

Present: GARVIN A.C.J. and-LYALL GRANT J.

RAMANATHAN v. FERNANDO et al.

72 and 73—D. C. (Inty.) Colombo, 35,505

Liquid claim—No valid defence disclosed—Right of defendant to appear and defend—Deposit of claim—Civil Procedure Code, Ch. LIII.

In an action upon a liquid claim brought under Chapter LIII. of the Civil Procedure Code, the defendant has the right to appear and defend upon depositing in Court the amount in claim, even where the Court finds that no valid defence is disclosed.

Per LYALL GRANT J.—Where a Judge rejects the affidavit of the defendant, his order ought to fix a time within which the amount sued for should be deposited in Court and to state that, unless the money is deposited within the time so fixed, leave to appear is refused.

APPEAL from an order of the District Judge of Colombo. This was an application for leave to appear and defend in an action on a promissory note. At the time of the making and the endorsement of the promissory note sued upon, the defendants-appellants were partners. Their case was that the promissory note was endorsed and delivered to the plaintiff in pursuance of an agreement between the plaintiff and the Auto Carriers Company, whereby the former advanced money to them and received in exchange promissory notes granted to the firm by purchasers of motor cars on the instalment system. After some time it was agreed that the Company should liquidate the debt by monthly payments, the plaintiff undertaking to return the promissory notes to the value of the payments. In accordance with this agreement the amount payable on the note sued upon had been paid to the plaintiff, who in breach of the undertaking had failed to return the promissory note. The learned District Judge was not satisfied that the allegations were a defence to the action and refused leave to defend.

F. H. B. Koch, for second defendant, appellant.—The District Judge should have allowed us leave to defend.

Sections 704 and 706 of the Civil Procedure Code contain the provisions governing the granting of leave to defend, and the English law has no applicability. (Moncrieff J. in *Annamaly Chetty v. Ali Marikar*.¹) The fact that the affidavit is held not to be *bona fide* and may subsequently be proved to be false might lead to a prosecution for perjury (Bonser C.J. in *Meyappa Chetty v. Usoof*²), but a defendant is entitled to leave to defend on giving security, or, at the most, on depositing in Court the amount claimed. Section 706 invests no discretion in the Court to refuse leave if the money is brought into Court.

¹ 2 *Browne* 267.

² 5 *N. L. R.* 265.

1930

Ramanathan
v.
Fernando

Leave was allowed in *Silva v. Sudirs*,¹ where the defendant did not attempt to excuse his delay. Our position is stronger here as our delay has been explained. The money has now been deposited and no prejudice could be caused to the plaintiff by our being allowed to file answer.

H. H. Bartholomeusz, for third defendant, appellant.

F. A. Hayley, K.C. (with *Nadarajah*), for the plaintiff, respondent.—Sections 704 and 706 of our Civil Procedure Code are taken from sections 532 and 533 of the Indian Code of 1882, which in turn were adapted from the English Act (18 & 19 Vict. c. 67), which related solely to Bills of Exchange. The object of the Legislature is to prevent frivolous defences. In England under Order 14, leave is not allowed even where money is brought into Court, if the defence is held not to be a *bona fide* one. (*Agra and Masterman's Bank v. Leighton*.²)

Section 704 deals with bad defences.

Section 706 deals primarily with good defences.

Under section 706, even where a good defence is disclosed the Court can demand security. So the Court has the right to refuse unconditionally where there is no defence.

*Simon v. Sheriff*³ was a case under sections 532 and 533 of the old Indian Code, where leave was refused outright.

Sanjiva Rao's All India Digest, Vol. 7, p. 876.—Where there is no pretence of a defence, leave should be refused. It is only where there is a doubt with regard to the *bona fides* of the defence that security should be demanded or the amount ordered to be deposited.

[GARVIN A.C.J.—The question is whether in any circumstances a man can be prevented from buying, as it were, his right to defend, irrespective of the *bona fides* or otherwise of his defence, by bringing the money into Court.]

Rampini's Commentary on the Indian Civil Procedure Code, section 533 (at page 784), contemplates the case of a refusal.

The section gives the Court a discretion with regard to granting leave. Therefore the Court must be allowed to refuse if it thinks fit, and the discretion cannot be ousted by the payment of the money into Court.

The second defendant here is out of time, and the granting of leave to defend was entirely in the discretion of the Court.

F. H. B. Kook, in reply.

June 27, 1930. GARVIN A.C.J.—

These are appeals from an order refusing leave to appear and defend an action instituted under the provisions of Chapter LIII. of

¹ 7 C. W. R. 186.

² (1866) L. R. 2 Ex. 56.

³ I. L. R. 19 Mad. 368.

the Civil Procedure Code. The appeal numbered 72 is by the third defendant; appeal numbered 73 is by the second defendant. At the time of the making and also of the endorsement of the promissory note, upon which this action is based, these two defendants were partners. The third defendant has since retired. The third defendant's application for leave was made within time but the second defendant made his application after the time allowed but before decree. They both filed affidavits, of which the second defendant's is the fuller.

The third defendant is a lady who it is said took no active part in the business at any time and has no personal knowledge of the transaction. Her affidavit is expressed to be based on information received, it is in some respects inconsistent with the averments in the second defendant's affidavit. But in broad outline her story is that since her retirement from the business in June, 1927, and as a result of an agreement made thereafter between her late partner the second defendant, and the plaintiff, and moneys paid and promissory notes delivered to the plaintiff by the second defendant in terms thereof, the promissory note sued on was discharged and that the plaintiff is, in any event, debarred, by the agreement referred to and its performance by the second defendant, from suing her.

The case for the second defendant is that this promissory note was endorsed and delivered to the plaintiff in pursuance of an agreement between the plaintiff and the Auto Carriers Company, whereby the former advanced moneys to them and received the promissory notes granted to the firm by purchasers of motor cars on the instalment system as security for the payment by them of the purchase price. He alleged that in September, 1928, it was found that the plaintiff held promissory notes to the value of Rs. 300,000 as against a debt of Rs. 120,000, and that it was then agreed that the Auto Carriers Company should liquidate this debt by monthly payments, the plaintiff undertaking to return promissory notes to the value of the payments "already made and thereafter to be made"; the plaintiff further agreeing that the defendant should receive payment from his customers of the moneys due on the promissory notes.

In accordance with this agreement he says, he paid to the plaintiff Rs. 56,645, including the amount payable on the promissory note sued on in this case, which to the knowledge of the plaintiff he had recovered from the maker, but that the plaintiff in breach of his undertaking failed to return to him any of the promissory notes and has in his possession promissory notes to the value of about Rs. 200,000 in respect of which he says the Company has discharged its liability.

It was contended that these facts sufficiently disclosed the case for the defendant (a) that this promissory note has been discharged

1930

GARVIN
A.C.JRamanathar
v.
Fernando

1930

GARVIN
A.C.J.

Ramanathan
v.
Fernando

and (b) that the defendant was entitled to claim that the plaintiff should return to him promissory notes to the value of approximately Rs. 200,000.

The District Judge was not satisfied that the plaintiff knew that the money due on this promissory note had been paid by the maker, and in the absence of an allegation that the payments alleged to have been made by the defendant were made against specific debts, he thought, the allegations afforded no defence to the action. The claim for an accounting, he treats, as an " attempt to delay matters ":

The affidavits filed by the defendants are not satisfactory. Making every allowance for the circumstance that they are affidavits and not formal answers, it was both possible and necessary to set out all the essential facts with accuracy and marshal them so as to disclose the defence or defences which it was intended to set up.

I am prepared to take this case on the footing of the Judge's finding—though I think a different view is at least possible—and treat this as a case in which no defence has been disclosed and that the application was made merely to gain time.

In such a case, has the Court power to refuse leave to defend and enter judgment for the plaintiff? It is beyond question that the Court has the power, in such a case, to require a defendant to pay into Court the amount mentioned in the summons as a condition of being allowed to appear and defend.

Can it refuse to grant leave to appear and defend altogether and absolutely?

It is the right of every person against whom an action is instituted to appear and, unless he admits the claim, to file his answer. For the purpose of expediting the recovery of claims of the nature specified in section 703 by discouraging frivolous, vexatious, and purely dilatory defences, the Legislature has in such cases curtailed this right by the requirement that a defendant shall not be admitted to defend the action until he has first obtained leave.

It is provided by section 706 as follows:—

" The court shall, upon application by the defendant, give leave to appear and to defend the action upon the defendant paying into court the sum mentioned in the summons, or upon affidavits satisfactory to the court, which disclose a defence or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the court may deem sufficient to support the application and on such terms as to security, framing and recording issues, or otherwise, as the court thinks fit. "

The only other part of this chapter which has a direct bearing on the question under consideration is the proviso to section 704:—

1880
 GARVIN
 A.C.J.
 Ramanathan
 v.
 Fernando

“ The defendant shall not be required, as a condition of his being allowed to appear and defend, to pay into court the sum mentioned in the summons, or to give security therefor, unless the court thinks his defence not to be *prima facie* sustainable or feels reasonable doubt as to its good faith. ”

It is a feature of these provisions that nowhere is it said that the Court may refuse leave. On the contrary, it requires the Court to grant leave. Sarkar in his *Commentary on Order 37, Rule 3, of the Indian Code*, which is similar to the English rule on the point, contrasts the rule with section 533 of the repealed Indian Code of Civil Procedure, draws attention to the omission from the new rule of the words “ upon the defendant paying into Court the sum mentioned in the summons ” and observes that “ under the old section it was obligatory upon the Court to grant leave ”.

Section 706 of our Code is identical in terms with the old section (533) of the Indian Code, and when read with the proviso to section 704 can only mean that it is obligatory on the Court to grant leave to appear and defend, though it may do so (a) without condition, (b) upon terms as to security, framing and recording of issues or otherwise, or (c) upon the more drastic condition that the sum mentioned in the summons is paid into Court.

Counsel drew our attention to the Summary Procedure on Bills of Exchange Act, 1885 (18 & 19 Vict. c. 67, s. 2), which is substantially the same as our section 706, and to the following passage in the judgment of Bramwell B. in *Agra and Masterman's Bank v. Leighton*¹:—

“ The intention of the Bills of Exchange Act was, that where there was no pretence for a defence, the party sued should not be allowed to defend, and the holder should have judgment as of course; but that if the defendant had a real, I do not say good, defence, he should have leave to appear and set it up. ”

As a statement of the intentions of the Legislature, this is substantially the same as that set out in the title to the bill. It does not purport to interpret the section or to hold that the Court has power to refuse leave altogether, nor can I regard it as authority for that proposition. These observations were only preliminary to the consideration of the questions before the Court and its decision thereon, which was that leave to appear and defend should be given whenever there is an apparently real defence and that leave should in such a case be given unconditionally unless there is reason to doubt its *bona fide*. The point now before us was neither taken nor considered, nor did it arise in that case.

¹ L. R. 2 Exch. Cases 56.

1930

GARVIN
A.C.J.*Ramanathan*
v.
Fernando

The Legislature in Ceylon has evidently thought it sufficient for its object, which I assume is to facilitate the recovery of the claims specified in Chapter LIII., to curtail the ordinary right of a defendant to answer by the requirement that he shall first obtain leave to do so and by vesting in the Court a discretion to grant leave upon terms or upon payment of the sum claimed into Court, except in cases in which the application should be granted without condition.

The law in India has now been brought into line with the English Rules and Orders by vesting in the Court a discretion to refuse leave. We must administer the law as it has been enacted, leaving it to the Legislature to amend it, if it thinks such a course necessary or desirable.

It was then argued that inasmuch as the defendant did not bring into Court with his application the sum mentioned in the summons the Court was entitled to refuse leave. Section 704 does not impose any such obligation upon an applicant for leave. He is entitled to apply to the Court for leave to appear and defend, and while it is obligatory that leave shall be granted, it is for the Court to say whether it will do so without condition upon terms as to security or only upon his paying into Court the sum mentioned in the summons. All the law requires him to do is to apply to the Court. It is the duty of the Court then to make such order thereon as it is empowered to make. The Court may grant leave only upon his paying the sum into Court, and in that event he should be given an opportunity to do so.

The sum mentioned in the summons has in this case been paid into Court. I would therefore allow the appeal of the third defendant and direct that she be granted leave to appear and defend, and I further order that her answer be filed within ten days from the day on which this record reaches the Court below or within such extended time as the District Judge may in his discretion allow.

I would make the same order on the second defendant's appeal. His defence and that of the third defendant are substantially the same, and if he is refused leave it can only be as a penalty for not making his application in time. He has given an explanation. The District Judge was not prepared to accept it in its entirety, basing his conclusion mainly upon a statement made at the bar unsupported by the affidavit or evidence of the plaintiff. But there were negotiations for a settlement of this action, and whether they proceeded as far as is alleged or not, I see no reason, in the absence of any evidence to the contrary, to doubt that the second defendant had reason to think that there was or would be no need to enter a defence to the action.

For reasons which are sufficiently manifested in this judgment I make no order as to the costs of these appeals. There will be no costs in the Court below.

JYALL GRANT J.—

1930

*Ramanathan
v.
Fernando*

Sections 704 and 706 of the Civil Procedure Code appear to me clearly to indicate that a person sued on a Bill of Exchange has always the right to appear and defend upon deposit of the sum sued for. It was conceded by respondent's Counsel that the law both in England and in India has been amended from time to time so as to deprive the person so sued of this privilege in the absence of satisfactory affidavits.

Our law, however, is in practically the same terms as sections 532 and 533 of the Indian Procedure Code of 1882, and the Indian commentators are agreed that the effect of the 1908 Code was to withdraw the privilege. By that Code the practice was assimilated to the present law of England.

In the absence of any such modification in the law of Ceylon, I agree that the defendant has, on deposit in Court of the sum sued for, an unqualified right to appear and defend.

I think that, where a Judge rejects the affidavits of the defendant, his order ought to fix a time within which the amount sued for should be deposited in Court and to state that unless the money is deposited within the time so fixed leave to appear is refused. This will obviate the necessity for a further order.

It would be unfair to require a deposit at an earlier stage in a case where the defendant has applied for leave to appear without depositing the amount. That question must first be considered.

In the present case the defendants had no reasonable opportunity of making a deposit before the final order was made, and I agree that they should have such an opportunity.

Appeal allowed.
