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

In the matter of an application for restitutio in integrum/revision in terms of Article 138 of the Constitution

Nammuni Arachchige
Sumathipala,
No. 893/2/C, Batewala,
Jalthara, Ranala.

DEFENDANT-PETITIONER

CASE NO: CA/RI/14/2017
DC OF KADUWELA NO: 2740/M

Vs.

Hettiarachchige Deepal
Hettiarachchi,
No. 37/8, Walauwatta,
Ranala.

PLAINTIFF-RESPONDENT

Before: Mahinda Samayawardhena, J.

Counsel: S.N. Vijithsingh for the Defendant-Petitioner.

Saman Liyanage for the Plaintiff-Respondent.

Argued on: 08.10.2018

Decided on: 15.10.2018

Samayawardhena, J.

The Plaintiff instituted this action against the Defendant under Chapter LIII of the Civil Procedure Code seeking recovery of a sum of Rs. 400,000/= with legal interest upon a Promissory Note marked P1. The Defendant upon summons being served moved Court to allow him to appear and defend the action unconditionally. The learned District Judge being dissatisfied with the *bona fides* of the defences taken up by the Defendant by way of an affidavit, straightaway entered Judgment in favour of the Plaintiff. This application for *restitutio in integrum* by the Defendant is against that Judgment.

I have no doubt that the procedure adopted by the learned District Judge is patently erroneous.

In an action filed under summary procedure on a liquid claim, if the Court thinks, at the stage of seeking leave from Court to appear and defend the action, that the defence taken up by the Defendant by way of an affidavit together with or without documents is (a) not *prima facie* sustainable and (b) even if *prima facie* sustainable, not *bona fide*[1], the maximum the Court could do is to order the Defendant to deposit the entire sum mentioned in the summons as a precondition to appear and defend the action. In such a situation, the Court has no power to enter Judgment in favour of the Plaintiff forthwith on the premise that no *prima facie* sustainable defence has been made out by the Defendant.

At that stage of the case, the Court is not expected to go into finer details of all the defences and try the main case itself. The

[1] Vide Amerasekera v. Amerasinghe [1998] 3 Sri LR 253

task of the Court at that stage was lucidly explained by Justice G.P.S. de Silva (later Chief Justice) in *Esquire (Garments) Industry Ltd v. Sadhwani (Japan) Ltd [1983] 2 Sri LR 242 at 248* in the following terms:

> *In this context, sections 704 and 706 of the Civil Procedure Code are the relevant provisions. On the affidavits and the documents placed before the Court, the primary question to which the District Judge had to address his mind in this case was whether the defence was prima facie sustainable or "feels reasonable doubt as to its good faith". At this stage, the Court is not called upon to adjudicate upon the merits of the defence. It is to be noted that section 704(2) speaks of a prima facie sustainable defence. In other words, the trial Judge need not, at that stage, be satisfied that the defence will ultimately succeed. What the District Judge has to consider is whether a triable issue (and not a sham issue) arises upon the material placed before him.* (emphasis added)

In *C.W. Mackie & Co Ltd v. Translanka Investments Ltd [1995] 2 Sri LR 6 at 7* Justice Ranaraja observed:

> *Section 704 of the Civil Procedure Code provides:*
>
> *"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 therefore, unless the Court thinks his defence not to be prima facie sustainable or feels reasonable doubt as to its good faith."*

> *The Court is required by this section, 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. At this stage Court is not called upon to inquire into the merits of the cases of either party.* (emphasis added)

When the Court is not called upon to adjudicate upon the merits of the cases of either party at that stage of the case, how can the Court enter Judgment for the Plaintiff on *prima facie* impressions of facts?

In *Ramanathan v. Fernando (1930) 31 NLR 495* it was held that:

> *In an action upon a liquid claim brought under Chapter LIII of the Civil Procedure Code, the Defendant has the right to appear and defend upon depositing in Court the amount in claim, even where the Court finds that no valid defence is disclosed.*

(Acting) Chief Justice Garvin at pp 498-499 explained it thus:

> *I am prepared to take this case on the footing of the Judge's finding-though I think a different view is at least possible-and treat this as a case in which no defence has been disclosed and that the application was made merely to gain time. In such a case, has the Court power to refuse leave to defend and enter judgment for the Plaintiff? It is beyond question that the Court has the power, in such a case, to require a Defendant to pay into Court the amount*

mentioned in the summons as a condition of being allowed to appear and defend.

Can it refuse to grant leave to appear and defend altogether and absolutely?

It is the right of every person against whom an action is instituted to appear and, unless he admits the claim, to file his answer. For the purpose of expediting the recovery of claims of the nature specified in section 703 by discouraging frivolous, vexatious, and purely dilatory defences, the Legislature has in such cases curtailed this right by the requirement that a Defendant shall not be admitted to defend the action until he has first obtained leave. It is provided by section 706 as follows:-"The court shall, upon application by the Defendant, give leave to appear and to defend the action upon the Defendant paying into 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."

The only other part of this chapter which has a direct bearing on the question under consideration is the proviso to section 704:- "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."

> *It is a feature of these provisions that nowhere is it said that the Court, may refuse leave. On the contrary, it requires the Court to grant leave.*

For the aforesaid reasons, I set aside the impugned Judgment of the learned District Judge (but subject to the following condition).

The next question is whether the learned District Judge is correct in coming to the finding that the defences of the Defendants are *prima facie* unsustainable. In the facts and circumstances of this case, that finding is correct. The value of the Promissory Note is Rs.400,000/=. The Defendant admits borrowing that money. He also admits his signature on it. His defence is that he paid the entire money. As the learned District Judge has observed, there is no proof to that effect acceptable to Court except his own *ipse dixit*.

In the result I order the Defendant to deposit the full value of the Promissory Note, i.e. the sum of Rs. 400,000/= as a precondition to appear and defend the action on or before 15.11.2018 in the District Court of Kaduwela. If the Defendant fails to do it, the impugned Judgment of the District Court shall prevail.

Appeal is allowed subject to conditions. No costs.

Send a copy of this Judgment to the District Court of Kaduwela forthwith.

Judge of the Court of Appeal