W. K. M. D. PERERA
v.
PEOPLE'S BANK

COURT OF APPEAL.
S. N. SILVA, J. (P/CA) AND
R. B. RANARAJA, J.
COURT OF APPEAL REVISION APPLN. NO. 612/93.
D.C. COLOMBO CASE NO. 80/DR.
AUGUST 15, 1994..

Debt Recovery (Special Provisions) Act, No. 2 of 1990, Sections 6 and 25(1) (a) - Procedure under Debt Recovery (Special Provisions) Act, No. 2 of 1990 - Oral evidence - Conditions for obtaining leave to show cause against decree nisi - Revisionary relief - Burden of proof - Civil Procedure Code, section 389.

A defendant has no status in terms of section 6 of the Debt Recovery (Special Provisions) Act, No. 2 of 1990 to participate in proceedings in an action instituted under the Act until such time he obtains leave of Court. He has first to make an application for the purpose. If he seeks to apply for leave to appear unconditionally, he has to file an affidavit which -

(a) deals specifically with the plaintiff's claim stated in the plaint;

(b) sets out his own defence to the plaintiff's claim; and

(c) states what the facts are on which he relies to support his defences.

There is no provision to lead oral evidence on any of these matters at this stage. It is only upon court being satisfied on the material placed before it by the defendant that there is an issue or a question in dispute which ought to be tried that leave to appear and show cause against the decree *nisi* will be granted.

The respondent's substantive defence that the cheque sued upon was given as security is not borne out by the material before court. The burden of satisfying court that the cheque was given as security and not as payment of a debt due lay on the petitioner. He had to do so by producing supporting facts in the form of documents. The documents produced by the petitioner *prima facie* neither support his defence nor are they sufficient to satisfy any court that there is an issue or a question in dispute which ought to be tried.

The further petition seeking to set aside the order making order *nisi* absolute is in effect a final order made on default of the petitioner to appear. In the circumstances the provisions of section 389 of the Civil Procedure Code will

apply. The petitioner should seek his remedy under that section and not by way of revision.

Per Ranaraja, J. "... Equitable relief by way of revision is available only to those who come to court with clean hands. Section 25(1) (a) of the Debt Recovery (Special Provisions) Act makes any person who draws a cheque knowing that there are no funds or insufficient funds in the bank to honour a cheque drawn by him, liable to be found guilty of that offence after summary trial ... Admittedly the petitioner has issued (the cheque) with the knowledge that there were no funds in his account. This conduct disentitles the petitioner to revisionary relief".

The order which the Court made in giving leave "to appear and file answer" upon payment of Rs. 3,500,000/- was wrong. For these words, the words "to appear and show cause against the decree *nisi*" should be substituted.

APPLICATION for revision of the order of the Additional District Judge of Colombo.

E. D. Wickramanayake with *H. R. Candappa* and *A. Cooray* for petitioner.
S. Parathalingam with *N. Kahandavitarne* for respondent.

Cur. adv. vult.

September 9, 1994.
RANARAJA, J.

The plaintiff-respondent Bank (respondent), instituted action under the provisions of the Debt Recovery (Special Provisions) Act, No. 2 of 1990, in the District Court to recover a sum of Rs. 3,500,000/- with interest thereon from the defendant-petitioner (petitioner). Court entered decree *nisi* which was served on the petitioner. The petitioner filed petition, affidavit and documents D1 to D15 and moved for leave to appear and show cause against the decree *nisi* unconditionally. Parties filed written submissions and court delivered order giving the petitioner leave to appear and file answer upon the deposit of Rs. 3,500,000/- to the credit of the case on or before 1.9.93. The petitioner filed the present application to have the said order revised.

A defendant who wishes to obtain leave to appear and show cause in proceedings instituted under the Debt Recovery (Special Provisions) Act, has to comply with the provisions of section 6 of the Act which reads:

(1) "In an action instituted under this Act the defendant shall not appear or show cause against the decree *nisi* unless he obtains leave from the court to appear and show cause.

(2) The court shall upon the application of the defendant give leave to appear and show cause against the decree *nisi* either,-

(a) ... or
(b) ... or
(c) upon affidavits satisfactory to court that there is an issue or a question in dispute which ought to be tried. The affidavit of the defendant shall deal specifically with the plaintiff's claim and state clearly and concisely what the defence is and what facts are relied on as supporting it."

Thus it is clear that a defendant has no status to participate in proceedings in an action instituted under the Act until such time he obtains leave of court. He has first to make an application for the purpose. If he seeks to apply for leave to appear unconditionally, he has to file affidavits which, (a) deal specifically with the plaintiff's claim stated in the plaint, (b) sets out his own defence to the plaintiff's claim and (c) states what the facts are he relies on to support his defence. There is no provision to lead oral evidence on any of these matters at this stage. It is only upon court being satisfied on the material placed before it by the defendant that there is an issue or a question in dispute which ought to be tried that leave to appear and show cause against the decree *nisi* will be granted.

It is the case for the respondent that it had filed two actions, nos. 2300/M, 12646 MR. against Ramona Construction Co. Ltd., the petitioner and his wife, who were the two directors of the company, for the recovery of Rs. 4,225,164/49 and 1,554,038/45 with interest respectively. Since the petitioner was attempting to sell a property called Makulgaha Kumbura while these two actions were pending, the respondent filed a further case no 3545/Sp, against the petitioner and the Registrar of lands, seeking a declaration that the petitioner had no right to sell the said land and an injunction against the Registrar from registering the deed of transfer. On representations made by the petitioner that he will personally take on the liability to pay a sum of Rs. 6,500,000/- in settlement of the sums claimed, the

respondent had withdrawn all three cases. An agreed by the parties, the respondent had appropriated a sum of Rs. 3,060,000/- lying in the margin account of the petitioner. The respondent had obtained cheque no. 044417 (P5) drawn by the petitioner for a sum of Rs.3,500,000/- for the balance sum due. However, this cheque was to be deposited upon the petitioner receiving the proceeds of the sale of the land referred to. When the cheque was presented to the bank for payment, it was returned with the endorsement "not arranged for" on the 1st occasion and "refer to drawer" on the 2nd occasion. Although the petitioner was given notice of dishonour, and a demand for payment was made by the respondent, the petitioner had failed to comply.

The petitioner has admitted in his affidavit that the respondent filed the said three actions and that they were withdrawn after discussions with the officers of the respondent bank. It is also admitted that his margin account was debited in a sum of Rs. 3,060,000/- following discussions with the respondent. The petitioner does not dispute the fact that he issued cheque (P5). However, when answering the averment in the plaint regarding dishonour of (P5), he blandly stated that the cheque was not dishonoured on 24.11.92. On a perusal of the copy of (P5), the endorsements referred to are clear on the face of it. The frank of the bank bears the date 23.11.92. It is the respondent's position that (P5) was received by post on 24.11.92.

The petitioner's substantive defence is that the cheque (P5) was given as security until such time the accounts between Ramona Construction Co., Ltd. and the respondent were settled and not in settlement of the debt due.

The burden of satisfying court that the cheque was given as security and not as payment of a debt due, lay on the petitioner. He had to do so by producing supporting facts, in the form of documents. The petitioner has produced 15 documents. Document (D8) which has also been produced marked (P4), cuts across the defence taken by the petitioner. This document clearly bears the statement "that the total of Rs. 6,560,000/- be used to settle all dues". This statement is reiterated in document (D7) which is a letter written

by the petitioner to an officer of the respondent bank. Besides, it adds that "it was agreed between us in writing that the total of Rs.6,050,000/- be used to settle all our dues." These two documents were the earliest after withdrawal of the three actions, addressed by the petitioner to the respondent. There is no word in them which even vaguely suggests that (P5) was given as security.

There is a further fact which militates against accepting the assertion of the petitioner that (P5) was given as security. The petitioner had admittedly altered the date of the cheque from 31.10.92 to 10.11.92. This points more to the petitioner seeking further time to deposit the proceeds of the sale of his land in his account, than to (P5) being given as security. The documents produced by the petitioner *prima facie* neither support his defence nor are they sufficient to satisfy any court that there is an issue or a question in dispute which ought to be tried.

The petitioner has filed a further petition dated 16.9.93 seeking to set aside the order of the Learned Additional District Judge dated 6.9.93, whereby the order *nisi* was made absolute. This order is in effect a final order on default of the petitioner to appear. In the circumstances, the provisions of section 389 of the Civil Procedure Code will apply. The petitioner should seek his remedy under that section and not by way of revision.

Finality, it is to be noted that equitable relief by way of revision is available only to those who come to court with clean hands. Section 25(1) (a) of the Debt Recovery (Special Provisions) Act, makes any person who draws a cheque knowing that there are no funds or insufficient funds in the bank to honour a cheque drawn by him, liable to be found guilty of that offence after summary trial. Upon conviction, such a person could be punished with imprisonment of either description for a term which may extend to one year or with a fine of Rs. 10,000/- or 10% of the full value of the cheque or both. However, there is no similar liability cast under the Act, on the person who knowingly accepts such a cheque. Admittedly, the petitioner has issued (P5) with the knowledge that there were no funds in his account. This conduct disentitles the petitioner to revisionary relief.

It was submitted that the Learned Additional District Judge was in error when he stated in his order the petitioner will be given leave "to appear and file answer" upon the payment of Rs. 3,500,000/-. I am in agreement with this submission. I accordingly substitute the words "to appear and show cause against the decree *nisi* " for the words "to appear and file answer". Subject to this variation in the order, the application for revision is dismissed with costs.

S. N. SILVA, J. I agree.

Revisionary relief refused.