

**SIVAPALANATHAN**  
**VS**  
**RAJ GOPAL**

COURT OF APPEAL,  
WIMALACHANDRA J.,  
C. A. NO.95/2004 (LG)  
D. C. COLOMBO 36067/MS  
AUGUST 26, 2004

*Civil Procedure Code, sections 705(2) and 706-Summary procedure on liquid claims - Conditions precedent to issue of summons - Prescription Ordinance, No. 22 of 1871, section 6 - Defence prima facie sustainable—Security*

*necessary? - Can a claim for unjust enrichment be joined? —Application for leave to appear and defend - Is a petition necessary?*

The petitioner contended that he has a valid ground to appear and defend unconditionally as the respondent's action is prescribed. The District Court ordered the defendant to defend with security.

The petitioner sought leave to appeal against the said order

**Held :**

- (i) A condition precedent to the issue of summons is that the document on which the action is based should not appear to be prescribed ; the plaintiff's action based on the 2 cheques is clearly prescribed.
- (ii) If it appears to Court that the plaintiff respondent's action is barred by some provision of a statute the defendant petitioner should be allowed to appear and defend without being ordered to furnish security.
- (iii) In an action under Summary Procedure, a claim for unjust enrichment is not a liquid claim arising upon the two cheques and is not a proper subject for Summary Procedure.

The Court should have amended the plaint by striking out the claim for damages based on unjust enrichment and then proceeded to issue summons.

- (iv) The manner of making the application is found in section 706 - it only speaks of an affidavit and not petition and affidavit

**Cases referred to :**

1. *Ramasamy Chetty vs Uduma Lebbe Marikkar* - 5 NLR 350
2. *Natchiappa Chetty vs Thambyah* - 6 NLR 205

**APPLICATION** for leave to appeal from an order of the District Court of Colombo with leave being granted.

*M. A. Q. M. Ghazzali* with *M. Somasundaram* for defendant respondent  
*V. K. Choksy* with *M. P. N. N. Swarnakanthi* for plaintiff respondents

October 5, 2004

**WIMALACHANDRA, J.,**

The defendant-petitioner filed this leave to appeal application against the order made by the Additional District Judge of Colombo, dated 20.02.2004. The Court granted leave and the matter was fixed for argument.

The learned counsel for the petitioner urged that the petitioner has a valid ground to appear and defend unconditionally, as the respondent's action based on the said two cheques has been prescribed. The learned counsel further submitted that under Section 705(2) of the Civil Procedure Code summons should not have been issued in the first instance as the plaintiff-respondent's action has been prescribed.

Section 705(2) of the Civil Procedure Code states that if the instrument appears to be properly stamped and not open to suspicion on the face of it, and not barred by prescription, the Court may order service of summons on the defendant. Therefore a condition precedent to the issue of summons is that the document on which the action is based does not appear to be prescribed.

The two cheques marked A and C had been executed on 26.05.1997 and 20.05.1997 respectively. The plaintiff-respondent filed this action on 12.06.2003. The law relating to prescription in Sri Lanka is governed by the Prescription Ordinance, No. 22 of 1871. In respect of any bill of exchange, promissory note or cheque, action for recovery shall be filed within six years from the date when such promissory note, cheque or bill of exchange shall have become due or from the date of the last payment of interest thereon (vide-Section 6 of the Prescription Ordinance). In the circumstances, the plaintiff-respondent's action based upon the aforesaid two cheques is clearly prescribed.

I cannot agree with the submissions made by the learned counsel for the respondent that the defendant cannot be heard or be allowed to take any objection as to the prescription before obtaining the leave of Court to appear and defend. If it appears to Court that the plaintiff-respondent's action is barred by some provisions of a statute, the defendant-petitioner should be allowed to appear and defend without being ordered to furnish security. Moreover, in terms of Section 705(2) of the Civil Procedure Code, it is a condition precedent to the issue of summons that the instrument sued upon should not be barred by prescription.

In the case of *Ramasamy Chetty Vs. Uduma Lebbe Marikkar*<sup>(1)</sup> the Supreme Court held that, where the defence set up by the defendant in an action on a promissory note appears on the face of his affidavit to be good in law, and no reasonable doubt exists as to the *bona fides* of the defence, it is the duty of the District Court to permit him to appear and defend without security.

I now proceed to consider the question as to whether the District Judge erred in holding that the defendant-petitioner did not raise a valid defence for the defendant to be allowed to appear and defend the action without being called upon to furnish any security. Upon a consideration of the short order made by the learned Judge it is obvious that she has not carefully considered the validity of the defence. A careful consideration of the two cheques, which is the subject matter of this action, reveals that the plaintiff's action is prescribed.

The defendant is entitled to be allowed to appear and defend without being called upon to furnish security in a case where a *prima facie* sustainable defence is disclosed. The learned Judge has not considered at all the defence disclosed by the defendant-petitioner. It is my considered view that the aforesaid defence in itself, disclosed by the defendant-petitioner, is one *prima-facie* sustainable, and the defence set up by him appears on the face of the affidavit to be good in law and no reasonable doubt exists as to the *bona fides* of the defence. In those circumstances it is duty of the Court to permit him to appear and defend the action without being called upon to furnish any security.

The defendant-petitioner has also joined other claims that do not come under the summary procedure. He has claimed Rs. 50,000 from the plaintiff-respondent on the basis that the defendant-petitioner has been unjustly enriched in a sum of Rs. 50,000 at the expense of the defendant-petitioner. In this action filed under the summary procedure, a claim of unjust enrichment is not a liquid claim arising upon the two cheques and it is not a proper subject for the summary procedure.

This question is not without authority in our Courts. I draw my attention to the case of *Natchiappa Chetty Vs. Tambyah*<sup>(2)</sup> where the plaintiff brought an action on a promissory note payable on demand, claiming principal and interest, and was allowed summons under chapter 53, and the defendant was given leave to defend on terms. It was held that to include

the claim for interest was illegal and was not a proper subject for the summary procedure of chapter 53 of the Civil Procedure Code, and it was further held (at page 207) that the Court ought to have refused to issue special summons except on the condition that the claim for interest was struck out.

Accordingly in the instant case the Court should have amended the plaint by striking out the claim for damages based on unjust enrichment and then proceeded to issue special summons under chapter 53 of the Civil Procedure Code.

The learned Counsel for the plaintiff-respondent submitted that the defendant-petitioner has filed the application for leave to appear and defend only by filing an affidavit without a petition and as such the defendant-petitioner's application for leave to appear and to defend the action is bad in law. The manner of making the application is found in Section 706 of the Civil Procedure Code, Section 706 states that, upon an application by the defendant, the Court shall 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 Court, which disclose a defence..... or such other facts as the Court may deem sufficient to support the application and on such terms as to security or.....otherwise, as the Court thinks fit.

Thus it is seen that Section 706 speaks only of an affidavit and not petition and affidavit. In the circumstances, in an action by summary procedure on a liquid claim, if he has sworn an affidavit to facts, which if proved will be a good defence, he should be allowed to defend unconditionally. The Section 706 clearly states that, in an application by the defendant, the Court must give leave to appear and defend the action upon the affidavit being satisfactory to the Court on such terms as the Court thinks fit.

The next submission of the learned counsel for the plaintiff-respondent is that the plaintiff-respondent was convicted in the Magistrate's Court of Colombo in Case No. 3550/1 for the dishonour of the two cheques. In support of his contention he relied on the proceedings dated 14.03.2002 of the Magistrate's Court of Colombo Case No. 3550/1, produced marked B. It is to be noted that the document marked B does not show that the

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defendent-petitioner was convicted for the dishonour of the aforesaid two cheques, which is the subject matter of this action. In any event this submission made by the learned counsel has no relevance to the matter before this Court.

It appears that in the impugned order the learned Judge has not considered the defence set up by the defendent-petitioner that the plaintiff-respondent's action is barred by prescription. It is my considered view that the defence set up by the defendent-petitioner appears on the face of his affidavit and upon a perusal of the aforesaid two cheques to be good in law. When the defendent-petitioner has placed before Court a *prima-facie* sustainable defence, the defendant cannot be required to give security as a condition of being allowed to appear and defend.

For these reasons, I set aside the order made by the learned Judge dated 02.02.2004 and direct the learned Additional District Judge of Colombo to permit the defendant to appear and defend without security.

*Appeal allowed ; Defendent permitted to appear and defend without security.*

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