

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

In the matter of an application for mandates in the nature of Writs of Mandamus, Certiorari and Prohibition under Article 140 of the Constitution.

CA WRIT NO: 805/2023

1. Mohamed Ismail Fairoze Hameed
Alias Mohamed Shahul Hameed Ismail Fairoze,
No. 570, Byllers Road,
Colombo 08.
2. Tenaga Car Parks (Pvt) Ltd,
2nd Floor, Jazima Complex,
No. 436/440,
Galle Road
Colombo 03.

Petitioners

1. Union Bank of Colombo PLC
PO Box 398,
No. 64, Galle Road
Colombo 03.
2. Chandima Priyadarshani Gamage,
Court Commissioner, Auctioneer and Valuer,
No. 9-1, High Level Road,
Sarwodya Road,
Panagoda, Homagama.

Respondents

Before: N.Bandula Karunarathna P/CA,J.
B.Sasi Mahendran, J.

Counsel: Farman Cassim PC with Vinura Kularathne and Nimali Abeyratne for
the Petitioner
Chandaka Jayasundera PC with Rehan Almeida for the 1st and 2nd
Respondents

Written

Submission: 22.02.2024 (by the Petitioner)

On 22.02.202, 02.04.2024 (by the 1st and 2nd Respondents)

Argued On: 01.02.2024

Judgment On: 08.05.2024

B. Sasi Mahendran, J.

Petitioners have instituted this action to obtain the following reliefs prayed for in the prayer of the Petition dated 13th December 2023,

- a. Issue Notice of this application on the Respondents;
- b. Grant and issue a mandate in the nature of a Writ of Certiorari quashing the impugned decision of the 1st Respondent contained in the Board Resolution dated 26th September 2023 depicted in the Government Gazette marked P18(b) and the daily newspapers compendiously marked P18(c) to the Petition;
- c. Grant and issue a mandate in the nature of a Writ of Certiorari quashing the impugned Notice of Sale contained in the letter dated 5th December 2023 marked P21 and/or the Notice of Sale contained in the Government Gazette dated 1st December 2023 marked P21(a) and/or the Notice of Sale published in the Daily FT Newspaper dated 5th December 2023 marked P21(b) to the Petition;
- d. Grant an interim order pending the hearing and determination of the Petitioner's application staying the operation of the decision of the 01st Respondent contained in the Board Resolution dated 26th September 2023 depicted in the Government

Gazette marked P18(b) and the daily newspapers compendiously marked P18(c) to the Petition;

- e. Grant an interim order pending the hearing and determination of the Petitioner's application restraining the 1st and/or 2nd Respondents and/or their servants and/or their agents and/or all those acting under them from taking any steps whatsoever to conduct the auction described in the Notices of Sale marked P21 dated 05th December 2023 and/or P21(a) dated 1st December 2023 and/or P21(b) dated 05th December 2023 to the Petition;
- f. Grant costs; and
- g. Such other relief that Your Lordships Court shall seem meet.

When the matter came up on 1st February 2024, Court directed to dispose the matter by way of Written Submissions.

Facts of the Case

According to the Petitioners, as stated in their Written Submission, the 2nd petitioner has obtained several credit facilities from the 1st Respondent Bank by executing several mortgage bonds and has failed to pay the due amounts owing to the credit facilities obtained.

According to the Petition, the 1st Petitioner who is a Director of the Company has made the allegation that the 2nd Respondent did not receive the Notice as per Section 8 of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990.

Section 8 of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 stipulates:

Notice of every resolution under section 4 authorizing the sale of any property shall be published in the Gazette and in at least three daily newspapers, in the Sinhala, Tamil and English languages and **copies of such notice** shall be dispatched to the borrower, if he is alive, and to every person who has, in respect of that property, registered his address as required by section 2 and if that property consists of the interest of a lessee under a lease from the State, to the Land Commissioner. (emphasis added)

Since the 2nd Petitioner did not receive the notice of Parate Execution they were unable to act according to Section 10 of Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 to prevent the said Parate Execution.

On the other hand, the Respondent as per their Objections and Written Submissions has stated that they have sent the notice and Board Resolution decision to the 2nd Petitioners. Also by motion dated 13th February 2024 they have filed the relevant documents to prove that on 17th October 2023 they have sent the notice to the Respondents.

The question before us is that whether notice was sent to the 2nd Petitioner. It appears to this Court that the particular issue that whether the 2nd Petitioner has received the Notice or not could not be decided by this Court. We are mindful that when the facts are disputed Courts are reluctant to exercise the Writ Jurisdiction, as the disputed facts should be established in the Original Courts.

A.S. CHOUDRI in his book on the Law of Writs and Fundamental Rights (2nd Ed.), Vol.2,(at page 449) states thus:

"Where facts are in dispute and in order to get at the truth, it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining their witnesses and the Court would be better able to judge which version is correct, a writ will not issue."

Referring to the above-stated authority, in the case of Thajudeen Vs. Sri Lanka Tea Board and Another (1981) 2 SLR 471 Ranasinghe J with Seneviratne J agreeing held:

“ That the remedy by way of an application for a Writ is not a proper substitute for a remedy by way of a suit, especially where facts are in dispute and in order to get at the truth, it is necessary that the questions should be canvassed in a suit where the parties would have ample opportunity examining their witnesses and the Court would be better able to judge which version is correct, has been laid down in the Indian cases of Ghosh v. Damodar Valley Corporation³ , Porraju v. General Manager B. N. Rly⁴” (at page 474).

The Court of Appeal further held that, “Where the major facts are in dispute and the legal result of the facts is subject to controversy and it is necessary that the questions should

be canvassed in a suit where parties would have ample opportunity of examining the witnesses so that the Court would be better able to judge which version is correct, a Writ will not issue. Mandamus is pre-eminently a discretionary remedy. It is an extraordinary, residuary and supplementary remedy to be granted only when there are no other means of obtaining justice. Even though all other requirements for securing the remedy have been satisfied by the applicant, the Court will decline to exercise its discretion in his favour if a specific alternative remedy like a regular action equally convenient, beneficial, and effective is available.”

The above Dicta was followed by K Sri Bawan J, (as he was then) in Office Equipment Ltd Vs Urban Development Authority, in CA Appeal CA Writ/ CA/ 1062/2000 decided on 05.09.2003, held that;

“ In view of the authorities cited above, I hold that the Petitioner’s claim cannot be suitably decided in a Writ application. Furthermore, prerogative writs will not issue where there are adequate, convenient and effective remedies available to determine the rights of parties. granted where the Petitioner has another adequate and specific legal remedy in the District Court competent to afford relief upon the same subject matter.

In Stassen Exports (Pvt) Ltd Vs. The Commissioner General of Inland Revenue & Others CA (Writ) Application No: 71/2019 held that;

“The above-mentioned matters are serious matters which are connected to the reliefs sought in this Application. Since those matters are involved with the facts, the Court cannot decide on those facts on affidavit evidence. It is trite law that when the material facts are in dispute the Courts does not exercise its Writ jurisdiction”

Vijith K. Malalgoda, PC J. in Francis Kulasooriya Vs. OIC-Police Station-Kirindiwela SC Appeal No. 52/2021 observed that; “Courts are reluctant to grant orders in the nature of writs when the matters on which the relief is claimed are in dispute or in other words when the facts are in dispute.”

In Kumudu Samanthi Akmeemana v. Hatton National Bank and Others, Decided on 30.04.2021, Arjuna Obeyesekere, J., P/CA. held that;

“The petitioner denies having signed the said Deed of Transfer, even though the said deed had been attested by the same Attorney-at-Law before whom all other deeds and

agreements relating to the said properties had been signed by the petitioner. The jurisdiction of this Court under Article 140 of the Constitution is to examine whether a statutory authority has acted within the four corners of its enabling legislation. It is not competent for this Court in the exercise of its jurisdiction to issue writs, to investigate disputed questions of fact. Therefore, this Court cannot in these proceedings determine whether the Petitioner has in fact signed the said Deed or not.”

We hold that, to prove the fact that the Respondent has not sent the notice to the 2nd Petitioner which is disputed by the Respondent the most appropriate procedure to prove such dispute is an action by way of regular procedure before an Appropriate Court of first instance, not by this Court. For that reason we refuse this application.

Be that as it may be, the Petitioners have admitted the fact that the 1st Petitioner is a Director who has received the notice, but not have taken action to settle the credit facilities obtained by the 2nd Petitioner.

What is the Duty of the Director

According to Pennington’s Company Law, 5th edition at Page 676 has stated thus,
“A director, like any other agent, owes a duty to his company to exercise reasonable care in the management of its affairs, and he is liable to it se damages if he falls to do so. But while the court has imposed stringent duties of honesty and fair dealing on directors in framing their fiduciary duties”

The Companies Act No 6 of 2007 emphasizes the Director’s Duties as Follows;

187. (1) A person exercising powers or performing duties as a director of a company shall act in good faith, and subject to subsection (2), in what that person believes to be in the interests of the company.

Kandiah Neelakandan in his article published in the Bar Association Law Journal [Volume III Part 1, 1999] at page 102 has stated thus:

The duties of a company director as recognised by English Law and adopted by our courts for several years fall into three main categories:-

(a) The duty of care and skill;

- (b) The fiduciary duties of directors;
- (c) The statutory duties.

“Directors are, in the eyes of the law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship between the company and its directors. The directors are persons selected to manage the affairs of the Company for the benefit of the shareholders. It is an office of trust which, if they undertake, it is their duty to perform fully and entirely. Explaining the dual character of directors, Lord Selbourne said: "The Directors are the mere trustees or agents of the company - trustees of the company's money and property - agents in the transactions which they enter into on behalf of the Company" which I have quoted earlier too in this article.”

This is a fundamental fiduciary responsibility of a director to act in the best interests of the company. An individual exercising authority or carrying out duties as a director of a company shall act in good faith and, subject to the following provisions, in what the individual believes to be the company's interest. Directors are individuals chosen to oversee the Company's affairs for the benefit of its shareholders. This is an office of trust, which, if they undertake, it is their duty to perform fully and entirely. Clarifies the dual character of directors.

In the instant Case, the 1st Petitioner knowing the fact that the 1st Respondent has passed the resolution and will take steps to conduct the auction, has not taken any steps to prevent the sale under section 10 of the said act. Section 10 (1) and (2) reads as follows.

(1) If the amount of the whole of the unpaid portion of the loan, together with 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 instalment 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 substitution under section 4 for the sale of that property.

The conduct of the Petitioner is questionable. We hold that the 1st Petitioner's conduct itself does not warrant to issue writs.

Jayaweera v. Asst. Commissioner of Agrarian Services Ratnapura and Another, 1996 (2) SLR 70 at page 73, Jayasuriya, J held that:

"I hold that the Petitioner who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the court has a discretion to deny him relief having regard to his conduct; delay, laches, waiver, submission to jurisdiction are all valid impediments which stand against the grant of relief." (emphasis added.)

In Udesh Kumara Seneviratne and others v K L T G Perera and others CA/WRIT/0281/07 decided on 30.04.2021, Mohammed Laffar J held that:

"In my view, the **conduct** of the Petitioners does not warrant the issuance of the writs as prayed in the Petition. A party cannot ask for a writ as of right. It is a discretionary relief as well as an equitable relief. When granting such a relief, the conduct of the party applying for it is intensely relevant. It is settled law that a person who approaches the Court for the grant of discretionary relief, to which category an application for certiorari would certainly belong, has to come with clean hands, and should candidly disclose all the material facts which have any bearing on the adjudication of the issues raised in the case. In other words, he owes a duty of utmost good faith (uberrima fides) to the court to make a full and complete disclosure of all material facts and refrain from concealing or suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence..... As correctly observed by Saleem Marsoof, J. in *Namunukula Plantations Ltd. vs. Minister of Lands and Others*, if any party invoking the discretionary jurisdiction of a court of law is found wanting in the discharge of its duty to disclose all material facts **or is shown to have attempted to pollute the pure stream of justice**, the court not only has the right but a duty to deny relief to such person." (emphasis added.)

Applying these principles, I hold that this Court is not inclined to grant the reliefs prayed in the Petition.

For the above said reasons, I proceed to dismiss the application with costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

N. Bandula Karunaratna (P/CA), J.

I AGREE

PRESIDENT OF THE COURT OF APPEAL