

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

In the matter of an application for a mandate in the nature of a Writ of Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 72/2020

Kumudu Samanthi Akmeemana,
No. 95, Pirivena Road,
Boralesgamuwa.

PETITIONER

Vs.

1. Hatton National Bank.
2. Dinesh Weerakkody,
Chairman, Hatton National Bank.
3. Jonathan Alles,
Managing Director/CEO,
Hatton National Bank.
4. L.R. Karunaratne.
5. R.S. Captain.
6. Amal Cabraal.
7. Palitha Pelpola.
8. D. Soosaipillai.
9. Nilantha De Silva.
10. Damien Fernando.
11. Madu Ratnayake.
12. Asoka Peiris.
13. Dr. Harsha Cabral P.C.

4th – 13th Respondents are Directors of
Hatton National Bank

1st – 13th Respondents at
Hatton National Bank, "HNB Towers",
No. 479, T.B. Jaya Mawatha, Colombo 10.

14. Hewa Magallagodage Ruwani,
No. 7/9, Galpotta, 1st Lane,
Nawala, Rajagiriya.

RESPONDENTS

Before: Arjuna Obeyesekere, J / President of the Court of Appeal
Mayadunne Corea, J

Counsel: S.N. Vijit Singh for the Petitioner

Priyantha Alagiyawanna with Isuru Weerasooriya for the 1st – 13th
Respondents

Supported on: 24th March 2021

Written Submissions: Tendered on behalf of the Petitioner and the 1st – 13th Respondents
on 31st March 2021

Delivered on: 30th April 2021

Arjuna Obeyesekere, J., P/CA

The Petitioner states that by virtue of Deed of Gift No. 1121 dated 1st May 2018 and Deed of Gift No. 1166 dated 12th July 2018, both attested by R.D. Bandula, Attorney-at-Law, she became the owner of two plots of land, each in extent of 14P, situated in Boralesgamuwa.

The Petitioner admits the following matters in paragraph 6 of the petition:

- a) The 14th Respondent, H.M. Ruwani is an acquaintance of hers;
- b) *The 14th Respondent had approached her for a loan and not having any liquid cash to satisfy the same, the Petitioner gave the 14th Respondent her two deeds of gift and told her to obtain a loan using the same;*

- c) The 14th Respondent handed over to the Petitioner a bank draft/cheque drawn in her name for a sum of Rs 26m issued by the 1st Respondent, Hatton National Bank,¹ which the Petitioner deposited in her account, as borne out by the Statement of Account relating to the Petitioner's current account marked 'P3e';
- d) The Petitioner had thereafter issued the 14th Respondent a cheque in a sum of Rs. 26m;
- e) She honestly believed that the 14th Respondent had kept the above deeds as a lien as agreed upon between themselves.

The Petitioner states that in November 2019, she found a notice and a banner affixed by the 1st Respondent on the aforementioned lands indicating that in accordance with a resolution passed by the 1st Respondent, the said properties will be sold by public auction on 20th January 2020. The resolution passed by the 1st Respondent on 26th September 2019 in terms of the Recovery of Loans by Banks (Special Provisions) Act No 4 of 1990, as amended (the Act) had been published in the newspapers of 13th November 2019 in all three languages – vide 'P4c' – 'P4e'.

The Petitioner states that she immediately met the officials of the 1st Respondent where she learnt that the 14th Respondent had by Mortgage Bond marked 'P5c' mortgaged the aforesaid properties to the 1st Respondent and borrowed a sum of Rs. 26m from the 1st Respondent. The Petitioner concedes that the 14th Respondent has borrowed the said sum of money from the 1st Respondent. The Petitioner states that she thereafter examined the folios at the Land Registry and found that apart from the aforementioned Deeds of Gift and the Mortgage Bond, no other conveyances had been registered in the said folios – vide 'P5a' and 'P5b'.

It is in this factual background that the Petitioner has filed this application seeking *inter alia* the following relief:

- a) A Writ of Certiorari to quash the resolution passed by the 1st Respondent to sell the said two properties by public auction;

¹ Vide 'R6' annexed to the Statement of Objections of the 1st Respondent in DC Colombo Case No. DSP 178/20.

- b) A Writ of Certiorari to quash the certificate of sale, in the event of the 1st Respondent proceeding to sell the properties;
- c) An interim order restraining the 1st Respondent from taking any further steps on the said resolution.

It is admitted that the 1st Respondent is a licensed commercial bank and is a bank for the purposes of the Act. Section 3 of the Act provides as follows:

“Whenever default is made in the payment of any sum due on any loan, whether on account of principal or of interest or of both, default shall be deemed to have been made in respect of the whole of the unpaid portion of the loan and the interest due thereon up to date; and the Board may in its discretion, take action as specified either in Section 5 or in section 4”.

Section 4 of the Act reads as follows:

“Subject to the- provisions of Section 7 the Board may by resolution to be recorded in writing authorise any person specified in the resolution to sell by public auction any property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover the whole of the unpaid portion of such loan, and the interest due thereon upto the date of the sale, together with the money and costs recoverable under section 13.”

The cumulative effect of the above provisions is that where a bank has provided a loan to a customer having obtained a property as mortgage for the said loan and where the customer has defaulted the repayment of the said loan, the Bank is entitled to pass a resolution to sell by public auction the said mortgaged property in order to recover the sums of money due to the bank. Thus, there is no dispute that the 1st Respondent has the power to pass a resolution to sell the properties mortgaged to it terms of Sections 3 and 4 of the Act.

The principal argument of the learned Counsel for the Petitioner is that the Petitioner is the owner of the said properties and that the 1st Respondent has acted *ultra vires* the powers conferred on it by the Act by passing a resolution to sell by public auction a property mortgaged to it, where the borrower is not the owner of the property mortgaged to the bank. This is the principle laid down by the Supreme Court in **Ramachandran vs The Hatton National Bank and Others**². In determining whether the 1st Respondent has acted *ultra vires* its powers, it would be necessary for this Court to determine whether the Petitioner continues to be the owner of the said properties.

The learned Counsel for the 1st Respondent submitted that after instituting this action, the Petitioner has filed action in the District Court of Colombo³ and obtained an enjoining order preventing the 1st Respondent from auctioning the said properties. Having obtained permission of this Court, the 1st Respondent had filed the pleadings of the said District Court action, which discloses the following facts:

- a) The 14th Respondent had made an application for a housing loan of Rs. 26m to purchase the aforementioned properties from the Petitioner;
- b) The 14th Respondent had submitted to the 1st Respondent an agreement to sell dated 1st November 2018 between the Petitioner and the 14th Respondent.⁴ The execution of the said Agreement to Sell has been admitted by the Petitioner.⁵
- c) In terms of the said agreement to sell, which incidentally had been attested by the same Attorney-at-Law who had attested the aforementioned Deeds of Gift, the Petitioner had agreed to sell to the 14th Respondent the said properties for a sum of Rs. 42m. The Petitioner had also acknowledged the receipt of Rs. 16m at the time the agreement was signed;

² [2006] 1 Sri LR 393.

³ Case No. DSP/178.

⁴ Marked 'R3' and annexed to the Statement of Objections filed by the 1st Respondent in the District Court.

⁵ Vide paragraph 11 of the plaint filed in the District Court.

- d) The 1st Respondent had obtained a Valuation Report dated 23rd October 2018, with the valuer having visited the land on 19th October 2018 in the presence of the Petitioner;⁶
- e) The Petitioner had executed Deed of Transfer No. 1252 on 26th November 2018 in favour of the 14th Respondent;⁷
- f) The said Deed of Transfer had been attested by R.D Bandula, Attorney-at-Law, who is the same Attorney-at-Law who had attested the two Deeds of Gift by which the Petitioner became the owner of the said properties as well as the Attorney-at-Law before whom the Petitioner had signed the Agreement to sell;
- g) Stamp duty due on the said Deed of Transfer had been paid on 27th November 2018;
- h) The 14th Respondent had mortgaged the said properties to the 1st Respondent on the same date as the aforementioned Deed of Transfer, after having executed the said Deed of Transfer;
- i) The 1st Respondent had issued the proceeds of the loan taken by the 14th Respondent by way of a bank draft/cheque dated 26th November 2018 drawn in favour of the Petitioner;
- j) The 14th Respondent is in default of the said loan.

It is therefore clear on the material that is presently before this Court that the Petitioner had transferred the said properties to the 14th Respondent by Deed No. 1252 and that the 14th Respondent was the owner of the said properties at the time the 14th Respondent mortgaged the said properties to the 1st Respondent. The owner of the properties and the obligor under the Mortgage Bond are therefore one and the same person. Thus, the 1st Respondent is seeking to sell by public auction a property mortgaged to it by the owner of the property for a loan facility made available to the owner. In these circumstances, the 1st Respondent has not acted

⁶ Marked 'R4' and annexed to the Statement of Objections filed by the 1st Respondent in the District Court.

⁷ Marked 'R5' and annexed to the Statement of Objections filed by the 1st Respondent in the District Court.

ultra vires its powers when it passed the resolution to sell by public auction the properties mortgaged to it by the 14th Respondent.

The argument of the learned Counsel for the Petitioner however arises this way. The position of the Petitioner that the folios did not reflect any transfer by her of the said properties to any other party at the time she checked the folios in January 2020 is correct. It is admitted by the 1st Respondent that even though the Deed of Transfer was signed and attested on 26th November 2018, and the stamp duty on the said deed was paid the next day, the Deed had been submitted for registration by the Attorney-at-Law who attested the said Deed, only on 18th May 2020, which is after the filing of this application.

The Petitioner denies having signed the said Deed of Transfer, even though the said deed had been attested by the same Attorney-at-Law before whom all other deeds and agreements relating to the said properties had been signed by the Petitioner. The jurisdiction of this Court under Article 140 of the Constitution is to examine whether a statutory authority has acted within the four corners of its enabling legislation. It is not competent for this Court in the exercise of its jurisdiction to issue writs, to investigate disputed questions of fact. Therefore, this Court cannot in these proceedings determine whether the Petitioner has in fact signed the said Deed or not.

The learned Counsel for the 1st Respondent has submitted that Deed No. 1252 is in conformity with the provisions of Section 2 of the Prevention of Frauds Ordinance. The question is, does the late registration render Deed of Transfer No. 1252 invalid? In terms of Section 7(1) of the Registration of Documents Ordinance, registration of a deed is only for purposes of priority and does not affect its validity. Hence, I am of the view that the late registration of Deed No. 1252 does not alter the *prima facie* position that the 14th Respondent was the owner of the properties at the time she mortgaged it to the 1st Respondent. In these circumstances, I see no legal basis to issue formal notice of this application on the Respondents.

In the District Court action, the Petitioner has put in issue the fact that she did not sign the said Deed No. 1252. I am of the view that this is a question of fact that must be decided by the District Court. Thus, the findings of this Court contained in this Order shall not prevent the District Court from going into the above issue.

Subject to the above, this application is dismissed, without costs.

President of the Court of Appeal

Mayadunne Corea, J

I agree

Judge of the Court of Appeal