HATTON NATIONAL BANK LTD.
v
DEPOSITORS ASSOCIATION OF K.A. MARTIN PERERA AND SONS AND ANOTHER

COURT OF APPEAL.
WIMALACHANDRA, J.
CA 1853/2005 (REV)
DC MT. LAVINIA 413/99/SPL
OCTOBER 4. 2006

Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 – Auction – Settlement in District Court – Bank agreeing to limit its claim – Undertaking – Sale of property by Bank – Incurring heavy expenditure – Excess – Setting off same – Is it permissible?

The defendant-respondent defaulted the loans obtained from the petitioner Bank. The Bank sought to parate execute the property. The plaintiff-respondent instituted action in the District Court against the Bank, and the two parties entered into a settlement in Court. One of the conditions was that, if the properties are sold for an amount in excess of Rs. 33.25 million in the public auction, the petitioner Bank should deposit the balance amount in the District Court to the credit of the case.

The Bank had to incur heavy expenses to place security at both properties. Subsequently the Bank sold the properties for 37.5 million and deposited a sum of Rs. 3 million to the credit of the case. The plaintiff-respondent moved Court for an order directing the petitioner Bank to deposit a further sum of Rs, 1.25 million.

The District Court made order that the parties must strictly comply with the conditions of the settlement.

The petitioner Bank moved in Revision.

Held:

(1) The petitioner Bank in terms of Clause 4 of the settlement can retain only Rs. 33.25 million and any sum in excess of Rs. 33.25 has to be deposited in Court.

The sums spent by the Bank to provide security – Rs. 1.35 million cannot be retained.

(2) Once the terms of settlement as agreed upon are presented to Court, notified thereto and recorded by Court, a party cannot vary the terms of settlement to his benefit nor can he resile from the settlement.

The Bank has no legal right to retain a further sum of Rs. 1.25 million for expenses incurred, the said settlement neither provided for such expenses nor for delay on the part of the Bank in selling the properties.

APPLICATION in Revision from an order of the District Court of Mt. Lavinia.

Cases referred to:

1. *Sinne Veloo* v *Messrs Lipton Ltd.* 66 NLR 214.
2. *Lameer* v *Senaratne* 1995 2 Sri LR 13

Palitha Kumarasinghe PC for petitioner.
Colin Amarasinghe for plaintiff-respondent.

May 4, 2007

WIMALACHANDRA, J.

This is an application in revision filed by the petitioner from the order of the learned District Judge dated 21.9.2005. The petitioner has also filed an application for leave to appeal bearing No. 399/2005 from the same order made by the learned District Judge. By consent of the parties leave to appeal was granted in the application for leave to appeal. Counsel appearing for both parties agreed that the order that will be made in the revision application shall apply to the leave to appeal application.

Briefly, the facts relevant to this application as stated in the petition are as follows:

The petitioner-bank granted banking facilities to the defendant-respondent and as security for the re-payment of the same he mortgaged certain properties to the petitioner. The defendant-respondent defaulted the repayment of the loans obtained from the petitioner. The petitioner adopted a

resolution in terms of the provisions of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 to sell the two properties mortgaged to the petitioner, namely,

(a) the house and property situated, at No. 22/11 Vidyalankara Mawatha, Maharagama; and

(b) the building situated at No. 576 High Level Road, Maharagama.

When the notice of the auction appeared in the newspapers, upon an application filed by the plaintiff-respondent, the petitioner-bank was noticed to appear before the District Court of Mount Lavinia on 11.08.1999 in case No. 413/99/SPL. On 11.08.1999 the petitioner-bank and the plaintiff-respondent entered into an agreement. The subject matter of the said agreement was with regard to the manner of sale of the aforesaid two properties mortgaged to the petitioner-bank.

The said settlement contained, *inter alia*, the following conditions:

(1) The sale of the house and property situated at No. 22/11, Vidyalankara Mawatha, Maharagama identified in schedule one of the Resolution adopted by the Hatton National Bank dated 29.4.1999 shall be temporarily suspended.

(2) The building situated at No. 576, High level Road, Maharagama identified in the 2nd schedule of the Resolution adopted by the Hatton National Bank dated 29.4.1999 would be sold by public auction on 13.8.1999 as scheduled.

(3) The petitioner-bank will make every endeavour to sell the aforesaid two properties for not less than Rs. 33.25 million, and if the petitioner-bank is successful in selling the properties for not less than Rs. 33.25 million, the petitioner-bank agrees to release the property identified in schedule one of the resolution adopted by the petitioner-bank dated 25.4.1999.

(4) If the aforesaid two properties are sold for an amount in excess of Rs. 33.25 million in the public auction, the petitioner-bank agrees to deposit the balance amount in the District Court to the credit of this case.

(5) If the petitioner-bank is unable to sell the said properties for a sum not less than Rs. 33.25 million the bank is entitled to purchase the properties.

(6) If the petitioner-bank purchases the properties and a certificate of sale is issued, the petitioner-bank shall take steps to sell the property by sealed tender within 45 days from 13.8.1999.

The petitioner-bank failed to sell the properties in accordance with the conditions stipulated in the said settlement. The petitioner-bank states that as a result it had to place security at both properties and thereby incurred heavy expenses. Subsequently, the petitioner-bank sold both properties for Rs. 20.5million and Rs. 17 million respectively. The petitioner-bank deposited a sum of Rs. 3 million in the District Court in favour of the plaintiff-respondent. Thereafter, the plaintiff-respondent by motion dated 9.6.2004 moved Court for an order directing the petitioner-bank to deposit a further sum of Rs. 1.25 million in the District Court in favour of the plaintiff-respondent. The petitioner-bank on 1.8.2004 filed objections to the motion dated 9.6.2004 filed by the plaintiff-respondent. Thereafter the Court fixed the matter for inquiry. Both parties agreed to file written submissions and invited the Court to decide the matter on the written submissions filed by the parties.

The learned Judge delivered the order on 21.09.2005 rejecting the objections filed by the petitioner-bank and made order that the parties must strictly comply with the conditions of the settlement.

"එසේ ප්‍රසිද්ධ වෙන්දේසියේ විකුණන ලද දේපල රුපියල් මිලියන 33.25 කට වැඩි මුදලකට එකී දේපල විකුණනු ලැබුවහොත් එකී රුපියල් තුන්සිය තිස් දෙලක්ෂ පනස් දහසක මුදල අඩුකර ඉතිරි මුදල මෙම නඩුවේ බැරට තැන්පත් කිරීමට බැංකුව එකඟවේ."

Thus it will be seen that after the sale the petitioner-bank can retain only Rs. 33.25 million and any sum in excess of the Rs. 33.25 million has to be deposited in the District Court. The Counsel for petitioner-bank submitted that the bank had to incur an amount of over Rs. 1.25 million to maintain and look after the said properties and the petitioner bank employed a security firm to provide security to the said properties amounting to Rs. 1,394,191.35. The learned Counsel streneously contended that the petitioner-bank is entitled to retain that sum paid to the security agency, which the bank had incurred.

I am unable to agree with the submissions made by the learned Counsel especially when the petitioner had agreed to limit its claim to Rs. 33.25 million. Therefore in terms of the settlement any sum over and above the said Rs. 33.25 million will have to be deposited in Court.

It is to be noted that the petitioner-bank by entering into the said settlement had given a solemn undertaking to Court to abide by the terms of the settlement. Once the terms of settlement as agreed upon are presented to Court, notified thereto and recorded by Court, a party cannot vary the terms of settlement to his benefit nor can he resile from the settlement.

A settlement recorded by the Court is a contract whereby new rights are created between the parties in substitution for, and in consideration of the abandonment of the former claims or contentions of either or both of them. In terms of the settlement the Court can either give the judgment or make order giving effect to the settlement.

It is settled law that once the terms of settlement as agreed upon are presented to Court, notified thereto and recorded by Court, a party cannot resile from the settlement unless he establishes that it was entered under duress, fraud or mistake. (See *Sinne Veloo* v *Messrs Lipton Ltd.*[1], *Lameer* v *Senaratne*[2]. In the instant case the petitioner did not even urge that the settlement was entered under any of those grounds referred to above.

In the circumstances, I am inclined to agree with the submissions made by the learned Counsel for the plaintiff-respondent that consequent to the said order made by the learned Judge the petitioner-bank is obliged to deposit in Court a further sum of Rs. 1.25 million appropriated by the petitioner in violation of the terms of settlement dated 11.8.1999.

Admittedly, the petitioner-bank sold the said properties for a sum of Rs. 37.50 million. In terms of the settlement, the petitioner-bank is entitled to retain only 33.25 million. It is not in dispute that the bank has deposited only Rs. 3 million. Accordingly it has no legal right to retain a further sum of Rs. 1.25 million for expenses incurred. It is to be noted that the said settlement neither provided for such expenses nor for any delay on the part of the petitioner-bank in selling the properties. In violation of the terms of the settlement, the petitioner-bank, unilaterally, without the permission of Court, decided and retained Rs. 1.25 million which was over and above the sum of Rs. 33.25 million due to the petitioner-bank in terms of the said settlement.

In the circumstances, I am of the view that the learned District Judge was correct when she held that the parties are bound by the terms of the said settlement entered on 11.8.1999.

Considering the facts and circumstances of this case, there are no exceptional circumstances disclosed as to the illegality of the order made by the learned Judge which has deprived the petitioner of some right. It is to be noted that revision is a discretionary remedy and will not be available unless the application discloses circumstances which shock the conscience of Court. Therefore, I see no illegality whatsoever in the matter pleaded by the Counsel for the petitioner with regard to the impugned order.

For the reasons stated above I am of the view that there is no reason to interfere with the order of the learned District Judge dated 21.9.2005. Therefore, the said order is hereby, affirmed and the application in revision is dismissed with costs fixed at Rs. 7500/=.

Both parties had agreed to abide by the decision in this application, in the leave to appeal application CALA No. 399/2005 as well. As such, that application too is also pro-forma dismissed.

Application dismissed.