

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

CA-WRT-117-24

In the matter of an application for mandates in the nature of Writs of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Jostein Viksund Design and Model Centre
(Private) Limited
Dungalpitiya,
Church Road,
Negombo

Petitioner

Vs.

1. Bank of Ceylon
Head Office
No.1, BOC Square
Bank of Ceylon Mawatha
Colombo 01.
2. M.H.T. Karunaratne
Auctioneer
M/S T&H Auction
No. 50/3, Vihara Mawtha Kolonnawa

Respondents

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

Counsel: Farman Cassim, Pc with Charaka Jayaratne for the Petitioners
Chandimal Mendis with Ashiq Hassim and Chathuri Weerawardhana for
the 1st Respondents.

Written 13.11.2024 (by the Petitioner)

Submissions: 22.10.2024 (by the 1st Respondent)

On

Decided On: 20.11.2024

B. Sasi Mahendran, J.

The Petitioner instituted this application praying for the following reliefs as prayed for by the Petition dated 19.02.2024.

- 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 Notice of Sale contained in the Government Gazette 2368 dated 19th January 2024 and Newspaper Notices dated 22nd January 2024 respectively marked P13 (b), P13(c), P13 (d), P13 (e), P13 (f) and P13 (g) to the Petition;
- c) Grant and issue a mandate in the nature of a Writ of Certiorari quashing the impugned decision of the 1st Respondent by way of Board Resolution dated 28th July 2023 contained and/or depicted in the Government Gazette No. 2354 respectively marked P12 (b), P12 (c), P12(d), P12 (e), P12 (f) and P12 (g) 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 1st Respondent Bank contained in the Board Resolution dated 28th July 2023 contained and/or depicted

in the Government Gazette No. 2354 and Newspaper Notices respectively marked P12 (b), P12 (c), P12(d), P12(e), P12 (f) and P12 (g) to the Petition;

- e) Grant an interim order pending the hearing and determination of the Petitioner's application restraining the 1st Respondent and/or the 2nd Respondent and/or their servants and/or its agents and or all those acting under it from taking any steps whatsoever to conduct the auction described in the Notice of Sale contained in the Government Gazette 2368 dated 19th January 2024 and Newspaper Notices dated 22nd January 2024 respectively marked P13 (b), P13(c), P13(d), P13(e), P13(f) and P13(g) to the Petition;
- f) Grant costs; and
- g) Such other relief that Your Lordships Court shall seem meet.

The facts of this case are briefly as follows:

The Petitioner, a duly incorporated company under the Companies Act No. 17 of 1982 is engaged in the manufacture of various motor yachts for export and domestic use as the Sri Lankan extension of the Norwegian Sport Boat manufacturer of Viksund Group and has its factory in Negombo.

The Petitioner states that, in or about April 2019, the founding company in Norway sub-contracted two urgent orders to the Petitioner for the manufacture of fishing boats by two separate purchases. According to the Petitioner, for the same purpose, two Letters of Credit marked as P4 (a) and P4 (b) were opened by the said purchasers for a period of 6 months through their respective issuing banks in Norway and the corresponding Sri Lankan bank was Commercial Bank of Ceylon PLC. The Petitioner states that, the Petitioner spent about Norwegian Kroner 2,500,000/- in the construction of moulds to facilitate the manufacture of the said orders. The Petitioner further states that, however, the 1st Respondent Bank, incorporated under the Bank of Ceylon Ordinance No. 53 of 1938 (as amended) approached the Petitioner and convinced the Petitioner to transfer the said Letters of Credit to the 1st Respondent Bank under the assurance that the Bank would readily provide added credit facilities in the furtherance of the transaction between the

Petitioner and the Norwegian customers. Subsequently, based on the reliance of the assurance given by the 1st Respondent Bank, the Petitioner considered the 1st Respondent as the corresponding Sri Lankan Bank for the said transactions.

The Petitioner further avers that, consequent to the discussions between the Chairman of the Petitioner Company and the 1st Respondent Bank in May 2019, the 1st Respondent agreed to grant the Petitioner with credit facilities and required the Petitioner to execute a mortgage over its property in Negombo.

In this context, the Petitioner states that, regardless of the letters sent by the Petitioner dated 14.10.2019 and 17.10.2019, the 1st Respondent had not acted to grant the credit facilities to the Petitioner which caused an unreasonable delay. The Petitioner further states that only 30 days prior to the maturity of the Letters of Credit, the 1st Respondent Bank executed the Mortgage Bond bearing No. 05 dated 19.12.2019 as a security for a Permanent Over Draft of Rs. 33,000,000 as credit facilities to the Petitioner. As stated by the Petitioner, for the utter dismay, although the credit facility of the said sum was approved, the 1st Respondent only provided the facility amounting to Rs. 12,000,000. The Petitioner further states that, as a result of the 1st Respondent's failure to release the due of the credit facility amidst of Covid-19 Pandemic, the 1st Respondent mala fide caused the maturity of the Letters of Credit, loss of the two purchase orders and loss of the credibility of the Petitioner.

According to the Petitioner, though there were amicable discussions between the Petitioner and the 1st Respondent Bank on the restructuring of the credit facilities, the Petitioner received a letter dated 31.10.2023 marked as P12 (a) attached with the copies of Notice under Section 21 of the said Ordinance indicating that, an outstanding amount of Rs. 18,299,491.96 on account of the principal and interest upto 18.07.2023 together with further interest on Rs. 12,000,000 at the rate of 29.25% per annum. Further, the Petitioner was sent copies of the Notice under Section 22 of the said Ordinance by letter dated 30.01.2024 marked as P13(a). The 1st Respondent had also affixed a banner stating 'Notice of Sale' at the premises on 14.02.2024 despite the 'fourteen days' provided by Section 22 of the Ordinance. The Petitioner moreover contends that despite the meeting on 16.02.2024 and the letter dated 15.02.2024 marked as P15, the Petitioner was informed that, the outstanding amount to be paid by the Petitioner was now worth of around Rs. 22,000,000 at the said meeting.

The main contention of the Petitioner is that the 1st Respondent had acted in mala fide in these circumstances and the issuance of Notice of Sale and the Gazette Nos. 2368 and 2354 are unlawful and ultra vires.

In this context, the Petitioner has invoked the writ jurisdiction of this Court seeking inter alia writs of Certiorari to quash the Notice of Sale in the Gazette No. 2368 dated 19.01.2024 and the Newspaper Notices dated 22.01.2024 marked as P13(b) to P13(g) and the decision of the 1st Respondent in the Gazette No. 2354 marked as P12(b) to P12(g).

The main allegation made by the Petitioner is that the 1st Respondent failed to provide the Petitioner with credit facilities that were agreed upon in due time. On the other hand, the 1st Res has stated that when the Res agreed to grant the facility of Rs. 33,000,000 by executing the Mortgage Bond No. 05 which is the subject matter of this case. Initially, Rs. 12,000,000 was granted to the Petitioner by the 1st Respondent on 24.12.2019. To release the further credit facility, the Petitioner was given an undertaking by letter dated 18.12.2019 that, the Petitioner needed to make certain changes in the Letter of Credit marked P4 (b). However, the Petitioner has failed to comply with the said undertaking. This was not revealed by the Petitioner in the Petition. Further, in the Counter Affidavit, document marked 1R2 was not challenged by the Petitioner. According to 1R2, it is clear that, the Petitioner has promised to amend the said Letter of Credit submitted to the 1st Respondent before 07.01.2020.

The 1st Respondent alleges that the Respondent could not release any further funds as the Petitioner has constantly failed to comply with the stipulations and requirements initiated by the 1st Respondent to the Petitioner. Since the Petitioner has defaulted in making payments, the Overdraft was rescheduled at the request of the Petitioner.

Since the Petitioner has failed to make any payments, the 1st Respondent has taken steps under the said Ordinance. This Court is mindful that, in document marked P15, there is no indication by the Petitioner that, he has paid any amount to settle the Overdraft.

Since the Petitioner has failed to settle the amount, the 1st Respondent had no other option but to send a letter of demand. Therefore, the Respondent has taken steps to recover the sum.

On 18.07.2023, a Board of Directors of the 1st Respondent passed a Resolution to sell the property in question by public auction to recover the monies due to the bank under Section 19 of the said Ordinance.

According to the 1st Respondent, the Petitioner is a habitual defaulter. As depicted in the document marked P12(b), the amount due from the Petitioner as of 18.07.2023 is Rupees Eighteen Million Two Hundred and Ninety-Nine Thousand Four Hundred and Ninety One Rupees and Cents Ninety Six (Rupees 18,299,491.96) on account of the principal and interest together with further interest on Rs. 12,000,000 at the rate of 29.25% per annum.

We are mindful that, the Petitioner has not taken any steps to settle the said due amount. The main purpose of this action instituted by the Petitioner is to stay the auction. Even after the Petitioner received the notice of the resolution, the Petitioner has not taken steps to settle the due amount. According to Section 23 of the Bank of Ceylon Ordinance (as amended), there is a provision available to stay the auction.

Section 23

“Payment before sale.

- (1) If the amount of the whole of the unpaid portion of the loan, overdraft, advance or other accommodation (together with all interest due thereon according to the terms of the mortgage), and of the moneys and costs, if any, recoverable by the Board under section 26 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 19 for the sale of that property.
- (2) If the amount of the installment or other payment in respect of which default has been made, together with any interest due thereon according to the terms of the mortgage, and of the moneys and costs, if any, recoverable by the Board under section 26, 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 19 for the sale of that property.

[S 23 subs by s 12 of Law 10 of 1974]”

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 part of the due amount up to the time this action was filed. This concept was referred to by His Lordship Chitrasiri J where similar Section is available in the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 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.”

There is no evidence to show that, the Petitioner had attempted to settle the amount due. We are mindful of the observation made by His Lordship SoZa, J in Siddeek v. Jacolyn Seneviratne, (1984) 1 SLR 83 at page 90, that;

“It is necessary at this, stage, to bear in mind that certiorari is a discretionary remedy-see Wade, : "Administrative Law" 5th Ed. (1982) pp. 546, 591. As de Smith says in his work "Judicial Review of Administrative, Action" 4th Ed. (1980) p. 404: "Thus, certiorari is a discretionary remedy and may be withheld if the conduct of the applicant, or, it would seem, the nature of the error does not justify judicial intervention".

The main ground urged by the Petitioner is that the 1st Respondent acted in mala fide. It is pertinent thus, to consider the concept of ‘*mala fide*’ as discussed in scholarly views as well as in judicial pronouncements.

In M.P. Jain ad S.N Jain, *Principles of Administrative Law* (2011) 7th Edition, page 1193; Mala Fides

“The term *mala fides* is used, at times, in a broad sense, and, at other times, in a narrow sense. In the broad sense, *mala fides* may denote an improper exercise of power or abuse of discretion or any of the grounds mentioned below. In one case, the Supreme Court observed;

“....*mala fide* exercise of power does not necessarily imply any moral turpitude as a matter of law. It only means that the statutory power is exercised for purposes foreign to those for which it is in law intended.”

In this quotation, *mala fides* is equated with an exercise of discretionary power for an improper purpose, which is being discussed here as a ground separate from *mala fides*. When a power is exercised for an authorised purpose, the same would amount to malice in law.

Further at page 1195:

“The use of the term *mala fides* in the broad sense is not proper as it is confusing. The various grounds of abuse of power are being discussed here separately, and for an analytical purpose, it is advisable to keep these grounds distinct from each other as far as possible. Therefore, it is in the narrow sense, that the term *mala fides* is being discussed here. In this sense, the term *mala fides*, or bad faith, means dishonest intention or corrupt motive in the exercise of power, or a deliberately malicious or fraudulent purpose, on the part of the decision-maker. *Mala fides*, in this narrow sense, includes those cases where the motive force behind an action is personal animosity, spite, vengeance, personal gratification or benefit to the concerned authority or its friends or relatives. *Mala fide* exercise of power is an abuse of power and hence invalid. Even though it may be difficult to determine whether or not the authority has exceeded its powers in a particular case because of the broad terms in which the statute may have conferred power on it, the discretionary action may, nevertheless, be declared bad if the motivation behind it is not honest.”

In Gunasinghe v. Hon Gamini Dissanayake and Others, 1994 (2) SLR 132 at page 135, His Lordship Ananda Grero, J. held that;

“With regard to the question of *mala fide*, the petitioner in his petition states that this acquisition was done as he is a supporter of the Sri Lanka Freedom Party and

also he found employment in the Department of Census and Statistics under the government of the said party. The 1st respondent in his affidavit has specifically stated that his decision to acquire this land was not motivated by political or any other consideration. He had stated that the 3rd respondent did not influence him to acquire this land. According to him acquisition was for an urgent public purpose. Simply stating that the petitioner is a supporter of a political party which the 3rd respondent is opposed, and that the petitioner was given employment in a government department by the SLFP Government would not make the acquisition *mala fide*. De Smith's Judicial Review of Administrative Action at page 336 it is stated that, "a Court will not in general entertain allegations of bad faith made against the repository of a power, unless bad faith has been expressly pleaded and properly particularised (i.e. enumerated in detail)". This Court is of the view that the petitioner has failed to enumerate in detail the part played by the 3rd respondent to influence the 1st respondent to acquire this land due to political reasons or rivalry. Further the petitioner has failed to satisfy this Court that it was due to political reasons that the 1st respondent took steps to acquire this land."

In Bandaranayake v. Judicial Service Commission, 2003 (3) SLR 101, at page 104, His Lordship Sripavan, J (as he was then) held that:

"The plea of mala fides is raised often but it is only rarely it can be substantiated to the satisfaction of Court. Merely raising doubt is not enough. There should be something specific, direct and precise to sustain the plea of mala fides. The burden of proving mala fides is on the individual making allegation as the order is regular on its face and there is a presumption in favour of the administration that it exercises its power in good faith and for the public benefit." [Vide Gunasinghe v Hon Gamini Dissanayake (5) The petition however did not set out in detail the allegations of mala fide against the first respondent Commission."

In the instant case, the Petitioner has failed to establish the mala fide of the 1st Respondent. Further, we note that the Petitioner's conduct that his failure to comply with the undertaking resulted in the 1st Respondent's delay in releasing the funds.

Further, we note that the Petitioner has failed to make the Directors who passed the Resolution a party to this application. The failure to make them a party itself is a ground for dismissal of this application. We further note the particular land belongs to one Chithra Fernando is also not a Petitioner in this action.

Considering all the facts set out above, we are of the view that this application be dismissed with taxed costs.

JUDGE OF THE COURT OF APPEAL

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

I AGREE

PRESIDENT OF THE COURT OF APPEAL