RAMANAYAKE
v.
SAMPATH BANK LTD. AND OTHERS

COURT OF APPEAL.
WIJEYARATNE, J. AND
WEERASEKERA, J.
CA APPLICATION NO. 962/92.
DC COLOMBO CASE NO. 41/DR.
DECEMBER 15, 1992.

Debt recovery – Debt Recovery (Special Provisions) Act No. 2 of 1990 – Debt – Triable issue – Leave to appear and defend – Civil Procedure Code, sections 384 to 389 – An issue or question which ought to be tried – Lending Institution – Failure to make demand – Failure to file answer or objections – Decree absolute – Failure to cure default by summary procedure.

The plaintiff respondent Bank sued the 3rd defendant-petitioner and the 1st, 2nd and 4th defendants-respondents seeking the recovery of Rs. 1,171,697/73 with interest and costs under the provisions of the Debt Recovery (Special Provisions) Act No. 2 of 1990. The 1st and 2nd defendants-respondents were the borrowers and the 3rd defendant-petitioner and 4th defendant-respondents were the guarantors.

Held :

(1) The provisions of the Debt Recovery (Special Provisions) Act, No. 2 of 1990 are available to lending institutions as defined in the Act. A commercial bank is such a lending institution. This procedure is however not available where the loan or advance is less than Rs. 1,50,000 or where the amount claimed as interest exceeds the principal sum. No sum of money which constitutes a penalty for default or delay in payment of a debt can be recovered under the Act.

(2) A debt recoverable under the Act is a sum of money which is ascertained or capable of being ascertained at the time of institution of the action and which is in default and alleged by a lending institution to have arisen from a transaction in the course of banking, lending, financing or other allied business activity of the institution but does not include a promise or agreement which is not in writing.

(3) A plaint filed under the provisions of the Act must be accompanied by an affidavit to the effect that the sum claimed is justly due from the defendant as well as the instrument, agreement or document sued upon or relied on. The affirmant of the affidavit should be–

(a) a director or principal officer of the lending institution or an attorney-at-law duly authorised to bring and conduct the action, and

(b) a person having personal knowledge of the facts of the cause of action; and this fact must be averred in the affidavit.

(4) If the instrument, agreement or document is produced before court and appears to be properly stamped (when required by law to be stamped) and not open to suspicion by reason of any alteration or erasure or other matter on the face of it, and not barred by prescription, the court being satisfied of the contents of the affidavit shall enter a decree *nisi* in the form set out in the first schedule to the Act and have it served on the defendant for his appearance and showing cause on a day as early as can conveniently be appointed having regard to the distance of the defendant's residence from the court.

(5) The defendant shall not appear or show cause against the order *nisi* unless he obtains leave from the court. Leave to appear and defend has to be granted upon the defendant paying into court the sum mentioned in the decree or furnishing reasonable and sufficient security for satisfying the decree. Leave may be granted unconditionally where the court is satisfied that the defendant's affidavit and other material raise an issue or question which ought to be tried (section 6 (2) (c) of the Act). The purpose of section 6 is to prevent frivolous or untenable defences and dilatory tactics.

(6) An issue or question which ought to be tried means *a plausible defence with a triable issue ; that is to say, an issue which cannot be summarily disposed of on the affidavits but requires investigation and trial.*

(7) The court has to decide *which of the alternatives* under section 6 (2) – whether (a), (b) or (c) – has to be followed and the court has to exercise its discretion judicially. The court must briefly examine the facts of the case, set out the substance of the defence and disclose reasons in support of the order.

(8) In this case the 3rd and 4th defendants-petitioners had been given unconditional leave. The 3rd defendant in his affidavit has not dealt specifically with the plaintiff's claim and stated his defence and the facts relied on as required by section 6(2)(c). He had denied the correctness of the loan account, but had not specified in which particulars the loan account was incorrect, neither stating the reasons for so alleging nor the facts he was relying on to support his claim that the loan account was incorrect. He had not dealt with the plaintiff's claim on its merits but merely set out objections of a technical nature. If a defendant is granted leave unconditionally on this type of technicality and evasive denial, then the purpose of this Act will be brought to naught.

(9) The decree absolute entered against the 3rd defendant-petitioner for non-appearance cannot be challenged on the merits in the trial court but could have been set aside by curing the default by taking steps under section 389 of the Civil Procedure Code by summary procedure within a reasonable time. This was not done and no excuse was given for the default of appearance and for the delay in filing the present application.

(10) Failure to aver in the affidavit that the amount due is "justly due" is not a fatal defect if the affidavit shows that the amount is rightly and properly due.

Cases referred to :

1. *Ramanathan* v. *Fernando* 31 NLR 495.
2. *Esquire (Garments) Industry Ltd.* v. *Sadhwani (Japan) Ltd.* [1983] 2 Sri LR 243.
3. *Read* v. *Samsudin* 1 NLR 292.
4. *Soysa* v. *Soysa* 17 NLR 118.
5. *Avva Umma* v. *Casinaden* 24 NLR 199.
6. *Miriam Lawrence* v. *Arnolda* [1991] 1 Sri LR 232.
7. *Divisional Forest Officer* v. *Sirisena* [1990] 1 Sri LR 44.
8. *Wijesinghe* v. *Perera* 2 CLW 506.
9. *Anamalay* v. *Allien* 2 NLR 251.
10. *Paindathan* v. *Nadar* 37 NLR 101.
11. *Jayalath* v. *Abdul Razak* 56 NLR 145.
12. *Marjan* v. *Rasiah* 51 NLR 34.
13. *M. Rajendra (Permanent Secretary to the Ministry of Transport and Works)* v. *Parakrama Ltd.* 63 NLR 554.

APPLICATION in Revision from the Order of the District Court of Colombo.

Romesh de Silva, P.C. with *Harsha Amarasekera* for 3rd defendant-petitioner.

S. A. Parathalingam for the plaintiff-respondent.

Cur. adv. vult.

January 21, 1993.

WIJEYARATNE, J.

The plaintiff-respondent (Sampath Bank Limited) filed this action under the Debt Recovery (Special Provisions) Act, No. 2 of 1990 (hereinafter referred to as the Act) against the 3rd defendant-petitioner and the 1st, 2nd and 4th defendants-respondents, seeking recovery of a sum of Rs. 1,171,697.73 together with interest and costs.

The 1st and 2nd defendants-respondents are the borrowers of the loan said to have been granted by the plaintiff-respondent on 30th June 1989 while the 3rd defendant-petitioner and the 4th defendant-respondent are the guarantors of the said loan.

Under the Debt Recovery (Special Provisions) Act, No. 2 of 1990, a lending institution (which has been defined to mean a licensed commercial bank, the State Mortgage and Investment Bank, the National Development Bank, the National Savings Bank, the Development Finance Corporation of Ceylon, or a registered finance company) may recover a debt due to it by an action instituted following the procedure laid down in the Act. This procedure is not available where the principal amount lent or advanced is below Rs. 1,50,000.

"Debt" has been defined as a sum of money which is ascertained or capable of being ascertained at the time of institution of the action and which is in default and alleged by a lending institution to have arisen from a transaction in the course of banking, lending, financing or other allied business activity of that institution, but does not include a promise or agreement which is not in writing.

The institution presenting the plaint has to file an affidavit to the effect that the sum claimed is justly due from the defendant and has in addition to produce to the court the instrument, agreement or document sued upon or relied on by the institution.

The affidavit has to be made by any director or a principal officer or by an Attorney-at-Law duly authorised to bring and conduct the action and such affidavit shall be made by such person having personal knowledge of the facts of the cause of action and such person shall swear or affirm to that effect in the affidavit.

If the instrument, agreement or document is produced to court and it appears to be properly stamped (when required by law to be stamped) and not open to suspicion by reason of any alteration or erasure or other matter on the face of it, and not barred by prescription, the court being satisfied of the contents of the affidavit shall enter a *decree nisi* in the form set out in the First Schedule to the Act and the *decree nisi* has to be served on the defendant.

The day to be inserted in the *decree nisi* as the day for the defendant's appearance and showing cause, if any, against it shall be as early a day as can conveniently be named, having regard to the distance from the defendant's residence to the court.

The institution has to tender with the plaint–

(a) the affidavit and the instrument, agreement or document sued upon ;
(b) the draft *decree nisi ;*
(c) the requisite stamps for the *decree nisi* and service thereof.

Under section 6 (1), the defendant shall not appear or show cause against the *decree nisi* unless he obtains leave from the court.

Section 6 (2) provides that leave to appear and show cause against the *decree nisi* may be given –

(a) upon the defendant paying into court the sum mentioned in the *decree nisi,* or,

(b) upon the defendant furnishing reasonable and sufficient security for satisfying the decree, or

(c) upon affidavits satisfactory to the court that there is an issue or a question in dispute which ought to be tried. The affidavit of the defendant has to deal specifically with the plaintiff's claim and state clearly and concisely the defence and the facts relied on as supporting it.

Section 6 (3) provides that in default of the defendant obtaining leave for appearance and showing cause, the court shall make the *decree nisi* absolute and the provisions of section 389 of the Civil Procedure Code (hereinafter referred to as the Code) shall, *mutatis mutandis,* apply to such order. For this purpose the judge has to endorse the words "*decree nisi* made absolute" (or words to the like effect) upon the *decree nisi* and date and sign the endorsement.

Section 7 provides that if the defendant appears and leave to appear and show cause is given, the provisions of sections 384 to 389 (inclusive) of the Civil Procedure Code shall, *mutatis mutandis,* apply to the trial of the action.

Sections 13 to 15 enact special provisions relating to execution.

Sections 16 to 18 provide for the giving of security in the event of appeals from orders or decrees made under the Act.

Section 21 provides that under certain circumstances the procedure under the Act cannot be availed of where the amount claimed as interest exceeds the principal sum and section 22 provides that no sum of money which constitutes a penalty for default or delay in payment of a debt can be recovered under the Act.

Section 24 lays down that nothing in the Debt Conciliation Ordinance and the Money Lending Ordinance shall apply to, or in relation to, a lending institution.

Section 25 creates new offences for drawing cheques without funds and such like.

Section 27 provides that where a debtor dies before or after institution of action, where grant of probate or letters of administration has not been made, the court may, in its discretion, after inquiry, appoint a person to represent the estate of the deceased (which is similar to the new section 398 of the Code introduced by the Amendment Act, No. 6 of 1990).

The procedure under this Act is very similar to the summary procedure on liquid claims provided in Chapter 53 (sections 703 to 711) of the Code.

Section 704 (2) of the Code provides that the defendant shall not be required, as a condition of his being allowed to appear and defend, to pay into court the sum claimed 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.

Section 706 of the Code, *inter alia*, provides that "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", which may be contrasted with the wording of section 6 (2) (c) of the Act.

In the case of *Ramanathan* v. *Fernando* [1], it was argued that section 706 of the Code gives a court discretion whether to grant leave or not even if the defendant brings the money to court. It was held in this case that 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. It was further held that on deposit of the sum in court the defendant has an unqualified right to appear and defend the action even though the court finds that no valid or sustainable defence is disclosed on the affidavits. The court has no discretion in the matter to refuse leave where the money is brought into court. The reason for this decision is that at this stage the court does not go into the merits of the case and it would offend one's sense of justice if the defendant is deprived of an opportunity to contest the case. The plaintiff's interests are safeguarded by the deposit of the money in court for which purpose a date is granted and it is directed that if the defendant fails to deposit the money, leave is refused and judgment will be entered for the plaintiff.

There is a remarkable similarity in the opening lines of section 706 of the Code and those of section 6 (2) of the Act. Both these sections begin with the words: "The court *shall* upon (the) application by (of) the defendant give leave to appear and to defend (show cause). ...."

As stated in Bindra's "Interpretation of Statutes" (7th Edn. 1984) at page 400 :

"it is conducive to judicial discipline to interpret identical provisions in two Acts which are *in pari materia*, in a similar manner."

Hence, following the decision in *Ramanathan* v. *Fernando (supra)*, I am of the view that *a defendant is entitled as of right* under the Act to appear and show cause against the *decree nisi* –

(a) by paying into court the sum under section 6 (2) (a), or
(b) by furnishing reasonable and sufficient security for same under section 6 (2)(b), even though his affidavit does not disclose an issue or question which ought to be tried.

Leave may be granted *unconditionally* under section 6 (2) (c) where the court is satisfied that the defendant's affidavit raises an issue or question which ought to be tried.

The court has to decide which of the alternatives under section 6 (2) – whether (a), (b) or (c) – is to be followed when granting leave. The court has to exercise its discretion judicially in the matter. The court must briefly examine the facts of the case before it, set out the substance of the defence, and disclose reasons in support of the order.

In the case of *Esquire (Garments) Industry Ltd.* v. *Sadhwani (Japan) Ltd.* [2] it was held that sections 704 and 706 of the Code were relevant to the question of granting leave to appear and defend and the correct question was whether *a triable issue* arose in the affidavits and documents before court.

Now what is a triable issue? The matter has come up for consideration in India where Order 37 Rule 3 (old section 553) of the Indian Civil Procedure Code is similar to section 706 of our Code and the law has been set out as follows :–

> "A triable issue can only mean that a defence is revealed or disclosed in the affidavit of the defendant which cannot be summarily disposed of on the affidavits and which requires a further trial or investigation. It also means that if the trial and further investigation resulted in the defendant's contention being found to be correct the defendant would be entitled to succeed. " –1959 I.L.R. (Bombay) 496 at 499 quoted in Chitaley and Rao's "Code of Civil Procedure", Vol. 3, 7th Edn. 1963, at page 3951.

It is significant that this concept of a triable issue is found in section 6 (2)(c) of the Act which states that the court shall, upon the application of the defendant, give leave to appear and show cause against the *decree nisi inter alia,* "upon affidavits satisfactory to the court that there is an issue or a question in dispute which ought to be tried."

The principles applicable to the granting of leave to defend or to show cause under the two procedures are somewhat similar. However section 6 (2)(c) of the Act expressly provides for the affidavit of the defendant to deal specifically with the plaintiff's claim and his defence thereto and what facts are being relied on in support thereof. The defendant has to deal with the plaintiff's claim on its merits ; it is not competent for the defendant to merely set out technical objections. It is also incumbent on the defendant to reveal his defence, if he has any.

Then the important question arises as to what is meant by the words "an issue or question which ought to be tried".

I am of the view that they mean nothing more than a plausible defence with a triable issue ; that is to say an issue which cannot be summarily disposed of on the affidavits, but requires investigation and trial. For this purpose the defendant is bound under section 6 (2)(c) to deal specifically with the plaintiff's claim on its merits and his defence thereto and what facts are relied on as supporting such defence. Hence the court is in an advantageous position to examine the defendant's affidavit and any other material to find out whether a plausible defence with a triable issue is disclosed, in which event leave may be granted unconditionally under section 6 (2)(c).

On the other hand, mere technical objections and evasive denials will not suffice.

If no plausible defence with a triable issue is set up, the judge can give the defendant leave to appear and show cause against the *decree nisi* by placing him on terms either under section 6 (2)(a) or section 6 (2)(b).

The purpose of section 6 of the Act (and also sections 704 and 706 of the Code) is to prevent frivolous or untenable defences being set up and to avoid the lengthening of proceedings by dilatory tactics.

This Act provides an expeditious method for the recovery of debts due to lending institutions, in the larger interest of the economy.

Coming to the facts of this case, this action was filed on 11.7.91. On that day, in the journal entry, the order of the learned Additional District Judge is recorded as follows :–

1. The plaint and the relevant annexures are accepted.
2. (a) The documents relied on by the plaintiff are duly stamped and not open to suspicion.
   (b) The claim is not prescribed.
   (c) The court is satisfied of the averments in the affidavit.
3. No penal sum has been included in the claim.
   In terms of the prayer in the plaint a *decree nisi* is entered.
4. If the defendants have cause to show against this *decree nisi,* they are given an opportunity to appear in court and to so do on 91.09.30.
5. Enter *decree nisi* accordingly and issue the same on the defendants for 91.09.30.

The learned Additional District Judge has signed the said journal entry.

The journal entry of 30.9.91 shows that the *decree nisi* had been served on all four defendants and that they had filed their respective petitions and affidavits.

After this an inquiry was held and written submissions were tendered to court.

Thereafter by his order dated 13.3.92 the learned Additional District Judge made order rejecting the applications of the 1st and 2nd defendants to show cause against the *decree nisi* and made it absolute against them and had made an endorsement to that effect thereon.

He had permitted the 3rd and 4th defendants to show cause against the *decree nisi* and granted a date, namely 26.3.92, for the filing of objections.

In the course of the said order dated 13.3.92 the learned Additional District Judge has said that in terms of paragraph 2 of the document produced marked P1, it appears that no demand has been made by the plaintiff from the guarantors. Accordingly it appears *prima facie* that the 3rd and 4th defendants have sufficient grounds to satisfy the court that they have a defence and they were granted unconditional leave to show cause against the *decree nisi.* Presumably the court was satisfied under section 6 (2)(c) of the Act.

On 26.3.92 the 3rd and 4th defendants were absent, nor were they represented by Attorneys-at-Law ; they failed to file objections or any answer.

Accordingly the learned Additional District Judge made order that under section 7 of the Act sections 384 to 391 of the Civil Procedure Code are made applicable and that the 3rd and 4th defendants have failed to show any cause against the *decree nisi* entered against them being made absolute. He therefore entered order absolute against the 3rd and 4th defendants too.

More than 3 –1/2 months later, by a motion dated 20.7.92, the 3rd defendant-petitioner has stated that the *decree nisi* has been made absolute *per incuriam*, in that –

(a) there is no valid affidavit of the plaintiff ;
(b) the plaint does not disclose a valid cause of action.

Consequently the matter was fixed for inquiry. Written submissions were tendered by parties and the learned Additional District Judge made his order dated 19.11.92 rejecting this application of the 3rd defendant-petitioner. In the course of his order the learned Additional District Judge has stated that the 3rd defendant has failed to cure his default of appearance on 26.3.92 and hence he has no legal status to make this application. He compared the position of the 3rd defendant to that of a defendant who was absent and a decree has been entered against him in his absence under section 85 of the Civil Procedure Code. Such a person has first to cure his default under section 86 of the Civil Procedure Code. Without curing his default he cannot now challenge any orders made in the course of the proceedings.

The present application has been filed by the 3rd defendant-petitioner on 9.12.92 in this court to revise and set aside the said order dated 19.11.92 and to stay all proceedings in consequence of the *decree nisi* being made absolute.

At the hearing of this application Mr. Romesh de Silva, P.C., for the 3rd defendant-petitioner, submitted that the plaint does not disclose a cause of action, because in paragraph 2 of the guarantee bond (P7) it is stated that the guarantors "hereby agree to pay the Bank in Colombo moneys herein mentioned ten days after demand in writing is made on us". Nowhere in the plaint or afffidavit is it averred that the money had been demanded from the 3rd defendant-petitioner. He relied on the decisions in *Read v. Samsudin* [3], *Soysa v. Soysa* [4], *Avva Umma v. Casinaden* [5], *Miriam Lawrence v. Arnolda* [6], and *Divisional Forest Officer v. Sirisena* [7].

He also submitted that the learned Additional District Judge in his order dated 13.3.92 had already come to the conclusion that there was no cause of action set out in the plaint as there is no averment that a demand was made. Therefore, acting on the basis *nunc pro tunc,* the claim should be dismissed as against the 3rd defendant-petitioner.

He also submitted that the affidavit was defective, in that–

(a) the *jurat* does not state whether the affidavit was sworn or affirmed ;
(b) there was no averment that the amounts were justly due to the plaintiff as required by section 4 (1) of the Act.

Mr. Romesh de Silva also submitted that the failure of the 3rd defendant-petitioner to appear or to file objections on 26.3.92 only results in the 3rd defendant-petitioner being precluded from relying on any additional evidence contained in those objections and annexures thereto. The court had to exercise its independent discretion on the available material whether the plaintiff is entitled to maintain his claim against the 3rd defendant-petitioner. He submitted that in view of the fact that the court has already accepted the position that there was no cause of action disclosed against the 3rd (and 4th) defendants, the plaint should have been dismissed. Therefore he submitted that acting in revision this court should set aside the order absolute dated 19.11.92.

Mr. S. A. Parathalingam (for the plaintiff-respondent who had been noticed as a stay order has been sought) submitted that the 3rd (and 4th) defendants were in default in failing to state or file objections under section 384 on 26.3.92 and the court acted correctly in making the order absolute.

He also submitted that the order absolute cannot now be set aside on its merits, but it could have been set aside under section 389 of the Civil Procedure Code on the grounds stated therein (namely accident, misfortune or non-service of *order nisi*). He also submitted that the court cannot at this stage look into the question whether the plaint disclosed a cause of action.

I have carefully considered these submissions.

In the affidavit filed it is specifically stated that the deponent is a Buddhist. Presumably this affidavit would have been affirmed to and not sworn though the *jurat* does not say so. In any event this objection does not appear to have been taken up before the learned Additional District Judge, and it is not open to the 3rd defendant to urge it now.

In section 705 [1] of the Civil Procedure Code dealing with the summary procedure on liquid claims, it is laid down that the plaintiff must make affidavit that the sum which he claims is "justly due" to him from the defendant, which is similar to the wording in section 4 (1) of the Act. The question has been considered whether the use of the words "justly due" is imperative in an affidavit filed under section 705 (1).

On this point there have been conflicting decisions of the Supreme Court in the cases of *Wijesinghe v. Perera* [8], and *Anamalay v. Allien* [9].

However it was held finally by a bench of three judges of the Supreme Court in the case of *Paindathan v. Nadar* [10] that it is not essential that the plaintiff should use the word "justly" in the affidavit if the facts set out therein show that the sum was rightly or properly due. So too in this case the affidavit shows that the amount is rightly and properly due, and hence this is only a technical objection which should not be allowed to prevail. However, I would stress on the

necessity of compliance with the wording of the section by the affidavit stating that the sum claimed is "justly due".

It has also been held in the court below that the total liability enforceable against the guarantors (i.e. the 3rd and 4th defendants) shall not exceed Rupees One Million together with all interest thereon computed from the date on which the demand in writing shall be made by the Bank, and there is no averment that such a demand was made in writing.

If the 3rd defendant-petitioner had filed his objections and the matter was fixed for inquiry, it would have been open for the plaintiff to meet this argument by showing specifically how the amount claimed, namely, Rs. 1,171,697/73 was arrived at, whether it includes interest and if so from what date, and also whether a demand in writing was in fact made, though not pleaded in the plaint.

Mr. Romesh de Silva's main submission was that the learned Additional District Judge by his order dated 13.3.92 has held that the plaint does not disclose a cause of action against the 3rd and 4th defendants. For this purpose I have carefully perused the order.

In the course of the order the learned Additional District Judge states that it appears that in terms of paragraph 2 of P7 (the bond) no demand has been made from the guarantors. Accordingly the affidavit discloses that, *prima facie (belu belmata)* the 3rd and 4th defendants have grounds to set up a defence, as there is a question of law arising out of this dispute. He has not stated that the plaint does not disclose a cause of action. If he had so held, I have no doubt that he would have dismissed the plaint immediately thereafter.

In any event it is well settled that even if the order of the learned Additional District Judge was wrong, it is valid and binding upon the parties until it is reversed by an appellate tribunal and cannot be challenged in collateral proceedings. See the decisions of the Supreme Court in *Jayalath v. Abdul Razak* [11] and *Marjan v. Rasiah* [12].

Section 7 of the Act says that if leave to appear and show cause is given, the provisions of sections 384, 385, 386, 387, 388, 390 and 391 of the Civil Procedure Code are applicable. In the case of *M. Rajendra (Permanent Secretary to the Ministry of Transport and Works) v. Parakrama Ltd.* [13] it was held that under section 384 the

respondent could appear by a lawyer and obtain a date to file or state his objections. This has not been done by the 3rd defendant-petitioner and he is in default.

Thereafter the 3rd defendant-petitioner has taken no steps under section 389 to have this order set aside on any of the grounds stated therein. In these circumstances it is not open to him to raise objections regarding the validity of the order dated 26.3.92 three and a half months later by a motion dated 20th July 1992. To set aside the order dated 26.3.92 he should have acted under section 389 of the Civil Procedure Code by way of summary procedure to cure his default, which he has failed to do.

Section 389 specifically provides that the application to set aside a final order made in the case of a respondent's non-appearance shall be by way of summary procedure and that too within a reasonable time. Therefore a petition and affidavit along with other exhibits, if any, should have been filed instead of a motion. The procedure followed has been wroing and on that ground too the motion should have been disallowed.

In his application he has not given any reason for his failure to appear on 26.3.92 except to state in paragraph 8 of the petition filed in this court that the petitioner was unaware of what steps had to be taken due to some confusion that prevailed between the petitioner and his lawyers. No acceptable excuse has been stated for the default of appearance on 26.3.92 . The 3rd defendant-petitioner also adduced no reason why he delayed more than 3–1/2 months to make the present application.

For all these reasons the 3rd defendant-petitioner's application has no merit and has to be dismissed.

Before concluding this case I wish to state that I have perused the affidavit dated 30.9.91 filed by the 3rd defendant in this case. In the affidavit he has admitted signing the guarantee bond but denied the correctness of the particulars of the loan account (marked P9) filed by the plaintiff Bank.

The 3rd defendant has gone on to state some objections which are of a technical nature, namely,

(1) The plaint and affidavit do not conform to section 4 (1) of the Act.
(2) No cause of action against him is disclosed.
(3) The plaintiff has not complied with paragraph 2 of the guarantee bond (P7).
(4) The plaint does not disclose whether any demand either orally or in writing was made against him.

The 3rd defendant in his affidavit has not dealt specifically with the plaintiff's claim and stated his defence, apart from denying the correctness of the loan account (P9). He has not specified in which particulars the loan account is incorrect, nor the reasons for so alleging. He has not stated on what facts he is relying to support his claim that the loan account is incorrect.

He has not set out the grounds for stating that the plaint and affidavit do not conform to section 4 (1) of the Act. One could only infer that it was because the words "justly due" were not used in the affidavit. However, as hereinbefore stated, this is not fatal defect.

He has not dealt with the plaintiff's claim on its merits, but merely set out objections of a technical nature.

I am of the view that the affidavit does not disclose a plausible defence and a triable issue and the 3rd defendant should have been given leave to show cause against the *decree nisi* only on terms either under section 6 (2)(a) or section 6 (2)(b) of the Act. If a defendant is granted leave unconditionally to show cause against the *decree nisi* on this type of technicality, then the purpose of this Act will be brought to naught.

I affirm the order of the learned Additional District Judge dated 26.3.92 and 19.11.92.

The application is dismissed with costs payable by the 3rd defendant-petitioner to the plaintiff-respondent.

WEERASEKERA, J. – I agree.

Application dismissed.