

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

In the matter of an application for leave
to appeal

Court of Appeal No: CALA 452/2006

District Court of Colombo No: 1305/DR

Nations Trust Bank Limited

Plaintiff-Petitioner

Vs.

Ceylon Overseas Traders (Pvt.) Limited
and four others

Defendant-Respondents

Before: Eric Basnayake J

**Counsel: Prasanna Jayawardene with Arendra Siriwardene instructed by Sudath Perera Associates for
the Plaintiff-Petitioner**

N.R. Sivendran with K. Prabakaran for the Defendant-Respondents

Argued on: 22.2.2011 & 10.6.2011

Written submissions tendered on: 19.1.2009 & 20.7.2010

Decided on: 20.1.2012

Eric Basnayake J

The plaintiff-petitioner (plaintiff) filed this leave to appeal application to have the order dated 27.10.2006 of the learned Additional District Judge of Colombo set aside. By this order the learned Judge had refused to reject the petition and affidavit dated 13.3.2006 and the written submissions dated 27.3.2006 of the 1st to 5th defendant-respondents (defendants). Leave to appeal was granted by this court on 17.11.2009.

The plaintiff filed this action on 27.12.2005 against the defendants in the District Court of Colombo under the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No.9 of 1994 to recover inter alia a sum of Rs.24462803.55. The above claim is based on banking facilities granted by the plaintiff to the 1st defendant. The 2nd to 5th defendants who are the directors of the 1st defendant company stood surety.

On 3.1.2006 the court entered decree nisi and ordered it to be served on the defendants, returnable on 28.2.2006. The decree nisi was served on the defendants on 30.1.2006. On 28.2.2006 the proxy of the defendants was filed. As no application was filed seeking leave to appear and show cause, time was allowed till 4.30 p.m. for the defendants to file any application and the case was fixed for the following day for inquiry. On the same day, namely, 28.2.2006 the defendants filed in court an application seeking leave.

On 1.3.2006, the defendants were absent and unrepresented. Hence the court fixed the case for 30.3.2006 for order. On 13.3.2006 a petition and an affidavit were filed with a motion by the 1st to 4th defendants moving to consider the contents thereof while considering granting leave. The 5th defendant filed a separate petition and an affidavit and documents 5R1 to 5R5. On 27.3.2006 the defendants had also filed written submissions.

The order fixed for 30.3.2006 was postponed to 20.4.2006. On 19.4.2006 the plaintiff filed a motion to reject the application and the affidavit filed on 13.3.2006 and the written submissions filed on 27.3.2006. In view of these objections both parties were allowed to file written submissions. The court on 27.10.2006 made order accepting the affidavit dated 13.3.2006 and the written submissions filed thereafter. It is this order the plaintiff is seeking to vacate.

Order of 27.10.2006

The learned Judge held that it is section 6 (2) that applies and the defendants have already filed a petition and affidavit on 28.2.2006 and in the event an application is made to submit more facts, that it should be permitted.

The procedure

The procedure with regard to the filing of these actions is laid down in the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No 9 of 1994. Accordingly the institution of the action shall be by plaint and affidavit. Along with the plaint, the plaintiff shall file in court a draft decree nisi, the requisite stamps for the decree nisi and for service thereof (section 4 (1)). The decree nisi is entered and served thereafter. **The day to be inserted in the decree nisi as the day for the defendants' appearance and showing cause, if any, against it shall be as early a day as can conveniently be named, regard being had to the distance from the defendant's residence to the court and no further time shall be given to the defendant by court thereafter for appearing and showing cause against such decree nisi** (emphasis added) (section 4 (3)).

The above provision clearly stipulates that the defendant should be given only one day to appear and show cause. In terms of these provisions the defendants have to appear in court and show cause on the same day. The defendant shall show cause upon the filing of an application supported by an affidavit. After giving the defendant an opportunity of being heard the court may grant leave to appear and show cause (a) upon the defendant paying in to 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 (section 6 (2)).

Once an application is filed by the defendant the case has to be fixed for inquiry. If the defendant does not show up at the inquiry the court has to make an order in terms of section 6 (2). In this case decree nisi had been served on the defendant on 30.1.2006 for the defendants to appear and show cause on 28.2.2006. The showing cause is by way of an application supported by an affidavit. However when this case was called on 28.2.2006 no application was filed. Only a proxy was filed. However the court was generous enough to allow the defendants to file an application during the course of the day and fixed the case for inquiry for the following day. As the defendants failed to show up at the inquiry the case was rightly fixed for order for 30.3.2006. The defendants did not complain about fixing a date for order.

On 13.3.2006 the defendants had filed a petition and affidavit with a motion. The proper way should have been to file a motion first and seek the approval of court.

The defendants had filed these petitions and affidavits and written submissions without an order by court allowing or disallowing such additional petitions and affidavits. No attempt was made to obtain prior permission. The court should not encourage parties to file papers at their whim and fancy. The court too is bound to follow the procedure. Otherwise there will be anarchy. Section 4 (3) provides the defendants with one opportunity. This is a special law created for a special situation. When the law is clear and free of ambiguity courts are bound to give effect to it. Considering section 4 (3) with section 6 (2) of the Act I am of the view that the learned Judge had erred in permitting the defendants to submit more facts in another petition. Therefore the order dated 27.10.2006 is set aside and the learned District Judge is directed to reject all the papers filed after 1.3.2006. The learned District Judge is further directed to deliver the order in accordance with section 6 (2) of the Act, on the petition and affidavit filed on 28.2.2006. The appeal is allowed with costs.



Judge of the Court of Appeal

C.A. Writ Application No. 609/2011

Before : S. Sriskandarajah, J. (P/CA)
Deepali Wijesundera, J.

Counsel : L.M. Ariyadasa for the petitioner.

Argued &

Decided on : 19th January 2012.

S. Sriskandarajah, J. (P/CA)

Counsel for the petitioner moves to withdraw this application. Respondents notices were not issued. Respondents are absent and unrepresented. The application for withdrawal is allowed and this application is pro forma dismissed.

PRESIDENT OF THE COURT OF APPEAL

Deepali Wijesundera, J.

I agree

JUDGE OF THE COURT OF APPEAL.

Kwk/=