

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an appeal in terms of Section 5 (c) (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

SC / APPEAL / 26 / 2022

SC / HCCA / LA / 55 / 2020

Civil Appellate Kalmunai:

EP / HCCA / KAL / LA / 535 / 2019

DC Pottuvil: MS / 296 / 19

Mohamed Cassim Mohamed Harees,

Mal 9th Road,

Sammanthurai.

PLAINTIFF

-Vs-

1. Mohamed Thasim Mohamed Siraj,

No.10, 8th Lane,

Maskeliya.

2. Ansar Mohamed Aroos,

No.66 / 4 / 1A, Bandawa,

Polgahawela.

3. Aroma Teas Private Limited,

No.66 / 4 / 1A, Bandawa,

Polgahawela.

DEFENDANTS

AND THEN BETWEEN

Mohamed Thasim Mohamed Siraj,
No.10, 8th Lane,
Maskeliya.

1ST DEFENDANT - APPELLANT

-Vs-

Mohamed Cassim Mohamed Harees,
Mal 9th Road,
Sammanthurai.

PLAINTIFF - RESPONDENT

2. Ansar Mohamed Aroos,
No. 66 / 4 / 1A, Bandawa,
Polgahawela.

3. Aroma Teas Private Limited,
No.66 / 4 / 1A, Bandawa,
Polgahawela.

2ND AND 3RD DEFENDANTS –
RESPONDENTS

AND NOW BETWEEN

Mohamed Thasim Mohamed Siraj,

No.10, 8th Lane,

Maskeliya.

**1ST DEFENDANT - APPELLANT -
APPELLANT**

-Vs-

Mohamed Cassim Mohamed

Harees,

Mal 9th Road,

Sammanthurai.

**PLAINTIFF - RESPONDENT –
RESPONDENT**

2. Ansar Mohamed Aroos,

No. 66 / 4 / 1A, Bandawa,

Polgahawela.

3. Aroma Teas Private Limited,

No.66 / 4 / 1A, Bandawa,

Polgahawela.

2ND AND 3RD DEFENDANTS –
RESPONDENTS - RESPONDENTS

Before: S. Thurairaja, PC, J.
Yasantha Kodagoda, PC, J. &
A.H.M.D. Nawaz, J.

Counsel: Saadi Wadood for the 1st Defendant – Appellant – Appellant.

Viran Corea for the Plaintiff – Respondent – Respondent.

Argued on: 22.07.2024

Decided on: 12.03.2026

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

1. The question before this Court is whether the order made by the learned District Judge of Pothuvil on 21 November 2019 directing the 1st Defendant – Appellant – Appellant (hereinafter sometimes referred to as the 1st Defendant) to deposit the full sum claimed in the plaint namely a sum of Rs. 12,400,000/- (Rs.12.4 million) as a condition of leave to defend the action can be sustained.
2. The learned Civil Appellate High Court Judges of Kalmunai have affirmed the order of the learned District Judge on 8 January 2020 and it is this order of the High Court of the Civil Appeals that has been appealed to this Court.

3. Prima facie, this is a case where the 1st Defendant is alleged to have issued a cheque bearing no.203802 in favour of the Plaintiff – Respondent – Respondent (the Plaintiff) for Rs. 12.4 million on 1 October 2018.
4. The Plaintiff asserted that this high value cheque for Rs.12.4 million had been issued by the 1st Defendant to satisfy part of the debt he owed the Plaintiff because of a larger investment relationship they had.
5. The threshold question of whether the 1st Defendant should deposit the full amount of the cheque before he could defend the action is the pivotal question that repays an answer in the case.
6. Both the District Court and the Civil Appellate High Court have held that the 1st Defendant who is alleged to have signed the cheque for Rs.12.4 million has to deposit this amount before he could proceed to file answer and defend action.
7. The following questions of law have been formulated;
 - i) *Whether the lower courts erred by **not granting unconditional leave** to the 1st Defendant to defend the action.*
 - ii) *Whether the lower courts erred in law by directing the 1st Defendant to **deposit the total amount claimed** as a condition for granting leave to defend.*
8. Section 704 (2) of the Civil Procedure Code embodies the principle that a Defendant sued upon a liquid instrument such as a cheque should ordinarily be granted leave to defend without conditions. However, where the Court considers the defense disclosed in the affidavit to be not prima facie sustainable, or entertains a reasonable doubt as to the *bona fides* of such defense, the Court is empowered to grant leave subject to

conditions, including the payment into court of the sum claimed or the furnishing of security.

9. Section 704 (2) of the Civil Procedure Code (CPC) is analogous to Order 37 of the Indian Code of Civil Procedure, 1908 and bears a close affinity to the summary judgment jurisdiction development in English procedure, formally under Order 14 of the Rules of the Supreme Court of the United Kingdom and now embodied in Part 24 of the Civil Procedure Rules. The object of this jurisdiction is to prevent a Defendant from delaying the recovery of a clear and liquid claim such as a cheque by raising a defense which is illusory or a sham, while at the same time ensuring that a litigant who demonstrates a *bona fide* triable issue is not shut out from defending the action.
10. Section 704 (2) gives expression to balancing the competing interests of the Plaintiff and the Defendant. It recognizes that where a Defendant sued upon a liquid instrument discloses a defense that is prima facie sustainable and *bona fide*, he should be permitted to defend without restriction. However, where the Court entertains doubt either as to the sustainability of the defense or as to its good faith, the Court may grant leave subject to conditions, including the payment of the sum claimed into Court or the furnishing of security. Where no real defense is disclosed, the summary procedure permits judgment to be entered forthwith.
11. Thus, the provision reflects a procedural compromise between two competing considerations; the need to protect the holder of a liquid instrument from dilatory litigation, and the equally important need to ensure that a Defendant with a genuine defense is afforded an opportunity to contest the claim
12. The rationale of Section 704 mirrors the philosophy of the English summary judgment procedure; a defendant should not be permitted to resist payment of a liquid claim by advancing a defense which is merely illusory or dilatory; yet a defense which raises a *bona fide* triable issue must not be stifled by procedural rigidity. The section

therefore calibrates the Court's discretion by allowing unconditional leave where the defense appears sustainable, conditional leave where doubt arises as to its strength or good faith, and refusal of leave where no real defense is disclosed.

13. Viewed from this legal template, the question arises whether both the District Court and High Court were correct in not granting unconditional leave to the 1st Defendant.
14. The 2nd Defendant in this case is not represented before Court but it is averred that the 1st and 2nd Defendant had both been the initial subscribers to the shareholding and promoters of the 3rd Defendant Company. In fact, both the 1st Defendant and the 2nd Defendant had been the Directors of the 3rd Defendant Company and it is undisputed that the 2nd Defendant ceased to be the Director of the 3rd Defendant Company in 2016.
15. As the facts indicate, both the 1st and 2nd Defendants had carried on the business of Tea Manufacture and Distribution in concert through the medium of the 3rd Defendant Company. The Plaintiff had been, as he avers, an investor in the business carried on by the 1st and 2nd Defendants and contributed from time-to-time investment funds and the plaint itself sets out his periodic payments into the bank accounts of the 1st and 2nd Defendants.
16. As one takes a look at the plaint, paragraph 6 of the plaint sets out a breakdown of the total amount of Rs. 12.4 million which the Plaintiff alleges he had invested towards this business. It is also apparent that out of this sum of Rs. 12.4 million, a sum of Rs. 1.8 million had been paid into the bank account of the 1st Defendant. The same paragraph of the plaint avers that the balance sum of Rs. 10.6 million had been deposited into the account of the 2nd Defendant. But the cheque in favour of the Plaintiff is for the total sum of investment namely Rs. 12.4 million and as the Plaintiff asserts in his plaint, the 1st Defendant had signed the cheque for Rs. 12.4 million. It would appear that by the time the cheque was issued, the 2nd Defendant had ceased to hold office by resignation or removal.

17. The gravamen of the complaint before Court is that when the Plaintiff presented the cheque for payment, it had already been countermanded by the 1st Defendant and consequently, the cheque was dishonored. Subsequent to a notice of dishonor this action was instituted by the Plaintiff and it is in the proceedings in the District Court of Potuvil that the 1st Defendant was directed to pay the full sum as reflected on the cheque bearing no. 203802.

18. At the outset, the 1st Defendant objected to the jurisdiction of the District Court of Potuvil to entertain this action. That objection was overruled on the strength of ***Sri Lanka Co-operative Society v. Susai***¹, which affirms the principle that a debt is payable where the creditor resides. Since the cheque in question was dishonoured within the jurisdiction of the District Court of Pothuvil, that court correctly assumed jurisdiction.

19. In his application to obtain leave and file answer, the 1st Defendant took up two defenses;

1. Forgery of his signature on the cheque.

2. There was no consideration for the cheque.

20. If the cheque is a forgery, Section 24 of the Bills of Exchange Ordinance would render it null and void and wholly inoperative; in such circumstances the cheque would be nothing more than a worthless piece of paper. The second defense, namely want of consideration, stands on a different footing. In that instance no invalidity of the instrument itself is alleged; rather, the liability to honour the cheque is denied and disaffirmed. It must be borne in mind that where forgery is alleged, the burden rests upon the 1st Defendant to establish it. That burden is coterminous with his duty to rebut the statutory presumption of valuable consideration that arises under Section 30 (2) of the Bills of Exchange Ordinance. If want of consideration is alleged, the statutory presumption of consideration created by Section 30 (2) has to be rebutted

¹ (2009) 1 Sri.L.R. 067

by the 1st Defendant. I shall comment on these two inconsistent pleas of forgery and want of consideration later – see paragraphs 32 and 33 of this judgement.

21. When the cheque came into the hands of the Plaintiff, he became a holder of the cheque on the face of it and Section 30 (2) of the Bills of Exchange Ordinance states that every holder of a bill is prima facie deemed to be a holder in due course. Section 30 (1) declares that every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value. In other words, the drawer of the cheque, provided that the signature thereon is genuine, is presumed to have received value. Thus, synoptically Section 30 places the burden of proof on the 1st Defendant to rebut the presumptions of value and good faith that arises by virtue of the fact that the Plaintiff became the holder of this cheque which was dishonoured by a countermand issued by the 1st Defendant.

22. Thus, proof of forgery of his signature on the cheque and rebuttal of the presumptions of valuable consideration for the cheque are obligations on the part of the 1st Defendant and though they are best left to the merits of the trial, the inquiry at the threshold is whether the affidavit of the 1st Defendant discloses a *bona fide* triable issue. Where the defense appears plausible yet doubtful, or where the Court entertains reservations as to its *bona fides* leave may be granted subject to conditions such as the deposit of the sum claimed or the furnishing of security.

23. Though the allegation of forgery may be plausible on evidence, this Court would investigate its *bona fides* with reference to the two affidavits that the 1st Defendant filed in the District Court. The two affidavits were tendered to the District Court by the 1st Defendant on two different dates i.e., 16 May 2019 and 25 July 2019. A perusal of the two affidavits shows contradictions with each other.

24. In the first affidavit filed on 16 May 2019, the 1st Defendant stated in paragraph 12 that the 2nd Defendant resigned from his position as Director of the 3rd Defendant Company in 2016 and appointed him as the sole Director. But in the second affidavit, the 1st Defendant shifted his grounds by asserting in paragraph 11 that he removed

the 2nd Defendant. In other words, the 1st Defendant spoke of a resignation of the 2nd Defendant in the first affidavit but shifted it to removal in the second affidavit.

25. There is also a narrative of his cheque books being stolen by the 2nd Defendant, which the 1st Defendant stated in both affidavits facilitated the forgery of his cheque by the Plaintiff. Even in the course of the hearing before this Court the attention of this Court was drawn to a police complaint made by the 1st Defendant as to the stolen cheques but this Court could not ascertain with reasonable certainty that the cheque in question bearing no.203802 was one among the list of numbers of stolen cheques given in the police complaint. In other words, the cheque bearing no. 203802 which the 1st Defendant alleged was stolen and forged could not be pinpointed from among the cheques in the police complaint.

26. As I alluded to as above, the provisions for granting leave to appear and defend are stipulated in Sections 704 and 706 of the Civil Procedure Code.

27. The contradictory nature of the two affidavits and the unreliable nature of the police report are pointers that inclined both Courts *a quo* to doubt the *bona fides* of the defense and in my view, the orders made by both Courts cannot be faulted. In the case of **Anamalay v. Allien**², it was established that a Court can only order a deposit in two scenarios; if the defense is legally unsound (bad in law) or if the defense is legally sound but the Court has a reasonable doubt for which reasons can be given. The reasoning by the two Courts that the contradictions in the 1st Defendant's affidavits do give rise to reasonable doubts is in my view is not altogether unsound or unsupportable. The case of **C.W. Mackie & Co., Ltd v. Translanka Investments Ltd**³ affirmed that even if a defense appears to exist, the Court may order security if it doubts the genuineness of that defense.

² 2 N.L.R. 251

³ (1995) 2 Sri.L.R.06

28. The case of **AZ Sebastian v. Sri Dharma Kumarajeewa**⁴ clarified that Sections 704 (2) and 706 are complementary; the Court has the discretion to impose security terms when a defense is considered satisfactory but perhaps not entirely beyond doubt.

29. As I opined earlier, the narrative of stolen cheques may become true on evidence but the fact and circumstances which the 1st Defendant brought to the fore at the threshold stage in the District Court call for their verification and proof at the trial and I take the view that the exercise of discretion by the learned District Judge which was found to be beyond reproach by the High Court should not be likely interfered with. In **Rengasamy v. Pakeer**⁵, it was held that;

"The Appellant's counsel contends that Section 704 applies, and that the words "reasonable doubt" there mean doubt for which a reason can be given. That, however, is not the meaning of "reasonable"; no such meaning will be found in any dictionary, and I do not think that anyone has ever used the word in that sense, although, no doubt, a Judge should always be able to give a reason for his belief."

30. Dr. Abdul Majeed cites the case of **Meyappa Chetty v. Chittampalam**⁶ in his *Commentary on Civil Procedure Code and Civil Law in Sri Lanka*⁷, wherein Bonser C.J. laid down that;

"The rule would appear to be that when the defendant does swear of facts which if true, constitute a good defence, he should be allowed to defend conditionally, unless there is something on the face of the proceedings which leads the Court to doubt the bonafides of the defence".

⁴ 80 N.L.R. 264

⁵ 14 N.L.R. 190

⁶ (1902) 2 Browne 396.

⁷ Volume II (revised 2nd edition) at p 1481.

31. It is worth noting that the learned District Judge had also cited the judgement in ***Amerasekara v. Amarasinghe***⁸ which articulated the view as follows;

(a) It was manifest on an examination of S. 704(2) that it requires the court to consider the petition and affidavit together with any document annexed and decide whether the Defendant has-disclosed prima facie sustainable defense.

(b) The averment in the affidavit of the Defendant-respondent that the promissory note in question was a false and fraudulent document does not only by itself furnish any material in the absence of other circumstances to buttress that allegation.

(c) The Defendant-respondent had averred that no consideration passed, having regard to the absence of a specific averment denying the signature on the promissory note this denial of consideration has no meaningful effect.

32. I would venture to observe at this stage that the defenses of invalidity of the cheque as a result of forgery and want of consideration are mutually exclusive. A Defendant who seeks to impugn a cheque as a nullity in one breath cannot allege in the same breath that he tendered a cheque but for no consideration. If somebody had stolen his cheque leaf and written out a cheque forging his signature, one cannot speak of a cheque which cannot be sued upon because there is no consideration given by the payee of the cheque. Implicit in that defense is the assertion that a valid cheque came into being but it cannot be sued upon for want of consideration.

33. A cheque cannot be both invalid and valid at the same time. These are mutually inconsistent defenses that throw doubt at the leave stage in the District Court. In any

⁸ (1998) 3 Sri.L.R. 253

event, these are relevant matters that could be well examined by the trier of facts and I take the view that the orders of both the District Court dated 21 November 2019 and the High Court dated 8 January 2020 have to be affirmed.

34. The two questions of law formulated in this Court are answered in the negative. Accordingly, this Court proceeds to dismiss the appeal and directs the learned District Judge to expeditiously dispose of this matter by giving his utmost attention to the further steps that need to be taken in regard to the further trial in the District Court.

Judge of the Supreme Court

S. Thuraiaraja, PC, J.

Judge of the Supreme Court

I agree

Yasantha Kodagoda, PC, J.

Judge of the Supreme Court

I agree