

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

S. K. Rahuman Maulana  
No. 716, Negombo Road, Mabile,  
Wattala.

C. A 1012/2008 (Writ)

**PETITIONER**

Vs.

1. People's Bank,  
Sir Chittampalam A. Gardiner Mawatha,  
Colombo 2.

**And 10 others**

**RESPONDENTS**

**BEFORE:** Anil Gooneratne J. &  
Deepali Wijesundera J.

**COUNSEL:** Jacob Joseph for the Petitioner  
Kushan de Alwis P.C., with K. Navaratne  
for 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, to 10<sup>th</sup> Respondents

**ARGUED ON:** 07.08.2013

**DECIDED ON:** 11.11.2013

**GOONERANTE J.**

This is a Writ Application filed by the Petitioner to quash the resolution marked P2 passed by the People's Bank (1<sup>st</sup> Respondent). Petitioner according to the material in the petition is a businessman who obtained a loan from People's Bank in a sum of Rs. 3,500,000/= by mortgaging the property described in paragraph 5 of the petition in the manner stated therein. Documents produced with the objections of Respondent X1 – X4 indicates the terms and conditions of the loan facility, and that loan was paid to the Petitioner and received by the Petitioner on 26.2.2002. It is the case of the Petitioner that he had paid the People's Bank and payment made thereof had been deposited in a margin account of the Bank. On or about 25.1.2005 Petitioner received letter P1. This letter itself is self explanatory of the dealings between parties. It is also pleaded that the 1<sup>st</sup> Respondent Bank passed resolution P2. The body of the petition states the property was to be auctioned (P5) and having negotiated with the 1<sup>st</sup> Respondent the auction sale was stayed.

Petitioner also attempts to demonstrate in the petition and as submitted to this court by learned counsel for the Petitioner that the Petitioner has made substantial payments to the Bank to satisfy the loan facility (P6, P7 &

P8). There is also material disclosed to this court that notice of auction was published (P9) on 19.9.2009. A Writ of Prohibition is also sought to restrain the Bank from auctioning the property (prayer C of the petition). Petitioner is seeking to contest this case on the following basis as submitted to court by learned counsel for Petitioner and as contained in the written submissions/petition.

- (a) The 1<sup>st</sup>, 3<sup>rd</sup> to 11<sup>th</sup> Respondents have acted ultra vires in passing the Resolution dated 7.1.2005 and guilty of abuse of power.
- (b) That the 1<sup>st</sup> Respondent has failed to appropriate payment made by the Petitioner to liquidate the loan of Rs. 3.5 million.
- (c) That the payments made by the Petitioner were put into a 'Margin Account', which is illegal and wrongful.
- (d) Breach of the principles of uberiene fees.
- (e) In the purported amount given as default in the Resolution, has been liquidated and no credit is given to the Petitioner.
- (f) That the purported Resolution is not valid in law

Petitioner also attempts to advance another argument, which at a glance of the relevant provisions gives the impression that it is an innovative argument, which could confuse any reader of the written submissions of Petitioner but this court is not convinced of same as Petitioner argues that Act No. 4 of 1990 Recovery of loans by Banks (Special Provisions) Act excludes the power of the

Bank of Ceylon and the People's Bank by Section 22 of that Act. Then there is reference to the Amended Act No. 1 of 2011 and Section 5A of that Act. It enacts that when default is made nor shall any steps be taken in terms of Section 4/5 of that Act where the amount is less than rupees five million. Act operates from 28.1.11. Default is made in a sum of Rs. 3.5 million and the exact amount due is Rs. 2,860,768/22 as per X31 and as such Respondents cannot take any steps since the amount is less than 5 million.

In any event resolution was adopted on or about 7.1.2005 and the Act No. 4 of 1990 as amended by Act No. 1 of 2011 was passed in February 2011. i.e lapse of 6 years from the date of passing the resolution by the People's Bank. Nor does the Act No. 1 of 2011 operate retrospectively. All laws are prospective unless specifically stated that it operates retrospectively. This is a frivolous argument. Rights of parties need to be decided as at the date of the action.

Bindras Interpretation of Statutes at page 779...

In general when a law is altered during the pendency of an action the rights of parties are decided according to law, as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights ...

Where the rights and procedure are dealt with together, the intention of the legislature may well be that old rights are to be determined by the old procedure and that only new rights under the substituted section are to be dealt with by the new procedure. If the procedural alteration is closely and inexplicably linked with the changes simultaneously introduced in

another part of the statute dealing with substantive rights liabilities, it is not possible to give retrospective operation to the amendment regarding procedure unless the legislature has indicated such an intention either by express words or by necessary implications ...

Whether a person has a right to recover a property is a question of substantive law. An enactment conferring substantive rights cannot be given a retrospective operation unless the legislature has made an explicit and express provision to that effect therein or such a consequence inevitably follows necessary intendment.

Maxwell on Interpretation of Statutes 12<sup>th</sup> Ed. Pgs. 215, 218 & 220

Pg. 215..

Upon the presumption that the legislature does not intend what is unjust rest the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless the retrospective affect is clearly intended. It is fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication”.

Pg. 218..

The rule under discussion has been applied chiefly in case in which the statute in question, if it operated retrospectively, would prejudicially affect vested rights or the legality of passed transactions or would impair contracts or would impose new disabilities in respect of past transactions.....

With regard to the pending action at page 220 of Maxwell on Interpretation of Statues refers as follows:

Pg. 220 ...In regard when the substantive law is altered during the pendency of an action, the rights of parties are decided according to the law as its existed when the action was begun, unless the new statute shows a clear intention to vary such a right.

This court reject the above argument and observe that the above Statute referred to by the Petitioner has no application or retrospective operation at all. 1<sup>st</sup> Respondent Bank has taken steps in terms of the provisions of the People's Bank Act, a statute which specifically applies to the 1<sup>st</sup> Respondent Bank and which Statute governs the available parate execution proceedings and no other Statute or provision of law could be invoked. The Respondent's position as pleaded by way of a preliminary objection is that Section 29D of the People's Bank Act read with Section 22 of the Interpretation Ordinance, the Petition cannot challenge the resolution and this court would not have jurisdiction to hear and determine this application and grant any relief to the Petitioner. Respondent inter alia plead that the Petitioner is also guilty of delay and or laches. Further the allegation of the Petitioner cannot be resolved without having oral evidence. As such application is not amendable to the Writ jurisdiction of this court. As a substantive matter Respondent plead that Petitioner has failed and neglected to comply with terms and condition of the loan agreement and at various stages was in default in payment of the loan. The basis of the agreement is contained in document X1 & X2.

I do agree with the contention of the Respondent Bank that the Petitioner is guilty of laches. The Writ application was filed by the Petitioner on or about 10.12.2008 to challenge a resolution adopted on 7.1.2005. Delay is apparent. Further the delay remains unexplained. Failure to adduce acceptable reasons to excuse delay would amount to laches. Issadeen Vs. Commissioner of National Housing 2003(2) SLR 10/11. This court also observes "Delay defeats equity" is one of the main principles of equity. Wanasundera J. in Ramasamy Vs. Ceylon State Mortgage Bank 78 NLR 510, 514. However if delay can be explained this court will not decline to interfere. There is no material to excuse delay and the Petitioner has not made any attempt to explain delay. Unexplained delay on the part of the Petitioner would be fatal to his application, and as such no writ will lie in the context of this case.

Parate execution could be described as an extra judicial sale. Laws of this country had been suitably amended to facilitate expeditious debt recovery. As such significant changes occurred in the law. It gives the power to non-judicial persons the Board of Directors (in this case 3<sup>rd</sup> to 11<sup>th</sup> Respondent) to take decision to sell the mortgaged property in case of default.

I also had the opportunity to peruse the case of Ekanayake & Others Vs. People's Bank 2005(1) SLR 94 held "The facts disputed are on the quantum recoverable. The error on the calculation of quantum will not affect the jurisdiction of the Bank to act under Section 29D. The calculation of the sum recoverable by the Respondent Bank from the Petitioner is a matter of fact. In these proceedings, the court cannot ascertain the correctness of the sum recoverable from the Petitioners without evidence." One of the grounds urged by the Petitioner, is the Bank's failure to appropriate the payments made by the Petitioner, to liquidate the loan of Rs. 3,5000/-. If one look upon the documents and averments in the pleadings such a matter cannot be inquired into in the absence of evidence being led. Respondent on the other hand demand payments due whether in fact no sum was due is a matter of fact and evidence to be proved by the Petitioner and review procedure by way of writ is not well suited to resolve such an issue. If disputed facts surface, court will not interfere by a Writ Application. As such Writ jurisdiction cannot be extended in favour of Petitioner since facts are on one hand disputed.

Thajudeen Vs. Sri Lanka Tea Board & Another 181(2) SLR 471..

Where the major facts are in dispute and the legal result of the facts is subject to controversy and it is necessary that the questions should be canvassed in a suit where parties would have



ample opportunity of examining the witnesses so that the Court would be better able to judge which version is correct, a writ will not issue.

Mandamus is pre-eminently a discretionary remedy. It is an extraordinary, residuary and suppletory remedy to be granted only when there is no other means of obtaining justice. Even though all other requirements for securing the remedy have been satisfied by the applicant, the court will decline to exercise its discretion in his favour if a specific alternative remedy like a regular action equally convenient, beneficial and effective is available.

Petitioner's application is also without merit as emphasized by the Respondents. Petitioner defaulted payment according to the Respondent. As such Bank is statutorily empowered to adopt a resolution to recover dues. Vide X5 to X7. Respondents called upon the Petitioner to pay and settle the dues (X9 to X14). By X15 Respondent Bank even released part of the land subject to mortgage to accommodate the Petitioner to settle. The Bank no doubt gave various concession to the Petitioner. Vide X15 to X21. Even the intended auction sale was cancelled at least on two occasions to assist the Petitioner. It is evident that the People's Bank has gone a long way and even gone an extra mile to save the situation to help the Petitioner. An agreement was also entered between parties merely to assist and facilitate the Petitioner, re-payment programme. However agreement was breached by the Petitioner (documents X31, X32 & X37). By X33 to X36 Petitioner sought various concession. All this seems to be to mislead the

Bank. The resolution is well within the powers of the People's Bank and in compliance with Section 29D of the People's Bank Act. The mere allegation of ultra vires as urged by the Petitioner is baseless and devoid of legal basis

On the aspect of suppression of material facts the several documents that surface, willful suppression is contained in documents X8 to X14 (Petitioner granted various facilities not disclosed).

Deed of release not disclosed (X15). Whilst giving notice of steps taken to auction the property the Bank requested the Petitioner to settle (vide X16 to X32). I am fortified in my views on this aspect by having regard to the contents of each and every document referred to above and the case law on the point. *Mowbray Hotels Ltd. Vs. Hon. D.M. Jayaratne Minister of Agriculture & Lands* 2004 BLR Pg. 51 per Sripavan J. .... "As the Petitioner come to court with unclean hands and it has therefore violated the solemn contract of utmost good faith which by itself attracts refusal of discretionary relief".

In all the above facts and circumstances of this case Petitioner is not entitled to the remedy prayed for by way of Writ of Certiorari and Prohibition. There are several matters of both fact and law highlighted by the learned counsel for the Respondent in both oral and written submissions. This court is mindful of

all those matters and would not hesitate to agree with the contention of the Respondent Bank. As such we dismiss this application without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL