

CAR MART LTD. AND ANOTHER
v
PAN ASIA BANK LTD

COURT OF APPEAL
AMARATUNGA, J. AND
WIMALACHANDRA, J.
CALA 327/04
D.C. COLOMBO 1003/DR.
DECEMBER.01, 2004.

Debt Recovery Act, No 2 of 1990, section 22 – Amended by Act, No. 9 of 1994, section 6 (3) – Decree nisi – Could the recoverable amount include penal interest? – If it is included does it affect the jurisdiction of the court? – Limitation on jurisdiction?

The decree nisi entered included penal interest. It was contended before the trial judge that in view of section 22, no sum of money which constitutes a penalty for default is recoverable in an action instituted for recovery of a debt in terms of the procedure laid down in the Act and therefore there is no valid plaint before court. The trial court rejected this position.

Held:

The proviso to section 6 (3) empowers the court to vary the decree *nisi* at the end of the action. If the defendant at the end of the case satisfies court that a sum of money is not legally due from him or a sum is not legally recoverable from him, the court has the power to make adjustments to the decree nisi before making it absolute.

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

Kushan de Alwis for petitioner.

S. F. A. Cooray with *C. Silva* for respondent Bank.

Cur.adv.vult.

December 10, 2004.

AMARATUNGA, J.

This is an application for leave to appeal against the order of the learned Additional District Judge of Colombo directing the defendant-petitioners to deposit a sum of Rupees 6,100,000/- in order to grant leave to appear and defend the action filed by the plaintiff Bank, (the Bank) under the Debt Recovery Act, No. 2 of 1990 as amended by Act, No.9 of 1994. The total sum sought to be recovered in the action is Rs. 18,563,155.64 and the sum of Rs. 6,100,000/- ordered by court is one third of the total amount sought to be recovered by the action.

After the plaint was filed, the court, under and in terms of the Debt Recovery Act, has entered a decree *nisi* on 02.09.2003. Thereafter the defendant-petitioners have filed objections to the decree *nisi* and both parties have agreed to conclude the inquiry by tendering written submissions. After considering the written submissions the learned Judge has made the order against which the petitioners now seek leave to appeal.

The main contention of the learned counsel for the petitioners was that the decree *nisi* entered by court was bad in law in that the action was not properly constituted according to the provisions of the Debt Recovery Act. In order to challenge the legality of the plaint, the learned counsel submitted that the plaint has been prepared in contravention of the provisions of section 22 of the Debt Recovery Act, which reads as follows:

“ No sum of money which constitutes a penalty for default in payment or delay in payment of a debt shall be recoverable in an action instituted for recovery of such debt in terms of the procedure laid by this Act. ”

The learned counsel pointed out that the total amount sought to be recovered by the Bank includes penal interest charged by the Bank. The learned counsel invited the court's attention to the bundle of documents marked X14 filed with the plaint in support of the averments set out in the plaint. The document marked X14 contains bank statements relating to the account of the 1st defendant-petitioner, which is the account relating to the debt sought to be recovered in the action. The learned counsel pointed

out that in many pages of the bundle marked X 14, there are particulars of the penal interest charged by the Bank and the total sum sought to be recovered in the action includes the amounts charged as penal interest.

The learned counsel therefore submitted that since the total amount sought to be recovered in the action includes the penal interest, which, in view of section 22 the Bank cannot recover in an action filed under the Debt Recovery Act, and the whole plaint was bad in law and accordingly there was no proper legally valid plaint before court to enable the court to enter a legally valid decree *nisi*. The learned counsel contended that section 22 contained a limitation on the court's jurisdiction to entertain and maintain an action to recover an amount which includes a penalty for default in payment or delay in payment of the defendants' debt. He therefore submitted that the learned Judge should have granted unconditional leave to the defendants to enter and defend the action. It was on that basis that the learned counsel sought leave to appeal against the order dated 19.08.2004.

The learned counsel for the respondent Bank contended that section 22 of the Debt Recovery Law is not a provision which affects the jurisdiction of court. He contended that if the Legislature intended to limit the jurisdiction, the Legislature would have used words such as 'no action shall be instituted or maintained under the procedure laid down by this Act to recover any sum of money which includes a penalty for default in payment or delay in payment of any debt.' Relying on the wording of section 22 the learned counsel submitted that the section merely prevented the court from including any sum in its decree which constitutes a penalty. He contended that if a defendant satisfies court that a part of the sum claimed by the plaintiff is a penalty, the court has to exclude that sum from the decree absolute it will enter at the action. He submitted that that is the correct interpretation to be given to section 22 of the Act.

The learned counsel for the petitioners replying to the above legal submission made by the learned counsel for the Bank submitted that after the court has entered decree *nisi* for the total amount claimed by the Bank, at the end of the action the court has

to either make the decree *nisi* absolute in its original form or to discharge it but the court has no power to vary the amount set out in the decree *nisi* by entering in the decree absolute a sum lesser than the sum specified in the decree *nisi*.

The proviso to section 6(3) of the Debt Recovery Act (inserted by amending Act, No. 9 of 1994) provides an answer to the submission of the learned counsel for the petitioners. The proviso is as follows:

“ Provided that a decree *nisi*, if it consists of separate parts may be discharged in part and made absolute in part... ”

This provision is similar to section 388(2) proviso of the Civil Procedure Code. The proviso to section 6(3) empowers the court to vary the decree *nisi* at the end of the action. If the defendant at the end of the case satisfies court that a sum of money is not legally due from him or a sum not legally recoverable from him (such as the sum referred to in section 22) the court has power to make adjustments to the decree *nisi* before making it absolute. If the court has no such power it would lead to an injustice.

The decree *nisi* entered by court is in VIII parts. The court has granted leave to the defendants to appear and defend after depositing a sum of Rs. 6,100,000/- in court. After depositing this sum it is open to the defendants to show that penal interest is included in the sums claimed by the plaintiff Bank. Then the court has the power under section 6(3) proviso read with section 22 to exclude the sum sought to be recovered as a penalty from the decree absolute.

For the foregoing reasons this court is unable to accept the submissions of the learned counsel for petitioners that the plaintiff Bank's action is not properly constituted and that at the end of the action the court has no power to vary the amount set out in the decree *nisi*. We therefore hold that there is no reason to grant leave to appeal. Accordingly we refuse leave to appeal and dismiss this application with costs in a sum of Rs. 10,000/-

WIMALACHANDRA, J - I agree.

Application dismissed.