1969 *Present :* Weeramantry, J., and Wijayatilake, J.

U. B. SENANAYAKE, Appellant, *and* M. ABDUL CADER, Respondent

S. C. 22/67 (F)—D. C. Matale, 842/MS

Cheque—Action instituted by payee against drawer for recovery of sum due thereon—Averments of presentment for payment and notice of dishonour—Imperative requirements—Bills of Exchange Ordinance (Cap. 82), ss. 45, 46 (1), 46 (2), 46 (2) (e), 46 (3), 48, 49, 50, 50 (2) (b), 95 (2).

Where, in an action upon a cheque, the plaint contains no averment of presentment for payment or of notice of dishonour, or of any circumstances showing that these essential requirements were dispensed with, and no issues are raised at the trial on any of these matters, the action must fail *in limine*.

APPEAL from a judgment of the District Court, Matale.

Vernon Jonklaas, Q.C., with *P. Edussuriya*, for the plaintiff-appellant.

N. R. M. Daluwatte, with *Kosala Wijayatilake*, for the defendant-respondent.

Cur. adv. vult.

November 13, 1969. WEERAMANTRY, J.—

The plaintiff-appellant sues the defendant-respondent in this case for the recovery of a sum of Rs. 12,000/- and interest thereon on the basis that The sum of Rs. 12,000/- was borrowed and received by the defendant from him upon a cheque for Rs. 12,000/- drawn by the defendant in his favour.

There appeared to me to be some room for argument in this case, having regard to the averments in the plaint, that the action instituted may perhaps be construed as an action for money lent and advanced rather than one upon a bill of exchange. However, both parties seem to have proceeded at all stages on the footing that the action was one upon the cheque and summary procedure was accordingly followed. Further, learned Queen's Counsel appearing for the plaintiff-appellant has also conceded that this action is an action upon the cheque, and it is therefore upon this basis that I proceed to consider the legal questions involved.

The plaint contains no averment of presentment or of notice of dishonour, or of any circumstances showing that these essential requirements had been dispensed with, nor were any issues raised at the trial on any of these matters.

On the question of presentment it would appear however to be the position of the plaintiff that he was in the circumstances of this case excused from this requirement. He has stated in his evidence that he did not present the cheque to the bank for the reason, *inter alia*, that the defendant had asked him not to present it as he was pressed for money. The learned District Judge, though not obliged to do so in view of the absence of an issue on the question, has given his mind to the plaintiff's suggestion that presentment had been waived. Upon an examination of the plaintiff's evidence the learned District Judge has quite rightly concluded that a request by the defendant not to present his cheques for payment as he was short of funds did not justify the non-presentment of the cheque, for such a statement is quite different from a statement that the legal requirement of presentment for payment as a pre-requisite to actionability is being waived.

Again, on the question of notice of dishonour, there is an averment in the plaint that by a notice the plaintiff demanded the sum due from the defendant. This of course, is not a notice of dishonour, and is no substitute for the averment there ought to have been, that the cheque was dishonoured and that notice thereof was duly given to the defendant.

The law on the necessity for proving presentment or any excuses therefor as well as dishonour or any excuses therefor is clear and well settled. It is somewhat remarkable that although the importance of these matters as pre-requisites to the success of a claim, in such instances as they are required, has been stressed time and again by our Courts for a century and a half, and although the importance of pleading such facts has likewise been stressed, we all too often come upon pleadings ignoring these requisites and trials conducted as though they did not exist. These decisions, as will be observed, reach back to a time prior to the codification in 1882 of the English law relating to Bills of Exchange, for under the English Common law as well this was the accepted position. Indeed

they reach back to a time even prior to the Civil Law Ordinance No. 5 of 1852 which by section 2 required our Courts to apply, in questions relating to bills of exchange, promissory notes and cheques, the same law that would be applied in England in the like case at the corresponding period.

Thus, as early as 1821, a time long anterior to the Civil Law Ordinance, this Court decided in *Boyd v. Benett* [1] (1820–33) Ram. 24 that a drawer of a bill of exchange payable to a third party is entitled to notice of dishonour. The Court there observed that no proof having been made that the drawer had received notice of dishonour, to which he was entitled, there would be a valid objection to the claim, and had the action been founded on that only, the plaintiff's libel would have been dismissed.

Passing next to the period between the enactment of the Civil Law Ordinance and 1882, the year of codification of the English law, we see numerous decisions indicating that the requirements of notice of dishonour and presentment were well recognised by our Courts as pre-requisites to actionability. For example, in 1871 D. C. Colombo 56533—(1871) Vand. 165—this Court, citing the 5th edition of Byles on Bills, held that where a debtor indorses a note of a third party to his creditor the latter cannot sue for his debt without proving presentment and notice of dishonour. So also in *Weerappah Chetty v. de Silva* [2] (1884) 6 S. C. C. 82 Burnside, C.J. held that the pleadings against the last indorser disclosed no cause of action as they failed to aver among other matters presentment for payment and due notice of dishonour. This case is of some special interest in view of certain very caustic observations made by the Chief Justice in regard to the drafting of the pleadings.

Between 1882, the year of enactment of the Bills of Exchange Act in England, and 1927, we directly applied the provisions of the English Act. Thus in the year 1907 the Court in *Karuppen Chetty v. Palaniappa Chetty* [3] (1907) 10 N.L.R. 278 applied section 87 (1) of the English Act of 1882 and required presentment of a note payable at a particular place, unless there was some excuse for not so doing. Applying this principle, the maker was held not liable when the note was not so presented. Apposite to the present case the Court observed that though it was inclined to think that the case should be sent back for the framing of a new issue on the question whether there was an excuse for non-presentment, on reconsideration it thought that the parties should be held to the issues which they had framed and accepted, and that, in the absence of such an issue, the appeal should be allowed and the action dismissed.

[1] *(1820–33) Ram. 24.*

[2] *(1884) 6 S. C. C. 82.*

[3] *(1907) 10 N. L. R. 278.*

So also in 1917 Wood Renton, C.J. observed that presentment for payment and notice of dishonour were conditions precedent to a right of action against the indorser on a promissory note and that the burden of showing that those conditions had been complied with rested upon the plaintiff (*Murugappa Chetty v. de Silva*[1] (1916) 2 C.W.R. 33).

It is also important to note that when the Civil Procedure Code was enacted in 1889 the English law had been codified by the Act of 1882; and the Civil Procedure Code, through the several specimen plaints contained in its first schedule, makes it quite clear that these principles, which had originated in the English Common law, had been taken over by our legal system. It will be seen that in several of these specimens, where it is necessary in law to plead presentment or an excuse therefor or notice of dishonour, such averments are expressly made. Shortly after its introduction, we find Clarence, J. observing in *Sadeyappa Chetty v. Lawrence*[2] (1892) 2 C.L. Reps. 3 that according to the rules of pleading laid down in the Civil Procedure Code an excuse for non-presentment of a promissory note or a waiver of presentment must be specially pleaded by a statement of the facts relied on. It was further held in that case that evidence would not be admissible on a question of excuse or waiver of presentment in the absence of the necessary averments in the plaint.

No change was brought about in respect of these matters by the enactment in 1927 of the Bills of Exchange Ordinance, in practically the same terms as the English statute, with the provision also, in Section 98 (2), that the rules of the Common law of England, including the law merchant, shall apply to bills of exchange, promissory notes and cheques, save in so far as they were inconsistent with the express provisions of the Ordinance or any other enactment for the time being in force.

It would be well at this point to refer briefly to the provisions of this statute in which, along with the Civil Procedure Code, our law relating to the matters under discussion is now contained.

Section 45 of the Bills of Exchange Ordinance requires that a bill be duly presented for payment in default of which the drawer and the indorsers shall be discharged. The same section makes detailed provisions in regard to the manner of due presentment of a bill. Section 46 (1) proceeds to enumerate the circumstances in which delay in presentment is excused and section 46 (2) the circumstances when it is dispensed with. One of the modes in which presentment is dispensed with is stated in section 46 (2) (*e*) to be waiver of presentment, express or implied. Section 46 (3) goes on to state that the fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

[1] *(1916) 2 C. W. R. 33.*

[2] *(1892) 2 C. L. Reps. 3.*

It will be seen from these provisions that it is necessary for a plaintiff suing a drawer upon the cheque to show that there was presentment and since he would ordinarily fail in default of proof of presentment he must in the event of there being no presentment prove the circumstance dispensing with this requirement.

Likewise section 48 sets out the requirement of notice of dishonour which must be given to the drawer and each indorser, in default of which drawers and indorsers are discharged. Here again elaborate rules are laid down as to notice of dishonour (section 49) and section 50 states when delay in such notice is excused or dispensed with. Section 50 (2) (*b*) shows that in regard to this matter as well, there may be waiver, express or implied.

Inasmuch as an action would fail in the absence of such a notice, it becomes clear that, as in the case of presentment, it is incumbent on the plaintiff to prove such notice, or where it has not been given, circumstances which in law dispense with this requirement.

We see then that the law expressly contemplates waiver of these statutory requirements; and the necessity for pleading and proving a matter of waiver is relied upon, is self-evident. As Lord Wright observed in *Edridge v. Rustomji*[1], (1933) A. I. R. Privy Council 233 at 236, waiver is a matter that depends on evidence of fact and where waiver is relied on, it should be pleaded and an issue directed thereon, so as to afford the other party an opportunity to adduce such evidence as he thinks proper.

Passing now to the more recent decisions on the subject, this Court has expressly stated that in an action on a promissory note where presentment for payment is necessary to make the maker and the indorser liable, it is a necessary averment in the plaint that the promissory note was duly presented for payment and was dishonoured (*Ceylon Estate Agencies and Warehousing Co. Ltd. v. de Alwis*[2] (1966) 70 N. L. R. 31 at 39). This Court further observed that if there was any excuse for not presenting the promissory note for payment, such excuse should be pleaded and that if the Court was to take a liberal view of the pleadings the defects should at least be cured by raising the appropriate issues on these matters at the trial, unless these facts were admitted by the defendants. The Court consequently held that as the plaintiff had failed to make this necessary averment in the plaint and had also failed to cure the defect in the plaint by raising the relevant issues at the trial, the plaint failed to disclose a cause of action on the first cause of action in that case, on the promissory note. This first cause of action was

[1] *(1933) A. I. R. Privy Council 233 at 236.* [2] *(1966) 70 N. L. R. 31 at 39.*

therefore held to have been rightly dismissed. So also in *de Alwis v. Ranasinghe*[1] (1966) 69 N. L. R. 278 (see also *Wijewardene v. Kunjimoosa and Company*[2] (1967) 70 N. L. R. 64) notice of dishonour was held to be a condition precedent to a right of action against an indorser where a cheque is dishonoured, the Court observing that the position that notice of dishonour has been dispensed with had not been pleaded in the plaint and that no issue was raised thereon at the trial. In the exceptional circumstances of that case, while observing that it would not be fair on the defendant to hold against him in appeal on a point which he was not called upon to meet at the trial, the Court with some reluctance granted an application for a re-hearing as there appeared to be material from which an inference of dispensing with notice of dishonour could have been drawn.

What our law upon the matter is would thus appear to be beyond doubt, but it would be appropriate to refer finally to the English authorities on this subject.

It has been held in English law that an averment of notice of dishonour is an essential averment in a statement of claim against the drawer (*May v. Chidley*[3] (1894) 1 Q. B. 451 ; *Roberts v. Plant*[4] (1895) 1 Q. B. 597). So also in all cases where the plaintiff relies upon the fact that notice of dishonour had been dispensed with, the matter of excuse or dispensation is a material fact and must be averred whether in the statement of claim (*Burgh v. Legge*[5] (1839) 5 M. & W. 418) or in a special indorsement (*Fruhauf v. Grosvenor*[6] (1892) 61 L. J. Q. B. 717 ; see also Halsbury, 3rd ed., vol. 3, p. 220 ; Bullen & Leake, Precedents and Pleadings, 11th ed., pp. 123 and 135). Likewise, where the plaintiff relies upon a matter of excuse for non-presentment he must state such matter of excuse in the statement of claim (Bullen & Leake, Precedents & Pleadings, 11th ed., p. 132). With particular reference to the special procedure of proceedings by specially indorsed writ, corresponding broadly with summary procedure upon liquid claims under our law, Byles observes (Byles on Bills, 21st ed., p. 344) that where proceedings in the High Court are instituted by specially indorsed writ under Order 3, Rule 6, the special indorsement must aver performance of the conditions necessary to entitle the plaintiff to payment, such as presentment, protest and notice of dishonour or the excuses for non-performance, in default of which the plaintiff would not be entitled to summary judgment. Reference may also be made to the Appendices to the Rules of the Supreme Court, 1883, Part V, Appendix C of which contains specimen statements of claim which may be likened to those appearing in our Civil Procedure Code. A number of these specimens show that averments of presentment and notice of dishonour, or of excuses therefor, must be made.

[1] *(1966) 69 N. L. R. 278.*
[2] *(1967) 70 N. L. R. 64.*
[3] *(1894) 1 Q. B. 451.*
[4] *(1895) 1 Q. B. 597.*
[5] *(1839) 5 M. & W. 418.*
[6] *(1892) 61 L. J. Q. B. 717.*

It is clear that the plaintiff's action, omitting as it does to comply with these essential and imperative requirements of law, must fail *in limine*, and the plaintiff's appeal is accordingly dismissed with costs.

WIJAYATILAKE, J.—I agree.

Appeal dismissed.