

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

In the matter of an appeal under and in terms
of Article 128 (2) of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

SC / APPEAL / 109 / 2018

SC / HCCA / LA / 306 / 2017

WP / HCCA / COL / 39 / 2017

DC COLOMBO / DCL / 03 / 2013

DFCC Bank PLC,

No. 73/5, Galle Road,

Colombo 03.

**PLAINTIFF – RESPONDENT –
PETITIONER – APPELLANT**

-Vs-

LOLC securities Ltd,

Level 18, World Trade Center,

Colombo 01.

**CLAIMANT – PETITIONER –
RESPONDENT – RESPONDENT**

1. Saheedul Hijry Mohamed Risan
alias Saheedul Hijry Mohamed
Rishan,

No. 01, Charles Circus,
Colombo 03.

2. Wedaralagedara Mohamed
Mubarak Siththi Sermile *alias*
Sithy Sharmila Rishan,

No. 01, Charles Circus,
Colombo 03.

DEFENDANTS - RESPONDENTS –
RESPONDENTS –
RESPONDENTS

Before: Murdu N.B. Fernando, PC, CJ.

S. Thurairaja PC, J &

A.H.M.D. Nawaz, J

Counsel: Nigel Hatch, PC with Siroshni Illangage for the Plaintiff – Respondent
– Petitioner – Appellant.

Erusha Kalidasa with Charith Jayasri Thabrew for the Claimant –
Petitioner – Respondent – Respondent.

Argued on: 10.08.2021

Decided on: 25.07.2025

1. Determination in this case is whether a third party's claim—such as a lien on assets seized from a judgment debtor—may properly be adjudicated in a separate action. At the outset, it is necessary to untangle the skein of facts to provide context for this issue. The essential facts of the case can be summarized succinctly.
2. The DFCC Bank (the Plaintiff-Appellant-Appellant, hereinafter sometimes referred to as “the Plaintiff”) has preferred this appeal to this Court from the judgment of the Commercial High Court dated 18.05.2017. The Plaintiff instituted this action under the Debt Recovery (Special Provisions) Act No. 2 of 1990, as amended, against the 1st and 2nd Defendants-Respondents-Respondents (hereinafter referred to as “the Defendants”), who were both shareholders and directors of a company. The Plaintiff sought to recover the sums of Rs. 87,538,561.34 and Rs. 7,666,923.97, allegedly due and owing under a guarantee.
3. The District Court of Colombo, by its order dated 05.08.2014, issued an *Order Nisi*. Following a full inquiry, at which the Defendants were duly heard and represented, the Court, by order dated 19.12.2014, granted the Defendants conditional leave to appear and defend the action, subject to their depositing a sum of Rs. 60 million.
4. The Defendants failed to comply with the aforesaid order and thereafter sought leave to appeal to the High Court against that order. By an order

dated 28.01.2015, the High Court refused leave to appeal. The Defendants' further appeal to the Supreme Court was unsuccessful, with the Supreme Court refusing leave by its order dated 23.04.2015.

Sequestration orders

5. During the pendency of Debt Recovery Action No. DDR/137/2014, the DFCC Bank made an application seeking the issuance of sequestration orders under Section 653 of the Civil Procedure Code (CPC), with a view to securing any decree that may be entered in its favour for the recovery of sums of Rs. 87,538,561.34 and Rs. 7,666,923.97.
6. Upon the issuance of sequestration orders in its favour under Section 653 of the Civil Procedure Code, the DFCC Bank, as Plaintiff in the Debt Recovery action, caused notice of the sequestration orders to be served on LOLC Securities Limited (sometimes referred to in this judgment as LOLC) through its Attorneys-at-Law, directing them not to alienate or transfer any assets that were subject to the said orders.
7. On the question of assets thus sequestered or seized, Lord McNaughten had said poignantly: "A creditor of the bankrupt having duly obtained an attachment in England before the date of the sequestration cannot, I think, be deprived of the fruits of his diligence."¹

¹ (1908) A.C.508, 510-511.

8. Before proceeding to the remaining facts, it is appropriate to briefly refer to the concept of sequestration in civil procedure. Sequestration, in my view, constitutes an extraordinary form of relief whereby the property of a defendant may be attached prior to the entry of judgment. Such relief is warranted only in exceptional circumstances: where the court is satisfied that the plaintiff has established a strong *prima facie* case, and where there is reason to believe that the defendant may act in a manner calculated to defeat the satisfaction of any decree that may ultimately be entered against him. The Civil Procedure Code thus requires the Plaintiff to establish a sufficient cause of action.²
9. In such circumstances, the court is empowered to order attachment or sequestration before judgment, even prior to the final adjudication of the plaintiff's claim, in order to preserve the subject matter of the litigation and to prevent the frustration of the court's eventual decree.
10. In the present case, the property attached comprised shares held by the defendants or their company, which was involved in the loan transaction with DFCC Bank. Pursuant to the court's order, LOLC Securities Limited — which acted as the Defendants' broker for the purpose of selling these shares on the trading floor of the Colombo Stock Exchange — was duly restrained from alienating or otherwise dealing with the said shares on behalf of their clients, the defendants.

² See Section 653; also see *Pan Asia Banking Corporation v Ranasinghe Arachige Thilangani Chandrasena Perera* S.C.CHC 26/2010 (SC minutes of 6.04.2017).

11. I will now turn to the final judgment rendered in this case and the subsequent developments.

Decree Absolute in DDR/137/2014

12. By order dated 15.02.2015, the District Court made absolute the *Decree Nisi*. It appears that the Defendants made no attempt to satisfy the *Decree Absolute*. The next step was taken by the DFCC Bank to execute writ in the case. To this end, notice was served on the stockbrokers, including LOLC Securities, in respect of shares held by the 1st Defendant in various companies. On 15.05.2015, the Fiscal served Seizure Notices on the stockbrokers of the 1st Defendant.

13. Thereafter, by notice dated 18 June 2015, the District Court directed all stockbrokers, including the LOLC Securities, to furnish details pertaining to the share portfolio owned by the 1st Defendant. LOLC Securities, by letter dated 23 June 2015, responded by providing particulars relating to the shareholdings of the 1st Defendant. However, it was pointed out by the learned President's Counsel Nigel Hatch that the LOLC Securities did not disclose the existence of any purported lien over the share portfolio owned by the 1st Defendant.

14. Thereafter, upon application by the DFCC Bank, the District Court duly made order directing the sale of the shares of the 1st Defendant. Pursuant to this order, sale notices dated 18 December 2015 were duly served on the LOLC Securities and the other stockbrokers. It is at this stage that

LOLC Securities made a claim application to the District Court which has given rise to this appeal.

Claim Application Instituted By LOLC Securities

15. It must be stated that by way of the Claim Application the LOLC Securities sought to prevent the sale of the shares.

16. In proceedings bearing Case No. DCL/0003/2016, LOLC Securities made an application under Sections 241, 242, and 244 of the Civil Procedure Code, asserting that the 1st Defendant had pledged his shares as security for credit facilities extended to him by LOLC Securities. It has to be noted that no reference to any lien was made in prior communications. It was only for the first time, in this claim application instituted approximately eight months after the LOLC had been served with the order of seizure, that this assertion was put forward.

17. Be that as it may, I observe that the upon the claim application that was made, there was also an *ex parte* interim order made by the District Court.

Preliminary objections

18. The essence of the preliminary objections raised by DFCC Bank was founded on the assertion that the claim application, styled and numbered as DCL/0003/2016, constituted a separate and misconceived proceeding. The contention was that, if at all, such an application ought properly to

have been filed in the main debt recovery action bearing Case No. DDR/137/2014. Upon inquiry into these objections, the learned District Judge overruled them and fixed the matter for inquiry.

19. A leave to appeal application against the order of the District Court of Colombo was refused by the learned judges of the High Court of Civil Appeal of the Western Province on 18.05.2017. It is against this order that this appeal has been preferred and this Court has granted leave on the following questions of law:

- 1) Has the High Court misdirected itself in law in failing to interpret and hold that Section 15(1) and the Second Schedule to the Debt Recovery (Special Provisions) Act No. 2 of 1990 (as amended) read with Section 15(5) which statutorily mandates that all claims to the property in issue shall be disposed of in the same Debt Recovery action precludes in law the maintainability of a separate Application under Section 241, 242 and 244 of the Civil Procedure Code?*
- 2) Has the High Court misdirected itself in failing to take cognizance of the intent and purpose of the Debt Recovery (Special Provisions) Act No. 2 of 1990 (as amended) which has been judicially construed as special legislation to expedite the process of recovering loans and execution of Writs thereunder?*
- 3) Has the High Court erred in law in misinterpreting the case of David Kannangara V. Central Finance Ltd. (2004) 2 Sri.LR 311 in that*

though it is a matter for Court to assign a number to a claim application, it is a matter for the parties to comply with the Debt Recovery (Special Provisions) Act No. 2 of 1990 as amended and institute a claim application under the said Debt Recovery Act as mandated by Section 15(5)?

4) Has the High Court erred in law in failing to take cognisance that the Respondent by making a purported Application under the Civil Procedure Code has avoided the mandatory requirement under the Debt Recovery (Special Provisions) Act No. 2 of 1990 (as amended) that if there is a claim, security is to be deposited or an undertaking given that the property sought to be seized would remain in constructive Fiscal custody until the claim inquiry is concluded?

20. All these questions taper into one single composite which I referred to at the commencement of this judgment namely whether a third party's claim—such as a lien on assets seized from a judgment debtor—may properly be adjudicated in a separate action.

21. Mr. Nigel Hatch, the learned President's Counsel, strenuously contended that the learned High Court Judges erred in failing to give due consideration to the intent and purpose of the Debt Recovery (Special Provisions) Act No. 2 of 1990, as amended. In support of his submission, he cited precedents underscoring the special character of this legislation. His central contention was that unless the courts accord primacy to the special provisions contained in the Act, they risk undermining the clear intention of the legislature by subordinating those provisions to the

general procedural rules set out in the Civil Procedure Code-see the cases that focus on the special character of the legislation *Bandara v People's Bank*³; *Zubair v Bank of Ceylon*⁴.

22. Mr. Nigel Hatch PC contended that the LOLC followed the wrong procedure in preferring a claim application under Sections 241, 242, and 244 of the Civil Procedure Code whilst Section 15 (5) of the Debt Recovery (Special Provisions) Act mandates that claims to seized property must be made in the main Debt Recovery Action. But both the District Court and the Civil Appellate Court disagreed with the submission and held that the claim application could proceed under the provisions of the Civil Procedure Code.

23. It is apposite to take note of some important sections which occur in Part II of the Debt Recovery (Special Provisions) Act in order to understand the intent and purpose with which this legislation was enacted by Parliament in 1990 along with a tranche of other enactments.

Decree absolute as writ of execution

24. The *decree nisi* made absolute under the Act is converted into a writ of execution by virtue of Section 13 (1) of the Act. This provision as it stands amended in 1994 goes on to provide that subject to orders of court, where a decree nisi entered in an action instituted under the Act is made

³ (2002) 3 Sri.LR 25.

⁴ (2000) 2 Sri.LR 187

absolute, it shall be deemed to be a writ of execution duly issued to the Fiscal in terms of section 225(3) of the Civil Procedure Code and notwithstanding anything to the contrary in any other written law, the execution of the same shall not be stayed.

25. This provision fully underscores the purpose of speedy recovery of debts which is intended by the legislation and such a writ of execution is kept alive for a period of 3 years as it has to be executed within that period. Section 14 prescribes that the fiscal must report to court within 14 days any person resisting the execution of the order.

26. One noticeable aspect of the above provision is that the writ of execution issued under the Debt Recovery (Special Provisions) Act is indeed a writ of execution issued in terms of the Civil Procedure Code as Section 225 (3) makes it patently clear. However, what is in contention between the disputants before this Court is the question of where a third party's claim such as that of LOLC in this case must be adjudicated. Is it in the main action or a separate action as invoked by the LOLC and approved by both the District Court and the Civil Appellate Court?

27. As I said before, the argument advanced by the learned President's Counsel on behalf of the DFCC Bank is that it has to be investigated in the main debt recovery action, whilst Mr. Erusha Kalidasa argued that the reference to provisions relating to writ of execution found in the Civil Procedure Code incorporates these provisions as component parts of the Special Legislation and as such, even when a third party such as LOLC

asserts a proprietary claim over the sequestered assets, such a claim can be filed under the provisions of the Civil Procedure Code,

28. Mr. Erusha Kalidasa-the learned Counsel for the 3rd party-the LOLC Securities contended that the application made to the District Court that contained explicit references to the provisions of the CPC was properly made and both the District Court and the Civil Appellate Court arrived at the right conclusion when they held that the LOLC's application was in order.

Section 15 (5) of the Debt Recovery (Special Provisions) Act

29. In the resolution of this dispute section 15 (5) sheds much light. This provision provides that all claims to property seized by whomsoever made shall be disposed of in the same action and a decision on such claim shall be a bar to the institution of any other action for the recovery of any property seized or to establish any right to such property or to have the same declared liable to be sold in execution of the decree in favor of the institution.

30. Mr. Nigel Hatch PC laid emphasis on the section and argued that the claim of the LOLC Securities must be adjudicated upon in the main case DDR/137/2014 and not in the new case bearing No DCL/0003/2016.

31. The learned High Court judges disposes of the issue by stating that the answer to that question lies in the following dicta of Amaratunga J in **Jayawardane v Ran Aweera**⁵

If a person making an application to a court refers to a wrong section of a statute in the caption as the provision of law under which such application is made, such reference to the wrong provision of law in itself will not deprive a court of its jurisdiction it otherwise has. If the Court has jurisdiction under another provision of law to deal with the substantive matter raised in the application, the court has jurisdiction to deal with such matter notwithstanding the reference to a wrong section in the caption.

32. The Civil Appellate High Court has proceeded on the footing that the reference in the caption of the claim application to Section 241 is a misdescription; however, the Court's jurisdiction has otherwise been properly invoked. The Civil Appellate Court was indeed articulating the trite proposition that even if a wrong provision has been inserted in the caption but the Court has otherwise jurisdiction, the court can proceed to exercise that jurisdiction. In my view, the civil appellate Court asked itself the wrong question. This is not a question whether the Court has jurisdiction or not. The proper question to pose is whether the LOLC can present a petition in a case otherwise than in the main case. The answer

⁵ (2004) 3 Sri.LR 37 at 41.

lies not only in Section 15 (5) of the Debt Recovery (Special Provisions) Act No 2 of 1990, but also in Section 241 of the CPC.

33. I have already referred to the legislative imprimatur contained in Section 15(5) of the aforesaid Act, which expressly provides that all claims must be adjudicated upon in the same action. Similarly, Section 241 of the Civil Procedure Code, under which the Defendants invoked the jurisdiction of the District Court, stipulates that a third-party claim, such as that of LOLC, must likewise be presented within the same proceedings. There exists no procedural basis for instituting a separate and independent action. It is apposite to examine Section 241 of the CPC.

*In the event of any claim being preferred to, or objection offered against the seizure or sale of, any immovable or movable property which may have been seized in execution of a decree or under any order passed before decree, as not liable to be sold, the Fiscal shall, as soon as the same is preferred or offered, as the case may be, report the same to the court which passed such decree or order; and the court shall thereupon proceed in a summary manner to investigate such claim or objection with the like power as regards the examination of the claimant or objector, and **in all other respects, as if he were a party to the action:***

34. The aforesaid section with the lines emphasized make it quite plain as a pikestaff that the claim of the LOLC Securities shall be investigated as if LOLC Securities were a party to the action. This simply means that the claim of the LOLC shall be filed in the same action namely the main debt

recovery action bearing Case No. DDR/137/2014. Section 241 leaves one in no uncertainty as to the litigation in which the claim must be preferred.

35. The above is put beyond any shadow of doubt by the holding of *Murugappa Chetty v Samarasekera*⁶. This is a case where a seizure in execution had been made of certain lands under a decree which declared them to be specially bound and executable, subject to the life-interest of one D. P. in them, and D. P. applied to the District Court that her claim to have the seizure released and the property declared not liable to be seized and sold in execution be investigated under section 241 of the Civil Procedure Code :

36. Lawrie, A.C.J held that it was not competent to the District Court to refer the claimant to a separate action, but that her claim was one to be investigated and determined under sections 241 and 242.

37. Therefore, when the LOLC instituted the case bearing No DCL/0003/2016 it was not one initiated under a wrong section as the learned High Court judges erroneously assumed but was a fresh action which was quite unauthorized by law. The Court could not have thought of this case as one that fell within the old main case as there was no reference to Case No. DDR/137/2014 in the caption. There was a reference to Case No. DDR/137/2014 only in the body of the application which had passed

⁶ 1 N.L.R 100.

muster in the Registry of the District Court. Therefore it cannot be said to be a mistake or error made by Court.

38. There has been a violation of the mandatory provisions of Section 15 (5) of the Debt Recovery (Special Provisions) Act No 2 of 1990 and Section 241 of the CPC and both the District Court and the High Court of Civil Appeals were oblivious to procedural requirements more particularly the last few lines of Section 241.

39. In the circumstances I would answer the questions of law in favor of the Plaintiff-Appellant-Appellant (the DFCC bank) and proceed to set aside both the orders of the District Court and the High Court respectively.

40. I would hasten to point out that instead of allowing arguments to have taken place given the protracted delay that this litigation has caused, the merit of the claim of the 3rd party yet remains uninvestigated. A prudent trier of fact could have easily realized the procedural tangle and avoided this wasteful exercise by amalgamating the aforesaid DCL/0003/2016 with the main case.

41. No party ever moved for the same and as a result, the procedural tangle wound its way to this Court.

42. Thus, this Court sets aside the orders of both the District Court and the High Court and allow the appeal of the Plaintiff. The parties will reflect

on the best possible course of action on their part to bring this litigation to an end.

JUDGE OF THE SUPREME COURT

Murdu N. B. Fernando, PC, CJ

I agree

CHIEF JUSTICE

S. Thurai Raja, PC, J

I agree

JUDGE OF THE SUPREME COURT