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 writ of certiorari under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka of 1978.

Liyanage Danushka Sandamali De Silva,
No.140 Bandaranayake Mawatha,
Katubedda, Moratuwa.

Appearing by her duly appointed
Attorney,Pathahennadige Mala Padmini,
No 140 Bandaranayaka Mawatha,
Katubedda, Moratuwa

Petitioner

C.A/WRIT/App/No.854/2008

Vs.

1. Bank of Ceylon,
   No. 4, Bank of Ceylon Mawatha,
   Colombo 1. People's Bank,
   And Nine (09) others.

Respondent

BEFORE	:	**S.Sriskandarajah, J (P/CA)**
COUNSEL	:	Suresh Phillips, Ms Pushpa Damayanthi with Ms Dharini Bhuran for the Petitioners. M.K.Muthukumar with Jinadasa Gamaga, for the Respondent.
Written Submission	:	Petitioners on 8th December 2009
Argued on	:	1.11.2010
Decided on	:	12.12.2011

S.Sriskandarajah, J

The 10th Respondent; Himaray (Private) Limited obtained an overdraft/ loan facility amounting to 5,500,000/- on or about 15th August 2005 on the current Account No. 0002757299 maintained by the said Respondent in the Hikkaduwa Branch of the 1st Respondent Bank. This facility was obtained to construct an ice factory at No 128,Baddegama Road, Hennatota, Hikkaduwa. The said overdraft facility was granted on the security provided by Petitioner and the 9th Respondent, mortgaging their properties situated at No 324, Bandaranayake Mawatha, Katubedda , Moratuwa and Patuwatta Wellaboda respectively. The Respondents contended that the facility was a loan and not an overdraft facility. The 1st Respondent by a letter of 1st November 2007 addressed to the Petitioner claimed Rs. 5,500,000/- with interest thereon at 11.62% per annum from 15th of December 2006 and informed the Petitioner that the failure of the settlement of the claim on or before the 15th November 2007, would cause the 1st Respondent to take steps for the sale of the mortgage property. The 1st Respondent published a Resolution in the Newspapers and in the Gazette of the Democratic Socialist Republic of Sri Lanka on 22nd July 2008 for the sale of the mortgage property. This decision was communicated

to the Petitioner by letter dated 24th July 2008. Steps were also taken to sell the mortgaged property of the 9th Respondent.

The position of the Petitioner is that the 10th Respondent obtained and utilised the loan to construct the Ice Factory at No.128, Baddegama Road, Hennatota, Dodanduwa. The 1st Respondent without proceeding against the properties of the 10th Respondent has passed a resolution to sell the property of the Petitioner that was given as security for the said loan. The Petitioner further submitted that the 1st Respondent is not entitled in law to pass a resolution to sell the property of the Petitioner for the loan taken by the 10th Respondent as the Petitioner being a 3rd party mortgager under the present law. In these circumstances the Petitioner states that the said Board Resolution and the notice of Auction Sale to sell the said property referred to in the 1st , 2nd and 3rd Schedules are ultra vires, bad in law and are done without lawful authority and ought to be quashed by an order in the nature of a writ of Certiorari.

The Petitioner is one of the Directors of the 10th Respondent Company Namely M/S Himaray (Pvt) Ltd. The loan application to the Bank of Ceylon made on 15.08.2005 marked 1R1 for 5.500.000/- was made by the Petitioner as a Director on behalf of the 10th Respondent Company. The said application was signed by the Petitioner as the Director. The Bank has informed the Petitioner by its letter of 1st November 2007 unless the 1st Respondent's claim on the said loan was settled on or before the 15th November 2007 the 1st Respondent would take steps for the sale of the mortgaged property.

I will now deal with the contention of the Petitioner that the resolution is beyond the powers of the 1st Respondent as the property which was the subject matter of the resolution belongs to a third party. The Petitioner in support of his contention relied on the judgement of the Supreme Court 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;

"that the provisions of the Recovery of Loans by Banks (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 a loan has been granted by the bank for the economic development of Sri Lanka."

The rational of the majority judgement of *Ramachandran v Hatton National Bank* is as follows:

> "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.
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> 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 main reason spelt out in the above judgement is that the person to whom the loan is granted being the borrower, has a continuous transaction with the Bank and knows the amounts paid by him or are in default. The guarantor being a third party would not have access to that information and he will come to know the defaults and the action taken by the Bank when the sale of his property is notified in the gazette.

In the instant case the Petitioner was informed by the 1st Respondent about the default and the 1st Respondent has given a deadline to pay the loan obtained. Hence the Petitioner cannot claim that he was not aware of the default of the loan. In these circumstances the Petitioner cannot claim that he is entitle to the benefit given to a 3rd party under the above case.

On the other hand as the Petitioner was the director of the 10th Respondent company he cannot claim that he is a third party. In *Hatton National Bank Limited v Samathapala Jayawardena and two Others* S.C (CHC) Appeal 6/06 S.C Minutes 31.07.2007 where C.N.Jayasinghe J held, with Shiranee Tilakawardana J and Saleem Marsoof J agreeing;

> "In my considered opinion, the 1st and 2nd Respondents cannot hide behind the vail of incorporation of Nalin Enterprises (Pvt) Ltd, while being the "alter ego" of the said Company of which the 1st Respondent has been the Managing Director and the 2nd Respondent ,who is the wife of the 1st Respondent has been a director. Although the independent personality of the company as distinct from its directors and shareholders has been recognized by the Courts since the celebrated decision of *Salomon v A. Solomon & Co Ltd* [1897]AC 22,Courts have in appropriate circumstances lifted the veil of incorporation. In particular, Courts have been vigilant not to allow the veil of incorporation to be used for some illegal or improper purpose or as a device to defend creditors – *Merchandise Transport Ltd v British Transport Commission[1962] 2 QB 173* and *Jones v Lipman [1962]1WLR 832.* As Staughton L.J observed in *Atlas Maritime Co SA v Avalon Maritime Ltd* (No1) [1991]4 All ER769 at page 779-
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> "To pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose"
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> As far as this case is concern, it is quit obvious that the 1st and 2nd Respondent, being Directors of Nalin Enterprises (Pvt) Ltd, benefited from the facilities made available to the said company by the Petitioner Bank, and to that extent they cannot claim that the mortgage which secured the facilities fall within the category of "third party mortgage" as contemplated in the majority judgement of this court in *Ramachandran v Hatton National Bank.*"

For the above reasons the Petitioner cannot challenge the said resolution to sell the mortgaged property of the Petitioner on the basis that it is beyond the powers of the 1st Respondent. Hence I dismiss this application without costs.

President of the Court of Appeal