

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

In the matter of an application for orders in the nature of writs of certiorari and prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA /WRIT 0419/19

- 1. Liyanage Holdings (Pvt) Ltd,**
No. 164/3, New Kandy Road,
Weliweriya
- 2. Ranwala Liyanage Nuwan Prabath
Liyanage**
No. 164/3, New Kandy Road,
Weliweriya

Petitioners

Vs.

- 1. Bank of Ceylon**
Bank of Ceylon Square,
No.01, Bank of Ceylon Mawatha,
Colombo 01
- 2. M.H.T Karunarithne**
T and H Auctioneers,
No. 50/3, Vihara Mawatha,
Kolonnawa

Respondents

Before : Sobhitha Rajakaruna, J.

Dhammika Ganepola, J.

Counsel : Harshika Samaranayake for Petitioner instructed by Nalin Samarakoon

Chandimal Mendis with Sarasi Paranamanna for 1st Respondent

Supported on: 22.02.2021

Decided on: 10.03.2021

Sobitha Rajakaruna J.

The Petitioner has invoked the writ jurisdiction of this court seeking, *inter alia*, a mandate in the nature of a writ of certiorari quashing the resolution passed by the 1st Respondent bank on 15th November 2017 published in the Gazettes marked as **P10 (a), (b) and (c)** in terms of the provisions of Sections 19 and 21 of the Bank of Ceylon Ordinance and published in the Gazette No. 2084 dated 10th August 2018,

The Petitioner company has obtained a series of loans from the 1st Respondent bank since 2011, only some of the portions of which have been repaid by the Petitioner. The Petitioner has failed to regularly make the payments and accordingly the Respondent bank has granted a reschedulment of the loan facility on 9th November 2016. However, despite the reschedulment, the Petitioners have continued to default the payments, and the Respondent bank has accordingly moved to recover the loans by resorting to sell the property in a public auction. The Board of the Respondent bank has resolved this decision by way of a board resolution passed on 15th November 2017.

Thus, the Respondent bank has issued notice to the Petitioner under Section 21 of the Bank of Ceylon Ordinance as reflected in the **Gazette Notifications No. 2084 dated 10.08.2018 marked as P10 (a), (b) and (c)** (in all three languages). In December 2018, the Respondent bank has issued notice under Section 22 of the Bank of Ceylon Ordinance by way of paper advertisement marked as **P11(a), P11(b) and P11(c)**. The Petitioners at this point has negotiated to pay a Rs. 500,000/- and on that assurance, the Respondent bank has agreed to suspend the public auction. In the meantime, the Respondent states that in August 2018 the Petitioner has deposited a sum of Rs. 8 million to Respondent's account, and this fact is undisputed.

Thereafter, in view of the continuous nonpayment of the loans, the Respondent in August 2019 has once again issued Section 22 notices on the Petitioner and has informed that a public auction would take place on 27th September 2019 to sell the mortgaged property. As a

consequence, the Petitioner has filed the instant application seeking, *inter alia*, to quash the resolution made by the Respondent bank that authorized the public auction.

An application for judicial review, at this stage of notice, demands that a court seized of an application for notice should consider whether the case is suitable for full investigation at a hearing at which all parties have been given notice. See ***R v Secretary of State for Home Department exp Begum (1990) COD 107***. Accordingly, the court will take into account the question whether the application for notice relates to a matter that ought to be resolved after full argument.

The counsel for the Petitioner's main contention during his submissions was that the said Gazette notifications / the said Resolution;

- (i) attempts to recover 'a loan which is not a unpaid portion of a loan';
- (ii) the said resolution attempts to recover interest on interest,
- (iii) the said resolution has failed to consider the subsequent payment of loans for the value of Rs. 8.5 million.

The Petitioner's counsel also asserted that the loss caused to the Petitioner because of the purported miscalculation as marked in P21 amounts to Rs. 1,690,166.12.

The Respondent bank by way of a preliminary objection taken up in its Limited Statement of Objections states, *inter alia*, that the Petitioners are blatantly guilty of laches. The paragraphs 1 (II) (b) and (c) of the Limited Statement of Objections reads as-

"1 (II) (b)- The Petitioners have admitted that they received Final notice sent by the 1st Respondent on 16th October 2017 and thereafter the Board Resolution passed by the 1st Respondent has been communicated to the Petitioners on 17th August 2018.

1(II) (c) – Despite being aware of the 1st Petitioner's failure to regularize the loan payments and the auction resulted from such failure, the Petitioners have slept on their rights for over a year without taking any remedial legal action. Thereafter the Petitioners seem to have suddenly awakened from their state of indolence only two days prior to the scheduled auction (25/09/2019) and have come before Your Lordships' Court in the eleventh hour."

The evidence placed before this Court by the Petitioner does not indicate that the Petitioner has raised the impugned issues with the Respondent bank prior to presenting it before this court.

In *Gunasekera and another v Abdul Latiff*[(1995), 1 SLR 225,] Ranaraja J, states that; “*laches’ itself means slackness or negligence or neglect to do something which by law a man is obliged to do. It also means that unreasonable delay in pursuing a legal remedy whereby a party forfeits the benefit upon the principle vigilantibus non dormientibus jura subveniunt.*” The court explained, however, that what is reasonable time and what constitute delay will depend on each case, and if the delay can be reasonably explained the court will not decline to intervene. Although it appears that the Petitioner has conveyed his displeasure over the issuance of Section 22 notice, the Petitioner has not highlighted the purported errors in the Gazette to the Respondent. It was only after the issuance of the Section 22 notice in August 2019, the Petitioner hastily decided to impugn the Gazette notification published in August 2018, and the Board resolution that authorized the public auction. Therefore, the Petitioner has failed to convince this court to give a reasonable explanation as to why he did not take any remedial actions before.

Furthermore, it is pertinent to note the significance of a resolution passed by the Board of Directors of the Respondent Bank. Under Section 17 of the Bank of Ceylon Ordinance the Board of Directors has the power to authorize, by way a resolution, the seizure of any property mortgaged to the bank as security. Thus, this court has also taken cognizance of Section 19 of the said Ordinance which precludes any person, borrower or any other person claiming through the borrower, any right, title or interest of such property mortgaged to the bank, to challenge or invalidate such resolution in any court of law. Section 19 further states that no court shall entertain any such application. When a legislative enactment so expressly provides that a court of law should not look into such matter, a court must always allow such legislative intention to take precedence. In *K. D. Gunapala v Bank of Ceylon, CA Writ 955/2006, decided on 07.08.2013*, H.N.J. Perera, J. has taken a similar view. In *Yapa v People’s Bank and another [(2006) 1 SLR 60]* Wimalachandra J. cites the case of *People’s Bank vs. Hewawasam [(2000) 2 SLR 29]*, wherein it is stated that “*if this court were to fall into the error of drawing a distinction between the words invalidate and null and void in the construction of Section 29D, this Court would be in my view seeking to act in contravention of the intention of the legislature and bring to naught the intention of the legislature in granting parate execution rights of the Bank..*”.

In the instant application, the Petitioner does not impugn the *vires* of the passing of the said resolution by the members of the Board of Directors of the Respondent bank. We note that

the said resolution is well within the powers of the Board of Directors of the Respondent bank and in compliance with the Bank of Ceylon Ordinance. However, the Petitioner challenges the relevant Gazette notification based only on the quantum recoverable. The Petitioner argues that the words mentioned in the 3rd paragraph of the notice (published in the said Gazette notification) implied that the bank is charging an additional interest upon the rescheduled loan.

In this regard, the learned counsel of the Respondent bank during his submissions, raised a valid point in terms of this Court's inability to inquire into the quantum that is recoverable. In *S.K. Rahuman Maulana v People's Bank, CA 1012/2008 Writ, decided on 11.11.2013* the Petitioner impugns the resolution on the basis that the Respondent bank has failed to appropriate the payments made by the Petitioner. Anil Goonerathne J., after careful perusal of the pleadings submitted by both parties has decided that such matters of facts cannot be inquired into in the absence of evidence being led. Goonerathne J., further drew his attention to the case of *Ekanayake & Others vs. People's Bank 2005(1) SLR 94*, in which it was held that "*The facts disputed are on the quantum recoverable. The error on the calculation of quantum will not affect the jurisdiction of the Bank to act under Section 29D. The calculation of the sum recoverable by the Respondent Bank from the Petitioner is a matter of fact. In these proceedings, the court cannot ascertain the correctness of the sum recoverable from the Petitioners without evidence.*"

Further, it is apt here to address the Respondent's contention that the Petitioner has not disclosed all the relevant facts to this court, and that the Petitioner is therefore guilty of suppression of material evidence. We agree that the Petitioner has not disclosed to this court the case that is filed in the District Court of Aththanagalle against the 2nd Petitioner, in relation to one of the mortgaged properties to the bank.

At this juncture, this Court would like to reiterate that jurisdiction vested in this Court to issue writs is a discretionary relief. His Lordship Justice Samayawardana, in the case of *Bettans Group of Companies (Pvt) Ltd. vs. Lankaputhra Development Bank and others, CA Writ/230/2015 decided on 10.07.2020*, has stated that "*The Petitioner cannot invoke the writ jurisdiction of this court as of right. It is 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 law. Banks are not charitable institutions;*

they are the cornerstones of economies... 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...”

Moreover, in ***R v Legal Aid Board ex.p. Hughes (1993) 3 Admin LR 623 at 628P.*** the Lord Donaldson MR held that notice/ permission should be granted if an application is *prima facie* arguable. The permission judge needs to be satisfied that there is a proper basis for aiming judicial review, and it is wrong to grant notice without identifying an appropriate issue on which the case can properly proceed – see ***R v Social Security Commissioner ex.p. Pattni (1993) 5 Admin LR 219 at 223G.***

In the circumstances, this court takes the view that there is no proper basis for claiming judicial review in the instant application and also the case is not suitable for full investigation at a hearing whereas an error on the calculation of quantum, if any, will not affect the jurisdiction of the bank to act under Section 19 of the Bank of Ceylon Ordinance.

Therefore, this court is not inclined to issue notice and accordingly the application is dismissed.

Judge of the Court of Appeal

Dhammika Ganepola, J.

I agree.

Judge of the Court of Appeal