NATIONAL DEVELOPMENT BANK

v.

CHRYS TEA (PVT) LTD AND ANOTHER

COURT OF APPEAL.
DE SILVA, J.
WEERASURIYA, J.
CA 146/96.
MARCH 04, 1999.
APRIL 26, 1999.

Debt Recovery (Special Provisions) Act, No. 2 of 1992, Act, No. 9 of 1994 - S.6(2)(a)(ii), S.30 - Leave granted to defend depositing security - Adequacy of security - Giving of reasons in the order - What is a Debt?

The Plaintiff Petitioner filed action against the Defendants in terms of the Debt Recovery Law to recover a sum of Rs. 7,304,063.37/-. When Decree Nisi was served the Defendants Respondents filed papers and moved for unconditional leave to defend the action or in the alternative to grant leave on reasonable terms as to security. Court allowed the Defendant Respondents to deposit Rs. 500,000/-. The said Order is bereft of any reasons as to why the said sum was ordered, when the claim was in excess of Rs. 7,000,000/-.

Held :

(i) Under S.6(2)(a) or s.6(2)(b) the Court has no discretion to order security which is not sufficient to satisfy the sum mentioned in the Decree Nisi.

(ii) If the Court has acted under S.6(2)(c) then prior to ordering security which is not sufficient to satisfy the sum mentioned in the Decree Nisi the Court must first come to the conclusion that the Court is satisfied on the contents of the affidavit filed by the Respondents that they disclose a defence which is *prima facie* sustainable.

Documents indicate that the Respondents have acknowleged that the sums mentioned in the Plaint *are* due and payable. Court could not have acted under S.6(2)(c).

(iii) The affidavit of the Respondents does not disclose a *prima facie* sustainable defence in terms of the Act.

(iv) Debt means a sum of money which is ascertainable or capable of being ascertained at the time of the institution of the action.

APPLICATION in Revision from the Order of the District Court of Colombo.

Romesh de Silva P.C., with *Geethaka Gunawardena* for the Plaintiff-Petitioner.

Shibly Aziz, P.C., with *S.Srikantha* for Defendant-Respondents.

Cur. adv. vult.

July 30, 1999.

DE SILVA, J.

This is an application to revise the order dated 16. 02. 1996 of the Additional District Judge of Colombo wherein she permitted the Defendants-Respondents (hereinafter referred to as the respondents) to defend the action filed by the Plaintiff Petitioner Bank (hereinafter referred to as the petitioner) under the Debt Recovery (Special Provisions) Act by depositing a sum of Rs. 500,000/=.

The facts in this case as set out in the petition are briefly as follows:

The Plaintiff filed action on 12. 09. 1995 against the defendants in terms of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994 to recover a sum of Rs. 7,304,063.37/=. Upon institution of action, the Court issued decree *nisi* against the defendants. When the decree *nisi* was served on the defendants they filed a petition and affidavit as required by law and moved for unconditional leave to defend the action or in the alternate to grant leave on reasonable terms as to security. Thereafter both parties filed written submissions and Court made order on 16. 02. 1996 allowing the defendants to defend the action upon deposit of a sum of Rs. 500,000/=. The present application to this Court is against the said order of the Additional District Judge.

Counsel for the petitioner contended that the said order of the Additional District Judge is erroneous for the following reasons:

(1) That the order is contrary to the expressed provisions of the Debt Recovery Act and the weight of the evidence produced in the case.

(2) The trial Judge has failed to give reasons for the said order.

(3) The security ordered was neither sufficient nor reasonable for satisfying the sum mentioned in the decree *nisi* in terms of the Debt Recovery Act.

(4) On the findings of the Additional District Judge that the respondents have taken money, the Court was precluded from making the said order.

In an action under the Debt Recovery (Special Provisions) Act where decree *nisi* is entered by Court the defendant can obtain leave only upon one of the three following grounds as set out in section 6 of the Act as amended by Act No. 9 of 1994 with leave of Court:

(1) Upon the defendant paying into Court the full sum mentioned in the decree *nisi* or

(2) Upon the defendant furnishing such security as to the Court may appear reasonable and sufficient for satisfying the sum mentioned in the decree *nisi* in the event it being made absolute or

(3) Upon the Court being satisfied on the contents of the affidavit filed that they disclose a defence which is *prima facie* sustainable and on such terms as to security, framing and recording of issues, or otherwise as the court thinks fit.

It is to be noted that the Additional District Judge's order contains only nine lines and it is bereft of any reasons as to why she ordered a sum of Rs. 500,000/= as security when the claim in the plaint is in excess of Rs. 7,000,000/= which is fourteen times the sum ordered as security. It is an accepted principle

that there is a duty cast on Court or any administrative body clothed with authority, when an order is made to give reasons for such an order.

It is to be observed that under Section 6(2)(a) or 6(2)(b) the Court has no discretion to order security which is not sufficient to satisfy the sum mentioned in the decree nisi.

The Additional District Judge has attempted to act under Section 6(2)(c) of the Act No. 9 of 1994 as it is the only section which permits the Court discretion to order security which would be a lesser sum than the sum mentioned in the decree *nisi*.

If the Court had acted under section 6(2)(c) then prior to ordering security which is not sufficient to satisfy the sum mentioned in the decree *nisi* the Court must first come to the conclusion that the Court is satisfied on the contents of the affidavit filed by the respondents that they disclose a defence which is *prima facie* sustainable. In the Additional District Judge's order there is no such finding. However her conclusion is that the respondents have taken the money from the plaintiff petitioner. Counsel for the petitioner contended that in these circumstances and in terms of the applicable law, the Court is precluded from making any order other than the order under section 6(2)(a) or 6(2)(b) of the Debt Recovery Act.

In terms of the petitioner's plaint filed in the District Court of Colombo (Document xi) the petitioner's case briefly was that there was an agreement between the parties under which the petitioner Bank agreed to discount (up to a maximum of Rupees 7 million bills of exchange, trade debts, credit purchases or invoices made, drawn or endorsed by the 1st respondent, in respect of the 1st respondents credit purchase from its customers. In terms of the said agreement, the petitioner discounted four cheques issued and presented by the 1st respondent and paid a sum of Rs. 6,999,572/= thereon to the respondents. The plaintiff's action was based on the default of the respondents to pay back the monies due to them on these transactions.

It is clear from the documents annexed to the plaint, specially the letters sent by the managing director of the 1st respondent to the petitioner marked 'I', 'J' and 'N' that the respondents have not repaid this money to the petitioner. Last paragraph of document J reads as follows:

"With regard to the above we request for a further extension till end of March 1995 to settle all the outstanding amounts and its interest commencing from the date on which the payment was due."

Again in document 'N' there is an admission by the respondents that the amount mentioned in the plaint is due to the petitioner. That letter commences as follows "we regret our inability to settle the amount of Rs. 7,000,000/= due to you."

Therefore there is no doubt whatsoever that the respondents have acknowledged that the sums mentioned in the plaint are due and payable.

The learned Counsel for the respondents submitted that the plaint presented to the District Court does not disclose a cause of action against the respondents. His submission was that the petitioner's case has to stand or fall on its own pleadings. Counsel contended that the petitioner's action is based on the breach of the terms and conditions of a contract as set out in document 'B' and not an action based on the dishonour of cheques. Counsel further submitted that the petitioner's pleadings as they are, will not permit the petitioner to recover any money secured by cheques which have not been honoured because his action is not an action on the cheques.

It is to be noted that this is an action instituted under the Debt Recovery (Special Provisions) Act. This Act was specifically introduced by the legislature to quicken the process of the recovery of "debts" by lending institutions with a special procedure.

Action under the Debt Recovery Act can be instituted by presenting a plaint and not a petition. The plaint has to be accompanied by an affidavit. According to section 4(1) all that is required to be sworn or affirmed to in the affidavit are words to the effect that the sum claimed in the plaint is justly due to the institution from the defendants. In addition to the above a decree *nisi*, the required stamps, agreements, instruments or documents sued upon or relied on by the institution also should be filed. Under the Debt Recovery Act an action could be filed only by a lending institution as defined in Section 30 of the Act and only for the recovery of a "debt". Debt means a sum of money which is ascertainable or capable of being ascertained at the time of the institution of the action.

In these circumstances I cannot agree with the submission of Counsel for the respondent that the plaint does not disclose a cause of action. If the petitioner has satisfied the requirements of the provisions of the Debt Recovery (Special Provisions) Act the petitioner has a right to invoke the jurisdiction of the Court seeking redress under that Act.

In the instant case as pointed out earlier the respondents have admitted a sum of monies mentioned in the plaint is due to the petitioner. The affidavit of the respondents does not disclose a *prima facie* sustainable defence in terms of the Act.

For the above reasons I set aside the order made by the Additional District Judge dated 16. 02. 1996 permitting the respondents to continue with the case by depositing Rs. 500.000/=. I direct the trial Judge to take steps in terms of Section 6(3) and make the decree *nisi* absolute. Application of the petitioner is allowed with costs.

T.B. WEERASURIYA, J. - I agree.

Application allowed.
District Court ordered to make the Decree Absolute.