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

1. M.H.M. Nilam,
   Nilam Stores,
   No. 94/23,
   Panithiyanawatte,
   Denipitiya,
   Weligama.
2. Dharmasiri Nandalal Daluwate,
   No.2, Government Quarters,
   Polwatumodara Mirissa,
   And other
   Battalagewatte,
   Polwatumodara Mirissa
   Respondent-Petitioners

CA Case No: CA/RI/22/2018
DC Colombo Case No: DSP/22/2017

Vs.

Amana Bank PLC.,
No. 480, Galle Road,
Colombo 3.
Presently at
No. 486,
Galle Road,
Colombo 3.
Petitioner-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: S. Kumarasingham for the Petitioners.
Palitha Kumarasinghe, P.C., with Asanka Ranwala for the Respondent Bank.

Supported &
Decided on: 19.11.2018

Samayawardhena, J.

The Petitioner has filed this application for revision and *restitutio in integrum* dated 02.11.2018 seeking to set aside the order *nisi* dated 02.06.2017 and order absolute dated 21.08.2018 entered by the learned Additional District Judge of Colombo in case No. DSP/22/2017 upon an application made by the Respondent Bank under section 16 of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, as amended (hereinafter "the Act"), to obtain an order for delivery of possession of the property which is described in the Certificate of Sale.

The factual matrix of the case, albeit briefly, is as follows: The Petitioner has obtained banking facilities from the Respondent Bank and admittedly defaulted payment as agreed. Thereafter, the Bank has taken steps under the provisions of the Act to adopt a Resolution and to recover the dues by *parate* execution of the mortgaged property given as security to obtain the loan.

The Petitioner has then filed a case before the Commercial High Court against that move, and later a settlement has been entered before the said Court. According to that settlement

signed by both parties and their registered Attorneys, the Petitioner and the Respondent Bank have agreed to the following:

(a) "*The plaintiff (Petitioner) concedes that the defendant Bank is entitled to adopt the Resolution referred to in the plaint*."

(b) The plaintiff will pay a sum of Rs. 25,322,158/= due as at 24.02.2016 as a full and final payment to settle the loan before 30.06.2016 together with profits accrued up to the date of payment, in which event, the Mortgage Bond will be discharged.

(c) If the plaintiff fails to pay the said sum as agreed, "*the defendant Bank is entitled to proceed with parate execution and auction the property mortgaged and the plaintiff undertakes that the plaintiff will not commence any legal proceedings in court to prevent the auction in any way or manner*."

(d) "*In the event the auction is held, the plaintiff agrees to deliver vacant possession of the mortgaged property to the defendant Bank*."

The Petitioner has not honoured that undertaking, and later filed a Revision Application (SC Revision No. 9/2016) before the Supreme Court challenging the Resolution adopted by the Bank on the basis that, according to the Loan Agreement, the loan has been given upon the principles of Islamic Sharia Banking, which prohibits interest being recovered; but the recovery of the

interest component to the principal sum shall be an integral part of the Resolution to be adopted under the Act, "*in other words, a Board Resolution would not be valid without an interest element claimed along with the unpaid portion of the principal sum borrowed*". The Petitioner further says that, the Bank, whilst lending money under the Sharia Banking principals, unscrupulously charges interest indirectly using terms such as, profit, markup, pricing etc., and therefore, the Loan Agreement is unenforceable in law as it is tainted with immorality. Hence the Petitioner has moved to set aside the settlement entered before the Commercial High Court by exercising the revisionary jurisdiction of the Supreme Court.

The Supreme Court by order dated 23.01.2017 has dismissed that application *in limine* on the basis that a party cannot directly come before the Supreme Court by way of a revision application against an order made by the Commercial High Court.

Thereafter, the Petitioner has filed a revision application before this Court (CA (PHC) APN 35/2017) seeking the same relief sought before the Supreme Court, but this Court has dismissed that application by Judgment dated 28.03.2017.

The Petitioner has then gone before the Supreme Court canvassing that Judgment, but the Supreme Court has dismissed that application as well.

In the meantime, the Petitioner has also filed a final appeal against the order absolute made by the District Court.

When facts remained as such, *parate* auction has been held and the Certificate of Sale has been issued in the name of the Bank.

Section 15(1) and (2) of the Act read as follows:

> *15(1) If the mortgaged property is sold, the Board shall issue a certificate of sale and thereupon all the right, title, and interest of the borrower to, and in, the property shall vest in the purchaser; and thereafter it shall not be competent for 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 of the property to the bank, in any court to move or invalidate the sale for any cause whatsoever, or to maintain any right title or interest to, or in, the property as against the purchaser.*
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> *(2) A certificate signed by the Board under subsection (1) shall be conclusive proof with respect to the sale of any property, that all the provisions of this Act relating to the sale of that property have been complied with.*

The conclusiveness of the Certificate of Sale has been emphasized in a long line of decisions. Vide for example the two separate Judgments of the Supreme Court by Justices Mark Fernando and Edussuriya in *Haji Omar v. Wickramasinghe [2002] 1 Sri LR 105*, Supreme Court Judgment of Justice Tilakawardane in *Amaradasa Liyanage v. Sampath Bank [2015] BLR 63*, Supreme Court Judgment of Justice Anil Gooneratne in *HNB v. Thejasiri Gunethilake* in SC Appeal No.189/2012 delivered on 23.11.2016.

Section 16 deals with recovery of possession of the (mortgaged) property in respect of which Certificate of Sale is issued. Section 16(1) of the Act treads as follows:

> *The purchaser of any immovable property sold in pursuance of the preceding provisions of this Act shall, upon application made to the District Court of Colombo or the District Court having jurisdiction over the place where that property is situate, and upon production of the certificate of sale issued in respect of that property under section 15, be entitled to obtain an order for delivery of possession of the that property.*

It must be made clear that at the time the application for delivery of possession under section 16(1) is made, there is no room to contest the initial Resolution passed. That is exactly what the Petitioner in the instant application is attempting to do. How can the Resolution, which is the first step of *parate* execution be challenged, when the law prohibits even challenging the Certificate of Sale issued after the public auction?

It is clear that the plaintiff is abusing the process of Court from moving one Court to another to prevent the Bank from recovering the dues by invoking the provisions of the Recovery of Loans by Banks (Special Provisions) Act, which was introduced to fast track recovery of loans granted by Banks.

The argument of the learned counsel for the Petitioner that "*a Board Resolution would not be valid without an interest element claimed along with the unpaid portion of the principal sum*

borrowed" is devoid of merit. If that argument is to be accepted, the Banks will not be able to recover only the principal amount (without interest) under the provisions of the Act. It is a misleading statement to say that section 4 of the Act refers to "*the recovery of the whole of the unpaid portion of a loan and the interest due thereon.*" There is no specific reference to "*interest*" in section 4. It says "*the unpaid portion of such loan together with the money and costs recoverable under section 13.*"

In any event, once the Petitioner gives an undertaking in writing signed by him and his Attorney on record, that he would not challenge the Resolution and prevent the auction and deliver vacant possession in the event the auction is held due to his failure to pay the amount during the extended time given, he cannot, after the lapse of the grace period, file cases, one after the other, challenging the Resolution.

This is a revision and *restitutio in integrum* application, which is a discretionary remedy where the conduct of the party applying for the relief is intensely relevant.

If he thought that Resolution is bad in law due to the application of Sharia Law, he should have taken up that position when he first filed the Commercial High Court case (No. 2/2016/M) challenging the Resolution.

I do not accept that Sharia Law principals are applicable in this transaction and therefore the provisions of the Recovery of Loans by Banks (Special Provisions) Act is inapplicable into this Loan Agreement. Assuming it is correct, as Chief Justice

Sansoni stated in *Cassim v. Government Agent, Batticaloa*[1] "*There must be finality in litigation, even if incorrect orders have to go unreversed*."

I must also emphasize that parties cannot present their cases or take up defences before the Court of Law in piecemeal. If that is allowed, there will not be an end to litigation.

Section 34(1) and (2) of the Civil Procedure Code reads thus:

1) *Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any court.*

2) *If a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of, his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.*

The doctrine of *res judicata* applies to all matters which existed at the time of giving the judgment and the party had an opportunity of bringing before Court.

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[1] (1966) 69 NLR 403 at 404

In *Banda vs. Karohamy*[2], Justice Nagalingam (with Chief Justice Howard agreeing) stated:

> *I am inclined to think that the doctrine of res judicata applies to all matters which existed at the time of the giving of the judgment and which the party had an opportunity of bringing before the Court. In this case it is quite obvious that the present plaintiff had the fullest opportunity of bringing before the Court his claim of title to the land based upon the conveyance (P1), for at the date he filed answer the title conveyed by P1 had vested in him and there was nothing to prevent him from pleading that title as well. The present plaintiff not having done so and not having obtained an adjudication upon that title in the former suit, the decree in that suit must therefore be deemed to operate as res judicata in regard to the present assertion of his claim. For these reasons I hold the judgment of the learned District Judge is right. The appeal therefore fails and is dismissed with costs.*

Similar conclusions were reached in *Jane Nona v. Mohamadu*[3], *Sinniah v. Eliakutty*[4].

The doctrine of *res judicata*, as Justice Bandaranayake (later Chief Justice) in *Stassen Exports Ltd v. Lipton Ltd*[5] expressed, has found justification in two fundamental principles: "*The first principle, which is public in nature, is based on the maxim interest*

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[2] (1948) 50 NLR 369 at 373
[3] (1932) 1 CLW 158 per MacDonell CJ
[4] (1932) 1 CLW 253 at 254 per Jayawardene AJ
[5] [2009] 2 Sri LR 172 at 185

rei publicae ut sit finis litium (in the interest of the state that there be an end to litigation) and secondly on the footing of a maxim, private in nature, namely, nemo debet bis vexari pro un at eadem causa (that no person should be proceeded against twice for the same cause)."

I unhesitatingly dismiss the application of the Petitioner with costs. Issuance of formal Notice on the Respondent Bank is refused.

Judge of the Court of Appeal