

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 writ of Certiorari
and Prohibition under and in terms of
Article 140 of the Constitution.

1. Property Finance and Investments (Pvt)
Limited, No. 10/1, Reid Avenue,
Colombo 7.
2. Property Finance and Investments
Kandy (Pvt) Limited, No. 10/1, Reid
Avenue,
Colombo 7.

Petitioners

C.A/WRIT/App/No.148/2010

Vs.

1. Seylan Bank PLC,
No.90, Galle Road,
Colombo 3.
- And nine (09) others

Respondents

BEFORE : S.Siskandarajah, J, P/CA

COUNSEL : Faiz Musthapa Pc with Sanjeewa Jayawardena,
for the Petitioners.

Romesh de Silva P.C with Palitha Kumarasinghe
PC,
for the Respondents.

Argued on : 14.03.2012, 30.03.2012, and 15.05.2012

Written Submission : 07.06.2012

Decided on : 19.09.2012

S.Sriskandarajah, J

The First and Second Petitioners are limited liability Companies established under Company Law of Sri Lanka. The share holders and the directors of the 1st Petitioner Company are Mr and Mrs Wijesena. The 1st Petitioner is the owner of the property bearing assessment No.05, Sri Dalada Veediya, Kandy and properties bearing assessment Nos. 10,12,14 and 14A, Sri Wickremarajasinghe Mawatha in Kottugodella Kandy (these properties here in after referred to as the subject matter of this application). Mr and Mrs Wijesena in order to develop the said properties by constructing a multi storied complex to house commercial, cultural, shopping and entertainment centre, called Kandy City Centre, incorporated the 2nd Petitioner Company to act as a developer. The Directors of the 2nd Petitioner company are Mr. and Mrs Wijesena and their son. The Petitioners submitted that for the said project in addition to a 15 years tax holiday, several other duty and tax concessions were given by the Board of Investment.

The 2nd Petitioner on or about 24.11.2001 applied and obtained a commercial loan from the 1st Respondent bank a sum of Rs.150 Million, thereafter on different occasions the 2nd Petitioner obtained several facilities from the 1st Respondent bank, with the entire sum borrowed amounting to a total of Rs.1,200 Million (term loan) and an overdraft amounting to Rs.135 Million as at 31.12.2005. On the request of the Petitioners the 1st Respondent Bank rescheduled the loan and granted the 2nd Petitioner a new additional facility of Rs. 750 Million; bring the total outstanding amount to Rs.2085 Million. The 1st Respondent submitted that Mr.Thusitha Wijesena in the name of the 1st and 2nd Petitioner companies owes the 1st Respondent bank a sum of approximately Rupees 2,532 Million.

The Petitioners submitted that the 1st Respondent Bank by letters dated 06.05.2009 and 09.05.2009 demanded the 2nd Petitioner for the payment of a sum of Rs.2,091 Million as loan facilities and/or over draft facilities due to the 1st Respondent Bank as at 31.12.2008.

Thereafter a resolution was adopted by the Board of Directors of the 1st Respondent Bank on the 10th of June 2009 in terms of Section 4 of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 to sell by Public Auction the properties mortgaged by bonds Nos 656 dated 06 June 2002, 842 dated 28th August 2003, 885 dated 16th December,2003, 1026 dated 28th October 2004, 1166 dated 22nd September,2005 and 1505 dated 12th June 2008, for the recovery of the sum of Rs. 2,091,815,806.63 due and owing to the 1st Respondent as at 31st December,2008. This resolution was published in the Gazette of the Democratic Socialist Republic of Sri Lanka dated 07.08.2009. A copy of the notice of the said Resolution that was published in the Gazette on 07.08.2009 and the news papers on 05.02.2010 were sent to the Chairman /Managing Director of the 1st and 2nd Petitioner Company Mr.Thusitha Wijayasena by the letter of the 1st Respondent dated 5th February 2010.

The Petitioner by this application filed on 2nd March 2010 challenged the said resolution on the basis that the notice of the resolution was not given within a reasonable period. The Petitioners contended that Section 8 of the act expressly requires that "Notice of every resolution under Section 4 authorising the sale of any property..... shall be dispatched to the borrower" and this has to be done within a reasonable time, in order to enable the borrower to either take steps to settle the amount in default or to take steps to appeal to the Bank in question, to reconsider the merits of the resolution. The Petitioners further contended that the failure of the Respondent Bank to serve notice of its resolution passed on 10.06.2009 within a reasonable time period rendered the said resolution passed by the directors of the Respondent Bank null and void as it deprive the Petitioners of the fundamental safeguard of the right to be heard.

The said resolution was passed by the 1st Respondent Bank on 10th of June 2009 and the notice of the said resolution was published in the Gazette on 07.08.2009 and in the news papers on 05.02.2010. Copies of these notices were sent to the Chairman /Managing Director of the 1st and 2nd Petitioner Company Mr.Thusitha Wijayasena by the letter of the 1st Respondent dated 5th February 2010. It is pertinent to note that neither the said resolution nor the notices had fixed a date for the sale of the said properties mortgaged. Therefore the Petitioners had ample opportunity from the 5th of February 2010 or immediately thereafter the date on which the notice was admittedly received by the Petitioners to take steps to settle the amount in default or to take steps to appeal to the 1st Respondent, to reconsider the merits of the resolution. Hence the delay of the service of the notice of resolution by about eight months would not have caused any prejudice to the Petitioners. Therefore the Petitioners' submission that the Petitioners were not given a fair hearing has no merit.

The 1st Petitioner submitted that the 1st Petitioner had not been noticed that the land and property belongs to it was to be auctioned by the resolution passed on 10.06.2009. Hence the 1st Petitioner contended that the resolution passed on 10.06.2009 and the Notice of Sale published in the Gazette on 19.02.2010 are null and void and are no force or avail in law. The Petitioner further submitted that all time material to this application all correspondents in relation to this transaction were between the 2nd Petitioner and the 1st Respondent Bank and the 1st Petitioner, as a separate and independent entity, was never made aware by the 1st Respondent Bank of any of the matters relating to the transaction of the 2nd Petitioner and the 1st Respondent Bank.

The necessity of the Bank to communicate in relation to the defaults of the borrower, to the owner of the property, mortgaged as security to facilitate another person (borrower) to obtain loan from a Bank was discussed in *Ramachandran and another v Hatton National Bank & others [2006] 1 Sri L R page 393* where Sarath N Silva C.J delivering the majority judgement held;

“There may be some justification for the special provisions, albeit as a departure from the established law and procedure, on the basis that the person to whom the loan is granted being the borrower, has a continuing transaction with the Bank and should know the amounts paid by him or are in default. The guarantor being a third party would not have access to that information. The Act does not even require the Bank to serve a prior notice on a guarantor and he will only know of the action being taken by the Bank when the sale of his property is notified in the gazette in terms of Section 8(as revealed in the pleadings of the Petitioners) or worse still when the fiscal come to take possession of the property in terms of Section 5 read with Section 62B of the Mortgage (Amendment) Act No 3 of 1990 referred to above. This would heighten the perilous plight of a guarantor who is deprived of rights at

common law procedural and constitutional safeguards and denial of natural justice.

For these reasons I agree with the submissions of President's Counsel for the Petitioner and hold that the Provisions of the Recovery of Loans by Bank (Special Provisions) Act No 4 of 1990 will not apply in respect of a mortgage given by a guarantor or any person other than a borrower to whom the loan has been granted by a Bank for the economic development of Sri Lanka"

The above judgement observed that the procedure laid down in Recovery of Loans by Bank (Special Provisions) Act No 4 of 1990 to recover loan is a departure from the established law and procedure hitherto adopted to recover loans, but the provision of this law will not apply to a mortgage given by a guarantor who is a third party or any person other than a borrower because being a third party he may not know the amount paid by the borrower and the amount in default for him to settle the sum due or to negotiate with the Bank to redeem his property mortgaged. Whereas invoking these special provisions is justified against a person to whom the loan is granted, being the borrower, has a continuing transaction with the Bank and should know the amounts paid by him or are in default. .

The Petitioners challenge to the said resolution is based on the interpretation given to the said law by the above judgement. The Petitioners' position is that the 1st Petitioner is the owner of the property that is the subject matter of this application and guarantor, the borrower is the 2nd Petitioner. Even though in law these two Petitioners are separate and distinct legal persons the 2nd Petitioner was incorporated to develop the 1st Petitioner's property. The sums borrowed from the 1st Respondent are to develop the 1st Petitioners property and for that purpose the 1st Petitioner's property was mortgaged. The

directors and share holders of the 1st Petitioner Company are Mr and Mrs Wijesena and they are the Directors and share holders along with their son to the 2nd Petitioner Company. Mr. Thusitha Wijesena the director of both company acted as the Managing Director of both Companies.

In Yashoda Holdings (Pvt) Ltd Vs Peoples Bank CA Writ No 1268/1998 CA minutes of 29.02.2008, the divisional bench of the Court of Appeal held that the Property of the Directors of Yashoda Holdings (Pvt) Ltd mortgaged as security for Yashoda Holdings (Pvt) Ltd to obtain loan from the Peoples Bank could be sold in public auction to recover the loan under the provisions of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990. This was on the basis that the Directors of Yashoda Holdings (Pvt) Ltd had communications with the Peoples Bank with regard to the amount due and the defaults of payment and the settlement of the loan obtained having mortgaged the property of the Directors of the said Company. In these circumstances the Directors of the Company as owners of the mortgaged property cannot claim that they have no communication with regard to the default of the Company for them to take action either to settle the loan or to discuss with the bank in order to redeem their property.

Mr Thusitha Wijesena the Chairman and Managing Director of the 2nd Respondent Company in his letter to the 1st Respondent dated 23rd February 2010 has said : "By the year 2000 we had already invested Rs 2 billion and we obtained Rs.800 million in March 2002 as our first loan from Seylan Bank and we mortgaged the total project as security". This statement shows the 1st and 2nd Petitioners were represented by Mr Thusitha Wijesena at all time material to this application.

All correspondents of the 1st Respondent in relation to the loan facilities and defaults of payment were with Mr. Wijesena, in these circumstances the 1st Petitioner cannot claim that the 1st Petitioner has no notice or that the Petitioner was not aware the amounts paid by the 2nd Petitioner or the

amount in default in relation to the loan for which the 1st Petitioners properties were offered as security for the 1st Petitioner to either pay and settle the loan or to negotiate for a settlement to redeem his property. As such the 1st Petitioner cannot claim that it is a third party to this transaction and that steps cannot be taken to recover the loan under the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990.

For the above reasons this court dismisses this application without costs.

President of the Court of Appeal