

PEOPLE'S BANK
v.
LANKA QUEEN INT'L PRIVATE LIMITED

COURT OF APPEAL
DE SILVA, J.,
WEERASURIYA, J.
C.A. REV. NO. 674/95
D.C. COLOMBO NO. 155/DR
DECEMBER 1, 1998.

Debt Recovery (Special Provisions) Act No. 2 of 1990 amended by 4 of 1994 – S. 4 (1), 6 (2) Procedure for recovery of debts – Decree Nisi entered – Show cause – Leave to appear and defend – application supported by affidavit only.

The learned Additional District Judge allowed the defendants to appear and show cause against the Decree Nisi entered in terms of section 6 (2) of Act No. 2 of 1990 as amended by No. 4 of 1994. The defendant-respondent did not file an application for leave to appear and show cause.

Held:

1. Act No. 2 of 1990 was amended by Act No. 4 of 1994. S. 6 (2) of the original Act was repealed and the word 'Application' which appeared in the original section has been qualified with the following words:

"Upon the filing of an application for leave to appear and show cause supported by affidavit." Thus it is mandatory for the defendant to file an application for leave to appear and show cause, further such application must be supported by an affidavit which should deal specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it.

2. Amended S. 6 (2) does not permit unconditional leave to defend the claim, the minimum requirement according to S. 6 (2) C is for the furnishing of security.

Per De Silva, J.

"In the absence of an application to show cause in writing, it is possible to say that there is no proper application supported by an affidavit before court."

APPLICATION in Revision from the order of the Additional District Judge, Colombo.

Y. Wijetilake, DSG, for petitioner.

Romesh de Silva, PC with Harsha Amarasekera for respondent.

Cur. adv. vult.

January 29, 1999.

DE SILVA, J.

This is an application seeking to revise the order of the learned Additional District Judge of Colombo dated 15. 09. 95 wherein she allowed the defendants to appear and show cause against the decree Nisi entered in terms of section 6 (2) of the Debt Recovery Act (Special Provisions) No. 2 of 1990 as amended by Act No. 4 of 1994.

The matter arose in the following manner. The People's Bank, the plaintiff-petitioner in this case instituted action against the defendant-respondent, under the provisions of the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended by Act No. 9 of 1994 to recover an aggregate sum of US \$ 1,074,743.08 with interest.

Decree Nisi was entered against the defendant and after service of the same the defendant filed two affidavits and moved to file answer and defend unconditionally. When this matter came up for inquiry before the District Court the plaintiff-petitioner raised two preliminary objections in that the defendant-respondent did not comply with the provisions of section 6 (2): viz.

1. That the defendant-respondent did not file application for leave to appear and show cause.
2. That the defendant-respondent did not deal with the plaintiff's claim and failed to disclose a defence which is *prima facie* sustainable.

The Debt Recovery Act, No. 2 of 1990 as amended by Act No. 9 of 1994 has provided for a special procedure for the recovery of debts by lending institutions. Action under Debt Recovery Act can be instituted by presenting a plaint and not a petition. The plaint has to be accompanied by an affidavit. According to section 4 (1) of the Debt Recovery Act all that is required to be sworn or affirmed to in the affidavit are words to the effect that the sum claimed in the plaint is justly due to the institution from the defendant. In addition to the above a *decree Nisi*, the required stamps, agreements, instruments or documents sued upon or relied on by the institution also should be filed. Under the Debt Recovery Act, an action could be filed only by a lending institution as defined in section 30 of the Act and only for the recovery of a debt. Debt means a sum of money which is ascertained or capable of being ascertained at the time of the institution of the action.

The only question that has to be decided by this court in this case is whether the defendant-respondent strictly followed the procedure laid down in section 6 (2) of the Debt Recovery Act when the decree *Nisi* was served on him.

Debt Recovery (Special Provisions) Act, No. 2 of 1990 was brought into operation on the 6th of March, 1990. Section 6 of Act No. 2 of 1990 reads as follows :

"6 (1). In an action instituted under this Act the defendant shall not appear or show cause against the decree *Nisi* unless he obtains leave from the court to appear and show cause.

6 (2). The court shall upon the application of the defendant give leave to appear and show cause against the decree either, –

- (a) upon the defendant paying into court the sum mentioned in the decree *Nisi*; or
- (b) upon the defendant furnishing such security as to the court may appear reasonable and sufficient for satisfying the sum

mentioned in the decree *Nisi* in the event of it being made absolute; or

- (c) upon affidavits satisfactory to the court that there is an issue or a question in dispute which ought to be tried. The affidavit of the defendant shall deal specifically with the plaintiff's claim and state clearly and concisely what the defence is and what facts are relied on as supporting it."

In default of the defendant obtaining such leave for appearance and showing cause the court shall make the decree *Nisi* absolute, and the provisions of section 389 of the Civil Procedure Code (chapter 101) shall, *mutatis mutandis*, apply to such order. For this purpose, the Judge shall endorse the words "decree *Nisi* made absolute" (or words to the like effect) upon the decree *Nisi* and shall date and sign such endorsement.

This section as found in the principal enactment does not specifically lay down the procedure that has to be followed by the defendant when applying for leave to appear and show cause. It appears that a defendant could either make a written or an oral application for that purpose.

By Act No. 9 of 1994 section 6 (2) of the original Act was repealed and the following new subsection was introduced. The new subsection 6 (2) reads thus : "6 (2). The court shall upon the filing by the defendant of an application for leave to appear and show cause supported by affidavit which shall deal specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it, and after giving the defendant an opportunity of being heard, grant leave to appear and show cause against the decree *Nisi*, either –

- (a) upon the defendant paying into court the sum mentioned in the decree *Nisi*; or

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- (b) upon the defendant furnishing such security as to the court may appear reasonable and sufficient for satisfying the sum mentioned in the decree *Nisi* in the event of it being made absolute; or
 - (c) upon the court being satisfied on the contents of the affidavit filed, that they disclose a defence which is *prima facie* sustainable and on such terms as to security, framing and recording of issues, or otherwise as the court thinks fit."

This new subsection clears any doubt that would have prevailed earlier in respect of the procedure a defendant has to follow in applying for leave to appear and show cause. On an examination of the amendment introduced in subsection 6 (2) it is abundantly clear that the word "application" which appeared in the original section has been qualified with the following words : "upon the filing of an application for leave to appear and show cause supported by affidavit". This shows that –

- (a) it is mandatory for the defendant to file an application for leave to appear and show cause.
- (b) such application must be supported by an affidavit which deals specifically with the plaintiff's claim and state clearly and concisely what the defence to the claim is and what facts are relied upon to support it.

This section does not permit unconditional leave to defend the case as the defendant-respondent has requested from the District Court. The minimum requirement according to subsection (c) is for the furnishing of security.

If the defendant satisfies (a) and (b) above then the defendant should be given an opportunity of being heard. The court will have to decide on one of the three matters specified in the above section. They are:

- (a) the court may order the defendant to pay into court the sum mentioned in the decree *Nisi*. Thus, even where the requirements as stated above are complied with, the court has the power and the authority to order the defendant to pay the full sum mentioned in the decree *Nisi* before permitting the defendant to appear and defend.
- (b) Alternative to (a) above, the court can order the defendant to furnish security which, in the opinion of the court is reasonable and sufficient to satisfy the decree *Nisi* in the event it being made absolute. The difference between this provision and the (a) above is that instead of paying the full sum mentioned in the decree *Nisi*, it will be sufficient for the defendant to furnish security, such as banker's draft, and then defend the action.
- (c) the third alternative is where the court is satisfied on the contents of the affidavit filed, that they disclose a defence which is *prima facie* sustainable and on such terms as to security, framing of issues or otherwise permit the defendant to defend the action. Thus, it is imperative that before the court acts on section 6 (2) (c) it has to be satisfied;
- i. with the contents of the affidavit filed by the defendant;
 - ii. that the contents disclose a defence which is *prima facie* sustainable; AND
 - iii. determine the amount of security to be furnished by the defendant, and permit framing and recording of issues or otherwise as the court thinks fit.

It was the contention of the petitioner's counsel that it is not repugnant to the provisions of 6 (2) to file only an affidavit setting out the defendant's position with a request for leave to defend.

I am unable to agree with this submission. As the section stands, the averments set out in the application must be supported by an affidavit. Therefore in the absence of an application to show cause in writing as contemplated by section 6 (2) it is possible to say that there is no proper application supported by an affidavit before court. If this interpretation is not given the amendment would become superfluous.

As pointed out earlier the institution of an action under the Debt Recovery Act is by plaint supported by an affidavit under section 4 (1) of the Act. Similarly the defendant's application in writing to defend and show cause disclosing a defence which is *prima facie* sustainable after dealing with the plaintiff's case must be supported by an affidavit. In the absence of an application the affidavit cannot stand alone in terms of section 6 (2) of the Debt Recovery Act, No. 9 of 1994.

For the above reasons I set aside the order made by the learned Additional District Judge permitting the defendant-respondent to continue with the case. I direct the trial Judge to take steps in terms of section 6 (3) and make the decree *Nisi* absolute. Application of the plaintiff-petitioner is allowed with costs.

WEERASURIYA, J. – I agree.

Application allowed.

Trial Judge directed to make the decree Nisi absolute.