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Civil Law

BANKING LAW

Court of Appeal

Samathapala Jayawardena Vs Sampath Bank and other

CALA Application No.19/05
D.C.Colombo case No.20533/L
Decided on 7th October 2005 by Andrew Somawansa J(P/CA) and L.K.Wimalachandra J.

Recovery of Loans By Banks (Special Provisions) Act No.04 of 1990 as Amended-Section 15(1), 16(1) of the said Act- Section 207 of Civil Procedure Code-Res Judicata-effect of judgement of the Divisional Bench case of Ramachandran and others vs Hatton National Bank and others on auctions already conducted prior to the said judgement-Laesio Enormis.

The Petitioner was the Managing Director of one Nalin Enterprises (Pvt) Limited who was the 2nd Respondent of this application and the Petitioner and the 2nd Respondent obtained various financial facilities from the 1st Respondent Bank. Since the Petitioner and the 2nd Respondent defaulted the re-payment of facilities the Bank having adopted the Resolution under the provisions of Recovery of Loans By Banks (Special Provisions) Act No.04 of 1990 sold the same in public auction on 11th October 2001.

Before conducting of the said auction by the Bank, the Petitioner and another co-owner challenged the Resolution in the Commercial High Court in case bearing No.CHC 199/2000(1) and High Court refused to issue Interim Injunction and subsequently, the Petitioner withdrew the said case and decree of dismissal was entered. However, after lapse of three and half years, the Petitioner again filed this Action in the District Court of Colombo on the basis that the auction held in pursuance to the Resolution in null and void on the basis that the property mortgaged by the a person other than borrower can not be auctioned by Public Auction under the provisions of the Act No.04 of 1990. The District Court refused the application of the Petitioner for an Interim Injunction and the Petitioner preferred this Leave to Appeal application against the said Order. The Petitioner relied on ratio of majority decision of the case of Ramacnandran vs HNB in support of his case.

However, the Respondent Bank contended that the Petitioner by the said previous Action instituted in the Commercial High Court has agitated the identical issue raised in the instant action and therefore, the Petitioner is not entitled to re-try the said issue in a different form.

His Lordship Wimalachadra J. in dealing with the said issue held that

"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 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 can not 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 [1939] 2 AER 559. This is a judgement 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 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 (editors note). In the course of his judgement Sir Wilfred Greene, MR at page 565, held that

"It was a 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 Ross v. Ford (1937) 3 AER 359, was correctly laid down. In that he was wrong, and he is asking the court to say that, having acted upon the basis of a mistaken view of law, now that t he law has been enunciated by the highest tribunal, he is entitled to make another attempt. That is a thing which is 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 the circumstances as such these, their opponents were entitled to harass them with further litigation because their view of the law turned out to be wrong, and, unless I were constrained by the bind-

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ing authority, I should be quiet unable, on principle, to accept any such propositions".

"As regards the above mentioned second ground of objection, we are inclined to agree with submissions made by the learned counsel for the 1st defendant bank that 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 reagitate the same matter in the District Court action D.C.20533/L.

In dealing with the effect of judgement of Ramachandran v. Hatton National Bank on the auctions conducted prior to the date of the pronouncing the said judgment by the Supreme Court, His Lordship held that

".....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 regard 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.LA Application No.14/2002 S.C. Minutes dated 23.7.2001 does not apply to the present application pending in this Court."

In dealing with the position of the Petitioner that the purchasing the property by the Bank for Rs.1000/- His Lordship held that

"The 1st defendant bank, at the auction purchased the said property for Rs.1000/- as there were no bidders. When the plaintiff owes the bank a sum of Rs.45 Millions and interest thereon from 1998, a question arises whether the principle of laesio enormis will apply. More ever section 15(1) of the Act No.04 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 thereupon 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.04 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 submission 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.

REF No: 1/01 / 2009

CONTRACT OF INSURANCE

Court of Appeal

Sri Lanka Insurance Corporation Vs Bodiya Baduge Lalani Perera and another.

CA(R)58/2005.,
D.C.Panadura Case No.1771/M
Decided on 8th July 2008 by His Lordship A.W.A.Slam, J.

Contract of Insurance-Motor Traffic Act- Notice Under Section 106 of Motor Traffic Act-Who can give notice under Section 106 of Motor Traffic Act-doctrine of subrogation

Sri Lanka Insurance Corporation made the instant revision application to set aside the Order of the Learned District Court by which the Learned District Judge allowed the application of the Plaintiff to execute the writ against Sri Lanka Insurance Corporation. The Plaintiff instituted action against the Defendants on the account of the death of her Son and ex-parte judgement entered against the Defendants and though the Defendants made an application to purge the default, the Defendants had failed to prosecute the said application too and the said application also had been dismissed. Thereafter, the Plaintiff moved the Court to issue writ against Insurance Corporation and the Learned District Judge allowed the Application.

The Insurance Corporation challenged the said writ of execution inter alia, on the basis that the Plaintiff has not given the notice of action as required by Section 106 of Motor Traffic Act to Insurance Corporation and therefore the Corporation is not liable to satisfy decree entered against the Insured.
His Lordship, Salam J. held that

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Notice under Section 106 of Motor Traffic Act can be given by any party to the Action and need not necessarily be given by the Plaintiff himself.

The Insurer has a legal right to move the Court to inquire in to his objection relating to the Plaintiff's failure to comply with Section 106 of Motor Traffic Act.

The basic principles of the doctrine of subrogation in our law with regard to claims arising against a person who has obtained an insurance policy against third –party risks under section 99 read together with section 100(4) has been recognized under section 105 subject to the limitations spelt out under sections 106 to 109 of the Motor Traffic Act. Under the provisions of the Motor Traffic Act any sum decreed by Court to be paid against the insured as a results of an automobile accident, shall not become payable by the insurer, when no notice under section 106 of the Motor Traffic Act is given within the stipulated period.

As far as evidence adduced at the ex-parte trial is concerned, it is manifestly clear that the Plaintiff has not produced any proof relating to the notice of action being given to the Petitioner. At the ex-parte trial documents produced included "P10" and "P11" which are two letter of demand addressed to the 1st and 2nd Defendants. Quite significantly, the Plaintiff has not even copied them to the Petitioner or in the least degree did make such a claim. Though the Plaintiff produced a letter marked "P12", since the said letter has been sent after 2 years 7 months and 4 days after the institution of the Action, it is hardly possible to construct that it amounts to a notice of action as contemplated under Section 106 of Motor Traffic Act.

In the proceedings had in the lower court, at no stage did the Plaintiff establish that notice of commencement of the action was given to the insurer by any of the parties to the case, within the stipulated period. In the circumstances, the Learned District Judge was bound to refuse the application for writ of execution against the Petitioner or to issue notice on the Petitioner before she took the draconian measure to issue a writ of execution.

As the Civil Procedure Code is silent with regard to the question as to whether notice of application for writ should be given to an insurer, in the event of no proper notice of action has been given and the conduct of the defence had not been taken over by the insurer the learned district judge could have issued notice on of the application on the petitioner based on the principle that every procedure is to be understood as permissible till it is shown to be prohibited by law. It is commonly understood principle of law that prohibitions are not to be presumed.

In order to hold an insurer liable for the payment of money under section 105(a) of the Motor Traffic Act, it is obligatory that insurer should have been given notice of action in which the decree was entered, before or within seven days after commencement of the action, by a party to the action; thus, the rule positively laid down to make the insurance Company liable to satisfy the decree is not the mere fact of an obtaining an insurance policy against third party risks but in addition the notice of action given to the insurer.

REF No: 2/01 / 2009

SUPREME COURT

Criminal Law

BAIL ACT

Leo A.M.Claes Vs. Wilfried Van Els and others,

SC (SPL) No.43A/07
SC (SPL) LA No.11/07
HCALT Case No.118/2006
LT Application No.21/7505/95

Decided on 1st February 2008 by His Lordship S.N.Silva C.J. , Shiranee Tilakawardane, J and S.Marsoof J.

Bail Act- Sections 21 and 23 of the Bail Act-Immigrants and Emigrants Act- a person whether a Sri Lankan or foreign national should be detained in accordance with power vested by law.

The Applicant instituted proceedings against the 1st and 2nd Respondents in the Labour Tribunal on 3rd June 1995 inter alia, on the basis that his service had been unjustly, unreasonably and without sufficient cause had been terminated by the Respondents. The Labour Tribunal on 3rd March 2006 dismissed the application of the Applicant. The Applicant preferred an Appeal against the said Order to the High Court. Though the notices were served on the parties named in the Petition, Fiscal reported that the 1st Respondent had closed business 3 years prior to that and summons could not be served.

Thereafter, Applicant filed a Motion and moved the Court to issue summons on Director, Leo Claes (the Petitioner) and however, no application was made to substitute him in place of original Respondent. Subsequently, by Petition and Affidavit, the Appli-

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cant sought an Order preventing the Petitioner from leaving the country, though the Petitioner was not a party before Labour Tribunal or in the High Court and no prayer for addition the Petitioner as a party.

The Learned High Court Judge made order allowing the said application and further made orders to notify the Controller of the Immigration and Emigration and the Ministry of Foreign Affairs that the Petitioner should not be allowed to leave the Country.

In Special Leave to appeal to Supreme Court, the Petitioner urged that the impounding of the Passport was erroneous and the Learned High Court Judge erred in law in allowing the application of the Applicant for preventing the Petitioner from leaving the Country.

Her Ladyship, Shiranee Tilakawardane, J held that

A passport can be impounded in terms of Section 51C of the Immigrants and Emigrants Act as amended by Act No.16 of 1993. This section reads as follows:

Whenever in any proceeding in respect of any offence under any law it appears to the court that the attendance of an accused or suspect or the examination of a witness is necessary, it may, impound any travel document issued to such accused, suspect or witness, as the case may be, and for the time being in force, for such period as it may deem necessary to procure the attendance of such accused, or suspect or the examination of such witness. A court making an order under this section impounding a travel document issued to any person shall cause a copy of such order to be transmitted to the Controller.

In this section, the expression " travel document" means a Sri Lanka passport, or an emergency certificate or identity certificate issued under the Immigrants and Emigrants Regulations, 1956.'.

It appears in this context the law has included identity certificates issued under the Immigrants and Emigrants Act. Since a valid passport in relation to those who are not citizens of Sri Lanka includes even documents of identity, as set out in the interpretation clause contained in Section 54 of the said Act, an extended meaning has to be given to what constitutes a "valid passport" of those who are not citizens of Sri Lanka. "Identity certificate", as long as they have the characteristics of a passport, under the Immigrants and Emigrants Act would extend to include a foreign passport. I cannot therefore agree with the contention of the Senior State Counsel in his written submissions that the power to impound does not extend to foreign passports.

Section 22 of the Bail Act No.30 of 1997 also permits a Magistrate to restrict travel of a person making an application for anticipatory bail. The said section reads as follows:

22(1) Whenever a Magistrate makes an order that in the event of the arrest of the applicant he shall be released on bail it may attach such conditions to the order as it may think fit, in the light of the facts of the particular case, (including conditions prohibiting the applicant from leaving Sri Lanka or requiring the applicant to surrender his passport to court), and shall specify-

(a) the non bailable offence or offences in respect of which the order is made ; and

(b) the manner in which bail shall be furnished by the applicant at the time of his arrest.

(2) Where a Magistrate in making an order under section 21, prohibits the applicant from leaving Sri Lanka, he shall forthwith notify the Controller of Immigration and Emigration of such fact.

According to this section, the powers of Magistrate may extend to "...prohibiting the applicant (for anticipatory bail) from leaving Sri Lanka or requiring the applicant to surrender his passport to the Court. In terms of the section the prerequisite being that the applicant must be arrested or at least a suspect before the Court.

Of specific importance is the relevance of Section 22(2) where the Order has to be in conformity with the procedure set out in Section 21 of the said Act. It is only an Order that has complied with the procedure set out in section 21 that is capable of attracting a prohibition against the applicant leaving the country, and it is this order that has to be notified to the Controller of Immigrants and Emigration.

The Petitioner, against whom the Court has ordered a prohibition against travel outside, is afforded an opportunity of being heard under procedure, which contemplates that an Order should only be made following an inquiry and after hearing him either personally or through his Attorney-at-Law.

The detention of a person, whether a Sri Lankan or a foreign national must strictly accord with the powers vested by law in the judicial officer issuing the Order. Such power must also be carefully exercised with strict adherence to procedures established by law.

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It should not be exercised in an arbitrary or unreasonable manner. It should not be exercised without providing for a hearing of the holder of the passport. A mere likelihood or an amorphous reason does not constitute sufficient ground for such order. There must be a good and sufficient reason shown to exist for impounding the passport of the Petitioner. The procedure for the issue of such an order can not be arbitrary, unfair or unreasonable. ...."

REF No: 3/01 / 2009

The Junior National Law Conference 2008

The Junior National Law Conference 2008, organized by the Junior Bar Committee was held at the Heritance, Ahungalla on the 8th and 9th of November 2008. The Conference was attended by approhimately 300 delegates and was proportionately represented by the Colombo and the outstation Bar Associations. The main speaker at the plenary session was Hon. Justice Shiranee Thilakawardena who spoke on the subject 'Inspiring Young Lawyers'. On both days a series of sessions were organized each comprising of a panel of eminent lawyers who delivered lectures and dealt with questions covering a wide range of topics essential to a junior lawyer. More importantly, the delegates were able to choose between two and sometimes three parallel sessions thus enabling them to avoid sessions not relevant to their area of practice. Another important event that took place at the Conference was the launch of the inaugural issue of the Junior Bar Law Journal titled The Junior Lawyer.

National Police Commission Responds to BASL Complaint

Following the complaint made to the National Police Commission (NPC) by the Bar Association of Sri Lanka (BASL) regarding the unlawful detention and abuse of Attorney at Law Mr. D. W. C Mohotti, the NPC has informed the BASL that it will be instituting disciplinary action against the relevant officer.

Mr. K. C. Logeswaran, Secretary NPC in a letter dated 11.12.2008 informed Mr. U. R. De Silva, Secretary BASL that there is a prima facie case against CI Upul Senaviratne, OIC Bambalapitiya Police for "discreditable and oppressive conduct" and will commence disciplinary action on receipt of the draft charges made by the IGP.

CI Upul Seneviratne had allegedly unlawfully detained, abused and forcibly removed the BASL identity card of Attorney at Law, D.W.C Mohotti on the 24th of October 2008 at the Bambalapitiya Police Station.

NOTICE

OBTAINING COPIES OF COURT PROCEEDINGS

By Circular No. 06/2006 dated 01.06.2006 of the Secretary of the Ministry of Justice, the charges for obtaining proceedings and documents has been specified and brought under different categories, depending on the type of application. In that Circular under paragraph 3, it has been specified that photocopying charges for a page is Rs. 3/- and for both sides of a sheet is Rs. 6/-. This Circular had been circulated to all High Court Judges, District Court Judges and Magistrates.

The Accountant of the Kurunegala High Court by Circular dated 25/07/2008 had informed the Registrars of the Courts within Kurunegala Zone that no photocopies of typed proceedings should be issued by way of photocopied proceedings. Under that Circular the Lawyers were compelled to apply for typed copies which would cost Rs. 25/- per page.

Mr. J M Gunatillake, the President of the Kuliyapitiya Bar had brought this matter to the notice of His Lordship the Chief Justice and His Lordship has mentioned that nobody could issue Circulars overriding the Circular issued by the Secretary of the Ministry of Justice and not to comply with the Circular issued by the said Accountant.

Therefore every Lawyer in any Court has the right to obtain photocopies @ Rs. 3/- per page as per Circular No. 06/2006 of the Secretary of the Ministry of Justice.

Sgd.
W DAYARATNE
PRESIDENT
BAR ASSOCIATION OF SRI LANKA
27th January 2009