

**YAPA
VS
PEOPLE'S BANK AND ANOTHER**

COURT OF APPEAL,
WIMALACHANDRA, J.
C. A. 2241/2003, (REV)
D. C. COLOMBO 6932/SPL,
AUGUST 6, 2004.

People's Bank Act, No. 29 of 1961-Amended by Act, No. 32 of 1986 – Sections 29 and 29 D - Parate execution –Ouster clause-Granting of interim relief – Ingredients necessary ? - Stamp Duty Act, No. 43 of 1982, section 16 – Applicability - Could the Board resolution be challenged indirectly ?

The People's Bank sought to parate execute the mortgaged property. The petitioner sought an enjoining order to restrain the Bank from selling the land by public auction. The enjoining order was refused. The petitioner moved in revision.

It was contended by the petitioner that-

1. In view of section 16 of the Stamp Duty Act, the 1st respondent (Bank) cannot claim the amount in the Board Resolution, as according to the amount of stamp duty paid on the mortgage bonds the Bank cannot recover more than Rs. 1,1419,770/- and any attempt to recover over and above the said amount is illegal.
2. That no consideration passed at the time of the execution of the mortgage bonds and hence the bonds are of no force or avail in law.

Held :

- (i) According to section 29D, the 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. The petitioner cannot challenge the resolution even indirectly by challenging the mortgage bonds on the basis that they are not properly stamped. The petitioner is trying to do indirectly, what he cannot do directly.
- (ii) That the plaintiff cannot now complain that no consideration passed in view of the acknowledgment made by him to the receipt of the said banking facilities as per the receipts issued by the plaintiff.

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

Cases referred to :

1. *Felix Dias Bandaranaike vs The State Film Corporation and another* (1981) 2 Sri LR 287 at 301
2. *People's Bank vs. Hewawasam* – (2000) 2 Sri LR 29
3. C. A. L. A. 74/97 with CA 433/97 – D. C. Colombo 4707/Spl.

Derrick Samarasekera for plaintiff petitioner.

Rohan Gunapala with Deepa Govinna for defendant respondents

Cur.adv.vult

08.12.2004

WIMALACHANDRA J.

This is an application in revision from the order of the Additional District Judge of Colombo dated 18.12.2003 in case No. 6932/Spl, refusing to grant an enjoining order in terms of paragraph (b) of the prayer to the plaintiff.

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

The plaintiff-petitioner (plaintiff) was a customer of the Matara-Uyanwatte Branch of the 1st defendant-respondent bank (1st defendant). Admittedly, the plaintiff made several applications for banking facilities to the 1st defendant. The 1st defendant granted the banking facilities sought by the plaintiff and as security for the said facilities he executed four mortgage bonds, 3024 dated 22.08.1996, 2668 dated 27.11.1998, 490 dated 08.07.1999 and 4270 dated 27.11.1998 respectively. It is not in dispute that upon the execution of the aforesaid mortgage bonds the 1st defendant released the banking facilities sought by the plaintiff and the plaintiff issued the receipts marked "X9", "X10" and "X11" annexed to the objections filed by the 1st defendant acknowledging receipt of the same. The plaintiff failed to repay the loan installments to the 1st defendant as agreed upon notwithstanding the reminders sent by the 1st defendant bank. Thereafter the 1st defendant adopted a resolution under Section 29B of the People's Bank Act, No. 29 of 1961 as amended by Act, No. 32 of 1986 to sell the properties mortgaged to the 1st

defendant to recover the monies due to the 1st defendant bank. The 1st defendant published the aforesaid resolution in the newspapers and in the Government Gazette in terms of provision 29 of the aforesaid People's Bank Act. The 1st defendant thereafter instituted an action in the District Court of Colombo seeking *inter alia* an enjoining order and an interim injunction against the 1st defendant from selling or alienating the said properties mortgaged to the 1st defendant bank by public auction until the final determination of the District Court action. The application for an enjoining order and an interim injunction was taken up for inquiry and after considering the pleadings, documents and submissions of counsel, the learned District Judge refused to grant an enjoining order to stay the auction sale by his order dated 18.12.2003. It is against this order the petitioner has filed this application in revision.

It is settled law that in deciding whether to grant an enjoining order or an injunction the plaintiff must first establish a strong *prima facie* case in his favour. In the case of *Felix Dias Bandaranaike Vs. The State Film Corporation and Another* ⁽¹⁾. 308 Soza, J said ;

“ 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.”

If a *prima facie* case has been made out, the Court would then consider the balance of convenience.

The learned Counsel for the petitioner submitted that in view of section 16 of the Stamp Duty Act, No. 43 of 1982, the 1st defendant cannot claim the amount in the Board Resolution. The learned Counsel further submitted that according to the amount of stamp duty paid on the aforesaid mortgage bonds the 1st defendant could not recover more than Rs. 1,419,770/= and any attempt to recover over and above the said amount is illegal.

The petitioner cannot take any advantage by challenging the mortgage bonds stating that they are not properly stamped, to restrain by an interim injunction a sale by public auction upon a resolution adopted by the bank in terms of the provisions of the People's Bank (Amendment) Act, No. 32

of 1986 to sell by public auction any immovable or movable property mortgaged to the bank as security for any loan in respect of which default has been made, in order to recover the whole or unpaid portion of such loan.

However, it is to be noted that mortgage bond No. 3024 bears the value of Rs. 5000/=. The total amount secured is Rs. 500,000/= and interest thereon. The mortgage bond No. 2668 bears stamps to the value of Rs. 5000/=. Similarly, each bond No. 490 and No. 4270 bear stamps to the value of Rs. 8,200/= and the amount secured by each bond is Rs. 500,000/= and interest thereon respectively.

According to Section 29 D of the People's Bank Act, N o. 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 states as 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."

In the case of *People's Bank Vs. Hewawasam*⁽²⁾ Jayawickrema, J. held that :

"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."

Jayawickrema, J. in the course of his judgement cited with approval the following passage from the judgment of the Court of Appeal case C. A. L. A. No. 74/97 with CA Application (revision) No. 433/97⁽³⁾ wherein Edussuriya, J. held 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....."

It seems to me that the petitioner is trying to do indirectly what he cannot do directly. As Edussuriya, J. pointed out in the aforesaid judgment, in terms of Section 29(D) it shall not be competent for the borrower to move any Court to invalidate such a resolution for any cause whatsoever and the Court cannot entertain such an application.

Accordingly, the petitioner cannot challenge the resolution even indirectly by challenging the mortgage bonds on the basis that they are not properly stamped in terms of the Stamps Ordinance.

Another submission of the learned counsel for the plaintiff is that no consideration had passed at the time of the execution of the mortgage bonds and hence the bonds are of no force or avail in law. In my view the plaintiff cannot now complain that no consideration had passed in view of

the acknowledgement made by the plaintiff to the receipt of said banking facilities as per the receipts issued by the plaintiff marked "X9", "X10", and "X11" (annexed to the statement of objections produced by the plaintiff).

In the circumstances, I am of the view that the plaintiff has failed to establish a *prima-facie* case in his favour. It is only if the plaintiff has made out a *prima facie* case the Court must consider where the balance of convenience lies.

In my view there is no substantial error of law or fact in the order made by the learned Judge that could be considered as an exceptional circumstance to grant relief in this application in revision.

For these reasons I refuse the plaintiff's application in revision with costs fixed at Rs. 2,500/=

Application dismissed.
