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

In the matter of an application for mandates in the nature of Writs of Certiorari, Prohibition and Mandamus under and in terms of Article 140 of the Constitution of the Democratic, Socialist Republic of Sri Lanka.

CA/WRIT/290/2017

1. Mohomed Cassim Haleem
   No. 10,
   Sri Vajirashrama Mawatha,
   Colombo 10.

2. M. Azath S. Sally
   No. 61A,
   Flower Road,
   Colombo 7.

Petitioners

Vs.

1. Seylan Bank PLC
   Seylan Towers,
   No. 90, Galle Road,
   Colombo 03.

2. W. M. Ravi S. Dias
   Chairman,
   Seylan Bank PLC,
   Seylan Towers,
   No. 90, Galle Road,
   Colombo 03.

3. Kapila P. Ariyaratne
   Director and Chief Executive Officer,
   Seylan Bank PLC,
   Seylan Towers,
   No. 90, Galle Road,
   Colombo 03.

4. Ishara C. Nanayakkara
   Deputy Chairman

5. Ms. M. Coralie Pietersz

6. Rear Admiral B. Ananda J. G. Peiris

7. Samantha P. S. Ranathunga

8. W. D. Kapila Jayawardena

9. P. L. S. Kumar Perera

10. S. Viran Corea

11. Anushka S. Wijesinha

12. Sandiya K Salgado

    Directors of Seylan Bank PLC,
    Seylan Bank PLC,
    Seylan Towers,
    No. 90, Galle Road,
    Colombo 03.

13. H. W. Gunasekara
    Manager- Property Unit,
    Seylan Bank PLC,
    Seylan Towers,
    No. 90, Galle Road,
    Colombo 03.

14. Eranga Lankathilake
    Asst. General Manager – Recoveries,
    Seylan Bank PLC,
    Seylan Towers,
    No. 90, Galle Road,
    Colombo 03.

15. M. H. M. Raheem
    142, Maliban Street,
    Colombo 11.

Respondents

Before **:** Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel **:** Faisz Musthapha PC for the 1st Petitioner.

Razik Zarook PC for the 2nd Petitioner.

Romesh de Silva PC with Sugath Caldera for the 1st to 16th Respondents.

Argued on **:** 30.03.2022, 08.06.2022, 25.07.2022, 26.09.2022 and 06.10.2022

Written Submissions: Petitioner -13.06.2018

1st to 14th Respondents-28.08.2019 and 30.11.2022

Decided on **:** 08.02.2023

Sobhitha Rajakaruna J.

The subject property ('Property') of this Application was pledged by way of several mortgage bonds to secure loans as described in the Petition. The 1st Petitioner who is the borrower has defaulted the settlement of loans and accordingly, the 1st Respondent-Seylan Bank PLC ('Bank') after passing a resolution, in terms of the provisions of the Recovery of Loans by Banks (Special Provisions) Act No. 04 of 1990 ('Act'), auctioned the said Property. As there were no bidders at the auction, the Bank purchased the Property and the relevant Certificate of Sale bearing No. 648 dated 26.01.2011 is marked as 'P6'. The 1st Petitioner by his letter dated 27.07.2015, marked 'P9', informed the Bank that he had negotiated with the 2nd Petitioner to purchase the Property for a sum of Rs.170,000,000.00.

By letter dated 01.11.2015, marked 'P10', the Bank has written to the 2nd Petitioner expressing its agreement to sell the Property to him for a consideration of Rs.180,000,000.00. As per the said 'P10', a sum of Rs.25,000,000.00 was required to be paid by the 2nd Petitioner on or before 16.11.2016 and the balance consideration was to be paid within two weeks of the Bank informing him that the vacant possession of the Property has been obtained. It is evident that the Bank has accepted a sum of Rs.25,000,000.00 as a down payment in respect of the above resale of the Property. However, there is no evidence to show that the balance payment has been made to the Bank.

The 1st Petitioner on 08.08.2017 wrote ('P12') to the Bank demanding the transfer of the Property to the 1st Petitioner or to his nominee (2nd Petitioner) by accepting the balance payment of Rs.155,000,000.00. Anyhow, the Bank by letter dated 17.08.2017, marked 'P15', has inquired from the 2nd Petitioner as to whom the above sum of Rs. 25,000,000.00 should be returned. Perhaps that may be due to the inability of obtaining the vacant possession of the Property through the Fiscal.

The Petitioners of the instant Application, meantime, filed the writ application bearing No. 269/2017 (Vide-'P13') in this Court on 14.08.2017, seeking, inter alia, a writ of Mandamus compelling the Bank to abide by the terms of the contract reflected in above

letter, marked 'P10', which has been identified by the Petitioners as a statutory obligation under Section 17 of the Act. However, before the said application was supported, the Bank has apparently resold the property to the 15th Respondent by way of a Deed of Transfer ('P20') attested on 17.08.2017. Subsequently, the Petitioners withdrew the said application (Vide-'P21') and filed the instant Application seeking, inter alia, for a writ of Certiorari quashing the decision of the 1st to 3rd and 6th to 10th Respondents to sell the property to the 15th Respondent and to quash the said Deed of Transfer 'P20'.

The Petitioners' contention is that the above resale of the Property to the 15th Respondent is illegal, null & void and of no force or avail in law. The crux of the argument relied on by the Petitioners is based on a legitimate expectation that the Bank would take steps to cancel the Certificate of Sale in terms of Section 17 of the Act by accepting the balance payment of Rs.155,000,000.00.

The Section 17 of the Act;

> "Where the property sold has been purchased on behalf of the bank, the Board may at any time before it resells that property, cancel the sale by an endorsement to that effect on a certified copy of the certificate of sale, upon the borrower or any person on his behalf paying the amount due in respect of the loan for which the property was sold (including the cost of seizure and sale) and interest on the aggregate sum at a rate not exceeding the prescribed rate per annum. Such an endorsement shall, upon registration in the office of the Registrar of lands, revest the said property in the borrower as though the sale under this Act has never been made."

The Bank by letter marked 'P10' (dated 01.11.2016) informed the 2nd Petitioner referring to a meeting it had with the Chairman of the Bank to pay a sum of Rs 25,000,000.00 on or before 16.11.2016. Despite such deadline, the cheque drawn for the same amount tendered to Bank by the 2nd Petitioner has been realized only on 06.01.2017. The crucial condition in 'P10' was to keep the 2nd Petitioner informed only when the vacant possession of the property would be available for the purpose of settling the balance payment by the 2nd Petitioner. One may assume that the Bank has used this condition as a triumph to twist the unique elements of the above Section 17 in the backdrop of the discretion prescribed in the said Section. The Bank has possibly overlooked the request made by the 1st Petitioner by his letter dated 08.08.2017, marked 'P12, to transfer the property back to him or to the

2nd Petitioner upon the payment of the balance amount, irrespective of the fact whether the Property is in vacant possession or not.

It is pertinent to note that the Bank took steps to get the aforesaid Deed of Transfer 'P20' attested (on 17.08.2017) in favour of the 15th Respondent almost after 8 months from the initial payment of advance by the 2nd Petitioner. The date of the Petition in CA/Writ/269/2017 as it appears on its caption is 14.08.2017 ('P13') and it was a date three days before the above resale of the Property. There is no proof tendered to Court that the said CA/Writ/269/2017 has been mentioned in open Court any time before 17.08.2017 or notice of the said application has been served on the Bank before that date.

As mentioned above the primary relief sought by the Petitioner in the said CA/Writ/269/2017 was for a writ of Mandamus compelling the Bank to abide by the terms reflected in the letter, marked 'P10', by which the Bank extended its agreement to sell the Property to the 2nd Petitioner based on the conditions therein. It is important to observe that in the instant Application the Petitioners are seeking for a writ of Mandamus for a different purpose and that is to direct the Bank to act in terms of Section 17 of the Act and cancel the Certificate of Sale, marked 'P6'. This is in addition to the other relief in the instant Application which is for a writ of Certiorari quashing the decision to re-sell the Property to the 15th Respondent.

It needs to be stressed that granting of above reliefs can be considered only based on the fundamental principles applicable in exercising the writ jurisdiction of this Court. At the outset, the question that comes into my mind is whether this Court has the jurisdiction to review any decision of the Bank after lending money to a borrower. On perusal of the previous judgements, it implies that this Court has taken an approach to hear and determine applications filed challenging decisions taken by banks during the recovery process of loans and particularly, the applications seeking to quash the Resolutions passed by the respective board of directors of the banks. The reason adopted by Court for such approach appears to be that respective impugned decisions have a statutory flavour enriched by several provisions of the said Act.

After drawing out a reasonable explanation to my above question, it becomes necessary to delineate the boundaries in exercising the writ jurisdiction upon the decisions taken during the recovery process. The issue that arises in this review Application revolves

around Section 17 of the Act. Hence, the secondary question that I need to consider is whether the jurisdiction of the review court will be exhausted beyond the point of issuing the Certificate of Sale by banks.

When you sift the provisions of the said Section 17, it envisages that the Board of Directors of the Bank is empowered to cancel a Certificate of Sale under such provisions only at any time before the resale. Hence, the said Section 17 comes into operation only during the period from the date of the Certificate of Sale and until the date of resale of the property by the Bank. Moreover, a considerable component of discretion has been bestowed on the Bank with the word "may" embodied in the said Section to cancel the Certificate of Sale and accordingly, the Bank is duty bound to exercise such discretion lawfully.

The Petitioners referring to a passage of '***Administrative Law'*** by Wade and Forsyth, 11th Edition, p. 195 submits that whether a power, expressed in merely permissive language, is accompanied by a duty to exercise it in certain circumstances require consideration of the whole statutory context in which the power is given. Anyhow, the argument put forward by the 1st to 14th Respondents ('Respondents') on the applicability of Section 17 to the instant Application is vital. The Respondents assert that due to the component of discretion bestowed upon the Bank in the said Section 17, no writ of Mandamus can be issued as no public duty involves during the period from the date of the Certificate of Sale and the date of the resale of the Property. I am inclined to agree with the said argument as I am convinced that there is no public duty, which is an essential ingredient to seek for a writ of Mandamus, vested on the Bank under the said Section 17 based on the way in which the provisions in the said Section have been formulated.

The Respondents on the point of view that the Petition of the Petitioners does not disclose any statutory duty breached by the Bank has cited the cases of ***Galle Flour Milling (Pvt) Limited vs. Board of Investment of Sri Lanka and another (2002) BLR 10; Jayawardena vs. People's Bank (2002) 3 Sri. L.R. 17; U. L. Karunawathie vs. People's Bank and others, CA/Writ/863/10 decided on 12.05.2015; Chandradasa vs. Wijeratne (1982) 1 Sri. L.R. 412; Jayaweera vs. Wijeratne (1985) 2 Sri. L.R. 413; Siva Kumar vs. Director General of Samurdhi Authority of Sri Lanka and another (2007) 1 Sri. L.R. 96; Gawarammana vs. The Tea Research Board and others (2003) 3 Sri. L.R. 120 and Harjani and others vs. Indian Overseas Bank (2005) 1 Sri. L.R. 167.***

However, what needs consideration of this Court is whether a writ of Mandamus can be issued on the consequences taken place based on the purported agreement, marked 'P10' and not by considering the whole statutory context in the Act or in its Section 17. The Petitioners' case is clung on the agreement reflected in 'P10', which is a purported agreement between the 2nd Petitioner and the Bank. The Respondents strenuously argue that this Court cannot exercise its writ jurisdiction to enforce agreements between private parties. In resolving this issue, I need to primarily examine whether the terms or conditions mentioned in 'P10' have a statutory flavour.

The approach taken by this Court in several previous cases is that this Court has the discretionary power to exercise its writ jurisdiction even on a question arising out of a contract of employment, if the respective order is in breach of statutory restrictions/provisions and also if such public body has taken a decision assuming a jurisdiction which he does not have or exceeding his jurisdiction by violating a statutory requirement which eventually comes under any of the established grounds of judicial review.

The Petitioners have decided to withdraw the earlier application bearing case No. CA/Writ/269/2017 and filed the instant Application changing the mode of reliefs for the reasons best known to them. This Court is compelled to determine this Application based on the issues raised by the Petitioners in the instant Application as it was existing at the date of the filing of this Application. It is quite clear that the remedy opted for by the Petitioners to get the said purported agreement 'P10' enforced is this writ Application and not a process of moving for a decree or an order of a District Court commanding the Bank to pay money, to deliver property etc. At this stage, the contents of the letter issued by the Bank, marked 'P15', which illustrates the intention of the Bank to refund the advance payment of Rs.25,000,000.00 is also required to be considered.

The decision to cancel the Certificate of Sale under Section 17 ofcourse has a statutory flavour but, in view of the foregoing, I take the view that this Court cannot extend its review jurisdiction beyond the stage of resale as there is no further statutory duty cast upon the Bank towards the borrower after the resale. The reason for me to arrive at such conclusion is based on the scheme of the Act and on the plain reading of the Section. In this regard, I have borne in mind the fact that the 1st Respondent-Seylan Bank PLC is not a State Bank which is incorporated by a separate Act of Parliament.

If you go on the strict interpretation of Section 17, it implies that a borrower or any person on his behalf may apply to a Review Court in respect of transgressions of the bank relating to the cancellation of the Certificate of Sale. Anyhow a non-cancellation of a Certificate of Sale can be challenged only if the total amount due in respect of the loan including all interests are settled. In order to settle such dues mentioned in Section 17, the borrower and the bank are at liberty to enter into any type of agreement and it cannot be assumed that such agreement will also be amenable to writ jurisdiction. Hence, I take the view that this Court cannot intervene to enforce the said purported agreement 'P10'.

Having considered the relief sought by the Petitioners for a writ of Mandamus, now I need to deal with the Petitioners' claim for a writ of Certiorari.

Apart from the provisions in the said Section 17, the Petitioners rely on Section 19 of the Act. Certain limitation has been imposed by Section 19 of the Act debarring the bank to hold the mortgaged property for a longer period than it is necessary to enable the bank to re-sell the property. I cannot assume that the provisions of Section 19 have any bearing on the instant Application as the Petitioners' main claim is on the legitimate expectation arising from the purported agreement 'P10'.

The Petitioners further argue that the Certiorari that has been sought is superfluous as the said Deed of Transfer 'P20' is void. In order to substantiate the said argument, the Petitioners have referred to the dicta in the judgement of Lord Denning in ***MacFoy vs. United Africa Co. Ltd. (1961) 3 A.E.R. 1169*** which has been applied in the Sri Lankan case of ***Rajakulendran vs. Wijesundera (Sriskantha Vol. 1 Part 1 page 164*)**. The following passage at page 168 of the said ***Rajakulendran*** case has been highlighted;

> *"If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. (at page 1172)"*

If I am to apply the dicta of Lord Denning in ***MacFoy*** case, there should be a decision or act taken totally in terms of the said Act during the process of recovering the loans by the Bank. I have explained above the demarcations for Judicial Review in respect of the decisions taken during the recovery process under the Act by the Bank which is considered

as a Private Bank in the country. The assertions that the purported agreement 'P10' falls within the ambit of a transaction in a contractual nature between the 2nd Petitioner and the Bank eventually vitiate the above argument of the Petitioner raised in line with the ***MacFoy*** case. For the reasons setout above, not only the Petitioners' claim for a writ of Certiorari to quash the decision to sell the property but also the relief sought to quash the notarially executed Deed of Transfer 'P20' by way of a writ of certiorari fails. The Petitioners are not acquainted with a blatant miscarriage of justice warranting this Court to consider the nullification of the said Deed of Transfer 'P20'.

In addition to my above findings, I wish to refer to the rationale adopted by Shirani A. Bandaranayaka J. (as her Ladyship then was) in her dissenting judgement in ***Ramachandran and another vs. Hatton National Bank and others (2006) 1 Sri. L.R. 393*** where she has given weight on a liberal and broader interpretation to the Act in view of recovering loans. She has observed that;

> *"Considering the purpose of the enactment of Act, No. 4 of 1990, it is obvious as pointed out earlier, that the intention of the legislature was to provide for the recovery of loans granted by the Banks. Therefore the Act makes provision for the sole purpose of recovery of the loans they have already granted. The loans were granted by the Bank, on securities provided by the debtor to the satisfaction of the creditor, the lending agency." (at page 413)*

In ***Tai Hing Cotton Mill Ltd. vs. Liu Chong Hing Bank Ltd. (1986) AC 426; (1985) 2 All ER 947,*** the Privy Council observed**;**

> *"The argument for the banks is that the obligations of care placed on the banks in the management of a customer's account which the courts have recognized have become with the development of banking business so burdensome that they should be met by a reciprocal increase of responsibility imposed on the customer. One can fully understand that banks must today look for protection. So be it. They can increase the severity of their terms of business, and they can use their influence, as they have in the past, to seek to persuade the legislature that they should be granted by statute further protection. But it does not follow that because they may need protection as their business expands, the necessary incidents of their relationship with their customer must also change."*

Thus, I take the view that even during the recovery process of loans under the said Act, all the transactions between the borrower and the bank cannot be designated with a statutory flavour. Borrowing money from banks is a complete contractual relationship between the borrower and the bank and the statutory provisions in the said Act have been provided for the recovery of loans granted by the banks for the economic development of the country and for matters connected therein or incidental thereto (See-the long title of the Act). Therefore, it is important to sever the statutory duties of the licensed commercial banks among many other transactions of such banks during the process of recovery of loans. It is stated in '***Banks and Banking Law in Sri Lanka'*** (by W. S. Weerasuriya, 2006, Institute of Bankers Sri Lanka, p. 203); 'While no doubt there is a close relationship between the banking practice and banking law, bankers must clearly appreciate that banking practice is not invariably banking law'.

In light of the foregoing, I hold that Petitioners are not entitled to any of the reliefs prayed for in the prayer of the Petition. Thus, I proceed to dismiss the Application of the Petitioner.

Application is dismissed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal