

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

In the matter of an
application for leave to
appeal

Court of appeal No: CALA 289/2002

District Court of Negombo No: 287/S/M

A.M.S. Fernando

Plaintiff-Petitioner

Vs.

S.A.N.K. Appuhamy

Defendant-Respondent

Before: **Eric Basnayake J**

Counsel: Thisath Wijegunawardene for the Plaintiff-Petitioner
Ms. Muditha Premachandra for the Defendant-Respondent

Argued On: 3.6.2011

Written Submissions Tendered On: 30.7.2007

Decided On: 16.6.2011

Eric Basnayake J

The plaintiff petitioner (plaintiff) filed this application to have the order dated 8.7.2002 (A 7) of the learned District Judge of Negombo set aside. By this order the learned Judge had allowed the defendant respondent (defendant) to defend the action without furnishing any security. Leave to appeal was granted by this court on 4.3.2005 on the following question namely “ did the learned District Judge correctly exercise her discretion under section 706 of the Civil Procedure Code, allowing the defendant to appear and defend the action without being called upon to furnish any security?”

The plaintiff filed this action on 11.1.2001 in the District Court of Negombo under summary procedure (Chapter LIII) to recover a sum of Rs.550000 with interest on a cheque. The plaintiff states in the plaint that the defendant had borrowed a sum of Rs.550000 on 1.5.1999 and given a cheque for the same amount with the date 20.8.1999. On 14.9.1999 this cheque was presented for payment and was dishonoured with an endorsement "account closed".

The defendant filed a petition and affidavit seeking leave to defend. In that the defendant stated that the plaintiff and the defendant had been parties to a "seettu" transaction and the defendant owed the plaintiff in a sum of Rs.500000. Rs.50000 was by way of interest. As security for this amount the defendant had transferred a land on 4.4.1998 in favour of the wife of the plaintiff. The cheque was given as security. There was no money consideration for the cheque. The defendant stated that it was a blank cheque and had only the signature. The defendant stated that the plaintiff had been a professional money lender and a person engaged in "seettu" transactions.

The plaintiff states in the plaint that the cheque was given as security. It was a post dated cheque. According to the plaintiff the cheque was given on 1.5.1999. It was dated 20.8.1999. It was presented for payment on 14.9.1999. This action was filed on 11.1.2001. That is more than 15 months after the cheque returned with an endorsement, the "account closed".

The defendant filed a copy of the deed by which a land was transferred for Rs.500000 on 4.4.1998. The defendant states that this land was transferred as security for the money received. The case was filed on the basis that the cheque was on account of the money paid. According to the plaintiff the money was paid on 1.5.1999. The defence is that no money was paid on the cheque. The cheque was given as security. It was a blank cheque.

Section 704 (2) requires the defendant to show a prima facie sustainable defence and good faith. The section is as follows:-

704 (2): The defendant shall not be required, as a condition of his being allowed to appear and defend, to pay in to court the sum mentioned in the summons or to give security therefore unless the court thinks his defence not to be prima facie sustainable or feels reasonable doubt as to its good faith.

In *Silva vs. Weerasuriya* 38 N.L.R. 323 the only question to decide was whether or not the defence raised was prima facie sustainable. In this case a promissory note contained an endorsement that "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". This was signed on the back of it by the payee (plaintiff). The defendant admitted the signature and stated that the promissory note was given in renewal of a debt he owed the plaintiff. He also said that some payments have been made and the plaintiff added compoundable interest to the claim. Dalton J held that it is impossible to say on the plaint and promissory note filed that the defences are not prima facie sustainable. The rational appears to be that when no money passed with the promissory note a claim under summary procedure would not lie on the promissory note.

In the present case are the facts sufficient for the court to form an opinion whether the defence was prima facie sustainable? The plaintiff states that a sum of Rs.550000 was paid on 1.5.1999. That was the day the cheque was supposed to have been given according to the plaintiff. The defendant states that no money was paid on the cheque. The cheque was a blank one containing only the signature of the defendant. In that event it is possible for the plaintiff to have filled up the date, and the amount. The defendant states that the cheque was given as security. A property valued at Rs.500000 was transferred to the wife of the plaintiff on 4.4.1998. Is there a connection between the transfer of the property with an extent of 100 perches and the cheque? The defendant states that the cheque was given with the transfer.

The cheque was dishonoured with the endorsement "the account closed". If the plaintiff was cheated, would he have waited for 15 months to file this action? The defence is that ~~no consideration passed on the cheque.~~ The defendant states that the transaction was with

regard to “seettu” over which the defendant received a sum of Rs.500000 from the plaintiff and the property for the same value was transferred as security in addition to the blank cheque.

The learned counsel for the plaintiff appears to rely on the case of C.W. Mackie & Co vs. Translanka Investments (1995) 2 Sri L.R. 6. The facts of this case are different to the present case. In Mackie’s case the plaintiff instituted action to recover a sum of Rs.69839650 on 93 causes of action based on 93 cheques. The cheques were issued to cover the value of the plaintiff’s goods received by the defendant. Ranaraja J stated that (pg 7) the court is required by this section (s.704 (2) to consider the petition and affidavit together with any documents filed, and decide whether the defendant has a prima facie sustainable defence. Even though there appears to be such a defence, if court is doubtful of its genuineness, the defendant may be ordered to give security before being permitted to appear and defend.

Considering the material before court I am of the view that the defence put forward is more plausible and sustainable. There is nothing to indicate bad faith. Would these facts make it incumbent on the holder to prove consideration? Section 706 is as follows:-

706: The court shall, upon the application of the defendant, give leave to appear and to defend the action upon the defendant paying in to court the sum mentioned in the summons, or upon affidavits satisfactory to the court, which disclose a defence or **such facts as would make it incumbent on the holder to prove consideration**, or such other facts as the court may deem sufficient to support the application and on such terms as to security, framing and recording issues, or otherwise, as the court thinks fit (emphasis added).

I am of the view that the facts would make the holder to prove consideration and for that reason the Judge was correct in granting unconditional leave. The learned counsel for the plaintiff submitted that the defendant did not deny his liability to pay the amount claimed. He complained that the learned District Judge has failed to consider whether the defendant had any other defences. The learned counsel also submitted that the learned

Judge has failed to consider the genuineness of the defence. I agree with the submission made by the learned counsel that the learned Judge had failed to analyse facts and the law and give reasons for her decision. However considering the facts of this case I am of the view that the learned Judge had correctly granted the defendant leave to appear and defend unconditionally. Hence this appeal has to fail. Therefore the appeal is dismissed with costs.

Judge of the Court of Appeal