IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C.A. Case No. 751/2000 (F)

D.C. Nuwara Eliya Case No. 1550/MS

T.M. Tennakoon,
Seetha Eliya,
Nuwara Eliya,
DEFENDANT-APPELLANT

-Vs-

Seemitha Nuwara Eliya District Sakasuruwam and Naya Ganudenu Samupakara Samithiya,
Badulla Road,
Nuwara Eliya.
PLAINTIFF-RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Lakshman Amarasinghe for the Defendant-Appellant. Plaintiff-Respondent absent and unrepresented.
Argued on	:	18.05.2015
Written Submissions on:		22.07.2015
Decided on	:	20.05.2016

A.H.M.D. Nawaz, J.

The Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff"), by its plaint dated 04.05.1999 filed this action in the District Court of Nuwara Eliya under

Summary Procedure on Liquid Claims (Chapter LIII) to recover a sum of Rs.391,124/- due from the Defendant-Appellant (hereinafter sometimes referred to as "the Appellant") on four cheques together with interest at 30% per annum from the date of action till the date of decree and thereafter legal interest till payment in full.

Consequent to the issuance of summons, the Defendant filed his objection and affidavit dated 29.05.2000 praying that for the reasons stated in the objection he may be permitted to file answer, and the plaintiff's action be dismissed with costs.

After written submissions were tendered by parties, the District Court by its order dated 30.11.2000 rejected the grounds raised in the defendant's objection and he was ordered to deposit a sum of Rs.350,000/- on or before 03.01.2001 before he could appear and defend the action. This appeal is against this order.

After this appeal was filed in this Court, notice was issued on the Plaintiff-Respondent but up to now neither the Plaintiff-Respondent nor any Attorney-at-Law on its behalf has appeared. According to the Journal Entries, it appears that several attempts were made to serve notices on the Plaintiff-Respondent but to no avail. Finally the matter was fixed for argument. The Defendant's Counsel Mr. Lakshman Amarasinghe has, after his oral submissions, filed written submissions and taken up the following grounds upon which he has stated that the Plaintiff had failed to follow the correct procedure specified in the Civil Procedure Code and therefore the Plaintiff could not have and maintain this action. The grounds urged by the Defendant are enumerated below.

Summons served on the Defendant is not in Form 19

It is a statutory requirement that the summons on an action under summary procedure under Chapter LIII must be in Form 19 in the 1st schedule to the Code. This is a requisite specifically prescribed for actions under summary procedure on liquid claims, and it is contended on behalf of the Defendant-Appellant that the failure to utilize Form 19 is a "fatal irregularity".

It is indubitable that no summons in Form 19 was issued in the case. The difference between ordinary Form 16 under regular procedure and special Form 19 under summary procedure on liquid claims is that while the ordinary summons requires the Defendant to file his answer on the date prescribed in the summons, the special Form 19 requires the Defendant to obtain leave from Court within a period of time mentioned therein, and to appear and defend the action. Under the procedure in Chapter LIII, the Defendant cannot file answer as in the case of a regular action, without obtaining leave to defend the action. As I said before, the summons served on the Defendant in this case is not in Form 19.

Only when the plaint and summons are in such forms as are prescribed for summary procedure on liquid claims, Section 704 (1) of the Civil Procedure Code permits a Plaintiff, if the Defendant fails to appear and defend the action within the time stipulated in the summons, to move for a judgment in his favour for a sum not exceeding the amount mentioned in the summons. In the ordinary case under regular procedure he must move for an *ex-parte* trial against the Defendant.

On a careful perusal of the summons that appears at page 65 of the brief, it is manifestly clear that the summons issued in the case was not in Form 19. If a procedural safeguard such as the necessity to obtain leave to appear and defend the action has been built into Chapter LIII of the Civil Procedure Code, it is for the purpose of giving effect to the summary nature of actions on liquid claims and no doubt the provisions enacted to promote the efficacy of summary procedure on liquid claims should not be allowed to be disregarded willy-nilly. As Abraham, CJ observed in ***Dulfa Umma et al v. Urban District Council, Matale*** 40 N.L.R 474 at 478.

> *"It happens, perhaps too frequently in this Court, that the language which the Legislature has chosen to employ in enacting certain rules of procedure compels the Court in applying the principles of construction to hold that non-compliance with a rule is fatal to an action."*

Abraham CJ was echoing the age old rule of construction that certain rules of procedure should be interpreted to be mandatory having regard to their purport and

intent and since Section 703 enacts that "*summons shall be in the Form No.19 in the First Schedule...*", the question arises whether the absence of summons in Form 19 in this case should necessarily entail the fatality of the action which the learned Counsel for the Defendant-Appellant has contended for. I am not inclined to agree with this submission for a number of reasons. Undoubtedly there is no summons in Form 19 but despite the non-receipt of summons in Form 19, I observe that the Defendant-Appellant filed a petition and affidavit dated 29.05.2000 seeking leave to appear and defend the action. There is nary a complaint about the absence of the special summons in the petition and affidavit. Thus the Defendant-Appellant cannot claim that he was prejudiced or misled inasmuch as he sought leave from the District Court to appear and defend the action.

It is trite law that a procedural enactment such as the stipulation in Section 703 of the Civil Procedure Code to the effect that "*summons shall be in the Form No.19 in the First Schedule...*" can be waived by a defendant. In fact Lord Denning in tendering the advice of the Privy Council in ***Macfoy v. United Africa Co Ltd.,*** (1961) A.C. 152 at 160; (1961) 3 All ER 1169 suggested the test:-

> "*One test which is often useful is to suppose that* ***the other side*** *waived the flaw in the proceedings or took some fresh step after knowledge of it. Could he afterwards, in justice, complain of the flaw?*"

Of course, that test is by no means conclusive and it has been to some extent criticised in ***Pritchard's*** case, (1962) Ch 913 but it does seem to me to help when forming a view as to what should be the effect of non service of summons in Form 19 given that the Defendant acquiesced in the non service.

Though this is an appeal from a civil suit which raises the issue whether issuance of summons in Form 19 is mandatory or directory, identical issues do oftentimes surface to the fore in administrative law in regard to the question whether a particular enactment is directory or mandatory and in order to resolve this issue in the instant appeal, I would adopt the principles summarized in the following passage from de

Smith's Judicial Review of Administrative Action, 4th edition (a passage cited with approval by Balcombe LJ in ***Secretary of State for Trade and Industry v. Langridge*** (1991) Ch 402 at 411).

> *"Although nullification is the natural and usual consequence of disobedience; breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned."*

Thus it seems clear that the breach of a positive requirement can be cured by waiver on the part of a person who is intended to be affected or protected by the requirement. The "other side", as Lord Denning alluded to in the case of ***Macfoy (supra),*** would be the Defendant in the context of Form 19 and Chapter LIII of the Civil Procedure Code.

He cannot now be heard before this Court to complain that non-receipt of summons in Form 19 was fatal to the procedure adopted as its non-receipt does not appear to have prejudiced him. The Defendant cannot contend that he was misled inasmuch as he sought leave from Court by way of a petition and affidavit.

The 2nd point taken by the defence counsel is that that the affidavit annexed with the plaint does not state that the sum was justly due.

It must be stated that the Plaintiff describes the procedure as summary procedure in the plaint. Whilst a special procedure under Chapter LIII is prescribed for "liquid claims", the plaint speaks of the summary procedure prescribed in Chapter XXIV, which is not applicable to this type of case. The procedure applicable to institute an action, where the claim is for a debt or liquidated demand for money arising upon a bill of exchange, promissory note, or cheque or instrument or a contract in writing for a liquidated amount of money is laid down in Chapter LIII of the Civil Procedure Code and Section 703 stipulates that the plaint must be accompanied by an affidavit and the

Plaintiff must state in the affidavit that the amount claimed by the Plaintiff is **"justly due"** to him from the Defendant-See Section 705(1) of the Civil Procedure Code.

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 claims is justly due to him from the Defendant-So said the case of ***Anamalay v. Allien*** 2 N.L.R 25. However in ***Paindathan v. Nadar*** 37 N.L.R 101 the Court took a contrary view and held that the use of the words "justly" is not imperative. The Court went on to hold *"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".*

In this case, the Plaintiff had filed an affidavit of one K.L.A. Sunil Shantha, the General Manager of the Plaintiff Bank, which does not state that the sum claimed by the Plaintiff is justly due from the Defendant. Furthermore, the plaint avers that a sum of Rs.391,124/- is due from the Defendant, whereas the affidavit filed by the General Manager states that only a sum of Rs.291,124/- is due from the Defendant. This discrepancy in the amount claimed by the Plaintiff remains unexplained. There should not be a discrepancy between the plaint and the affidavit as to the amount claimed, because the Court has to accept the facts in the affidavit as evidence to give judgment if the Defendant defaults. As such, the plaintiff's actual cause of action as to which amount due is in doubt. The Plaintiff has stated in the plaint that the total amount due from the Defendant arose from four cheques. The details of these four cheques and the amount due on each of these cheques are given in paragraph 4 of the plaint. The total amount accordingly is Rs.391,124/-. But the letter of demand contains a different amount which is much less than the amount claimed in the plaint (See page 22 of the Brief). The Plaintiff failed to demand the correct amount due from the Defendant. These sums of monies are different form the amount mentioned in the affidavit of the General Manager, Sunil Shantha. The Plaintiff cannot ask for a judgment on an imprecise and indefinite amount. A doubt is now created as to which amount of the three amounts mentioned in the three documents is correct. When there is a discrepancy between the amounts in the Plaint, affidavit and the letter of demand, how can the Plaintiff ask for

judgment in a sum of Rs.391,124/-? No doubt the case of ***Paindathan v. Nadar*** *(supra)* created a leeway in that what is justly due can be gleaned from the affidavit filed and as I pointed out one cannot ascertain what amount is justly due in view of the discrepancy in the affidavit. I take the view that on this ground of uncertainty alone, the plaint must have been rejected.

The 3rd point is that the Plaintiff has failed to give the Defendant notice of dishonour of the cheques.

It is ingrained in the law of negotiable instruments that when a cheque is dishonoured, the holder must give notice of dishonor to the drawer and indorsers to render them liable. In the instant case the Plaintiff sued the Defendant on four cheques and all these four cheques had been dishonoured, but the Plaintiff gave notice of dishonor only in respect of a cheque for Rs.108,333/- bearing No. 280588 and dated 28.06.1996 and failed to give notice of dishonor in respect of the other cheques.

Notice of dishonor must be distinguished from a "Letter of Demand". It is necessary to make a demand by way of a "Letter of Demand" but it is equally necessary to give notice of dishonour when a cheque is dishonoured. Section 47 (2) of the Bills of Exchange Ordinance enacts:

> *"Subject to the provisions of the Ordinance, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder."*

Section 48 of the Bills of Exchange Ordinance stipulates the requirement for a notice of dishonor. This provision contains not only the requirement of a notice of dishonour but also the effect of not giving such notice. Section 48 goes as follows:

> *"Subject to the provisions of the Ordinance when the bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged."*

So it is clear that if a holder of a cheque who finds that the cheque has been dishonoured gets an immediate right of recourse against the drawer of the cheque and

its subsequent indorsers but in order to maintain this right he must give notice of dishonor. Otherwise the both the drawer of the cheque and any indorser thereof will get discharged. In other words there will be no right of action against them.

In 1969 in the case of ***Senanayake v. Abdul Cader*** (1969) 74 CLW 79; 74 N.L.R 255, Justice Weeramantry observed that it was surprising that lawyers were suing on cheques without observing the basic requirements of the rules relating to presentment of payment and notice of dishonour. In that case, the Plaintiff had sued the Defendant on a chequeforRs.12,000/- which had been drawn by the Defendant in the plaintiff's favour and which had been dishonoured by the bank on presentment. The plaint, however, contained no averment of presentment for payment or of notice of dishonor, or of any circumstances showing that these essential requirements had been dispensed with; nor had any issues been raised at the trial on any of these matters.

The Supreme Court held that since there had been a non-compliance with these essential and imperative requirements of the law, the plaintiff's action must fail *in limine*. In this case, the history of the importance of notice of dishonour was gone into by Weeramantry J. The learned Judge articulates the following at page 257:

> *"Thus, as early as 1821, a time long anterior to the Civil Law Ordinance (No.5 of 1852), this Court decided in* ***Boyd v. Benett,*** *(1820-33) Ram 24 that a drawer of a bill of exchange payable to a third party is entitled to notice of dishonor. The Court there observed that no proof having been made that the drawer had received notice of dishonor, 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".*

Even as far back as 1884, 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 dishonor-see ***Weerappah Chetty v. de Silva*** (1884) 6 SCC 62. 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.

The following are other decisions of the Supreme Court of Sri Lanka where actions based on cheques have failed because of defective pleadings. In ***de Silva v. Ranasinghe*** (1966) 69 N.L.R 278 it was held when a cheque is dishonoured, notice of dishonor is a condition precedent to a right of action against an indorser. In ***Wijesundera v. Kunjimoosa & Co.***, (1967) 70 N.L.R 64 it was held that notice of dishonor in terms of Section 49(12) of the Bills of Exchange Ordinance is a condition precedent to a right of action against an endorser or drawer of a cheque.

In this case it was further held that where a cheque when presented for payment is dishonoured by a bank with the endorsement "effects not cleared" an indorsee of the cheque must be given due notice of dishonor before he can be sued on the cheque. In such a case Section 50(2)(c) of the Bills of Exchange Ordinance does not dispense with notice of dishonour. Notice of dishonour must be given within a reasonable time. A notice sent nearly a month after the date of dishonour is not a notice as required by the Bills of Exchange Ordinance-see also The *Eastern Garage & Colombo Taxi Cab Co. Ltd., v. Silva* (1922) 23 N.L.R 509.

In ***Kulasuriya v. Perera*** (1963) 66 N.L.R 188 it was held that in the absence of special circumstances notice of dishonour of a cheque is not deemed to be given within a reasonable time in terms of Section 49(12) of the Bills of Exchange Ordinance if the person giving the notice and the person receiving the notice reside in the same place (town) and the notice is not given or sent off in time to reach the latter on the day after the dishonor of the cheque.

In ***Perera v. Perera*** (1968) 71 N.L.R 167 the Supreme Court held that actions on negotiable instruments like cheques should be decided in accordance with the pleadings and the issues raised thereon and the evidence led relevant to those issues. Excuses for delay in giving notice of dishonor are limited only to those which are set down in Section 50 of the Bills of Exchange Ordinance and a careful consideration of the grounds for excuse given in Section 50 of the Ordinance does not exculpate the Plaintiff in this case for not giving notice of dishonor and there is no averment at all in the plaint that notice of dishonor was ever given.

In light of the above, as the plaintiff's action omitted to comply with this essential and imperative requirement of the law, it must fail *in limine.* An absence of notice of dishonor in the case, unless it is excused in terms of Section 50 of the Bills of Exchange Ordinance, and no averments in the plaint as to giving notice of dishonor or its excuse will entail the sanction of a dismissal of the plaint *in limine.* It has also been held in the English case of ***May v.Chidley*** (1894) 1 Q.B 451 that an averment of notice of dishonor is an essential averment in a statement of claim against the drawer-see the repetition of this requirement in cases such as ***Roberts v. Plant*** (1895) 1 Q.B 597; See also *Bullen & Leake & Jacob's Precedents of Pleadings* 18th Edition (Volume 1) Chapter 10-Bills of Exchange, Cheques and Promissory Notes Pleading at 10-21.

The above enunciation is dispositive of the instant appeal before me and I therefore allow the appeal and set aside the order of the learned District Judge dated 30.11.2000. I dismiss the plaintiff's action without costs.

JUDGE OF THE COURT OF APPEAL