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 under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. CASE NO. WRT/0125/24

1. Mahesh Corporation (Pvt) Ltd,
   No. 256, Welihena South,
   Kochchikade.

2. Wewalage Michael Mahesh Fernando,
   No. 256, Welihena South,
   Kochchikade.

3. Wewalage George Henry Philip Fernando *alias*
   Wewalage George Fernando,
   No. 256, Welihena South,
   Kochchikade.

4. Warnakulasooriya Mary Irangani Mallika Fernando,
   No. 256, Welihena South,
   Kochchikade.

PETITIONERS

Vs.

1. Seylan Bank PLC,
   P.O. Box 400,
   No. 90, Galle Road, Colombo 03.

2. W.M.R.S. Dias,
   Chairman,
   Seylan Bank PLC.

3. Ramesh J Jayasekara,
   Director,
   Chief Executive Officer,
   Seylan Bank PLC.

4. Mr. S. Viran Corea,
   Non-Executive Director,
   Seylan Bank PLC.

5. Ms. Sandhya S. Salgado,
   Independent Director,
   Seylan Bank PLC.

6. D.M.D. Krishan Thilakaratne,
   Non-Executive Director,
   Seylan Bank PLC.

7. D.M. Rupasinghe,
   Independent Director,
   Seylan Bank PLC.

8. L.H.A. Lakshman Silva,
   Independent Director,
   Seylan Bank PLC.

9. V.G.S. Sujeevani Kotakadeniya,
   Non-Executive Director,
   Seylan Bank PLC.

10. Averil A Ludowyke,
    Independent Director,
    Seylan Bank PLC.

    2nd to 10th Respondents, all of
    P.O. Box 400,
    No. 90, Galle Road, Colombo 03.

11. Chandima Priyadarshani Gamage,
    Auctioneer,
    No. 9-1, High Level Road,
    Sarwodaya Mawatha, Panagoda,
    Homagama.

RESPONDENTS

BEFORE : K.M.G.H. KULATUNGA, J.

COUNSEL : Ronald Perera, PC with Sanjeewa Dassanayake and Naamiq Naffath instructed by D. Jiminige for the Petitioners.

Priyantha Alagiyawanna with Sauri Senanayake for the Respondents.

ARGUED ON : 01.04.2025

DECIDED ON : 16.05.2025

JUDGEMENT

K.M.G.H. KULATUNGA, J.

1. The 1st petitioner is a company incorporated under the Companies Act, and the 2nd, 3rd and 4th petitioners are directors of the 1st petitioner company. The 1st petitioner had obtained four facilities from the 1st respondent bank. 1st respondent is a duly incorporated banking institution and is a licensed commercial bank within the meaning of the Banking Act and the Recovery of Loans by Banks (Special Provisions, Act No. 4 of 1990).

2. It is common ground that the 1st petitioner is a customer of the 1st respondent bank and has obtained the following facilities:
    i. a permanent overdraft of Rs. 50 million;
    ii. a letter of credit (sight) of Rs. 100 million;
    iii. a revolving import loan of Rs. 35 million; and
    iv. a term loan of Rs. 200 million.

3. The 1st petitioner failed and neglected to make payment and defaulted in servicing the said facilities. Thereupon, on the request of the 1st petitioner, the outstanding amounts of the said financial facilities were restructured.

4. The 1st petitioner accepted the offer letter dated 05.06.2018 (P-4) and the following facilities were offered on terms and conditions listed in the said letter:
    i. a term loan No. I of Rs. 200 million;
    ii. a term loan No. II of Rs. 85 million; and
    iii. a term loan No III of Rs. 29 million.

5. Upon so accepting, the 1st petitioner entered into three separate loan agreements (*vide* P-5 (i) – P-5 (iii)). As security for the said financial facilities the petitioners executed six mortgage bonds marked P-6 (i)

– P-6 (vi) along with declarations under Section 47A of the Mortgage Act.

6. As the 1st petitioner once again defaulted and the 1st respondent bank upon duly demanding the payment and following the due process embarked upon to recover as provided for the Recovery of Loans by Banks (Special Provisions) Act, No. 04 of 1990 (hereinafter also referred to as 'the Act'). Acting under the provisions of the said Act, the Board of Directors of the 1st respondent bank resolved to auction to said properties mortgage by resolution dated 28.01.2019. The same was duly published in the Government Gazette dated 15.03.2019 and also published in newspapers of 13,03.2019 in all three languages. The resolution has also been conveyed to the petitioners in accordance with Section 08 of the Act by letter dated 29.04.2019.

7. The public auction of the said property was fixed for 23.08.202 and the notice of auction was published in the Government Gazette on 30.07.2021 and in newspapers in all three languages. The plaintiffs were also duly informed of the same along with copies of the Gazette notification and newspaper publications.

8. The petitioners then filed action in the Commercial High Court bearing No. Civil 197/2021/ MR in August 2021 challenging the said resolution and *inter alia* also sought interim relief to stay the auction. Interim injunction sought was not granted and then the 1st petitioners entered into a settlement with the 1st respondent bank. The terms of settlement as agreed was tendered to court. The of settlement dated 16.06.2022 (**P-10)** as agreed was so entered and the proceedings were accordingly terminated.

9. The said terms of settlement have spelt out the mode of the payment and instalments in respect of the amounts outstanding. This is no

more than a rescheduling of the outstanding amounts. Then paragraph 10 of P-10 specifically provides that in the event of the default of any two instalments the respondent bank is entitled to proceed with the resolution adopted on 28.09.2019 and to sell the property by a public auction.

10. The 1st petitioner failed to duly make payment and defaulted. The 1st respondent bank in of in accordance with the agreed terms of the settlement, proceeded to give notice of sale in accordance with Section 9 of the Act. The notice of auction was published in the Government Gazette on 02.02.2024 (**R15)** and in newspapers in all three languages (**R16a-16c**). The plaintiffs were also duly informed of the same along with copies of the Gazette Notice and newspaper publications by letter dated 09.02.2024 (**R17c**). The public auction was scheduled for 27.02.2024.

11. The petitioner has now preferred this application primarily seeking to quash a resolution adopted by the 1st respondent bank on 28.01.2019 and also quash the decision to hold the auction that was scheduled for 27.02.2024.

The petitioners' submission

12. When this matter was taken up for argument, Mr. Sanjeewa Dassanayake, argued that the respondents are not entitled to proceed with the resolution dated 28.01.2019 in view of the terms of settlement entered on 16.06.2022, in the Commercial High Court. The basis of this submission is that the terms of settlement with the payment plan amounts to a *restructuring* of the facility. Further, a sum of Rs. 56 million has been paid as at 30.01.2024 in accordance with the settlement. However, it is admitted that Rs. 38,600,000 still remains due and outstanding.

13. Then was also argued that the notice of resolution as failed to comply with Section 09 of Act No. 04 of 1990, as there has been a failure to

exhibit the notice of auctioned on the land 14 days prior to the date of auction.

14. It was also submitted that in view of the circulars and directives, the Central Bank it was illegal and ultra vires, unreasonable and irrational to have proceeded with the auction in violation and in frustration of the legitimate expectation of the 1st petitioner.

Respondent's submission

15. As opposed to this, it was argued and submitted on behalf of the respondent bank that the resolution dated 28.01.2019 is valid and the respondent bank is entitled to proceed with the auction accordingly. As a preliminary objection, it was submitted that the petitioner is now challenging the said resolution adopted in January 2019 almost after five years and is guilty of laches. It was also submitted that the default of petitioner and the resolution was adopted well before the Covid pandemic as well as the economic crisis. The said events did not have any relevance to the default and non-servicing of the said facilities in 2018.

16. The respondent further argued that the petitioners did have an alternate remedy and in fact did exercise that right by moving the Commercial High Court in HC Civil /197/2021 MR against the resolution and also seeking interim relief. The learned Commercial High Court Judge refused and rejected the interim injunction by order dated 08.03.2022. Thereafter, the petitioner entered into a settlement with the respondent bank dated 16.06.2022 in which the parties agreed to a payment plan (*vide* P-10). Though, the 1st petitioner did initially pay Rs. 56 million in accordance with the said terms of settlement he has since then failed to continue with the payments as agreed by the said terms of settlement. It is upon this failure that notice of auction was published.

17. The main argument of the respondent is that the petitioners have specifically agreed, accepted and conceded the right of the respondent bank to proceed with the recovery under and by virtue of the resolution dated 28.01.2019 if there be a default. Having so held out, the petitioners cannot now take a different position contrary to what was so agreed or repudiate the former statement. In summary the main grounds raised are laches, alternate remedy and estoppel.

Consideration of the arguments

18. It is common ground that a writ of *certiorari* is sought against the resolution under Section 4 authorizing the sale of the property is dated 28.01.2019. This is sought by prayers *(c)* and *(d)*. Thus, the petitioners have opted to move this court for a writ after the lapse of five years. No reason is averred in the petition and neither is any reason acceptable in law is forthcoming. It is trite law that prerogative writ is a discretionary remedy and the granting of which may be refused if there be laches, undue delay or waiver. A petitioner is not entitled a writ as a matter of course or of right. The Court has the discretion to deny relief if there be delay, laches, waiver, or submission to jurisdiction.

19. In **Jayaweera v. Assistant Commissioner of Agrarian Services Ratnapura and Another** [1996] 2 SLR 70) the above was held as follows:

> "*A 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.*"

20. Then in **Bisomenike vs. C. R. de Alwis** (1982-1SLR-368), Sharvananda, J., (as he then was) observed that;

> *"A Writ of Certiorari is issued at the discretion of the Court. It cannot be held to be a Writ of right or one issued as a matter of course. The exercise of this discretion by Court is governed by certain well-accepted principles. The Court is bound to issue it at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, submitting to jurisdiction, laches, undue delay or waiver. The proposition that the Application for Writ must be sought as soon as the injury is caused is merely an Application of the equitable doctrine that delay defeats equity and the longer the injured person sleeps over his rights without any reasonable excuse the chance of his success in Writ Application dwindles and the Court may reject a Writ Application on the ground of unexplained delay. An Application for a Writ of Certiorari should be filled within a reasonable time."*

21. In **Sarath Hulangamuwa vs. Siriwardene, Principal Vishaka Vidyalaya, Colombo and five others [1981 (1 Sri LR 275)]**, the Court of Appeal held that;

> "*The Writs are extraordinary remedies granted to obtain speedy relief under exceptional circumstances and time is of the essence of the Application.... The laches of the Petitioner must necessarily be a determining factor in deciding the Application for Writ as the Court will not lend itself to making a stultifying order that cannot be carried out...."*

22. The apparent basis on which the said resolution is challenged is that the said resolution ceases to be operative in view of the intervening settlement and making a certain payment. The petitioners attempt to

proceed on the premise that it was a restructure of the facility and the default after the settlement in the Commercial High Court constitutes a default of a new facility which thus requires a fresh resolution to be adopted.

23. Rescheduling primarily adjusts the repayment timeline, whereas restructuring changes the entire loan structure. Rescheduling is no more than the modification of loan repayment terms but the principal terms and conditions of loan contract remain significantly unchanged. Rescheduling normally will be to extend or lengthen the loan tenure and may be to revise the payment instalments. In contrast, restructuring will involve the modification of the principal terms and conditions of the loan, which may be a change in the structure of the loan or other significant change to its terms and may involve restructuring or conversion of the type or nature of the facility, i.e., overdraft to term loan.

24. It is common ground that the petitioners did institute action in the Commercial High Court challenging the resolution. Upon failing to obtain interim relief, the petitioners entered into the settlement P-10. By the said terms of settlement, the petitioners and the 1st respondent agree to *reschedule* the mode of payment of the amounts in default, due and payable. The settlement P-10 is no more than rescheduling and is certainly not restructuring. Thus, to my mind, it is lawful for the respondent bank to proceed with the said resolution dated 28.01.2019.

25. Then by paragraph 10 of the terms of settlement P-10 the petitioners hold out that the Respondent bank is entitled to proceed with the resolution dated 28.01.2019, to recover in the event of any default (para 10). This term of settlement clearly is an acceptance of the continuous validity of the original resolution and the petitioners agree and then concede the respondent bank's right to proceed with the said

resolution. The petitioners having so held out and conducted have induced the respondent bank to agree to the rescheduling of the amounts due.

26. Having so agreed the petitioners are now estopped, and cannot take a different position. "**Estoppel**," according to the Black's Law Dictionary, is that a party is prevented by his own acts from claiming a right to the detriment of other party who was entitled to rely on such conduct and has acted accordingly. Section 115 of the Evidence Ordinance incorporates this concept of estoppel which reads thus;

> *"**115**. When one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."*

27. Section 115 of the Indian Evidence Act is in all fours with Section 115 of our Evidence Ordinance. Sarkar on the Law of Evidence, 12th Edition, considering this provision, expounded the rationale and the application as follows;

> *"The principle of estoppel is based on the maxim 'allegans contractor non-est audiendus' i.e., a party is not to be heard to allege the contrary. The rule is enacted in Section 115 of the Indian Evidence Act. A person cannot approbate and reprobate (**Durga Dass v. Sansar Singh**, 2003 (1) PLJR 666 (P&H)). The rule of estoppel is based on equity and good conscience, viz. that it would be most inequitable and unjust to a person that if another by a representation made, or by conduct amounting to representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it (**Prabhu v. Official Liquidator**, AIR*

*2008 KLT 894 (907): AIR 2008 (NOC) 2173 (Ker-DB)). As a doctrine based on equity, the principle of estoppel in only applicable in cases where the other party has changed his position relying upon the representation thereby made (**H.R. Basavaraj v. Canara Bank**, (2010) 12 SCC 458)."*

28. The petitioners are now seeking to resist the said recovery by challenging the said resolution. The petitioners in the first instance defaulted well before the pandemic and economic crisis. Having made a solemn agreement on the resolution, the petitioner cannot now be heard to take a contrary position. It is unfortunate that this appears to be a clear abuse of the process of Court at all levels to prevent the respondent bank from the recovering what is due. As repeatedly observed by this Court, commercial banks, by and large, hold and are entrusted with the funds of the public by way of deposits. Therefore, money lent unless recovered will seriously affect the liquidity and the stability of the banking institutions. This was the rationale of implementing the provisions of Act No. 04 of 1990 pertaining to *parate* execution conferring the power to sell the collateral in a commercial transaction to one of the parties giving the power of adjudicating to that extent. This was deemed as necessary by the legislature to ensure the unhindered continuity of such banking institutions. It is only upon expeditious and successful recovery of monies lent and the banks will have the liquidity and to re-lend and to keep the economy moving.

29. Notwithstanding the incorporation of these extraordinary statutory provisions the expeditious recovery in many a case is unduly delayed by defaulters who are able to use the judicial system to their benefit which, as I see, is more of an abuse of the process. The submission that the petitioners have abused the process and successfully delayed the auction of the property certainly appears to have merit.

30. The next argument advanced is that the notice of auction is not compliance with the provisions of Section 09 of Act No. 04 of 1990. It was submitted that a copy of such notice of sale published in the Gazette had not been posted on or near the property which is to be sold 14 days prior to the auction. This issue is now academic; the said auction could not be held due to the interim relief. Therefore, considering the legal issues, the notice of auction is now superfluous. However, in context, it may be prudent to make the following observations.

Section 9 provides for the notice of auction which is as follows;

> *"9. Notice of the date, time and place of every sale authorized by a resolution under Section 4 shall, not less than fourteen days before the date fixed for the sale be published in the Gazette and copies of such notice shall be -*
> *(a) dispatched to the borrower, if he is alive, and to every, person to whom notice of any resolution is required to be dispatched under Section 2,*
> *(b) posted on or near the property which is to be sold."*

31. Section 09 has three components. It clearly provides that the publication in the Gazette should be made not less than 14 days from the date of sale. Then, 2nd and 3rd components are that copies of such notices should be dispatched to the borrower and also posted on the property. Therefore, it appears that a mandatory requirement of 14vdays qualifies the publication in the Gazette. It is the copies of such notice that should be dispatched and posted as required by sub paragraphs (a) and (b). If one proceeds on the premise with all three requirements be complied with 14 days' notice yet for all the strict non-compliance with the said minimum 14 days as to the posting on the property would not and cannot create any prejudice to the petitioners. With the publication in the Gazette, it is deemed that the general public is given notice. This requires to be dispatched to the

borrower, primarily to provide the defaulted of an opportunity to rectify and make payments, and to avoid the same of the property. Section 10 provides for payment before sell. As the petitioners have received notice under Paragraph 9(a), they were sufficiently afforded with the opportunity to pay and settle and prevent the sale of the property. As for Section 9(b) the objects appeared to give notice to any other occupier or interested party of the sale. The failure to post on the property can in no way cause any prejudice to the petitioners who had due notice. It is trite law where there is no prejudice there would be no relief by way of writ. It is also noteworthy that, the alleged non-compliance with Section 9(b) in the forms of not giving the total 14 days' notice in the context of this application is no more than a mere technical non-compliance. Thus, as far as the petitioners are concerned, the failure to put up a notice on the land 14 days in advance has not caused any prejudice of whatever form to them. It is not that there was no notice put up on the land but that it was less than 14 days. This is if at all, only a minor irregularity that has certainly caused no prejudice to the petitioners.

32. J. A. N. De Silva, J. (P/CA) (as he then was) in **Seneviratne and. Others v. Urban Council, Kegalle and Others** [(2001) 3 Sri.L.R. 105] rejecting an application for a writ held that;

> *"If the Appellant has not been prejudiced by the matters on which he relies on the Court may refuse relief even though he has succeeded in establishing some defect. The literal or technical breach of an apparently mandatory provision in a statute may be so insignificant as not in effect to matter. In those circumstances the Court may in its discretion refuse relief."*

33. Correspondingly Justice Tilakawardane in **Amaradasa Liyanage vs. Sampath Bank PLC** (S.C. Appeal No. 126/2012, S.C Minutes 04.04.2014) at p. 12: complementing the afore said dicta opined that;

"The ambit and purpose of the Recovery of Loans by Banks Act is, in essence, to recover monies due to the Bank while ensuring that the Bank does not enjoy an unjust enrichment. The provisions of the Act, by allowing parate execution, is to facilitate the process of collecting monies due, without lengthy court proceedings, and to do so in a fair and reasonable manner. This objective should therefore not be hindered by minor procedural irregularities… for such minor irregularities cannot have much impact on the rights of the borrower. Minor procedural irregularities cannot, further, be grounds upon which actions may be instituted for such actions would only amount to the abuse of the process of Court which must not be allowed."

34. The primary object and purpose of the Recovery of Loans by Banks Act, in allowing *parate* execution is to facilitate the expeditious recovery and collection of monies due, devoid of lengthy court proceedings. Courts are required to ensure that this objective is not hindered or stultified by minor procedural irregularities that cannot have an impact on the rights of, or cause prejudice to, the borrower. Even if literal or technical breach of an apparently mandatory provision in a statute is established which causes no prejudice and is insignificant the Court may in its discretion refuse relief in the exercise of its writ jurisdiction. Thus, I see no merit in this argument.

35. Getting back to the matter in hand, it is common ground that the petitioners expressly admit the terms agreed and the settlement entered into at the Commercial High Court (*vide* paragraph 13 of the petition). A copy of the entire proceedings of HC-Civil/197/2021 MR is annexed marked as **P-09** and the terms of settlement is annexed marked as **P-10**. According to the journal entry dated 16.06.2022 of P-09, the terms of settlement P-10 had been entered. Accordingly, the proceedings have been terminated in view of the settlement so agreed and entered.

36. The respondent bank and the petitioners have, by virtue of the said settlement, agreed on a payment plan which in fact which has in effect rescheduled the payments due in respect of the facility. For all purposes, the parties in entering the said settlement have agreed that the respondent bank is entitled to act on the resolution adopted on 28.01.2019 and recover if there be a default. In view of this representation and so holding out by the petitioners the respondent bank has been induced to agree to the rescheduling the payments as opposed to proceeding with the sale. This is not restructuring but rescheduling as said above. Thus, there is no legal impediment to act on the resolution adopted on 28.01.2019.

37. When the 1st petitioner failed to make payment as agreed by the said terms of settlement, it becomes on the one hand a serious violation of the said agreement, P-10. Then the petitioners have expressly agreed that any violation in the form of a default of two instalments will entitle the respondent bank to auction the property under the said resolution already adopted. Resolutions adopted in accordance with the provisions of Act No. 04 of 1990 will remain good and valid notwithstanding the lapse of time. The law does not stipulate a period within which *parate* execution or the auction should take place. If any payment is made between the adopting of the resolution and the auctioning of the property such sums paid would be given credit to and set off. The resolution specifically provides that it will recover the said sum as resolved "*less payments (if any) since received".* That being so upon the default the respondent bank *ipso facto* accrued the right to proceed under the resolution. At that point, the respondent bank has by virtue of the agreement proceeded to give notice and schedule the auction based on the said resolution. The petitioners having so expressly agreed and so held out are now estopped from challenging the validity or the legal right and entitlement of the respondent bank to proceed with the said resolution.

38. The petitioner by challenging the right of the bank to proceed with the said resolution is clearly acting in violation of the terms of settlement and agreement entered into in the Commercial High Court. To my mind, this conduct goes against all accepted norms of legal conduct and it has to be a serious abuse of process. In one breath you enter into a settlement upon a certain solemn covenant and undertake before a Court of law and upon violating and reaching such terms is now making an attempt to obtain an order from a different forum preventing the other party from act enforcing and exercising the rights that accrued from such agreement. In this circumstance, the petitioner has failed to come to this Court with clean hands, I would say.

39. In the above premises, this application of the petitioner cannot succeed and should be dismissed due to undue delay (laches), having an alternate remedy, and in view of the apparent abuse of process. This petition is accordingly dismissed.

40. The petitioner has named the respondent bank as the 1st respondent and has also named as 2nd - 10th respondents the chairman and directors as parties. The naming of entire board of directors as done in this application appears to be out of the ordinary. There is no substantive or specific relief prayed against the said 2nd - 10th respondents separately, and independent to that of the 1st respondent bank. In these circumstances, the petition is dismissed subject to cost fixed at Rs. 50,000.00 to be paid to 1st – 10th respondents separately.

The application is dismissed subject to the cost.

JUDGE OF THE COURT OF APPEAL