

DHARMARATNA
v
PEOPLE'S BANK

COURT OF APPEAL
AMARATUNGA, J.,
ABEYRATNE, J.,
CA 1111/2000
D.C. POLONNARUWA DR 118/2000
OCTOBER 15, 2003

Debt Recovery (Spl.Pro) Law , No. 2 of 1990 as amended by Act, 9 of 1994 – Sections 13 and 30 – Decree Nisi made Absolute – Application to execute decree – Civil Procedure Code – Section 219 – Is an overdraft a debt or a loan?

Held:

- (i) An overdraft arises from transactions relating to Banking. The plaintiff petitioner has by its letters agreed to pay the amount due from him. In the circumstances an "Overdraft" comes within section 30 of the Debt Recovery Law.

APPLICATION in Revision from an order of the District Court of Polonnaruwa.

K. S. Tillakaratne for the petitioner.

Rohan Sahabandu with *Ms. Deepa Govinna* for respondent Bank.

Cur. adv. vult

December 18, 2003

GAMINI AMARATUNGA, J.

This is an application for revision to have "the order of the learned District Judge of Polonnaruwa in D.C. Polonnaruwa DR 118/2000 set aside and declare the same a nullity and all subsequent proceedings a nullity". This relief sought is vague in that the petitioner has not stated specifically what order he seeks to have declared a nullity. Firstly there is the 'order' made by the learned Judge making the decree *nisi* absolute. That order has been made on 5/5/2000. Thereafter in execution proceedings the petitioner judgement-debtor was examined under section 219 of the Civil

Procedure Code and at the end of the examination, the Attorney-at-law for the petitioner has made an application for permission for cross-examine the petitioner. The learned Judge by his 'order' dated 6/9/2000 has refused that application. Thus there are two orders and from the prayer it is not clear which order is the subject matter of this application. 10

However in the body of the petition the petitioner has averred that the order making the decree *nisi* absolute was a nullity. Therefore I proceed to examine the petitioner's assertion that the decree absolute was a nullity.

The plaintiff Bank (hereinafter referred to as the Bank) filed action under the Debt Recovery (Special Provisions) Law, No. 2 of 1990 as amended by Act, No. 9 of 1994 to recover a sum of Rs. 15,12,963.01 from the defendant as money due to the Bank from him. According to the plaint this sum was due on account of overdraft facilities provided by the Bank to the petitioner, and interest payable for the said facilities. The Court having entertained the plaint entered a decree *nisi*. When it was served on the defendant-petitioner he filed an application supported by an affidavit and documents seeking leave to appear and defend. After examining the material placed before Court by the petitioner the learned Judge has held that the petitioner's application did not disclose a defense which was *prima facie* sustainable. He has therefore made order on 5/5/2000 making the decree *nisi* absolute. 20 30

The petitioner has stated in his petition filed in this Court that he has preferred an appeal against that order. The Bank has made an application to execute the decree absolute which is deemed to be a writ of execution in terms of section 13 of the said Debt Recovery Act. In execution proceedings the petitioner was examined under section 219 of the Civil Procedure Code and the application made by the petitioner's counsel for permission to cross examine the petitioner was refused by Court on 6/9/2000. The petitioner has filed this application on 6/10/2000 and has obtained an order from this Court on 19/10/2000 staying further proceedings in the District Court. 40

The petitioner's contention that the decree absolute was void and or a nullity is based on the submission that in terms of the Debt

Recovery Act an overdraft is not a debt or a loan. A 'Debt' within the meaning of the Debt Recovery Act, No. 2 of 1990 as amended by Act, No. 9 of 1994, has been defined in section 30 of the Act as follows.

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"Debt means a sum of money which is ascertained or capable of being ascertained or capable of being ascertained at the time of the institution of the action, and which is in default, whether the same be secured or not or owed by any person or persons, jointly or severally or as principal borrower or guarantor or in any other capacity and alleged by a lending institution to have arisen from a transaction in the course of banking, lending, financial or other allied business activity of that institution but does not include a promise or agreement which is not in writing.

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An overdraft arises from transactions relating to banking. The Bank in its statement of objections has stated by letter dated 6/7/1999 the petitioner has agreed to pay the amount due from him. This letter marked P9, had been referred to in paragraph 13 of the plaint and annexed to the plaint. Accordingly it is clear that Bank had the right in law to file the action under the Debt Recovery Act. Accordingly I reject the submission that the Bank had no right to file its action under the Debt Recovery Act and the Court had no jurisdiction to entertain and deal with the action.

The petitioner's argument that execution proceedings were also null and void was based on his submission that the institution of the action and the subsequent decree absolute was bad in law. Since I have held that the action had been validly filed and that the Court had jurisdiction to deal with it, the argument relating to the invalidity of execution proceedings is also rejected. Accordingly I dismiss the revision application with costs in a sum of Rs. 10,000/-.

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ABEYRATNE, J.

I agree.

Application dismissed.