G. Fernando, J.

VALLIAPPA CHETTLAR, Appellant, and VISUVANATHAN,  
Respondent

*S. C. 92 (Inty.) with S. C. 409 (F)—D. C. Chavakachcheri, 1767*

*Liquid claim—Summary procedure—Prima facie defence as regards a part only of claim—Appropriate order as to leave to appear and defend—Civil Procedure Code, s. 704 (2).*

In an action by way of summary procedure for the recovery of Rs. 25,200 upon three cheques X, Y and Z, each for Rs. 8,400, the defendant applied for leave to appear and defend unconditionally. There was no admission of any liability by the defendant. The Court was of opinion that the defendant had no prima facie defence in respect of cheques X and Y but that the defence in respect of cheque Z was prima facie sustainable.

*Held*, that the defendant should be allowed to file answer unconditionally as against the claim on cheque Z only. In respect of the other two cheques, an order to give security as a condition of his being allowed to appear and defend was valid. As the defendant failed to furnish security in respect of the claims on cheques X and Y, the entering up of the judgment for those claims should be deferred until adjudication upon the claim on cheque Z.

*Issadeen & Co., Ltd. v. Wimalasuriya* (62 N. L. R. 299) distinguished.

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

*C. Ranganathan*, with *S. C. Crossette-Thambiah*, for defendant-appellant.

*E. B. Wikramanayake, Q.C.*, with *S. Sharvananda*, for plaintiff-respondent.

*Cur. adv. vult.*

September 22, 1961. WEERASOORIYA, J.—

This is an action by way of summary procedure for the recovery of Rs. 25,200 with legal interest and costs, on three causes of action based on three cheques issued by the defendant-appellant in favour of the plaintiff-respondent, each for Rs. 8,400, and filed with the plaint as X, Y and Z.

The appellant applied for leave to appear and defend the action unconditionally. After inquiry the District Judge made order on the 22nd June, 1959, permitting him to file answer only on his furnishing,

on or before the 21st July, 1959, security in Rs. 16,000 cash or Rs. 20,000 in immovable property. Appeal No. 92 is the interlocutory appeal filed by the appellant against this order. As he failed to furnish the required security, judgment was subsequently entered against him as prayed for. Appeal No. 409 is from this judgment and the decree entered in accordance therewith.

Section 704 (2) in Chapter LIII of the Civil Procedure Code provides that 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." The order of the learned District Judge dated the 22nd June, 1959, appears to have proceeded on the basis that the appellant had no prima facie sustainable defence on the first and second causes of action, which are based on cheques X and Y. In our opinion, too, no prima facie sustainable defence is disclosed on these causes of action.

Cheque Z has been specially indorsed by the plaintiff in favour of a company styled The United Tractor and Equipment, Ltd., which is not a party to this action. One of the defences taken to the claim on this cheque is that the United Tractor and Equipment, Ltd., as the indorsee to whom or whose order the cheque is payable, is the "holder" thereof as defined in section 2 of the Bills of Exchange Ordinance (Cap. 68) and, therefore, the proper party to sue on it, and not the plaintiff. As there is no averment in the plaint or in the supporting affidavit filed by the plaintiff that, subsequent to the indorsement, the United Tractor and Equipment, Ltd. had transferred back the cheque to the plaintiff for value, we were not inclined to hold that this defence is not prima facie sustainable, and the only point on which we reserved our judgment was as to the appropriate order that should be made under Chapter LIII of the Civil Procedure Code. Mr. Ranganathan for the appellant, relying on the case of *Issadeen & Co., Ltd. v. Wimalasuriya*<sup>1</sup>, contended that his client should have been given leave to appear and defend the action unconditionally. The defendant in that case admitted liability in a sum of Rs. 7,600 out of a claim for Rs. 20,000. He sought leave to defend the action only as regards the balance of the claim. Although the District Judge did not consider as lacking in good faith the defence that not more than Rs. 6,700 was due, he ordered the defendant to give security in that sum as a condition of his being allowed to appear and defend the action. This Court held that the defendant should be allowed to file answer without giving any security. The answer which the defendant was allowed to file would necessarily have been limited to so much of the claim as was in dispute. In my judgment in that case, in referring to the absence of any provision in Chapter LIII (unlike

<sup>1</sup> (1960) 62 N. L. R. 299.

in English law) enabling judgment to 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, I stated as follows: "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."

The above observations do not, however, fully apply to the present case since there is no admission of any liability by the appellant, and what he seeks to obtain is leave to appear and defend the action in its entirety. The present case is, therefore, distinguishable from that of *Issadeen & Co., Ltd. v. Wimalasuriya (supra)*. As the appellant has no prima facie sustainable defence on the first and second causes of action he would not be entitled to file answer as against the claims on cheques X and Y except on his paying into Court the sum of Rs. 16,800 or giving security therefor. The order of the District Judge requiring him to give security in Rs. 16,000 was, in this respect, more favourable to him. The only ground of complaint which the appellant can have is that on his failing to furnish the security ordered, judgment was entered against him even on the third cause of action, in regard to which he would appear to have a prima facie sustainable defence.

I would, therefore, set aside the judgment and decree appealed from and send the case back to the District Court with a direction that the appellant be allowed to file answer unconditionally as against the claim on cheque Z, which forms the subject of the third cause of action. As the appellant failed to furnish security in terms of the order of the District Judge dated the 22nd June, 1959, the plaintiff will in any event be entitled to judgment for the sums claimed on the first and second causes of action. The entering up of such judgment will however be deferred till an adjudication has been given in regard to the claim on the third cause of action.

I think that in all the circumstances there should be no order as regards costs.

H. N. G. FERNANDO, J.—I agree.

*Case sent back for further proceedings.*