` 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 a Writ of Certiorari in terms of the provisions Of Article 140 of the constitution Of Sri Lanka.

K.D.Gunapala of " Ishara"
Gemunu Mawatha,Nagoda,
Kalutara.

C.A.Application (Writ) No 955/2006

Petitioner

Vs

(1) Bank of Ceylon
No 4, Bank of Ceylon Mawatha, Colombo 1.
(2) M/s R S M Auctions,
474, Pitakotte Road, Kotte.

Respondents

Before :- Anil Gooneratne, J. &

H.N.J.Perera, J

Counsel :- Faisz Musthapha P.C with Thushani Machado for the

Petitioner

Arjuna Obeysekere D.S.G. for the Respondents

Argued:- 07.02.2013

Written Submissions:- 15.05.2013

Decided on:- 07.08.2013

H.N.J.perera, J

The Petitioner by this writ application has invoked the writ jurisdiction of this court seeking inter-alia,

(1) To grant and issue a mandate in the nature of a Writ of Certiorari to quashing the resolution passed by the Respondent Bank on 19.07.2005 (P21) purportedly in terms of the Provisions of Section 19 and 21 of the Bank of Ceylon Ordinance and published in the Ceylon Daily News of 07th October 2005.

(2) To grant and issue a mandate in the nature of Writ of Certiorari quashing the purported Resolution of the Respondent Bank in terms of the provisions of Section 19 of the Bank of Ceylon Ordinance and published in terms of notices marked P24 A-E authorising the 2nd Respondent abovenamed to sell by public auction the said premises on 18/06/2006.

The petitioner was the Managing Director of RIO Industries Limited. The petitioner and the said Company were customers of the Kalutara Branch of the Bank of Ceylon since 1976. Since 1995 the said Company had obtained several loan facilities from the Respondent Bank. As security for the said loan facilities, the said Company and the petitioner had mortgaged three properties

belonging to the said Company and the petitioner. Accordingly, several mortgage bonds had been executed between the Respondent and the said Company and the petitioner, which bonds have been produced, marked as P1-P8 and P17.

It is also not disputed that the petitioner had also obtained an overdraft facility of Rs 3,000,000 from the Respondent in 1996. As security for the said loan facility, the petitioner had mortgaged a property belonging to the petitioner. Accordingly, the petitioner had executed mortgage bond No 1671 marked P17.

It is admitted between the parties that in the event of any default in payment of the aforesaid loan facilities granted to the petitioner and the said Company, the Respondent is entitled to take steps in terms of the Bank of Ceylon Ordinance and sell by Parate Execution, the properties that had been mortgaged as security.

It is the position of the Respondent that the petitioner and the said Company had not paid any interest or capital during the period 1999-2002. Thereafter on the request of the petitioner the loan facilities granted to the petitioner and the said Company were re-scheduled in August 2002. And under the re-scheduled Agreement, the petitioner was required to pay the capital outstanding of Rs 4,810,718.36 in sixty equal instalments of Rs 80,179/=.

It is the position of the Respondent that although the Respondent had rescheduled the loans taken by the petitioner and the said Company both had failed to re-pay a single instalment agreed to by them. Thus the capital outstanding of Rs 4,810,718/= at the time of re-scheduling continued to be outstanding, with interest accumulating.

It is alleged by the Respondent that in spite of the overdraft facility granted by the Respondent to the petitioner having been re-scheduled and in spite of the petitioner having been granted a full waiver of interest for a period of one year, the petitioner has failed to pay any amount of the capital outstanding of Rs 4,810,718.36, for a period of three years.

When this matter was taken up for argument the learned President's Counsel who appeared for the petitioner confined his submissions to one issue. It was argued that the resolution P21 is *ultra vires* the powers conferred upon the Bank to resort to *parate* execution. For Section 19 authorises the Bank to have recourse to *parate* execution only to recover the amount secured by the mortgage bond. The resolution P21 purports to authorize the sale of mortgaged property outstanding " on re-scheduled loan of Rs 4,810,718.36 up to 31st March 2005 together with further interest from 1st April 2006 on the said amount till the date of payment on bond No 1671 dated 9.12.1996 i.e. P17.

It was contended on behalf of the petitioner that Section 19 authorises the Bank to pass a resolution to sell by public auction any immovable property mortgaged to the Bank as security for any loan, overdraft, advance or other accommodation "in respect of which default has been made". In addition Section 26 permits the recovery of costs and expenses incurred by the Bank in advertising the sale and in selling the mortgage property. It was submitted on behalf of the petitioner that the resolution P21 is ex facie, in excess of the loan in respect of which default has been made. It was further submitted that although the resolution P21 purports to authorize the sale of mortgaged property outstanding "on re-scheduled loan of Rs 4,810,718.36 up to 31st March 2005 together with further interest from 1st April 2006 on the said

amount till the date of payment on Bond No 1671 dated 9.12 1996 i.e. P 17, P17 at page 9, specifically states that "it being intended that the total amount of moneys hereby secured shall not exceed a sum of Rs Four Million only. (4,000,000/=) of lawful money of Sri Lanka and interest, the security hereby created being intended to recover the final balance of account between the obligor of the one part and the Bank of the other part in respect of all transactions and dealings such final balances not to exceed in the whole the sum of Rs Four Million (Rs 4,000,000/=) of lawful money aforesaid and interest".

It is the contention of the Counsel for the petitioner that the final balance in P21 cannot exceed Rs 4,000,000/= and interest. However P21 specifies the amount due as Rs 4,810,718.36 and interest, which is grossly in excess of the final balance of Rs 4,000,000/= contemplated in P17. Therefore it was argued on behalf of the petitioner that by the resolution P21, the Bank cannot recover an amount in excess of the sum secured by the mortgage bond. It was also submitted that P21 authorises the sale of property for the recovery of an amount well in excess of the principal sum of Rs 4,000,000/= secured by P17 and consequently the interest also in excess of what is contemplated in the mortgage bond and that it is quite clear the resolution is *ultra vires* Section 19 of the Bank of Ceylon Ordinance and as such is illegal and liable to be quashed.

It is submitted on behalf of the Respondent that the power of Parate Execution has been conferred on the Respondent by the provisions of the Bank of Ceylon Ordinance and not under the provisions of the Mortgage bonds. And in terms of Section 15 of the said Ordinance, when default is made in the payment of any sum due under any loan, default is deemed to have been made in

respect of the whole of the unpaid portion of the loan. In terms of Section 16 of the said Ordinance, the board of the Respondent Bank has the discretion to act under Section 17, 17A or 19 to recover the whole of the unpaid portion of the loan. In terms of Section 20 of the said Ordinance, the resolution that can be passed by the Respondent is to recover the whole of the unpaid portion of the loan and P21 only seeks to recover the whole of the unpaid portion of the loans granted to the petitioner and the said company. It is further submitted that the Respondent is exercising statutory powers conferred on it under Sections 15, 16 and 20 of the Bank of Ceylon Ordinance and the statutory powers of the Respondent to recover the whole of the unpaid amount of any loan, cannot be fettered and or restricted by contract.

It is an admitted fact that the petitioners mortgaged the properties that are mentioned in the resolution marked P21 to the Respondent Bank. The Respondent Bank is a statutory body incorporated as a Bank by the Bank of Ceylon Ordinance No 53 of 1938.The powers and functions of the Respondent Bank are stipulated in the said Ordinance. By the Bank of Ceylon (Amendment) Law 10 of 1974, the Respondent Bank was empowered with the right of parate execution of mortgaged property to facilitate recovery of moneys in default in circumstances where loans/overdrafts are secured against the mortgage of property.

Section 16 provides;

" Where under the provisions of this Ordinance, default is made or deemed to have been made in respect of the whole of the unpaid portion of any loan, overdraft, advance or other accommodation and the interest due thereon, the board may, in its discretion,

take action as specified in Section 17 or in Section 17A or in Section 19."

Section 20 provides;

"The board may by resolution to be recorded in writing authorize any person specified in the resolution to sell by public auction any movable or immovable property mortgaged to the bank as security for any loan, overdraft, advance or other accommodation in respect of which default has been made in order to recover the whole of the unpaid portion of such loan, overdraft, advance or other accommodation, and the interest due thereon up to the date of the sale, together with the moneys and costs recoverable under section 26, 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 or the subsequent sale for any cause whatsoever, and no court shall entertain any such application."

Under the above provision, the Respondent bank is legally entitled to pass a resolution to sell a property that was mortgaged to the bank as security to recover the unpaid portion of the loan.

It is not disputed that the petitioner obtained an overdraft facility of 3,000,000/= secured by mortgage bond marked P17. The dispute between the petitioner and the Respondent is in the quantum of the sum of money due to the bank that was secured by this mortgage bond.

In the instant case it is an admitted fact that the petitioner has mortgaged the relevant properties to the Respondent Bank to

secure the aforesaid loans and the Board of Directors of the Respondent Bank has passed a resolution to sell the property as the petitioner has defaulted payment of the said loan. It is not disputed that the petitioner had obtained an overdraft facility of Rs 3,000,000/= from the respondent in 1996 and as security of the said loan facility the petitioner had mortgaged a property belonging to the petitioner. It is also not in dispute that as the petitioner had not paid any interest or capital during the period of 1999-2002 on the request of the petitioner the loan facility granted to the petitioner was rescheduled in August 2002 and under the re-scheduled agreement the petitioner was required to pay the capital outstanding of Rs 4,810,718.36 in sixty equal instalments of Rs 80,179/=.The petitioner had failed to re-pay a single instalment agreed to by him.

The resolution P21 purports to authorize the sale of mortgage property outstanding on re-scheduled loan of Rs 4,810,718.36 up to 31st March 2005 together with further interest from 1st April 2006 on the said amount till the date of payment on bond No 1671 dated 9/12/1996.The original overdraft facility granted to the petitioner had been Rs 3,000,000/=. The petitioner does not dispute the fact that the petitioner had not paid any interest or capital during the period 1999-2002. It is also not in dispute that thereafter on the request of the petitioner and the company the loan facilities granted to the petitioner and the said company were rescheduled in August, 2002. Under the rescheduled agreement a certain portion of the interest which the petitioner had to pay the Respondent Bank had been added to the capital outstanding and the petitioner had agreed to pay an amount of Rs 4,810,718.36 in sixty instalments. In terms of Section 15 of the said Ordinance when default is made in payment of any sum due

under any loan, default is deemed to have been made in respect of the whole of the unpaid portion of the loan. And in terms of Section 16 of the said Ordinance, the Board of Directors of the Respondent Bank has the discretion to act under Section 17, 17A or 19 to recover the whole of the unpaid portion of the loan. In terms of Section 20 of the said Ordinance, the resolution that can be passed by the Respondent Bank is to recover the whole of the unpaid portion of the loan and P21 only seeks to recover the whole of the unpaid portion of the loans granted to the petitioner and the said Company.

In any event the Respondent Bank is only entitled to recover the sums of money that is legally due to the respondent. The dispute is in relation to the amount recoverable from the petitioner on the mortgage bonds executed and this Court in not inclined to interfere with the decision of the Board of Directors of the Respondent Bank. Therefore this application is dismissed with costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

Anil Gooneratne, J

I agree.

JUDGE OF THE COURT OF APPEAL