

BANK OF CEYLON
v
WARNAKULASURIYA

COURT OF APPEAL
WIMALACHANDRA, J.
BASNAYAKE, J.
CALA 323/2005
DC KEGALLE 16/DR
MAY 3, 2007

Debt Recovery (Special Provisions) Act 2 of 1990 amended by 9 of 1994 – S6, S7 – Decree nisi entered – Security ordered to be deposited – Who Should begin? Civil Procedure Code – S 384-S389 – Burden of proof.

The plaintiff filed action in terms of the Debt Recovery (Special Provisions) Act as amended to recover a certain sum. Upon institution of the action, Court entered decree *nisi*, when the decree *nisi* was served the respondent sought unconditional leave to appear and show cause. After inquiry, Court granted the respondent leave to appear and show cause against the decree *nisi* upon

deposit of a sum of Rs. 50,000/-. Thereafter the Court directed the defendant to begin the case.

On leave being sought

Held:

- (1) The Debt Recovery (Special Provisions) Act, is a special Act introduced by the legislature to expedite the process of recovery of debts by lending institutions.
- (2) In terms of S6 if the Court grants leave to appear and show cause against the decree *nisi* the procedure to followed is laid down in S7 of the Debt Recovery Law".

Per Wimalachandra, J.

"Dicta in the burden of proof in my judgment in *Bank of Ceylon v Kaleel* – 2004 – 1 Sri LR 284 have no application to the circumstances under consideration in the present application the objections with regard to the question 'who should begin the case' – is *obiter dicta*, and my observation in the judgment in the *Bank of Ceylon v Kaleel* ought to stand rectified".

APPLICATION for leave to appeal from an order of the District Court of Kegalle

Cases referred to:-

1. *Bank of Ceylon v Kaleel* – 2004- 1 Sri LR 284. (Not followed)
 2. *Peiris v Chairman VC (Medasiya Patu, Matale)* – 62 NLR 546 at 547
- M.K. Muthukumar* with *Sumith Hewage* for the plaintiff-petitioner.
Gamini Perera with *S.D Piyadasa* for the defendant-respondent.

May 3, 2007.

WIMALACHANDRA, J.

This is an application for leave to appeal filed by the plaintiff-petitioner (petitioner) from the order of learned Additional District Judge of Kegalle dated 5.8.2005. By that order the learned Judge directed the plaintiff to begin the case. 01

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

The petitioner is a banking corporation duly established by the Bank of Ceylon No. 53 of 1938 (Chapter 397 of the Legislative

Enactments). The plaintiff is also a lending institution within the meaning of the Debt Recovery (Special Provisions) Act No.2 of 1990 as amended by Act No.9 of 1994. The plaintiff filed action in the District Court of Kegalle against the defendant-respondent (respondent) in terms of the Debt Recovery (Special Provisions) Act No.9 of 1994 to Recover a sum of Rs. 395,203.59 and interest thereon from 1.3.2003 Upon institution of the action, the learned District Judge entered decree *nisi* against the respondent. When the decree *nisi* was served on the respondent, he filed a petition and affidavit and sought unconditional leave to appear and show cause against the decree *nisi*. The Court fixed the matter for inquiry and when it was taken up for inquiry both parties agreed to file written submissions and accordingly, written submissions were filed. The learned Additional District Judge by his order on 28.1.2004, granted the respondent leave to appear and show cause against the decree *nisi* upon deposit of a sum of Rs. 50,000/=. The respondent deposited Rs. 50,000/= and the case was fixed for hearing on 16.7.2004 on which date the petitioner brought to the notice of the Court that in terms of section 7 of the Debt Recovery (Special Provisions) Act the case should proceed under sections 384 to 389 of the Civil Procedure Code. The learned judge, after hearing the submission made by the parties made order on 17.8.2004 directing the defendant to begin the case and fixed the case for hearing on 9.11.2004. However, on a subsequent date the counsel for the respondent made submissions on the question as to the party who should begin the case. The learned Judge thereafter made order on 5.8.2005, that the petitioner should begin the case. It is against this order the petitioner has filed this application for leave to appeal.

It is to be noted that this is an action instituted under the Debt Recovery (Special Provisions) Act. This Act is a special Act Introduced by the legislature to expedite the process of recovering debt by lending institutions. In terms of section 6 of the Act, if the Court grants leave to appear and show cause against the decree *nisi* to a respondent, the procedure to be followed is laid down in section 7 of the Debt Recovery (Special Provisions) Act. Section 7 of the Debt Recovery (Special Provisions) Act No. 9 of 1994 states as follows:

"If the respondent appears and leave to appear and show cause is given the provisions of section 384, 385, 386, 387, 388, 390, and 391 of the Civil Procedure Code (Chapter 101) shall *mutatis mutandis* apply to the trial of the action".

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The learned Counsel for the respondent has placed reliance on the judgment in *Bank of Ceylon v Kaleel and other*.⁽¹⁾ I agree with the submission of the learned counsel for the petitioner that the *dicta* on burden of proof in my judgment in that case have no application to the circumstances under consideration in the present application. In *Bank of Ceylon v Kaleel and others*, the application for revision was refused upholding the preliminary objection that the petitioner in that application was not entitled to invoke the revisionary jurisdiction of this Court without having recourse to the remedy of leave to appeal. The petitioner in that case had not set out material amounting to exceptional circumstances. Having refused the application on the aforementioned basis, I have made certain observations on the burden of proof which are applicable to actions of regular procedure.

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Section 7 of the Debt Recovery (Special Provisions) Act No.2 of 1990 as amended by Act No. 9 of 1994 read with sections 384, 385, 386, 387, 390 and 391 of the Civil Procedure Code provides for the procedure after the grant of leave to appear and show cause against the decree *nisi*. Section 384 of the Civil Procedure Code spells out the manner and the sequence in which the respondent may make his objections and adduce evidence, and section 385 of the Civil Procedure Code provides for the petitioner to reply, so that there cannot arise any dispute on the burden of proof. It is only in the event of the court acting under section 386 of the Civil Procedure Code and, in its discretion, framing issues and adjourning the matter for trial that the rules prescribed in the Civil Procedure Code for the taking of evidence at the trial of a regular action, as nearly as may be become applicable.

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In *Bank of Ceylon v Kaleel & Others (supra)*, after refusing the application in revision, I have made certain observations with regard to the question who should begin the case, This observation is *obiter dicta*: though the decision in dismissing the revision application was

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correct, on the facts and circumstances of that case, the said observations I made in the aforesaid case of *Bank of Ceylon v Kaleel and Others (supra)*, were incorrect. It is apt to refer to the following expression made by H.N.G. Fernando, J. (later C.J) in the case of *Peiris v Chairman V.C. (Medasiya Pattu, Matale)*⁽²⁾ at 547, "While it is disappointing to realize that my judgment was erroneous. I welcome the opportunity now given me to employ the language of Baron Bramwell in a similar situation: The matter does not appear to me now as it appears to have appeared to me before." 90

Accordingly, my observations in the judgment in the *Bank of Ceylon v Kaleel and Others (supra)* ought to stand rectified.

For these reasons, leave to appeal is granted against the order of the learned Additional District Judge of Kegalle dated 5.8.2005 and I allow the appeal and set aside the aforesaid order. The learned Additional District judge is directed to conduct the proceeding in terms of section 7 of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994 read with sections 384, 385, 386, 387, 388, 390 and 391 of the Civil Procedure Code. 100

BASNAYAKE, J. - I agree.

Appeal allowed.