

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 and in terms of Article
140 of the Constitution of the Democratic
Socialist Republic of Sri Lanka.

CA-WRT-620/23

1. Withana Pathirannehelge Nishanhai
Pathirana
No. 424/1D
Suhada Mawatha
Rammuthugala
Kadawatha
2. Thilak Madhuwantha Gunasinghe
No. 424/1D
Suhada Mawatha
Rammuthugala
Kadawatha

Petitioners

Vs.

1. Hatton National Bank PLC
HNB Towers
No.479
TB Jya Mawatha
Colombo 10.
2. Nihal Jayawardena PC
Chairman

3. Jonathaan Alles
Managing Director
4. Madu Rathnayake
Director
5. Devaka Cooray
Director
6. Dilshan Rodrigo
Director
7. Osman Chndrawnsa
Director
8. Prawira Rimoe Saldin
Director
9. Rasitha Gunawardana
Director
10. Kithsiri Gunawardena
Director
11. Prasad Samarasinghe
Director
12. Vish Govidasamy
Director

The 2nd to 12th respondents are all of:
HNB Towers
No. 479, TB Jaya Mawatha
Colombo 10.

13. K.P.N.Silva
Licensed Auctioneer
No. 186/2
Hulftsdrop Streed
Colombo 12.

Respondents

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

Counsel: Rasik Dissanayake with Rukshan Mendis and Dinusha Pathirana for the
Petitioners
Priyantha Alagiyawanna with Heshani Gunerathne and Sauri
Senanayake for the Respondents.

Written

Submissions: 20.01.2025 (by the 1st to 13th Respondents)

On

Judgment On: 28.01.2025

JUDGMENT

B. Sasi Mahendran, J.

The Petitioner instituted this application by petition dated 17.10.2023 seeking inter alia a writ of Certiorari to quash the Resolution marked P23A passed by the Board of Directors of the Respondent Bank to sell the property containing “Eminence Luxury Banquet Hall” by auction and to quash the decision of the 1st Respondent Bank to refuse the granting of a moratorium to the Petitioners under the circular marked P25.

The facts of this case are as follows:

According to the Petitioners, they are entrepreneurs and had been carrying on a business of managing Banquet Halls since 2003 and initiated the said business by purchasing “Renuka Banquet Hall” at Ganemulla via a leasing facility for a period of 20 years since 01.01.2003.

The Petitioners state that they purchased the land in Kirillawala facing the Kandy Road and constructed a building comprising 4 stories and operated a banquet hall in the said building by the name of “Senara White Palace” under the incorporated legal entity Senara White Palace (Pvt.) Ltd since 16.09.2011. The Petitioners state that the Petitioners engaged in another business venture to construct a state-of-the-art banquet Hall in Thihariya under the name of “Eminence Luxury banquet Hall”.

The Petitioners further state that they purchased three adjoining plots of land to construct the said Banquet Hall in Thihariya and an amalgamated plan was drawn for the total land parcel consisting of one acre three roods and thirty-eight perches (A:1 R:3 P:38) owned by the Petitioners on 05.04.2016 bearing No. 6269 by the licensed surveyor S.R.P. Pathiraja marked P2. The Petitioner avers that the plan marked P2 was purchased by the Petitioners as follows:

- A. On 05.04.2013, the Petitioners purchased the plot of land referred to as land parcel A, depicted in the plan bearing No. 5713 drawn by S.R.P. Pathiraja Licensed Surveyor marked as P3B, by the deed bearing No. 2093 attested by Indika Ivan Rosairo Weragoda Notary Public marked as P3A for a valuable consideration of Rs. 40,000,000/-.
- B. On 29.11.2013, the Petitioners purchased the plot of land referred to as land parcel B, depicted in the plan bearing No. 5854 drawn by S.R.P. Pathiraja Licensed Surveyor marked as P4B, by the deed bearing No. 2236 attested by Indika Ivan

Rosairo Weragoda Notary Public marked as P4A for a valuable consideration of Rs. 30,000,000/-.

C. On 19.10.2015, the Petitioners purchased the plot of land referred to as land parcel C, depicted in the plan bearing No. 12751 drawn by K.K.A.S. Padmini Licensed Surveyor marked as P5B, by the deed bearing No. 4113 attested by G. Prasantha Nilmini Perera Notary Public marked as P5A for a valuable consideration of Rs. 12,000,000/-.

The Petitioners further aver that the lands enumerated in deed marked P3A and P4A purchased by the Petitioners with the financial assistance of the Respondent Bank granted by way of mortgaging the respective lands and the land parcel C was purchased by amalgamating several lands.

The Petitioners state that in accordance with the folio marked P6A, the land parcel A was mortgaged to the Respondent Bank by deed bearing No. 10077 attested by P.N. Ekanayake Notary Public on 05.04.2013 for an amount of Rs. 26,000,000/- and the limit for the mortgage bond for the said land parcel was increased for an amount of Rs. 5,000,000/- by the Respondent Bank by the deed bearing No. 12009 attested by P.N. Ekanayake Notary Public on 19.10.2015.

The Petitioners further state that in accordance with the folio marked P6B, the land parcel B was mortgaged to the Respondent Bank by deed bearing No. 10534 attested by P.N. Ekanayake Notary Public on 29.11.2013 for an amount of Rs. 30,000,000/- and the limit for the mortgage bond for the said land parcel was increased for an amount of Rs. 1,000,000/- by the Respondent Bank by the deed bearing No. 12010 attested by P.N. Ekanayake Notary Public on 19.10.2015.

The Petitioners state that the amalgamated land depicted in plan marked P2 was mortgaged to the Respondent bank for an amount of Rs. 300,000,000/- by the mortgage

bond bearing No. 12657 attested by P.N. Ekanayake Notary Public on 29.09.2016 which was further mortgaged to the Respondent by a secondary mortgage bond bearing no. 12658 P.N. Ekanayake Notary Public on the same day.

As stated by the Petitioners, upon acquiring the land parcels A, B and C and securing the finances, the constructions of “Eminence Luxury Banquet Hall” was started, since when the Petitioners were able to settle all the interest payments on time with the income they got from managing “Renuka Banquet Hall” and “Senara White Palace” from 2013 to 2019.

The Petitioners further state that the Petitioners obtained an amount of Rs. 312,400,000/- under Term Loan Facility I, an amount of Rs. 82,000,000/- under Term Loan Facility II and, an amount of Rs. 100,000,000/- under Term Loan Facility III.

The Petitioners state that however, under Term Loan Facility III which was granted upon mortgaging of “Senara White Palace”, the Petitioners were only granted an amount of Rs. 82,700,000/- after deducting an amount of Rs. 12,300,000/- for an existing loan taken from the Bank of Ceylon. The Petitioners further state that they repaid the interests on time when the business was flourishing till 2019.

The Petitioners state that due to the Easter Sunday attacks in 2019, the industry of the Petitioners was badly impacted and the Petitioners fell behind in the interest payments made to the Respondent Bank. The Petitioners further state that they mortgaged the land which was used as the car park of “Senara White Palace” to a third party and remitted a sum of Rs. 52,500,000/- to the Respondent Bank amidst severe financial difficulties and the said car park was later acquired by the said third party.

According to the Petitioners, due to Covid-19 pandemic, the Petitioners’ business further deteriorated and since the events held at “Senara White Palace” after 2019 were conducted at a loss, the Petitioners were not able to pay the interests to the bank.

The Petitioners state that a show cause letter dated 19.10.2022 marked P13 was sent to the Petitioners by the Senior Manager of the Ganemulla Branch of the Respondent Bank inter alia seeking reasons for non-payment of the term loan facilities and indicating that the balance amount payable by the Petitioners as Rs. 536,672,316.47/-.

In reply, the Petitioners sent a letter dated 22.10.2022 stating that the normal functionality of the Petitioners' business had been severely affected due to the pandemic and economic crisis.

The Petitioners state that the Respondent bank delayed in issuing the Term Loan facility III for the value of Rs. 100,000,000/- when the estimated cost for the completion of the "Eminence Luxury Banquet Hall" was only Rs. 130,000,000/- and upon granting the Respondent had only given Rs.82,700,000/- and out of the said granted amount Rs. 5,000,000/- is still being withheld by the Respondent. The Petitioners further state that since the funds were being delayed, the Petitioners had to sell their personal vehicle and a property. The Petitioners further aver that however, the Petitioners had sold all the other properties except "Senara White Palace" which is the sole source of income for the Petitioners.

As stated by the Petitioners, the construction of the "Eminence Luxury Banquet Hall" which was approved by the Pradeshiya Sabha of Attanagalla was completed to a degree of 90% according to the valuation report marked P17 and the constructed portion valued to Rs. 1,404,275,000/-. The Petitioners state that in addition to the said valuation, the Petitioners bought amenities worth over Rs. 10,000,000/-.

The Petitioners further state that, by letter dated 13.02.2023 marked P20, the Petitioner was notified that the Board of Directors of the Respondent Bank has passed a resolution to auction the "Eminence Luxury Banquet Hall" property to recover the outstanding facilities. The Petitioners state that though they were verbally given a grace period until

30.09.2023 to settle the outstanding amounts from the Respondent bank upon negotiating a settlement plan with the Respondent Bank, by letter dated 18.07.2023 marked P23, the Respondent bank notified the Petitioners that the property in which the “Eminence Luxury Banquet Hall” is situated was published in the Gazette and newspapers purported acting under Section 4 of the Recovery of Loans by Bank (Special Provisions) Act No.4 of 1990.

The Petitioners further state that, by letter dated 25.09.2023, the Petitioners were notified that the property containing “Eminence Luxury Banquet Hall” will be sold at a public auction on 23.10.2023 at 9.00 a.m.

Further, the Petitioners state that the Resolution marked P23A had appointed the 13th Respondent to sell the land of the Petitioners at a public auction on the said date. As averred by the Petitioners, the letter marked P24 inter alia states that the Petitioners are not entitled to the moratorium granted by the Central Bank on 07.07.2022 as the Petitioners had not come to an agreement with the Respondent on any settlement plan. The Petitioners state that according to Circular No. 2 of 2022 dated 07.07.2022 marked P25, the Monetary Board of the Central Bank had directed the licensed banks including the Respondent to consider granting concessions on a case-by-case basis by clause 4.1 of the said Circular.

The Petitioners state that the Respondent had not conducted a valuation of the property pursuant to auctioning of the said property.

The main grievance of the Petitioners is that the Resolution passed by the Respondent Bank to sell the property containing “Eminence Luxury Banquet Hall” by auction is arbitrary and unreasonable on the basis that the said auction was called without conducting a valuation for a period of more than three years of the said property and without ascertaining the current market value.

In this context, the Petitioners have invoked the writ jurisdiction of this Court seeking inter alia, writs of Certiorari to quash the resolution marked P23A and the decision of the Respondent Bank to refuse the granting of a moratorium to the Petitioners under circular marked P25.

On the other hand, the Respondents raised objections by Statement of Objections dated 27.11.2023, that the Petitioners were given ample opportunities to repay their dues.

We are mindful that in Section 10 of the said Act, there is a provision available to stay the auction which reads as follows:

Section 10

“(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.”

But the Petitioner has failed to take any steps to prevent the sale. There is no material to be found to establish that the Petitioner has paid at least the unpaid installment up to the time this action was filed. This section was referred by His Lordship Chitrasiri J in DFCC Bank (PLC) v. Fathima Ruzana Fakurdeen and others., SC Appeal No. 133/2014, decided on 24.03.2016,

“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.”

To see whether the Petitioner has attempted to the concession under the said circular, Court’s attention was drawn on Section 7 (1), 7(2) and 7 (3) of the said circular which was marked as P25.

“7 Transparency of the Concessions

7.1 Eligible Borrowers may request for the above concessions on or before 31 July 2022 in writing or through electronic means.

7.2 Licensed banks shall make the decision on whether to accept or decline the request made by the borrower within one month of the receipt of the request and duly inform the burrower of such decision.

7.3 In the case of a rejection of request, licensed banks shall inform the burrower the reasons for such rejection and shall advise the burrower by and through the same letter that there is an opportunity for the borrower to appeal against such rejection to the Director, Financial Consumer Relations Department of the Central Bank of Sri Lanka.”

There is no indication that the Petitioner has applied for this concession which was refused by the Bank. Even if it was refused, there is a provision available to him to appeal

to Director Financial Consumer Relations Department. Generally, our Courts are reluctant to issue Certiorari when there is an adequate alternate remedy.

We are mindful of the sentiments expressed by the Justices in the following judgements with regard to the Recovery of Loans by Banks under the Recovery of Loans by Banks Act. His Lordship Samayawardhena J (as he was then) in Bettans Group of Companies (Pvt) Ltd v. Lankaputhra Development Bank and Others, CA/WRIT 230/2015, Decided on 10.07.2020 held that;

“Before I part with this Judgment let me also add the following. The Petitioner cannot invoke the writ jurisdiction of this Court as of right. It is a discretionary relief; an act of grace on the part of the Court. The fact that the loan was obtained and the Petitioner is in default is undisputed. By this application, filed more than five years ago, the Petitioner has prevented the Bank from recovering its dues through parate execution-a quicker and faster procedure recognised by the law. Banks are not charitable institutions; they are the cornerstones of economies. It should be understood that similar to the Petitioner being engaged in a business, granting loans with the expectation of timely repayment is a major part of the ordinary course of business of a Bank. If a Bank is prevented from taking such measures as it is entitled in law to take to protect its interests, the economy of the country would suffer. The Recovery of Loans by Banks (Special Provisions) Act was passed to assist Banks to fast-track the procedure of debt recovery. There is no place for high-flown technical objections under this Act.”

Amaradasa Liyanage v. Sampath Bank PLC, SC Appeal No:126/2012, Decided on 04.04.2014, His Lordship Tilakawardane,J held that;

“The ambit and purpose of the Recovery of Loans by Banks Act is, in essence, to recover monies due to the Bank while ensuring that the Bank does not enjoy an

unjust enrichment. The provisions of the Act, by allowing parate execution, is to facilitate the process of collecting monies due, without lengthy court proceedings, and to do so in a fair and reasonable manner. This objective should therefore not be hindered by minor procedural irregularities such as the absence of the signatures of all Board members on the Certificate of Sale, for such minor irregularities cannot have much impact on the rights of the borrower.

Minor procedural irregularities cannot, further, be grounds upon which actions may be instituted for such actions would only amount to the abuse of the process of Court which must not be allowed. In the present case, monies due remained unpaid for a total of four years prior to the auction taking place and to challenge the sale of property on the basis of a minor irregularity in documentation will undoubtedly remain unsuccessful.”

The above judgment was referred by His Lordship Aluwihare J in Upul Chaminda Perera Kumarasinghe and Another v. Pan Asia Banking Corporation PLC, SC Appeal No. 74/2021, Decided on 11.10.2023, held:

“The plaintiffs cannot seek the intervention of the court to prevent the Defendant Bank from lawfully exercising their rights in terms of a valid contract, without making a case for irreparable and irremediable damage. Courts cannot and should not be treated as the refuge of all defaulting creditors.”

In Zubair v. Bank of Ceylon, 2000 (2) SLR 187 at page 188, Udagama., J held that:

“Before parting with this order it would also be appropriate to mention that in Debt Recovery matters it would not be correct for courts to hold against the intention of the Legislature on technicalities.”

We are mindful that since the Petitioner has failed to pay the loan facilities which he obtained in 2015 as stated by the Respondents, bank has given ample facilities by

rescheduling the said loan. It is clear that the conduct of the Petitioner amounts to a habitual defaulter that is to say that his conduct does not honor his obligation. Under such circumstances, the Court will not grant any relief even if he is entitled under the said circular.

Jayaweera v. Asst. Commissioner of Agrarian Services Ratnapura and Another, 1996 (2)

SLR 70 at page 73, His Lordship 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.”

The Petitioner did not satisfy this Court that by passing of the resolution, the Respondent bank has acted contrary to the circular marked as P25 or has ignored the direction given by the Monetary Board.

As stated by His Lordship Justice Grero in Desmond Perera and Others v. Karunaratne, Commissioner of National Housing and Others, (1994) 3 SLR page 316, at pages 329 and 330:

“As pointed out by the learned President's Counsel for the 3rd respondent, Lord Diplock in the case of *CCSV v. Minister for the Civil Service* (1984) UKHL 9, clearly classified under three heads the grounds on which administrative action could be subject to control by judicial review. They are:

(i) Illegality;

- (ii) Irrationality; and
- (iii) Procedural impropriety.”

“By 'Illegality' as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, by judges by whom the judicial power of the state is exercisable.”

In the instant case, the Petitioner has failed to satisfy the above said grounds. Therefore, for the above said reasons I dismiss the application of the Petitioner with Costs of Rs. 50,000/-.

JUDGE OF THE COURT OF APPEAL

N. Bandula Karunarathna,J (P/CA)

I AGREE

PRESIDENT OF THE COURT OF APPEAL