

METAL PACKING LTD. AND ANOTHER
v
SAMPATH BANK LTD.

COURT OF APPEAL
WIMALACHANDRA, J.
BASNAYAKE, J.
CALA 325/2006
DC COLOMBO 1143/DR
MARCH 19, 2007

Debt Recovery (Special Provisions) Act – No. 2 of 1990 – Sections 6 2(a), 6 2(b) and 22 – Amended by Act No.9 of 1994 – Should the plaintiff affirm in the affidavit that the sum is “lawfully due”? Justly due? Failure to reply business letters?

The District Court after inquiry ordered the respondents to deposit 1/3 of the principal amount. The objection that in the affidavit there is no averment that the amount is “lawfully due”, was rejected as the Court held that on the face of the plaint and the affidavit the amounts claimed were “lawfully due”.

On leave being sought,

It was contended that the law amended – Act No. 9 of 1994 making it obligatory to annex to the plaint an affidavit affirming that the money is “lawfully due” and that the affidavit filed does not contain the word “lawfully due”.

Held:

- (1) The defendant did not disclose a defence against the claim in the plaint. The defence is mainly confined to technical objections to the regularity of the procedure. The defendants have merely denied the plaintiff's case. Mere denial is not sufficient when they have failed to respond to the letter of demand sent by the plaintiff demanding the said sum. In business matters in certain circumstances, the failure to reply to a letter amounts to an admission of a claim made therein.

Per Eric Basnayake, J.

"The term justly due was interpreted in *Ramanayake v Sampath Bank*, where the Court held that the failure to aver in the affidavit that the amount is 'justly due' is not a fatal defect, if the affidavit shows that the amount is rightly due and properly due and hence that is only a technical objection which should not be allowed to prevail."

- (2) The Courts have to be satisfied that the contents of the affidavit disclose a defence against the claim made by the plaintiff which is *prima facie* sustainable.

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

Cases referred to:

- (1) *Ramanayake v Sampath Bank* 1993 1 Sri LR 149.
- (2) *Seneviratne and Others v Lanka Orix Leasing Company Ltd.* 2006 1 Sri LR 230.
- (3) *People's Bank v Lanka Queen International Pvt. Ltd.* 1 Sri LR 233.
- (4) *Car Mart and another v Pan Asia Bank Ltd.* 2004 3 Sri LR 56.
- (5) *National Development Bank v Chrys Tea (Pvt) Ltd. and Another* 2002 2 Sri LR 2006.
- (6) *Saravanamuttu v De Mel* 49 NLR 429.

M.A. Sumanthiran with *Nigel Bartholomeusz* for defendant-petitioner-petitioner.

P. Wickremasekera for plaintiff-respondent-respondent.

June 2, 2008

ERIC BASNAYAKE, J.

The plaintiff-respondent (hereinafter referred to as the plaintiff) filed this action in the District Court of Colombo against the defendant-petitioner-petitioner (hereinafter referred to as the 1st and the 2nd defendant as the case may be) under the Debt

Recovery (Special Provisions) Act as amended to recover *inter alia* a sum of Rs. 12,851,301.30 together with interest amounting to Rs. 10,911,751.93.

The 1st defendant opened an account with the plaintiff's bank to obtain a loan and subsequently obtained one. The 2nd defendant stood as surety. The 1st defendant settled part of the loan and defaulted. The plaintiff informed the 1st defendant of the amount outstanding with a breakdown (P12 and 13). Thereafter this amount was demanded. However, the defendants did not respond (P10, 11, 12 and 14A). *Order nisi* was issued at the first instance to which the defendants filed papers and sought leave to defend unconditionally.

The defendants in the objections filed admitted to the fact of the 1st defendant obtaining a loan from the plaintiff. The defendants stated that a sum of Rs. 14,088,248.08 was paid to the plaintiff. The defendants do not mention the amount taken as a loan.

The court after inquiry required the defendants to deposit 1/3rd of the principal amount, namely, Rs. 4,283,767.01. The defendants are now seeking to have the order of the learned Additional District Judge set aside.

Objection

The only objection taken before this court is that the plaintiff had failed to affirm in the affidavit that the sum claimed is 'lawfully due'. The law requires an affidavit to be annexed to the plaint to the effect that the sum claimed is 'lawfully due' to the institution. The learned Counsel appearing for the defendants submitted that this failure is fatal and thus the action should be dismissed.

Section 4(1) of the Debt Recovery (Special Provisions) Act as amended by Act No. 9 of 1994 is as follows:

4(1) The institution suing shall on presenting the plaint file **with the plaint an affidavit to the effect that the sum claimed is lawfully due** to the institution from the defendant (emphasis added).

The learned Counsel appearing for the plaintiff had drawn the attention of court to the several paragraphs of the plaint and the

corresponding affidavit showing that the 1st defendant had obtained a loan from the plaintiff bank accepting its terms and conditions (p7) and also presenting a promissory note (P9). The statements of account reflected the amount recovered and the amount outstanding (P12 and 13). The amount outstanding was demanded (P15A and 15B) and was never disputed to have been so by the defendants. The learned Counsel submitted that the above mentioned facts would be sufficient to indicate that the sum claimed was 'lawfully due'.

Prior to the amendment (by Act No. 9 of 1994) the law stated that "the sum claimed is justly due". The term 'justly due' was interpreted in the case of *Ramanayake v Sampath Bank*⁽¹⁾ where the Court held that the failure to aver in the affidavit that the amount is 'justly due' is not a fatal defect if the affidavit shows that the amount is 'rightly due' and 'properly due' and hence that is only a technical objection which should not be allowed to prevail. The learned Additional District Judge held that on the face of the plaint and the affidavit the amounts claimed were 'lawfully due'. Hence the learned Judge rejected this submission.

Submission of the Counsel for the defendants

The learned Counsel for the defendants submitted that the law was amended after the judgment in *Ramanayake v Sampath Bank* (*supra*) thus making it obligatory to annex to the plaint an affidavit affirming that the money claimed is "lawfully due". The affidavit filed by the plaintiff does not contain the word "lawfully due" or anything to that effect.

In *Seneviratne and Another v Lanka Orix Leasing Company Ltd.*⁽²⁾ the plaintiff instituted action upon an on demand promissory note under the Debt Recovery (Special Provisions) Act as amended by Act No. 9 of 1994 to recover a certain sum of money. The District Court directed the defendant to deposit half the amount claimed. In a leave to appeal application one of the objections taken was that the plaint and the affidavit did not contain averments to the effect that the sum claimed by the plaintiff was 'justly due'. Wimalachandra J. held that "the defendants have not dealt with the plaintiff's claim on its merits and they have solely depended on the regularity of the procedure and technical objections to the plaintiff's

action. The defendants have not disclosed a triable issue (at 237).

Like in the present case in *Seneviratne's case (supra)* too the defendants filed application against the impugned order of the learned Judge on the basis that they were entitled to unconditional leave to appear and defend. Wimalachandra, J. having followed the case of *People's Bank v Lanka Queen Int'l Private Ltd.*⁽³⁾ held that the effect of the amended section 6(2) does not permit unconditional leave to defend the claim without furnishing security. Wimalachandra, J. quoted De Silva J's observation in the *People's Bank case (supra)* as follows:

"The new subsection clears any doubt that would have prevailed earlier in respect of the procedure a defendant has to follow in applying for leave to appear and show cause. On an examination of the amendment introduced in sub-section 6(2) it is abundantly clear that the word "application" which appears in the original section has been qualified with the following words: "Upon the filing of an application for leave to appear and show cause supported by affidavit". This shows that -

- (a) It is mandatory for the defendant to file an application for leave to appear and show cause.
- (b) Such application must be supported by an affidavit which deals specifically with the plaintiff's claim and states clearly and concisely what the defence to the claim is and what facts are relied upon to support it.

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 sub-section(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 in to 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 *decree nisi* before permitting the defendant to appear and defend.
- (b) Alternative to (a) above, the court may order the defendant to furnish security which, in the opinion of the court is reasonable and sufficient to satisfy the *decree nisi* in the event of it being made absolute. The difference between this provision and (a) above is that instead of paying the full sum mentioned in the *decree nisi*, it will be sufficient for the defendant to furnish security, such as banker's draft, and then defend the action.
- (c) The third alternative is where the court is 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 and framing of issues or otherwise permit the defendant to defend the action. Thus it is imperative that before court acts on section 6(2)(c) it has to be satisfied;
 - (i) with the contents of the affidavit filed by the defendant;
 - (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 *Car Mart and Another v Pan Asia Bank Ltd.*⁽⁴⁾ in a similar action where the defendant was ordered to pay 1/3rd of the amount claimed, the learned Counsel for the defendant submitted that the *decree nisi* was bad in law. He submitted that the action was not properly constituted according to the provisions of the Debt Recovery Act. He

submitted that the plaint was prepared in contravention of the provisions of section 22 of the Act. He further submitted that after the court has entered *decree nisi* for the total amount claimed by the Bank, at the end of the action the court has to either make the *decree nisi* absolute or discharge it whereby the court has no power to vary the amount.

The Court held that the proviso to section 6(3) empowers the court to vary the *decree nisi* at the end of the action. If the defendant at the end of the case satisfies court that a sum of money is not legally due from him or a sum not legally recoverable from him the court has power to make adjustments to the *decree nisi* before making it absolute. The court held that the District Court has granted leave for the defendants to appear and defend after depositing the sum ordered. Amaratunga, J. held (at 59) that "after depositing this sum it is open to the defendants to show that penal interest is included in the sum claimed."

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*. 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* (*National Development Bank v Chrys Tea (Pvt) Ltd. and Another*,⁽⁵⁾ followed in *Seneviratne and Another v Lanka Orix Leasing Company Ltd. (supra)*). Even under Section 6(2)(c) the court has to order security, but the court can use its discretion to determine the amount of security if the defendant discloses a defence. The courts have to be satisfied that the contents of the affidavit filed by the defendants disclose a defence against the claim made by the plaintiff which is *prima facie* sustainable (Wimalachandra J. in *Seneviratne's* case (*supra*) at 240).

The defendants did not disclose a defence against the claim made in the plaint. Like in *Seneviratne's* case in the instant case too the defendants defence is mainly confined to technical objections to the regularity of the procedure. The defendants have merely denied the plaintiff's case. "Mere denial is not sufficient when they have failed to respond to the letter of demand sent by the plaintiff demanding the said sum. In business matters, in certain circumstances, the failure to reply to a letter amounts to an admission

of a claim made therein.* (*Saravanamuttu v De Me*⁽⁶⁾ followed in *Seneviratne's case (supra)*).

Therefore this case is without any merit. Hence this application is dismissed with costs.

WIMALACHANDRA, J. - I agree.

Application dismissed.