
EKANAYAKE AND OTHERS
VS
PEOPLES BANK

COURT OF APPEAL
WIJAYARATNE, J.
SRISKANDARAJAH J.
C. A./WRIT/APP. NO. 1655/2002 (WRIT)
JULY 23, 2004

Peoples Bank Act 29 of 1961 - amended by Act 32 of 1986 - Sections 5, 29D, 29M - Quantum recoverable challenged - Does the error on the calculation of quantum affect the jurisdiction of the Bank to act under Section 29D?

The Respondent Bank sought to parate execute the property mortgaged. The Petitioner disputed the quantum recoverable and sought to quash the Resolution of the Bank to auction the property mortgaged on that ground.

HELD:

- (i) The facts disputed are on the quantum recoverable. The error on the calculation of quantum will not affect the jurisdiction of the Bank to act under Section 29D.

per Sriskandaraja, J.,

"The calculation of the sum recoverable by the Respondent Bank from the Petitioners is a matter of fact. In these proceedings the Court cannot ascertain the correctness of the sum recoverable from the Petitioners without evidence."

- ii. Under Section 29M the Respondent Bank is only entitled to recover the sums of money that is legally due and should return to the petitioners the balance of the proceeds of Sale.

APPLICATION for a Writ of Certiorari.

Cases referred to :

1. *R vs Fulham etc., Rent Tribunal exp. Zerek - 1951 2 KB 1*
2. *R vs Home Secretary exp. Zamir - 1980 AC 930 at 949*

*G. I. T. Alagaratnam with M. Adamaly for Petitioners.
Ronald Perera with Chandimal Mendis for the Respondent.*

March 28, 2005.

SRISKANDARAJAH J.

The 1st Petitioner is the owner of the land that was mortgaged to the Respondent bank, the 2nd Petitioner is the wife of the 1st Petitioner. The 3rd Petitioner is the mother of the 1st Petitioner who has a life interest in the property owned by the 1st Petitioner that was mortgaged to the Respondent bank. The Petitioners by this application are seeking a Writ of Certiorari to quash the resolution of the Board of Directors of the Respondent bank dated 29.11.2001 marked 24B to auction the property belonging to the 1st Petitioner under the powers of Parate Execution, for the recovery of a sum of Rs. 2,437,000 and interest thereon. This decision was communicated to the 1st Respondent by letter dated 20.12.2001 marked P24A. The 1st Petitioner in his affidavit attached to the petition admitted that as indicated in the said letter dated 20.12.2002 he along with one Mr. Bandara has met the Assistant General Manager of the Kurunegala branch of the Respondent bank and had discussed the matter with him in the presence of the Regional Manager and the Assistant Regional Manager. At this discussion, the 1st Petitioner admitted that he had informed them that he was prepared to pay the sum of Rs. 1.5 Million as full and final settlement. The 1st Petitioner stated that ignoring this offer the Respondent bank has published the resolution passed by the Board of Directors to auction the property which belongs to the petitioners in the Government Gazette dated 31.5.2002.

The Petitioner further submitted that the alleged loan of Rupees. 1.65 million sought to be recovered by the Respondent bank was never given to the petitioners and was a mere book adjustment by the Respondent bank for its own convenience. The Petitioners further submitted that the records and, correspondence of the Respondent bank established glaring contradictions in the sums claimed to be due and owing from the petitioner thus establishing the Petitioners' claim that there has been some misappropriation by the Respondent in respect of his account. The Petitioner's position is that the sum claimed in any event is not due in as much as the auditors of the Respondent bank themselves has confirmed that the outstanding debit balance in the 1st and 2nd Petitioners current account and loan account as being only Rs. 767,048.60 on 31.12.2000. The Petitioners also submitted that the Respondent bank is clearly guilty

at the very least for commercial unreasonableness in purporting to compound interest with capital.

The Respondents position is that the 1st and 2nd Petitioners maintained current account No. 4069 at the Kuliypitiya branch of the Respondent bank since 24.2.1998. The Petitioners requested a loan facility amounting to Rs. 1,650,000. This is borne out by documents marked R2, R2(a), R2(b), R4, R5 and R5(a). The Respondents further submitted that these loan facilities were granted in two stages and separate mortgage bonds were executed with regard to the same facility. The 3rd Petitioner has signed all the said mortgage bonds as the life interest holder of the said property. The Respondents submitted that the Petitioners have admitted that they have received the facilities and that they have failed and neglected to pay the said amounts granted by the Respondent bank. The Petitioners were granted several opportunities to repay the said facilities and since they continually failed and neglected to repay the said amount, the Board of Directors of the Respondent Bank passed the resolution dated 29.11.2001 to auction the property by Parate Execution. The Respondent also took up the position that the decision of the Board of Directors to sell the property of the Petitioners by Parate Execution is not amenable to Writ Jurisdiction.

It is an admitted fact that the petitioners mortgaged the properties that are mentioned in the resolution marked as P24B to the Respondent bank. The Respondent is a statutory body incorporated as a Bank by the People's Bank Act No. 29 of 1961. The powers and functions of the Respondent Bank are stipulated in Section 5 of the said Act. This section enables the Respondent to inter alia carry out commercial banking activities. By the People's Bank Amendment Act No. 32 of 1986 the Respondent Bank was empowered with the right of Parate Execution of mortgaged property, to facilitate the recovery of moneys in default in circumstances where loans/overdrafts are secured against the mortgage of property.

Section 29D provides :

"Subject to the provisions of section 29E, the Board may by resolution to be recorded in writing authorize any person specified in the resolution to sell by public auction any immovable or movable property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover the whole of the unpaid portion of such

loan, and the interest due thereon up to the date of the sale together with the moneys and costs recoverable under Section 29L....."

Under the above provision, the Respondent bank is legally entitled to pass a resolution to sell a property that was mortgaged to the bank as security to recover the unpaid portion of the loan.

It is an admitted fact that the Petitioner obtained an over draft facility of Rs. 750,000 secured by mortgage bond No. 7082 marked P3, a loan facility of Rs. 900,000 secured by a mortgage bond No. 7190 marked P4, an overdraft facility of Rs. 500,000 secured by mortgage bond 8180 marked P 7 and overdraft facility of Rs. 60,000 secured by mortgage bond No. 950 marked P9. The dispute between the Petitioners and the Respondent is in the quantum of the sum of money due to the bank that was secured by these mortgage bonds. Even though the Petitioner took up the position that the alleged loan of Rs. 1,650,000 sought to be recovered by the Respondent bank was never given to the Petitioner and was a mere book adjustment by the Responded bank for its own convenience.

The Petitioner admitted that the auditors of the Respondent bank confirmed an outstanding debit balance in the 1st and 2nd Petitioner's current account and the loan account as being Rs. 767,048.60 on 31.12.2000. The Petitioner has also informed the Respondents as borne out in the affidavit of the 1st Petitioner that they are prepared to pay a sum of Rs. 1.5 million as full and final settlement. The Respondents submits that as the Petitioners have failed and neglected to make payments as undertaken by them in the loan agreement, the said facilities were transferred as past dues, penal interest was calculated and resolution was passed to recover the total sum due from the petitioners.

The facts disputed in this case are on the quantum recoverable. The error on the calculation of quantum will not affect the jurisdiction of the bank to act under Section 29D of the People's Bank Amendment Act. As there is material to show that the property of the Petitioner was mortgaged to the Respondent bank as security for loan and default has been made by the petitioner to settle the loan the Respondent Bank is empowered to recourse to Parate Execution under Section 29D.

The calculation of the sum recoverable by the Respondent Bank from the Petitioners is a matter of fact. In these proceedings, the Court cannot

ascertain the correctness of the sum recoverable from the Petitioners with out evidence.

Administrative Law by H. W. R. Wade and C. E. Forsyth, (Ninth Edition on page 260) the authors states as follows :

"Although the contrast between questions which do and do not go to jurisdiction was in principle clear-cut, it was softened by the court's unwillingness to enter upon disputed questions of fact in proceedings for judicial review. Evidence of facts is normally given on affidavit : and although the rules of court made provision for cross examination, interrogatories, and discovery of documents, and for the trial of issues of fact, the court did not often order them. The procedure was well adapted for trying disputed facts. If the inferior tribunal had it self tried them, 'the court will not interfere except upon very strong grounds. There has to be a clear excess of jurisdiction' with out the trial of disputed facts *de novo*. The questions of law and questions of facts were therefore to be distinguished, as was explained by Devlin J. (*R. v Fulham etc. Rent Tribunal exp. Zerek*).

Where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the court should determine it then and there. But where the dispute turns to a question of fact, about which there is a conflict of evidence, the court will generally decline to interfere.

Lord Wilberforce (*R v Home Secretary exp Zamir*⁽²⁾) similarly described the position of the court, which hears applications for judicial review :

It considers the case on affidavit evidence, as to which cross-examination, though allowable does not take place in practice. It is, as this case will exemplify, not in a position to find out the truth between conflicting statements.

In case of conflict of evidence, the court will not interfere in the decision, where there is evidence to justify a reasonable tribunal reaching the same conclusion."

In any event under Section 29M of the People's Bank (Amendment) Act the Respondent bank is only entitled to recover the sums of money that is legally due to the respondent and should return to the Petitioners the balance of the proceeds of the sale. The dispute is in relation to the quantum of the sum recoverable from the Respondents on the mortgage

bonds executed and as this is a question of fact this Court is not inclined to interfere with the decision of the Board of Directors of the Respondent Bank. Therefore this application is dismissed without costs.

WIJAYARATNE, J. - I agree.

Application dismissed.
