

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

Ratna Enterprises (Pvt.) Ltd.,  
No. 94, Saunders Place,  
Colombo 11.

**PETITIONER**

C.A 556/2005 (Writ)

Vs.

People's Bank,  
No. 75, Sir Chittampalam A.  
Gardiner Mawatha,  
Colombo 2.

**RESPONDENTS**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** Romesh de Silva P.C.  
with Sugath Caldera for Petitioner  
  
Wijedasa Rajapakse P.C  
with Nilantha Kumarage for Respondent

**ARGUED ON:** 11.10.2012

**DECIDED ON:** 17.01.2013

**GOONERATNE J.**

This is an application for a Writ of Certiorari/Prohibition filed by Ratna Enterprises Pvt. Limited against the Respondent People's Bank to quash the resolution marked P4, of 4.1.1996. It is a resolution made under Section 29D of the People's Bank Act as Amended by Act No. 32 of 1986.

Section 29D reads thus:

Subject to the provisions of section 29E, the Board may by resolution to be recorded in writing authorize any person specified in the resolution to sell by public auction any immovable or movable 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 up to the date of the sale, together with the moneys and costs recoverable under section 29L, and thereafter it shall not be competent for the borrower or 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 to the Bank, in any court to move to invalidate the said resolution for any cause whatsoever, and no court shall entertain any such application.

It is pleaded in the petition and affidavit of the Petitioner company that the Petitioner had been a client of the Respondent Bank who had applied for and obtained loan facilities and as security for repayment of the loan, the Petitioner mortgaged the property leased to the Petitioner Company from the Urban Development Authority. The Petitioner pleads and argued that leasehold rights were granted to the Petitioner Company by lease

document No. 517 of 29.10.1992, marked 'P3', and based on the leasehold rights as pleaded, the Respondent Bank cannot, in law, pass the resolutions marked P4, or has no legal right to pass a resolution.

There cannot be any controversy between the parties that the Petitioner has defaulted in the repayment of the loan, and it is pleaded that the Petitioner has also made certain part payments. It was also submitted by learned President's Counsel for the Petitioner that parties have been negotiating for some time. However there appears to be no finality in the several steps of negotiating with a view of settlement of the main issue regarding default of payment of the loan facility. It is further pleaded that the Urban Development Authority has cancelled the leasehold rights by deed No. 957 of 30.5.2003.

I find much emphasized by the Petitioner on the following matters more particularly that leasehold rights cannot be mortgaged. In order to understand the case of the Petitioner, being inter alia forceful arguments, the matters stated below by the Petitioner to be noted.

- (a) The Respondent can pass a resolution only to sell any immovable or movable property mortgaged to the bank as security.
- (b) It is submitted with respect that lease hold rights are not and do not fall in to the category of immovable or movable property.
- (c) For this reason alone the resolution marked P4 is bad in law and cannot be proceeded.

- (d) Leasehold rights are not absolute rights
- (e) The owner of a property can exercise attributes of ownership namely right to sell, mortgage demolish, rent, lease, transfer, gift etc.
- (f) However, rights of a lessee is different form the rights of an owner.
- (g) If a lease is given then the lessee cannot mortgage the leasehold rights
- (h) Right to lease and/or rent is only one attribution of ownership only the owner can exercise that right.
- (i) In any event, even if there is a mortgage of leasehold rights, the Respondent Bank whose rights are circumscribed by the People's Bank Act and acting under and in terms of Section 29 D of the Act, cannot auction leasehold rights, since leasehold rights do not fall into the definition of immovable or movable property.
- (j) In this matter the UDA only granted a limited right to the Petitioner namely to hold on lease the limited leasehold rights and the absolute owner in any event being the State, the Respondent cannot auction the leasehold rights.

The leasehold rights granted to Petitioner being cancelled by the UDA, by deed 957 of 30.5.2003 is another matter raised by the Petitioner stating that Respondent cannot in law proceed to auction the premises in question which is subject to security, for payment of the loan facility.

I would at this point of the judgment refer to the settlement (P6) reached between parties in the Supreme Court. As stated in document P6, Respondent Bank had by 5.7.1999 undertaken not to sell the property by public auction before 31.12.1999, on the condition that Petitioner will withdraw the application and not challenge the sale of the property after

31.12.1999, in any court of law. As at 5.7.1999 (date of entering into settlement/P6) the lease had not been cancelled. Lease cancelled after 5<sup>th</sup> July 1999. Petitioner urge a change of circumstances and as such Petitioner had a right to challenge the resolution P4 and argue that Respondent cannot proceed to auction the land when the leasehold rights are cancelled.

The Respondent on the other hand had taken up several objections and state that the Petitioner has obtained several loan facilities and failed to settle more than Rs. 104 million. In support annex documents R3 to R9. Respondent also seek to establish the default made to the UDA as regards payments of lease rentals (vide R10). However this court cannot in this application and need not consider any matters relating to default of lease rentals. The main issue to be resolved is the issuance of a writ as prayed for, in the background of delay and changes in circumstances which occurred due to negotiations which never succeeded to reach finality?

As a matter of law the Respondent Bank plead.

- (i) inordinate delay – resolution passed as far back as 1996.
- (ii) Necessary parties not before court
- (iii) Deliberate suppression/misrepresentation of material facts
- (iv) Settlement reached in the S.C/FR application on 5.7.1999. As such Petition is estopped in law.

It is also stated by the Respondent that by documents R1 & R2 dated 31.7.1992 and 18.1.2005 relate to permission granted by lessor (UDA) to Petitioner to mortgage the subject matter of the lease to raise funds and letter of UDA to Respondent on the auction sale of the land in dispute.

The submission that leasehold rights are not absolute right and that such rights cannot be mortgage need to be examined? As such is the resolution at P4 bad in law?

This aspect of the law pertaining to a lease developed over the years. In earlier times lessee's rights were not considered to amount anything more than purely personal rights enforceable against the lessor. Gradually the lessee was permitted to bring actions to protect the lessee. i.e possession and enjoyment of leasehold rights not only against the lessor but against all others who attempted to interfere with the lessees rights. In *Goonewardena Vs. Rajapakse* 1 NLR 217 A notarial lease is a pro tanto alienation, and gives the lessee during his term the legal remedies of an owner and possessor. (per Bonser C.J).

In *Abdul Azeez Vs. Abdul Rahimon* 1909(1) Curv. L.R 271 per Hutchinson CJ. "a lessee under a valid lease from the owner is dominus or owner for the term of his lease. He is the owner during that term as against all the world, including his lessor.

Carron Vs. Fernando 35 NLR 352 held a notarially executed lease of land creates a real right in the land and that a duly registered mortgage of the leasehold interest is an effective and enforceable charge into whosoever in possession, that interest may pass.

The above authorities makes it clear that a lessee has the right of an owner during the subsistence of the leased property. As such taking R1 and its contents, the mortgage of immovable property leased to the Petitioner who has leasehold rights could be mortgaged as long as the mortgage is not extinguished.

The issuance of a writ is a discretionary remedy of court. No doubt certain delays which is not properly explained would disentitled the Petitioner for a remedy/relief in the circumstances of this case. However the Respondent too allowed the Petitioner to negotiate at various intervals and that would have resulted in causing the unexplained delay. Nevertheless if the cancellation of the lease took place in the year 2003, even if the delay is excused up to that point, still there is a necessity to apply to this court on time. The application itself was filed in 2005 and even if all delays prior to cancellation could be excused, it is apparent that from the year 2003 the delay on the part of the Petitioner remains unexplained, and would not

suffice to give details of the sale of property in January 2005. (as in paragraphs 19 & 22 of Petition).

There is also the settlement reached in the Supreme Court (P6).

Can the Petitioner approbate and reprobate the same transaction.

Where one party is permitted to remove the blind which hides the real transaction the maxim applied that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief and insist upon its apparent character to prejudice his adversary. The maxim is founded not so much on any positive law as the broad and universally applicable principles of justice. 20 N.L.R at 124.

Voluntary conduct of the Petitioner is demonstrated by order P6. Having agreed to a particular course of action, a party cannot be held to retract from that position to prevent the creditor adopting legal measures or taking steps to recover the amount due. In this context I would refer to the principles on estoppel.

An estoppel will arise where the person who makes the representation so conducts himself that a reasonable man would take the representation to be true and believe that it was intended to be acted upon. 16 N.L.R at 125; 25 N.L.R at 206. To establish an estoppel it must be proved that the action taken by the party seeking to establish the estoppel was directly connected with the false impression caused by the representation or conduct of the party sought to be estopped. The representation or the conduct must be, in effect, an invitation to the party affected by it to do a particular act. But it need not be proved that the party sought to be estopped knew the truth about the facts which he by his statement or his conduct misrepresented. 21 N.L.R 360.



I would also stress that the Petitioner by his conduct precluded himself from applying for a writ of certiorari. It is the burden of the Petitioner to show that the Petitioner has by his conduct, was not prevented in applying for prerogative writ. This burden has not been discharged satisfactorily subsequent to the order P6. circumstances changed no doubt over the years. The cancellation of the lease document is certainly not the act of the Respondent Bank. This court is mindful of the fact that cancellation of the lease document would extinguish the leasehold rights. Even with all this the debt remains unpaid, according to the material supplied to this court.

When the resolution P4 was passed by the Respondent Bank it was valid, and the Respondent Bank at that stage could have proceeded in terms of the law. Instead the Respondent Bank too got involved in the so called settlement process, which seems to have continued for years and years. If the position of the Respondent Bank was that the Petitioner never complied with the undertaking given to the Bank at various stages, why was the Bank indifferent in taking the required statutory steps at an early stage when the intended settlement failed. Even though this court is not inclined to issue the writ I do agree with the submissions of the Petitioner that the People's Bank cannot proceed to auction the land based on resolution P4, since the leasehold rights were cancelled on or about 2003 and Petitioner's

rights to the property which the Petitioner had would be extinguished with the cancellation of the lease. Then in view of the changed circumstances (cancellation of the) the question is whether Petitioner has a right to challenge Resolution P4? Is the Petitioner, in law, entitled to challenge P4 as the Petitioner, with the cancellation of the lease cannot have any legal right to the property in dispute after cancellation. It appears to this court that with the cancellation of the lease a vacuum immersed, which I would attempt to explain as follows;

The expressions “null”, “nullity”, “null” and “void” and “invalid” are synonyms which mean that an exercise of power does not have any existence as such.

*Dalton S.P.J., A.G.A.Kegalla v. Wijewardena (1936) 37 NLR 369, 371.*

These expressions are so commonly applied in that sense and instances in which they have been so used are so numerous, that it is hardly necessary to cite any such instances.

*Basnayake C.J., Kasturiarachchi v. Pini (1958) 61 NLR 167, 168*

“If an act in law is void, then it is in law a nullity... There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

*Lorde Denning in the Privy Council, McFoy v. United Africa Company Ltd., (1961) 3 AER 1169, 1172.*

The Petitioner seeking a writ is not entitled to relief, as a matter of right or as a matter of routine. Even if the Petitioner is entitled to relief, having regard to the Petitioner's conduct, delay, laches, waiver are some of the grounds that would disentitle the Petitioner for a writ. It is possible to argue that refusal to grant a writ may not have very clear cut grounds, but the discretion is vested in court. This court takes the view that resolution P4 was valid when it was passed. However over the years circumstances have changed and the Respondent Bank cannot years later, based on P4, in law, auction the property. But even though I make that observation the Respondent Bank would have to be properly advised on the recovery procedure in terms of the statute and that is not the role of the court.

This court further observes that writ cannot be granted on the ground of public inconvenience though the grounds on which the writ is sought may be valid (large amount of money due to the Respondent Bank).

It was held that the consequences of the issue of the writ could be properly be taken into account in refusing mandamus 34 NLR 33, 37.

Per Sinnathamby J. 61 NLR 491..

“In the present case the consequences of granting the writ can only be described as disastrous. It would result in all the legislation passed by Parliament since it came into existence and all its action liable to be regarded as illegal and of no effect. It would affect the rights and liabilities of several thousands of people who conducted their business activities and their lives on the basis that legislation enacted by Parliament is valid; it

would disturb the peace and quiet of the country; and, above all, it will bring the government of the country to a standstill. I take the view that in these circumstances even if the grounds on which the application is made are valid no Court would exercise its discretion in favour of the petitioner.

In all the above circumstances subject to views expressed on document P4, I am reluctantly compelled to dismiss this application without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL