IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C.A 1963/2005 (Revision)
D.C. Mt.Lavinia 129/2005/DRM

The Hon. Attorney General,
The Attorney General's Department
Colombo 12.

PLAINTIFF

Vs.

1. M. B. Mohamed Zameer of
No. 4, Rohini Road, Colombo 6.

and two others

Carrying on business under the name style and firm of "Ran Lanka Garments" at No. 4, Rohini Road, Colombo 6.

DEFENDANTS

1. M. B. Mohamed Zameer of
No. 4, Rohini Road, Colombo 6.

and two others

DEFENDANTS-PETITIONERS

Vs.

The Hon. Attorney General,
The Attorney General's Department
Colombo 12.

PLAINTIFF-RESPONDENT

ANDNOW

1. M. B. Mohamed Zameer of
No. 4, Rohini Road, Colombo 6.

and two others

DEFENDANTS-PETITIONERS-PETITIONES

Vs.

The Hon. Attorney General,
The Attorney General's Department
Colombo 12.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: Basheer Ahamed and U.A Mawjeeth
for Defendants-Petitioners-Petitioners

Vikum de Abrew S.S.C.
for Plaintiff-Respondents-Respndents

ARGUED ON: 06.03.2012

DECIDED ON: 23.07.2012

GOONERATNE J.

This is a revision application filed on or about November 2005 by three Petitioners, to revise the order and decree absolute dated 28.10.2005 made in D.C. Mt. Lavinia Case No. 129/05/DRM in an action instituted in terms of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Amendment Act No. 9 of 1994, read with the Customs Ordinance. The Journal Entry of 29.11.2005 indicates that this matter had been supported in this court and notice was issued on the Respondent. It also indicates that a limited stay order was also issued in terms of prayer 'C' of the prayer to the petition. Thereafter this application had been listed from time to time for various steps and for filing objections of the Respondent, and the stay order granted as above had been extended periodically. The Journal Entry of 16.2.2010 shows that on that date two preliminary issues had been raised by parties and court permitted written submissions to be filed. Since then the case had been postponed for various reasons mainly due to applications for adjournments made by both parties, and at a certain stage Petitioner had even moved court to consider the withdrawal of the application. However no finality was reached on any kind of settlement. As such both parties argued the matter on 6.3.2012.

The learned Counsel for Petitioner in his oral and written submissions referred to the position of the Petitioners and drew the attention of this court to the several matters referred to in paragraph 4 of the Petition and urged that the Petitioners have disclosed acceptable grounds that would enable court to have granted the Petitioner's Leave to Appeal and show cause against the Decree Nisi. I would very briefly refer to the grounds urged:

(a) Court has no jurisdiction as the third defendant does not reside within the jurisdiction of the court.
(b) The Respondent has suppressed material facts viz the matters stated in documents D1, D2, D3, D4 and D5.
(c) The Respondent is not entitled to interest.
(d) The forfeiture and penalties are not warranted
(e) The Petitioners have not been given credit to the amounts recovered under the Bank Guarantee.
(f) Director General of Customs has not awarded additional forfeitures
(g) The DG of Customs is estopped from enforcing this order as the appeal made by the Petitioner is, as stated in D6 in terms of section 163 and 165 of the Customs Ordinance, pending.

On all above matters, the learned District Judge has in his order considered same and given good cogent reasons and before I proceed to examine same in the light of the required provisions of the Debt Recovery

Act, the following submissions of the Petitioners need to be considered in support of (a) to (g) above, and on preliminary issues suggested before this court on an earlier occasion.

On or about 26.4.2005 the Defendants-Petitioners made an application supported by affidavits seeking leave to appear and show cause under Section 6 of the said Act. The inquiry into the Leave to Appeal and show cause was held in the Original Court on 3.8.2005. On that date both parties agreed to tender written submissions. On 28.10.2005 the learned District Judge pronounced the order X6 rejecting the application of the Petitioners. The Petitioners contend that Decree 'Nisi' was made 'absolute' without granting Leave to Appeal and show cause under any one of the three alternatives referred to in Section 6(2) (a) or (b) or (c) of the Debt Recovery (Special Provisions) Act. The Petitioner further contends that court was mandated and required to act under any one of the 3 alternatives (a) or (b) or (c) and grant leave.

Section 6 (2) reads thus;

"The court shall upon the filing by the defendant of an application for leave to appear and show cause supported by affidavit which shall deal specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it, and after giving the defendant an opportunity of being heard, grant leave to appear and show cause against the decree nisi, either –

(a) upon the defendant paying into court the sum mentioned in the decree nisi, or

(b) 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 of it being made absolute; or

(c) 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";

The Petitioners' position seems to be that it was the position in law that the Defendants be heard and court should make an appropriate order granting leave on any one of the above (3) alternatives, and the Original Court cannot make the Decree Nisi a Decree absolute without first granting leave to appear and show cause under Section 6 (2) of the Act. Emphasis seems to be on granting leave to appear and show cause or to appear and show cause after granting leave. Petitioners also state that the case of People's Bank Vs. Lanka Queen Int'l (Pvt.) Ltd. has no application to the case in hand.

I have to mention at this point that the learned counsel in paragraph 7 of his written submissions tendered to this court on 8.5.2012, seeks to explain the position of the Petitioner on the application of Section 6(2) of the Act. It seems to me that the counsel has either misunderstood the position and replied in that way or attempt to give or express another view, which this court will ultimately arrive at a conclusion.

In any event since the Petitioners seems to emphasis their point of view on the application of Section 6(2) of the Act I would include in verbatim the matters stated therein by the Petitioner.

1. It is not for the Defendant to act under (a) above and pay into court the sum mentioned in the decree nisi. The Defendant would then deprive himself of the benefit of the other aforesaid alternatives, namely (b) "... security ... ... as to the Court may appear reasonable and sufficient" or (c) "... on such terms ... ... as the court thinks fit".
2. These provisions will never come into play. These provisions will become redundant and never come into application.
3. In terms of section 6(2) of the Debt Recovery (Special Provisions) Act as amended by Act No. 9 of 1994. (a) where the Defendant's application supported by affidavit deals specifically with the plaintiff's claim and (b) states clearly and concisely what the defence to the claim is and what facts are relied upon to support it, the original Court after giving the Defendant an opportunity of being heard, is mandated to make order granting leave to appear and show cause against the decree nisi, under either (a) or (b) or (c) of Section 6 (2). It is for this purpose namely under which alternative, the Court should make the Order, that the Defendant is heard under Section 6(2).
4. The question of the affidavit disclosing a defence "which is prima facie sustainable" is on a reading of section 6(2), only relevant to the third alternative 6(2)(c), for these words appear only in that sub-section 6(2)(c).
5. Assuming there is no prima facie sustainable defence, even then the original Court is mandated to grant leave under the other alternatives (a) or (b).
6. The Court therefore did not have jurisdiction to make the Decree nisi Decree absolute, without acting under one of the alternatives provided in the sub-sections (a), or (b) or (c) to Section 6 (2).

Then on the question of entitlement to file a revision application notwithstanding Section 16 of the said Act the following matters have been submitted to court.

1. In terms of Section 145(2) of the Customs Ordinance as amended, only "Sections 3, 4, 5, 6, 7, 8, 12, 13, 14, 15 and 23 of the Debt Recovery (Special Provisions) Act, No.2 of 1990 shall, mutatis mutandis, apply to the institution and hearing of every such action."
2. That since Section 16 is not included in the above provisions, section 16 on which the above preliminary objection raised on behalf of the Hon. Attorney General is based would not apply. The preliminary objection raised by the Respondent should therefore be answered against the Respondent.

I would initially deal with the question of jurisdiction of the District Court. Merely because the 3rd Defendant was not a resident within the jurisdiction of the District Court, the court is not without jurisdiction. The 1st & 2nd Defendants are residents within the local limits of the District Court of Mt. Lavinia. In the written submissions of Respondent there are two relevant cases cited. Fernando vs. Wage 9 SCC 189. An action could be brought in the District Court within whose jurisdiction one of the Defendant reside. Hussain Vs. Peiris 34 NLR 238. Action could be instituted where any party Defendant resides.

The learned District Judge has correctly applied the facts and decided on territorial jurisdiction of court. This is a frivolous defence and does not disclose a sustainable defence. Further court is bound to assume jurisdiction apart from above in terms of Section 145(2) of the Customs Ordinance where the Attorney General institute action in the District Court where the party Defendant is liable to pay the forfeiture or penalty, resides. As such trial Judge has not made any mistake since that aspect of the law is governed by the Civil Procedure and the provisions of the Customs Ordinance. There is no merit in the argument of the Petitioners, on that aspect.

There is another defence pleaded on suppression of material facts based on documents D1, to D5. If proved Petitioners have to be given leave to proceed and show cause, but it is not so. This seems to be a highly misleading position, which the trial Judge correctly rejected. Document D5 the Petitioner has withdrawn the application and the case dismissed. D1 to D4 relate to persons who are not Defendants in the case. The learned District Judge has taken each document and given cogent reason to reject the Petitioner's defence.

The trial Judge very correctly refer to same at pages 4/5 of his order at X6.

On the question of interest and forfeiture and penalties not warranted, trial Judge has dealt with that aspect at pages 5/6 of order at X6. There is no prayer on interest according to the plaint. However a party cannot be denied the award of interest under Section 192 of the Civil Procedure Code and Section 145 (1) of the Customs Ordinance. It appears that such an objection was taken by the Petitioners merely to take an objection and either to delay the process or to mislead court. Trial Judge has given his mind to document P12 & P13. On making the order P12 (26.6.1992), the penalties were mitigated, considering appeals of Petitioners.

This is under Section 163 of the Customs Ordinance. Section 163 reads thus...

In all cases in which under this Ordinance any ships, boats, conveyances, goods, or other things have become liable to forfeiture, or shall have been forfeited, and in all cases in which any person shall have incurred or become liable to any penalty, it shall be lawful for the Collectors should he deem such forfeiture or penalty unduly severe, to mitigate the same, but all cases so determined by the Collector shall nevertheless be liable to revision by the Minister.

The position of the Defendants-Petitioners in this regard cannot be accepted since they appealed from order P12. On that appeal the Customs officials had reduced certain sums due. Thereafter decision P13 was issued. I

would incorporate the following extract from the order of the learned District Judge which clarify the position in detail.

පැ13 දරණ නියෝගය කියවා බැලීමේදී අධිකරණයට පෙනී යන්නේ පැ 12 දරණ නියෝගය සම්පූර්ණයෙන් ඉවත්කර නැති බවත් පැ 12 දරණ නියෝගයට අමතරව යම්කිසි අඩු කිරීමක් සහිතව පැ 13 දරණ නියෝගය ප්‍රකාශයට පත්කර ඇති බවත්ය. එනම් පැ 12 දරණ නියෝගය අනුව හා පැ 13 දරණ නියෝගයේ සඳහන් සීමාවන්ට යටත්ව හා සංශෝධනයට යටත්ව පැ 12 සහ පැ 13 දරණ නියෝග වල සඳහන් සහන ලබා ගැනීමට පැමිණිලි පක්ෂයට අයිතිවාසිකම් තිබෙන බව අනාවරණය වේ.

විත්තිය විසින් කියා සිටින්නේ ඩී 6 දරණ අභියාචනය 1996.07.22 වන දින මුදල් ඇමතිවරයා විත්තිකරු විසින් ඉදිරිපත් කර ඇති නිසා, ඒ පිළිබඳව තීරණයක් දෙනතුරු මෙම නඩුව ඉදිරියට ගෙනයාමට නොහැකි බවත්ය. එකී ඩී 6 දරණ ලිපිය කියවා බැලීමේදී, අධිකරණයට පෙනියන්නේ එම ලිපිය රේගු ආඥා පනතේ 165 වන වගන්තිය යටතේ ඉදිරිපත් කර ඇති අභියාචනයක් නොවන බවය. තවද එකී අභියාචනයක් ඉදිරිපත් කර ඇති බවට වෙනත් කිසිම පිළිගතහැකි සාක්ෂියක් ඉදිරිපත් කර නැත. 1996 වර්ෂයේ ඉදිරිපත් කර ඇති එම අභියාචනය, වර්තමාන තත්ත්වය කුමක්ද යන්න තහවුරු කිරීමට ද විත්තිය අපොහොසත් වී ඇත. කෙසේ වෙතත් පැ 13 දරණ නියෝගය ප්‍රකාශයට පත්කර ඇත්තේ ඩී 6 දරණ අභියාචනයෙන් පසුවය. එම නිසා ඩී 6 දරණ අභියාචනය පිළිබඳව කරුණු ඉදිරිපත් කිරීමට විත්තිකරුට අයිතිවාසිකම් නැත.

The Petitioner also urge that the forfeiture and penalty are not warranted as stated above. It is an admitted fact that by document P26, the Petitioners acknowledge the receipt of letter sent to the Customs Officials and state that the Defendants-Petitioners are undergoing severe financial constraints, and as such request the Customs Department for time till 31st July 2000 to pay the mitigated sum. The trial Judge's observations on same that the Defendant-Petitioners are estopped from challenging same cannot be faulted, having regard to the admissions in P26. It is evidence that the Defendant-Petitioners had not challenged the order made against them by the Customs Department on October 1999.

If all the Petitioners objections and defences are taken in it's entirety, this court observes that some of them are highly technical and the rest of it are defences that cannot be maintained in a case of this nature. i.e under the Debt Recovery (Special Provisions) Act. The procedure contemplated under the Act is a special procedure geared to recover debts, and to expedite proceedings in a court of law. No doubt the amount due are very clearly admitted by the Defendants-Petitioners in view of document P26.

I would also refer to the following case law Sunil Ramanayake Vs. Sampath Bank Ltd. 1993 (1) SLR 146/147...

Wijeyaratne J. held:

(1) The defendant shall not appear or show cause against the order nisi unless he obtains leave from the court. Leave to appear and defend has to be granted upon the defendant paying into court the sum mentioned in the decree or furnishing reasonable and sufficient security for satisfying the decree. Leave may be granted unconditionally where the curt is satisfied that the defendant's affidavit and other material raise an issue or question which ought to be tried (section 6 (2)(c) of the Act). The purpose of section 6 is to prevent frivolous or untenable defences and dilatory tactics.

(2) An issue or question which ought to be tried means a plausible defence with a triable issue; that is to say, an issue which cannot be summarily disposed of on the affidavits but requires investigation and trial.

(3) The court has to decide which of the alternatives under section 6(2) whether (a), (b) or (c) – has to be followed and the court has to exercise its discretion judicially. The court must briefly examine the facts of the case, set out the substance of the defence and disclose reasons in support of the order.

(4) In this case the 3rd and 4th defendants-petitioners had been given unconditional leave. The 3rd defendant in his affidavit has not dealt specifically with the plaintiff's claim and stated his defence and the facts relied on as required by section 6(2) (c). He had denied the correctness of the loan account, but had not specified in which particulars the loan account was incorrect, neither stating the reasons for so alleging nor the facts he was relying on to support his claim that the loan account was incorrect. He had not dealt with the plaintiff's claim on its merits but merely set out objections of a technical nature. If a defendant is granted leave unconditionally on this type of technicality and evasive denial, then the purpose of this Act will be brought to naught.

Wigneshwaran J. in C.A No. 415/98 (Rev.) C.A minutes of 27.5.1998...

"The Debt Recovery (Special Provisions) Act No. 2 of 1990 was designed to regulate and expedite the procedure relating to Debt Recovery of lending institutions .... This Court should not interfere with the procedure that has been comparatively recently been designed for the purpose of speedy Debt Recovery".

Zubair vs. Bank of Ceylon (2000) (2) SLR187...

Court held: "In Debt Recovery matters, it would not be correct for the courts to hold against the intention of the legislature on technicalities.

The learned counsel for Petitioners seems to argue on the lines that the Original Court is bound to grant leave under Section 6 of the Act. Attention of this court has been brought to the said section under the principal enactment and the Amendment Act No. 9 of 1994. The said section reads thus:

"The court shall upon the filing by the defendant of an application for leave to appear and show cause supported by affidavit which shall deal specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it, and after giving the defendant an opportunity of being heard, grant leave to appear and show cause against the decree nisi, either –

(d) upon the defendant paying into court the sum mentioned in the decree nisi, or
(e) 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 of it being made absolute; or

(f) 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";

There is no doubt that the application of the Defendant supported by an affidavit should deal with the Plaintiff's claim and state clearly and concisely the defence to the claim. As such prior to an hearing, on the question whether to grant leave and show cause the pleadings should disclose and the material aspect of the pleading disclosing the defence to the claim. This is a prerequisite. This seems to be the procedure that should be adopted subsequent to the Amended Act No. 9 of 1994. The case of People's Bank Vs. Lanka Queen Int'l (Pvt.) Ltd. (1999) 1 SLR 233 at pg. 237...

Per De Silva J.

This new subsection clears any doubt that would have prevailed earlier in respect of the procedure a defendant has to follow in applying for leave to appear and show cause. On an examination of the amendment introduced in subsection 6(2) it is abundantly clear that the word "application" which appeared in the original section has been qualified with the following words: "upon the filing of an application for leave to appear and show cause supported by affidavit". This shows that –

(a) it is mandatory for the defendant to file an application for leave to appear and show cause.

(b) such application must be supported by an affidavit which deals specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it

This section does not permit unconditional leave to defend the case as the defendant-respondent has requested from the District Court. The minimum requirement according to subsection(c) is for the furnishing of security.

If the defendant satisfies (a) and (b) above then the defendant should be given an opportunity of being heard. The court will have to decide on one of the three matters specified in the above section.

In the case in hand the learned District Judge has specifically dealt with all the defences put forward by the Defendant-Petitioners. The trial Judge has looked at the entire case and pronounced a very comprehensive order. Some of the grounds urged by the Defendant are utterly frivolous and no doubt, does no disclose at all a prima facie sustainable defence. Therefore I would hold with thr Respondent that Decree nisi should be made absolute and add to their contention that Defences suggested cannot be maintained and lacks the requirements of the Debt Recovery Act which is a special law to expedite court proceedings.

There is no doubt, and according to the dicta in several cases, exceptional circumstances need to be clearly established in a revision application. This is the very basic principle in the maintainability of a

revision application. The Decree nisi which is made absolute is a final judgment or decision in terms of the Debt Recovery Act. Therefore this court is of the view that the more appropriate remedy of the Petitioners would be a final appeal. However as observed above a stay order has also been issued by this court. As such there is no peril of any kind, and that should not be the thinking on a plain reading of Section 13(1) of the said Act. The material suggested, and contained in the petition does not in any way demonstrate any exceptional circumstances. I do not think that an application of this nature could be made to court in order to invite the revisionary jurisdiction of this court. I had the benefit of reading the following case law from which I conclude that the Petitioner's application to this court should fail and be rejected, apart from their failure to demonstrate a sustainable defences.

1. *Rustom Vs. Hapangama* 1978 – 1979 1 SLR page 355, it was held that when there is explicit provisions for right of appeal, a revision could only lie if the Petitioner could demonstrate that there are "exceptional circumstances" to invoke revisionary powers.
2. *Sub Inspector Muthalif Vs. Pedrick* 28 CLW 22 – Court held that the Supreme Court will exercise its powers of revision, even in a case where an appeal lies, in the following cases:

a. where there has been a failure of justice
b. where a fundamental rule of judicial procedure has been violated
c. where the persons affected by the order made against him had no knowledge of it till the time for preferring an appeal had lapsed

3. *Alima Natchier Vs. Marikkar* 1947 NLR 81 – The court held: "in the absence of exceptional circumstances, the mere fact that trial judge's order is wrong is not a ground for the exercise of revisionary powers".
4. *Devi Property Development (Pvt.) Ltd. Vs. Lanka Medical (Pvt.) Ltd* CA 518/2001 – Nanayakkara J. held: "revision is an extra ordinary jurisdiction vested in court to be exercised under exceptional circumstances if no other remedies are available."
5. *Dharmaratne Vs. Palm Paradise Cabana Ltd.* 2003 (3) SLR 24 – held, "Existence off exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted, if such a selection process is not their revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision Application or to make an appeal in situations where the legislature has not given a right of appeal".

In all the above facts and circumstances I see no real basis to grant relief to the Petitioners. Court has to be very cautious in the exercise of extra ordinary powers vested with the Appellate Court in terms of the basic law of the land. There is no miscarriage of justice but some injustice caused to the Respondents by a delay in the disposal of this case, which prevented the Respondents from resorting to remaining available statutory provisions to conclude the legal steps. Application dismissed with costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL