

PERERA
v.
PEOPLE'S BANK

SUPREME COURT

G. P. S. DE SILVA, C.J.,

KULATUNGA, J.

RAMANATHAN, J.

S.C. NO. 131/94

C.A. NO. 612/93

D.C. COLOMBO NO. 80/DR

MARCH 31 AND APRIL 27, 1995

Debt Recovery (Special Provisions) Act 2 of 1990 – Decree Nisi – Leave to appear conditionally – Order stayed by Court of Appeal till 6.9.1993 – On 6.9.93 defendant absent – Decree Nisi made absolute by District Court – Is it Per Incuriam as there was an order extending the stay order from 6.9.93 by Court of Appeal? – Defendant in default – Attracts S. 6(3) of Act. No. 2 of 1990.

The plaintiff-respondent-Bank instituted proceedings under the provisions of the Debt Recovery (Special Provisions) Act No. 2 of 1990, to recover Rs. 3.5. million. The District Court entered decree nisi. The defendant moved for unconditional leave to appear and show cause. The District Court made Order on 17.8.93 to deposit a sum of Rs. 3.5 million on or before 1.9.93, as a precondition to the grant of Leave to appear and show cause. The Court of Appeal acting in Revision stayed the said Order till 6.9.1993. When the case was called on 6.9.1993, in the District Court, the defendant was absent and the decree was made absolute. Unknown to the District Court, the defendant had on 6.9.93 obtained from the Court of Appeal an Order to extend the Stay Order till 21.9.93. The defendant once again moved the Court of Appeal to set aside the Order of the District Court dated 6.9.93. This was refused.

Held:

- i) There was default on the part of the defendant on 6.9.1993 to appear in the District Court.
- ii) The defendant had failed to deposit the required sum of money; he was absent and unrepresented; and the District Court was not informed that an application was being made in the Court of Appeal to extend the 'Stay Order'.

Revision is a discretionary remedy and the conduct of the defendant is a matter which is relevant. The defendant's conduct disentitles him the relief by way of revision.

APPEAL from the Judgment of the Court of Appeal.

E. D. Wickremanayake for the Defendant-Appellant.

S. A. Parathalingam with *Ian Fernando* for the Plaintiff-Respondent.

Cur. adv. vult.

May 12, 1995.

G. P. S. DE SILVA, CJ.

The plaintiff-respondent Bank (the plaintiff) instituted these proceedings in the District Court under the provisions of the Debt Recovery (Special Provisions) Act, No. 2 of 1990 for the recovery of a sum of Rs. 3.5 million with interest from the defendant-appellant (the defendant). The District Court entered decree *nisi* which was served on the defendant. The defendant filed petition and affidavit along with certain documents and moved for unconditional leave to appear and show cause against the decree *nisi*. Written submissions were filed by the parties. The District Court by its order dated 17th August 1993 rejected the defendant's prayer for unconditional leave and ordered the defendant to deposit a sum of Rs. 3.5 million to the credit of the case on or before 1st September, 1993 as a precondition to the grant of leave to appear and show cause. The defendant by his application in revision dated 25.8.93 sought, *inter alia*, to set aside the aforesaid order of the District Court dated 17th August 1993.

The sum of Rs. 3.5 million had to be deposited to the credit of the case on or before 1st September, 1993. On 1st September 1993 the defendant moved the Court of Appeal and obtained a stay of proceedings till 6th September 1993. When the case was called in the District Court on 1st September 1993 (pursuant to the order of the District Court dated 17.8.93) the court was then informed of the order made by the Court of Appeal staying proceedings until 6th September 1993. The District Court accordingly made order on 1st September 1993 staying further proceedings till 6th September 1993. The District Court further directed that the case be called on 6th September 1993 (*vide* J. E. of 1.9.93).

When the case was called in the District Court on 6.9.93 Counsel for the plaintiff-Bank moved the court to have the decree *nisi* made absolute. The District Court allowed the application and made the decree *nisi* absolute. In the meantime, **unknown to the District Court**, the defendant has obtained an order from the Court of Appeal on the same day (6th September 1993) extending the stay order till 21.9.93.

In a subsequent application in revision dated 16th September 1993, the defendant sought to set aside the order of the District Court dated 6.9.93 whereby the decree *nisi* was made absolute. At the hearing before us, Mr. Parathalingam for the plaintiff-Bank raised a preliminary objection, namely, that the order of the District Court making the decree *nisi* absolute concluded the proceedings and that no useful purpose would now be served by setting aside the order of the District Court dated 17th August 1993. At the hearing before us, Mr. Parathalingam for the Plaintiff-Bank and Mr. E. D. Wickremanayake for the defendant made their submissions both orally and in writing only on the preliminary objection.

The principal submission of Mr. Wickremanayake was that the order of the District Court made on 6th September 1993 was an order made *per incuriam*. Mr. Wickremanayake strenuously contended that there was a stay order issued by the Court of Appeal operative till 6th September and that the stay order was extended on the 6th September itself till 21st September 1993, Counsel strongly urged that the order of the District Court dated 6th September was clearly an order made *per incuriam* in view of the stay order granted by the Court of Appeal. On the other hand, Mr. Parathalingam argued that the defendant was **in default** and the District Court rightly made the decree *nisi* absolute in terms of the provisions of section 6(3) of the Debt Recovery (Special Provisions) Act No. 2 of 1990.

On 6th September 1993 the case was called before the District Court. It was called for the purpose of ascertaining whether the defendant had complied with the order dated 17.8.93 which required him to deposit Rs. 3.5. million to the credit of the case. The defendant was fully aware of the purpose for which the case was being called on 6.9.93 as is evidenced by the motion dated 1.9.93 filed on behalf

of the defendant in the Court of Appeal. It is not disputed that the defendant had failed to deposit the required sum of money. What is more, the defendant was absent and unrepresented. The Court was not informed that an application was being made in the Court of Appeal to extend the "Stay Order". There was no intimation to the court that the money would be deposited in the course of the day. There was complete silence on the part of the defendant. These were the particular circumstances in which the Court allowed the application made on behalf of the plaintiff-Bank and proceeded to make the decree *nisi* absolute. On a consideration of the totality of these facts I am inclined to the view that there was a "default" on the part of the defendant on 6.9.93 to appear in court.

In any event, revision is a discretionary remedy and the conduct of the defendant is a matter which is intensely relevant. I hold that the conduct of the defendant disentitles him to relief by way of revision in the facts and circumstances of this case. The appeal is accordingly dismissed but without costs.

KULATUNGA, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal dismissed.