NATCHIAPPA CHETTY *v.* TAMBYAH.

1896.
September 17

D. C., Colombo, 6,986.

Promissory note payable on demand—Claim for unstipulated interest—Summons issued on the special form provided for action for recovery of liquidated amount under s. 708 of the Civil Procedure Code—Improper claim under summary procedure—Leave to defend the claim for interest—Duty of Court as to such claim for interest—Application of English decisions to procedure of Ceylon Courts.

Where a plaintiff brought an action on a promissory note payable on demand, claiming principal and interest, and was allowed a summons under chapter 53, and the defendant was given leave to defend on certain terms the claim for interest,—

Held that, as the note was payable on demand, without any stipulation as to interest, and the date of demand appeared to be the date of the institution of the action, the claim for interest was illegal and was not a proper subject for the summary procedure of chapter 53 of the Civil Procedure Code.

It was the duty of the Court to have refused the issue of a special summons except on the condition that the claim for interest was struck out.

BONSER, C.J.—In applying decisions on English procedure to the procedure of our Courts, we ought never to lose sight of the essential difference between the two procedures. In the English Courts litigants take each step as on their own responsibility and at their peril, whereas here the duty of taking the greater part of the steps in a litigation is thrown upon the Court. While it may be right to punish litigants for their own carelessness, it is not equally right to punish them for mistakes made by the Court.

ON the 15th February, 1895, this action was instituted on a promissory note, dated 10th May, 1894, for Rs. 2,600 payable on demand. The plaintiff prayed for interest from the date of the note. Summons issued under chapter 53 of the Civil Procedure Code for Rs. 2,778.75 and legal interest on Rs. 2,600 from the date of the institution of the suit.

The defendant filed affidavit averring that demand was made only on 14th February, 1895, and denying his liability to pay the Rs. 178.75 claimed as interest due from the date of the note to the date of institution.

On the defendant's *ex parte* motion for leave to appear and defend the plaintiff offered to waive interest.

Grenier, A.D.J., held that advantage could not be taken of the offer, and that, as defendant did not contest that the principal sum was due, he should be allowed to defend the action on the question of interest, on paying Rs. 2,600 or securing its payment.

1896. September 17.

The defendant appealed, and as he did not pay or secure Rs. 2,600 final decree was entered, and the defendant appealed from it also.

Bawa, for defendant, appellant.

Dornhorst, for respondent.

The arguments of counsel are stated and dealt with in the judgment of the Chief Justice.

17th September, 1896. BONSER, C.J.—

This is a case which involves some little technicality. The plaintiff sued the defendant upon a promissory note for Rs. 2,600, dated 10th May, 1894, whereby the defendant promised to pay on demand the sum of Rs. 2,600, nothing being said about interest. On the 15th February, 1895, the plaintiff filed his plaint. It alleged that the note was now overdue, that demand had been made, and that no payment had taken place. The date of demand was not stated in the plaint, so that it must be inferred that the only demand was the institution of the action. The plaintiff claimed the principal sum of Rs. 2,600 with interest at 9 per cent. per annum, which is the legal rate of interest, from the date of the note till payment. The plaintiff then applied to the Court, under section 703 of the Code, for summons to issue on the special form which is provided for actions "where the claim is for a debt or liquidated demand in money arising upon a bill of exchange, promissory note, or cheque, or instrument, or contract in writing for a liquidated amount of money, or on a guarantee where the claim against the principal is in respect of such debt or liquidated demand, bill, note, or cheque."

When a summons has been issued in this special form, the defendant is not allowed to appear and defend the action without special leave and, to obtain that leave, must show some ground of defence. The summons was issued, and it stated that the plaintiff had instituted an action under chapter 53 of the Civil Procedure Code for Rs. 2,778.75, Rs. 2,600 of that being principal and Rs. 178.75 being interest from 10th May, 1894, to 15th February, 1895—that is, the date of the note to the date of the institution of the action—and the defendant was summoned to appear and defend the action.

The defendant applied to the Court for leave to defend, and he supported his application by an affidavit in which he does not deny that the principal money is due, but he states that he is not liable for any interest, and that he is advised he has a good legal defence against the claim of the plaintiff for interest.

When that application of the defendant came to be heard by the Acting District Judge it was pointed out to him that the special form of summons ought not to have issued, because this claim for interest ought not to have been included, not being a liquidated amount arising upon a promissory note. In fact, there was no ground for holding any interest due at all. The Acting District Judge, however, would not allow this to be done, but he gave the defendant leave to come in and defend the action as far as regarded the interest, and imposed as a condition precedent that he should deposit the principal of Rs. 2,600 in Court. Against that order the defendant has appealed.

Mr. Dornhorst has ingeniously argued that the claim for interest was sustainable, that under the terms of section 57 of the English Bills of Exchange Act, which governs this case, interest ran from the date of the note, and was liquidated damages. He argued that a promissory note, payable on demand, being at maturity on the very day on which it was made, interest ought to be reckoned from that date. But, in my opinion, that contention is inconsistent with the plain words of section 57 of the Bills of Exchange Act, which provides that in the case of a bill—and for this purpose in my opinion " bill " and " note " are synonymous—interest is to run, in case of a bill payable on demand, from the date of demand, and in other cases from maturity. The date of demand in this case being the institution of the action, this sum of Rs. 178.75 interest was improperly claimed. It was not an action for a liquidated amount of money arising upon the note, and it was not a proper subject for the summary procedure of chapter 53. The Court ought to have refused to issue a special summons, except on the condition that the claim for interest was struck out. When this mistake on the part of the Court was pointed out, the Court should have at once rectified it, especially as the plaintiff was willing that this should be done. The Acting District Judge should there and then have taken his pen and amended the plaint by striking out the claim for interest, and then proceeded to deal with the case.

The appellant relied upon the case of *Gurney v. Small (1891), 2 Q. B. 584*, which was a case under order 14, rule 1, of the English Rules and Orders, where it was held that a summons could not be issued under that special procedure, where a similar claim for interest had been included in the original writ of summons. It was held that a subsequent amendment of the writ of summons could not have retrospective effect so as to make the issue of the special summons good. But in a later case of *Paxton v. Baird (1892), 1 Q. B. 139*, it was held that, where a writ of

1896. *September 17.*

BONSER, C.J.

summons originally included a claim for interest, such as this, so as not to be a specially endorsed writ, the writ might be amended by striking out the claim for interest, and the appearance to the unamended writ of summons must stand good for the amended writ of summons.

In applying decisions on English procedure to the procedure of our Courts we ought never to lose sight of the essential difference between the two procedures. In the English Courts litigants take each step on their own responsibility and at their peril whereas here the duty of taking the greater part of the steps in a litigation is thrown upon the Court. While it may be right to punish litigants for their own carelessness, it is not equally right to punish them for mistakes made by the Court.

Mr. Bawa argued that this plaint, not being a plaint to which the special provision of chapter 53 was applicable, the defendant was entitled to come in and defend the whole action unconditionally. But, in my opinion, it would be exceedingly unjust that the defendant, when he admits that Rs. 2,600, the principal, was due, should be able to keep the plaintiff at arm's length for many months, as would be the case if he were allowed to defend the action generally. In my opinion, the ends of justice would have been met if the Court had struck out the claim for interest, and given judgment for the principal, which was admitted by the defendant to be due. That order, which ought to have been made then, we make now.

Then with regard to costs. The defendant ought to have the costs of his affidavit for leave to defend, and of his appearance.

It appears that the District Judge entered up judgment for the whole claim, including interest, which under no circumstances could the plaintiff claim, either in this or in any other form of action.

The judgment should be amended to a judgment for Rs. 2,600, with interest at 9 per cent. per annum from the date of the institution of action.

The defendant will also have his costs of appeal.

WITHERS, J.—

I agree in the order proposed. I think we can and should do what the Court below might and should have done.

The Court entertained this plaint and ordered summons under chapter 53. The defendant claimed leave to appear and defend, not the principal claim, but the claim for interest. The Court allowed him to defend on the terms that he should deposit the principal sum of the note in Court or give security. The defendant should not have been required to defend on terms, for

1896.
September 17.
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WITHERS, J.

the defence to the claim for interest was *ex facie* a sound one. But for the imposition of those terms there would possibly have been no appeal. Had the issue been fought out, the defendant would have succeeded. A Court should be very careful in entertaining plaints presented to it under chapter 53. The plaintiff cannot take out a summons as he chooses. The Court's duty is to order the summons (see section 55). A Court should not order summons in form No. 19 unless it is satisfied that the claim satisfies the requirements of section 703. If the plaint needs amendment to bring it within the chapter, and the plaintiff consents to an amendment, the Court should have the amendment made, and order the issue of summons accordingly. If the plaintiff does not consent to the amendment, the Court should order the issue only of an ordinary summons.