1977 *Present :* **Thamotheram, J., Walpita, J. and Gunasekera, J.**

A. Z. SEBASTIAN, Appellant *and* L. S. SRI DHARMA KUMARAJEEWA, Respondent.

S.C. 121/75 (F) – D.C. Negombo 2829/M

Civil Procedure Code – Action by summary procedure on a liquid claim – Bona fide defence disclosed in affidavit – Court can order security as a condition to file answer – Sections 704 (2), 706.

In an application for leave to appear and defend, even if the affidavit of the defendant is satisfactory, the court can exercise its discretion under section 706 and order the defendant to deposit part of the sum claimed in the plaint as a condition to defend the action.

Decision in *Issadeen and Company v. Wimalasuriya* 62 N.L.R. 299 not followed.

APPEAL from an order of the District Court of Negombo.

N. Devendra with *L.F. Ekanayake* for the appellant.

Respondent absent and unrepresented.

Cur. adv. vult.

December 8, 1977. GUNASEKERA, J.

The Defendant-Appellant has appealed against the Order of the learned District Judge granting him leave to appear and defend this action filed against him under summary procedure on the condition that he should deposit a sum of Rs. 10,000/-. He submits that he should have been allowed to so appear and defend the action unconditionally.

The Plaintiff-Respondent claimed in this action that the Appellant had issued a cheque for Rs. 20,000/- in his favour, and that this cheque was dishonoured by the Bank on presentation with the endorsement that the Appellant's account had been closed. Summons were issued in terms of section 703 of the Civil Procedure Code and the Appellant moved for leave to appear and defend the action on the ground that the Respondent was a money lender and that the Appellant borrowed from him only a sum of Rs. 10,000/- for which this cheque for Rs. 20,000/- had been taken as security and that the capital sum borrowed as well as all interest due had been repaid by him to the Respondent.

On the day fixed for the Appellant's Application he did not appear in Court and his Attorney withdrew from the case stating he had no instructions. The learned Judge nevertheless considered the Petition and Affidavit filed by the Appellant and ordered that he should deposit Rs. 10,000/- in Court on or before 20.4.1975 to enable him to appear and defend the action.

Mr. Devendra for the Appellant referred us to section 704(2) of the Civil Procedure Code and submitted that as this Order of the learned Judge indicates that he did not think that the Appellant's defence was 'not *prima facie* sustainable' or that it lacked 'good faith' the Appellant should in law be permitted to defend the action, unconditionally. He relied on the judgment of Weerasooriya, J. in *Issadeen and Company v. Wimalasuriya.*[1]

In that case too the Plaintiff's claim was to recover a sum of Rs. 20,000/- on a cheque issued to him and the defence was that only a sum of Rs. 10,000/- had been borrowed by the Defendant on the security of the cheque sued on, and that a certain amount of the capital borrowed had been repaid and only Rs. 7,000/- was still due. The learned District Judge ordered the Defendant to deposit a sum of Rs. 7,000/- to enable him to file his Answer.

[1] (1960) 62 N.L.R. 299.

Weerasooriya, J. considered Section 704(2) and stated:

> "Mr. Renganathan submitted that there is nothing in section 704(2) which precludes its application to a case where a *prima facie* sustainable defence is disclosed in regard to only part of the claim while the rest of it is admitted. Assuming that the learned District Judge had no reasonable doubt about the good faith of the defence disclosed in the present case, I think that Mr. Renganathan's submission is entitled to prevail. Under the corresponding provisions of the law in England (see Order XIV, rule 4) judgment may be given in favour of the Plaintiff for a part of his claim which is admitted, and the Defendant allowed to defend as to the residue of it. We have no such provision in Chap. LIII. But, in my opinion, this does not mean that where as against a part of the claim a *prima facie* sustainable defence is disclosed, the good faith of which is not in doubt, the defendant should be ordered to deposit the sum which is submitted to be due, or give security in respect of it, as a condition precedent to his filing Answer. As pointed out by Mr. Renganathan, such an order would virtually prevent the defendant from **defending himself unconditionally as he is entitled to do under section 704(2),** against that part of the claim in respect of which he has a *prima facie* sustainable defence. I am fortified in the view I have taken by the decision in *Annamalay Chetty v. Ali Marikar,*[2] where of two promissory notes sued on, the claim on one of them was admitted by the defendant who, however, pleaded that the other had been discharged by the grant of a fresh note which had been not matured. It was held in appeal that the defendant was entitled to defend the action unconditionally". (The underlining is by me).

With regard to section 706 he said,

> "Mr. Jayasundera contended that section 704(2) should be read subject to section 706, and that under the latter section the Court has a discretion to impose conditions even in a case where there is a defence which is *prima facie* sustainable and as to the good faith of which there is no reasonable doubt. But, regarding this same argument Hutchinson, CJ., stated nearly half a century ago in *Rengasamy v. Pakeer*[3] that it was too late to urge it, in view of two previous decisions to which he referred, one of them being *Annamalay Chetty v. Ali Marikar* (supra)".

But what Hutchinson, CJ. himself said about section 706 was,

> "The section which applies here is 706.... The law says that even when the affidavits are satisfactory and disclose a defence the Court may impose such terms as to security as it thinks fit. There is a good deal to be said for the view that the Legislature intended to give to the Judge in

[2](1901) 2B. R. 267. [3](1912) 14 N.L.R. 190.

every such case a discretion as to imposing terms with which the Appeal Court should not interfere. But I think that it is too late to urge that view now. Having regard to the decisions of the Court in *Annamalay Chetty v. Ali Marikar* (supra) and *Meyappa Chetty v. Usoof,*[4] I think that we are bound to hold that in such a case as this, where the defendant has sworn to things which, if proved, will be a good defence, he should be allowed to defend unconditionally, unless there is something on the face of the proceedings which lead the Court to doubt the *bona fides* of the defence. I cannot reconcile this rule with section 706, which authorises the Court to impose such terms as it thinks fit; but it is the rule laid down by two Judges in the last mentioned case, and we are bound to follow it".

In the first case followed by Hutchinson, CJ (Annamalay Chetty's case) what Browne, J. said was,

"Appellant's Counsel has quoted to us the most recent remarks in the English Court upon the question raised by this Appeal, as they appear in the Law Times of the 3rd of August, 1901 under the head "Practice, Order XIV Leave to Defend", *viz.*, "Order XIV should not be used to shut out a defendant from laying his defence before the Court because it appears that such defence is not likely to succeed. The plaintiff should only have leave to sign judgment where it appears that assuming all the facts in favour of the defendant they do not amount to a defence in law as on the former practice on a demurrer to the plea".

From this it appears that the true criterion as to whether a defendant should be allowed to defend an action upon a bill of exchange only on terms is – whether the suggested defence is considered not to amount to a defence in law."

Browne, J. did not consider section 706 in this judgment. Moncreiff, J. mentioned section 706 but paraphrased only section 704(2) and merely stated "the provision requires no commentary." In the other case (Meyappa Chetty's case) too section 706 was not considered or even referred to.

It will thus be seen that when Hutchinson, CJ. expressed the view that section 706 allows a District Judge to order security even when he thought the Defendant's Affidavit satisfactory but said that earlier decisions of this Court held him bound not to apply the plain words of this section he said so, if I may say so with respect, *per incuriam*. Those earlier decisions proceeded on the interpretation given to the English Order XIV and a consideration only of section 704(2), completely disregarding section 706. It will also be seen that the rule enunciated by Weerasooriya, J. in the Issadeen and Company case that if the *bona fides* of the defendant is not doubted the defendant must be allowed to defend the action unconditionally originated from these two decisions and the English Practice and the English Order XIV.

[4](1902) 5 N.L.R. 265, Meyappa Chetty v. Usoof.
(1902) 2 Br 394.

But on this question we are governed by the plain words of the two sections 704(2) and 706 and an analysis of these two sections in my view shows that the rule enunciated in the Issadeen and Company case is manifestly erroneous.

Section 704(2) says:

> "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".

The words I have underlined show clearly that this subsection is dealing only with one particular question, that is, when the Judge can order the Defendant to deposit the **full amount claimed** or give security for **that full sum.** It only says that a Judge cannot order such a deposit of the **full sum claimed** unless he is able with reason (See 14 N.L.R. at 191) to state that the defence is not *bona fide*; in the reverse it means that the Judge can order such a deposit if he considers the defence not *prima facie* sustainable or not *bona fide.*

The reason for this law is also quite clear. If the Defendant merely deposits the full sum claimed without offering any explanation, he can as of right file his Answer (*Ramanathan v. Fernando*[5]). And so if the Judge rejects the defence totally he cannot proceed *ex parte* but must still give the Defendant an opportunity of exercising the right he has in law to deposit the full sum claimed and file his Answer.

It is equally clear that section 704(2) certainly does not say that if the Judge accepts the defence outlined as *bona fide* he must necessarily give leave to appear and defend unconditionally. To reach that conclusion in the earlier decisions, Browne, J. in Annamalay Chetty's case applied the English Practice on Order XIV and Bonsor, CJ. in Meyappa's case merely said (apparently following the earlier decision):

> "The rule would appear to be that when the defendant does swear to facts, which, if true, constitute a good defence, he must be allowed to defend unconditionally, unless there is something on the face of the proceedings which lead the Court to doubt the *bona fides* of the defendant."

In the English Law under Order XIV the question of *bona fides* of the defence decides not the question of the amount of security to be given as in our law, but the very right to defend the action. The Annual Practice (1956) at page 243 says,

> "The purpose of Order 14 is to enable a plaintiff to obtain summary judgment without trial, if he can prove his claim clearly; and if the defendant is unable to set up a *bona fide* defence, or raise an issue against the claim which ought to be tried. (*Roberts v. Plant*[6]).

[5](1930) 31 N.L.R. 495 [6](1895) I.Q.B. 577

> The mere offer to bring the sum claimed into Court is not sufficient to entitle the defendant to have leave to defend. "He is bound to show that he has some reasonable ground of defence to the action", Per Bramwell L.J ..."

And though Rule 6 says, "Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the Judge may think fit", the Practice on that Rule as set out in page 265 is,

> "The principle on which the Court acts is that where the defendant can show by affidavit that there is a *bona fide* triable issue, he is to be allowed to defend as to that issue without condition (*Jacobs v. Booth's Distillery Co.*)[7]".

and at page 266,

> "Since *Jacobs v. Booth's Distillery Co.*, (1901) 85 L.T. 262 H.L., the condition of payment into Court, or giving security, is not often imposed."

It was wrong to so resort to the English practice when the English Law itself differed so much from our law. Our Civil Procedure Code expressly provides for the situation when the Judge accepts the defence outlined as *bona fide*. Section 706 says that "upon affidavits **satisfactory** to the Court...the Court shall give leave to appear and defend the action on such terms as to security...as the Court thinks fit." section 704(2) and 706 are complementary and must be applied together because section 704(2) only provides for the position when the defence is rejected as not *bona fide* and section 706 provides for the position when the defence is considered satisfactory. (See Garvin, ACJ. in *Ramanathan v. Fernando* (supra)). Needless to state however is the position, that when the defence outlined is very 'satisfactory' the learned Judge may well exercise his discretion in terms of section 706 and permit the Defendant to appear and defend unconditionally.

I am therefore of the view that the rule enunciated in the case of Issadeen and Company that the Judge is bound to allow unconditional leave if the whole or even part of the defence is accepted as *bona fide* is incorrect and should not be followed. To some extent this was made manifest in the later case of *Valliappa Chettiar v. Visuvanathan,*[8] where the claim was on three cheques each of Rs. 8,400/- and no *bona fide* defence was available in respect of two of them and the learned District Judge had ordered security to be given in a sum of Rs. 16,000/-. The same Counsel who appeared for the Appellant in the Issadeen and Company case understandably argued before

[7](1901) 85 L.T. 262 H.L.

[8](1961) 66 N.L.R. 481.

Weerasooriya, J. that in keeping with the earlier decision the *bona fides* of the defence to a part of the claim having been established the Defendant should have been permitted to answer unconditionally. Weerasooriya, J. rejected this submission and affirmed the Order of the learned District Judge saying that the earlier decision could be distinguished on the ground that "there is no admission of any liability by the Appellant and what he seeks to obtain is leave to appear and defend the action in its entirety." If these facts create an exception to the rule enunciated in the Issadeen and Company case it must be observed that in the instant case too there is no admission of liability by the Appellant and the Appellant seeks to defend the action in its entirety. But both before the decision in the Issadeen and Company case as is shown by the facts in that case itself and thereafter as is shown in Valliappa Chettiar's case Judges of our Courts have always exercised their discretion in terms of section 706 in cases where they considered the Affidavit of the Defendant 'satisfactory' and often ordered the Defendant to deposit part of the sum claimed in the Plaint.

I would therefore affirm the Order of the learned District Judge and dismiss this Appeal.

THAMOTHERAM, J. – I agree.

WALPITA, J. – I agree.

Appeal dismissed.