

**MAWSOOK
VS
PEOPLE'S BANK**

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CA 102/2004(REV).
DC BATTICALOA 8691/M.
MAY 13, 2005.

Debt Recovery (Special Provisions) Act, No. 2 of 1990, amended by Act, No. 09 of 1994 - Defendant directed to deposit money or provide security to defend the action - Does leave to appeal lie? - Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 - Compared - Exercising revisionary jurisdiction - Civil Procedure Code, sections 756 and 763.

The defendant-petitioner sought to revise the order of the District Court of Batticaloa directing the defendant-petitioner to deposit money or provide security to defend the action. It was contended by the plaintiff-respondent that revision does not lie as the proper remedy is by way of leave to appeal.

HELD:

- (1) The defendant-petitioner's only explanation as to why he did not come by way of a leave to appeal application is that he had no right of appeal is without merit the proper remedy is by way of a leave to appeal application.
- (2) Furthermore, no exceptional circumstances have been urged.

APPLICATION in revision against the order of the District Court of Batticaloa.

Cases referred to :

1. *Dassanayake vs. Sampath Bank* (2002) 2 Sri LR 268 (distinguished)
2. *Bandara vs. People's Bank* (2002) 2 Sri LR 21
3. *Rustom vs. Hapangama* 1978 - 80 Vol. (I) SLR 352

H. G. Hussain with A. H. K. Sepali for petitioner.

Naveen Marapana for respondent.

Cur. adv. vult.

July 29, 2005.

ANDREW SOMAWANSA, J. (P/CA)

This is an application for revision seeking to set aside the order of the learned District Judge of Batticaloa dated 19.12.2003 directing the defendant-petitioner to deposit money in a sum of Rs. 3 million or provide security to the value of Rs. 6 million to defend the action.

When this application was taken up for hearing counsel for the plaintiff-respondent raised two preliminary objections one of which has a direct bearing on the maintainability of this action. They are as follows :

- (1) Can the stay order be operative when the other two defendants have not moved this Court canvassing the impugned order of the learned District Judge of Batticaloa.
- (2) Is the petitioner entitled in law to move this Court by way of revision when the remedy by way of leave was available to the defendant-petitioner.

Both parties agreed to tender written submissions on the aforesaid preliminary objections and have tendered their written submissions.

In the written submissions tendered by counsel for the plaintiff-respondent he has indicated that he restricts his objections to the aforesaid 2nd objection only in view of the fact that he has come to know that 2nd and 3rd defendants have not been served with summons in the original Court. It appears that he is well advised for it appears that summons have been served only on the defendant-petitioner and the objection taken is without any merit.

As for the 2nd objection counsel for the plaintiff-respondent submits that the impugned order was made on 19.12.2003 and as per paragraph 6 of the petition tendered to this Court the petitioner states that he received a certified copy of the order on 24.12.2003. Therefore if the defendant-petitioner seeks to challenge the said order he had ample time to file a leave to appeal application in this Court seeking to challenge the said order. He submits that the defendant-petitioner has not given any explanation as to why he did not file a leave to appeal application and in any event he does not state anywhere in his petition that any exceptional circumstances exists that would give him the right to move this Court in revision. I would say there is force in this argument.

In his written submissions tendered by the defendant-petitioner, counsel submits that the application of the defendant-petitioner arises from an order made in the course of proceedings and as such the only remedy available as the law stood is by way of revision as decided in the case of *Dassanayake vs. Sampath Bank Ltd*⁽¹⁾. In the circumstances the defendant-petitioner is entitled to prosecute this application as presently preferred to this Court. He further submits that the defendant-petitioner has no other alternative remedy other than to move in revision as decided by another division of this Court is without any merit and I would say is misconceived for the simple reason is that the question considered in *Dassanayake vs. Sampath Bank Ltd (Supra)* is Section 16 in the Recovery of Loans by Banks (Special Provision) Act No. 4 of 1990 and no doubt jurisdiction exercised by the District Court under Act No. 4 of 1990 is in the nature of special jurisdiction created by the Act and does not permit a party who is dissatisfied with an order made in the course of proceedings under it to seek relief by way of leave to appeal. However the instant action instituted against the

defendant-petitioner is as admitted in the written submissions tendered on his behalf in terms of the provisions of the Debt Recovery Act as stated in the very first paragraph of his written submissions. In the circumstances, neither the provisions contained in Act No. 4 of 1990 or the decision in *Dassanayake vs. Sampath Bank Ltd. (supra)*, would be applicable to the facts of the instant action. The fact that the instant action is instituted in terms of the provisions of the Debt Recovery Act is admitted by the defendant-petitioner in his petition as well as in his affidavit supporting the petition. In the circumstances, the provisions that would be applicable to the issue at hand is clearly the provisions contained in the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994. In the case of *Bandara vs. The Peoples Bank* ⁽²⁾ Court considered the provisions of the aforesaid Act No. 2 of 1990 as amended by Act No. 9 of 1994 wherein the facts were as follows :

After institution of the action, the trial Judge acting under the provisions of the Debt Recovery Act, having entered decree *nisi*, subsequently made it absolute. Thereafter, the fiscal executed the writ.

The petitioner contends that he was not served with notice of execution of decree, although he has preferred an appeal against the decree absolute.

It was held that :

"The Debt Recovery (Special Provisions) Act is an Act which has created special jurisdiction and it is a procedure whereby no right of appeal has been bestowed on a party aggrieved by a decree absolute."

It was observed by Court that :

"The only remedy which was available to the defendant-petitioner in terms of section 16 of the Debt Recovery (Special Provisions) Act was to have sought relief by way of leave to appeal against the order dated 13.11.1996 making the decree *nisi* absolute which the defendant failed to avail himself".

It is pertinent at this stage to refer to Part III of the aforesaid Act No. 2 of 1990 wherein sections 16 and 17 reads as follows :

Section 16. Subsection (7) of section 756 of the Civil Procedure Code is hereby amended by the addition of the following proviso at the end thereof :-

“Provided however that in an application for leave to appeal in respect of any order made in the course of any action instituted under the Debt Recovery (Special Provisions) Act No. 2 of 1990 proceedings in the original court shall not be stayed when Leave to Appeal is granted unless the Court of Appeal otherwise directs and the Court of Appeal shall where it decides to grant Leave to Appeal call upon the appellant to give security in cash or by a guarantee from a banker for the satisfaction of the entire claim of that plaintiff or such part thereof, as the court deem fit in all the circumstances of the case, in the event of the appeal being dismissed”.

Section 17 Section 763 of the Civil Procedure Code is hereby amended by the addition immediately after paragraph (b) of subsection (2) of that section, of the following :-

“Provided that in the case of decrees entered under the provisions of the Debt Recovery (Special Provisions) Act No. 2 of 1990 the security to be given by the judgment debtor shall be the full amount of the decreed sum or such part thereof as the court deem fit in all the circumstances of the case”.

It appears to me that the defendant-petitioner has filed a flawed application, abused the process of Court and obtained an *ex-parte* stay order effectively circumventing the aforesaid provisions in Part III of Act No. 2 of 1990 which is a clear abuse of the process of Court.

It is to be seen that the defendant-petitioner's only explanation as to why he did not come by way of a leave to appeal application is that he had no right of appeal is without any merit. Furthermore, he does not state anywhere that any exceptional circumstances exist that would give him the right to invite this Court to invoke its revisionary jurisdiction despite the fact that inexcusably the defendant-petitioner has not availed himself of the proper remedy that was available to him. In this respect I would refer to the leading decision on this point, the case of *Rustom vs. Hapangama & Co.*⁽³⁾ at 352. The head note reads as follows :

The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available, only if the existence of special circumstances are urged necessitating the indulgence of this Court to exercise its powers in revision.

The appellant has not indicated to Court that any special circumstances exist which would invite this Court to exercise its powers of revision, particularly since the appellant had not availed himself of the right of appeal under section 754(2) which was available to him.

For the foregoing reasons, I would uphold the objection taken by the counsel for the plaintiff-respondent and dismiss the application for revision with costs fixed at Rs. 10,000/-.

WIMALACHANDRA, J. - I agree.

Application dismissed.
