1948 *Present :* **Howard C.J. and Dias J.**

DE SILVA *et al.*, Appellants, *and* DE SILVA *et al.*, Respondents.

S. C. 17—D. C. Inty. Balapitiya, M 34.

Civil Procedure Code—Action on promissory note—Summary procedure—Is it available to executor of holder ? Defence not prima facie *sustainable—Order for security—Chapter 53 of the Code.*

The provisions of Chapter 53 of the Civil Procedure Code relating to summary procedure on liquid claims can be utilised by the executor of a deceased holder of a promissory note.

In such an action where the defendant's affidavit indicates that his defence is not *prima facie* sustainable he should be required to give security as a condition of his being allowed to appear and defend.

[1] *A. I. R. (1933) P. C. 58.* [2] *A. I. R. (1925) Allahabad 263.*

APPEAL from a judgment of the District Judge of Balapitiya.

H. V. Perera, K.C., with *H. W. Jayewardene*, for plaintiffs, appellants.

C. Thiagalingam, with *V. Arulambalam* and *M. L. S. Jayasekere*, for defendants, respondents.

Cur. adv. vult.

February 24, 1948. HOWARD C.J.—

This is an appeal by the plaintiffs from an order of the District Judge of Balapitiya allowing the 1st defendant to file answer to the plaintiffs' claim without giving security. The plaintiffs who are the executors of the late P. H. A. de Silva obtained a provisional Probate in D. C. Balapitiya Testamentary Case No. 110 on April 24, 1946. On July 8, 1946, plaint was filed by the plaintiffs claiming a sum of Rs. 57,500 on a promissory note P 1 given by the defendants to the late P. H. A. de Silva on November 1, 1944. The plaint was accompanied by an affidavit by the plaintiffs setting out the facts relating to the promissory note, the averment that probate had been issued to them and that the sum claimed was justly and truly due and owing to them from the defendants. Summons under section 703 of the Civil Procedure Code (Cap. 86) was issued on July 8, 1946, for defendants to appear within 7 days from date of service of summons and obtain leave of Court to defend action. This summons was served on July 26, 1946. On July 31, 1946, the 1st defendant filed a petition and affidavit applying for leave to defend the action without giving security. On a joint motion filed by the parties following an objection by the plaintiffs the matter was fixed for inquiry on November 15, 1946. The learned District Judge in allowing the 1st defendant to file answer without giving security has held that the summary procedure provided by Chapter 53 of the Civil Procedure Code cannot be utilised by the plaintiffs in this case because (*a*) they are executors and their names are not on P 1 and (*b*) there is no averment in the affidavit that the amount sued for is due on the note. Further, on the merits he considers that the affidavits filed disclose such a tangle of transactions and accounts that the defendant would be entitled to defend without security. He held that it was unnecessary to discuss the merits at length but he could not say that the defence set out is not a *bona fide* one.

In holding that the plaintiffs could not utilise the summary procedure provided by Chapter 53 of the Civil Procedure Code the District Judge relied on the judgment of Bonser C.J. in *Meyappa Chetty v. Bastian Fernando*[1]. In this case it was held that the defendants must be allowed to defend unconditionally by reason of the fact that the plaintiffs had not sworn that the money is due on the note as required by section 705 of the Civil Procedure Code. The judgment of Bonser C.J., however, contained the dictum that he doubted whether the summary procedure applies to a case where the names of the defendants do not appear in the

[1] *(1899) 1 Browne's Reports 127.*

instrument sued on. It appeared to the learned Chief Justice that the summary procedure was intended to apply to cases where there was no doubt as to the identity of the persons who made themselves liable on the instrument sued on, and that it was not intended to apply to cases where the preliminary question to be tried was whether the instrument is binding on the defendant or not. This point the learned Chief Justice held it was unnecessary to decide. The District Judge held that this principle was applicable to the present case, as evidence that the plaintiffs were the executors of P. H. A. de Silva and therefore entitled to sue was *dehors* the contract, the summary procedure was not applicable. The application of the summary procedure was considered again in *Letchimanan v. Ramanathan Chetty*[1]. In this case the Court was constituted by Bonser C.J. and Browne A.P.J. The former recapitulated the doubts he had expressed in *Meyappa Chetty v. Bastian Fernando*, but Browne A.P.J. on the other hand stated at page 371 that he did not feel those doubts but considered that the summary procedure was applicable to the case they were considering and proof might be given of the alleged members of a partnership and they might be sued by such procedure. But in the case under consideration the appellant was given leave to defend unconditionally as personal service as required by section 705 had not been made. In a subsequent case *Mather v. Peri Thamby Chetty*[2] the decision in *Letchimanan v. Ramanathan Chetty* (*supra*) in regard to the necessity for personal service was overruled. In my opinion the doubts of Bonser C.J. as expressed in that case and *Meyappa Chetty v. Bastian Fernando* (*supra*) in regard to the necessity for the names of the defendants to appear in the instrument sued on were not justified. Hence the principle applied by the District Judge to the case where the plaintiffs were the executors of the payee was not based on any legal principle.

In regard to the lack of an averment in the plaintiffs' affidavit that the amount sued for is due on the note I would refer to the case of *Paindathan v. Nadar*[3] where it was held that the affidavit will substantially comply with the requirements of section 705 of the Code if the facts therein set out show that the sum was rightly and properly due. In the present case I am satisfied that the affidavit does comply with this requirement.

Mr. Thiagalingam in contending that an executor cannot employ the summary procedure of Chapter 53 of the Civil Procedure Code relies not only on the doubts expressed by Bonser C.J. but also on certain Indian decisions. These Indian decisions do not specifically deal with the situation which arises when an executor seeks to stand in the shoes of a deceased payee. I do not consider that it is necessary to have recourse to such authorities in order to arrive at a decision in the present case. Mr. Thiagalingam also maintains that by reason of the phraseology employed in Form No. 19 in the First Schedule to Cap. 86 the summary procedure is not applicable. Section 703 provides that " the summons

[1] *(1901) 1 Browne's Reports 368.* [2] *(1927) 28 N. L. R. 443.*
[3] *(1935) 37 N. L. R. 101.*

shall be in the form No. 19 in the First Schedule, or in such other form as the Supreme Court may from time to time prescribe ". Form No. 19 is worded as follows :—

" Summons in an action of Summary Procedure on a Liquid Claim.

To the above-named defendant (or defendants),

Whereas the above-named plaintiff has instituted an action against you in this court under Chapter LIII., of the Civil Procedure Code, for ..... rupees principal and interest (or ..... rupees, balance of principal and interest) due to him as payee (or indorsee) of a bill of exchange (or as the case may be : state the instrument on which the claim is made), of which a copy is hereto annexed.

You are hereby summoned to obtain leave from the court within ..... days from the service hereof, inclusive of day of such service, to appear and defend the action, and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after expiration of such ..... days to obtain a decree for any sum not exceeding ..... rupees (name the sum claimed), together with interest thereon at the rate specified in the said (instrument) to the date of payment in full, and the sum of ..... rupees for costs.

Leave to appear may be obtained on an application to the court supported by affidavit showing that there is a defence to the action on the merits, or that it is reasonable that you should be allowed to appear in the action.

(Here copy the instrument sued on, and where it is a negotiable instrument and carries endorsements, with the endorsements).

By order of Court,

Sgd.————.

Secretary.

The————day of————19 —— "

Mr. Thiagalingam contends that as the words " due to him as payee (or indorsee) " are employed in the form the summary procedure is not available to any one who is not a payee or indorsee. I do not consider that the Form can place such a limitation on those entitled to make use of the summary procedure. Section 703 makes provision for actions not only on a " Bill of Exchange " but also on " a promissory note, or cheque or instrument or contract in writing for a liquidated amount of money or on a guarantee ". The words " payee (or indorsee) " do not apply to all these instruments and hence if the limitation contended for was imposed the procedure would not apply in the case of instruments like guarantees and other contracts. In support of his contention Mr. Thiagalingam has cited the case of *Palaniappa Chettiar v. Hassen Lebbe*[1] in which it was held that a warrant of attorney given to confess judgment in favour of a person, his heirs, executors, administrators and assigns is invalid. It must also be restricted to the Form No. 12 in the First Schedule prescribed in section 31 of the Civil Procedure Code. Form No. 12 does not provide for " assigns ". In my opinion having regard

[1] *(1939) 40 N. L. R. 409.*

to the difference in wording in sections 31 and 703 of the Civil Procedure Code this case does not assist Mr. Thiagalingam. Section 31 provides that a warrant of attorney may be given. If given, it must be in the Form No. 12 in the First Schedule. The wording of section 703 is not similar.

There now only remains for consideration the question as to whether the District Judge was correct in holding that he was unable to say the defence set out is not a *bona fide* one and that the defendant was entitled to defend without giving security. In coming to this decision the learned Judge has stated that the affidavits filed disclose a tangle of transactions and accounts. In these circumstances it is obvious that he has not embarked on a voyage of careful scrutiny to discover whether the defence is a *bona fide* one. The plaint and affidavits of the plaintiffs are of the simplest character and hence if there is a tangle of transactions and accounts this tangle arises solely from the affidavit and petition of the respondent. The law in regard to the interpretation of section 704 (2) of the Civil Procedure Code has been considered in several cases and is quite clear as stated by Hutchinson C.J. in *Supramaniam Chetty v. Krishnasamy Chetty*[1]. In that case the Full Court held that the District Judge had reasonable grounds for doubting the good faith of the defence. In this connection the learned Chief Justice considered that the Court should consider whether the defendants' affidavit " is satisfactory to the Court ". The question was whether the defendant had paid Rs. 1,300 out of Rs. 2,000 owing on a formal acknowledgment. He swore that he had, but his affidavit was not supported by receipts and accounts. The Chief Justice also referred with approval to the case of *Wallingford v. The Directors of the Mutual Society* [2] under order XIV. of the English Rules. At pp. 704–705 Lord Blackburn stated as follows :—

> " Now I think what we have to see here is, what is it that the Judge is to be satisfied of, in order to induce him to refuse to make the order for the plaintiff to sign judgment. If he is satisfied upon the affidavits before him that there really is a defence upon the merits, it is a matter of right, unless there is something very extraordinary (which I can hardly conceive), that the defendant should be able to raise that defence upon the merits, either to the whole or to a part. He may fall far short of satisfying a Judge that there is a defence upon the merits ; still he may do so if he discloses such facts as may be deemed sufficient to entitle him to defend.
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> And that, my Lords, raises another question altogether. There may very well be facts brought before the Judge which satisfy him that it is reasonable, sometimes without any terms and sometimes with terms, that the defendant should be able to raise this question, and fight it if he pleases, although the Judge is by no means satisfied that it does amount to a defence upon the merits. I think that when the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend upon particulars. It is not

[1] *(1907) 10 N. L. R. 327.* [2] *L. R. (1880) 5 A. C. 685.*

enough to swear 'I say I owed the man nothing'. Doubtless, if it was true that you owed the man nothing as you swear that would be a good defence. But that is not enough. You must satisfy the Judge that there is reasonable ground for saying so. So again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the Judge that those are facts which make it reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned.

So looking at the affidavits (they are very long and I will not go through them) which were used before Mr. Justice Manisty, I think that in none of these particulars did the appellant satisfy the burden that was cast upon him. He makes general statements of fraud, but nowhere does he condescend upon any particular of fraud, such as in my mind, if I had been in Mr. Justice Manisty's place, would have made me think that it was at all fit that he should be allowed to defend upon that ground. There are long statements resulting in saying that this society was illegal upon various grounds, which I cannot follow at all. One ground, among others, is, because there was a drawing of lots on one occasion, therefore, it was illegal as coming under the Lottery Acts. I cannot think that that was a good ground of defence."

A careful examination of the respondent's affidavit reveals the fact that no real defence is disclosed to the plaintiff's action. Paragraph 4 of the affidavit admits the payment by the deceased of a sum of Rs. 50,000 in order to enable the respondent to discharge a mortgage bond of a similar amount. At the same time a promissory note for Rs. 5,000 was drawn in favour of the deceased to cover interest. Properties of the respondent were also hypothecated to the deceased by mortgage bond of August 25, 1942. In paragraph 5 of the affidavit it is stated that it became necessary to obtain a release of this mortgage bond. One of the properties has been sold to Dr. Abeysuriya for Rs. 12,500 and the deed of release should be for Rs. 44,000 which according to paragraph 5 (*b*) was the amount due to the respondent on the Bokkara estate account and for professional services rendered to the deceased. It was in these circumstances that the respondent signed the promissory note for Rs. 57,000. In this connection it is stated in paragraph 5 (*c*) that it was agreed that the respondent should stand security for the said sum of Rs. 12,500 owed by Dr. Abeysuriya. In paragraph 3 it is stated that the Bokkara estate was a joint venture of the respondent and the deceased and that the respondent's share of the property should remain with the deceased for the purchase of another estate in common. Hence it is difficult to reconcile paragraphs 3 and 5 (*b*). Moreover, to use the words of Lord Blackburn, the respondent has not condescended upon particulars in regard to the amount alleged to be owing to him on the Bokkara estate account and for professional services rendered to the deceased. The respondents' affidavit merely amounts to saying "I owe nothing", which is not sufficient. In paragraph 13 of his affidavit the respondent sets out

various defences which I have already dealt with in this judgment. Paragraph 14 states that the deceased was a money-lender and hence the action cannot be maintained, as :—

(*a*) proper books of accounts have not been kept by him ; and
(*b*) the promissory notes sued upon were fictitious to his knowledge.

In regard to (*b*) the affidavit does not indicate for what reason the promissory notes were " fictitious " within the meaning of this term in section 14 of the Money Lending Ordinance (Cap. 67). With regard to (*a*) it was held in *de Silva v. Edirisuriya* [1] that the bar created by section 8 (2) of the Ordinance does not apply to the administrator of the estate of a deceased money lender. Moreover the respondent in affirming that the deceased was a money lender does not set forth the grounds of his belief. Generally speaking the nature of the affidavit of the respondent, the first defendant, indicates that his defence is not *prima facie* sustainable. The learned Judge should have felt reasonable doubt as to its good faith.

For the reasons I have given I am of opinion that the first defendant should under section 704 (2) of the Civil Procedure Code have been required to give security as a condition of his being allowed to appear and defend. The order of the District Judge is therefore set aside and the case is remitted to him so that as a condition of being allowed to appear and defend the first defendant shall give security for a sum of Rs. 10,000. The plaintiffs are awarded the costs of this appeal and those of the inquiry on November 15, 1946. Costs incurred before this date will abide the final result of this case.

DIAS J.—I agree.

Order set aside.