

**JAYAWARDENA
VS
SAMPATH BANK LTD AND ANOTHER**

COURT OF APPEAL
SOMAWANSA J (P/CA),
WIMALACHANDRA J,
CALA 19/05
D.C. COLOMBO 20533/L
MARCH 15, 2005,
MAY 18, 2005

*Recovery of Loans of Banks (sp. Pro) Act - 4 of 1990 - Sections 8, 9, 15(1), 16(1)
- Resolution to sell - Third Party mortgages -Challenged in High Court - failure
- Special Leave to Supreme Court refused - Bank seeking to recover possession
- third party relying on the later Supreme Court decision? - third - Party mortgage
void - Applicability of the said decision change of Law by a decision of a higher
Court - Res Judicata- Laesio enormis.*

The Respondent Bank sought to 'Parate Execute' the property owned by the Plaintiff Petitioner (Director) and mortgaged for the facility granted to the 2nd Respondent (Company) as there was default. The Plaintiff and the 2nd Respondent challenged the said decision in the High Court, stating that, the property of the Plaintiff is not liable to be sold. The injunction sought was refused and the Special Leave to Appeal application to the Supreme Court was refused subsequently the action was dismissed.

The Bank thereafter proceeded to sell the property by public auction, and as there were no bidders purchased same at a nominal price. Action thereafter was instituted by the Bank to recover possession and when decree Nisi was made absolute, the order was challenged in the Court of Appeal, the Court of Appeal rejected the application.

The Plaintiff thereafter filed a separate action seeking a declaration that he is the owner and an injunction preventing the Bank from taking over possession. The injunction was not granted. The Plaintiff thereafter sought leave to appeal and leave was granted. The Plaintiff Petitioner contended that as the Supreme Court in a subsequent decision had held that, third party mortgages are void, the Bank Could not have sold the property belonging to the Plaintiff Petitioner, which was given to secure the loan granted to the company.

HELD

- (i) The cause of action in the first case and the present case in the same.
- (ii) The Plaintiff cannot now re-agitate the same matter by instituting a fresh action, and he has no right to have the action re-tried in a different form.

- (iii) As to the effect of change of law by decision of a higher Tribunal the Court has to apply the Law as it is at the time when the decision is given and the fact that the law is subsequently altered by a decision of a higher court or by the legislature gives no right to have an action restored ;

Per Wimalachandra J

"Overruling of the previous decision by the Supreme Court is a declaration that the supposed ruling in the Supreme Court. Leave to Appeal Application never was the Law. The over-ruling applies even to pending cases with retrospective effect; however in our view it does not apply to a case which has been concluded leaving only the execution of the decree."

- (iv) The doctrine of *laesio enormis* would not apply. When there are no bidders the Bank can purchase the property, the price paid by the Bank to purchase is immaterial as the Bank is obliged to re-sell the property in order to recover the full amount due to the Bank - Bank has no power to keep the property for itself.
- (v) The earlier orders made against the Plaintiff Petitioner operate as *res judicata*.

Application for leave to Appeal with Leave being granted from an order of the District Court of Colombo

Cases referred to :

1. S. C. Appeals 5 and 9/2004 - SCM 1.4.2005
2. Katiratamby vs Parupathipillai - 23 NLR 209
3. Derrick vs Williams - 1939 2 All ER 559
4. Rose vs Ford - 1937 3 All ER 359

Ikram Mohamed P. C., and M. S. A. Wadood and M. C. M. Muneer for Plaintiff Petitioner

Palitha Kumarasinghe with Nuwan Rupasinghe for Defendant Respondents
Cur adv vult

07, October, 2005.

Wimalachandra J.

This is an application for leave to appeal from the order of the learned Additional District Judge of Colombo dated 07.01.2005 by that order the learned Additional District Judge dismissed the plaintiff - petitioner's (Plaintiff) application for an interim injunction.

At the inquiry, both parties submitted comprehensive written submissions with regard to the extension of the interim relief granted by this Court and also on the question of granting leave.

Before we proceed to discuss the merits of this application for leave to appeal against the aforesaid order of the learned District Judge, it is pertinent to consider briefly the facts relevant to this application.

The plaintiff and the 2nd defendant - respondent company (the 2nd defendant) had obtained several banking facilities and as security mortgaged the land and premises described in the schedule to the plaint. The plaintiff is a director of the 2nd defendant - company. Admittedly, the plaintiff and the 2nd defendant had defaulted the re-payment of the said banking facilities. Thereafter the Board of Directors of the 1st defendant bank adopted a resolution to recover the amount due to the 1st defendant under the provisions of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990, to sell the mortgaged property by Public auction. The 1st defendant after having taken steps under sections 8 and 9 of the aforesaid Act advertised the property for sale by public auction. The plaintiff and the 2nd defendant then filed action bearing No.5498/L in the District Court and sought a declaration that the bank (1st defendant) has no right to pass such a resolution to sell the said property under the aforesaid Act No.4 of 1990 and also sought an interim injunction on the ground that the plaintiff is only the **mortgagor** and not the borrower (the 2nd defendant) within the meaning of the said Act and hence the 1st defendant (bank) is not entitled to exercise *parate* execution against the property mortgaged, which does not belong to the borrower, the 2nd defendant. As the District Court had no jurisdiction over the matter, the case was transferred to the Commercial High Court of Colombo. The said case was re-numbered as HC (Civil) No.199/2000(1).

The Commercial High Court by its order dated 27.04.2001 refused the plaintiffs application for an interim injunction. Thereafter the plaintiff and the 2nd defendant made an application for special leave to appeal to the Supreme Court against the said order dated 27.04.2001 on the ground that the 1st defendant (Bank) has no right to exercise *parate* execution against a property mortgaged by a person as security for loans obtained by another person. That is, the bank has no right to exercise *parate* execution in case of a property mortgaged by a person other than the

borrower. The Supreme Court refused to grant leave to appeal and dismissed the said application (vide document marked "N", S.C. Minutes dated 23.07.2001). After the Supreme Court dismissed the plaintiff's application, he did not pursue the case No. HC (civil) 199/2000 (1) in the Commercial High Court and it appears that, it was later dismissed and decree was entered.

Thereafter the 1st defendant proceeded to sell the said property by Public auction, and the 1st defendant bought the property as there were no bidders. The Board of Directors of the 1st defendant issued a certificate of sale under section 15(1) of Act No.4 of 1990. The 1st defendant then instituted proceedings in action No.6468/Spl in the District Court of Colombo in terms of section 16(1) of the aforesaid Act for the delivery of vacant possession of the said property purchased by the 1st defendant at the auction. The Court issued a decree *nisi* and it was served on the plaintiff who appeared in court and raised certain legal objections. The learned judge having considered the objections raised by the plaintiff, rejected the objections and made the decree *nisi*, absolute. The plaintiff then filed a leave to appeal application No. 416/2003 and a revision application No. 1917/2003 against the said order of the learned judge in the Court of Appeal. This Court on 11.01.2005 dismissed the leave to appeal application on the ground that there is no right of appeal against the said order. Admittedly the revision application No.1917/2003 too was dismissed on 25.04.2005 on the ground that it had not been supported in terms of the Appellate court Rules.

Whilst the aforesaid applications CA No. 1917/2003 and CALA No.416/2003 were pending the plaintiff instituted the above mentioned action No.20533/L in the District Court, Colombo on 28.10.2004 pleading that the plaintiff was the lawful owner of the premises described in the schedule to the plaint and that he had mortgaged the same by mortgage bond bearing No.1485 dated 14.11.1996 in favour of the 1st defendant - bank as security for the Banking facilities obtained by the 2nd defendant-company, of which he is a director. The plaintiff supported for an interim injunction, preventing the 1st defendant from ejecting the plaintiff from the said property and restraining the 1st defendant from reselling the same. The 1st defendant filed objections and after an inquiry the learned Judge made order on 07.01.2005 refusing the plaintiff's application for injunctive relief. It is against this order the plaintiff has filed this application for leave to appeal.

When the matter came up on 18.02.2005 in the Court of Appeal to support *ex-parte* for interim relief, the Court granted a stay order restraining the 1st defendant - bank and its agents, servants and all those acting under the 1st defendant from taking possession of the premises in suit and/or alienating and/or otherwise encumbering the said premises. When the matter was mentioned on the notice returnable date, the 1st defendant was represented by a counsel and objected to the extension of the aforesaid stay order. The matter was fixed for inquiry on 15.03.2005 and on the date of inquiry, counsel for both parties made submissions and thereafter agreed to file written submissions. Accordingly, written submissions were tendered by both parties and the written submissions dealt with the question of granting leave to appeal as well.

In District Court action No.20533/L, the main relief prayed for by the plaintiff were ;

- (a) a declaration that the plaintiff is the owner of the said properties described in the schedule to the plaint.
- (b) a declaration that the public auction held on 11. 10.2001 is void in law and/or the plaintiff's ownership to the said property has not passed to the 1st defendant bank by the said sale and/or the 1st defendant -bank is not the owner of the said property.
- (c) an interim injunction restraining the 1st defendant from ejecting the plaintiff from the said premises pending the final determination of the action.

The learned President's Counsel for the plaintiff submitted that the learned judge dismissed the plaintiff's application for the interim injunction prayed for in the plaint mainly on the ground that the Commercial High Court in Case No. 199/2000(1) had decided that a 3rd party mortgagor comes within the definition of "borrower" and although that order is not binding on the District court, the Commercial High court has clearly interpreted the intention of the legislature and it has been confirmed by the Court of Appeal in two other cases. The learned High Court Judge in Case No.199/2000 (1) had held that the word "borrower" in Act No. 4 of 1990 must be interpreted to include the mortgagor who had provided security, by mortgaging a property, for the loan obtained by the borrower.

The plaintiff and the 2nd defendant sought leave to appeal from that order. The supreme Court dismissed the said application for special leave

to appeal holding that "we see no basis to grant special leave to appeal" (*Vide*- S.C. Special Leave to Appeal 14/2001, S. C. Minutes dated 23.07.2001)⁽¹⁾. It appears that the Supreme Court has held with the said order made by the Commercial High Court in Case No. HC. (Civil) No.199/2000(1). In the circumstances, as at the date of institution of this action (D. C. Case No.20533/L) on 28.10.2004 the law was that Banks are entitled to resort to *parate* execution under the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990, where a property is mortgaged by a person as security for a loan obtained by another person (actual borrower).

Mr. Ikram Mohamed, P. C. submitted that the Supreme Court has now by its judgment dated 01.04.2005 in S. C. Appeal Nos. 5 and 9/2004 (1) held that the provisions of the Recovery of Loans by Banks (Special Provisions) Act No.04 of 1990 will not apply in respect of a mortgage given by a guarantor or a person as security for a loan obtained by another person from a Bank. The learned President's Counsel contended that the order made by the Commercial High Court in Case No. 199/2000 (1) is an erroneous decision in view of the aforesaid Supreme Court decision in S. C. Appeal Nos. 5 and 9/2004.

The learned Counsel cited the case of **Katiratamby Vs. Parupathipillai**⁽²⁾ where it was held that an erroneous decision on a pure question of law does not prevent a Court from deciding the same question arising between the same parties in a subsequent suit according to Law. The plaintiff by filing the District Court action No.20533/L against the Bank has tried to re-agitate the same matter between the same parties in a surreptitious manner. The cause of action in the Commercial High Court Case No. 199/2000(1) is not totally different from the cause of action in the District Court Case No.20533/L. It is to be observed that the facts are the same in both cases. It is not in dispute that the 1st defendant bank passed a resolution under the provisions of Act No.4 of 1990 to sell the mortgaged property belonging to the plaintiff by public auction on the basis that the 2nd defendant had defaulted the repayment of a sum of Rs.45 million and interest thereon borrowed from the bank.

The plaintiff and the 2nd defendant filed the action HC (Civil) No.199/2000 (1) *inter alia* for a declaration that the said resolution is not lawful and/or is illegal and for a declaration that the bank is not entitled to sell the property described in the said resolution which is morefully described in the schedule to the plaint and also for an interim injunction to restrain

the defendant bank from selling the said property described in the said resolution. The Commercial High Court refused to issue an interim injunction. Thereafter the plaintiff and the 2nd defendant made an application for leave to appeal to the Supreme Court against the said order on the ground that the bank is not entitled to sell the property by way of *parate* execution where the property has been mortgaged by a person other than the actual borrower. The supreme Court refused to grant leave to appeal and dismissed the application. The present action bearing No.20533/L has been filed on 28.10.2004, in the District Court of Colombo *inter alia* for a declaration that the said public auction held by the 1st defendant - bank is null and void and for a declaration that the plaintiff is the owner of the said property and also for an interim injunction preventing the 1st defendant - Bank from ejecting the petitioner and all those holding under him and claiming title to the property. In these circumstances it shows that the cause of action in both cases, that is in case No. HC(Civil) 199/2000(1) and in case No. D. C. Colombo 20533/L is the same or just the same.

Therefore the plaintiff cannot now re-agitate the same matter by instituting a fresh action and he has no right to have the action re-tried in a different form.

We find support for the aforesaid view in the English case of *Derrick Vs. Williams*.⁽²⁾ This is a judgment as to the effect of change of law by decision of a higher Tribunal. The Court has to apply the law as it is at the time when the decision is given, and the fact that the law is subsequently altered by a decision of a higher Court or by the legislature gives no right to have an action retried. It would, of course be a different matter if the decision of the higher Court were given while an appeal in the case was pending (editor's note). In the course of his judgment Sir Wilfred Greene, MR. said, (at page 565)

"It was mistake of law, and consisted of the fact that the plaintiff was under the belief that the law as laid down by this Court in *Rose Vs. Ford*⁽⁴⁾ was correctly laid down. In that he was wrong and he is asking the Court to say that the law has been enunciated by the highest tribunal, he is entitled to make another attempt. That is a thing which it seems to me, cannot be permitted on principle. It appears to me to be completely indefensible it would be an intolerable hardship on successful litigants if, in circumstances such as these, their opponents were entitled to harass them with further litigation because their view of the law had turned out to be wrong,

and, unless I were constrained by binding authority I should be quite unable, on principle, to accept any such proposition.

The overruling of the previous decision by the Supreme Court is a declaration that the supposed ruling in the SC Leave to Appeal Application No.14/2001, HC(Civil) 199/2000(1) never was the law. The overruling applies even to pending cases with retrospective effect. However in our view it does not apply to a case which has been concluded leaving only the execution of the decree. As regards the case No. 6468/Spl, it has now come to the stage of execution of decree for delivery of immovable property. Consequently, the aforesaid decision of the Supreme Court overruling its earlier decision in the S. C. Leave to Appeal Application No.14/2001 (S.C.) Minutes dated 23.07.2001 does not apply to the present application pending in this Court.

It is to be observed that the 1st defendant bank commenced proceedings by filing action No.6468/SPL in the District Court of Colombo in terms of Section 16(1) of the Act No.04 of 1990, for the delivery of vacant possession of the property purchased by the bank. Section 16(1) of Act No.04 of 1990 reads as follows :

“The purchaser of any immovable property sold in pursuance of the preceding provisions of this Act shall, upon application to the District Court of Colombo or..... and upon production of the certificate of sale issued in respect of that property under section 15, be entitled to obtain a order for delivery of possession of that property.”

It appears to me that the plaintiff has instituted the District Court action bearing No.20533/L with the sole intention of preventing the execution of the decree in Case No.6468/SPL for the delivery of possession of the property purchased by the 1st defendant - bank.

As regards the above mentioned second ground of objection, we are inclined to agree with the submissions made by the learned counsel for the 1st defendant - bank that the order made in the District Court case No. 6468/SPL, the dismissal of the Leave to Appeal Application No. 416/2003 and the Revision Application No.1917/2003 by the Court of Appeal operates as *res-judicata* and the plaintiff is not entitled to re-agitate the same matter in the District Court action D. C. 20533/L.

The 1st defendant - bank, at the auction purchased the said property for Rs.1,000 as there were no bidders. When the plaintiff owes the bank a sum of Rs. 45 Million and interest thereon from 1998, a question arises whether the principle of *laesio enormis* will apply. Moreover section 15(1) of the Act No. 4 of 1990 prevents or does not allow the challenge of the auction. Section 15(1) reads thus :

"If the mortgaged property is sold, the Bank shall issue a certificate of sale and there upon all the right, title and interests of the Borrower, to, and in, the property shall vest in the purchaser; and thereafter, it shall not be competent for any person claiming through or under any disposition whatsoever of right, title or interest of the borrower to, and in the property made or registered subsequent to the date of mortgage of the property to the Bank, in any Court to move to invalidate the sale for any cause whatsoever, or to maintain any right title or interest to or in the property as against the purchaser."

In terms of Section 19 of the Act No. 4 of 1990, if the Bank purchases the property, the Bank is then obliged to re-sell the property within a reasonable period in order to recover the full amount due to the Bank. It appears that when there are no bidders, the Bank can purchase the property. In the circumstances, I agree with the submissions made by the learned counsel for the 1st defendant -Bank that the price paid by the Bank to purchase the property is immaterial as the Bank is obliged to re-sell the property in order to recover the full amount due to the Bank. It seems to me that the Bank has no power to keep the property for itself. Moreover, no Bank can sell a property at Market price when people are occupying the property. In the instant case the plaintiff and persons holding under him are in occupation of the property which is the subject matter of this action. In these circumstances it seems to me that the doctrine of *laesio enormis* will not apply to this matter.

For these reasons we are of the view that this is not a fit case to grant leave to appeal. Accordingly, the application for leave to appeal is dismissed with cost fixed at Rs. 10,000.

Judge of the Court of Appeal

Somawansa, J. (P/CA) – I agree,

Appeal dismissed.