DEVELOPMENT FINANCE CORPORATION
(D.F.C.C. BANK LTD)
v
SOMAWEERA

COURT OF APPEAL
AMARATUNGA, J.
BALAPATABENDI, J.
C.A.L.A 251/99 (LG)
D.C.MT. LAVINIA 382/99 SPL
DECEMBER 3, 2002
JULY 14, 2002

Development Finance Corporation (DFCC) Act, No. 35 of 1955 amended by 25 of 1993 – S4, 5 and 18, Power to grant loans – Conducive to economic Development of the country – Meaning – What is a commercial enterprise – Recovery of loans by Banks (Spl. Provi) Act, No. 4 of 1990 – S. 4 and 22 – Can DFCC resort to Parate Execution under Act, No. 4 of 1998 –" includes" as opposed to "Means" – Preamble – Aid to Construction – Who is a person?

The petitioner obtained a loan for his business of selling fast foods and operating a restaurant. Security offered was land, and as the loan was not repaid, the Bank sought to parate execute the property.

The petitioner sought and obtained an injunction preventing the Bank from "Parate Executing" the property, on the ground that the D.F.C.C. is not entitled to resort to section 4 of Act No. 4 of 1990 as the Act is confined to recovery of loans given for economic development, and the business of selling fast foods and running a restaurant is not an enterprise which is conducive to economic development of Sri Lanka. The Court also took the view that the D.F.C.C. had no power to grant the loan– as the plaintiff's business did not fall within the purposes of the D.F.C.C.

Held :

(i) The phrase "Commercial Enterprise" has to be interpreted in its *ordinary* natural sense. Section 18, states that, commercial enterprise includes an enterprise.....which shall be conducive to the economic development of Sri Lanka. Word "include" is used as a word of enlargement and ordinarily applies that something else has been given beyond the general language, which precedes it, word "means" is used where the legislature wants to exhaust the significance of the term defined, the word "includes" is used in order to enlarge the meaning.

Creation of employment opportunities is an aspect of economic development.

(ii) Preamble of an act cannot be utilised to cut down or restrict a clear provision in the Act.

(iii) In the Act No. 4 of 1990, there is no requirement in the definition of "loan" that – it shall have been granted for economic development.

(iv) One resolution can be adopted for the same property mortgaged under three separate Bonds – there need not be three Resolutions.

(v) It is provided that, the Bank could authorise any person to auction the property, the appointment of S and S is valid, as the interpretation Ordinance defines a person to include anybody of persons corporate or incorporate.

APPLICATION for Leave to Appeal with leave being granted.

Cases referred to:

1. *Attorney-General* v *H.R.H. Prince Earnest of Hanover* (1957) AC 436.
2. *Yashoda Holdings* v *People's Bank* – 1998 3 Sri LR 382, at 386,387

S.A. Parathalingam, P.C. with *Nihal Fernando* for defendant-appellant.

Harsha Soza for plaintiff-respondent.

Cur adv vult.

May 30, 2003

GAMINI AMARATUNGA, J.

This is an application for leave to appeal against the order of the learned District Judge of Mount Lavinia issuing an interim injunction preventing the appellant Bank (hereinafter referred to as the Bank) from selling by auction the property mortgaged to the Bank by the plaintiff-respondent (hereinafter referred to as the plaintiff).

The facts relevant to this application are as follows. The plaintiff who carried on the business of selling fast food and operating a restaurant under the name of "Big Apple" obtained three loans from the Bank for the said business. The first loan was a sum of Rs. 10 million to be settled in 72 installments after a grace period of 24 months. The second loan was a sum of Rs. 3 million to be settled in 72 monthly installments after a grace period of 15 months. The third loan was a sum of Rs. 550,000/- repayable in 36 equal installments after a grace period of six months.

As security for the repayment of the said loans the plaintiff has executed mortgage bonds No. 63 of 15/9/94, No. 138 of 24/5/1995 and No. 327 of 19/7/1996 mortgaging the land and premises at No. 21, Hill Street, Dehiwala to the Bank. The fact that the said loans were not fully settled and that the plaintiff is in default is evident from the averments in the plaint itself and the learned District Judge in his order dated 20/10/1999 has stated that *prima facie* it appears that the plaintiff is in default.

The Board of Directors of the Bank acting under section 4 of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 has passed a resolution to sell by public auction the property mortgaged to it by the aforesaid mortgage bonds. According to the resolution, a copy of which has been marked and produced as P10 by the plaintiff, the total amount of the outstanding debt owed by the plaintiff to the Bank as at 1st July 1998 was Rs. twenty million six hundred and eight thousand and seventy six and twenty two cents (Rs 20,608,076.22). In terms of this Resolution, the auctioneer authorized by the Bank published notice in the newspapers

advertising the auction sale of the mortgaged property on 24.2.1999.

The plaintiff by his plaint dated 19.2.99 sought an enjoining order, an interim injunction, a permanent injunction preventing the Bank from selling the mortgaged property and a declaration that the said Resolution of the Bank is null and void and that the Bank is not entitled to sell the property on the said resolution. On the same day the District Court has issued an enjoining order as prayed for and notice of interim injunction. After the Bank appeared and filed objections to the granting of an interim injunction, the learned Judge has made order dated 20/10/1999 issuing an interim injunction.

The basis upon which the plaintiff claimed the relief sought by him from the District Court was that the D.F.C.C. Bank did not have the power to grant a loan for the purpose for which the plaintiff sought that loan and in view of this the Bank is not entitled to resort to parate execution under section 4 of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 by way of a Resolution adopted by the Board of Directors of the Bank.

The argument for the plaintiff was that under section 5 of the Development Finance Corporation Act, No. 35 of 1995 as amended it could exercise the powers given by *that section* only in carrying out the purposes of the Corporation set out in section 4 of the Act. According to said section 4 the purposes of the Corporation shall be "to assist in the promotion, establishment, expansion and modernization of private industrial, agricultural and commercial enterprises in Sri Lanka." Within the meaning of section 18 of the said D.F.C.C. Act, "Commercial enterprise" includes an enterprise not falling within the description of an agricultural or industrial enterprise, which shall be conducive to the economic development of Sri Lanka." In view of the provisions set out above it is the argument of the plaintiff that the *business of selling fast foods and running a restaurant is not an enterprise which is* 'conducive to the economic development of Sri Lanka' and therefore granting loan facilities to the plaintiff's business did not fall within the purposes of the D.F.C.C. and therefore under section 5 of the said D.F.C.C. Act the Bank had no power to grant the said loans to the plaintiff. It is

stated in the written submissions filed in this Court on behalf of the plaintiff-respondent that 'where the lending or the grant of the loan is itself void it cannot give rise to a valid debt.... and hence no money is due.'

This submission, as well as the argument on which it is based, is misconceived in law and is therefore untenable. Section 4 of the D.F.C.C. Act which sets out the purpose of the D.F.C.C. states

> "To assist in the promotion, establishment, expansion and modernization of private industrial, agricultural and commercial enterprises in Sri Lanka". 80

The plaintiff's business of selling fast food and running a restaurant is a commercial enterprise with the simple and ordinary meaning of that phrase. It is a private enterprise. Therefore *prima facie* the plaintiff's private commercial enterprise is an enterprise contemplated for the purposes of the D.F.C.C. as set out in section 4 of the D.F.C.C. Act.

However the plaintiff's argument that his enterprise not being an enterprise which is conducive to the economic development of Sri Lanka is not an enterprise contemplated by section 4 of the D.F.C.C. Act is based on the definition of commercial enterprise set 90 out in section 18 of the D.F.C.C. Act. The relevant part runs as follows.

> "Commercial enterprise *includes* an enterprise not falling within the description of an agricultural or industrial enterprise which shall be conducive to the economic development of Sri Lanka". (emphasis added)

The plaintiff's argument has been formulated by overlooking the significance of the word 'includes' used in the above quoted definition. If the definition has used the word 'means' instead of the word 'includes' the plaintiff's argument is tenable. Maxwell says that 100 "Sometimes, it is provided that the word shall 'mean" what the definition section says it shall mean: in this case, the word is restricted to the scope indicated in the definition section. Sometimes, however, the word "include" is used in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as compre-

hending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. In other words, the word in respect of which "includes" is used bears both its extended statutory meaning and its ordinary, popular and natural sense whenever that would be properly applicable." Maxwell *Interpretation of the Statutes 12th Edition, page 270.*

Bindra, in his work *Interpretation of Statutes* explains the significance of the word includes in definition clauses in statutes. "It is a well known rule of interpretation that the word "include" is used as a word of enlargement and ordinarily implies that something else has been given beyond the general language which precedes it: to add to the general clause a species which do not naturally belong to it." Page 988, 8th Edition. He goes on to say this. "It is well known that the Legislature uses the word 'means' where it wants to exhaust the significance of the term 'defined' and the word includes where it intends that while the term defined should retain its ordinary meaning its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise so as to make the definition enumerated but not exhaustive." Page 989.

Thus the phrase 'commercial enterprise' in the D.F.C.C. Act has to be interpreted in its *ordinary and natural sense,* the extended meaning given to it would include within the phrase 'commercial enterprise' any other enterprise not falling within the description of an agricultural or industrial enterprise which shall be conducive to the economic development of Sri Lanka.Thus the plaintiff's business falls within the ambit of the D.F.C.C. Act in its ordinary and natural sense of a *commercial enterprise* . Therefore it would be incorrect to say that the business of the plaintiff is not one falling within the purposes of the D.F.C.C. Act. (emphasis added)

The learned District Judge has adopted the plaintiff's argument and has held that the loan granted by the Bank to the plaintiff is a loan given contrary to section 4 of the D.F.C.C. Act. For the reasons I have set out above this view is erroneous in law and therefore is untenable. In considering the plaintiff's argument the learned Judge should have considered whether it was open to the plaintiff to come to Court on the basis that the Bank had no power to grant

him the loans in question. The plaintiff has applied for, consented to take and had in fact taken the loans from the Bank. The learned Judge should have considered whether the plaintiff is estopped in law from challenging the power and the right of the Bank to grant the loan. There is a total failure to consider this aspect.

The learned judge has then referred to the Preamble of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, which reads as follows "An Act to provide for the recovery of loans granted by Banks for the economic development of Sri Lanka...." Having earlier held that the running of a fast foods sales outlet and a restaurant are not acts connected with or conducive to the economic development of Sri Lanka, the learned Judge has come to the conclusion that the provisions of Act, No. 4 of 1990 cannot be utilized to recover loans granted to the plaintiff. This view is erroneous for two reasons. Firstly, the Preamble of an Act cannot be utilized to cut down or restrict a clear provision in the Act. If the enacting words admit only one construction, that construction will be given effect to even if it is inconsistent with preamble. *Attorney General* v *H.R.H. Prince Earnest of Hanover*(1) Section 22 of Act, No. 4 of 1990 defines 'loan' as "a loan of money and includes any overdraft or advance or any other monetary accommodation by whatever name or designation called." There is no requirement in the said definition that the loan should have been granted for the economic development of Sri Lanka. Even in Section 4 of the Act, No. 4 of 1990 there is no reference to a loan granted for the economic development of Sri Lanka. It merely refers to any loan. Therefore there was no justification for the learned Judge to hold that the powers given under section 4 of Act, No. 4 of 1990 are confined to the recovery of loans given for the economic development of Sri Lanka.

Secondly, even if one hold that what is recoverable under section 4 of Act, No. 4 of 1990 are only those loans given for the economic development of Sri Lanka still there was material that the loans have contributed to the economic development. The plaintiff in paragraph 21 (b) of the plaint has stated that "there are 110 employees working in the said Fast Food Outlet and Restaurant and if the property is sold they would lose their employment. This indicates that the plaintiff's business has generated a considerable number of employment opportunities. Creation of employment opportunities is an

aspect of economic development. For these reasons the learned Judge's view that the Bank cannot proceed to recover the plaintiff's loans under Section 4 of Act, No. 4 of 1990 was erroneous.

In this case there was no dispute that the Bank has granted loans to the plaintiff and that he was in default. The property sought to be auctioned has been mortgaged to the Bank as security for the loan. Thus all conditions necessary to pass a resolution in terms of Section 4 of Act, No. 4 of 1990 have been satisfied. However in considering whether the petitioner has a *prima facie* case the Judge has erred both in law and in fact. He has taken irrelevant matters into consideration and failed to properly consider the relevant matters.

The plaintiff has by mortgage bond No 327 dated 19.6.1996 mortgaged certain movable properties as security for a loan of Rs. 550,000/-. The learned Judge has held that since the three mortgage bonds referred to in the resolution relate to separate properties there should have been separate resolution for each property. No reasons have been given for this conclusion. There is no requirement to have separate resolutions in respect of each property mortgaged. Two mortgage bonds relate to the same property and the third mortgage bond relates to items affixed or fastened to the building situated in the mortgaged property. The bond specifically states that such movable property fastened to the building shall when so fastened be deemed to be land. Thus it is clear that two mortgage bonds relate to the same land and the same building and the 3rd bond relates to movable property fixed and fastened to the same building and thus considered to be a part of the land. Therefore there is nothing to prevent the bank from adopting one resolution for the same property mortgaged under three separate bonds and the learned Judge's view that there should have been three resolutions and the inclusion of the same property (mortgaged by three bonds) is bad is an erroneous view.

In the written submissions filed by the plaintiff respondent, it is stated that in terms of section 4 of the Recovery of Loans by Banks Act the Board of Directors of the Bank has the power to authorize any person specified in the resolution to sell the mortgaged property by any person and the resolution which authorizes Shockman and Samarawickrama is invalid as that entity is not a person.The Interpretation Ordinance (Cap 2) person is defined as including any

body of persons corporate or unincorporated. This definition is an answer to that argument.

The learned Judge has also failed to consider the balance of convenience. According to the learned Judge's finding the plaintiff has obtained the loans from the Bank and that he was in default. In this context it is appropriate to quote the words of Amarasinghe, J. in *Yashoda Holdings* v *The People's Bank*(2) at 386 and 387. Amerasinghe, J. said as follows.

> "I am of the view that balance of convenience in this case lies in allowing the normal banking laws and procedures to operate. The equities are in favour of the Bank.....its' loan portfolio, liquidity and profitability have been and will continue to be affected if it cannot take such measures as it is entitled in law to take to protect its interests..... If the Bank, acting in accordance with the law, takes certain steps that might eventually harm the appellant's business, the appellant (sic) (the bank) should not be restrained, for the harm sought to be prevented does not relate to acts that are unlawful or wrongful, whatever the appellants preference might be in the matter. Then harm if any that might be caused would be that which the appellant has brought upon itself by failing to liquidate its debts."

Amarasinghe, J. having referred to the indebtedness of the appellant further said as follows.

> "...the application for an injunction must also fall on the ground that a *prima facie* case had not been made out in the sense that there is a *bona fide* contention between the parties on the question of indebtedness." p387.

In this case the plaintiff's conduct in asserting that the Bank had no power to grant him the loan which was sought, obtained and utilized by him puts the plaintiff's *bona fides* in doubt. What I stated above indicate that his argument is not tenable in law.

As Amarasinghe, J. has stated the power which the Court possesses of granting injunction should be very cautiously exercised and only on clear and satisfactory grounds. In this case the court has not exercised its power in that manner.

For the reasons I have set out above I hold that the plaintiff has not made out a *prima facie* case and the balance of convenience was and is with the Bank. The Court's decision to issue an interim injunction is wrong in law. I therefore allow the appeal and set aside the order of the learned District Judge dated 20.10.1999. The plaintiff shall pay a sum of Rs. 20,000/- as costs of this appeal to the Bank. 260

BALAPATABENDI, J. - I agree

Application allowed.

Editors Note:

The Supreme Court in SC Spl LA 134/03 on 2.12.2003 refused Special Leave to Appeal to the Supreme Court.