DHARMAWANSA
VS.
PEOPLE'S BANK AND ANOTHER

COURT OF APPEAL.
SOMAWANSA.J (P/CA),
WIMALACHANDRA. J.
CA 269/2000(Rev.)
DC POLONNARUWA DR/13/96.
OCTOBER 01, 2003.
FEBRUARY 22, 2005.

Debt Recovery (Special Provisions) Act, No. 02 of 1990 amended by Act, No. 9 of 1994 section 5, section 13, section 13(1), section 16 - Decree nisi made absolute - Operates as a writ of execution - Civil Procedure Code section 225(3), section 337 - No right of appeal against decree absolute ? - Is the writ of execution valid only for three years ? - Is the decree absolute valid for only 3 years ? - Procedure to be followed when the writ is not executed within the 3 year period ? - Inherent power of Court to reissue writ.

The plaintiff-respondent (Bank) instituted action under the provisions of the Debt Recovery Law. The Court entered decree *nisi*. The 1st defendant-petitioner's objections to the decree *nisi* being made absolute were rejected and decree *nisi* was made absolute on 13.11.1996. The 1st defendant-petitioner appealed against the said order. The Court issued the writ of execution of the decree on 01.03.2000.

The defendant-petitioner moved in revision and contended that –

(1) A writ of execution is automatically stayed once an appeal is filed.

(2) When the decree *nisi* was made absolute - which is deemed to be a writ of execution - it is valid only for a period of three years from the date of decree absolute (13.11.1996).

HELD:

(1) In terms of section 13(1) of the Act it is specifically stated that where a decree *nisi* entered in an action instituted under the Debt Recovery Act is made absolute, it should be deemed to be a writ of execution duly issued to the fiscal in terms of section 225 of the Civil Procedure Code.

(2) Section 13(1) of the Act states that notwithstanding anything to the contrary in any other written law, the execution of same shall not be stayed.

(3) The provisions of the Act do not provide for an express right of appeal ; however section 16 has recognized the right to make an application for leave to appeal from an order made in the course of any action instituted under the Act-in terms of section 16 where leave is granted the proceedings in the District Court shall not be stayed, unless the Court of Appeal directs otherwise.

(4) Nowhere in the Debt Recovery Act does it say that the decree absolute is valid only for three years.

(5) Section 13(2) states that the writ of execution - section 13(1) - shall be valid for a period of three years from the date on which the decree *nisi* was made absolute; it does not mean that the decree absolute is valid only for three years. It means that the writ of execution is valid for three years. Every decree is valid till it is set aside by the Appellate Courts.

(6) According to section 13 the procedure applicable to execution of writs under the Debt Recovery Act is the Civil Procedure Code. Therefore after the lapse of three years, the plaintiff can make an application for re-issue of the writ to the fiscal. The Court has inherent power to re-issue the writ if the writ is not executed within the time allowed for execution.

(7) There is nothing in the Civil Procedure Code which prevents a subsequent application for the execution of the writ.

(8) In the instant case decree absolute was entered on 13.11.1996. The fiscal did not execute the writ within the period of three years. The plaintiff thereafter made an application on 09.02.2000 to get the writ executed-the defendants were fully aware of this application. There is no illegality in the said order allowing writ.

APPLICATION in revision from an order of the District Court of Polonnaruwa.

Cases referred to :

1. *Gurusamy Pulle vs. Mera Lebbe*- 17 NLR 467
2. *Samad vs. Zain - Bar Journal* 1981 Vol. 1 - page 196.

K. S. Tilakaratne for 1st defendant-appellant-petitioner.
Rohan Sahabandu for plaintiff-respondent-respondent.

Cur.adv. vult.

April 28, 2006.

WIMALACHANDRA, J.

This is an application in revision filed by the 1st defendant-petitioner (1st defendant) from the order of the learned District Judge of Polonnaruwa dated 01.03.2000.

The plaintiff-respondent bank (plaintiff), instituted action under the provisions of the Debt Recovery (Special Provisions) Act, No. 2 of 1990 as amended by Act No. 9 of 1994. It is common ground that the 1st defendant sought a loan of Rs. 800,000 on 14.10.1994 which was granted by the plaintiff-bank. As security the 1st defendant gave a promissory note. Admittedly the 1st defendant failed to re-pay the loan he borrowed from the plaintiff-bank. The bank filed action under the Debt Recovery Act to recover the said loan.

The Court entered the decree *nisi* and ordered that it be served on the defendants in the manner provided in section 5 of the aforesaid

Debt Recovery (Special Provisions) Act. On receipt of the copy of the decree *nisi* the 1st defendant filed petition and affidavit to obtain leave from Court to appear and show cause against the decree. It is to be noted that the 1st defendant has not filed in the Court of Appeal a copy of his petition and affidavit filed by him in the District Court to obtain leave from Court to appear and show cause and also he has not filed the proceedings of the inquiry held in respect of the application made by him to obtain leave to appear and show cause against the decree *nisi* entered against him. Furthermore, he has not filed the copies of the relevant journal entries in the District Court record as well.

It appears that the learned Judge had considered the affidavit of the 1st defendant in making the impugned order. I am of the view that the petition and affidavit filed by the 1st defendant in the District Court are necessary to understand the order made by the learned Judge on 13.11.1996. The learned Judge having perused the objections raised by the 1st defendant by his petition and affidavit had overruled them and had also made the observation that the defendants have admitted that they have obtained the loan facilities from the plaintiff bank and also the admission made by them that they have failed to repay the loan facilities. The learned Judge after considering the objection raised by the defendants in their affidavits had overruled them and made the decree *nisi*, absolute by his order dated 13.11.1996. In terms of section 13 of the Debt Recovery (Special Provisions) Act as amended by Act, No. 9 of 1994, once the decree *nisi* is made absolute it is deemed to be a writ. Section 13(1) of the Debt Recovery (Special Provisions) Act as amended by Act, No. 9 of 1994 states as follows :

> ***"Subject to orders of Court where a decree nisi entered in an action instituted under this Act is made absolute, it shall be deemed to be a writ of execution duly issued to the Fiscal in terms of section 225(3) of the Civil Procedure Code and notwithstanding anything to the contrary in any other written law, the execution of the same shall not be stayed."***

Therefore it is clearly seen that once the decree *nisi* is made absolute it shall operate as a writ of execution duly issued to the Fiscal in terms of section 225(3) of the Civil Procedure Code. In the circumstances, all the material placed before the learned Judge which would have influenced the learned Judge to make the order *nisi,* absolute are necessary to understand the order canvassed by the 1st defendant and to place it in its proper context. In this application the 1st defendant has challenged the order issuing the writ. As I stated above the 1st defendant has failed to file copies of the petition and affidavit filed by him to show cause against the decree *nisi* which are necessary documents to understand the impugned order.

In the instant case the 1st defendant has not even made any attempt to comply with Rule 3(1), at least by furnishing certified copies of the aforesaid documents. Accordingly, in my view on this ground alone the 1st defendant's application should be dismissed.

The 1st defendant has appealed against the order dated 13.11.1996 whereby the decree *nisi* was made absolute. The Court issued the writ of execution of the decree, on 01.03.2000. It is against this order, this application in revision has been filed.

The 1st defendant in his written submissions has taken the following grounds of objections :—

(1) A writ of execution is automatically stayed once an appeal is filed.

(2) When the decree *nisi* is made absolute, which is deemed to be a writ of execution, it is valid only for a period of three years from the date on which the decree *nisi* was made absolute.

I shall now examine the aforesaid grounds of objections raised by the 1st defendant. In terms of section 13(1) of the Debt Recovery (Special Provisions) Act as amended by Act, No. 9 of 1994 it is

specifically stated where a decree *nisi* entered in an action instituted under this Act is made absolute, it shall be deemed to be a writ of execution duly issued to the Fiscal in terms of section 225(3) of the Civil Procedure Code. That means the decree absolute operates as a writ of execution. Section 13(1) of the Act further states that nowithstanding anything to the contrary in any other written law, the execution of the same shall not be stayed.

It is to be observed that the provisions of the Act do not provide an express right of appeal to a party aggrieved by a decree absolute entered by Court. However, section 16, as amended by Act, No. 9 of 1994 has recognized the right to make an application for leave to appeal from an order made in the course of any action instituted under the Act. In terms of section 16, notwithstanding anything to the contrary in any other law, where leave to appeal is granted on an application made in respect of an order made in the course of any action instituted under this Act, proceedings of the original Court shall not be stayed unless the Court of Appeal directs otherwise. In the circumstances the 1st defendant's contention that once an appeal is lodged the writ is stayed is entirely misconceived.

The next complaint of the 1st defendant is that in terms of section 13(2) of the Act the writ of execution referred to in section 13(1) is valid only for a period of three years from the date on which the decree *nisi* was made absolute. Accordingly, the 1st defendant contends that the writ of execution had lapsed as from 12.11.1999 as the decree *nisi* had been made absolute on 13.11.1996. This contention of the 1st defendant is untenable for the following reasons.

Nowhere in the Debt Recovery (Special Provisions) Act does it say that the decree absolute is valid only for three years. When section 13(2) states that the writ of execution referred to in section 13(1) shall be valid for a period of three years from the date on which the decree *nisi* was made absolute it does not mean that the decree absolute is valid only for three years. It means that the writ of execution is valid for 3 years. Every decree is valid till it is set aside by the Appellate Courts.

According to section 13 of the Act, it seems to me that the procedure applicable to execution of writs under the Debt Recovery (Special Provisions) Act is the Civil Procedure Code. Therefore after the lapse of three years the plaintiff can make an application for re-issue of the writ of the Fiscal. The Court has the inherent power to re-issue the writ if the writ cannot be executed within the time allowed for execution. There is nothing in the Civil Procedure Code which prevents a subsequent application for the execution of the writ. It was held in the case of ***Guruswamy Pulle*** **vs.** ***Meera Lebbe***[1] that when a writ cannot be executed within the time allowed for execution by the Court, the proper course is for the Fiscal or the execution-creditor to move for and obtain an extension of time rather than for the Fiscal to return the writ to Court and to secure a re-issue thereof. It was also held that the Court has inherent power to extend the time fixed for the execution of its own process.

In the instant case the decree absolute was entered on 13.11.1996 which decree was a writ of execution issued to the Fiscal and it remained to be executed for three years. However, the Fiscal did not execute the writ within the period of three years. Hence the plaintiff made an application on 09.02.2000 to get the writ executed. When this application was made all three defendants were present in Court and were represented by their Attorney-at-Law. (*Vide* J. E. No. 12 dated 09.02.2003). Accordingly, the defendants were fully aware of the application made by the plaintiff to get the writ executed by the Fiscal. It appears that when the aforesaid application was made by the plaintiff, the defendants did not challenge the said application. Where an application for writ is allowed once, but no writ is taken out, a subsequent application could be made for the execution of the writ in terms of the provisions of section 337 of the Civil Procedure Code. It was held in ***Samad*** **vs.** ***Zain***[2] that section 337 has to be broadly interpreted and should not be interpreted unduly harshly so as to deny relief for judgment creditor.

In these circumstances, I am of the view that there is no illegality in the order made by the learned District Judge and in the present case

there are no exceptional circumstances disclosed for relief to be granted by way of revision. Revisionary powers should normally be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated. In the present application, I cannot see any miscarriage of justice that has occurred which would have caused a denial of justice to the 1st defendant.

For these reasons, I dismiss the 1st defendant's application in revision with costs fixed at Rs. 15,000.

ANDREW SOMAWANSA, J. (P/CA). – *I agree.*

Application dismissed.