

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

CA 136/99(F)

DC Colombo : 34363 MS

Warnakulasooriya
Mahalekamge Raymond Peter,
Fernando
Mahalekam DC and Oil Mills
Kuliyapitiya.

Defendant-Appellant.

Vs.

Union Trust and Investment Ltd
(Previously Maharaja
Investment Ltd).
No. 347, Union Place,
Colombo 02.

Plaintiff-Respondent.

BEFORE : A W A Salam, J.

CONSEL : Mahinda Ralapanawa with Nissanka Bandara for the Defendant-Appellant.
Deepika Ratnayake for the Plaintiff-Respondent.

W/S TENDERED ON : 05.09.2012.

DECIDED ON : 08.11.2012.

A. W. A. Salam, J.

The plaintiff-respondent filed action against the defendant-appellant to recover a sum of money due on a promissory note. Summons was issued on the defendant-appellant as stipulated in section 703 of the Civil Procedure Code (CPC) and the defendant-appellant made no application for leave of court to defend the action. Consequently the plaintiff-respondent obtained a decree in his favour as prayed for in the plaint.

Quite significantly, after the service of summons the defendant-appellant filed a proxy on 3 June 1991 but never followed up with an application seeking leave to defend the action as set out in Section 706 of the CPC. Section 704 of the CPC provides that in default of the defendant obtaining leave to appear and defend the action, 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 entering the decree. The plaintiff-respondent obtained decree in 1991 and the defendant-appellant filed application under section 707 of the CPC in November 1997 almost 6 years after the decree.

According to section 707 after the decree in terms of 704 is entered for default the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to appear to the summons and to defend the action, if it seems reasonable to the Court so to do, and on such terms as the court thinks fit. The basic requirement under this provision is that a defendant seeking such a relief should establish "special circumstances".

The summons served on the appellant clearly indicates that he is obliged to make the application to appear and seek leave to defend the case against him within a period of 14 days after service of summons, inclusive of the day on which such summons was handed over to him. The summons issued on the appellant has been prepared in accordance with the rules laid down for the issuance of summons under summary procedure on liquid claims. So much so the registered attorney-at-law of the defendant-appellant has filed the proxy of the appellant within a period of 14 days from the date of receipt of summons but failed to make an application seeking leave of Court to defend the action.

The learned counsel for the appellant has taken up the position that there is no mention of the next date on which the case is to be called in open court in the summons issued on his client and therefore no decree could have been possibly entered against him for default of appearance

and/or failure to make an application for leave to defend in terms of section 704 of the CPC. I do not think it is necessary to mention the date on which the case is to be called in open Court because the summons is specifically endorsed to the effect that should the defendant is desirous of defending the action he must obtain the leave of court for that purpose within a period of 14 days as contemplated under section 704.

In the case of Khan Vs Sally 41 NLR 282 the defendant was granted leave to appear and defend the action and ordered to file answer on giving security in a sum of Rs. 200 by January 16, 1939. When the case was called on January 17, on the very next date after the deposit of security finally became due it was found that the money was not deposited. Consequently, judgement was entered for the plaintiff. Upon an application being made by the defendant to have the said decree set aside in terms of section 707 of the CPC, it was held that dilatoriness on the part of the Proctor which resulted in the failure of the defendant to comply with an order of court within the time fixed did not amount to proof of such special circumstances as are contemplated by section 707 of the Civil Procedure Code.

In *Silva v. Goonesekera* (1907) 1 Appeal Court Reports 100, *Wendt and Middleton JJ.* held that the failure on the part of the defendant's proctor to inform the defendant of the order of Court to furnish security before a certain date was

not a "special circumstance" within the meaning of Section 707.

In *Latiff Vs. Saibu* [2] (1926) 8 C. L. Rec. 10, the plaintiff while filing the plaint under Chapter LIII of the Code applied to the Court and obtained a warrant of arrest and a mandate of sequestration of the defendant's property before judgment. The defendant had to appear in Court within five days of the service of summons on him and obtain leave to defend the action. The summons was served on the defendant on March 19, 1926, and on the same day he was brought under arrest before Court. The defendant thereupon filed an affidavit through his proctor who then applied for his release and the withdrawal of the mandate for sequestration. The Court granted the application on the defendant depositing a sum of Rs. 750 as security. As no application was made to Court for leave to appear and defend the action the plaintiff's proctor moved for judgment on March 25, and the Court entered decree in favour of the plaintiff on March 30. The defendant and his proctor filed a joint affidavit stating that the defendant had given the necessary instructions to the proctor to obtain leave to appear and defend and that the proctor drew the affidavit for the express purpose of making such an application upon it but by pure oversight failed to make the necessary application. On an appeal from the order of the District Judge setting aside the decree, Garvin A.C.J. (with whom Dalton J. agreed) said: "That the defendant has failed to

establish the existence of special circumstances within the meaning of section 707.

If the defendant is to succeed he must bring himself within the provisions of Section 707 to show that he is entitled to the relief which he claims. The facts of this case are even worse. The defendant having received summons filed the proxy within 14 days but made no application to obtain leave to defend the action for 6 years. This cannot in the remotest possibility fall within the phrase special circumstances as used in section 707 of the CPC. This invariably calls for a dismissal of the appeal. Accordingly, the appeal is dismissed subject to costs.

Judge of the Court of Appeal

NR/-