

**GOOD FELLOWS (Pvt.) LTD**  
**v**  
**PEOPLE'S BANK**

COURT OF APPEAL  
SRISKANDARAJAH, J.  
CA 546/2004  
AUGUST 11, 2005  
OCTOBER 14, 2005  
NOVEMBER 6, 2006  
JANUARY 8, 11, 2007

*Writ of Certiorari – Parate Execution – People's Bank Amendment Act, No. 32 of 1986 – Appropriation of payments – Secured and unsecured debts – Agreement between parties? – Question of disputed facts – Conflict of evidence – Does writ lie?*

The petitioner company sought by way of writ of certiorari to quash the decision of the Bank to sell by parate execution the mortgaged property. The petitioner had also obtained overdraft facilities and export trust facilities.

The petitioner had sought permission from the respondent Bank to make monthly payments of US\$ 100,000/- in favour of the short term loan with a view of settling this facility which was secured by the mortgage of property. The respondent contending that there was no such agreement appropriated the payments to a set off against unsecured liabilities, and passed a resolution to sell the mortgaged property by parate execution.

The petitioner challenged the said decision, to parate execute the property mortgaged, as there was an agreement, that, the payments would be appropriated against the mortgage.

It was the contention of the respondent that there was neither a specific request by the petitioner nor an agreement reached between the parties with regard to the appropriation of payments, and as a prudent banker the respondent has applied the funds firstly, in reduction of unsecured liability.

**Held:**

- (1) Whether there was an agreement or not at the time of making the payments and the question whether all things are equal in the given circumstances to consider the interest of the debtor more favourably, more than that of the creditor are matters of fact and these facts are in dispute.
- (2) Where the question depends solely on a disputed question of fact about which there is a conflict of evidence, Court will not interfere as it cannot be determined in writ proceedings.

**APPLICATION for a Writ of Certiorari.****Cases referred to:**

1. *Fernando v Fernando* 55 NLR 465.
2. *Ramanathan Chetty v Sarkuman* 15 NLR 335.
3. *Cracklaw v Clements* 12 NLR 67.
4. *R. v Fullham etc Rent Tribunal Exp. Zerek* 1951 1 KB 1.
5. *R. v Home Secretary exp Zamir* 1980 AI 970 at 949.
6. *E.M. Mahishpniya Ekanayake and two others v People's Bank CA* 1655.2002 C.A.M. 28.3.2005.

*M.U.M. Ali Sabry with S.M. Gadafei* for petitioner.

*S.J. Mohideen with Visaka Gunapala* for respondent.

*Cur.adv.vult.*

March 22, 2007.

**SRISKANDARAJAH, J.**

The Petitioner is a Company limited in liability incorporated under the Company Laws of Sri Lanka. The petitioner Company is registered in terms of the Board of Investment of Sri Lanka Law No. 40 of 1978. The petitioner company engaged in the business of exporting garments in a mass scale abroad, especially to the United States of America.

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.

The petitioner submitted that the petitioner has maintained business relationship with the respondent Bank which *inter alia* includes maintaining current accounts, obtaining over draft facilities and bank loans of special nature such as Short Term Loan facilities (STL) and Export Trust Receipts facilities (ETR).

The petitioner to obtain Short Term Loan facilities (STL) entered into the following mortgage bonds:

Mortgage Bond bearing No. 1790 dated 9th January 1996 attested by Gnana Ekanayake N.P. the petitioner pledged and/or mortgaged the property described in the 1st Schedule to the petition in favour of the respondent Bank to the value of maximum sum of US\$ 165,000 equivalent to Sri Lankan Rs. 8.085,000/- (P3 & P4).

Mortgage Bond bearing No. 1977 dated 13th September 1996 attested by Gnana Ekanayake N.P. the petitioner pledged and/or mortgaged the lease hold rights of the property described in 2nd Schedule to the Petition in favour of the respondent Bank up to a maximum sum of US\$ 177,000 equivalent to Sri Lankan Rs. 9.872,000/- (P5).

The petitioner to obtain Export Trust Receipt facilities (ETR) submitted in mortgage certain machineries in favour of the respondent Bank up to a maximum sum of US\$ 280,000. By Mortgage Bond bearing No. 1999 dated 8th October 1996 attested by Gnana Ekanayake N.P. (P6).

The petitioner submitted that as a result of the set backs experienced by the petitioner company it could not service the loan facilities granted by the respondent Bank in terms of the payment schedules agreed upon between the parties. The petitioner submitted that as at 31st July 2000 a sum of US\$ 542,430 was due to the respondent Bank from the petitioner on the said Short Term Loan Facility. The respondent's letter addressed to the petitioner is annexed as P7 which indicates that the present capital outstanding on rescheduled Short Term Loan as US\$ 542,430, the total capital out standing as US\$ 6,348,859 and accumulated interest up to 31.07.2000 is US\$ 762,842. The petitioner in response to the above letter by its letter dated 15.8.2000 (PS) sought permission to make monthly payment of

US\$ 100,000/- in favour of the Short Term Loan with a view to settling the said STL facility, the respondent denied the receipt of the letter of 15.08.2000 (PS). The respondent contended that it was neither agreed verbally nor in writing to apply funds in reduction of Short Term Loan facilities. As set out in the said offer letter all facilities were amalgamated except for unpaid L/C Bill liability and recoveries made. Consequent upon the stoppage of settlement of facilities by the petitioner the facilities were segregated and the amounts recovered were set off against unsecured facilities. The respondent contended that having requested the petitioner to settle its liabilities and upon their failure or in the absence of any meaningful attempt by the petitioner to repay, having sent a registered letter dated 12.9.2001 a resolution dated 30.08.2002 was passed for recovery of a sum of US\$ 3,854,945.35 which matter was communicated to the petitioner by letter dated 10.09.2002 and the said Resolution was advertised in the newspaper of 6.11.2002 (P12).

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 authorise 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 sale together with the moneys and costs recoverable under Section 29 L...."

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.

The respondent submitted that there was neither a specific request by the petitioner nor an agreement reached between the parties with regard to the appropriation of payments. As a prudent Banker the respondent has applied the funds firstly, in reduction of unsecured liabilities.

According to the petitioner the thrust of the matter in issue is:

1. Was there an agreement between the parties at the time of making payments? or
2. If there was no agreement about it, what would be the law and rules applicable in respect of appropriation and in whose favour such appropriation stands?

In this regard the petitioner submitted C.G. Weeramanthry on Law of Contracts Vol. II page 676 paragraph 701:

"The Debtor's right to declare at the moment he makes payment which of his different debts he wishes to reduce is based on the Principle of Roman Dutch Law that "all things being equal, the interest of the Debtor must prevail over those of the Creditor."

The petitioner has also cited *Fernando v Fernando*<sup>(1)</sup>, *Ramanathen Chetty v Sarkuman*<sup>(2)</sup>, *Cracklaw v Clements*<sup>(3)</sup>. The respondent submitted that the cases referred to by the petitioner are based on certain principles laid down several decades ago when the laws in respect of Banking was quite different. The position in the cases cited were in respect of instances where in respect of one Mortgage moneys had been paid at different times without a clear indication of how it has to be appropriated, was it to be set off against interest or capital, or whether it helped to defeat prescription. The respondent contended that the petitioner has clearly stated that it has defaulted in payment owing to set-backs they suffered in their trading activities. The petitioner is falsely making the claim that it came to know for the first time only by letter dated 29.08.2002 that the US\$ 6000,000 paid by them had been appropriated to a different facility. This position has been denied by the respondent.

The main contest of the petitioner and the respondents are based on the agreement between the parties at the making the said payment of US \$6000,000. If there is no agreement as

learned author C.G. Weeramanthy stated on Law of Contracts Vol. II page 676 paragraph 701: "all things being equal, the interest of the Debtor must prevail over those of the Creditor". The question whether there was an agreement or not at the time of making the said payment and the question whether all things are equal in the given circumstances to consider the interest of the debtor more favourably than that of the creditor are matters of facts and these facts are in dispute.

In *R v Fulham etc. Rent Tribunal exp. Zerek*<sup>(4)</sup>, Devilin J., held:

"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 courts will generally decline to interfere".

In *R v Home Secretary exp Zamir*<sup>(5)</sup> at 949 Lord Wilberforce 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 *E.M. Maheshpriya Ekanayake and two others v People's Bank*<sup>(6)</sup> the court held:

"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 have 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 without evidence.

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.\*

In the instant case it is an admitted fact that the petitioner has mortgaged the relevant properties to the bank to secure the aforesaid loans and the Board of Directors of the Bank has passed a resolution to sell the said property as the petitioner has defaulted the payment of the said loan. Whether the petitioner has paid certain sums of money to the credit of the said loan accounts? Was there an agreement between the petitioner and the bank at the time of making the payment in dispute? Was the money paid to a particular account and it was appropriated to a different account of the petitioner with or without the consent of the petitioners? These are questions of fact. As the matters in dispute are questions of fact and it cannot be determined in these proceedings this court is not inclined to interfere with the resolution of the respondent Bank dated 27.11.2002 marked P22. Therefore the court dismisses this application without costs.

*Application dismissed.*