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

In the matter of an application for Restitutio-in-Integrum under Article 138 of the Constitution of the Republic of Sri Lanka

CA (RII) 09/2020

DC Colombo Case No:

DDR/25/2019

E.T.I. Finance Limited

Principle place of business

No. 114, Ward Place,

Colombo 07.

Registered Office

No.122, Ward Place,

Colombo)7.

Plaintiff.

Vs.

Meegodage Manjula Asiri Deepal

Suraweera

Batupitigama,

Wariyapola.

Defendant

And Now

Meegodage Manjula Asiri Deepal

Suraweera

Batupitigama,

Wariyapola.

Defendant-Petitioner

Vs.

E.T.I. Finance Limited
Principle place of business
No. 114/ Ward Place,
Colombo 07.
Registered Office
No.122, Ward Place,
Colombo)7.

Plaintiff.-Respondent

Before: **D.N. Samarakoon, J.**
B. Sasi Mahendran, J.

Counsel: S.N. Vijithsingh for the Defendant-Petitioner.
K.Wasantha S. Fernando with K.Dharmaratnam for the Plaintiff-Respondent

Argued On : 01.02.2023

Decided On : 04.04.2023

B. Sasi Mahendran, J.

This is an application invoking the extraordinary restitutionary jurisdiction of this Court in terms of Article 138(1) of the Constitution. The Defendant-Petitioner (hereinafter referred to as "the Petitioner") seeks, *inter alia*, to set aside the orders of the District Court of Colombo dated 16th January 2020 ("**X5**") and 12th March 2020 ("**X6**") in case bearing No. DDR/25/2019 by which the learned District Judge required the Defendant-Petitioner to pay into court the sum mentioned in the decree nisi and made the decree nisi absolute, respectively.

The factual matrix, in brief, is as follows. The Plaintiff -Respondent (hereinafter referred to as "the Respondent") instituted an action (by Plaint dated 14th January 2019 – "**X1**") in the District Court of Colombo under the provisions 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. 5,743,813.76/- together with interest owed to it by virtue of a loan agreement ("**B**" on page 98 of the Brief) entered on the 31st of August 2015 between the Petitioner and the Respondent. On being satisfied that the Respondent met the prerequisites to institute this action and the contents of the Plaint, the Court duly entered a decree nisi on 16th May 2019. The Petitioner filed an application for leave to appear and show cause ("**X2**"). The inquiry about whether to permit the Petitioner to appear and show cause was disposed of by way of written submissions. The learned Judge by the impugned order dated 16th January 2020 ("**X5**") directed that the Petitioner pays into court the sum mentioned in the decree nisi. As depicted in the journal entry dated 12th March 2020 ("**X6**") the decree nisi was made absolute when the Petitioner failed to do so.

The Petitioner's main grievance is that as the Petitioner had already mortgaged his property to the Respondent, the Respondent is disentitled to resort to the provisions of the Debt Recovery Act and action ought to have been instituted under the Mortgage Act No. 6 of 1949, as amended, to claim its debt. The learned Additional District Judge overruled the said objection and directed the Petitioner to pay into court the sum mentioned in the order nisi. When the Petitioner failed to do so, the decree nisi was made absolute. It is against these orders that the present application is filed.

At the argument, the Petitioner raised the following grounds against the said order. Firstly, the learned District Judge did not set out the date on which the security was to be deposited by the Petitioner, for him to appear and show cause. Secondly, as aforesaid, the Petitioner had already mortgaged his property to the Respondent, and as such, the Respondent is disentitled to seek refuge within the provisions of the Debt Recovery Act. Thirdly, the affidavit tendered along with the Plaint was not in conformity with the law since it was not tendered by the "principal officer".

Date to deposit security

It is true that the order ("**X5**") does not indicate the date for payment on the face of it. However, a perusal of the journal entries makes it apparent when the sum should have been paid into court. The journal entry dated 16th January 2020 (the day on which the impugned "**X5**" order was delivered) reads:

"නියෝගය ප්‍රකාශ කරමි.

නියෝගය පරිදි මුදල් තැන්පත් කල පසුව හේතු දැක්වීමට ....අවසර දෙමි.

12.03.2020"

The next date on which the matter was to be called is spelled out as 12th March 2020. On this date (12th March 2020), the journal entry "**X6**" notes that the Petitioner was represented by his registered Attorney-at-Law, who appeared for him previously, even on the date on which the impugned "**X5**" order was delivered. It is beyond controversy that the date before which the deposit of the security was to be made is apparent on the face of the record; a record which had the Petitioner acted diligently, would have been conveniently discoverable. The Petitioner cannot claim to be unaware. The Petitioner was represented by way of proxy, signifying an obligation to honour Court's direction.

The impugned order makes it explicit that the Petitioner could not "appear and show cause" unless that condition of depositing security was adhered to.

In People's Bank v. Lanka Queen International Private Limited [1999] 1 SLR 233 his Lordship De Silva J. observed that when an application is made for leave to appear, the Court must decide on one of the three alternatives in Section 6(2). These are:

"(a) the court may order the defendant to pay into court the sum mentioned in the decree Nisi. Thus, even where the requirements as stated above are complied with, the court has the power and the authority to order the defendant to pay the full sum mentioned in the decree Nisi before permitting the defendant to appear and defend.

(b) Alternative to (a) above, the court can order the defendant to furnish security which, in the opinion of the court is reasonable and sufficient to satisfy the decree Nisi in the event it being made absolute. The difference between this provision and the (a) above is that instead of paying the full sum mentioned in the decree Nisi, it will be sufficient for the defendant to furnish security, such as banker's draft, and then defend the action.

(c) the third alternative is where the court is 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 of issues or otherwise permit the defendant to defend the action. Thus, it is imperative that before the court acts on section 6 (2) (c) it has to be satisfied;

i. with the contents of the affidavit filed by the defendant;

ii. that the contents disclose a defence which is prima facie sustainable; AND

iii. determine the amount of security to be furnished by the defendant, and permit framing and recording of issues or otherwise as the court thinks fit."

The impugned order ("**X5**"), required the sum ordered to be deposited in Court. Further, the Additional District Judge correctly exercised his discretion and concluded that the Petitioner was also unable to disclose a defence that is prima facie sustainable.

The extraordinary remedy of restitution is available only if the Petitioner could satisfy this Court of the existence of well-established grounds which have been propounded over the years. These grounds include fraud, false evidence, non-disclosure of material fact, deception, fresh evidence, and mistake. Nothing of which has been satisfactorily made out.

Selection of procedure

The Petitioner contends that the Respondent ought to have resorted to the provisions of the Mortgage Act and not the summary procedure set out in the Debt Recovery Act since the Petitioner's property has been mortgaged to the Respondent as security ("**B1**" on page 102 of the Brief).

There is nothing precluding the Respondent from instituting an action under the provisions of the Debt Recovery Act. The word "debt" is defined in Section 30 of the Act to mean:

> a sum of money which is ascertained or capable of being ascertained at the time of institution of the action and which is in default, **whether the same be secured or not** or owed by any person or persons jointly or severally or as principal borrower or guarantor or in any other capacity, and alleged by a lending institution to have arisen from a transaction in the course of banking, lending, financial or other allied business activity of that institution, but does not include a sum of money owed under a promise or agreement which is not in writing [emphasis added]

Recently, her Ladyship Murdu Fernando P.C. J. in Mahavidanage Simpson Kularatne v. People's Bank S.C. Appeal 04/2015 decided on 15.09.2020 having analysed case law which interpreted the term "debt" observed that the term is "very wide and covers many situations."

For the present purposes, the inclusion of the words "**whether secured or not**" makes it plain that "debt" can include situations as agitated in the present application, where the Petitioner has mortgaged his property to the Respondent.

If a party has two remedies given to him by law, the existence of one will not prevent his taking advantage of the other, particularly if the latter remedy is likely to be more prompt and certain than the former (vide In the Matter of the Application of John Ferguson for a Writ of Prohibition against the District Judge of Colombo [1874] 1 NLR 181).

The purpose of enacting the Debt Recovery Act, and a reason why creditors would take advantage of the provisions of this Act is understood when reading the Special Determination of the Supreme Court on the Debt Recovery (Special Provisions) Bill. In SC Special Determination No. 1/90 (reported in 'Decisions of the Supreme Court on Parliamentary Bills' 1990 – Volume VI page 3) the Supreme Court held (on page 5):

"It needs to be emphasized that legal provisions for the expeditious recovery of debts-not before they fall due, but after default by the borrowers- by banking and financial institutions are not burdens or punitive measures imposed on borrowers. Expeditious debt recovery is, in the long-term, beneficial to borrowers in general for at least two reasons. Firstly, expeditious repayment or recovery of debts enhances the ability of lending institutions to lend to other borrowers. Secondly, the Law's delays in respect of debt recovery, howsoever and by whomsoever caused, tend to make lending institutions much more cautions and slow in lending: by refusing some applications, by requiring higher security from some borrowers, and by insisting on more stringent terms as to interest from other borrowers. Expeditious debt recovery will thus tend to make credit available more readily and on easier terms, and will maximize the flow of money in to the economy. Undoubtedly, there is a legitimate national interest in expediting the recovery of debts by lending institutions engaged in the business of providing credit, and thereby stimulating the national economy and national development. The objections to the constitutionality of the Bill must be considered in that context."

In the light of the purpose for which this Act was introduced, it appears that the Respondent has a choice of procedure.

The "principal officer" instituting the action

Section 30 of the Act defines principal officer in relation to an institution as:

a director, secretary or other officer not below the rank of a manager of such institution and shall include any other officer of such institution **specially authorized by such director, secretary or other officer net below the rank of a manager.** [emphasis added]

The Petitioner's contention that the Respondent does not have the authority to institute this action as the affidavit filed by the Respondent was not made by a principal officer, in terms of the law, does not hold water. The affidavit, accompanying the Plaint, is affirmed by one Yapa Appuhamilage Kemanthaka Hiranjan Dharmasena Yapa, who has been duly authorised to do so as per the document "**Y**" (on page 79 of the Brief). The National Identity Card Numbers of the person making the affidavit and the person who was authorised to affirm/sign the affidavit is one and the same. So long as there is lawful delegation and the officer concerned is personally aware of the cause of action so as to institute proceedings under the Debt Recovery Act, we are unable to find any controversy. The reason the law requires personal knowledge was eruditely laid out by his Lordship Amaratunga J. in Idress v. Union Bank of Colombo [2003] 3 SLR 220. His Lordship observed that such a person would be competent and capable to affirm the affidavit, unlike a person who did not possess personal knowledge.

In conclusion, therefore, we are careful not to assist a disgruntled litigant who has not been diligent, especially when such a litigant is seeking to invoke an extraordinary remedy.

This application is dismissed with costs.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL