

**PEOPLES BANK**

**v.**

**HEWAWASAM**

COURT OF APPEAL.

JAYASINGHE, J.,

JAYAWICKREMA, J.

CA/LA 12/97.

D.C. COLOMBO NO. 4548/SPL.

30<sup>TH</sup> NOVEMBER, 1999.

19<sup>TH</sup> JANUARY, 2000.

*Declaration that Mortgage Bond is null and void - Interim Injunction restraining Bank from selling/alienating land in Mortgage Bond - Resolution passed by Bank - Null and void? - Peoples Bank Act, No. 29 of 1961 amended by Act, No. 32 of 1986 - S 29D - Can the borrower invalidate the Resolution - Injunction - Prima facie case - Notaries Ordinance S.31(18) - S.33 - Wrong date of Execution - S.2 Prevention of Frauds Ordinance.*

The Plaintiff Respondent sought a declaration that the Mortgage Bond 2885 is null and void and/or has been fraudulently executed by the Defendant Petitioner (Bank) and that the Resolution passed by the Bank to 'parate execute' the property is null and void.

The Plaintiff Respondent contended that he did not sign the Mortgage Bond, and it was never executed on 26. 01. 93.

The Defendant Petitioner's contention is that the Respondent has sought to take advantage of a mistake made by the Notary in setting out the date on the original Mortgage Bond to be 26. 01. 1993, whereas the correct date of execution which is set out in the duplicate is 26. 01. 1994. The District Court issued an interim injunction restraining the Bank from selling/alienating the land in question.

**Held :**

(1) In view of the admissions, the Plaintiff Respondent is estopped from denying the fact that the property described in Deed 10384 (Title Deed) was tendered as security. The Plaintiff Respondent has not come to court with clean hands.

(2) The Defendant Petitioner has produced the Duplicate of the Bond from the Land Registry which gives the correct date of the execution as 26. 01. 1994.

The mere fact that the Notary has inserted a false/wrong date of its execution does not render a Deed void - Provided that the Deed has been executed according to S.2 Prevention of Frauds Ordinance.

(3) The provisions in S.29(D) are of similar import as "shall not be called in question in any Court". The Resolution passed by the Bank cannot be invalidated or challenged in an action in the District Court. The sale of the mortgaged property by public auction upon the said Resolution cannot be restrained by an interim injunction.

(4) The Plaintiff Respondent has failed to establish a 'prima facie case.' The Plaintiff Respondent has taken advantage of a mere mistake of the date of the execution set out in the original Bond to fabricate a case to the extent of even challenging the Mortgage Bond itself.

**APPLICATION** for Leave to Appeal from the Order of the District Court of Colombo.

**Cases referred to :**

1. *Thiyagarasa vs Arunodayam* [1987] 2 Sri.L.R. 184 at 188
2. *C.A. LA 74/97 with CA (Rev) 433/97 D.C. Colombo 4707 Spl.*
3. *Felix Dias Bandaranayake vs State Film Corporation* [1981] 2 Sri.L.R. 281 at 312
4. *American Cyanamid Company vs Ethicon Ltd.*, (1975) 1 SLL ER 504 at 510
5. *Ceylon Hotel Corporation vs Jayatunga* 74 NLR 443
6. *Amerasekara vs Mitsui Co.* [1993] 1 Sri.L.R. 22
7. *Rajan and 2 others vs Sellasamy* [1994] 2 Sri.L.R. 377
8. *Walkers Sons & Co. Ltd., vs Wijesena* [1997] 1 Sri.L.R. 293
9. *Hotel Galaxy vs Mercantile Hotel Ltd.*, [1987] 1 Sri.L.R. 6

*P.A.D. Samaresekera P.C.* for Defendant Petitioner.

*Hemasiri Withanachchi* with *Vijith-Singh* for Plaintiff Respondent.

*Cur. adv. vult.*

February 07, 2000

**JAYAWICKREMA, J.,**

This is an application to revise the order of the learned District Judge of Colombo dated 10. 01. 1997 (marked X-8) wherein she had issued an interim injunction restraining the

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Defendant Bank from selling and/or alienating the land described in the schedule to the plaint upon the purported Mortgage Bond No. 2885, except with a due order obtained from the Court.

The Plaintiff-Respondent instituted action against the Defendant-Petitioner seeking *inter alia*, a declaration that the Mortgage Bond No. 2885 is null and void and/or has been fraudulently executed by the Defendant-Petitioner, for a declaration that the resolution marked 'E' of the Board of Directors of the Defendant-Petitioner is null and void in law, and for an enjoining order/interim injunction restraining the Defendant Bank from selling and/or alienating the land described in the schedule to the plaint upon the purported Mortgage Bond No. 2885.

The Plaintiff-Respondent is the owner of the land and premises described in the schedule to the plaint in terms of the deed No. 10385 (marked A). He had discussions with the Defendant Bank as a Director of Juelstox International (Pvt.) Company Limited and the Defendant Bank agreed to grant a credit facility of Rs. 13,000,000/=. In order for the said Company to obtain the said credit facility the Plaintiff-Respondent provided information and also gave a copy of the said Deed No. 10384 as security to the Defendant Bank.

The Plaintiff-Respondent alleged that the Defendant-Petitioner obtained his signature on several documents to process the overdraft facility and thereafter, the Defendant-Petitioner granted to the Plaintiff-Respondent an overdraft facility of Rs. 1,000,000/=.

The Defendant-Petitioner by letter dated 07. 11. 1995 (marked - D) informed the Plaintiff-Respondent that the Defendant has resolved to sell by public auction the land described in the schedule to the plaint upon a purported Mortgage Bond No. 2885 dated 20. 01. 1993 attested by Jayanthi Medawatte, N.P.

The Plaintiff-Respondent averred in his plaint that the said Bond No. 2885 has been fraudulently executed by the Defendant-Petitioner and that the Plaintiff-Respondent did not sign the said Mortgage Bond in the presence of the said Notary Public.

The basis for the above averment is that the year of attestation in the deed appears as 1993 where as it should have been 1994.

The learned Counsel for the Plaintiff-Respondent argued that the Mortgage Bond No. 2885 was never executed on 26. 01. 1993 and therefore is a fraudulent deed.

Counsel for the Defendant-Petitioner submitted that the Plaintiff-Respondent has sought to take advantage of a mistake made by the Notary in setting out the date in the Original Mortgage Bond (marked D-7) to be 26. 01. 1993 where as the correct date of execution of the Bond, which is set out in the duplicate (marked D-8) is 26. 01. 1994. He contended that the only typographical mistake in the Original Bond (D-7) is that the year of execution, 1994 has been typed as 1993. He further submitted that it so happened that in the month of January, by mistake one continues to insert the old year instead of the new year and that the Plaintiff-Respondent who executed the Mortgage Bond No. 2885, latching on to the said mistake, has dishonestly made use of the said mistake to fabricate the case against the Defendant-Petitioner to the extent that he never executed the said Mortgage Bond. The learned Counsel for the Defendant-Petitioner submitted that even if the Plaintiff-Respondent's case is taken at its highest it does not reveal a *prima facie* case and the present action has been instituted with the sole object of delaying the recovery of the monies lawfully due and owing to the Defendant-Petitioner.

The Plaintiff-Respondent states in his plaint that he never offered the land described in the Mortgage Bond as security.

But, it is to be noted that in his 'Customers Application For Credit Facilities' dated 08. 10. 1993 which is marked as D-5 in para 14, he has offered as security 17.7 perches land with upstairs house at No. 1A/1111, New Parliament Road, Sri Jayawardanapura.

Further the document (marked C) dated 04. 10. 1993 sent by the Defendant-Petitioner to the District Manager of the same Bank with a copy to the Plaintiff-Respondent clearly states that deed No. 10384 and plan No. 5531 has been offered as security and therefore to inquire into the matter and report. Further the plaintiff-Respondent in para 7 of his plaint admits that on this application a sum of Rs. 13,000,000/= was granted as a loan by the Defendant-Petitioner and in para 8 he admits that he tendered the deed No. 10384 as security. The relevant admissions of the Plaintiff-Respondent in his plaint dated 22. 02. 1996 (XI) are as follows:

Para 7 :

"පැමිණිලිකරුගේ ව්‍යාපාර කටයුතු සඳහා අවශ්‍ය මූල්‍ය පහසුකම් ලබා ගැනීම සඳහා සාමාන්‍ය ගනුදෙනුකරුවකු වශයෙන් වර්ෂ 1993 ජනවාරි මසදී හෝ ඊට ආසන්න කාලයකදී විත්තිකාර බැංකුව සමග සාකච්ඡා පැවැත්වූ අතර, එකී සාකච්ඡාවල ප්‍රතිඵලයන් ලෙස පැමිණිලිකරුගේ ව්‍යාපාර කටයුතු සඳහා රුපියල් මිලියන 13 ක ණය මුදලක් පැමිණිලිකරු වෙත ලබා දීමට බැංකුව එකඟව පල කරන ලදී".

Para 8 :

"එකී ණය මුදල එකී ජ්‍රවේළුස්ටොක් ඉන්ටරනැෂනල් ප්‍රයිවට් ලිමිටඩ් යන ආයතනය වෙත ලබා දීම සඳහා අදාළ ලියවිලි සකස් කිරීම වස්, විත්තිකරු විසින් පැමිණිලිකරුගේ විවිධ තොරතුරු ලබාගත් බවත්, එකී ණය මුදල ලබා දීම සඳහා වෙනත් දේ අතර සුරැකුම් වශයෙන් ඉහත කී ඒ 1-2 වශයෙන් ලකුණුකර ඉදිරිපත් කරන ලද අංක 10384 දරණ ශිඛිකම් ඔප්පුවේ පිටපතක්ද, විත්තිකරු විසින් පැමිණිලිකරුගෙන් ලබාගත් බවත් පැමිණිලිකරු ප්‍රකාශ කර සිටී. . . ."

When one considers the above admissions by the Plaintiff-Respondent in his plaint, it appears that if there was any

fraudulent act it was on his part by denying that he obtained the loan on tendering Deed No. 10384 as security. The land and premises described in deed No. 10384 is the same as in the Mortgage Bond No. 2885. In view of the above admissions, the Plaintiff-Respondent is estopped from denying the fact that the property described in deed No. 10384 was tendered as security, which is the same as the property described in the Mortgage Bond No. 2885. It is a basic principle of equity that a person who comes before Court should come with clean hands. In the instant case the Plaintiff-Respondent himself after tendering the property in Deed No. 10384 as security, now challenges that the Defendant-Petitioner has fraudulently obtained his signature to certain documents. The learned Counsel for the Plaintiff-Respondent, in para 3.2 of his written submissions accepted the position that the subject matter of this case is the property described in Mortgage Bond No. 2885. He submitted that the Plaintiff-Respondent did not execute that Mortgage Bond. This argument is untenable, in view of the admissions made by the Plaintiff-Respondent himself in his plaint.

When one considers the above facts it is clear that the Plaintiff-Respondent is attempting to take advantage of the typographical error in the year of execution. It is to be noted that even the Plaintiff-Respondent himself had made such an error in para 13 of his plaint, when he states that the date in Mortgage Bond No. 2885 as 20. 01. 1993. In actual fact, according to the Plaintiff-Respondent's position it should be 26. 01. 1993. Thus the Plaintiff-Respondent himself has made a typographical error in giving the date of the deed. In any case the title extract marked as D-6 issued by the Registrar of Lands clearly states that the number and the date of the Deed as 2885 dated 26. 01. 1994 and not as 1993.

Although the Original Bond marked D-3 bears the date 26. 01. 1993, the duplicate of the said bond marked D-8 bears the correct date i.e. 26. 01. 1994. Further in a letter sent by the Plaintiff-Respondent to the Defendant-Petitioner Bank

marked D-14(a), the Plaintiff-Petitioner agreed to pay the loan of Rs. 1,000,000/= in instalments. That letter also refers to the resolution marked E which sets out that the Defendant-Petitioner Bank would sell by public auction the property Mortgaged by Bond No. 2885 to recover the monies due to the Bank. The Defendant-Petitioner has produced the duplicate of the said Bond No. 2885 from the Land Registry which gives the correct date of the execution as 26. 01. 1994. The letter marked G which has been produced by the Plaintiff-Respondent has been issued by the Land Registry, on an application made by the Plaintiff-Respondent to obtain a copy of a deed No. 2885 executed on 26. 01. 1993 and not of a deed executed on 26. 01. 1994. On that application, the Registrar has informed the Plaintiff-Respondent that a deed No. 2885 executed on 26. 01. 1993 has not been received at the Registry. If the Plaintiff-Respondent applied for a copy of a deed executed on 26. 01. 1994, most probably, the Land Registry would have sent a copy of deed No. 2885 to the Plaintiff-Respondent as according to D-6, the certified extracts of the folio, this bond has been executed on 26. 01. 1994. Further in the original bond the embossed Company seal of Juelstox International (Pvt.) Limited which is in the possession of the Plaintiff-Respondent has been placed at the place where the Plaintiff-Respondent has signed the bond.

According to the provisions of the Notaries Ordinance an instrument will not be invalidated due to an error in the date of attestation. **Section 31(18) of the Notaries Ordinance is as follows:**

“He (Notary) shall correctly insert in letters in every deed or instrument executed before him the day, month, and year on which and the place where the same is executed and shall sign the same.”

The above provision is subject to **Section 33 of the said Ordinance which is as follows:**

“No instrument shall be deemed to be invalid by reason only of the failure of any notary to observe any provision of any rule set out in section 31 in respect of any matter of form: . . .”

It was held in **Thiyagarasa Vs. Arunodayam<sup>(1)</sup>** at 188 that:

“the mere fact that the notary has inserted a false or wrong date of its execution does not render the deed void.”, provided that the deed has been executed according to Section 2 of the Prevention of Frauds Ordinance.

Further it is to be noted that provision in Section 31 (20)(b) of the Notaries Ordinance with regard to the notaries duty to state whether she knows the Plaintiff-Respondent or the attesting witnesses, does not affect the validity of the Bond, in view of the provisions contained in Section 32 of the said Ordinance.

Further according to the provisions contained in **Section 29 D of the People’s Bank Act No. 29 of 1961 as amended by Act No. 32 of 1986, a borrower is not competent to make an application to Court to move to invalidate a resolution to sell by public auction any immovable property mortgaged to the Bank.**

Section 29 D is follows:

“The Board may by a resolution . . . authorise any person to sell by public auction any immovable property mortgaged to the Bank as security for any loan in respect of which default has been made in order to recover the whole of the unpaid portion of such loan, and the interest due thereon . . . and thereafter it shall not be competent for the borrower in any Court to move to invalidate the said resolution for any cause whatsoever and no Court shall entertain any such application.”

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It was held by **Edussuriya, J. in C.A. L.A. No. 74/97 with C.A. Application (Rev.) No. 433/97 - D.C. Colombo Case No. 4707/Spl<sup>(2)</sup>**, that:

“Section 29(D) sets out that it shall not be competent for the borrower to move any Court to invalidate such a resolution for any cause whatsoever, and no Court shall entertain such an application . . .

If this Court were to fall into the error of drawing a distinction between the words invalidate and null and void in the construction of Section 29(D), this Court would be, in my view seeking to act in contravention of the intention of the legislature and bring to naught the intention of the legislature in granting parate execution rights to the Bank . . .”

The above expression in Section 29(D) is of similar import as “**shall not be called in question in any Court**”, contained in Section 22 of the Interpretation Ordinance. Hence, we agree with the submissions made by the learned President’s Counsel on behalf of the Defendant-Petitioner that the said resolution (marked E) passed by the Board of Directors of the People’s Bank, cannot be invalidated or challenged in an action in the District Court. Therefore, in these circumstances, the sale of the mortgaged property by public auction upon the said resolution marked E cannot be restrained by an interim injunction. The Plaintiff-Respondent has failed to establish a *prima facie* case. The Plaintiff-Respondent has taken advantage of a mere mistake of the date of the execution set out in the Original Bond to fabricate a case to the extent of even challenging the mortgage bond itself. It was held in **Felix Dias Bandaranayake Vs. The State Film Corporation<sup>(3)</sup>** at 302 that:

“In Sri Lanka we start off with a *prima-facie* case. That is, the applicant for an interim injunction must show that there is a serious matter in relation to his legal rights, to be tried at the hearing and that he has a good chance of winning. It is not necessary that the Plaintiff should be certain to win. It is

sufficient if the probabilities are he will win. Where however the Plaintiff has established a strong *prima facie* case that he has title the legal right claimed by him but only an arguable case that the Defendant has infringed it or is about to infringe it, the injunction should not be granted.”

Unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the Plaintiff has any real prospect of succeeding in his action, the Court should not go on to consider the balance of convenience of the parties. (*Vide American Cyanamid Company Vs. Ethicon Ltd.*<sup>(6)</sup> at 510). The question to be decided in an interlocutory injunction is, will the harm the Defendant-Petitioner will suffer, if the injunction is granted be greater than the harm which the Plaintiff will suffer if it is refused? In deciding the equities the conduct and dealings of parties before the application is taken into account. The question of waiver and acquiescence by the Plaintiff of the Defendant's conduct and unexplainable delay on the part of the Plaintiff in making the application are considered (*Vide Ceylon Hotels Corporation Vs. Jayatunge*<sup>(5)</sup>).

In order to entitle the Plaintiff to an interlocutory injunction, though the Court is not called upon to decide finally on the right of parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it, there is a probability that the Plaintiffs are entitled to relief.

The parties seeking an enjoining order or interim injunction should have a good chance of winning the case or there must be a *prima facie* case to succeed (*Vide Amarasekera Vs. Mitsui Company Limited*<sup>(6)</sup>). If the *prima facie* case has been made the Court must consider where the balance of convenience lies. (*Vide Rajan and 2 others Vs. Sellasamy*<sup>(7)</sup>).

A party applying for an enjoining order or interim injunction enters into an contract with the Court that he will

speak the truth. The party must act with *Uberrima Fide* (*Vide Walkers Sons & Company Limited Vs. Wijesena*<sup>(8)</sup>).

It is settled law that if a party has breached the principle of *Uberrima Fide* and obtained an enjoining order, the said enjoining order will be dissolved without the Court looking into the merits of the case. (*Vide Hotel Galaxy Vs. Mercantile Hotel Limited*<sup>(9)</sup>). Hence in view of the above reasons, we set aside the order of the learned District Judge dated 10. 01. 1997 (marked X-8). The application for revision is allowed with costs fixed at Rs. 10,000/= payable by the Plaintiff-Respondent to the Defendant-Petitioner.

**JAYASINGHE, J.** - I agree.

*Application allowed.*