IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

DFCC Bank (PLC)
Head Office, P.O.Box 1397
Colombo 03

Defendant-Appellant

S.C.Appeal No.133/2014
SC/HA/LA No.44/2014
H.C.(Civil) Case No.44/2014/MR

Vs

1. Fathima Ruzana Fakurdeen alias Faleel Ariff Pathuma Rushana alias Fathima Ruzana Ariff
   No.27, Keththarama Mawatha
   Grandpass
   Colombo 14.
2. Mohamed Sarook Mohamed Fakurdeen
   No. 27, Keththarama Mawatha
   Grandpass
   Colombo 14

Plaintiff-Respondents

BEFORE : **SISIRA J.DE ABREW,J**
PRIYANTHA JAYAWARDENA, PC, J.
K.T.CHITRASIRI,J.

COUNSEL : Nigel Hatch P.C with Ms.Siroshni Illangage and Thejaka Perera for the Defendant-Appellant
Farman Cassim with Charaka Jayaratne and Damithree Welikala for the Plaintiff-Respondents

ARGUED ON : 07.02.2016

WRITTEN SUBMISSIONS ON : 12.09.2014 by the Defendant-Appellant

DECIDED ON : 24.03.2016

CHITRASIRI, J.

Two Plaintiff-Respondents (hereinafter referred to as the plaintiffs) are husband and wife. They carried on business in partnership under the name and style "Eat More Restaurant". The defendant-appellant namely the DFCC Bank PLC (hereinafter referred to as the defendant) had extended financial facilities to the said partnership at the request of its partners who are the two the plaintiffs in this case. However, in the plaint filed in the High Court of the Western Province exercising its civil jurisdiction, [herein after referred to as the High Court] two distinct entities are mentioned as the defendants to the action and those are namely;

DFCC Bank PLC

DFCC Vardhana Bank PLC.

The aforesaid manner in which the defendant had been identified in the plaint is a question of law raised by the defendant in the High Court as well as in this Court. Therefore, I will advert to this point later in this judgment.

As mentioned before, upon a request been made by the plaintiffs, defendant bank extended financial facilities to the two plaintiffs in accordance with the terms and conditions referred to in the agreement marked B12 which was annexed to the petition filed in this Court. The aforesaid terms and conditions found in the document marked B12 had been agreed and accepted by the parties. Such consensus is evident by the letter dated 10th January

2011 filed, marked B11. Accordingly, a loan of Rupees Twenty Million (Rs.20,000,000/-) had been granted to the two plaintiffs having them mortgaged the properties referred to in the Mortgage Bonds bearing Nos.3160 and 810. Those two Mortgage Bonds are marked as B12 and B13 with the petition filed in this Court.

Admittedly, the two plaintiffs have failed to service the facilities as agreed. Accordingly, the defendant took steps to auction the properties mortgaged in order to recover its dues, in terms of the provisions contained in the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990. Initially, the defendant had sent the letter dated 5.7.2013 to the plaintiffs informing them that the properties in question are to be auctioned pursuant to a decision of the Board of Directors of the defendant Bank. The aforesaid decision of the Board was marked as P14, with the plaint filed in the High Court. The said decision which is dated 26.6.2013 of the Board of Directors had been published in the newspapers as required by law and the newspaper article was marked as P16A with the plaint.

Pursuant to the receipt of the aforesaid letter dated 5.7.2013, the plaintiffs filed this action on 10.2.2014 in the High Court by the plaint dated 07.02.2014. In paragraphs 19 to 28 of that plaint, the plaintiffs have stated the reasons that made them to file this action. Having averred so, the plaintiffs, among other reliefs, have sought for an enjoining order and for an

interim injunction preventing the aforesaid auction being held. Learned High Court Judge issued an *ex parte* enjoining order against the defendant Bank and fixed the matter for inquiry in respect of the issuance of the interim injunction sought by the plaintiffs. Parties moved to have the said interim injunction inquiry concluded by allowing them to file written submissions on the matter. Accordingly, learned High Court Judge issued the interim injunction as prayed for in paragraph "ඇ" in the prayer to the plaint dated 7.2.2014 having considered the material before him including that of the submissions filed by the parties.

Being aggrieved by the said decision of the learned High Court Judge, the defendant Bank filed this application seeking to set aside the aforesaid order dated 04.07.2014 of the learned High Court Judge. This Court granted leave to proceed with the said application on the following questions of law.

(a) The Commercial High Court erred in law in failing to take into account that the plaintiffs have filed action against a legally non-existent Defendant;

(b) The said order is contrary and repugnant to the Recovery of Loans by Banks (Special Provisions)Act No.4 of 1990 in holding that the petitioner does not have the power to auction two properties under one Board Resolution;

(c) The Commercial High Court erred in law in misinterpreting and/or misconstruing the provisions of section 4 and/or section 10 of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990;

(d) The Commercial High Court misconstrued and/or misinterpreted the provisions of the Recovery of Loans by Banks (Special Provisions)Act No.4 of 1990;

(e) The Commercial High Court misdirected itself in law in not considering that the plaintiffs are guilty of suppressing and misrepresenting material facts and/or documents in seeking an equitable remedy;

(f) The Commercial High Court erred in law in not considering that the plaintiffs are guilty of severe delay and/or laches;

(g) The Commercial High Court misdirected itself in law granting the Interim Injunction;

(h) The Commercial High Court erred in law in failing to take cognizance of the fact that the petitioner had acted within the rights vested in it by the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 at all material times.

The first question of law referred to above is whether the learned trial judge has failed to take into account the manner in which the defendant had been named in the caption to the plaint filed in the High Court. In that plaint the parties are named as follows in its caption:

1. ෆාතිමා රුසානා ෆකුර්ඩීන් හෙවත්
ෆලිල් ආරීෆ් පාතුමා රුසානා හෙවත්
ෆාතිමා රුසානා ආරීෆ්
අංක **27,** කෙත්තාරාම මාවත
ගෘන්ඩ්පාස්
කොළඹ **14**

2. මොහමඩ් සරුක් මොහමඩ් ෆකුර්ඩීන්
අංක **27,** කෙත්තාරාම මාවත,
ගෘන්ඩ්පාස්
කොළඹ **14**

පැමිණිලිකරුවන්

එරෙහිව

ඩී.එෆ්.සී.සී. බෑන්ක් පී එල් සී
(ඩී.එෆ්.සී.සී. වර්ධන බෑන්ක් පී එල් සී)
ප්‍රධාන කාර්යාලය,
තැ.පෙ. 1397,
අංක 73/5, ගාලු පාර,
කොළඹ 03.

විත්තිකරුවන්

Learned President's Counsel for the defendant Bank submitted that the caption in the plaint indicates two different legal personalities. On the face of it, names of two entities are mentioned in the caption even though only the DFCC Bank PLC had been noticed to appear and defend this action. Even the reliefs prayed for in the plaint are directed towards one entity, namely DFCC Bank Plc. Furthermore, no specific reason is given to explain as to why the names of DFCC Bank PLC and DFCC Vardhana Bank PLC are being mentioned as one defendant.

I will now advert to the provisions of law relevant to the naming of defendants. Section 6 of the Civil Procedure Code stipulates that every application to court for relief or remedy obtainable through the exercise of the court's power or authority, constitutes an action. Therefore, cause of action upon which an action is instituted should necessarily give rise to an enforceable claim. This position was accepted in the case of **Pless pol Vs. Lady De Zoysa [9 NLR 316 at 320]** Under those circumstances, when the person against whom the claim is made has not been correctly identified in

the plaint, then the relief sought in that plaint will not become enforceable. Therefore, a claim made in such a plaint should necessarily fail.

Section 14 of the Civil Procedure Code describes the word defendants. In that Section, the manner in which the defendants could be joined is stipulated. Though two entities are being mentioned as defendants in this case, the plaint does not show whether such an addition is in conformity with the law referred to in Section 14 of the Civil Procedure Code. Moreover, Section 15 of the said Code describes the manner in which a person can be joined as a party to an action. Therefore, the way in which the parties are named in the plaint is contrary to those provisions contained in the Civil Procedure Code. Accordingly, I am of the view that the plaint filed in this case is defective.

This matter has not been addressed at all, by the learned High Court Judge. Had he looked at this issue, he could have addressed his mind as to the maintainability of the action at the very outset, as an issue of law. With having those errors of law which could have easily been identified at the very outset, it is incorrect to have issued an interim injunction as prayed for in such a defective plaint.

Questions of law referred to in items (b) (c) (d) and (h) mentioned hereinbefore are directed towards the law found in the provisions contained in the Recovery of loans by Banks (Special Provisions) Act No.4 of 1990. This

particular Act was enacted to provide for the recovery of loans granted by banks for the economic development of Sri Lanka and for the matters connected therewith or incidental thereto. It was brought into operation as a Special Act having given the title (Special Provisions) in its name. Basically, a special procedure had been laid down in the Act in order to have a speedy process to recover the moneys due to the Banks. This procedure is applicable only to the Banks referred to in Section 22 of the Act and not to any other financial institutions. Certainly, this procedure may help achieving the purpose of enacting this Act when compared with the procedure that are available to recover dues such as the Regular Procedure found in the Civil Procedure Code. Therefore, it is the duty of the court to ensure that those provisions in the Act No.4 of 1990 are implemented in the way that the legislature had intended.

Contention of the learned Counsel for the plaintiffs is that the defendant has violated Section 10 of the aforesaid Act No.4 of 1990. He has no complaint as to any other violation of the provisions contained in the Act. Section 10 of the Act reads thus:

> *10. (1) If the amount of the whole of the unpaid portion of the loan, together with the interest payable and of the moneys and costs, if any, recoverable by the Board under Section 13 is tendered to the Board at any time before the date fixed for the sale, the property shall not be sold, and no further steps shall be taken in*

pursuance of the resolution under Section 4 for the sale of that property;

(2) If the amount of the installment in respect of which default has been made, and of the moneys and costs, if any, recoverable by the Board under Section 13 is tendered to the Board at any time before the date fixed for the sale, the Board may in its discretion direct that the property shall not be sold and that no further steps shall be taken in pursuance of the resolution under Section 4 for the sale of that property.

Sub section (1) above provides for the borrower to prevent the auction being held provided he/she tenders to the Board unpaid portion of the loan together with interest and the costs incurred thereto. Sub section (2) allows the borrower to pay the installment in respect of which default has been made with the moneys and costs recoverable by the Bank and then to request the Board to halt the auctioning of the property mortgaged using its discretion referred to therein. Therefore, it is clear that the borrower should have paid the unpaid installments if he/she has not paid the entire unpaid amount, in order to move under Section 10 of the Act No.4 of 1990.

No material is found to establish that the plaintiffs have paid at least the unpaid installments up to the time this action was filed in the High Court. They have not even stated in the plaint that they have paid dues accordingly,

to fall within the ambit of Section 10 of the Act. Learned President's Counsel for the defendant bank submitted that the plaintiffs have failed to pay any money since the Board resolution was passed even though they became aware of the resolution by the letter dated 05.07.2013. In such a situation, it is incorrect to state that the plaintiffs were not given the chance of inviting the Board of Directors to have the benefit of the aforesaid Section 10 of the Act. Accordingly, the questions of law referred to above in items (b) (c) (d) and (h) are answered in favour of the appellant.

Remaining questions of law mentioned in items (e) (f) and (g) referred to above, relate to the law applicable when issuing interim injunctions. Upon a perusal of the impugned order, it is evident that the learned High Court Judge has relied only on two decisions namely, **Rajan Vs. Sellasamy [1994 (2) SLR 378]** and **American Cyanamid Co. Vs. Ethicon Ltd. [1975 (1) AER 504]** when he decided to grant the interim injunction in favour of the plaintiffs. In both those decisions, it seems that the only criteria that is necessary to issue an interim order is the presence of an arguable issue or the presence of a serious question to be tried at the trial.

I am unable to agree with the aforesaid position that it is the only matter that should be considered when issuing an interlocutory order. I must state that the law in this regard has developed in many ways even in other

jurisdictions since the American Cyanamid case was decided in the year 1975. However due to time constraints, I am unable to refer to those subsequent decisions in other Common law countries at this stage but I will now refer to some of our decisions in connection with issuing of interim injunctions.

J.F.A.Soza,J in his article published in the Bar Association Law Journal [Volume 1 Part II, July August 1983] has stated thus:

> *"Our early Judges trained in the English traditions were quick to import the English approach to our country without paying overmuch attention to the verbal niceties of the provisions of our statute law which at that time were embodied in sections 86 and 87 of the old Court Ordinance."*

Similarly, our Judges kept on considering possible answers to three main questions when issuing interim injunctions, as done by the Judges in England. Those 3 questions are:

- Has the applicant made out a *prima facie* case?
- Where does the balance of convenience lie?
- Do equitable considerations favour the grant of an injunction?

This is the practice that had been adopted in this country and it is clearly evident by the decision in the case of **Felix Dias Bandaranayake v. The State Film Corporation and another [1981 (2) SLR at 287]**

Therefore, I am unable to agree that it is only the presence of a serious question to be tried that is necessary to issue an interim injunction as stated by the learned High Court Judge. In **Felix Dias Bandaranayake v. The State Film Corporaton and another (supra at page 302),** Soza, J stated as follows:

> *"In Sri Lanka we start off with a prima facie case. That is, the applicant for an interim injunction must show that there is a serious matter in relation to his legal rights, to be tried at the hearing and* ***that he has a good chance of winning."***
> [emphasis added]

Accordingly, it is necessary to ascertain the matters that constitute a *prima facie* case which lead for a plaintiff to win the case finally. Before looking at those matters, it is necessary to refer to Section 54 of the Judicature Act in which the manner in which injunctions are granted is stipulated. Under paragraph (a) of section 54(1) of our Judicature Act, it must appear from the plaint that the plaintiff is entitled to judgment, that is, the plaintiff must show that a legal right of his is being infringed and that he will probably succeed in establishing his right.

Under paragraph (b) of the same section 54(1) it must appear that during the pendency of the action there is or there is about to be done or committed by the defendant or at his instance or with his acquiescence an act in violation of the plaintiff's rights in respect of the subject-matter of the action and tending to render the judgment ineffectual. Once again he must

establish his entitlement to the legal right which is being or about to be violated and the alleged violation must be such as would tend to render the judgment ineffectual. Here too the probability of victory for the plaintiff must be there. It is only then it would be possible to say that the violation or threatened violation would tend to render the judgment ineffectual.

Under paragraph (c) of section 54(1) of the Judicature Act, it must appear that during the pendency of the action the subject-matter of the suit is about to be removed or disposed of to defraud the plaintiff. The plaintiff cannot complain of the likely removal or disposal of the subject-matter to defraud him unless he has established a good case of legal entitlement to the subject-matter with the likelihood of success in the suit.

Therefore, the *prima facie* case meaning is that a serious question to be tried and at the same time the probability of success in the case also should be established when issuing injunctions in terms of Section 54 of the Judicature Act. In **Jinadasa v. Weerasinghe, [31 NLR 33 at page 34]** it was held as follows:

> *"In such a matter the Court must be satisfied that there is a serious question to be tried at the hearing and* ***that on the facts before it there is a probability that plaintiff is entitled to relief."***
> [emphasis added]

The said comment is a quotation from the decision in **Preston vs. Luck [1884 (27) Ch. D.497 at 506**]

Furthermore, in **Hubbard Vs. Vosper (1972) 2 Q.B.84 at 96, Lord Denning MR** said:

> *"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done".*

In the case of **Kalutara Bodhi Trust v. Kalutara Multi Purpose Co-operative Society Ltd (2012) BLR at 175** held that:

> *"The establishment of a prima facie alone would not be sufficient for the grant of an interim injunction".*

Therefore, establishing *prima facie* case is a *sine qua non* when granting an interim injunction. Considering the decisions referred to above, it is my opinion that the presence of a serious question to be tried is only one among other ingredients to ascertain whether the applicant has made out a *prima facie* case. In other words, mere presence of a serious question before Court is not sufficient to establish a *prima facie* case. Furthermore, it must be noted that if the plaintiffs are not in a position to have the final reliefs that he/she has sought for, then granting an interim relief may also cause irreparable damage to the party against whom the interim injunction is issued,

In this instance, learned High Court Judge has not addressed his mind at all, to ascertain whether the plaintiffs would succeed in having final reliefs sought for in the plaint. As referred to hereinbefore in this judgment, serious

defects are found in the plaint filed by the plaintiffs. Those defects alone would be a reason to have the plaint dismissed. Under those circumstances, it is clear that the plaintiffs have not made out a *prime facie* case for them to have an interim injunction. In the circumstances, it is my opinion that the learned High Court Judge has misdirected himself when he issued an interim injunction as prayed for in the plaint.

For the aforesaid reasons, I answer all the questions upon which leave was granted in favour of the defendant-bank. Accordingly, this appeal is allowed with costs fixed at Rupees Fifty Thousand (Rs.50,000/-), The order of the learned High Court Judge dated 04.07.2014 is set aside. Interim injunction prayed for in the plaint is refused. Learned High Court Judge is directed to hear and conclude this case expeditiously.

Appeal allowed.

JUDGE OF THE SUPREME COURT

SISIRA J.DE ABREW, J

I agree

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PC, J.

I agree

JUDGE OF THE SUPREME COURT