

FERNANDO
v.
CEYLON PETROLEUM CORPORATION

COURT OF APPEAL.
WEERASEKERA, J.,
WIGNESWARAN, J.
C.A. 37/88 (F)
D.C. CHILAW 22750
OCTOBER 10, 1996.

Civil Procedure Code – Cap. L111, Section 705(3) Form 19 – Irreconcilable – Leave to appear and defend unconditionally – Reasonableness and justifiability of the defence – Triable issues – Notice of dishonour – Section 48 of the Bills of Exchange Ordinance.

The plaintiff-respondent sued the defendant-appellant for the recovery of a certain sum of money by way of summary procedure.

Summons in conformity with Form 19 was served on the defendant-appellant on 16.3.87. The defendant-appellant appeared in Court on 1.4.87. Court granted time to the defendant-appellant. The affidavit of the defendant was filed on 26.10.87 – praying for leave to appear and defend unconditionally. The affidavit also set out the defence that there had been no notice of dishonour given to the defendant. The plaintiff-respondent objected to the affidavit on the ground that it was filed out of time. The District Court held with the plaintiff-respondent. On appeal –

Held:

(1) The summons was served on 16.3.87, proxy was filed on 1.4.87. The period of time in between was 17 days. The first day, Sundays and Public Holidays would have to be excluded (There were two Sundays). The application was not out of time.

(2) S 705 (3) states that the day to be inserted in the Notice as the day for the defendant's appearance shall be as early as can be conveniently named, this presupposes the fixing of a date for appearance.

Form 19 refers to obtaining of leave from Court within ... days. Thus the provisions are contradictory due to S 705 (3) referring to a particular date and Form 19 referring to a particular period (in this instance 14 days).

No proper notice or summons as required by S 705 (3) could be served if S 705(3) and Form 19 were both to be conformed to. Both provisions cannot be reconciled.

Per Weerasekera, J:

"Even if there had been a delay to come to Court within the stipulated time, the discretion of Court to entertain the defendant's affidavit was never fettered if the defence put forward was reasonable and it was in the interests of justice to allow such an application for leave to appear and defend unconditionally".

(3) It is seen that the Notice of dishonour had not been given to the defendant-appellant. Whether there was a lawful notice of dishonour is a triable issue.

Appeal from the judgment of the District Court of Chilaw.

Cases referred to:

1. *Perera v. Karunanayake* 67 NLR 23.
2. *Nanayakkara v. Paiva* 64 NLR 193.
3. *Esquire (Garments) Industry Ltd., v. Sadhwani (Japan) Ltd.*, 1983 2 SLR 242.

Thilak Gunawardene with Nalinda Premachandra for defendant-appellant.

Bimal Rajapakse for plaintiff-respondent.

Cur. adv. vult.

October 10, 1996.

WEERASEKERA, J.

This is an appeal from the order of the learned District Judge dated 16.03.88 refusing the application of the defendant-appellant for leave to appear and defend unconditionally.

The plaintiff-respondent sued the defendant-appellant for the recovery of a sum of Rs. 576,744/34 by way of summary procedure.

Summons in conformity with form 19 in the schedule to the Civil Procedure Code was served on the defendant-appellant on 16.03.87. The defendant appeared in Court on 01.04.87. The Court granted time to the defendant-appellant and subsequently further time was granted. The affidavit of the defendant-appellant dated 23.10.87 was filed on 26.10.87. In para ten of the affidavit the defendant-appellant prayed for leave to appear and defend unconditionally. The affidavit set out the defence that there had been no notice of dishonour given to the defendant-appellant. The plaintiff-respondent moved for time to consider the affidavit and thereafter on 01.02.88 objected to the affidavit on the ground that it had been filed out of time. Subsequently

written submissions were filed and the order appealed from was thereafter made on 16.03.88 in regard to the question as to whether this application for leave to appear and defend unconditionally had been made out of time.

We find that Summons was served on 16.03.87 and the proxy was filed on 01.04.87. The period of time in between was 17 days. Even so as decided in *Perera v. Karunanayake* ⁽¹⁾; the first day would have to be excluded and as decided in *Nanayakkara v. Paiva* ⁽²⁾ Sundays and Public Holidays would also have to be excluded. There were two Sundays within this period. Three days then would have to be deducted. Thus the defendant should be deemed to have come into Court on the 14th day.

Furthermore Section 705(3) of the Civil Procedure Code states as follows:

“The day to be inserted in the notice as the day for the defendant’s appearance shall be as early a day as can be conveniently named ...” This presupposes the fixing of a date for appearance. Form 19 refers to obtaining of leave from the Court “within... days”. In this instance it was 14 days. Thus the provisions are contradictory due to Section 705(3) referring to a particular date and Form 19 referring to a particular period (in this instance 14 days).

It is our view therefore no proper notice or summons as required by Section 703 could be served if the provisions of Section 705(3) and Form 19 were both to be conformed to. Both provisions cannot be reconciled. In any event there is no specific mention of what the notice means in Section 705(2). What therefore appears to have been contemplated by law was summons in terms of Form 19. A series of judicial decisions confirm this. In any event we seriously question as to whether the summons that was served in this case was in accordance with Form 19. The summons in this instance excluded the day of service which was not in conformity with Form 19. Therefore the objection that the application to appear for leave and to defend unconditionally was made out of time does not seem to be sustainable in the light of Court granting time on 01.4.1987 which was the 14th day in terms of the law.

We are of the view that proforma without any judicial evaluation the learned District Judge had proceeded to refuse the application of the defendant-appellant only on a technical ground that the defendant did not come into Court within 14 days of service of summons.

Even if there had been delay to come into Court within the stipulated time the discretion of Court to entertain the defendant's affidavit was never fettered if the defence put forward by the defendant was reasonable and it was in the interests of justice to allow such an application for leave to appear and defend unconditionally. A series of decisions of the Appellate Courts have found that it was not whether the affidavit was filed within time or not which was important but reasonableness of the defence and its justifiability.

How does one determine the reasonableness and/or justifiability of the defence is the next question. What material is there before Court except the affidavit even if filed out of time? It is for this reason apparently that the question as to whether the defence was reasonable and justifiable has been an over riding consideration when such an application was examined. In an application for leave to appear and defend the prime consideration should be not merely the mathematical or arithmetical computation of time, but whether what is set out in the affidavit is reasonable and whether it is justifiable. The learned District Judge regrettably has failed to appreciate this aspect. He has failed to consider the affidavit, submissions and documents. If he did so he would have seen that not only are the provisions of Section 703 and 705(3) and Form 19 irreconcilable but that the defence taken up in this case was reasonable and that the justice of the case demanded that the defendant be allowed leave to appear and defend. It seems that the learned District Judge was unaware of a recent decision of His Lordship the Chief Justice which said that the question that has to be determined is whether the affidavit disclosed a triable issue. *Vide Esquire (Garments) Industry Ltd. v. Sathwani (Japan) Ltd.* ⁽³⁾.

On an examination of the affidavit and the submissions we find that they disclose a defence, in that, notice of dishonour had not been given to the defendant-appellant. In our view the question whether

there was a lawful notice of dishonour in fact given is a triable issue. (Vide Section 48 of the Bills of Exchange Ordinance)

It is therefore our view that even if there was a lapse of time in making an application for leave to appear and defend, the affidavit disclosed a triable issue. The defendant-appellant therefore should be granted permission to appear and defend unconditionally.

The order of the learned District Judge dated 16.03.88 is hereby set aside. Application for leave to appear and defend unconditionally is allowed. The plaintiff-respondent will pay costs in the lower Court, and costs in this Court fixed at Rs. 325/-

WIGNESWARAN, J. – I agree.

Appeal allowed.
