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 Writ of Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Blue Ocean Reality (Private) Limited
No.32, 1st and 2nd Floor, Galle Road,
Dehiwala, and,
No.9A, De Fonseka Place,
Bambalaitiya, Colombo 04.

CA/WRIT/228/2022

Petitioner

Vs.

1. People's Bank
   Head Office, 10th Floor, No. 75,
   Chittampalam A Gardiner
   Mawatha,
   Colombo 02.

2. E. S. Ramanayake
   Specialist Licensed Auctioneer,
   No.11/55, Bogahawatte,
   Kudabuthgamuwa, Angoda.

3. Sujeewa Rajapakse
   Chairman

4. Kumar Gunawardana
   Director

5. Isuru Balapatabendi
   Director

6. Keerthi Goonatillake
   Director

7. Manjula Wellalage
   Director

8. Bhadranie Jayawardhana
   Director

9. Visakha Amarasekere
   Director

   All of
   Head Office, 10th Floor, No. 75,
   Chittampalam A Gardiner
   Mawatha,
   Colombo 02.

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Faisz Musthapha, PC with Faisza Markar, Keerthi Thilekeratne and Amarasiri Panditharathne for the Petitioner.

Jaliya Bodinagoda for the 1st Respondent.

Supported on : 23.06.2022

Decided on : 28.10.2022

Sobhitha Rajakaruna J.

The Petitioner obtained a loan facility of Rs.225,000,000.00 from the 1st Respondent-People's Bank ('Bank') by mortgaging the allotment of land called 'Mahawelawatta' bearing Assessment No.35, Ramakrishna Road in Wellawatte ('the property'). The mortgage bond No. 639 attested by M. A. D. Muditha Peiris on 27.09.2018 is marked as 'P3'.

The Petitioner was unable to service the said loan facility and thereby the Board of Directors of the Bank passed a Resolution on 24.01.2020, marked 'P5', under Section 29D of the People's Bank Act (as amended by Act No. 32 of 1986) ('the Act'). The Bank thereafter proceeded to issue the notice of sale and to auction the property. Due to certain payments being made by the Petitioner before the date of sale, such auction has been postponed on couple of occasions.

Upon the default of the Petitioner, the property was to be auctioned as per 'P19(a)' on 23.06.2022 and such sale was also suspended due to the payment of another portion of the default amount. The Petitioner filed this application after the Bank published the said latest notice of sale 'P19(a)' notifying the date, time and place of the sale of the property.

The Petitioner's primary relief in this application is to seek for a writ of prohibition preventing the 1st and 2nd Respondents taking steps to auction the premises bearing No. 35, Ramakrishna Road, Wellawatte in pursuance to the Resolution of the Board of Directors of the 1st Respondent Bank, marked 'P5'.

The 1st Respondent Bank contends that the Petitioner is not entitled to seek a writ of Prohibition preventing the execution of the Resolution, marked 'P5', without challenging the validity of the said resolution by a writ of Certiorari; anyhow this Court has no jurisdiction to quash the said Resolution 'P5' in terms of Section 29D of the Act.

Effect of Section 29D of the People's Bank Act.

The contention of the 1st Respondent is that the provisions of Section 29D of the Act oust the jurisdiction of this Court to review the said Resolution, marked 'P5' and the Petitioner cannot do indirectly, what it cannot do directly by seeking a writ of Prohibition to suspend the sale of property which hinders the effect of the Resolution 'P5'.

The said Section 29D of the Act;

> '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'.

In the presence of the above statutory provisions, the Petitioner contends that the Petitioner is not challenging the said Resolution 'P5' but only the steps taken by the 1st and 2nd Respondents to auction the subject property are being challenged. The 1st Respondent strenuously argues that it is abundantly clear under Section 29D of the Act that no Court has jurisdiction to entertain any application by way of writ or otherwise that has the effect of depriving the 1st Respondent proceeding with the said Resolution together with the sale of the property. In support of this argument, the 1st Respondent has cited the cases of ***Yapa vs. People's Bank and another (2006) 1 Sri. L.R. 60; People's Bank vs. Hewawasm (2000) 2 Sri. L.R. 29; Meragala vs. People's Bank and others (2006) 2 Sri. L.R. 101; People's Bank and seven others vs Yasasiri Kasthuriarachchi (2010) 1 Sri. L.R. 225.***

In ***Yapa vs. People's Bank and another (at p. 106)*** which was an application in revision from the order of the Additional District judge of Colombo, the Court of Appeal has held the Petitioner cannot challenge the resolution even indirectly by challenging the mortgage bonds on the basis that they are not properly stamped.

The Court of Appeal in ***People's Bank vs. Hewawasm (at p. 37)*** has considered the effect of the said Section 29D read together with Section 22 of the Interpretation Ordinance and held that;

"The above expression in Section 29(D) is of similar import as "shall not be called in question in any Court", contained in Section 22 of the Interpretation Ordinance. Hence, we agree with the submissions made by the learned President's Counsel on behalf of the Defendant-Petitioner that the said resolution (marked E) passed by the Board of Directors of the People's Bank, cannot be invalidated or challenged in an action in the District Court. Therefore, in these circumstances, the sale of the mortgaged property by public auction upon the said resolution marked E cannot be restrained by an interim injunction."

It is observed that the said case of ***People's Bank vs. Hewawasm*** is also an application to revise the order of the learned District judge of Colombo. The case of ***Meragala vs. People's Bank and others*** was a writ application by which the writ jurisdiction has been invoked and the Court of Appeal has taken a similar view as in the said ***Hewawasam case*** and has held that the validity and/or legality of a resolution cannot be questioned. The Court has not examined the power of the Court of Appeal under Article 140 of the Constitution in the said case. The Supreme Court in ***People's Bank and seven others vs Yasasiri Kasthuriarachchi*** (a case relied on by the 1st Respondent) has not directly examined the effect of Section 29D of the People's Bank Act although the Court has observed the outcome of another writ application bearing No. CA 1268/98.

However, the view taken by Udalagama J. (P/CA) in ***Satchithanandasivam vs. People's Bank (2004) 2 Sri. L.R. 63 (at p. 65-66)*** is that a resolution of a respondent-bank could be challenged 'if it is ex facie apparent on the application that the body or Authority who made the direction or order had acted ultra vires the powers that had been conferred upon such body or was acting contrary to rules of natural justice or had not complied with the mandatory provisions of law'.

The Petitioner heavily relied on ***Harjani and another vs. Indian Overseas Bank and others (2005) 1 Sri. L.R. 167*** by which the Indian Overseas Bank has sought to take advantage of the provisions of the Recovery of Loans by Bank (Special Provisions) Act No. 4 of 1990 relating to parate execution. Saleem Marsoof P.C. J. (P/CA) (as he then was) in the said case, observing the fact that the powers in regard to parate execution have been conferred by Statute

on any bank as defined in Section 22 of the said Recovery of Loans by Bank (Special Provisions) Act, has held;

> *"I am of the opinion that this Court is bound to exercise supervisory jurisdiction over the exercise of such powers despite the fact that some at least of these Banks are local or foreign Banking Companies."*

The 1st Respondent argues that the said ***Harjani case*** has no bearing on the instant application as the said judgement only considered a resolution passed under the said Recovery of Loans by Bank (Special Provisions) Act and not one adopted under Section 29D of the Act which contains the 'ouster clause'.

Sri Lankan Courts, in view of section 22 of the Interpretation Ordinance were used to adopting a method of not interfering when there is an ouster clause. However, the 1978 Constitution of the Republic conferred power to Court of Appeal on writ jurisdiction by which the effect of the said section 22, in my view, was redeemed.

This Court exercises its writ jurisdiction under Article 140 of the Constitution and proceedings for writs are not 'suits' or 'actions' as the Court of Appeal exercises its supervisory functions and it is not called upon to pronounce judgements on the merits of the dispute between the parties who were before a court of first instance.

Anandacoomaraswamy J. in ***Wickremasinghe vs. The Monetary Board of the Central Bank of Sri Lanka and another (1989) 2 Sri. L.R. 230*** considering judgements in several other cases[1] on this point has drawn attention to the decision of Basanayake CJ. (in ***Silverline Bus Co. Ltd vs. Kandy Omnibus Co. Ltd 58 NLR 193)***, who has held that proceedings in certiorari do not fall within the category of proceedings known as **suits or actions**.

The statutory ouster clauses and Constitutional ouster clauses have been differentiated when considering their application to the writ jurisdiction of the Court Appeal. The modern Sri Lankan jurisprudence on ouster clauses has been enriched with the precedent laid down by

[1] Government of Madras vs. Vasappa AIR 1965. Re Goonesinhe 44 NLR 75. Silverline Bus Co. Ltd. vs. Kandy Omnibus Co. Ltd. 58 NLR 193, 197, 203, 206. Kudakanpillai vs. Mudanayake 54 NLR 350. H.E. Tennakoon vs. P.K. Duraisamy 59 NLR 481. Colombo Apothecaries Ltd. vs. Wijesuriya 71 NLR 258. Maliban Biscuits Manufactories Ltd. vs. Subramaniam 74 NLR 76,78,79.

Mark Fernando J. in agreement with Dheeraratne J. Wadugodapitiya J. in ***Atapattu and others vs. People's Bank and others (1997) 1 Sri. L.R. 208.*** The Supreme Court held in that case;

> *"There is an apparent conflict between the ouster clause (which is pre-Constitution legislation), and Article 140. While generally a Constitutional provision, being the higher norm, must prevail over statutory provision, there are some constitutional provisions which enable pre-Constitution written law to continue to apply. The first is Article 16(1), which is inapplicable here, because that deals only with inconsistency with fundamental rights. The second is Article 168(1), which provides: 'Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the Constitution, shall, mutatls mutandis, and except as otherwise expressly provided in the Constitution, continue in force." However, this would make the ouster clause operative only "**except as otherwise expressly provided**" in Article 140."* (Emphasis added)
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> *"But there is one difference between those Articles and Article 140. Article 140 (unlike Article 126) is "subject to the provisions of the Constitution". Is that enough to reverse the position, so as to make article 140 subject to the written laws which Article 168(1) keeps in force? Apart from any other consideration, if it became necessary to decide which was to prevail - an ouster clause in an ordinary law or a Constitutional provision conferring writ jurisdiction on a Superior Court, "subject to the provisions of the Constitution" - **I would unhesitatingly hold that the latter prevails, because the presumption must always be in favour of a jurisdiction which enhances the protection of the Rule of Law, and against an ouster clause which tends to undermine it** (see also Jailabdeen v. Danina Umma (1962) 64 N.L.R. 419, 422). But no such presumption is needed, because it is clear that the phrase "subject to the provisions of the Constitution" was necessary to avoid conflicts between Article 140 and other Constitutional provisions - such as Article 80(3), 120, 124, 125, and 126(3), That phrase refers only to contrary provisions in the Constitution itself, **and does not extend to provisions of other written laws**, which are kept alive by Article 168(1), Where the Constitution contemplated that its provisions may be restricted by the provisions of **Article 138** which is subject to "any law".*
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> *"There is another reason why this particular ouster clause is of no avail in these appeals. It purports to protect from review only a determination by the Bank whether any premises should*

or should not be acquired; it does not purport to apply to distinct preliminary or incidental matters, such as the substitution of parties". (Emphasis added).

The Supreme Court has again upheld the dicta of the said ***Atapattu case*** (judgement by Mark Fernando J.) in ***B. Sirisena Cooray vs. Tissa Dias Bandaranayake and two others (1999) 1 Sri. L.R. 1 (at p. 12)*** (judgement by Dheeraratne J.) and ***Wijayapala Mendis vs. P. R. P. Perera and others (1999) 2 Sri. L.R. 110 (at p. 119)*** (judgement by Mark Fernando J.). The eloquent words of the erudite judges of the Supreme Court in those three cases have laid down a clear principle that the writ jurisdiction exercised by the Supreme Court and the writ jurisdiction exercised by the Court of Appeal under Article 140 is unfettered.

Denning LJ. in the case of ***R vs. Medical Appeal Tribunal ex. p. Gilmore [1957] 1 QB 574 (at p. 583)*** has declared that; "*I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words".* Atkin LJ. (in ***R vs. Electricity Commissioners ex. p. London Electricity Joint Committee Co. (1920) Ltd. [1924] 1 KB 177 (at p. 206)***) has said that he can see no difference in principle between certiorari and prohibition, except that the later maybe invoked at an earlier stage.

I need to draw my attention at this stage to the Court of Appeal judgement of Shiranee Tilakawardane J. (P/CA) (as her Ladyship then was) in ***Katugampola vs. Commissioner General of Excise and others (2003) 3 Sri. L.R. 207 (p.210)*** where the Court has held with reference to the above ***Atapattu case***;

"Therefore, ***the ouster clauses contained in ordinary legislation would not effectively restrict or preclude the jurisdiction granted by Article 140 of the Constitution.*** *Nevertheless, the restriction contained in Article 55 (5) and the Amended Article 61 A as these are ouster clauses stipulated in the Constitution itself, the powers of this Court would be restricted by these provisions contained in the Constitution. It was held in the case of* ***Atapattu v People's Bank 1997 1 Sri L.R. 208, Bandaranayake vs. Weeraratne 1981 1 Sri. L.R. 10 at 16****, that the ouster clauses contained in the Constitution would bar jurisdiction that has been granted within the Constitution and would therefore such ouster clause adverted to above would be a bar to the entertaining of writ applications to invoke the writ jurisdiction by this Court."* (Emphasis added).

Even in the presence of a constitutional ouster as per in Article 61A, Shiranee Tilakawardane J. (P/CA) has taken the view in ***Katugampola case*** that the Writ jurisdiction could be sought under circumstances where the person who made the impugned decision did not have any legal authority to make such a decision. 'In that sense it is not reasonable for any public power, even in the presence of a Constitutional preclusive clause, to get drifted without being reviewed, when required, by an appropriate Court of law at some stage during the process.' (See-the order of this Court-***Mohamed Ismail Wahabdeen vs. His Lordship Justice Jayantha Jayasuriya-Hon. Chief Justice and others, CA/WRIT/468/2021 decided on 08.08.2022***).

In the circumstances, I am of the view that the statutory ouster mentioned in section 29D of the Act cannot be used to undermine the judicial control of this Court against decision or a determination made under the said Act, if it is ex-facie apparent that such act or decision comes under any of the ground of judicial review. It cannot be assumed that the Board of Directors of the Bank has an unfettered discretion under the said Act to take decisions without proper legal authority and depriving access to justice through an application for a writ. Anyhow, I agree to a great extent that the said statutory ouster contained in Section 29D of the Act would be applicable to related actions filed in the District Court.

Contractual Relationship – availability of Writs.

The other main argument of the 1st Respondent is that the relationship between the Petitioner and the Bank was purely contractual as the Petitioner is the 'Debtor' and the 1st Respondent is the 'Creditor'. The 1st Respondent contends that the Courts have consistently held in the below mentioned cases that where the relationship between the parties was contractual, the remedy by way of writ jurisdiction will not be available;

> ***Podi Nona vs. Urban Council, Horana (1981) 2 Sri. L.R. 141; Jayaweera vs. Wijeratne (1985) 2 Sri. L.R. 413; Meragala vs. People's Bank and others (2006) 2 Sri. L.R. 101.***

I have already dealt with this question in ***Devendra Budalge Sudesh Lalitha Perera vs. Janatha Estates Development Board and others, CA/WRIT/004/2022 decided on 06.10.2022*** and ***W. G. Chamila vs. Urban Development Authority and others, CA/WRIT/215/2022 decided on 26.10.2022.*** In those cases, this Court held;

"The general perception is that the contractual and commercial obligations are enforceable by ordinary actions and not by judicial review. However, with the judicial activism within the realm of judicial review, our Courts as well as English courts have deviated in many occasions from the above general rule. As such many Judges have shown a tendency to favour the inclusion of contractual obligations in judicial review in order to disallow administrative power to be escaped from judicial control. The below mentioned passage of His Lordship Mahinda Samayawardane J. in ***Kumudini Madugalle vs. National Housing Development Authority, CA/Writ/540/2019 decided on 16.06.2020*** is very much apt here;

> "I must make clear this Judgement shall not be taken to mean that violations based on contracts by public bodies are totally outside writ jurisdiction. There is no such blanket prohibition. Each case shall be treated separately. De Smith in his treatise[2] at page 148 states "The existence of a possibility of a private law claim does not by itself however, make judicial review inappropriate."

Moreover, it has been decided in ***R vs. British Coal Corporation ex parte Vardy (1993) ICR 720*** that if the dismissal was in breach of statutory restrictions, a quashing order will lie to quash it. (Also see-***Administrative Law by Wade and Forsyth, (11th Edition) Oxford*** **at page 537**)."

I take the view that in line with the precedent laid down by several related judgements[3], the current law should be that this Court has the discretionary power to exercise its writ jurisdiction even on a question arising out of a relationship which is contractual in nature, if the impugned order of the public authority was in breach of statutory restrictions/provisions and also, if he has assumed a jurisdiction which he does not have or exceeded his jurisdiction; or if it discloses the decision of the public authority is ex-facie bad in law violating, among other, the Rules of Natural Justice including Rule of Law. Based upon all the circumstances of this case, it is necessary to examine whether there are any merits in the application of the Petitioner.

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[2] De Smith's Judicial Review (8th Edition)

[3] See the judgements referred to in the above Devendra Budalge case & W. G. Chamila case and also Harjani and another vs. Indian Overseas Bank and others (2005) 1 Sri. L.R. 167

The Argument – "No Default Made".

Now, I advert to the contention of the Petitioner who claims that there is "no default" made by the Petitioner as a result of rescheduling the original loan by the 1st Respondent. The Petitioner further claims that the publication of the auction notices marked, 'P8(a)' ['P10'] 'P12', and 'P19(a)' [P17b], are wrongful and arbitrary. The Petitioner states; "the purported act of publishing auction notices in the above circumstances, was a most reckless purported 'recovery tactic' adopted by the officers of the 1st Respondent Bank and the said actions of the 1st Respondent Bank has caused immense damage to the Petitioner Company".

If the Petitioner attempts to argue that re-scheduling a loan by the Bank erodes the recovery process of the loan, then certainly, such stand should be established by an appropriate legal norm.

It is observed that the auction which was scheduled to be held earlier has been postponed merely on the basis that the Petitioner had made intermittent payments in lieu of the total default amount. On several occasions, the Bank has delayed auctioning the subject property upon the re-scheduling the loans and on the assurance consistently given by the Petitioner to settle such loans in full.

The Bank has the power by virtue of Section 5(1)(o) of the Act to take or agree to take all such things and proceedings as may seem expedient for the purpose of upholding and supporting the credit of the bank, and to obtain and justify public confidence and to avert or minimize financial disturbances which might affect the bank. There is no much difference between the terms 'restructuring' and 'rescheduling' as both deals with an existing loan and the bank in such an event provides additional time or change the structure of the loan enabling the borrower to improve his cash flow. Hence, re-scheduling a loan, in my view, is always for the benefit of the borrower and for the best interest of the bank to recover the money lent to the borrower. Any kind of interpretation that may be given contrary to this norm cannot be accepted according to the law relating to Banking.

The 1st Respondent asserts that the Petitioner has not made any application to this Court to restrain the notices of sale issued on previous occasions complaining that the Bank was not empowered to auction the subject property in terms of the same Resolution, marked 'P5'.

The argument raised by the Petitioner is that the Resolution marked 'P5' will not be tenable in law in view of the submissions made in reference to the aforesaid notices of sale. The view point of the Petitioner in this regard is that the said notices of sale other than the one issued immediately after 'P5', cannot be sustained based on the same Resolution 'P5' and the Bank is not empowered to proceed with the subsequent notices of sale without a fresh Resolution being passed by the Board of Directors of the Bank. The provisions contained in the Resolution 'P5', to my mind, are very clear on this point, as the said Resolution recognizes the norm of accepting payments even after passing the Resolution. The words; "less payments (if any) since received" embodied in the said Resolution authorizes the Bank to proceed with the same Resolution even when the Petitioner tenders any unpaid portion of the loan before any date fixed for the sale. But this situation may vary subject to the conditions of an agreement rescheduling the loan and in the existence of an eminent error in the recovery process. The Petitioner of the instant application in the rescheduled agreements has categorically given consent for the Bank to proceed with the same Resolution 'P5'.

The Section 29H(1) of the Act stipulates the duty of the Board not to proceed with the sale if the amount of the whole of the unpaid portion of the loan together with all interest is tendered to the Board any time before the date fixed for the sale. However, when the borrower tenders the amount of the instalment or equated payment or other payment in respect of which default has been made, at any time before the date fixed for the sale, the Bank has no mandatory duty in terms of Section 29H(2) of the Act to suspend the auction but it's only the discretion of the Board of Directors to do so. In this recovery process under Section 29M of the Act, the borrower is privileged to be paid back any payment of excess.

Thus, I cannot agree with the Petitioner's argument that 'no default' has been made by the Petitioner in order to execute the notice of sale, marked 'P19(a)'.

Novation.

The other facet of the Petitioner's contention is that there has been novation of the original loan (i.e., of Rs. 225,000,000.00) by subsequent agreements between the Petitioner and the Bank and thus, the original loan is now comprised in two re-scheduled loans consisting of a capital loan and an interest loan as per the offer letter, marked 'P6'. As opposed to such

assertions, the 1st Respondent submits that the agreement marked 'P6', has been entered into as a consequence to the acknowledgement by the Petitioner that there was an outstanding capital (Rs.225,000,000.00) and an outstanding interest (Rs.32,100,000.00 and Rs.408,000,000.00) on one loan (Rs.225,000,000.00).

On a careful perusal of the contents of the said 'P6' and 'X12', I am compelled to accept the submissions made on behalf of the 1st Respondent that no two new loans have been granted by the Bank but the Petitioner has only been granted an extension of time to pay the outstanding capital together with the interest. The Petitioner by way of the said re-scheduled offer, marked 'P6', has expressly conceded that in an event of any three instalments and/or the last instalment of the re-scheduled loans are in arrears, the Bank is entitled to enforce the Board Resolution, marked 'P5'. This clearly demonstrates that none of the elements to espouse 'novation' has been fulfilled as required in ***'The Law of Contracts' by C. G. Weeramantry, Volume II, para. 751-753,*** the legal literature relied on by both parties in this case on the point. It is important to note that the Petitioner is not challenging either the said re-scheduled offer marked 'P6' ('X12') or the Board Resolution marked 'P5'.

Proportionality.

The Petitioner states in the event the subject property is sold by auction, the Petitioner's business will come to a grinding halt and in turn he would have to retrench the employees attached to its business. Petitioner illustrates that a total sum of Rs.36,805,179.10 relating to the period from December 2020 to February 2022 has been paid and again on 23.06.2022 a sum of Rs.6,500,000.00 has been paid. There is no necessity for this Court to assess at this stage the accuracy of the above figures but the material fact to be taken in to consideration is that the Petitioner acknowledging his liability has repaid certain portions of the loan. The Petitioner further states; "the inability to pay the installments due to and owing to the Bank has been occasioned by circumstances beyond his control and as such it offends the **principles of proportionality** in the event the said resolution which is totally without jurisdiction is enforced to sell its property by public auction.". (Emphasis added)

Wade and Forsyth (in ***'Administrative Law', 11th Edition, Oxford, at pp. 306-307***) have identified the 'structured proportionality' test emerged from several judgements in Britain for use when

assessing whether a decision limiting a right protected under the Human Rights Act 1998 should be upheld or not. In European Union law, the orthodox approach is first a test of suitability[4] and then a test of necessity[5]. Further, it elaborates that 'it should also not be supposed that proportionality is irrelevant to the unqualified Articles of the Convention (that lack a limitations clause)'. Under the 'structured' test, the decision maker, among other, must address the question whether a fair balance has been struck between the rights of the individual and the interests of the community.

I do not think it possible or desirable to attempt to define what facts or circumstances might have caused the Petitioner not to settle the loans. The question arises is whether the Petitioner is entitled to raise a claim in this case under the doctrine of proportionality when the transactions and the relationship with the Bank are completely in the contractual nature and also when the Petitioner has expressly and explicitly conceded for the repercussions in an event of default. It is not only by the agreement set out in 'P6' but by the provisions in the agreement entered in to between the Petitioner and the Bank on 17.11.2020, marked 'X12', in my view, the Petitioners is precluded from taking refuge under the 'principle of proportionality' which has been emerged in public law arena prescribing that the administrative measures must not be more drastic than it is necessary for attaining the desired result.

Central Bank Circular.

The Petitioner points out that the Central Bank Circular No.05 of 2021, Circular No. 08 of 2021 and Circular No. 02 of 2022 offer concessions to business and individuals engaged in various economic sectors who were subject to COVID-19 moratoriums. The Circular No. 02 of 2022 came in to operation after filling this application by the Petitioner and however, the licensed banks are liable to suspend recovery action only in respect of credit facilities that have been classified as non-performing on or after 01.01.2020. Similar provisions with different dates are included in the other two circulars as well. It is noted that the Petitioner upon the non-settlement of the loan that was granted in September 2018, has made the initial request to the Bank on 08.01.2019 by 'P5' to reschedule the loan. Several facilities at numerous

[4] (is the measure reasonably likely to achieve its objectives)
[5] (weighing the adverse consequences against the importance of the objectives of the measure)

occasions have been granted to the Petitioners by the Bank. Thus, I agree with the 1st Respondent's contention that those Circulars will have no bearing in determining the instant application. Anyhow, there is no evidence tendered at all by the Petitioner for this Court to deliberate whether the Petitioner was subject to COVID-19 moratorium which is one of the main preconditions of such circulars.

Conclusion.

As mentioned earlier in this judgement, the Petitioner seeks only for a writ of Prohibition restraining the 1st and 2nd Respondents from taking steps to auction the subject property. The Petitioner to become successful in his plea in the instant application should reveal that the execution of the decision taken by those Respondents to auction the property exceed their jurisdiction. Similarly, it is required to demonstrate that such decision should be irrational, guilty of illegality or vitiated by the principles of Natural Justice.

In light of my findings in this judgement, I take the view that the Petitioner, prima facie, has failed to establish that it is entitled for a writ of Prohibition as prayed for in the prayer of the Petition.

For the reasons set out above, I am not inclined to accept the contentions of the Petitioner that the two agreements contained in 'P3' and 'P6' are distinct loans and that in the case of default there must be separate Resolutions; and as such the 1st Respondent Bank cannot enforce the said Resolution in terms of Clause 6.9 of 'P6' for the reasons that it is contrary to Section 29D and Section 29K of the Act.

As per the crucial document 'P6' or the agreement, marked 'X12', in which the Petitioner has waived his rights by conceding for the Respondents to proceed with the auction based on the same Resolution, marked 'P5'. The Petitioner has not challenged the authenticity of both documents and also has not denied his signature etc., at any point of time. However, the Petitioner has failed to establish illegality to render the above agreements null and void. When analyzing the reliefs prayed for by the Petitioners, the Petitioner's conduct, particularly the acquiescence during the recovery process should be taken into consideration.

In ***Jayaweera vs. Assistant Commissioner of Agrarian Services Ratnapura and Another (1996) 2 Sri. L.R. 70,*** in which F.N.D. Jayasuriya J. held***;***

> *"A Petitioner who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has a discretion to deny him having regard to his conduct, delay, laches, waiver, submission to jurisdiction- are all valid impediments which stand against the grant of relief"*

It is ex-facie not apparent on the application of the Petitioner that the Respondents who made the decision to proceed with the sale of the subject property have acted ultra vires or acted contrary to the rules of Natural Justice or have not complied with the statutory provisions. In the circumstances there is no necessity to examine the other objections raised by the 1st Respondent on 'laches' and 'suppression' & 'misrepresentation'.

Thus, based on the arguability principles that should be adopted in respect of matters relating to issuance of notice in a judicial review application, I arrive at the conclusion that the Petitioner has failed to submit a prima facie case which warrants this Court to issue formal notice of this application to the Respondents.

Therefore, I proceed to refuse this application.

Application is dismissed. I order no costs.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal