

BRUNSWICK EXPORTS LTD.
v.
HATTON NATIONAL BANK LTD.

COURT OF APPEAL

DE SILVA, J.,

WEERASURIYA, J.

C.A. NO. 430/97

D.C. COLOMBO NO. 15837/MB

FEBRUARY 15, 1999

High Court of the Provinces (Special Provisions) Act No. 10 of 1996 – S. 2 (1) First schedule – Commercial High Court – Art. 154P Constitution – Mortgage Act – Commercial transaction – Civil Procedure Code – S. 5, 207 – Cause of action – Jurisdiction.

The original plaintiff (Emirates Bank Int. Ltd) instituted action seeking to recover a certain sum of money with interest and for an order declaring that the land and premises described in the schedule are primarily bound and executable for the payment of the stated sum. The defendant filed answer praying for the dismissal of the action. When this matter was taken up for trial, the defendant petitioner made an application that in terms of the provisions of S. 2 (1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, the case ought to be transferred to the Commercial High Court of Colombo. The substituted plaintiff-respondent objected to the said application, and Court upheld the objection.

Held:

1. The substituted plaintiff-respondent which is a licensed Commercial Bank had sought to recover the monies which it alleged were due to it from the defendant as being monies advanced to it in the ordinary course of its banking business on the security of a Mortgage of immovable property.
2. The mortgage had been executed to secure the repayment of a commercial loan given by a Commercial Bank to a company for the purpose of its business.
3. The Mortgage Act provides both the substantive law and the procedure relating to actions based on mortgage bonds and the enforcement thereof.
4. Act No. 10 of 1996 does not prescribe substantive law or procedure in respect of actions for the enforcement of Mortgage Bonds or any action of any nature whatsoever.

5. Act No. 10 of 1996 merely vests jurisdiction in the Commercial High Court to hear and determine certain civil actions.
6. Item (1) of the first schedule manifestly embraces within its fold all banking transactions except actions instituted under the Debt Recovery (Special Provisions) Act No. 2 of 1990.
7. The "Media" upon which the plaintiff has instituted action was a commercial transaction and therefore, action must necessarily stand removed to the High Court.

Cases referred to:

1. *Lowe v. Fernando* 16 NLR 398.
2. *Samichi v. Peiris* 16 NLR 257.

S. L. Gunasekera with N. R. Sivendran for defendant-petitioner.

S. Sivarasa, PC with A. A. M. Illiyas for substituted plaintiff-respondent.

Cur. adv. vult.

March 12, 1999.

WEERASURIYA, J.

The facts as set out by the defendant-petitioner (hereinafter referred to as the defendant) are briefly as follows:

Emirates Bank International Limited by plaint dated 09.01.89, instituted action against the defendant seeking judgment in the aggregate sum of Rs. 5,375,000 with interest till payment in full and for an order declaring all the land and premises described in the schedule to the plaint especially and primarily bound and executable for the payment of the above sum and in default of payment the said property to be seized and sold by the fiscal. The defendant filed answer praying for the dismissal of the action.

On 28.01.97, when the case was taken up for trial, defendant made an application that in terms of the provisions of section 2 (1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, the case ought to be transferred to the Commercial High Court of Colombo. Learned counsel for the substituted plaintiff-respondent objected to the said application and the District Judge having directed the parties to file written submissions, by his order dated 31.03.1997, rejected the application of the defendant and fixed the

case for trial in the District Court. It is from the aforesaid order that this application for revision has been filed.

At the hearing of this application, learned counsel for the defendant submitted that the present action is one which falls within the ambit of item (1) of the first schedule to the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, and hence the case stands removed to the Commercial High Court of Colombo.

Learned President's Counsel for the substituted plaintiff-respondent contended that in the absence of a specific reference to the Mortgage Act in the first schedule of the aforesaid Act, Commercial High Court has no jurisdiction to entertain this action.

Section 2 (1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 reads as follows:

"Every High Court established by Article 154P of the Constitution for a Province shall, with effect from such date as the Minister may, by Order published in the Gazette appoint, in respect of such High Court have exclusive jurisdiction and shall have cognizance of and full power to hear and determine, in the manner provided for by written law, all actions, applications and proceedings specified in the first schedule to this Act, if the party or parties defendant to such action resides or reside, or the cause of action has arisen, or the contract sought to be enforced was made, or in the case of applications or proceedings under the Companies Act, No. 17 of 1982 the registered office of the company is situated, within the Province for which such High Court is established."

Items Nos. (1), (2) and (3) of the first schedule referred to in section 2 (1) read as follows:

(1) All actions where the cause of action has arisen out of commercial transactions (including causes of action relating to banking, the export or import of merchandise, services affreightment, insurance, mercantile agency, mercantile usage, and the construction of any mercantile document) in which the debt, damage or demand is for a sum exceeding one million rupees or such other amount as may be fixed by the Minister, from time to time, by notification published in the *Gazette*, other than actions instituted under the Debt Recovery (Special Provisions) Act No. 2 of 1990.

(The Minister of Justice and Constitutional Affairs by an Order published in the *Government Gazette* No. 943/12 of 01.10.1996 increased the monetary limit of Rupees 1 Million to 3 Million.)

(2) All applications and proceedings under sections 31, 51, 131, 210 and 211 of the Companies Act, No. 17 of 1982.

(3) All proceedings under the Code of Intellectual Property Act, No. 52 of 1979 (other than proceedings referred to in item (2) of the second schedule).

In view of the above provisions of section 2 (1) of the High Court of the Provinces (Special Provisions) Act and the Order published in the *Gazette* notification, the Commercial High Court established by Article 154P of the Constitution for the Western Province has exclusive jurisdiction in respect of the actions, proceedings and applications set out in the first schedule to the Act, provided the value of the action exceeds Rupees 3 Million.

Learned President's Counsel for the substituted plaintiff-respondent submitted that if it was the intention of the legislature to include hypothecary actions as well in the actions to be heard by the Commercial High Court, item (1) would have been more specific or there would have been another item similar to items (2) or (3) to the first schedule.

Learned President's Counsel highlighted the fact that the first schedule contains specific reference to the Companies Act and the Intellectual Property Act.

It is apparent that in this action the substituted plaintiff-respondent which is a licensed Commercial Bank had sought to recover from the defendant the monies which it alleged were due to it from the defendant as being monies advanced to it in the ordinary course of its banking business on the security of a mortgage of immovable property, together with the interest thereon. This position is reflected in paragraphs 1 (a), 3, 4, 5, 8 and 9 of the plaint. The first prayer to the plaint was – "for judgment against the defendant in the said aggregate sum of Rs. 3,575,000 with interest . . . till the date of payment in full . . .".

The cause of action pleaded by the plaintiff-respondent consisted purely a claim that the defendant had failed to repay the amount of money advanced to it in the course of its banking business and

hence the plaintiff-respondent was entitled to the recovery of the same and to have the property mortgaged sold in execution to realise the said sum. Thus, the mortgage referred to above had been executed to secure the repayment of a commercial loan given by a Commercial Bank to a company for the purpose of its business.

The Mortgage Act prescribes both the substantive law and the procedure relating to actions based on mortgage bonds and the enforcement thereof.

The High Court of Provinces (Special Provisions) Act No. 10 of 1996 does not prescribe substantive law or procedure in respect of actions for the enforcement of mortgage bonds or any action of any nature whatsoever.

The said Act merely vests jurisdiction in the Commercial High Court to hear and determine certain civil actions which are specified therein. Since the High Court is vested with jurisdiction to hear and determine any civil action in terms of the said Act, such existing substantive and procedural laws as are relevant to such action would apply whether they seek for the enforcement of a mortgage bond or any other action, as the case may be.

Item (1) of the first schedule referred to earlier manifestly embraces within its fold all banking transactions and the proviso which excludes actions instituted under the Debt Recovery (Special Provisions) Act No. 2 of 1990 is a clear pointer to this. The inclusion of the said proviso clearly indicates that but for the said proviso any action instituted by a bank in terms of the Debt Recovery (Special Provisions) Act No. 2 of 1990 would have stood removed to the High Court. It is therefore clear that the proviso precludes the High Court from entertaining actions instituted in terms of Debt Recovery (Special Provisions) Act. Thus, it would be seen that any action arising out of a money lending transaction engaged in by a bank falls within the ambit of item (1) of first schedule. The absence of a proviso similar to item (1) relating to an action instituted in terms of Mortgage Act makes it evident that any action in which a bank seeks to recover money loaned to another upon the security of a mortgage and claim to sell such security by way of mortgage to recover such sum, falls within the ambit of item (1) in the first schedule referred to above.

It is relevant to note that mortgage bonds are often executed in respect of personal transactions and at times they are executed to secure interest free loans. There would be no need to specifically refer to any action on a mortgage bond executed to secure commercial loans given on interest in which debt, damage or demand inclusive of interest exceeded Rs. 3 Million, as such transactions clearly falls within the ambit of item (1) of first schedule. It is to be noted that reference in items (2) and (3) of the first schedule to applications and proceedings under sections 31, 51, 131, 210 and 211 of the Companies Act and to proceedings under the Code of Intellectual Property Act were necessary since such applications and proceedings do not fall within the ambit of item (1).

In the case of *Lowe v. Fernando*⁽¹⁾ at page 404 De Sampayo, J. observed that –

“ . . . the expression 'cause of action' generally imports two things, viz a right in the plaintiff and a violation of it by the defendant, and " 'cause of action' means the whole cause of action, ie all the facts which together constitute the plaintiff's right to maintain the action", (Dicey's Parties to an action, chapter XI, section A) or as it has been otherwise put, 'the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour'.”

In *Samichi v. Peiris*⁽²⁾ which was a full Court decision the expression 'cause of action' occurring in section 207 of the Civil Procedure Code, was given its primary meaning so as to include the right in virtue of which the claim is made. In section 5 of the Civil Procedure Code cause of action is defined as the wrong for the redress of which an action may be brought. The 'wrong' is the combination of the right and its violation and so the cause of action is the 'wrong' in the broad sense referred to.

In the present action, "the media" upon which the plaintiff has instituted action was a commercial transaction and therefore, action must necessarily stand removed to the High Court.

For the foregoing reasons, I set aside the order of the District Judge dated 31.03.1997. This application is allowed with costs.

DE SILVA, J. – I agree.

Application allowed.