JUDGMENTS

CIVIL LAW

Mortgage Bonds

COURT OF APPEAL

Commercial Bank of Ceylon Vs Sampath Bank Ltd and others

CA Application no 1835/2003
D.C. Colombo Case No.16791/MB
Decided on 23.05.2007 by S.I.Imam and S.Sriskandarajah.

Mortgage Bonds- Claims on Priority-the rights of secondary and tertiary mortgagees over the property-rights over proceeds- Section 50(1) of NDB Act No.02 of 1979.

This was a Revision application made by the Petitioner to revise an order of the District Court of Colombo dated 16th September 2003.

The Defendant –Respondent-Respondent (hereinafter referred to as the Defendant) had mortgaged a land and premises in favour of the 2nd Respondent namely the National development Bank by Mortgage Bond bearing No 142 dated 17.12. 1992. The Defendant Company also had executed a Secondary Mortgage Bond bearing No 401 dated 27.7.1994 and a Tertiary Mortgage Bond bearing No.2855 dated 8.8.1995 in respect of the same property in favour of the Petitioner (Commercial Bank of Ceylon).

Since the Defendant defaulted in repayment of the loan obtained from NDB, the NDB adopted a Resolution under National Development Bank Act to sell the property by public auction and at the auction held on 28.11.1996, as there were no other bidders, NDB purchased the property and subsequently sold the same to 1st Respondent (W.Wilfred and Sons Ltd).

The said W.Wilfred and Sons Ltd mortgaged the said property with the Respondent (Sampath Bank Ltd) by Mortgage Bond No.1701 dated 4th March 1998.

In the meantime, the Petitioner (Commercial Bank Ltd) put the said Mortgage Bonds Nos. to 401 dated 27.7.1994 and 2855 dated 8.8.1995 in to suit and obtained an ex-parte judgement and decree and was seeking to sell the property by public auction. Before the said auction, the Respondent, Sampath Bank Ltd made an application to stay the sale inter alia, on the basis that since the said property had been sold by Public Auction by NDB on Mortgage Bond No 142 and dated 17.12. 1992 on 28.11.1996, the rights of Commercial Bank (the Petitioner) under the said Secondary Mortgage Bond bearing No 401 dated 27.7.1994 and a Tertiary Mortgage Bond bearing No.2855 dated 8.8.1995 became invalid and/or unenforceable and the Petitioner had no rights to sell the said property by way of public auction.

District Court by Order dated 16th September 2003 allowed the application of the Respondent, Sampath Bank and held that the said ex-parte decree in favour of the Commercial Bank is invalid and of no effect in law. The Commercial Bank preferred this revision application against the said Order.

The Petitioner before the Court of Appeal inter alia, argued that

[a] the Condition of Sale and Certificate of Sale that had issued by NDB subsequent to the public auction in 1996 are subject to the said Secondary and Tertiary Mortgage Bonds;

[b] the said Mortgage Bonds become a Primary and Secondary Mortgage Bonds as against the Mortgage Bond No.1701 dated 4th March 1998 executed in favour of the Respondent, Sampath Bank Ltd and the said Mortgage Bond No.1701 become a Tertiary Mortgage Bond;

[c] the Petitioner is entitled by law to enforce the said Mortgage Bonds in favour of the Petitioner as they were executed before the sale took place by public auction and prior to the said land and premises being registered in the name of the NDB;

[d] The Learned District judge erred in not ordering a sale by public auction and determining the sums due to the Petitioner and Respondent on a priority basis.

His Lordship Imam,J of the Court of Appeal held that

After NDB sold the said property to W.Wilfred and Sons Ltd in pursuance to Certificate of Sale and recovered its due under the Mortgage Bond, there was no balance amount left from the proceeds of the said sale. If there was a balance amount, the District Court could have been in a position to issue such balance to the Petitioner to satisfy the amounts due under the said Secondary and Tertiary Bonds. Thus, the property which was to be sold under ex-parte judgement is not liable to be sold by way of public auction.

In the case of Perera v. Kapuruhamy 23 NLR 176 it was held that "a secondary mortgagee is one entitled to have his claim satisfied before other creditors from the proceeds of sale of the property mortgaged after the primary mortgage is paid.... He can only claim the proceeds of the sale leftover after the full satisfaction of the decree upon the primary mortgage...It follows therefore that the title to a land sold in execution of the decree upon a primary mortgage passes to the purchaser free

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of any encumbrances created by a secondary mortgage or any such encumbrance". A sale in execution under a Decree upon a Primary Mortgage shifts the rights created by other Mortgages from the land to the proceeds of sale left over after the satisfaction of claim of the Primary Mortgagee."

Therefore upon the sale in favour of NDB, the rights created by the secondary and tertiary mortgage bonds shift from the property in suit to the proceeds of the sale left over after the satisfaction of the primary mortgage in favour of NDB. Hence the Petitioner has no right to auction the property in suit.

His lordship also considered the impact of Section 50 of the national development Bank Act No 2 of 1979 which states "if the mortgaged property is sold, the general manager on a specific authorization by the Board of directors shall issue a certificate of sale and thereupon all the right, title and interest 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 the right, title or interest of the borrower to and in the property made or registered after the date of the 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"

The said Secondary and Tertiary Mortgages Bonds clearly fall within the meaning of " any disposition whatsoever of the right, title or interest of the borrower to and in the property, made or registered after the date of the mortgage of the property to the Bank". The Petitioner is claiming under the Defendant and therefore the Petitioner is not entitled to have and maintain any right, title or interest to the said property.

The Petitioners' claim that the Certificate of Sale is subject to the Secondary and Tertiary Mortgage Bonds and that the rights of the Respondent are subject to the rights of the Petitioner's mortgages also is an assertion which is contrary to the said Section 50(1) of the Act No.02 of 1979.

Application dismissed.

REF No: 1/02/2009

CIVIL PROCEDURE CODE

COURT OF APPEAL

Sri Lanka Telecom –v- Lokumarakkala

L. K. WIMALACHANDRA , and
ERIC BASNAYAKE, J.
C.A..A. No.12/2007 D.C. COLOMBO
CASE NO. 42371/MR/2004

DECIDED ON : 13.03.2008

Civil Procedure Code – Second plaint cannot be filed – plaint can be only amended

The original plaint containing 19 paragraphs was filed. Subsequently the plaintiff filed another plaint with 13 paragraphs. There has been no application to amend the original plaint. The lower court accepted the second plaint and the appeal arose therefrom.

HELD by L. K. WIMALACHANDRA, J (with Eric Basnayake, J agreeing) that –

(a) when the plaint is accepted it is the duty of the Court to issue summons.

(b) the trial Judge erred in accepting a plaint containing 13 paragraphs when the original plaint filed at the institution of the action contained 19 paragraphs, especially when there was no application to amend the original plaint containing 19 paragraphs.

(c) the trial Judge erred in accepting the 2nd plaint. The proper course is for the plaintiff to make an application to amend the original plaint to put the real subject matter of the action in issue.

This is an application for leave to appeal filed by the defendant petitioner from an order of the Additional District Judge of Colombo dated 2.1.2007. Briefly, the facts relevant to this application as set out in the petition are as follows:

The plaintiff-respondent (plaintiff) instituted the action bearing No.42371/MR/2004 on 25.6.2004 against the defendant-petitioner (defendant) in the District Court of Colombo. The defendant states that eleven months after the institution of the said action the defendant was served with summons dated 14.6.2005 with a copy of the plaint attached to the summons directing the defendant to tender its answer on or before 20.9.2005. A copy of the plaint attached to the summons is produced marked P4 and a copy of the summons dated 14.6.2005 is annexed to the petition marked 'P3'. The copy of the plaint attached to summons is dated 25.6.2004, contains 13 paragraphs signed by the plaintiffs registered Attorney (P4). The defendant thereafter filed its answer (P5) on 17.1.2006. The defendant specifically states that its answer (P5) was in response to the 13 paragraph plaint (P4) which was the plaint served on the defendant. Thereafter the case was called on 16.2.2006 to fix the case for trial (Vide J.E. No.5 dated 16.2.2006). On that day the trial was fixed for 15.6.2006. Then on 12.6.2006 the registered Attorney-at-Law for the plaintiff made an application by way of motion to revoke the proxy granted to her. The trial Judge allowed this application to revoke the proxy granted to the plaintiffs Attorney-at-Law (Vide J.E. No.8 dated 12.6.2006). When the case was taken-up for trial on 15.6.2006 an application for a postponement was made on behalf of the counsel for the plaintiff on

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the ground of indisposition and the learned Judge re-fixed the trial for 25.8.2006. Thereafter on 15.8.2006 ten days prior to the date of trial and over two years after the institution of the action a motion dated 15.8.2006 was filed on behalf of the plaintiff by an unnamed Attorney-at-Law purporting to be the registered Attorney of the plaintiff seeking to file a true copy of a photocopy of the plaint, dated 25.6.2004 containing 13 paragraphs annexed to the said motion on the ground that the original plaint had either been misplaced or inadvertently not filed (P6 and P6(a)). It is to be noted that the original plaint which was filed on 25.6.2004 contains 19 paragraphs, (P2).

When the aforesaid motion was supported by the plaintiff on 25.8.2006 which happened to be the 2nd date of trial, the defendant objected to the motion on the ground that a separate and distinct plaint containing 19 paragraphs which was not served on the defendant was already filed of record, though the defendant was served with a 13 paragraph plaint along with summons. The Court directed the defendant to tender written objections and the same was filed by the defendant on 22.09.2006, (P7). The plaintiff thereafter filed counter objections. Thereafter the learned Judge delivered the order on 2.1.2007 allowing the said motion of the plaintiff. It is against this order the defendant has filed this application for leave to appeal. When this application was taken up for inquiry on 23.3.2007, the counsel for the plaintiff consented to the granting of leave. Accordingly, leave to proceed was granted.

The mode of institution of an action is found in Chapter VII of the Civil Procedure Code.

When the plaint is accepted it is the duty of the Court to issue summons. The plaintiff instituted this action on 25.6.2004 by presenting a plaint containing 19 paragraphs which has been subscribed by the registered Attorney-at-Law of the plaintiff, a certified copy was produced marked 'P2'. The Court had accepted the plaint and directed to issue summons on the petitioner (Vide J.E. No.2, dated 6.6.2005) The plaintiff has not denied that he never filed a plaint consist of 19 paragraphs. After accepting the plaint the Court made order to issue summons on the defendant. It is the duty of the Court to issue summons once the plaint is accepted. On 15th August,2006, the plaintiff filed a motion seeking to file a photocopy of a plaint consist of 13 paragraphs on the ground that the original plaint had been either misplaced or inadvertently not filed and inadvertently a plaint drafted by a legal apprentice had been filed. The said motion filed by the plaintiff through his registered Attorney states thus:

It is to be observed that what was annexed to the motion was a plaint containing 13 paragraphs. The motion filed by the plaintiff admits that at the time of the institution of the action, a plaint containing 19 paragraphs was filed. However, when the plaintiff filed the said motion he never sought the permission of Court to file an amended plaint containing 13 paragraphs.

In the circumstances, the trial Judge erred in accepting a plaint containing 13 paragraphs when the original plaint filed at the institution of the action contained 19 paragraphs, especially when there was no application to amend the original plaint containing 19 paragraphs.

Where a plaintiff had mistakenly filed a wrong plaint, he cannot subsequently tender another plaint containing 13 paragraphs by way of a motion (P6) on the basis that what was filed at the institution of the action was a wrong plaint, mistakenly filed by him. Moreso, when the Court has accepted the plaint that was filed at the institution of the action. The plaintiff admits in the motion that at the time of institution of the action a different plaint (P2) was filed (see - P6). It will be seen that more than two years after the institution of the action the plaintiff is seeking to introduce a fresh plaint. Furthermore, the new plaint containing 13 paragraphs is not duly subscribed by the plaintiff's registered Attorney-at-Law and it does not show that the new plaint was properly stamped. This is evident by the copy produced in Court on 25.8.2006 [P6(a)]. It does not bear any evidence of stamping.

In these circumstances, it seems to me that the trial Judge erred in accepting the 2nd plaint. The proper course is for the plaintiff to make an application to amend the original plaint to put the real subject matter of the action in issue.

Appeal allowed

REF No: 2/02/2009

NOTICE

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Through Presidents/Secretaries of Branch Associations

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2. Medicine
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Your generous contribution and timely support for this National cause is anticipated with many thanks.

W. Dayaratne
PRESIDENT
BAR ASSOCIATION OF SRI LANKA