

UKWATTE
v
D.F.C.C. BANK

COURT OF APPEAL
SRIPAVAN, J.,
C.A. 1824/03
NOVEMBER 19 AND
DECEMBER 3, 2003

Recovery of Loans by Banks, (Special Provisions) Act, No. 4 of 1990, sections 4 and 7 – D.F.C.C. Bank – Development Finance Corporation of Ceylon Act, No. 35 of 1955, section 10 – Default – Resolution to sell – Parate execution – Writ of execution – Should the Directors of the Bank be made parties? – Could parate execution powers be extended to properties of non borrowers? – Constitutional jurisdiction and appellate jurisdiction – Difference – Interpretation.

Held:

- (i) The Board of Directors of the Bank are necessary parties and the failure to make them parties is fatal.

Per Sripavan, J.,

“General supervision, control and administration of the affairs of the Bank is vested in the Board of Directors in terms of section 10. Accordingly the Board of Directors are distinct from the Bank”

- (ii) The words “any property” and “for any loan” in section 4 of Act, No. 4 of 1990 declare the intention of Parliament. It is not limited to the property of the borrower.

Per Sripavan, J.,

“In SC Spl.. Determination 22/03 what was examined by the Supreme Court was the constitutionality of the Bill and not the constitutionality or provisions contained in Act, No. 4 of 1990 already in force.

The constitutional jurisdiction of the Supreme Court is distinct from appellate jurisdiction it exercises.”

- (iii) The legislative function is the prime responsibility of Parliament. If the words of an Act are clear and plain, a Court must follow them and leave it to the legislature to set it right rather than to change those words according to the judge's notion of injustice and inconvenience.

APPLICATION for a writ of certiorari.

1. *Jalima Umma v Mohamed* – 50 NLR 15 at 17.
2. *Dissanayake v Cooperative Stores Union* – 60 NLR 140
3. *Karunaratne v Commissioner of Cooperative Development and others* – 79 NLR Vol. 11 - 193
4. *S.C. Spl. Determination 22/03*
5. *Sirisena v Kobbekaduwa* – 80 NLR 177
6. *S.C.Spl LA 14/2001 – SCM 23.7.2001*

M.A. Sumanthiran with Viran Corea and Deepthi Madanayake for petitioners.

Romesh de Silva, P.C., with M.E. Wickremasinghe for 1st respondent.

Cur.adv.vult

January 14, 2004

SRIPAVAN, J.

The only question to be considered is whether the petitioners are entitled to an interim relief sought in paragraph (b) of the prayer to the petition, namely, the resolutions marked P4 & P7 be stayed until the final determination of this application.

The final relief sought by the petitioners is a *writ of certiorari* to quash the said resolutions marked P4 & P7. It is common ground that the said resolutions were passed by the Board of Directors of the first respondent Bank in terms of section 8 of the Recovery of Loans by Banks (Special Provisions) Act, No.4 of 1990. The first respondent Bank was established under the Development Finance Corporation of Ceylon Act, No. 35 of 1955 as amended and is a body corporate with perpetual succession and a common seal with capacity to sue and be sued in its corporate name. The general supervision, control and administration of the affairs of the first respondent Bank is vested in the Board of Directors constituted in accordance with section 10 of the said Act. Accordingly, the Board of Directors are distinct from the first respondent Bank. 10

It has been constantly held that the party or parties against whom relief is sought must be identified clearly and no room left for uncertainty. In the case in hand, the resolutions sought to be quashed are that of the Board of Directors of the first respondent Bank and none of the Directors have been made parties to this application. 20

In *Jalima Umma v Mohammed* (1) 17 Nagalingam, J., held that "if the order complained of cannot be quashed in the absence of the proper party who made the order, then the relief applied for against the first respondent too necessarily fails."

In *Dissanayake v Co-operative Stores Union* (2) Weerasuriya, J., refused to grant a *writ of certiorari* to quash the proceedings before an arbitrator on the basis that the arbitrator is a necessary party and must be made a respondent. 30

In *Karunaratne v Commissioner of Co-operative Development and another* (3) the Supreme Court dismissed a claim for *certiorari* observing that T.D.J.Vitharana, Deputy Commissioner who made the award which was sought to be quashed has not been made a party to the application.

The authorities cited above show that the Board of Directors of the first respondent Bank are necessary parties to these proceedings and the failure to make them respondents does not entitle the petitioners to the final relief prayed for. If the petitioners cannot succeed in obtaining the final relief, certainly they are not entitled for 40

an interim relief asked for in paragraph (b) of the prayer to the petition.

Learned Counsel for the petitioners submitted that the words "*any property mortgaged to the bank as security for any loan*" found in section 4 of Act, No. 4 of 1990 could not be interpreted so widely in order to extend parate execution even to properties of non-borrowers. In this context, Counsel contended that a Divisional Bench of the Supreme Court in S.C. Spl Determination 22/03⁽⁴⁾ held that the proper interpretation to Act, No. 4 of 1990 is a restrictive one confining its unconscionable procedure to "*borrowers*" alone without extending it to "*non-borrowers*". I am unable to agree with this submission for the following reasons :-

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(a) The Supreme Court while exercising its constitutional jurisdiction in terms of Article 121(1) of the Constitution considered a *Bill* (emphasis added) titled "Recovery of loans by Banks (Special Provisions) Amendment, in the aforesaid special determination.

(b) What was examined by the Supreme Court was the constitutionality of the *Bill* and not the constitutionality or the provisions contained in Act, No 4 of 1990 already in force.

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(C) The constitutional jurisdiction of the Supreme Court is distinct and different from the appellate jurisdiction it exercises.

The legislative function is the prime responsibility of parliament as the elected body representing the people. If the words of an Act are clear and plain, a Court must follow them and leave it to the legislature to set it right rather than to change those words according to the judge's notion of injustice and inconvenience. The function of a Court is to give effect to the express intention of Parliament. Section 4 of Act, No. 4 of 1990 reads as follows:

"Subject to the provisions of section 7 the Board may by resolution to be recorded in writing authorise any person specified in the resolution to sell by public auction *any 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 thereon after the date of the sale together with the moneys and costs recoverable under section 13". (emphasis added)

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The words “*any property*” and “*for any loan*”, in the above mentioned section declare the intention of Parliament. It is not limited to the property of the borrower. “If the words properly construed admit of only one meaning, the Court is not entitled to deny to the words that meaning, merely because the Court feels that the result is not in accordance with the intention of the Legal Draftsman or the Minister” – per Sharvananda, J. in *Sirisena & others v Kobbekaduwa*⁽⁵⁾. In fact in a High Court case CHC/Civil/199/2000/1 the learned Commercial High Court Judge observed that “*in the absence of any restrictions under section 4 of the Act, it is not conceivable or practicable to use section 15(1) as a prohibition against the bank from adopting resolutions in case of mortgages given by any person other than the actual borrower.*” An application for Special Leave made to the Supreme Court against this order of the High Court was refused⁽⁶⁾ on the ground that there was no basis to grant Special Leave to Appeal. Accordingly, there is no prohibition on the first respondent Bank in adopting a resolution in respect of a mortgage given by any other person other than the actual borrower. 80 90

For the reasons stated above, the interim relief sought by the petitioners in terms of paragraph (b) of the prayer to the petition is refused. As agreed by both Counsel on 19.11.2003 the decision in this application would bind the parties in C.A. Application No. 1825/2003 as well. 100

Interim relief refused.