

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

In the matter of an application for Restitution,
in the nature of *Restitutio-In-Integrum* under
and in terms of Article 138 of the Constitution
of the Democratic Socialist Republic of Sri
Lanka,

Court of Appeal

Case No: RII/0102/2024

DC Colombo

Case No: DSP/275/2019

Nations Trust Bank PLC.,
No. 242, Union Place,
Colombo 02.

Petitioner

Vs

1. Shiraj Mario Nesaduray,
No. 22, Crestwood,
Hokandara Road,
Thalawathugoda.
2. Rukmal Susantha Dias,
No. 269 B, 4th Lane,
Shanthipura, Thalawathugoda.
3. Kishani Mahawalathanna
Jayawardhana Dias,
No. 269 B, 4th Lane,
Shanthipura, Thalawathugoda.

Respondants

And Now Between

2. Rukmal Susantha Dias,
No. 269 B, 4th Lane,
Shanthipura, Thalawathugoda.
3. Kishani Mahawalathanna
Jayawardhana Dias,
No. 269 B, 4th Lane,
Shanthipura, Thalawathugoda.

Respondent-Petitioners

Vs.

Nations Trust Bank P.L.C.,
No. 242, Union Place,
Colombo 02

Petitioner-Respondent

Shiraj Mario Nesaduray,
No. 22, Crestwood
Hokandara Road,
Thalawathugoda

1st Respondent-Respondent

Before : R. Gurusinghe J
&
Dr. S. Premachandra J.

Counsel : Niranjana de Silva with Navindu Mendis
for the 2nd and 3rd Respondent-Petitioners

Eraj de Silva, PC. With Daminda Wijayaratne
instructed by Shashika Deepani Premanayaka
for the 1st Respondent

Chandaka Jayasundere, P.C., with Rehan Almeida
Instructed by Poornima Perera
for the Petitioner-Respondent

Argued on : 04-06-2025

Decided on: 09-07-2025

ORDER

R. Gurusinghe

The 2nd and 3rd respondent-petitioners (hereinafter referred to as the Petitioners) filed this application for *Restitutio-in-Integrum* against the petitioner bank and 1st respondent-respondent seeking, *inter alia* to set aside the order dated 06.12.2024 marked P9 of the Learned Additional District

Judge of Colombo in case bearing no. DSP/275/2019, and to dismiss the petitioner bank's application filed under section 16(1) of the Recovery of Loans by Banks (Special Provisions) Act No. 04 of 1990 (hereinafter sometimes referred to as the Act), and to issue an *ex-parte* interim order staying further proceedings in the case bearing No.DSP/275/2019.

1st respondent-obtained 8 million rupees loan on or around 13 June 2008 from the petitioner-obtained bank (Nations Trust Bank, hereinafter referred to as the bank), and the 1st respondent-obtained secured the repayment by mortgaging the property (hereinafter sometimes referred to as the property) described in the schedule to the Mortgage Bond No. 954 dated 13 June 2008.1st respondent-obtained failed to repay the loan to the bank as agreed. Thereafter, the bank took steps under the provisions of the Recovery of Loans by Banks (Special Provisions) Act No.04 of 1990 and proceeded to *parate* execution proceedings against the property and auctioned the mortgage property. As there were no other buyers, the bank purchased the property. The certificate of sale was issued in the name of the bank in accordance with section 15 of the Act No. 04 of 1990. Thereafter, the bank instituted proceedings in terms of section 16(1) of the Act. The petitioners and the 1st respondent-obtained resisted the application of the bank. The Learned Additional District Judge allowed the 2nd and the 3rd respondent-petitioners to lead oral evidence. After a lengthy inquiry, the Learned Additional District Judge of Colombo pronounced the order dated 6 December 2024, allowing the bank's application.

Thereafter, the petitioners filed this application before this court on 17.12.2024. After supporting the application *ex-parte*, the court granted an interim order in favour of the petitioners, staying further proceedings in the case bearing no.DSP/275/2019 in the District Court of Colombo.

The bank filed limited objections to the petitioners' application and sought for the vacation of the interim order granted staying the proceedings of DSP/275/2019.

The bank has taken up several preliminary objections and substantial objections to the petitioners' application. The bank has taken the position that the certificate of sale in question is conclusive proof of the legitimate sale of the property in favour of the bank, and the petitioners or other respondents cannot challenge such certificate of sale. Furthermore, the bank maintained that the petitioners had neither pleaded nor presented any evidence of exceptional circumstances that entitle them to invoke the extraordinary jurisdiction of *Restitutio-in-Integrum* or revision. The petitioners have not demonstrated any grounds which entitle them in law to invoke the extraordinary jurisdiction of *Restitutio-in-Integrum* or revision, and therefore are not entitled to any relief in the nature of an application of *Restitutio-in-Integrum* or revision.

The petitioners' position is that the mortgage property was sold to the 1st respondent-respondent to obtain a loan and the petitioners did not intend to transfer the beneficial interest to the 1st respondent-respondent. However, according to the evidence presented in the District Court, the 2nd respondent-petitioner admitted that they were unable to repay the loan obtained from the Commercial Bank, and there was an outstanding amount of more than 3 million. He further admitted that at that time, they were not in a position to obtain a loan from a bank.

Paragraph 19 of the plaint in the case bearing No. L315 DC Kaduwela, the petitioners state that 5 million rupees out of the 8 million rupees loan obtained from the Nations Trust Bank was used to settle the loan obtained by the petitioners from the Commercial Bank, and the remaining balance was transferred to the petitioners' company account. If the loan obtained

from the Commercial Bank by the petitioners had not been settled at that time, the Commercial Bank would have taken steps under the provisions of the Recovery of Loans by Banks (Special Provisions) Act No. 04 of 1990. Therefore, the position that the 2nd and 3rd respondent-petitioners did not benefit from the loan obtained by the 1st respondent-respondent is not correct. On the other hand, the petitioners' position that no consideration has ever passed between them is also not correct.

Petitioners' position in the petition is that they have filed an action against the 1st respondent-respondent seeking for a declaration that the 1st respondent-respondent is holding the property for the benefit of the petitioners.

The petitioners admit that the paper title was with the 1st respondent-respondent at the time of mortgaging the property to the bank. The petitioners have filed a similar action in the District Court of Kaduwela against the 1st respondent-respondent, seeking the same reliefs, and that action was dismissed.

In the case of Warnakulasuriya Chandima Prasad Rajitha Fernando vs DFCC Bank SC/APPEAL/33/2019 Decided on: 26.02.2024, the Supreme Court stated as follows;

In Sunpac Engineers (Private) Limited v. DFCC Bank and Others (SC/APPEAL/11/2021, SC Minutes of 13.11.2023) a Seven Judge Bench of this Court held that the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, is a special Act passed by Parliament aiming at revitalising the country's economy by facilitating speedy recovery of debts by non-judicial sales and the Act 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. There is no need to highlight that this is a special Act and is a departure from the established law and procedure because it is expressly stated in the Act itself. Where there are provisions in a special Act which are inconsistent with the general law and procedure, the general law and procedure must yield to the provisions of the special Act.

Even if the petitioners' position is accepted, the bank is still entitled, according to law, to proceed with the non-judicial sale of the property mortgaged to it. Section 15(1) of the provisions of the Recovery of Loans by Banks (Special Provisions) Act No.04 of 1990 provides;

Section 15(1) reads as follows: If the mortgaged property is sold, the Board shall issue a certificate of sale and thereupon all the right, title, and interest of the borrower to, and in, the property shall vest in the purchaser; and thereafter it shall not be competent for any person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to, and in, the property made or registered subsequent to the date of the mortgage of the property to the bank, in any court to move or invalidate the sale for any cause whatsoever, or to maintain any right, title or interest to, or in, the property as against the purchaser.

2nd and 3rd Respondent-petitioners' action in the District Court for a declaration of a constructive trust is not completely independent of the 1st respondent-respondent. The petitioners admit that the paper title was with the 1st respondent-respondent. The position of the bank is that the 1st respondent-respondent held the title to the property, and after the issuance of the certificate of sale, the title was transferred to the bank.

The loan of 8 million obtained by the 1st respondent-respondent from the bank was entirely utilised for the benefit of the petitioners. Any property mortgaged to the bank as security for any loan in respect of which default has been made is subject to non-judicial sale by the bank, irrespective of whether the mortgagor is a borrower or a third party.

The bank was attempting to recover the loan granted to the 1st respondent-respondent, secured by a mortgage since 2018.

In this order, the court considers only substantial objections, and no decision is made on preliminary objections.

For the reasons stated above, the petitioners have no prima facie case for maintaining a *restitutio-in-integrum* application. Therefore, the interim order issued against the bank is vacated.

Judge of the Court of Appeal.

Dr. S. Premachandra, J.
I agree.

Judge of the Court of Appeal.