

**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 354/2005

District court of Colombo No: 1064/DR

D.G. Yasasiri

1<sup>st</sup> Defendant-Petitioner-  
Petitioner

vs.

National Development Bank  
of Sri Lanka

Plaintiff-Respondent-  
Respondent

S. Ranaweera

2<sup>nd</sup> defendant-Respondent

Before: **Eric Basnayake J**  
**K.T. Chitrasiri J**

Counsel: Palitha Kumarasinghe P.C. with Hemantha Wijegunawardene for the 1<sup>st</sup>  
Defendant-Petitioner-Petitioner  
Romesh De Silva P.C. with Geethaka Gunawardene for the Plaintiff-  
Respondent-Respondent

Written Submissions Tendered On: 2.7.2009

Decided On: 26.8.2011

Eric Basnayake J

The 1<sup>st</sup> defendant-petitioner-petitioner (1<sup>st</sup> defendant) filed this leave to appeal application inter alia to have the order dated 30.8.2005 of the learned Additional District Judge of Colombo set aside and have the 1<sup>st</sup> defendant granted unconditional leave to

appear and show cause against the decree nisi. The plaintiff-respondent-respondent (plaintiff) filed this action 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 (DRA) against the 1<sup>st</sup> and the 2<sup>nd</sup> defendant-respondent to claim a sum of Rs.9,596,822.76 together with interest at 18.5% from 1.7.2004. The plaintiff sought a decree nisi to be entered in the first instance in terms of section 4 of the DRA read with s. 377 (a) of the Civil Procedure Code (CPC).

According to the plaint one Amaradasa Liyanage was an account holder of the plaintiff. On or about March 2001 the plaintiff had granted a loan of Rs.11,121,000 to Amaradasa Liyanage. The plaintiff states that the defendants by an indenture of guarantee dated 12.2.2001, guaranteed to repay the plaintiff on demand the said loan. The plaintiff claims that the liability of the defendants should be that of the principal debtor and that the defendants had renounced all rights in law to which sureties may be entitled to and agreed that they could be sued jointly and / or severally.

Amaradasa Liyanage having defaulted payment the plaintiff states that letters of demand were sent to Amaradasa Liyanage and to the 1<sup>st</sup> and the 2<sup>nd</sup> defendants. Liyanage as well as the defendants had failed and neglected to respond. The plaintiff claims that after deducting payments made by Liyanage to the plaintiff a sum of Rs.9.596.822.76 was due to the plaintiff as at 30.6.2004 and a cause of action has arisen to recover the said sum from the defendants.

Order nisi was entered on 23.7.2004 requiring the defendants to show cause as to why it should not be made absolute after obtaining leave of court first. The 1<sup>st</sup> defendant had filed a petition and an affidavit and sought leave to defend the action unconditionally. The court after inquiry had made order requiring the 1<sup>st</sup> and 2<sup>nd</sup> defendants to deposit 1/3<sup>rd</sup> of the claim, namely, a sum of Rs.3,198,940 within a period of two months. The 1<sup>st</sup> defendant filed this leave to appeal application to have the said order set aside and be granted unconditional leave. Leave to appeal was granted by this court on 27.1.2006.

Counsel for both parties thereafter invited court to make an order with regard to the appeal on written submissions.

**“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 (Asoka De Silva J (later Chief Justice) in N.D.B. vs. Chrys Tea (Pvt.) Ltd. and Another (2000) 2 Sri L.R.206) (emphasis added).

The 1<sup>st</sup> defendant sought leave to appear and defend the action unconditionally. **If he seeks to apply for leave to appear unconditionally, he has to file an affidavit which (a) deals specifically with the plaintiff’s claim, (b) sets out his own defence to the plaintiff’s claim and (c) states the facts he relies on to support his defence** (emphasis added) (Ranaraja J in W.K.M.D. Perera vs. People’s Bank (1994) 2 Sri L.R. 344 at 346), s. 6 (2) of DRA, People’s Bank vs. Lanka Queen Int’l Pvt. Ltd. (1999) 1 Sri L.R. 233).

The 1<sup>st</sup> defendant denied in the petition and the corresponding affidavit the averments contained in all the eighteen paragraphs of the plaint. The 1<sup>st</sup> defendant stated that he has a strong defence and moved that he be allowed to file objections unconditionally. In the petition filed in the District Court the 1<sup>st</sup> defendant claimed that the plaintiff cannot have and maintain this action for the reason that:

- The plaint does not disclose a cause of action.
- The plaint is contrary to the provisions of the DRA.
- The plaint is contrary to the directions set out by S. 40 (d), 42, 43, 46 (2) and 50 of the CPC.
- The affidavit tendered is defective.
- The plaintiff cannot have and maintain this action in terms of the DRA.
- The statements of accounts tendered are not duly certified.
- The amount has been wrongly calculated.
- The guarantee bond is not properly stamped.
- The stamps affixed not cancelled.
- The plaint does not accompany the loan agreement.
- No written agreement involving the loan.
- No valid demand made.
- The plaint does not state that the amount claimed is justly due.
- The statement of accounts filed does not give dates as to when the monies were released. It does not specify the document on which the money was released; It does not specify the payments of installments or how these installments were credited. (How much as interest and how much to the capital etc.) It does not specify how the amount claimed was arrived at.

The 1<sup>st</sup> defendant does not deal with the plaintiff's claim. The plaintiff's claim refers to a loan granted to one Liyange while the 1<sup>st</sup> and the 2<sup>nd</sup> defendants stood surety. Without specifically dealing with the plaintiff's claim, the 1<sup>st</sup> defendant has taken a large number of technical defences. **“Section 6 (2) (c) of DRA expressly provide for the affidavit of the defendant to deal specifically with the plaintiff's claim and his defence thereto and what facts are being relied on in support thereof. The defendant has to deal with the plaintiff's case on its merits. It is not competent for the defendant to merely set out technical objections. It is also incumbent on the defendant to reveal his defence, if he has any. Mere technical objections and evasive denials will not suffice. The purpose of section 6 of the Act is to prevent frivolous or untenable defences**

**being set up and to avoid the lengthening of proceedings by dilatory tactics”**

(Wijeratne J in Ramanayake vs. Sampath Bank (1993) 1 Sri L.R. 145 at 153) (emphasis added).

I find that the affidavit filed by the 1<sup>st</sup> defendant is not in accordance with section 6 (2) of the DRA. I am of the view that the affidavit filed by the 1<sup>st</sup> defendant fails to meet the requirements set out in section 6 (2) of the DRA and should be rejected. I direct the learned District Judge to take steps in terms of Section 6 (3) of the DRA and make the decree nisi absolute. The appeal is dismissed with costs.

Judge of the Court of Appeal

K.T. Chitrasiri J

I agree

Judge of the Court of Appeal