

PERERA
v
NATIONAL DEVELOPMENT BANK

COURT OF APPEAL
WIMALACHANDRA, J.
BASNAYAKE, J.
CALA 7/2006
FEBRUARY 22, 2007

Debt Recovery Act No. 2 of 1990 – Sections 6 (2), 6 (A) – Order nisi entered – Party absent – Order nisi made absolute – By consent order absolute vacated – Time granted to show cause why order nisi should not be made absolute? Should the matter be fixed for inquiry under Section 7? Civil Procedure Code – Sections 384, 385, 386, 387, 390 and 391, – Section 703 – Procedure to be followed.

In an action filed under the Debt Recovery Law (DR Law) order nisi was entered against the three defendants. The 2nd defendant did not appear and the order nisi was made absolute. This order was set aside by consent as the order nisi was not served on the 2nd defendant. The Court gave the defendant 14 days to show cause as to why the order nisi should not be made absolute.

The 2nd defendant sought leave to appeal, from the said order contending that since the Court had vacated the order absolute, it should be fixed for inquiry under Section 7.

Held:

- (1) When a defendant purges default the only consequence is vacating the order absolute. This does not give the defendant an added advantage of over coming the request of showing a defence.
- (2) Purging of default does not allow the defect to by pass the request of disclosing a defence.
- (3) Section 7 is based upon the defendant appearing and obtaining leave. The 2nd defendant has to appear and obtain leave. If leave is not obtained, no further steps can be taken in terms of Section 7. It is mandatory for the 2nd defendant to obtain leave.

APPEAL from leave to appeal from an order of the District Court of Kandy.

Riza Muzni for 2nd defendant-petitioner.

Romesh de Silva, PC, with *Geethaka Gunawardane* for plaintiff-respondent-respondent.

November 13, 2007

ERIC BASNAYAKE, J.

The 2nd defendant-petitioner-petitioner (2nd defendant) filed this leave to appeal application to have the order of the learned Additional District Judge, Kandy, dated 30.12.2005, set aside.

The plaintiff-respondent-respondent (plaintiff) filed this action under the provisions of the Debt Recovery Act No. 2 of 1990 as amended (the Act) against three defendants including the 2nd defendant, to recover a sum of Rs. 1,032,472.03. The *order nisi* was entered and was ordered to be served on the defendants. After the service the 1st and the 3rd defendants appeared in court. The 2nd defendant did not appear. Hence the *order nisi* was made absolute against the 2nd defendant.

The 2nd defendant appeared on a later date and urged that the 2nd defendant was not served with *order nisi* and therefore requested that the order absolute be vacated. The learned Counsel appearing for the plaintiff consented to vacating the order absolute. Order absolute was thereby vacated. Thereafter the Court gave the 2nd defendant 14 days time to show cause as to why the *order nisi*

should not be made absolute. The 2nd defendant without complying with the said order filed this leave to appeal application.

Submission of the learned Counsel for the 2nd defendant

The learned Counsel appearing for the 2nd defendant submitted that since the Court has vacated the order absolute it should be fixed for inquiry under Section 7 of the Act No. 2 of 1990 as amended. The learned Counsel rests his submission on Section 6A(2) which is as follows:

6A(2) : Where the ground on which an application is made under subsection (1) is duly established to the satisfaction the court may set aside the decree absolute upon such terms and conditions as the court shall consider it just and right to impose upon the applicant and upon the decree absolute being set aside, the court shall proceed with the hearing and determination of the matter in accordance with the provisions of Section 7 of this Act.

The learned Counsel appearing for the 2nd defendant submitted that since the 2nd defendant's application to purge the default has been allowed, Section 7 of the Act applies. In terms of Section 7 of the Act, the Court must treat the 2nd defendant as having obtained leave to appear and now proceed in terms of sections 384, 385, 386, 387, 390 and 391 of the CPC. He further submitted that the Court has set aside the order absolute in terms of Section 6A(2). Therefore, court is required to proceed with the hearing and determination thereafter in accordance with the provisions of Section 7. He submitted that Section 6A(2) does not leave room for the defendant to go back to Section 6 and obtain leave to appear

and defends, but to move forward by having a hearing and determination in terms of Section 7. What is required is a hearing in terms of Sections 384, 385, 386, 387, 390 and 391 of the CPC. He submitted that there is no provision for the defendant who has already faced an inquiry with regard to non-service of the *order nisi* to go through a second inquiry to obtain leave to appear and defend. Therefore, he submitted that the order dated 30.12.2005 is erroneous.

The question to be answered in this case is with regard to the procedure that has to be followed, when a *decree absolute* is set aside pursuant to an application made by a defendant to purge the default.

Submission of the learned President's Counsel appearing for the plaintiff

The learned President's Counsel appearing for the plaintiff submitted that the basis of the Debt Recovery (Special Provisions) Act is that no person is entitled as of right to answer to the *decree nisi*. All defendants have to first obtain leave of court (Section 6). Normally a defendant has a right to be heard or has a right to file answer. A defendant can file answer irrespective of whether he has good or bad reasons or is without any defence. However, in certain specific instances, the right to file answer has been taken away by the legislature. One such example is summary procedure on liquid claims under Section 703 of the Civil Procedure Code.

It was further submitted that the Legislature has enacted the Debt Recovery (Special Provisions) Act to ensure speedy recovery of monies lent by banks and lending institutions. Thus the Legislature has specially legislated that defendants have no right to answer unless they first obtain leave to appear and show cause. The procedure is laid down in Section 6 of the Act in terms of which leave has to be obtained. If the *decree nisi* is served and the defendant does not appear, the *decree nisi* has to be made absolute. However if a party complains that the *decree nisi* has not been served (to the satisfaction of Court) the *decree absolute* has to be set aside (Sections 6A(1) and 6A(2)).

Some uncertainty has been created by the wording in section 6A(2) with the words "the court shall proceed with the hearing and determination of the matter in accordance with the provisions of Section 7 of this Act."

Section 7 is as follows:

If the defendant appears and leave to appear and show cause is given the provisions of Sections 384, 385, 386, 387, 388, 390 and 391 of the Civil Procedure Code (Chapter 101) shall, ***mutatis mutandis***, apply to the trial of the action (*emphasis added*).

The learned President's Counsel submitted that according to the proper interpretation of Section 7, the Court must now look in to the question of whether the 2nd defendant had obtained leave in terms of Section 7. The 2nd defendant has filed his objections and now the Court has to hold an inquiry as to whether the 2nd defendant should be allowed to appear and show cause. It is only in the event such leave is granted that the 2nd defendant should be entitled to a hearing under Sections 384 of the CPC.

The learned President's Counsel submitted that although the 2nd defendant appeared and purged the default as provided for by Section 6A(1) of the Act, the 2nd defendant should obtain leave to appear in order to defend the action. The learned President's Counsel submitted that vacating the order absolute for the reason that the 2nd defendant was not served with *order nisi* does not give him the leave and license to forego Section 6(2) of the Act. Section 6(2) of the Act provides the requirements under which leave to appear and show cause could be considered. Leave is required in terms of the provisions of Section 6(1) which states thus: "*In an action instituted under this Act the defendant shall not appear or show cause against the decree nisi unless he obtains leave from court to appear and show cause.*"

Section 6(2) is as follows:

6(2): The court shall upon the filing by the defendant of an application for leave to appear and show cause 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 in to 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 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 the court thinks fit".

Where the defendant ... having appeared, his application to show cause is refused, the court shall make the *decree nisi* absolute (6(3)).

The learned President's Counsel for the plaintiff submitted that Section 7 is based upon the defendant appearing and obtaining leave. In this case the 2nd defendant has to appear and obtain leave. If leave is not obtained, no further steps can be taken in terms of Section 7. He submitted that it is mandatory for the 2nd defendant to obtain leave.

The learned President's Counsel submitted that the interpretation given by the Counsel for the 2nd defendant would only lead to absurdity. The reason is that a defendant who makes an application to purge a default and succeeds would be in a better position than that of a defendant who responds to the *decree nisi*. The learned President's Counsel submitted that this would nullify the very basis for which the Debt Recovery (Special Provision) Act was created.

Section 6(1) states that the defendant shall not appear or show cause ... Unless he obtains leave to appear. To obtain leave the defendant shall file an application. Together with this application the defendant should file an affidavit. This application 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. Thereafter the defendant shall be heard. The court would grant leave only in three situations as prescribed by Section 6(2). It is only if leave to appear and show cause is given (Section 7) that the provisions of Sections 384, 385, 386, 387, 390 and 391 of the CPC shall apply.

Therefore in all the circumstances, it is mandatory upon the defendant to obtain leave. When a defendant purges default, the only consequence is vacating the order absolute. This does not give the defendant an added advantage of overcoming the

requirement of showing a defence. Purging the default does not allow the defendant to by pass the requirement of disclosing a sustainable defence. In this case the 2nd defendant never filed papers as required by law to satisfy court that he has a *prima facie* sustainable defence. Hence the 2nd defendant has no right to appear without satisfying the requirements specified in Section 6(2) of the Act. I am of the view that this application is without merit. The learned Judge is directed to make the *decree nisi* absolute. Leave refused with costs fixed at Rs. 15,000/-.

WIMALACHANDRA, J. - I agree.

Application dismissed.