KIRAN ATAPATTU
VS
PAN ASIA BANK LIMITED

COURT OF APPEAL
WIMALACHANDRA, J.
CALA 299/2004
D. C. COLOMBO 1010/DR
NOVEMBER 09, 2004

Debt Recovery Special Provisions Act'2 of 1990 - Section 30 amended by 4 of 1994 - Section 6(2)(C) - Do overdrafts come within the meaning of the provisions of the Debt-Recovery Law ? -What is a Debt ? -Can the Bank charge compound interest ?- Evidence Ordinance (Amendment) Act -14 of 1995 - Evidence Ordinance Special Provisions Act -34 of 1997 - Computer Printouts - Method of proving - Is an affidavit necessary ?- Evidence Ordinance Section 90 (C) - Civil Procedure Code - Section 705(1) Affidavit to state "Justly due?" Interest exceeding capital - legality ?- Conditional leave to defend - Can it granted ? - Sustainable defence to grant leave to appear and defend action?

The plaintiff Respondent (Bank) instituted action against the Defendant Petitioner under the Debt Recovery Special Provisions Act to recover a certain sum. The trial court entered Decree Nisi in favour of the plaintiff. The Defendants thereafter moved for unconditional leave to appear and defend. The Defendant was ordered to deposit Rs. 3.5 Million as a precondition to the grant of leave to appear.

It was contended that -

(i) The Debt. Recovery Special Provisions Law does not apply to overdrafts ;
(ii) The Bank cannot charge compound interest ;
(iii) The Statement of Claim is not admissible as it is a computer printout ;
(iv) That the affidavit does not contain the words that, the monies are lawfully due ;
(v) that the interest claimed exceeds the capital.

Held –

1. Whether one calls the sum borrowed on overdraft or a loan if it is capable of being ascertained it falls within the meaning of 'debt,' on his own explanation the sum borrowed by the Defendant and the interest component can be ascertained. Term debt in Section 30 includes overdrafts, if the amount is capable of being ascertained or is ascertained at the time of institution of action.

2. Compound interest is recoverable. Roman Dutch Law prohibitions against compound interest is no longer in force in Sri Lanka.
3. In terms of Section 6 - Evidence Ordinance (Amendment) 14 of 1995 - The plaintiff is entitled to produce computer printouts if they are accompanied by an affidavit of a person occupying a responsible position in relation to the operation of the relevant machine. The Plaintiff had in fact filed an affidavit.
4. There is nothing in Section 705 (1) of the Code that the Plaintiff shall make an affidavit that the sum is lawfully due to him from the Defendant thereon it only states that he must make an affidavit that the sum which he claims is justly due. In any event the Defendant should not be granted unconditional leave to defend merely because such word was not used.
5. Section 21 of the Principal Act lays down that the institution may receive as interest, a sum of money in excess of the money claimed as principal.
6. Section 6(2) does not permit unconditional leave to defend the action. *The minimum requirement is the furnishing of security.*
7. Defendant-Appellant does not disclose a sustainable defence to grant leave to appear and defend the action.

APPLICATION for leave to appeal from an Order of the District Court of Colombo.

Cases referred to :

1. *National Bank of India* Ltd., vs Stevenson - 1913 16 NLR 496
2. *Matikar vs Supramaniam Chettiar* - 44 NLR 409
3. *Paindathan vs Nadar 37 NLR 101*
4. *Peoples Bank vs Lanka Queen Intl* (Pvt) Ltd., 1999 1 Sri LR 233
5. *National Development Bank vs* Chrys Tea (Pvt) Ltd., and another 2000 2 Sri LR 206

Romesh de Silva P. C., with Palitha Kumarasinghe for Defendant Petitioner-Petitioner.

Harsha Amarasekera with *K. Pieris* for Plaintiff Respondent-Respondent

February 19, 2005.

Wimalachandra, J.

This is an application for leave to appeal from the order of the Additional District Judge of Colombo dated 27.07.2004.

Briefly, the facts relevant to this application are as follows :–

The plaintiff-respondent (plaintiff) instituted the action bearing No. 1010/ DR in the District Court of Colombo against the defendant-Petitioner (defendant) under the Debt Recovery (Special Provisions) Act. No.02 of 1990 to recover a sum of Rs. 10,518,434/69 and interest thereon. The Additional District Judge of Colombo entered. decree *nisi* in favour of the plaintiff, and it was served on the defendant. The defendant filed petition and affidavit along with certain documents and moved for unconditional leave to appear and defend action. The District Court by its order dated 27.07.2004 refused to grant unconditional leave and ordered the defendant to deposit a sum of Rs. 3.5 million to the credit of the case within three months from the date of the order, as a precondition to the grant of leave to appear and show cause. It is against this order the defendant has filed this application for leave to appeal.

The defendant admits that he obtained banking facilities amounting to Rs. 6 million from the plaintiff. (*vide* "F15" annexed to the petition) He admits that the said sum of Rs. 6 million has not been repaid. These facilities were granted to the defendant upon requests made by him. (*Vide* documents marked 'B1', 'C1', 'C2', 'C3').

Under the provisions of the Debt Recovery Act, No. 02 of 1990 where the debt (the capital plus interest) exceeds Rs. 150,000 the provision of the Act could be made use of to recover such amounts. Accordingly the aforesaid overdrafts obtained by the defendant from the plaintiff and the accrued interest could be recovered as a debt under the Debt Recovery Act, No. 02 of 1990.

Admittedly, the defendant has obtained banking facilities from the plaintiff. The plaintiff was entitled to charge the interest on the said banking facilities. It is admitted that the defendant has not paid the capital sums borrowed by him and the interest thereon.

The learned President's Counsel for the defendant in his written submissions, submitted that the defendant has obtained only overdrafts and not loans which do not come within the meaning of section 30 of the Debt Recovery (Special Provisions) Law. In terms of section 30 of the Act, No. 02 of 1990, 'debt' means a sum of money which is ascertained, or capable of being ascertained at the time of the institution of the action,

and which is in default. In the instant case, out of the total sum of Rs. 10,518,434.69, the capital sum borrowed by the defendant is Rs. 6,000,000 (Six Million Rupees), which he has admitted as being due. The balance portion of the aforesaid sum claimed by the plaintiff is the interest component.

The plaintiff's action is based on the default of the defendant to pay back the monies due to the bank. The defendant has not disputed the fact that the sums lent to him by the plaintiff in the form of over-drafts is Rs. 6 million and he has not repaid the entire Rs. 6 million. Accordingly, there is no dispute as to the amount of Rs. 6 million that the defendant obtained from the plaintiff-bank. As regards the interest, though the defendant seeks to dispute the amount of the interest, he does not deny the non payment of interest. The defendant has filed along with his petition and affidavit a document marked "R2" prepared by Thilakaratne & Co., a firm of Chartered Accountants, a summary of the facilities he obtained from the bank and the total interest component on the facilities obtained. According to "R2" the interest component is Rs. 5,409,678.48. Therefore, on his own explanation, the sum borrowed by the defendant and the interest component can be ascertained. It is to be noted that the discrepancy between what the plaintiff claims and the defendant has admitted as due is only a sum of Rs. 86,127.29. However according to the defendant's calculation, the amount due on account of capital which is Rs. 5,108,756.21 according to "R2" and the amount due as interest which is Rs. 5,409,678.48 is clearly ascertained. It is to be noted that according to "R2" he has shown the capital amount as Rs. 5,108,756.21 but he has admitted that the overdraft facilities he obtained from the plaintiff amounting to Rs. 6 million has not been paid. Accordingly, in these circumstances, it is my view that the amount borrowed by the defendant and the interest component is considered capable of being ascertained. Therefore whether one calls the sum borrowed an overdraft or a loan, if it is capable of being ascertained it falls within meaning of debt under section 30 of the debt Recovery (Special Provisions) Act. Accordingly, there is no merit in the submissions made by the learned President's counsel for the Defendant that the capital sum claimed by the plaintiff does not fall within the meaning of "debt" in terms of section 30 of the Debt Recovery (Special Provisions) Act. It is my further view that the term 'debt' described in section 30 includes overdrafts, if the

amount is capable of being ascertained or is ascertained at the time of institution of the action.

It has been argued by the learned President's Counsel for the defendant that the plaintiff-bank has charged compound interest and the defendant is not obliged to pay compound interest. In the case of *National Bank of India Ltd.* Vs. *Stevenson* [1], it was held that ;

"the rights and liabilities of the parties in connection with the account current were ; in terms of Ordinance No. 22 of 1866, which introduced into this Island the English law of banks and banking, governed by that law, and not the Roman Dutch; and that, therefore, the charge of compound interest was not, as such, unmaintainable.

While under the Roman Dutch law compound interest was not allowed, even though it had been expressly stipulated for, under the English law it was allowed where, *inter alia,* there was an agreement, express or implied, to pay it, or where its allowances was in accordance with a custom of a particular trade or business.

Held, further, that by reason of the custom with the banks, and of the acquiescence of the defendant mentioned above, he became liable to pay the compound interest charged."

C. G. Weeramantry in his book "The Law of Contract", volume II at page 925 states thus :

"The Roman Law prohibited compound interest so also the Roman Dutch Law did not allow compound interest even though expressly stipulated for, but the Roman Dutch law prohibition against compound interest is no longer in force in South Africa or in Ceylon."

It was held in the case of *Marikar Vs. Supramaniam Chettiar*[2] that compound interest is recoverable under the law of Ceylon, although the question of such a charge may be considered on the reopening of a transaction.

In the circumstances the submissions made by the learned President's counsel that the plaintiff cannot claim compound interest has no merit.

Another defence of the defendant is that the statement of accounts marked "A" annexed to the plaint showing the claim of the plaintiff amounting to Rs. 10,518,434.69. is not admissible as it is a computer print out and the plaintiff has not taken steps to produce the same as required in terms of the Evidence Ordinance (Amendment) Act, No. 14 of 1995. In the written submissions filed, the learned President's Counsel submitted that the plaintiff has not filed an affidavit in terms of the Evidence (Special Provisions) Act, No. 34 of 1997 as to the admissibility of the computer print out marked "A".

In terms of Section 90(c) of the Evidence Ordinance the only way of proving entries in a banker's book is by either producing the originals or certified copies of the entries thereon. The learned counsel for the plaintiff in his written submissions brought to the notice of Court that in each page of the said statement of account marked "A" the same officer of the plaintiff-bank who has deposed to the affidavit filed with the plaint has certified that the statements contained in the said accounts are correct and are those taken from the books maintained by the plaintiff bank in the ordinary course of banking business. In terms of section 6 of the Evidence Ordinance (Amendment) No. 14 of 1995, the plaintiff is entitled to produce computer print-outs if they are accompanied by an affidavit of a person occupying a responsible position in relation to the operation of the relevant machine. The learned counsel for the plaintiff states that the plaintiff has in fact filed such an affidavit together with the plaint, deposed by the manager of the relevant "Metro" branch who is the same person who has certified the foot of each page of the statement of account marked "A".

In these circumstances I am of the view that the submissions of the learned President's Counsel about the validity of the statement of account marked "A" is not well-founded.

Another objection of the defendent is that the affidavit filed by the plaintiff does not contain the words that the monies are "lawfully" due to the plaintiff.

There is nothing in section 705(1) of the Civil Procedure Code that the plaintiff shall make an affidavit that the sum which he claims is "lawfully" due to him from the defendant thereon. It only states that he must make an affidavit that the sum which he claims is "justly" due to him from the defendant.

However in the case of *Paindathan* Vs. *Nadar* [2] the Supreme Court held that in an action under chapter LIII of the Civil Procedure Code it is not essential that the plainitiff should actually use the word "justly" in his affidavit in support of the plaint. It was further held that the defendant should not be granted unconditional leave to defend merely because such word was not used.

Another objection taken by the defendant is that the interest claimed by the plaintiff exceeds the capital. In this regard attention is drawn to section 18 of the Debt Recovery (Special Provisions) (Amendment) Act, No. 9 of 1994 which amended section 21 of the principal Act, which reads as follows :

> **"Notwithstanding anything to the contrary in this Act or in any other law, an institution may recover as interest in an action instituted under this Act, a sum of money in excess of the sum of money claimed as principal, in such action."**

In any event, the defendant's lawyers by their letter dated 12.08.2003 marked "F15" admitted that the defendant has obtained Rs. 6 million from the plaintiff-bank. Admittedly, the defendant has not repaid the said sum of Rs. 6 million. It is to be noted that the full amount claimed by the plaintiff is Rs. 10,518,434.69. Accordingly, the interest component is well below the capital sum of Rs. 6 million.

It is clear from the documents annexed to the plaint and the documents annexed to the petition filed by the defendant in support of this application for leave to appeal and especially the letter dated 12.08.2003 marked "F15", that the defendant has obtained banking facilities to the extent of Rs. 6 million. It appears that the defendant has not repaid this money to the plaintiff. Even the interest on the said capital sum of Rs. 6 million has not been paid. Therefore there is no doubt that the defendant has not repaid the capital sum of Rs. 6 million obtained from the plaintiff-bank. By the letter dated 12.08.2003 marked "F15" the defendant through his lawyers whilst admitting that he borrowed Rs. 6 million, requested the plaintiff to reduce the rates of interest charged by the plaintiff-bank.

Accordingly there is an admission by the defendant that the amount mentioned in the plaint is due to the plaintiff, and he had appealed to the

bank to reduce the rates of interest charged. In this situation when the documents, especially the document marked "F15" indicate that the defendant had acknowledged the capital sum borrowed from the plaintiff-bank and when he only disputes the computation of interest, and in these circumstances it is not obnoxious to the section 6(2)(c) of the Debt Recovery (Special Provisions) Act to order the defendant to furnish security for leave to appear and defend.

It is to be observed that whilst the defendant admitting that he borrowed Rs. 6 million from the plaintiff and that he has not repaid the said sum and interest thereon, he is now relying on technical defences to obtain leave to appear and defend unconditionally.

It is to be observed that the learned Judge has made order granting the defendant leave to appear and defend upon furnishing security in a sum of Rs. 3.5 million which is 1/3rd of the amount claimed by the plaintiff. As stated above, the defendant has admitted that the bank granted him Rs. 6 million, which sum has not been repaid by him. The section 6(2) of the Debt Recovery (Special Provisions) Act provides for the affidavit of the defendant to deal specifically with the plaintiff's claim on its merits. In the instant case the defendant has relied on technical objections and not revealed his defence, if he has any, to the claim made by the plaintiff. He has taken refuge mostly on the technical objections set out in his affidavit. The defendant has not set up any plausible defence relating to a triable issue.

In the case of People's Bank V. Lanka Queen INT'L Private Ltd [3]. it was held that the amended section 6(2) (amended by Act, No. 4 of 1994) does not permit unconditional leave to defend the claim. The minimum requirement according to section 6(2)(c) is the furnishing of security.

In the aforesaid case Justice De Silva has made a comprehensive analysis of section 6(2) as amended by Act No. 9 of 1994. De Silva, J. held that the amended section 6(2) does not permit unconditional leave to defend the claim, the minimum requirement according to section 6(2)(c) is for furnishing of security.

De Silva, J. referring to section 6(2) made the following observation at pages 237-238.

"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 dectee 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 satisty 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 to the defendant to furnish security, such as banker's draft, and then defend the action.

(c) the third alternative is where the court is satistied 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 defenant ;

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.

In the case of National Development Bank Vs. Chrys Tea (Pvt) Ltd. and another[4] this Court held that ;

(i) Under Section 6(2)(a) or 6(2)(b) the Court has no discretion to order security which is not sufficient to satisfy the sum mentioned in the decree nisi.

(ii) Section 6(2)(c) is the only section which permits the Court discretion to order security which would be a lesser sum than the sum mentioned in the decree *nisi.*

In the instant case, it is my considered view that the defendant's affidavit does not disclose a sustainable defence to grant leave to appear and defend the action. Furthermore, I am bound by the judgements in the aforesaid cases of *People's Bank V. Lanka Queen INT'L Private Ltd.(Supra)* and *National Development Bank* Vs. **C***hrys Tea (Pvt.) Ltd. and another.(Supra)*

This Court therefore sees no reason to interfere with the order of the learned Additional District Judge dated 27.7.2004. The application for leave to appeal is accordingly dismissed with costs fixed at Rs. 50000 payable by the defendant to the plaintiff.

Application dismissed.