

**ANANDA**  
**v**  
**DISSANAYAKE**

COURT OF APPEAL  
WIMALACHANDRA, J.  
RANJIT SILVA, J.  
CALA 148/2005  
DC COLOMBO 36162/MS  
AUGUST 29, 2006  
DECEMBER 5, 2006

*Civil Procedure Code – Cap 53– Section 704, Section 706 – Summary Procedure on liquid claims – Defendant objecting to jurisdiction and that promissory note is not valid in statement of objections – Praying for leave to defend unconditionally – Validity – Judicature Act section 39 – Action barred by positive rule of law – Objections when? – Matters involving Law Merchant, which Court has jurisdiction? – Debtor seeking creditor – Past consideration – No consideration? – Bills of Exchange Ordinance, section 27 and 91 – Prima facie sustainable defence.*

The plaintiff instituted action to recover a certain sum of money with interest owing to him on a promissory note – under Cap 53 of the Code. The petitioner without filing petition/affidavit filed a statement of objections/affidavit and a number of documents praying that, the case be dismissed for want of jurisdiction as the parties were residing outside the jurisdiction of the District Court of Colombo and on the ground that the promissory note was not a valid note, as there was no valuable consideration. The application was dismissed by the District Court.

**Held:**

- (1) Objection to jurisdiction must be taken at the earliest opportunity if no objection is taken and the matter is within the plenary jurisdiction of the Court, the Court will have jurisdiction to proceed with the matter. Where the action is barred by a positive rule of law objection must be taken before pleading to the merits of the case.
- (2) In a matter involving "Law Merchant" English Law (Common Law) has to be applied. It is the debtor who should seek the creditor. Therefore the plaintiff must file action in the District Court having jurisdiction within which he resides.
- (3) In the instant case, there is ample evidence to show the intention of the parties that the payment must be made at the office of the defendant-petitioner. Evidence indicates that the place of residence of the defendant-petitioner is within the jurisdiction of the District Court of Colombo.
- (4) Although the general rule is past consideration is no consideration there are exceptions to this rule – Sections 27/91 Bills of Exchange Ordinance once the petitioner admitted the receipt of money and a Promissory Note signed in the absence of any documentary evidence to the contrary, it is not in the mouth of the petitioner to argue that he has a *prima facie* sustainable defence.

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

**Cases referred to:**

- (1) *David Appuhamy v Yassassi Thero* – 1987 – 1 Sri LR 253.
- (2) *Actalina Fonseka and others v Dharshani Fonseka* – 1989 – 2 Sri LR 95 at 100.
- (3) *Ponnaiya v Kanagasabai* – 35 NLR 128 (distinguished)

*Roland Munasinghe* with *G.W.R. Dammika* for defendant-petitioner.

*W. Dayaratne* for plaintiff-respondent.

January 24, 2007

**RANJIT SILVA, J.**

This is an application for leave to appeal filed by the Defendant-Petitioner (referred to as the Petitioner hereinafter) challenging the order made by the learned District Judge of Colombo on 18.04.2005 in case No. 36162/Ms disallowing the application of the petitioner to file answer and defend unconditionally. By the said impugned order marked Z, the learned District Judge rejected the objections taken by the petitioner to the exercise of jurisdiction, on the following grounds.

- 1) that the plaintiff's did not reside within the territorial limits of the jurisdiction of the District Court of Colombo.
- 2) that the promissory note marked X3 relied on by the plaintiff-respondent-respondent was not a valid promissory note for want of consideration and granted leave to the petitioner to appear and defend on the condition that the petitioner should enter into a bond for the full sum claimed on the promissory note in a sum of Rs. Eight Million (Rs. 8,000,000/-).

When this matter came up for inquiry before a different bench on 14.12.2005 the matter proceeded to inquiry and the order was reserved for 24.02.2006 on which date order was pronounced granting leave to the petitioner and the matter was fixed for argument. The parties made their oral submissions on 29.08.2006. The Counsel for the petitioner moved for a date to cite authorities and as undertaken the Counsel for the petitioner furnished to Court the authorities by way of written submissions dated 05.12.2006.

### **The facts and the Law**

The respondent instituted action in the DC of Colombo to recover a sum of Rs. 8,000,000/- together with interest due and owing to her on a promissory note signed by the petitioner on 12.05.2004. The main action was filed under Chapter LIII of the Civil Procedure Code under the Summary Procedure on Liquid Claims. According to and in terms of the plaint the petitioner had paid only a sum of Rs. 160,000/- as interest due on the promissory note and thereafter defaulted payment. Therefore the respondent by letter of demand A2 filed along with the plaint demanded the said capital and the interest due on the note but the petitioner did not respond to the letter of demand.

As the petitioner was in default the respondent filed the aforesaid action to recover the said sum together with interest thereon.

The petitioner was duly served with summons in terms of section 704 of the CPC. In terms of section 706 of the CPC on receipt of summons one has to obtain leave of Court to appear and defend the action with or without conditions. If one could establish that there is a *prima facie* sustainable defence the court must grant leave to appear and defend unconditionally yet if the Court entertains any doubt as to the good faith (*bona fides*) of the defence the Court can still grant conditional leave to appear and defend, as it was done in this case. The petitioner instead of filing petition and affidavit filed a statement of objections together with an affidavit and a number of documents marked X1 to X12 praying that the case be dismissed for want of jurisdiction as the parties were residing outside the jurisdiction of the District Court of Colombo and also on the ground that the particular promissory note was not a valid promissory note as there was no valuable consideration in respect of the said promissory note.

The petitioner further argued that the Court had no jurisdiction to issue summons under form 19 of the CPC and in the alternative and in addition to the aforesaid relief prayed that he be permitted to file answer and defend the action unconditionally.

The respondent argued that the petitioner had no right to take up the objection with regard to the lack of territorial jurisdiction at that stage of the action and that he could do so only in his answer after the petitioner was granted leave to appear and defend. This argument is not tenable and ought to be rejected in limine. It was held in *David Appuhamy v Yassassi Thero*<sup>(1)</sup> that I quote "an objection to jurisdiction must be taken at the earliest opportunity. If no objection is taken and the matter is within the plenary jurisdiction of the Court, the court will have jurisdiction to proceed with the matter and make a valid order. In *Actalina Fonseka and others v Dharshani Fonseka*<sup>(2)</sup> it was held that where the action is barred by a positive rule of law objection must be taken before pleading to the merits of the case.

### **Section 39 of the Judicature Act reads thus**

*Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of first instance neither party shall afterwards be entitled to object to the jurisdiction*

of such Court, but such Court shall be taken to have jurisdiction over such action proceeding or matter.

For these reasons I am of the view that the petitioner was entitled to take up want of jurisdiction as an objection together with an application seeking permission or leave to appear and defend unconditionally. Passing I must emphasize that section 39 of the Judicature Act covers only instances of Patent want of jurisdiction and as far as a Patent want of jurisdiction is concerned no amount of consent, acquiescence or waiver can cure such defect and such an objection in regard to a Patent want of jurisdiction could be taken any time even in appeal for the first time. Such an attack can be made even in collateral proceedings. The objection taken by the petitioner with regard to the form of the summons served on him does not deserve any consideration by this Court and could be disregarded. On the other hand I am of the opinion that the petitioner has made a valid application to Court seeking leave to appear and defend the action, whether such application was made in addition or as an alternative to other relief claimed has no significance also the argument that instead of a petition the petitioner filed a petition of objection and therefore there is no valid application before Court must also be rejected out of hand as I find no merit in that argument too.

### **Issues of facts – valuable consideration**

It is admitted by the petitioner that the respondent gave him Rs.8,000,000/- at least not refuted. However, the petitioner contended that the money was given to him some time prior to the execution of the promissory note and therefore did not constitute valid valuable consideration for the promissory note and hence it was not a valid promissory note. His contention was that for the money lent to him there was a previous agreement and that the respondent tore the document containing the said agreement into pieces in front of the petitioner and several others and took away even the torn pieces of paper with him. Once the petitioner admitted the receipt of the money and promissory note signed, in the absence of any documentary evidence to the contrary, it is not in the mouth of the petitioner to argue that he has a *prima facie* sustainable defence that warrants the granting of unconditional leave for the petitioner to file answer, appear and defend the case.

Although the general rule is 'past consideration is no consideration' there are exceptions to this rule, one of the exceptions is found in section 27 of the Bills of Exchange Ordinance."

Section 27 of the Bill of Exchange the relevant portion is;

*Sub section (1) Valuable consideration for a bill may be constituted by*

(a) .....

(b) *an antecedent debt or liability, such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.*

*Sub (2) .....*

*This provision is made applicable to promissory notes by section 91 of the Bills of Exchange.*

*Section 91(1) reads as follows:*

*"Subject to the Provisions in this part, and except as by this section provided, the Provisions of this Ordinance relating to Bills of Exchange apply, with the necessary modifications, to promissory notes.*

For these facts and the Law I find that the learned District Judge cannot be faulted for the conclusions drawn by him on the facts and for the findings reached based on the facts, namely that the Promissory note was a valid promissory note.

## **Jurisdiction**

"The petitioner raised an objection as to the jurisdiction in the District Court of Colombo on the grounds that both the respondent and the petitioner were residing outside the territorial limits of the said District Court.

This objection was subsequently restricted to the fact that the District Court of Colombo lacked jurisdiction as the respondent (plaintiff) resided outside the jurisdiction of the District Court of Colombo (para 06 of the Objections)

In a matter involving "Law Merchant" English Law (Common Law) has to be applied. According to the English Common Law it is the

debtor who should seek the creditor. Therefore, the plaintiff in a case must file action in the District Court having jurisdiction within which he resides (*Ponnaiya v Kanagasabai*<sup>(3)</sup>).

In this case I find that the intention of the parties with regard to the place of payment is clear. In paragraph 04 of the Petition of objections the petitioner himself has admitted that a receipt which is marked X12 was issued to the respondent at his office in Colombo in respect of the payment of Rs. 178,000/- as interest on the capital amount borrowed by him from the respondent according to X8 one of the documents marked and produced by the petitioner himself the address given therein as the place of his residence is No. 5, Mahakumarage Mawatha, Grandpass, Colombo 14 is also within the jurisdiction of the District Court of Colombo. X8 was the reply to the letter of Demand marked A2. In A2 the address of the petitioner is stated as No. 5, Mahakumarage Mawatha, Grandpass, Colombo 14 the same address referred to in X8. In X8 the petitioner has not refuted or disputed the address of the petitioner but has expressly confirmed and admitted the address given in A2 as correct.

The petitioner has cited *Ponnaiya v Kanagasabai (supra)* in support of his argument based on 'want of jurisdiction'. In the said judgment it was held that "the rule of English Law seems to be this; that you must discover the place of payment from the intention of the parties. Here there was no express intention the note was silent as to the place of payment and the learned Commissioner was dissatisfied with such evidence as was addressed to him on that point. There in the absence of anything from which one can fairly deduce what was the intention of the parties as to the place of payment one is thrown back on what seems to be the English Rule that the debtor must seek out the creditor at his residence or place of business."

In the instant case there is ample evidence to show the intention of the parties that the payment must be made at the office of the petitioner. What is more there is evidence, X8 and A2 to indicate that the place of residence of the petitioner is within the jurisdiction of the District Court of Colombo. On the other hand there is no proof whatsoever that the respondent is living at Homagama or at some place outside the jurisdiction of the District Court of Colombo. Therefore, I hold that the decision in *Ponnaiya v Kanagasabai*

*(supra)* has no application to the facts and circumstances of this case, and that the District Court of Colombo has jurisdiction over the matter.

For the reasons adumbrated I find no jurisdiction to interfere with the order made by the learned District Judge of Colombo on 18.04.2005 in case No. 36162/MS. I dismiss this appeal with costs fixed at Rs. 7,500/- to be paid to the respondent by the petitioner.

**WIMALACHANDRA, J.** – I agree.

*Appeal dismissed.*