

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST 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.*

CA/WRIT/0023/23

1. Vithan Harischandralage Premasiri
2. Vithan Harischandralage Sampath Priyanga

Both of;

No.15/5, Nuwarawatta, Hingurakgoda.

Petitioners

1. National Development Bank PLC.
2. Manager Centralized (Recoveries)
National Development Bank PLC.

Both of;

No.40, Nawam Mawatha,
Colombo 02.

3. Manager
National Development Bank,
Hingurakgoda Branch,
Hingurakgoda.

4. Thrivanka & Senanayake Auctioneers
No.200, Hulftsdorp Street,
Colombo 12.
5. H. S. K. J. Bandara
Divisional Secretary,
Divisional Secretaries Officer,
Hingurakgoda.
6. K. D. Bandula Jayasinghe
Commissioner General of Lands,
Land Commissioner General's
Department,
"Mihikatha Medura",
Land Secretariat, No.1200/6,
Rajamalwatta Road,
Battaramulla.
7. Registrar of Lands
Land Registry,
Polonnaruwa.
8. Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondents

Before : Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel : Saliya Pieris PC with Geeth Karunaratne and S. Jayawardena for the Petitioners.

Rishan Vidanagamage instructed by M. Wickramanayake for the 1st – 4th Respondents.

Vikum de Abrew ASG with S. Soysa and M. Fernando for the 8th Respondent.

Decided on : 26.01.2023

Sobhitha Rajakaruna J.

The Petitioners in this Application is primarily seeking for a writ of Certiorari quashing the Resolution of the 1st Respondent Bank ('Bank') resolving to auction the Petitioners' property ('Property') under the provisions of Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 ('Act'). What needs consideration by this Court at this threshold stage is whether the Petitioners have made out a prima facie case.

The Petitioners contend that the Bank has resolved to auction the Property in contravention of the Cabinet decisions. It is observed according to the documents made available to Court that no specific direction or an arrangement has been made by the Cabinet by which the Petitioners would be benefitted.

The Petitioners referring to the 7th condition in the Grant marked 'P1' and also to the provisions of Section 42 of the Land Development Ordinance ('LDO') asserts that no disposition of the holding or any portion thereof shall be made except with the prior permission in writing of the Divisional Secretary and thereby he submits that the Bank has no authority to auction the property under Section 41A of the LDO. It is observed that the word 'disposition' is defined in Section 2 of the LDO. I take the view that the intention of the Legislature to impose a condition in regard to disposition is merely to

bind the owner of the holding by such conditions and not by any licenced commercial bank stipulated in Section 41A of the LDO.

The Petitioners' further contention is that in terms of Section 37 of the LDO the conditions included in any grant shall run with the land and shall bind the original and all owners thereof and all persons whomsoever who acquire any title thereto. I take the view that the Petitioners cannot maintain this argument when considering the scheme of the LDO. The Section 19 of the principal enactment of LDO has been amended by virtue of the Land Development (Amendment) Act No.11 of 2022. Accordingly, subject to other provisions of the said Section, the approval of the Divisional Secretary also shall not be required when mortgaging such holding to a licenced commercial bank, including the National Development Bank.

Although this amendment was introduced after the stage of mortgaging the Land, it clearly implies the policy and its enactments of the legislature in reference to the mortgaged property which comes under Section 41A of the LDO.

It is clearly stipulated in Section 41A of the LDO that nothing in the preceding provisions of the relevant chapter of the LDO shall be deemed to prohibit the seizure and sale by a licenced commercial bank including the 1st Respondent Bank.

Although this Court has the prerogative powers to issue writs, we should be always guided by the provisions of law. There seems to be no provision in the Act or in the LDO to prevent the Bank proceeding with the subject resolution passed under provisions of the Act. This Court has constantly decided that it is not possible or not desirable to attempt to define what facts or circumstances might have caused the defaulters to not settle the loans.

Anyhow, I need to consider whether the Petitioners are 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 Petitioners have expressly and explicitly conceded for the repercussions in an event of default.

As per the provisions of the Agreement entered into by the Petitioners and the Bank, in my view, the Petitioners are precluded from taking refuge under the 'principle of

proportionality' or any other ground which has not been established in this case and also not emerged in public law arena. (See-*Blue Ocean Reality (Private) Limited vs. People's Bank and others, CA/WRIT/228/2022 decided on 28.10.2022*)

This Court has constantly taken the view that in an application for judicial review, the stage of notice demands that the Court should consider whether the case is suitable for full investigation at a hearing at which all parties have been given notice. Thus, I hold that the test for prima facie case has not been fulfilled by the Petitioners of the instant Application and accordingly, the Application for formal notice on the Respondents is refused.

Application is dismissed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal