

**EAGLE BREWERIES LTD.**  
**v**  
**PEOPLE'S BANK**

COURT OF APPEAL  
ANDREW SOMAWANSA, J. (P/CA)  
WIMALACHANDRA, J.  
CA 586/2004  
DC CHILAW 709/MDR  
FEBRUARY 24, 2006

*Debt Recovery (Sp. Pro.) Act No.2 of 1990 Section 4(1), 4(2), 4(5) – Action based on cheques – Full sum to be deposited – Notice of appeal filed – Rejection of same by the District Court – Validity – Civil Procedure Code. Section 754(4), 754(3), 755 – a writing or document stipulated under Section 4 of the Debt Recovery Act? Revision – Exceptional circumstances.*

The plaintiff-respondent instituted action in terms of the Debt Recovery (Sp. Prov.) Act (DR Act) – action being based on 20 cheques. After inquiry on 3.12.2003 Court ordered the defendant to deposit the full sum claimed in the plaint to be entitled to file answer.

The petitioner lodged a notice of appeal which was rejected by the District Judge on 26.1.2004. The District Court also rejected the position of the defendant that, there was no agreement. The petitioner moved in revision and contended that the District Judge has no jurisdiction to reject the notice of appeal but could only record his observations as to whether or not there is a right of appeal against the judgment appealed against.

It was also contended that as there was no writing or documents on which the respondent can sue or on which the loan is said to have been granted, – the action cannot be maintained.

**Held:**

(1) In terms of the provisions contained in the Civil Procedure Code, with regard to tendering of notice of appeal, the relevant provisions do not permit or give authority to the District Judge to reject the notice of appeal on the basis that the petitioner is not entitled to a final appeal, it was the function of the Court of Appeal to look into this aspect of the matter.

- (2) Section 754(1) states that "if such conditions are not fulfilled the Court shall refuse to receive it – it refers to the requirements specified under Section 754(3) and 754(4) only and no other. It does not give jurisdiction to the District Judge to refuse the notice of appeal as he is of opinion that the order in question does not give rise to a final appeal.

Held further:

- (3) While it is conceded that statement of accounts and the cheques do not come within the meaning of instrument or agreement, the restricted interpretation sought to be given to an instrument or an agreement as being a document which contains a contract entered into between two or more parties is unacceptable. For a cheque or a statement of account from a Bank too could be considered to constitute a document that would contain a contract entered into between two parties.

Cheque drawn from a Bank and a statement of accounts from a Bank would come within the ambit of a document in terms of Section 4(1).

Held further:

- (4) Exercise of the revisionary powers of the appellate Court is confined to cases in which exceptional circumstances exist warranting intervention and revision is a discretionary remedy – No explanation has been given as to why he did not resort to his statutory right to seek relief from the 2nd order dated 3.12.2003.

**APPLICATION** in revision from an order of the District Court of Chilaw.

**Case referred to:**

- (1) *Dhamaratne and another v Palm Paradise Company Ltd. and others* 2003 3 Sri LR 24.

*Sunil Cooray* for petitioner.

*Ronald Perera* for respondent.

February 24, 2006

**ANDREW SOMAWANSA, J. (P/CA)**

In this revisionary application the defendant-petitioner is seeking to revise and set aside the orders of the learned District Judge of Chilaw dated 03.12.2003 holding that unless the defendant-petitioner deposits in Court the sum claimed in the plaint the defendant-petitioner is not entitled to file answer and to contest this action and the order dated 26.01.2004 rejecting the defendant-petitioner's notice of appeal. Defendant-petitioner further prayed for the dismissal of the plaintiff-respondent's action or in the alternative

an order granting unconditional leave to the defendant-petitioner to file answer and contest the action. The defendant-petitioner also supported and obtained a stay order staying proceedings in the District Court which have been extended from time to time.

After the pleadings were completed and when this application was taken up for argument both Counsel agreed to resolve the matter by way of written submissions and both parties have tendered their written submissions.

The relevant facts are: the plaintiff-respondent (hereinafter called the respondent) instituted the instant action in terms of provisions of the Debt Recovery (special provision) Act No. 2 of 1990 as amended seeking to recover Rs. 928,980/50 and interest at the rate of 32% per annum. The action is based on 20 cheques drawn by the defendant-petitioner (hereinafter called the petitioner) on his current account maintained at the respondent's Bank branch at Madampe and all of which had been honoured by the respondent Bank. The District Court issued *decree nisi* on the petitioner and the petitioner filed his objections supported by affidavit and moved that he be allowed leave to appear and defend unconditionally by filing answer to contest this action and that the *decree nisi* be dissolved. At the conclusion of the inquiry into this application made by the petitioner the learned District Judge by his order dated 03.12.2003 held that unless the petitioner deposits in Court the sum claimed in the plaint the petitioner will not be entitled to file answer or to contest this action. Being aggrieved by this order, the petitioner duly filed a notice of appeal in terms of Section 755(1) of the Civil Procedure Code. The respondent objected to the said notice of appeal being accepted and moved that the same be rejected. At the conclusion of the inquiry into the aforesaid objection the learned District Judge by his order dated 26.01.2004 rejected the petitioner's notice of appeal. It is the aforesaid two orders that the petitioner is seeking to revise and set aside.

As for the order rejecting the notice of appeal the same cannot stand for the learned District Judge has no jurisdiction to reject either a notice of appeal or a petition of appeal but could only record his observations as to whether or not there is a right of appeal against the judgment or decree appealed against.

At this stage it is useful to consider the relevant provisions in the Civil Procedure Code,

*Section 754(3) "Every appeal to the Court of Appeal from any judgment or decree of any original Court, shall be lodged by giving notice of appeal to the original Court within such time and in the form and manner hereinafter provided".*

- (4) *"The notice of appeal shall be presented to the Court of first instance for this purpose by the party appellant or his registered attorney within a period of fourteen days from the date when the decree or order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of public holidays, and the Court to which the notice is so presented shall receive it and deal with it as hereinafter provided. If such conditions are not fulfilled, the Court shall refuse to receive it".*

It is to be noted that the last sentence in 754(4) of the Civil Procedure Code which reads

'if such conditions are not fulfilled the Court shall refuse to receive it' refers to the requirement spelt out in Sections 754(3) and (4) only and no other. It does not give jurisdiction to the District Judge to refuse notice as he is of opinion that the order in question does not give rise to a final appeal as in the instant action.

Thereafter Section 755(4) and (5) comes into operations which reads as follows:

*755(4) "Upon the petition of appeal being filed, the court shall forward the petition of appeal together with all the papers and proceedings of the case relevant to the judgment or decree appealed against, as speedily as possible to the Court of Appeal retaining however an office copy of the judgment or decree appealed against, for the purposes of execution if necessary. Such proceedings shall be accompanied by a certificate from the Registrar of the Court of Appeal stating the dates of the institution of the decision of the case, in whose favour it was decided and the dates on which the notice and the petition of appeal were filed, and the opinion of the Judge as to whether or not there is a right of appeal against the*

*judgment or decree appealed against".*

- (5) *"On receipt of the petition of appeal, the Registrar of the Court of Appeal shall forthwith number the petition and shall enter such number in the Register of Appeals and notify the parties concerned by registered post.*

*Provided that when the judge of the original court has expressed an opinion that there is no right of appeal against the judgment or decree appealed against, the Registrar shall submit the petition of appeal to the President of the Court of Appeal or any other Judge nominated by the President of the Court of Appeal who shall require the petition to be supported in open court by the petitioner or an attorney on his behalf on a day to be fixed by such Judge, and the court having heard the petitioner or his attorney, may, reject such petition or fix a date for the hearing of the petition and order notice thereafter to be issued on the respondent or respondents;*

*Provided further, that, when a petition is rejected under this section the Court shall record the reasons for such rejection".*

In terms of the provisions contained in the Civil Procedure Code with regard to the tendering of notice of appeal the relevant provisions do not permit or give authority to the learned District Judge to reject the notice of appeal on the basis that the petitioner is not entitled to a final appeal. On this point of law, I would say the learned District Judge has misdirected himself as having authority to do so when in fact he did not have such authority and it was the function of the Court of Appeal to look into this aspect of the matter.

In the circumstances, I would hold that the order dated 26.01.2004 is palpably wrong and could be considered as exceptional circumstances warranting the interference and exercise of the extraordinary powers of this Court to set aside the said impugned order. In this respect, I would also consider the fact that when the notice of appeal was rejected on 26.01.2004 the only means by which he could obtain relief was by way of revision for there was no other alternative means of relief that he could resort to.

In respect of the other order dated 03.12.2003 Counsel for the petitioner contends that the question of law raised by him at the inquiry in the original Court is that this action cannot be maintained in terms of Debt Recovery (Special Provisions) Act No. 2 of 1990 as there was no writing or documents on which the respondent can sue in this action. He submits that there was no written agreement or document on which the loan is said to have been given and is now sought to be recovered. For the above submission the defendant relies on the express provisions of Section 4(1), Section 4(2) and Section 4(5) of the Debt Recovery (Special Provisions) Act No. 2 of 1990, which reads as follows:

*"4(1) The institution suing shall on presenting the plaint .... produce to the court the instrument, agreement or document sued upon or relied on by the institution".*

*"4(2) If any instrument, agreement or document is produced to the court and the same appears to the court to be properly stamped (where such instrument, agreement or document is required by law to be stamped) and not be open to suspicion by reason of any alteration or erasure or other matter on the face of it, and not to be barred by prescription, the court .... shall enter a decree nisi in the form set out in the First Schedule.....".*

*"4(5) The institution shall tender with the plaint - (a) the ... instrument, agreement or document referred to in subsection (1) of this section ..."*

Counsel submits that an action under the said Act No. 2 of 1990 cannot be instituted by an institution unless it has, and it produces in court, an instrument, agreement or document sued upon or relied on by the institution and the petitioner had shown, in applying for unconditional leave to appear and defend this action, that there is an issue or a question in dispute which ought to be tried within the meaning of Section 6(2)(c) of the said Act, No. 2 of 1990. Therefore the Court was obliged under Section 6(2) of the said Act to "give leave to appear and show cause".

He further submits that the contention of the plaintiff bank is that the several cheques which it has produced with the plaint, and/or the statement of accounts which it has produced with the plaint, amounts to an instrument, agreement or document sued upon or

relied on by the plaintiff bank. This contention of the plaintiff bank is wholly incorrect and untenable and the statement of accounts and the cheques produced do not come within the meaning of "instrument" or "agreement". An "instrument or agreement" is clearly a document which contains a contract entered into between two or more parties. The word "document" in Section 4(1) must be given a meaning *ejusdem generis* and must mean some document by which the loan was granted by the plaintiff to the defendant. This is clearly seen by the words "sued upon or relied on" in Section 4(1).

For the above reasons Counsel submitted that the plaintiff is not entitled to institute this action under the provisions of the said Act No. 2 of 1990, and that the defendant has shown that he has an arguable defence in this action, the Court was bound to have granted unconditional leave to appear and defend under Section 6(2)(c) of the Act No. 2 of 1990.

I am not impressed with the aforesaid submissions for the relevant provisions state that on presenting the plaint ... produced to the Court the instrument, agreement or document sued upon or relied upon by the institution. While it is conceded that statement of accounts and the cheques produced do not come within the meaning of instrument or agreement. However, the restricted interpretation sought to be given by Counsel to an instrument or an agreement as being a document which contains a contract entered into between two or more parties is unacceptable. For a cheque or a statement of accounts from a Bank too could be considered to constitute a document that would contain a contract entered into between two parties. My considered view is that a cheque drawn from a Bank and a statement of accounts from a Bank would come within the ambit of a document in terms of Section 4(1) of Act No. 2 of 1990. In any event the objection taken by the petitioner was rejected and journal entry dated 03.12.2003 reads as follows:

නිතිඥ ආර්. එ-/ජ් රත්දෙනිය මහතා පැමිණිල්ලට සිටී.  
 නිතිඥ අර්චන් ප්‍රනාන්දු මහතා විත්තියට සිටී.  
 නියෝගය.

විත්තිකරුවෙහි අධ්‍යක්ෂ පද්මසිරි මහතා පෙනී සිටී.  
 විත්තිකරු වලංගු විත්ති වාචකයන් ඉදිරිපත් කර නැත.

එබැවින් විත්තිකරු විසින් පැමිණිල්ලේ සඳහන් මුදල මෙම අධිකරණයේ නඩුවේ

බැරට තැන්පත් කරනු නොලබන්නේ නම් විත්තියට උන්නර ගොනු කිරීමට අවස්ථාවක්

හිමි නොවන බවට නියෝග කරමි. (සටහන බලන්න)

මුදල් තැන්පත් කිරීම සඳහා කැඳවන්න.

10.03.2004

The petitioner was given time till 10.03.2004 to deposit the money. It appears that he did not take any steps to have this order dated 03.12.2003 vacated or set aside or stay the proceedings when he had a statutory right of appeal with the leave of the Court of Appeal first had and obtained. However it appears that without resorting to his statutory right or depositing the money he had proceeded to tender a notice of appeal on 19.12.2003. Ultimately after an inquiry as per journal entry dated 26.01.2004 petitioner's notice of appeal was rejected and the instant revision application has been tendered on 04.03.2004.

It is to be noted that no explanation at all has been given as to why he did not resort to his statutory right to seek relief from the order dated 03.12.2003. No explanation given as to the delay in coming to this Court by way of revision.

It is well settled law that the exercise of the revisionary powers of the Appellate Court is confined to cases in which exceptional circumstances exist warranting its intervention and that the revision is a discretionary remedy and will not be available unless the application discloses circumstances which shock the conscience of the Court and is certainly not available to a party who for reasons best known to him sleeps over his rights without asserting them.

In *Dharmaratne and Another v Palm Paradise Cabanas Ltd. and Others*<sup>(1)</sup> Gamini Amaratunga, J. having considered 19 judgments held as follows:

*Per Gamini Amaratunga, J.*

Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method or rectification should be adopted. If such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in



the garb of a Revision Application or to make an appeal in situations where the legislature has not given a right of appeal."

The practice of Court is to insist in the exercise of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which should not be lightly disturbed.

The petitioner has not pleaded or established exceptional circumstances warranting the exercise of revisionary powers."

For the foregoing reasons, whilst I would revise and set aside the order dated 26.01.2004, I would refuse the application to revise and set aside the order dated 03.12.2003. In all the circumstances I make no order as to costs.

**WIMALACHANDRA, J.** - I agree.

*Application dismissed.*

*Order rejecting notice of appeal held to be void.*