1935 *Present :* **Poyser and Koch JJ. and Soertsz A.J.**

PAINDATHAN *v.* NADAR.

4—D. C. Chilaw, 10,321.

Summary procedure on liquid claims—Affidavit in support of plaint—The use of words " justly due " not essential—Civil Procedure Code, s. 705.

In an action under Chapter LIII. of the Civil Procedure Code it is not essential that the plaintiff should actually use the word "justly" in his affidavit in support of the plaint.

The defendant should not be granted unconditional leave to defend merely because such word was not used.

The affidavit will substantially comply with the requirements of section 705 of the Code if the facts therein set out show that the sum claimed was rightly and properly due.

CASE referred to a Bench of three Judges on a construction of section 705 of the Civil Procedure Code. This was an action on a promissory note under Chapter LIII. of the Civil Procedure Code. The question referred was whether the plaintiff's affidavit was defective as it did not set out that the money was "justly" due. The learned District Judge held that the affidavit was sufficient to comply with the require-

ments of section 705 of the Civil Procedure Code and that the defendant could file answer on giving security.

Croos Da Brera (with him *S. Alles*), for defendant, appellant.—The plaintiff cannot avail himself of the summary procedure provided by Chapter LIII. of the Code as he has not complied with the requirements of section 705. That section requires that in the affidavit the plaintiff should swear that the amount claimed is justly due. In *Anamalay v. Allien*[1] it was held that the word "justly" is a material word and its omission was an irregularity. It has been the practice in all Courts of the Island to use this form of affidavit. This practice should not be disturbed (*Boyagoda v. Mendis*[2]). The form of affidavit used in our Courts has been borrowed from the English practice. The word "justly" was intended to express in a compendious way the requirement of the English law that the plaintiff should swear that there is no defence to his claim. To allow the plaintiff to use other language would involve the Courts in an inquiry as to its sufficiency. Enactments which shut out a defence should be strictly construed. Counsel also cited *Meyappa v. Bastian Fernando*[3]; *Lagos v. Grunwaldt*[4]; *Gurney v. Small*[5] *18 Halsbury 191; 67 L. T. 350 N. S.*

Rajapakse (with him *H. N. G. Fernando*), for plaintiff, respondent.—The plaintiff has substantially complied with the requirements of the Code. The use of the word "justly" is not imperative. The affidavit filed clearly shows that the amount is due. The defendant has not in his affidavit disclosed any facts which will entitle him to obtain leave. It was never the intention of the Code to invest with any special sanctity the mechanical use of the word "justly". So long as the language used shows that the amount is justly due the affidavit should not be rejected.

Cur. adv. vult.

Croos Da Brera, in reply.

September 14, 1935. POYSER J.—

The question for determination in this case is the correct interpretation of section 705 of the Civil Procedure Code.

The plaintiff sued the defendant on a promissory note for the sum of Rs. 635 being Rs. 400 principal and Rs. 235 interest. The material part of the affidavit in support of the plaint is as follows:—

> "There is now due and owing to me from the defendant upon the said note the sum of Rs. 635, to wit, Rs. 400 being principal and Rs. 235 being interest due from September 17, 1930, to August 17, 1934, which said sum or any part thereof the defendant has failed and neglected to pay me although thereto often requested. I have no adequate security from the defendant to meet payment of the amount due on the said note".

When the matter came up for inquiry before the District Judge it was argued that the plaintiff's affidavit was defective as it did not set out that the money was "justly" due to him.

[1] *2 N. L. R. 251.*
[2] *30 N. L. R. 321.*
[3] *(1899) 1 Br. 127.*
[4] *(1910) 1 K. B. (46) C. A.*
[5] *(1891) 2 Q. B. 584.*

The District Judge held that the affidavit was sufficient to fulfil the conditions required by section 705 of the Civil Procedure Code and that the defendant could only file answer if he gave adequate security.

The defendant appeals from that decision.

This appeal originally came before my brother Akbar and myself, we referred to a Bench of three Judges as we had doubts whether the case of *Anamalay v. Allien* [1], a two Judge decision, was correctly decided.

In that case it was held, that in order to entitle the plaintiff to the summary procedure under Chapter LIII., it is necessary that he should make an affidavit that the sum he claimed is '*justly*' due to him from the defendant. The material passage in the judgment of Bonser C.J. at page 252 reads as follows:—

> "It appears that the plaintiff is not in a position to avail himself of this summary procedure. In order to do this he must make an affidavit that the sum he claims is '*justly*' due to him from the defendant. In my opinion the word '*justly*' is a material word. In this case the plaintiff has merely sworn that the amount is due on the promissory note . . . ."

If this case was correctly decided, and there is no other reported case dissenting from it, this appeal will have to be allowed.

In my opinion, however, it is not essential that the plaintiff should actually use the word 'justly' in his affidavit in support of the plaint, nor do I consider it reasonable that a defendant should be granted unconditional leave to defend an action instituted under Chapter LIII. of the Civil Procedure Code merely because such word was not used. The affidavit will substantially comply with the requirements of section 705 if the facts therein set out show that the sum claimed was rightly and properly due.

Further, section 705 does not specifically provide that the affidavit shall be in a particular form (compare section 703 in regard to the plaint and summons) and in the absence of any such provision, I consider it is only necessary to set out sufficient material to show that the sum claimed is justly due.

We have been referred to the case of *Boyagoda v. Mendis* [2], in which it was laid down that where an enactment concerning procedure has received a certain interpretation, which has been recognized by the Courts for a long period of years, the practice based upon such interpretation should be followed.

I am not at all sure that section 705 has always received the interpretation laid down in *Anamalay v. Allien* (*supra*).

I followed this case in *Wijesinghe v. Perera* [3], sitting by myself I was bound to do so but there are no other cases—at least none were cited to us—to indicate that the principle enunciated in *Anamalay v. Allien* (*supra*) had been recognized by the Courts for a long period of years and I cannot think that that principle has been so recognised.

[1] *2 N. L. R. 251.* [2] *30 N. L. R. 321.*

[3] *2 Cey. Law Weekly 506.*

An examination of the affidavits filed in this appeal are conclusive grounds, in my opinion, for dissenting from the principle laid down in *Anamalay v. Allien* (*supra*).

I have previously referred to the material facts of the plaintiff's affidavit. The defendant in his affidavit admits the execution of the promissory note sued on and that he gave the same as security for monies advanced to him from time to time. He states he has a good and valid defence to this action both on the facts and the law, but he does not state what such defence is. This affidavit therefore discloses no defence to the action, but if we are to follow *Anamalay v. Allien* (*supra*), we must allow the defendant unconditional leave to defend merely because the plaintiff has not sworn that the sum claimed is "justly" due to him, although he has set out ample material to show that such sum is justly due.

For these reasons I do not agree with the principle laid down in the case of *Anamalay v. Allien* (*supra*) and would dismiss the appeal with costs.

KOCH J.—I agree.

SOERTSZ A.J.—I agree.

Appeal dismissed.