

**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 and
Mandamus under and in terms of Article 140
of the Constitution of the Democratic
Socialist Republic of Sri Lanka.*

1. N and A Engineering Services
Private Limited
No. 50/1A, New Kandy Road,
Kaduwela.
2. Y. N. Premasiri
No. 267/64, Morawakawatta,
Kaduwela.

Petitioners

CA/WRIT/0603/2021

Vs.

1. People's Bank
No. 75 Sri Chittampalam A. Gardiner
Mawatha,
Colombo 02.
2. Sujeewa Rajapakse
Chairman,
People's Bank,
No. 75 Sri Chittampalam A. Gardiner
Mawatha,
Colombo 02.
3. Kumar Gunawardana
Director,
People's Bank,
No. 75 Sri Chittampalam A. Gardiner
Mawatha, Colombo 02.

4. Sudarshan Ahangama
Director,
People's Bank,
No. 75 Sri Chittampalam A. Gardiner
Mawatha,
Colombo 02.
5. Isuru Balapatabendi
Director,
People's Bank,
No. 75 Sri Chittampalam A. Gardiner
Mawatha,
Colombo 02.
6. Keerthi Goonatillake
Director,
People's Bank,
No. 75 Sri Chittampalam A. Gardiner
Mawatha,
Colombo 02.
7. Manjula Wellalage
Director,
People's Bank,
No. 75 Sri Chittampalam A. Gardiner
Mawatha,
Colombo 02.
8. K. A. Vimalenthirajah
Director,
People's Bank,
No. 75 Sri Chittampalam A. Gardiner
Mawatha, Colombo 02.
9. Bhadranie Jayawardhana
Director,
People's Bank,
No. 75 Sri Chittampalam A. Gardiner
Mawatha,
Colombo 02.

10. E. A. Perera
Auctioneer,
“Kings View Residence”,
No. 282/3, 5/2 Level. Kotte Road,
Nugegeoda.

Respondents

Before : Sobhitha Rajakaruna J.

Counsel : Sandamal Rajapaksha with Sachintha Rodrigo for the Petitioner.

Kaushalya Nawarathne with Prabuddha Hettiarchchi and Eshan Sandungahawatta for the 1st Respondent.

Supported and Decided on: 17.12.2021

Sobhitha Rajakaruna J.

The limited Statement of Objections in this application were due to be filed on or before 17.12.2021. Upon the application of both parties this matter has been scheduled to be taken up for support also on 17.12.2021. Accordingly, the learned Counsel for the 1st Respondent seeks permission to tender the limited Statement of Objections in Open Court. Application is allowed. The learned Counsel for the 1st Respondent tendered the relevant Statement of Objections in Open Court along with two sets of copies.

Registrar is directed to file of record the relevant limited Statement of Objections of the 1st Respondent.

Heard learned Counsel for the Petitioner in support of this application and the learned Counsel for the Respondents opposing the application.

The Petitioners have filed this application seeking, inter alia, a mandate in the nature of a Writ of Certiorari quashing the Resolution dated 31.08.2021 adopted under the People's Bank Act No 29 of 1961 (as amended) by the 1st Respondent Bank. The Petitioners further seek for an interim order restraining the 1st to 10th Respondents from taking any steps to

auction the lots of land belonging to the Petitioners at the auction scheduled to be held on 19.12.2021.

The learned Counsel for the Petitioners submit that two of the four lots of land sought to be auctioned by the 1st Respondent Bank are owned by the 2nd Petitioner. Accordingly, the Petitioners state that the said lots of lands do not belong to the borrower of the loan but in fact belongs to a 3rd party.

The learned Counsel for the Petitioner brings to the notice of this Court the judgements of the following cases;

- i. Hatton National Bank vs. Jayawardane (2007 1 SLR 82);
- ii. Ramachandran & others vs. Hatton National Bank (2006 1 SLR 393) and
- iii. DFCC vs. Muditha Perera & others (S.C. Appeal 150/2010 decided on 25.03.2014)

Saleem Marsoof J. in the above Supreme Court case bearing No. ***S.C. Appeal 150/2010*** has held as follows;

“The Court of Appeal had not err in law by determining on a prima facie basis, for the purposes of considering interim relief, that the Appellant was not a borrower within the meaning of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 continuing having regard to the decision of the Supreme Court in both Ramachandran and others vs. Hatton National Bank and HNB vs. Jayawardane”

The learned Counsel for the Petitioners at this stage brings to the notice of this Court, the ‘conclusion’ paragraph of the above judgement and asserts that the dicta in ***Ramachandran & others vs. Hatton National Bank Case*** still stands unchanged.

In view of the questions of law raised, this Court is inclined to issue notice on the Respondents.

Having considered the issuance of notice, it is necessary to ascertain as to whether this Court could grant an interim relief as prayed for in paragraph “(b)” of the prayer of the Petition.

The document marked P1 discloses the names of the Directors of the 1st Petitioner Company. Accordingly, the 2nd Petitioner, Yamanage Nimal Premasiri is a member of the Board of Directors of the said Company. The other Director of the Board is Yamanage

Ananda Kumarasiri. The fact emanates from the submissions of the learned Counsel for the Petitioner is that both of them are brothers.

The attention of Court is drawn to paragraph 09, 10, 11 and 12 of the Petition of the Petitioner. The Petitioners, particularly in those paragraphs in the Petition, state that they have run into a great hardship on account of the prevailing pandemic and as a consequence its business operations have been severely and adversely affected. Further, the Petitioners state that on account of the same the 1st Petitioner has found it difficult to meet his liabilities towards the 1st Respondent Bank with regard to the monthly loan installment payments and have sought to re-schedule the loan. The learned Counsel for the Respondents, accordingly, asserts that the Petitioners have expressly admitted their liabilities.

However, the learned Counsel for the Petitioner relies upon the circular marked P12 by which certain concessions have been granted by the Central Bank for COVID-19 affected businesses and individuals. In response to that the learned Counsel for the Respondents referring to paragraph 2 (C) of the said circular indicates that the concessions that intended in the said circular will be applied only in respect of credit facilities that have been classified as non performing on or after 01.04.2020. The learned Counsel for the Respondents referring to several documents submits that the default of the Petitioners begins from the year 2012.

Further, he refers to the documents marked 1R(a) to 1R(l) which clearly indicates that several facilities have been granted to the Petitioners. Further, the learned Counsel for the Respondents referring to several documents including the documents marked R2, R3(1) to R3(19) indicates that an ample opportunity has been afforded to the Petitioners in view of settling the dues to the Bank.

Finally, the parties have entered even into a Memorandum of Understanding (MOU) marked R(8). The R(8) document has been signed by the 2nd Petitioner and/or the aforesaid 2nd Director of the 1st Petitioner's company. In terms of R(8), a particular course of action has been agreed upon by these parties, in view of settling the dues. Moreover, if the 3rd party would not be able to fulfil the transactions within 30 days, then the MOU will be automatically cancelled by virtue of the 'Termination Clause' therein, (clause 11.1.6). Hence, the Court observes that the R(8) is also no longer in operation.

The learned Counsel for the Petitioners asserts that this application would be rendered nugatory unless an interim relief is granted preventing the auction being held on Sunday the 19th November 2021.

As discussed in *Duwearatchi & another vs. Vincent Perera & others (1984 2 SLR 94)*, an interim stay order in a writ application is an incidental order made in the exercise of the inherent or implied powers of the Court and the Court should be guided by the following principles;

- (i) *Will the final order be rendered nugatory if the petitioner is successful?*
- (ii) *Where does the balance of convenience lie?*
- (iii) *Will irreparable and irremediable mischief or injury be caused to either party?*

At this stage the Court is mindful of the questions of law upon which the decision to issue notice in this application has been taken. When evaluating whether this application would be rendered nugatory if no interim relief is granted, this Court need to take into consideration not only the weight of the said questions of law but also the ample evidence placed before us by the Respondents highlighting the conduct of the Petitioners.

The documents annexed to the limited Statement of Objections, submitted along with an Affidavit by the Respondents, clearly indicates that the 1st Respondent on several occasions requested the Petitioners to repay the due amounts and however, the Petitioners have failed and neglected to settle the loans. On numerous occasions on the request of the Petitioners, the Bank has taken steps to reschedule the loan facilities. Having granted several concessions, the Petitioners have continued to neglect the payment of the outstanding sums as per the rescheduled agreements pertaining to the said facilities.

The 1st Respondent Bank has adopted a resolution on 23rd December 2020 to auction the property mortgaged and then again has adopted another resolution for the second time on 31st August 2021 to auction the mortgaged properties in order to recover the monies lawfully due to the 1st Respondent Bank from the Petitioners. Therefore, Petitioners have been knowing for several years the fact that the Bank had taken lawful steps to auction the mortgaged property.

In deciding in whose favour the balance of convenience would lie, in my view, it is not only the damages that would be caused to a party by not issuing an interim relief be taken into consideration. If the circumstances and the evidence placed before Court provides an opportunity, prima facie, for the Court to consider the conduct and the conscience of a particular party, then the Court should take such 'conduct' and 'conscience' also in to consideration in view of assessing the balance of convenience and also the test to ascertain whether the final order be rendered nugatory if the Petitioner is successful. I am of the view that this is a fit and proper case for this Court to consider the conduct and the conscience of the Petitioners in deciding on the interim relief sought by the Petitioners.

Thus, this Court is of the view that although there is a question of law to be looked in to in this application, the circumstances and the evidence placed before us starting from the year 2012 do not warrant this Court to issue an interim relief at this stage as prayed for in the prayer of the Petition. Application for interim relief is refused.

However, Registrar is directed to issue notice on the Respondents. Notice returnable on 22.02.2022.

Judge of the Court of Appeal