

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

In the matter of an application of under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka to obtain a writ in the nature of a writ of certiorari, mandamus and prohibition.

CA-WRT-497/23

1. Hetti Pathirannehelage Asoka
Gunawardene
No. 231
Kurunegala Road
Pannala
2. Danangoda Gamage Yanitha Shrmila
No. 231
Kurunegala rod
Pannala.

Petitioner

Vs.

1. Bank of Ceylon
No. 01, BOC Square
Bank of Ceylon Mawatha
Colombo 01.
2. Ronald C. Perera
President's Council
Chairman
Bank of Ceylon
No. 01, BOC Square

Bank of Ceylon Mawatha
Colombo 01.

3. R.M. Priyantha Rathnayake
Director
Bank of Ceylon
No. 01, BOC Square
Bank of Ceylon Mawatha
Colombo 01.
4. Major General (Rtd) G.A Chandrasiri
Director
Bank of Ceylon
No. 01, BOC Square
Bank of Ceylon Mawatha
Colombo 01.
5. Professor Kithsiri Liyanage
Director
Bank of Ceylon
No. 01, BOC Square
Bank of Ceylon Mawatha
Colombo 01.
6. Naresh ABEYSEKERA
Director
Bank of Ceylon
No. 01, BOC Square
Bank of Ceylon Mawatha
Colombo 01.
7. Janaki Siriwardene
Director
Bank of Ceylon

No. 01, BOC Square
Bank of Ceylon Mawatha
Colombo 01.

8. M.H.T.Karunarathne
Auctioneer
T & H Auctions
No. 50/3, Vihara Mawatha
Kolonnawa

Respondents

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

Counsel: Yuwin Matugama with Patalee Doratiyawa for the Petitioners
Bhagya Herath with Sajeevi Jayasinghe for the Respondents .

Argued On: 17.12.2024

Written

Submissions: 20.01.2025 (by the Petitioner)

On 17.01.2025 (by the 1st to 7th Respondents)

Judgment On: 28.01.2025

JUDGMENT

B. Sasi Mahendran, J.

The Petitioners instituted this application by petition dated 29.08.2023 seeking *inter alia* writs of Certiorari to quash the Resolution passed by the 1st Respondent dated 04.05.2023 marked P15(a), P15(b) and P15(c) published in the Gazette notification bearing No. 2331 and to quash the auction notice marked P17(a), P17(b) and P17(c) dated 31.07.2023.

The facts of this case are as follows:

According to the Petitioners, the Petitioners are spouses who carry on the business in the name and style of 'Smart Design Center'. The Petitioners state that on 19.01.2012, the Petitioners purchased 1 Rood and 8.5 perches described as the property depicted in Plan No. 1594 dated 31.01.1989 prepared by Sumanaratne D. Abeykoon Licensed Surveyor by way of Deed of Transfer bearing No. 10468 dated 17.01.2012 attested by Thilak Sumanaratne Notary Public.

The Petitioners further state that the Petitioners obtained a loan for the said business at a specific value of Rs. 3,000,000/- at the rate of an annual interest of 3% from the 1st Respondent and the Petitioners entered into Mortgage Bond bearing No. 2468 mortgaging the entitlement of the 2nd Petitioner dated 17.09.2012 where it was specifically agreed between the parties that the said Mortgage Bond was intended to cover the final balance of account between the obligors and it was specifically in respect of all transactions and dealings such final balance not to exceed in the whole the sum of Rs. 3,000,000/-. The Petitioners aver that the Petitioners requested a further loan where the capital amount was Rs. 2,000,000/- in 2013 to be paid within six months at an interest rate of 20% from the 1st Respondent with the intention of manufacturing garments.

The Petitioners further aver that on or around 05.09.2013, the 1st Respondent released the said Rs. 2,000,000/- to the account of the Petitioners bearing No. 73803565 which was

maintained at the Bank of Ceylon Pannala branch. The Petitioners state that further to the said loan, the Petitioners entered into a Mortgage Bond bearing No. 2553 dated 07.01.2013 by which the parties agreed that the said Mortgage Bond was executed in respect of all transactions and dealings where such final balance not to exceed in the whole the sum of Rs. 2,000,000/-.

The Petitioners further state that the Petitioners obtained another loan of Rs. 4,000,000/- from the 1st Respondent at the rate of 9% per annum and entered into a Mortgage Bond bearing No. 2956 dated 10.04.2014. According to the Petitioners, further to the said loans, they were granted a loan of Rs. 2,088,000/- at the rate of 13% per annum by the 1st Respondent and the parties entered into the Mortgage Bond bearing No. 3683 dated 16.10.2015.

The Petitioners contend that in all the loan transactions, the capital of the said loans did not exceed Rs. 5,000,000/- and nor did the 1st Respondent take any steps to calculate the said capital for an amount exceeding Rs. 5,000,000/-.

The Petitioners further state that the Petitioners from the year 2013, made payments accordingly to the said account No. 73803565 and further made payments to the Suspense Account to which the payments were made by the Petitioners as required by the Bank accordingly. The Petitioners state that they were affected immensely due to the Easter Attack in 2019.

As stated by the Petitioners, by letter dated 05.07.2019, the 1st Respondent informed the Petitioners to deposit a further sum of Rs. 3.5 million and settle the sum of the arrears of loan payments and reschedule the remaining money payable.

The Petitioners state that by letter dated 23.07.2019, the Petitioners informed that they did not at any instance formally agree to reschedule the said loan and therefore requested the 1st Respondent to grant a favourable scheme to repay in installments.

The Petitioners further state that the Petitioners were sent a notice dated 17.05.2023 in terms of Section 21 of the Bank of Ceylon Act No 34 of 1968 as amended together with the Gazette notification bearing no. 2331 dated 04.05.2023 according to which the 1st Respondent has caused a Resolution marked P15(a), (b), and (c) to be passed on 09.03.2023 claiming to reschedule sums of money which are below the value of executing *parate* according to the Bank of Ceylon Act and the Recovery of Loans by Banks Act.

The Petitioners further aver that on 03.08.2023, the 1st Respondent informed the Petitioners that the Notice for Auction has been put up in Newspapers marked P17(a), (b), and (c) and that the Auction is to be held on 13.09.2023.

The main grievance of the Petitioners is that the 1st Respondent had acted ultra vires and adopted the wrong procedure when passing the resolution marked P15(a), (b), and (c) and therefore bad in law and that the Notice of Auction marked P17(a), (b) and (c) is bad in law as the 1st Respondent has completely disregarded the provisions in Section 22 of the Bank of Ceylon Ordinance on the basis that at the time of default, if the balance of the principal amount borrowed was less than Rs. 5 million, the bank cannot resort to *parate* execution based on Section 5A of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 as amended.

In this context, the Petitioners have invoked the writ jurisdiction of this Court seeking inter alia writs of Certiorari to quash the Resolution passed by the 1st Respondent dated 04.05.2023 marked P15(a), P15(b) and P15(c) published in the Gazette notification bearing No. 2331 and to quash the auction notice marked P17(a), P17(b) and P17(c) dated 31.07.2023.

On the other hand, the Respondents raise the objection that the documents marked P12 and P13, it is apparent that the Petitioners themselves prayed for the loans from the 1st

Respondents to be rescheduled and thereby such were rescheduled as agreed by the parties.

According to the document marked R1, it is clear that the loan given by the 1st Respondent to the Petitioners was more than Rs. 5 million. We are mindful that both the Petitioners and the 1st Respondent have agreed to reschedule the said loans which was denied by the Petitioners.

We are also mindful that the original loan was obtained in the year 2012. But as depicted in the document marked R7, the parties have agreed to reschedule in 2015 which was not denied by the Petitioners. Also, as the present amount indicated in R13(a) and R13(b) up to 07.09.2023, principal outstandings are Rs. 7,967,841.64/- and Rs.2,900,000.

According to the document marked R14, the 1st Respondent has indicated by letter dated 27.06.2022, that they are going to take steps unless the Petitioners pay the amount due and specially indicating that the property will be sold by public auction in such instance and requesting to pay the due amounts. It is true that the original loan taken by the Petitioners was less than Rs. 5 million but, they have taken several loans during the said period.

According to Section 25 of the Bank of Ceylon Act, which reads as follows:

“In any case where more than one loan, overdraft, advance or other accommodation has been granted by the bank on the security of the same property and default is made in the payment of any sum due upon any one or more of such loans, overdraft, advance or other accommodation, the foregoing provisions of this Ordinance shall apply notwithstanding that default may not have been made in respect of any of the other loans, overdraft, advance or other accommodation, and the board may, in any such case, by resolution under section 19 authorize the sale of the property for the recovery of the total amount due to the bank in respect of **all such loans**,

overdraft, advance or other accommodation, as the case may be, and the provisions of this Ordinance shall apply accordingly.” (Emphasis added)

Therefore, the Bank of Ceylon has the power under Section 25 to calculate all the loans together.

It is clear that the principal amount borrowed and due to the 1st Respondent is more than Rs. 5 million without interest. Although the Petitioners initially obtained a loan below Rs. 5 million, later it has increased to an amount exceeding Rs. 5 million. The said amount indicated by the Bank was at the point of the default and at that point, the principal amount borrowed, due, and owing to the bank on the loan granted exceeded Rs. 5 million.

To get protection under Section 5A of the Recovery of Loans by Banks Act, at the time of the default, the principal amount due should not exceed Rs. 5 million. This was considered by His Lordship Samayawardhena J in Aqua World Private Limited and Another v. Kuranage Marian Stella Rose Perera v. DFCC Bank And Others, SC APPEAL NO. SC/Appeal/219/2016, Decided on 07.03.2024, held that;

“For the purpose of section 5A, a Bank is not permitted to aggregate multiple loan facilities, all secured by the same mortgage, in order surpass the threshold of Rs. Five Million. The principal amount of each loan facility should exceed Rs. Five million.

The proviso to section 5A (1) needs no interpretation; it is self-explanatory. It state (a) at the time default (b) when calculating the principal amount borrowed due and owing to the Bank (c) on the loan granted to such defaulter, (d) the interest accrued on such loan and any penalty imposed thereon, Shall not be taken into consideration.

The calculation has to be done at the point of default, and at that point; the principal amount borrowed due and owing to the bank on the loan granted, should exceed Rs. Five million.

Learned Counsel for both parties restricted the argument to the following question of law.

When the capital to be recovered is less than Rs. Five million as at the date of resolution, can the bank resort to prate execution?”

Before we part with this judgment, we are mindful of the sentiments expressed by His Lordship Samayawardhena J with regard to the Recovery of Loans by Banks under the Recovery of Loans by Banks Act 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.”

For the said reasons, we dismiss the action with the costs of Rs. 100,000.

JUDGE OF THE COURT OF APPEAL

N. Bandula Karunarathna,J (P/CA)

I AGREE

PRESIDENT OF THE COURT OF APPEAL