

MASHREG BANK PSC

v.

ARUNACHALAM

COURT OF APPEAL
UDALAGAMA, J.
NANAYAKKARA, J.
C.A.L.A. 285/2000
D.C. COLOMBO 579/DR
JUNE 26TH, 2001

Debt Recovery Law 2 of 1990 - Amendment 9 of 1994 - Conditional Leave granted - Security to be deposited - Variation of the Security at the instance of the Defendant - Ex-parte-Audi Alteram Partem Rule

Held :

As far as possible and feasible in the interest of justice and fair play a Judge should afford an opportunity to all the parties of being heard before making an order or varying an existing order, if this is not done, a Judge can leave room for allegations of bias by an affected party.

APPLICATION for Leave to Appeal from an Order of the District Court of Colombo.

Cases referred to :

1. *Paulusz v. Perera* - 34 NLR 438
2. *Ramasamy Pullai v. De Silva* - 12 NLR 298
3. *Silva v. Silva* - 13 NLR 87
4. *Vantwest v. Gunawardena* - 34 NLR 220
5. *In Re M. V. Ayesha* - 1986 - 1 Sri LR 314

R. A. Surendran with A. A. M. Illiyas for Plaintiff Petitioner.

S. A. Parathalingam, P.C., with C. I. Liyanapatabendi for Defendant Respondent.

Cur. adv. vult.

July 28, 2001.

NANAYAKKARA, J.

The plaintiff-petitioner instituted an action against the defendant-respondent in the District Court of Colombo under the Debt Recovery Act No. 2 of 1990 as amended by Act No. 9 of 1994 claiming, inter alia, a sum of Rs. 2,609,935.25 with interest thereon. After the institution of the action, the learned District Judge acting in terms of the provisions of the Debt Recovery Act entered Order Nisi against the respondent, which order was served on the respondent. Thereafter on an application by the respondent praying for leave to appear and show cause against the Order Nisi, the court after inquiry, which was decided on written submissions, being satisfied with the application of the respondent made an order on 28. 06. 2000 granting conditional leave in terms of section 6 (2) para C to the respondent, and directed him to deposit a sum of Rupees 12 Million by way of security. Thereafter the respondent filed an application for leave to appeal (174/2000) in this court against the said order of the District Judge praying for an Interim Order staying the operation of the order made on 28. 06. 2000. But this application for leave to appeal (174/2000) against the order of the District Judge was refused by this court on the 18th of July 2000. Thereafter the respondent filed a motion in the District Court of Colombo, giving notice to the petitioner, seeking relief and variation of the order made on 28. 06. 2000 in regard to the security that the respondent was directed to deposit. The said motion was scheduled to come up for support in the District Court on 24. 07. 2000. Before this motion was taken up in court, the respondent filed another motion without notice to the petitioner on 21. 07. 2000 and for some inexplicable reasons it was taken up and supported on the same day in Chambers. The learned District Judge on this occasion varying his own order of 28th June 2000 in regard to the security, ordered the respondent to deposit a sum of Rs. 200,000/- in cash and the balance by way of deed of property. When the petitioner attended court on the day on which the earlier motion was scheduled to have been taken up, and when

he became aware of the variation made in the original order by the learned District Judge on 21. 07. 2000 in respect of the security, filed a motion on 24. 07. 2000 with notice to the respondent to have the said varied order in regard to security vacated, but this application was refused by court by its order dated 11th September 2000. On refusal by the District Court to set aside the order, the petitioner filed this application for leave to appeal seeking relief, inter alia, by way of staying the operation and the setting aside of the order made on 21st July 2000.

When this matter was taken up for hearing in this court, it was argued by Counsel for the petitioner that the order made by court on 21st July 2000 varying the original order was bad in law as it was done ex-parte without notice to the petitioner. Counsel also submitted that the court after having made an order in regard to the security that was to be deposited by the respondent, the court should not have varied that order without the knowledge of the petitioner. It was further argued that the court by altering the original order without notice to the respondent had violated the principles of Natural Justice of *audi alterem partem*. The attention of the court was also drawn to the following cases:-

Paulusz v. Perera⁽¹⁾,
Ramasamy Pullai v. De Silva⁽²⁾,
Silva v. Silva⁽³⁾,
Vantwest v. Gunawardena⁽⁴⁾,
M. V. Ayesha⁽⁵⁾

in support of his contention.

In response to the argument advanced by Counsel for the petitioner, Counsel for the respondent submitted that the learned District Judge had every right and authority to vary an order which he had made in respect of the security, as the variation was not one of substance but was only in regard to the manner and mode of furnishing of security that the respondent was directed to deposit. It was argued further, that the learned District Judge was fully satisfied with the averments and defence

set out in the affidavit of the respondent, and variation of the order has not affected the petitioner in any manner.

At this stage it has become necessary to consider the appropriateness and the validity of the order made by learned District Judge in the light of the submissions made by both counsel in regard to this matter.

When the order made by the learned District Judge is carefully examined, it is true that as learned Counsel for the respondent pointed out the subsequent variation made in the original order was not of substantial nature and it was only in regard to the mode of furnishing security. But it should be stated here, that it is not so much the variation of the order that matters but the manner in which it was done without any notice to the petitioner, particularly when the case was scheduled to come up on an earlier motion filed for the same purpose. What is most objectionable is the manner in which the variation was made in the order.

I am really perplexed why the learned District Judge proceeded to make an ex parte order without the knowledge of the petitioner in the Chambers on the same day the motion was filed by the respondent praying for relief in the matter of security.

It is my considered view as far as possible and feasible in the interest of justice and fairplay that a judge should afford an opportunity to all the parties, of being heard before making an order or varying an existing order. If this is not done a judge can leave room for allegations of bias by an affected party. I am of the opinion, in view of the above mentioned reasons alone, the order made by the learned District Judge should not be permitted to stand and therefore I set aside the orders of the learned District Judge dated 21. 07. 2000 and 11. 09. 2000 and direct that the order be reconsidered with adequate notice to the petitioner.

UDALAGAMA, J. - I agree.

Application allowed.