

BANK OF CEYLON
v
KALEEL AND OTHERS

COURT OF APPEAL
AMARATUNGA, J. AND
WIMALACHANDRA, J.
C.A. NO. 500/2000
D.C. COLOMBO 304/DR
FEBRUARY 17 AND
MARCH 13, 2003 .

Debt Recovery (Special Provisions) Act, No. 2 of 1990 – Leave to appear and defend granted – Who should begin? – Burden of proof – Civil Procedure Code, sections 150 and 754(2) – Leave to appeal not exercised – Can an application in revision be maintained? – Exceptional circumstances – Alternate remedy.

The defendant-respondents filed an application for unconditional leave to appear and defend the action. The trial court allowed the application subject to the condition that, the defendants deposit Rs. 1 million.

The trial court further held that the plaintiff-petitioner should begin the case.

The petitioner moved in revision.

HELD:

- (1) The court will not interfere by way of revision when the law has given the plaintiff-petitioner an alternative remedy (s. 754(2)) and when the plaintiff has not shown the existence of exceptional circumstances warranting the exercise of revisionary jurisdiction.

Per Wimalachandra, J.

“In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it – the order complained of is of such a nature which would have shocked the conscience of court.”

- (2) The defendants have denied all averments in the plaint. The plaintiff has the right to begin unless where the defendant admits the facts alleged by the plaintiff. The question as to the party who should begin is linked to the question on whom the burden of proof lies in a suit. The plaintiff has the right to begin and prove the case.

APPLICATION in revision from an Order of the District Court of Colombo

Cases referred to:

1. *Rustom v Hapangam & Co.*, (1978-79) 2 Sri LR 225
2. *Parapragasam & another v S.A. Emmanuel C.A.* 931/88 – D.C. Jaffna L/4772 – C.A.M. 24.7.91
3. *Aghose v Premchand* - 7 CLR 274

Nihal Jayamanne, P.C. with *Ajith Munasinghe* for plaintiff-petitioner

S.A. Parathalingam, P.C. with *Dinal Phillips* and *Shiran Cooray* for defendant-respondents

Cur.adv.vult

June 30, 2004

WIMALACHANDRA, J.

This is an application in revision from the order dated 24.04.2004 made by the learned Additional District Judge of Colombo. By that order the learned Judge directed the plaintiff-petitioner to begin the case and lead evidence. 01

Briefly, the facts relevant to this application are as follows:

The plaintiff-petitioner (hereinafter referred to as the plaintiff) instituted the action bearing No. 304/DR in the District Court of Colombo against the 1st to 6th defendants-respondents (hereinafter referred to as the defendants) under the Debt Recovery (Special Provisions) Act, No. 2 of 1990. In this action the plaintiff bank claims a sum of Rs. 25,611,112/19 with interest at the rate of 18% per annum from 1.7.1999 from the defendants jointly and severally on the basis that they were the guarantors to a bank facility granted to a Company known as Jewelarts Ltd. The Additional District Judge entered order nisi and the defendants filed an application for unconditional leave to appear and defend action. Thereafter the learned Judge after an inquiry granted the defendants leave to appear and defend the action subject to the condition that the defendants deposit Rs. One Million. 10

When the case came up for inquiry, the plaintiff made an application that the respondents should begin the case. The defendants 20

objected to this application. The learned Judge heard both parties and made order on 24.4.2000 that the petitioner should begin the case. It is against this order the present application in revision has been made.

When this matter came up before this Court the defendants raised a preliminary objection, to the validity of this application, that the plaintiff has not filed a leave to appeal application from the said order of the learned Judge. It is the position of the defendants that the plaintiff cannot maintain an application in revision when there is an appropriate remedy available to the plaintiff. 30

There is a right of appeal against the said order with the leave of this Court in terms of section 754(2) of the Civil Procedure Code. However the plaintiff has not exercised this right. In these circumstances, revisionary powers of this Court may be exercised only if the plaintiff's application discloses exceptional circumstances warranting the exercise of the revisionary jurisdiction of this Court.

The plaintiff has not chosen to apply for leave to appeal from the said order as provided by section 754(2) of the Civil Procedure Code. Nor has he set out in this petition for revision any exceptional circumstances why he failed to file leave to appeal application as provided by law. 40

In *Rustom v Hapangama & Co.*,⁽¹⁾ Vaithialingam, J. after an exhaustive analysis of all the authorities on this question held that the power of revision conferred on the Appellate Court are very wide and can be exercised only on exceptional circumstances or is defendant on the facts of each case.

In the case of *Parapragasam & another v S.A. Emmanuel*,⁽²⁾ Weerasekera, J. made the following observations on this question.

"...It is now settled law that the power of revision vested in the Court of Appeal is a discretionary remedy. The practice is not to exercise the power of revision when any other or alternate remedy is available for the reason that it is a discretionary remedy vested in Court and it is exercised when the applicant has no other remedy. But it is also now settled law that the revisionary power would be exercised even though there is an alternate 50

remedy only if there is the existence of special circumstances are shown necessitating the indulgence by Court to exercise its discretionary remedy of revision.'

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In the instant case the plaintiff has not explained his failure to exercise the right of appeal in terms of section 754(2) of the Civil Procedure Code. The revisionary jurisdiction could be exercised only if the petition of the plaintiff discloses exceptional circumstances, which the plaintiff has not done. Moreover the plaintiff has not stated on its petition that non-interference by this Court would cause a denial of justice or irremediable harm.

In the circumstances this Court will not interfere by way of revision when the law has given the plaintiff an alternate remedy and when the plaintiff has not shown the existence of exceptional circumstances warranting the exercise of revisionary jurisdiction.

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In any event, for this Court to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it. In other words the order complained of is of such a nature which would have shocked the conscience of Court.

The plaintiff in its petition admits that the defendants have denied all averments in the plaint (paragraph 5(a) of the petition filed by the plaintiff). The explanation (1) of section 150 of the Civil Procedure Code states that the plaintiff has the right to begin unless where the defendant admits the facts alleged by the plaintiff. A similar provision is found in Or 18 R.1 of the Indian Civil Procedure Code. Sarkar's Law of Civil Procedure 8th edition at page 837 states that;

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"Plaintiff had the right to begin unless defendants admitted all the 'material allegations', in the plaint (*Aghore v. Premchand*,⁽³⁾)"

Cross on Evidence 6th edition at page 241 states:

"the plaintiff has the right to begin unless the defendant has the burden of proof on every issue, and in this context 'burden of proof' may be taken to mean evidential burden"

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The question as to the party who should begin the case is linked to the question on whom the burden of proof lies in a suit. In the present case the plaintiff admits that the defendants have denied all the averments in the plaint (vide paragraph 5(a) of the petition filed by the plaintiff). In this situation it seems to me that the plaintiff has the right to begin and prove its case.

For these reasons I uphold the preliminary objection raised by the defendants and I would accordingly, dismiss this application in revision with costs. 100

AMARATUNGA, J. – I agree

Application dismissed.