

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

CA-WRIT Application No: 666/2023

Welhena Kankanamge Bandulal Senerath
711, D.E. Wijesinghe Mawatha
Pelawatta,
Battaramulla.

PETITIONER

Vs.

1. DFCC Bank
No. 73/5,
Galle Road,
Colombo 03.
2. Welhena Kankanamge Aruna Srilal Senerath
No. 391,
Badulla Road, Hali-Ela.
3. Welhena Kankanamge Lalith Nirosha
Senerath
No. 386/4B,
1st Lane, Badulla Road, Hali-Ela.

4. La Monarose Hotels & Resorts (Private)
Limited
"Green Woods"
No. 301,
Bandarawela Road,
Badulla.
5. Thusith Karunaratne Licensed Auctioneer,
No. 182/3 (50/3), Vihara Mawatha
Kolonnawa.
6. J. Durairatnam,
Chairman, DFCC Bank.
7. N H T I Perera,
Director, DFCC Bank.
8. Ms. V.J. Seneratne
Director, DFCC Bank
9. L.K.A.H Fernando
Director, DFCC Bank.
10. N K G K Nemmawatta
Director, DFCC Bank
11. H M N S Gunawardana
Director, DFCC Bank.
12. H A J De Silva Wijeratne
Director, DFCC Bank.
13. N Vasantha Kumar
Director, DFCC Bank.

14. A L Thambaiyah
Director, DFCC Bank.

15. W R H Fernando
Director, DFCC Bank.

16. W D Batagoda
Director, DFCC Bank.

The 6th to the 16th Respondents Chairman
and Directors of DFCC Bank No. 73/5, Galle
Road, Colombo 03.

RESPONDENTS

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

Counsel: Suren Gnanaraj for the Petitioner.
Kushan De Alwis, PC with Sashendra Mudannayake and Linuri
Munasinghe for the 1st and 05th Respondent.
Rukshan Senadheera for the 2nd, 3rd ad 4th Respondents

Argued on: 21.02.2024

Writt

Submissions 24.01.2024 and 06.05.2024 (by the Petitioner)

On: 02.04.2024 (by the 1st and 5th Respondents)

Decided On : 30.05.2024

B. Sasi Mahendran, J.

The Petitioner filed this application seeking a Writ of Certiorari to quash the resolution of the 1st Respondent Bank adopted under section 4 of the Recovery of Loans by Banks

(Special Provisions) Act No. 4 of 1990 as subsequently amended whereby, it has been resolved to sell by public auction on 3rd November 2023 at 10.30am the property which was mortgaged to the 1st Respondent by the Petitioner.

Factual circumstances of this application.

According to the affidavit of the Petitioner dated 1st November 2023, he became the owner of the property depicted as Lot 1 in Plan No. BD/ 6896 dated 21st July 2009 by Deed of Transfer No 3332 dated 1st December 2017, which is the subject matter of this case. The Petitioner has further stated that, the 2nd and 3rd Respondents are her siblings and all 3 are the Shareholders and Directors of the 4th Respondent (Company) and is the Chairman of the said Company.

According to the Petitioner, the Company made an application to the 1st Respondent(Bank) to obtain a loan of Rs 60,000,000/- (Sixty Million). In consequent to the said application, the said bank agreed to grant the said loan by the letter dated 21.12.2017.

The said company agreed to settle the said loan in 102 equal monthly installments together with the interest. Further, to comply with the terms of conditions of the said loan facility, a mortgage bond bearing No 6482 dated 21.12.2017 was executed by the company and the Petitioner who owned the property.

We are mindful that the Deed of Transfer No. 3331 was executed on 01.12.2017. It shows that the said deed was executed to facilitate as a security for repayment of the said loan. Thereafter, the Company made an application to the Bank to obtain another loan facility of Rs 8,250,000/- (Rupees Eight Million Two Hundred and Fifty Thousand). As a security to the 2nd loan, a secondary mortgage bond bearing No 6803 was executed on 29.07.2019 by the Petitioner and the Company.

Thereafter, upon the request made by the company, by letter dated 11.03.2020 the aforesaid loan facility was rescheduled and repayment period was extended. Again on the request of the company, by letter dated 07.09.2022 the said loan facility was rescheduled and a grace period of loan repayment was further extended. It should be noted that, under the circular No. 02/2020 issued by the Monetary Board of Central Bank of Sri Lanka,

certain concessions has been granted to the company. The Bank in their objections in paragraphs 18-21 has elicited on how the concessions were given by the Bank to the company, which was not disputed by the Petitioner.

According to the Bank, the company neglected to repay the said loan which the company had agreed to pay. Therefore, a letter of demand dated 05.07.2023 was sent to the company, by copying to the Managing Director of the said Company and who is the Petitioner of this case. In the said Letter of Demand, the Bank has detailed the facilities given by the bank and had demanded a sum of Rs 97,938,398.32 (Ninety Seven Million Nine Hundred and Thirty Eight Thousand Three Hundred and Ninety Eight Rupees and Cents Thirty Two) as at 30.04.2023. Further they have informed that, if they neglect to pay the said sum, the Bank would take steps under the laws of Sri Lanka for the recovery of amounts due to the said Bank. However, notwithstanding the aforesaid the company failed to honour the repayment of the loan.

On 8th of August 2023 the Petitioner received a copy of resolution passed on 26.07.2023 by it's Board of Director's to take action under section 4 of the Recovery of Loans by Banks Act No. 4 of 1990. The 5th Respondent, the auctioneer by letter dated 09.10.2023 which was marked as P15 has informed the petitioner the date and time of the auctioning of the property.

Further we observe that the mortgage bond No 6803 marked as X4 in paragraph 09, states that the Company and the 1st Petitioner has given consent to the bank that if the company fails to pay the loan, the bank is empowered to exercise the parate execution rights. Also we observe that, whenever the bank has extended the loan facilities, the Petitioner has signed to agree with the said conditions. And we also observe that he is the Chairman, who has given his property as a security to the said loan.

The main argument put forward by the Petitioner is that, the said regulation passed by the 1st Respondent Bank is unlawful and arbitrary. The main defense taken by the Petitioner is that, the land which was mortgaged to the Bank under the Mortgage Bond is owned by him and he is not a borrower in terms of the said Act. It is true that the land is not owned by the 4th Respondent Company. But the Petitioner himself, entered in to a mortgage bond with the 1st Respondent as a surety to the said loan. According to the Petitioner, he has based his case on the footing that the bank is not entitled to parate

execute a property, mortgaged by a third party. Relying on the Judgments of, Ramachandra and Ananda Siva v Hatton National Bank [2006] 1 SLR 393 and DFCC Bank v Weliwita Don Kusumitha Muditha Perera and Others [SC Appeal No. 150/2010] decided on 25.03.2014. But this proposition was overruled by in the case of Sunpac Engineers (Private) Limited and One Other V DFCC Bank and One Other SC Appeal 11/2021.

Samajawardhena J at (Page 47) held that:

“The cause of action allegedly accrued to the plaintiff in parate execution cases arises out of a banking transaction and not of a mortgage transaction. The mortgage is part of the banking transaction. In the instance case, the 1st plaintiff is the borrower and the 2nd plaintiff is the mortgagor. The bank resorts to parate execution of the mortgaged property to recover the loan.

Let me explain this in lucid language. When a person goes to a bank to obtain a loan, the bank asks for security. That security can be provided by the borrower himself or he can plead with another to give security on his behalf. The main transaction is the loan transaction between the bank and the borrower, not the security, which is incidental. The incidental transaction cannot be brought to the fore to thwart or undermine the main transaction. It is beside the point who provides the security. The covenants of the Mortgage Bonds remain the same for both the borrower and the third party. If another individual obliges the borrower’s request and mortgages his property as security for the loan, and hands over his original title deeds to the bank, and if the borrower defaults on the loan payment, the bank should be able to recover the money by selling the mortgaged property. In practical terms, the guarantor or the mortgagor would be the debtor to the bank where the loan is in default. That is the purpose of providing security. If the mortgaged property is sold to recover the dues to the bank, the mortgagor must deal with the borrower, not with the bank. This is what happens in modern day banking, involving performance guarantees, advance payment bonds, letters of credit, credit card transactions etc. Once the demand is made, money is paid without informing the guarantor.”

Further held that,

The Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, as amended, applies to any property mortgaged to the bank as security for any loan in respect of which

default has been made irrespective of whether the mortgagor is the borrower or a third party.

The Bank of Ceylon Ordinance, No. 53 of 1938, as amended, and the People's Bank Act, No. 29 of 1961, as amended, apply to any property mortgaged to the said banks as security for any loan in respect of which default has been made regardless of whether the mortgagor is the borrower or a third party.

Accordingly, the majority judgment of Ramachandran v. Hatton National Bank [2006] 1 Sri LR 393 is overruled.

In fact the Petitioner in his written submission in paragraph 34 has considered the aforesaid judgments and has stated as follows;

“However, subsequent to the filing of this action, seven judges of the Supreme Court in the case of Sunpac Engineers (Pvt) Ltd and another v DFCC Bank and other [SC Appeal 11/2021; overturned the decision of Ramachandra and Anada Siva v Hatton National Bank [Supra].”

Now the Law is settled that the Bank (1st Respondent) is empowered by statute to parate execute the property mortgaged by the 3rd Party (Petitioner) for the loans obtained in order to recover its outstanding monies. In addition, the Petitioner is the Director who has mortgaged his property. Our Courts are held that any Director of a corporate entity who mortgage his property for a loan obtained by the Company is a burrower within the meaning of the said Act.

Hatton National Bank Ltd. V. Jayawardane and Others, (2007) 1 SLR 181 at page 189, Nihal Jayasinghe,J, held that;

“In my considered opinion, the 1st and 2nd respondents cannot hide behind the veil of incorporation of Nalin Enterprises (Pvt) Ltd, while being the "alter ego" of the said company of which the 1st respondent has been the Managing Director and the 2nd respondent, who is the wife of the 1st respondent, has been a Director. “

As far as this case is concerned, it is quite obvious that the 1st and 2nd respondents, being Directors of Nalin Enterprises (Pvt) Ltd.; benefited from the facilities made available to the said company by the petitioner Bank, and to that extent they cannot claim that the mortgages which secured the said facilities fall within the category of "third party mortgage" as contemplated in the majority judgments of this Court in "Ramachandra v Hatton National Bank (supra).

The 1st and 2nd plaintiff are integrated to Nalin Enterprises and when Nalin Enterprises sought to obtain facilities from the petitioner Bank the borrowers are in fact the said Nalin Enterprises along with the 1st and 2nd plaintiffs. It would be an exercise totally illogical to seek to differentiate the 1st and 2nd plaintiffs as third party mortgagers within the meaning of Ramachandra v Hatton National Bank (supra)."

Amarasekara J in Sunpac Engineers (Pvt) Ltd and another v DFCC Bank and other [SC Appeal 11/2021 (Supra) at Page 114 held that:

"This, the 2nd question of law has to be answered stating that any director of a corporate entity who mortgage his property for a loan obtained by the corporate entity is a borrower within the meaning of Act No. 4 of 1990."

Further held that,

"The learned judges who heard the said Ramachandran Case and the said Jayawardena case mentioned above would have contributed their best to solve the issues presented before them as per the submissions available before them. They may not have foreseen the other issues that may arise with such interpretations in future. Present interpretation, the exist after the said Ramachandran case has given an opportunity to many defaulters to annual the intention of the legislature expressed by bringing these legislations. For example, a defaulter who may get his name registered in CRIB, and unable to get further loans, may transfer his property to one of his family members name and get further loans through one of his colleagues while getting his family member to sign the mortgage. The said colleague does not take interest in paying as it is not his property at stake and the family member can take up the position that it is third party mortgage. The original defaulter may further file an action stating that he did not mean to transfer the title but it was a trust."

Since the Petitioner is a Director and Chairman of the 4th Respondent he will be a borrower within the meaning of Act No. 4 of 1990.

Be that as it may, the question has to be considered is whether the property mortgaged by the Petitioner who is the Chairman and what steps has he taken to settle the loan.

Even after he received the Letter of Demand he has not taken steps to settle the loan. According to the section 10 of the said act there is a provision available to stay the auction.

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 instalment up to the time this action was filed. This section was referred by **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 instalments if he/she has not paid the entire unpaid amount, in order to move under Section 10 of the Act No.4 of 1990.”

Furthermore, the Petitioner has admitted the fact that the Petitioner is a Director who has received the notice, but not have taken action to settle the credit facilities obtained by the 4th Respondent.

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.

In this instant Case, the 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.

The conduct of the Petitioner is questionable. Therefore, We hold that the 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."

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

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

JUDGE OF THE COURT OF APPEAL

N. Bandula Karunarathna,J (P/CA)

I AGREE

JUDGE OF THE COURT OF APPEAL