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Present: Dalton J. and Jayewardene A.J.

SAYADOO MOHAMADO *v.* MAULA ABUBAKKAR.

78—D. C. (Inty.) Kurunegala, 11,359.

Action by summary procedure under Chapter LIII. of the Code—Leave to defend granted on ex parte application — Rescission or modification of such order on application of plaintiff—Ordinance No. 2 of 1889, ss. 704 and 706.

Held, that an order made *ex parte*, granting leave to defend, may be vacated by the Court making the order.

The rule in *Vonlintzgy v. Narayansingh* [1] followed.

Allan Drieberg, K.C. (with *H. V. Perera*) for appellant.

Hayley, for respondent.

August 3, 1926. DALTON J.—

I have had the advantage of reading the judgment of my brother, who has gone into the question raised so thoroughly that I feel I cannot usefully add anything to what he has stated. The decision of Phear J. in *Vonlintzgy v. Narayansingh* (*supra*) was not cited

[1] *(1871) 6 Bengal L. R. (App.) 64.*

to, nor was it before, the Court at the argument on the appeal, but it seemed to me at the conclusion of the argument that there was nothing in principle in the Code to prevent a party coming in, as here, after leave had been granted *ex parte* to appear and defend; to debar a party from doing so might well in fact cause great injustice. It is satisfactory, however, to find decided authority on the point. I entirely concur in the conclusion arrived at by my brother, and would dismiss this appeal, with costs.

JAYEWARDENE A.J.—

This case raises an important question of practice under Chapter LIII. of the Civil Procedure Code, which provides a summary procedure for the enforcement of liquid claims. The question is: whether, where a defendant obtains leave to appear and defend an action on an *ex parte* application, the plaintiff can ask the Court to rescind or modify the order granting such leave? It is somewhat surprising that although the Code has been in operation for over thirty-five years there has been no definite ruling on the point.

In the present case the plaintiff sued the defendant to recover a sum of Rs. 5,000 due to him on a promissory note made by the latter. He proceeded under Chapter LIII., and a summons in form No. 19 was issued to the defendant directing him to obtain leave to appear and defend the action within seven days of the service of the summons. The defendant appeared within the time fixed and filed an affidavit and moved that he be granted permission to file answer and proceed with the case without furnishing security. This was allowed. This application was made and granted *ex parte*. A few days later the plaintiff filed an affidavit and moved that the defendant be called upon to give security to the extent of the plaintiff's claim and costs before filing answer. The plaintiff's application was fixed for inquiry. At the inquiry, defendant's Proctor contended first, that the Court could not vary its order giving leave to defend the action; and second, that the defendant's affidavit disclosed an answer to the plaintiff's claim. After argument, the learned District Judge held that as the order in question was *ex parte* it can be varied, and he directed the defendant to give security before filing answer, as the *bona fides* of the defence appeared to him, questionable. The defendant appeals against the judgment, and the same objections have been pressed before us.

The first question came before this Court last year in the *P. & O. Banking Corporation v. L. P. de Mel et al.*[1] There, the defendant had obtained an order granting leave to appear and defend the action unconditionally, and the plaintiff moved for a notice on the defendant to show cause why his application for leave to defend unconditionally should not be fixed for inquiry. The

[1] *D. C. Colombo, 17,075.*

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learned District Judge refused to entertain the plaintiff's motion, as he thought he had no power to vacate his order made under section 704. He said: "I do not think that this judgment (*9 N. L. R. 26, at p. 28*) is an authority for the proposition that the Court has the power to vacate every order which has been made by it *ex parte*. An order giving a defendant leave to appear and defend the action is made under section 704, and under that section I do not think the Court is required, nor has it been the practice in this Court, to notice the plaintiff to show cause against the defendant's application. An order under that section must, therefore, be necessarily *ex parte*, and I do not think that an order of this kind can be vacated by the Court which made it." The plaintiff appealed against this order. He did not make the defendant a respondent to the appeal, but Counsel appeared for him and contended that the appeal was not in order in the absence of the defendant as a party to the appeal. The case was argued before the late Chief Justice and myself. We dismissed the appeal, and later put our reasons in writing. In the course of his judgment (*S. C. Minutes, November 9, 1925*) His Lordship said: "We were in effect asked by Mr. Bartholomeusz, who appeared for the plaintiff-appellant, to lay down for guidance in this and future cases the course to be pursued upon applications under section 706. If we had adopted his argument, the procedure would in future be very similar to that in England under Order XIV., rule 1. Mr. Perera pointed out that if this matter went back for re-hearing with the additional evidence afforded by the counter-affidavit his client would be affected. I understand that the practice has always been in Colombo, at any rate, to treat applications under section 706 as *ex parte* applications, and that there is no record of any case in which the plaintiff has appeared on such an application or has filed a counter-affidavit. I am not very clear how, in the absence of the plaintiff, satisfactory action can be taken under section 706 in certain cases, but I am not prepared, in view of the practice which I am told has prevailed for over thirty years, to order the substantial departure therefrom asked for the plaintiff, and in any case it would be necessary, I think, to hear the defendant on the point. If the matter comes up again before this Court, I think that information as to the practice in all the Courts should be given. If there is any doubt as to the practice—as Mr. Bartholomeusz seems to think there is—then the procedure now in question can receive further consideration." That case, therefore, decided nothing, but it is important to note that the learned Chief Justice's observation that he was not very clear how, in the absence of the plaintiff, satisfactory action can be taken under section 706, I would add, and under section 704. There is no doubt that applications for leave to appear and defend under sections 704 and 706 are made *ex parte* and generally dealt

with without notice to the plaintiff. But I think it is often the practice to have these cases called in open Court on the last date fixed for the defendant to appear for the Court to make its order, and this gives the plaintiff an opportunity of being present in Court and being heard on the application, if necessary. For sometimes the defendant takes objection to the plaintiff following the summary procedure laid down under Chapter LIII. on technical grounds. Thus in *Natchiappa Chetty v. Tambyah*,[1] where the defendant on his *ex parte* motion for leave to appear and defend took the objection that the plaintiff could not adopt this procedure as he claimed interest not provided for in the promissory note sued on, the plaintiff offered to waive interest. This Court held that the plaintiff's offer should have been accepted. Again, in *Muttaiya Chetty v. Arumugam*,[2] the defendant, who contended that his application for leave to appear and defend was in time, and that the Fiscal's return to the summons was erroneous, was directed to notice the plaintiff.

The practice I am referring to, if followed, would avoid the necessity of a special notice on the plaintiff.

Chapter LIII. has been taken over from Chapter XXXIX. of the Indian Civil Procedure Code (sections 532 to 537) entitled "Of Summary Procedure on Negotiable Instruments." The Indian sections were based on "the Summary Procedure on Bills of Exchange Act, 1855 (*18 and 19 Vic. c. 67*), which applied to County Courts in England till 1919, when it was repealed by *9 and 10 Geo. V. c. 73*. The proviso to section 704 finds no place in the English Act, but the language of section 706 is identical with that used in section 2 of the Act apart from alterations made to suit local requirements. The proviso to section 704, which is somewhat inconsistent with section 706 (see *Rengasamy v. Pakeer* [3]), has been introduced in view of the construction placed on the English Act in *Agra and Masterman's Bank v. Leighton*.[4] Under the English Act, where a defendant has obtained leave to defend—such leave is granted *ex parte*—the Court may set aside the order on the plaintiff's application. Thus in *Pollock v. Turnock*,[5] where it was contended that under the Act the Court had power to rescind an *ex parte* order by virtue of its general jurisdiction. Bramwell B. remarked that both he and Baron Martin had been in the habit at Chambers of setting aside orders of this kind where they had been obtained fraudulently, and in *Agra and Masterman's Bank v. Leighton* (*supra*), where leave to appear and defend had been granted, an application by the plaintiff to rescind this order, or for the defendant to bring the amount claimed into Court, was entertained and considered. The Court held that where in an

[1] (*1896*) *6 N. L. R. 205.*
[2] (*1903*) *6 N. L. R. 302.*
[3] (*1911*) *14 N. L. R. 190.*
[4] (*1866*) *L. R. 2 Ex. 56.*
[5] (*1857*) *1 H. & N. 741.*

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action by an endorsee leave has been given on affidavits showing a good defence as between the original parties to the bill, and stating circumstances which raise the inference that the plaintiff is not a holder for value, or for any other reason liable to be opposed by the same defence, affidavits in answer will be received to contradict that inference, and will, if clear and cogent, be ground for rescinding the lease. Baron Bramwell said: "But, further, it often happens that a man comes in before the Judge, and shows a good defence as between the parties to the bill, and also states his belief, from certain circumstances of more or less credit, that the plaintiff is not a holder for value; afterwards the plaintiff comes and shows that belief to be groundless. In such a case the leave to appear is rescinded, because it appears that the leave was originally given to him on a supposed state of facts which is shown to be erroneous." The Court, in the circumstances of the case, refused to rescind the leave granted. But the power of the Court to rescind or modify the order giving leave to appear and defend was not even questioned. See also *Girvin v. Grepe*.[1] In India the same rule has been followed. Section 533 of the Indian Civil Procedure Code, which is identical with section 706 of our Code, was section 2 of the Indian Bills of Exchange Act V., 1866. This section was construed in the case of *Vonlintzgy v. Narayansingh* (*supra*) by Phear J., who was afterwards Chief Justice of Ceylon. That was a suit on a bill of exchange drawn and accepted by the defendants, who carried on business under the name of Narayan Singh & Co. Application was made by one of the defendants, who had been sued as a partner in the defendant's firm for leave to come in and defend the suit. The application was supported by an affidavit which stated that this defendant was not a member of the defendants' firm nor indebted to the plaintiff. The application was made *ex parte*. Phear J. in granting the application said: "The practice I have always thought right under the Indian Act is that which was laid down by Baron Bramwell in *The Agra and Masterman's Bank v. Leighton* (*supra*)." Then, after stating the facts of the case and quoting the passage from the judgment of Bramwell B. I have reproduced above, he continued: "The words of the Indian Act are slightly larger than those of the English Act, but in spirit the two Acts are precisely the same. It is only when there is a doubt as to the *bona fides* of the defence set up that payment of money into Court should be ordered, or security for the same be directed to be given. Restrictions as to the time of pleading or as to the issues to be raised, may in any case be imposed, whenever they may seem to the Court to be required for the purpose of preventing unnecessary expense or delay; and I think the Court has a discretion to order security for costs to be given, not only when it doubts the *bona*

[1] *(1879) 13 Ch. D. 174.*

sides of the defence, but also when it considers that matter of defence is raised which does not appear to be strictly necessary, though it is not such as the Court ought to disallow.

"*If the plaintiff has not been heard at first against the defendant's application, he may always be allowed to come in afterwards for the purpose of showing that the leave to appear and defend ought not to have been granted, or that the terms upon which it has been granted ought to have been more stringent than they were.*"

(*The Bengal Law Reports* are not available locally, and I have to thank Messrs. Butterworth & Co., Calcutta, the well-known Law Publishers, who very kindly obtained a copy of the judgment for me.) The rule laid down in the Calcutta case is still regarded as good law. It is given as a decision on section 533 in *O'Kinealy's Code of Civil Procedure*, published in 1905, and on the corresponding provision (Order 37, rule 3) of the Civil Procedure Code of 1908 in *Woodroffe and Amir Ali's Commentary*. Such being the practice prevailing in England and in India under a Statute whose provisions are almost, if not entirely, identical with those of Chapter LIII., I think we should follow that practice. We are at least bound to follow the procedure which obtained in England and which has been established by, and recognized in, the cases I have cited above and which will be referred to later. So far as I can see there is no *cursus curiae* or authoritative ruling to preclude us from doing so. This practice also appears to me to be sound on principle, and appeals to one's sense of fairness and justice. I might here refer to the local case of *Nallan v. Ossen*,[1] where, after the defendant had obtained leave to appear and defend, the plaintiff moved the Court to vacate the order and to enter up judgment in his favour on the ground that the defendant was out of time and that the Court's order had been made *per incuriam*, the application was entertained. I would, therefore, hold that where a defendant has obtained leave *ex parte* to appear and defend unconditionally, or on terms under section 704 or section 706 of the Civil Procedure Code, it is open to the plaintiff to move to have the order rescinded or made subject to terms, or that the terms imposed should be rendered more stringent. An *ex parte* order under these sections should, I think, be treated as any other *ex parte* order made by the Court, and any party affected by it should be entitled to apply to vacate it on notice to the party in whose favour it was made. (*Muttiah v. Muttusamy*,[2] *Gargial v. Somasunderam Chetty*.[3]) There is, as a rule, no right of appeal against such an order, but the Court may, in certain circumstances, admit an appeal (*Scott v. Mohamodu*).[4] The Court will, however, not rescind, vary, or modify such order lightly. It will do so if leave has been obtained

[1] (*1897*) *2 N. L. R. 381.*
[2] (*1895*) *1 N. L. R. 25.*
[3] (*1905*) *9 N. L. R. 26.*
[4] (*1914*) *18 N. L. R. 53.*

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fradulently (*Pollock v. Turnock* (*supra*)), or if the plaintiff's affidavit contradicting that of the defendant affords " clear and cogent " proof that the defendant has no defence, or a doubtful one (*Agra and Masterman's Bank v. Leighton* (*supra*)), and as Baron Martin said in the former case, " we have always acted upon the principle that where a Judge has made an order for the defendant to be at liberty to appear, it will not be set aside, unless the case be clear. If it were otherwise, the act might lead to great abuse." But an order for leave will not be rescinded if the affidavits raise a *bona fide* conflict of testimony. (*Brutton v. Thomas* [1] and *Febart v. Stevens.*[2]) As Wilde B. said in the latter case: " Where a defence is sworn to, and is shown to the satisfaction of a Judge, the practice is to allow the defendant to appear. If it can be shown by anything, for instance, under the defendant's own hand, that he has sworn falsely, and that it is clear that there is no defence, the order for leave to appear will be rescinded. But when the plaintiff merely sets up a case in answer to the case sworn to by the defendant, the order will stand; for it never was intended that the cause of action should be tried upon affidavits." The Court was, therefore, right in over-ruling the first objection. As regards the merits, the defendant in his affidavit swore that he paid the plaintiff Rs. 4,000 out of the Rs. 5,000 admittedly received on the note. But he produced no receipt for this payment. The learned Judge held that the absence of a receipt makes the *bona fides* of the defence questionable. I am unable to say he is wrong. This is one of those cases in which, to use the words of Bramwell B. in *Agra and Masterman's Bank v. Leighton* (*supra*), " an apparently real defence is shown, but its sincerity is doubtful," and the defendant is let in to defend only on terms. In the local case of *Suppramanian Chetty v. Krishnasamy,*[3] the non-production of a receipt for payments alleged to have been made was considered to throw doubt on the *bona fides* of the defence. As regards the balance Rs. 1,000, the defendant gives certain reasons for not paying this sum to the plaintiff. These reasons appear to me to be wholly unconvincing. The District Judge was therefore justified in ordering the defendant to give security. The security will be for the amount of the plaintiff's claim. The appeal will be dismissed, with costs.

Appeal dismissed.

[1] (*1858*) *1 F. & F. 377.*

[2] (*1860*) *30 L. J. Ex. 1.*

[3] (*1907*) *10 N. L. R. 327.*