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

In the matter of an Application for Writs of *Certiotari* & *Prohibition* under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No.

CA/WRT/375/2019

Withanage Don Buddhadasa
"Pubudu"
Walgama,
Bandaragama.

Petitioner

1. Bank of Ceylon,
   BOC Square,
   Bank of Ceylon Mawatha,
   Colombo 1

2. Thusitha Karunaratne,
   No. 50/3,
   Vihara Mawatha, Kolonnawa.

3. Senuth Bajaj Traders (Pvt) Ltd,
   93E, Opposite School,
   Walgama, Bandarawela.

4. Withanage Dulanji,
   93E, Opposite School,
   Walgama, Bandarawela.

5. Dombagaha Wattage Samantha
   Thushara Jayasiri,
   93E, Opposite School,
   Walgama, Bandarawela..

Respondents

Before: **M. T. MOHAMMED LAFFAR, J.**
S. U. B. KARALLIYADDE, J.

Counsel: Harith De Mel with Sahiru Jasinghe, instructed by Ms. Nilu Welgama for the Petitioner.

Ms. A. Gajadeera, S.C. instructed by S. T. K. Hewage for the 1st Respondent.

Argued on: 03.10.2022

Written Submissions on: Not filed by the Petitioner before the stipulated date.
Not filed by the Respondent before the stipulated date.

Decided on: 31.01.2022

MOHAMMED LAFFAR, J.

The Petitioner who was the owner of the premises in suit, subject to his life interest, had gifted the same to his daughter who is the 4th Respondent in this Application. As per the document marked 1R4, the Petitioner is the Chairman/Director and the 4th and 5th Respondents are the Directors of the 3rd Respondent Company. The 5th Respondent is the son-in-law of the Petitioner.

On 26-05-2010, an Application was made to the 1st Respondent Bank for a Bank Guarantee for a sum of Rs. 20,79,000/- by the 3rd Respondent, in favour of David Peiris Motor Company on the security of the property in suit. Accordingly, the Letter of Guarantee was duly issued by the 1st Respondent Bank. The Mortgage Bond bearing No. 1241 executed in respect of this transaction is marked and produced as P9A. On 14-07-2010, an Application for a credit facility for a sum of Rs. 7,921,000/- was submitted by the 3rd Respondent Company on the security of the property in question. The loan facility was granted by the 1st Respondent Bank, and accordingly, the Mortgage Bond bearing No. 1240 marked as 1R5 was executed. On 18-11-2011, having mortgaged the same property, the

Petitioner and the 4th Respondent obtained a housing loan of Rs. 3,000,000/- from the 1st Respondent Bank. The Mortgage Bond bearing No. 2333 executed in this regard is marked as 1R9.

On 09-09-2015, under Section 19 of the Bank of Ceylon Ordinance, a Resolution had been passed to sell the mortgaged property in order to recover the dues from the 3rd Respondent. The 3rd Respondent had challenged the said Resolution before the Court of Appeal in case No. CA/Writ/466/2015. Thereafter, the said Writ Application was withdrawn on the basis that the matter would be settled among the parties.

Since the 3rd Respondent failed to comply with the terms of settlement entered in case No. CA/Writ/466/2015, the 1st Respondent Bank passed a Resolution on 12-04-2019 to sell the mortgaged property in a public auction which is marked as **1R16**. The Notice of Resolution to auction the subject matter published in the Newspapers in terms of Section 21 of the said Ordinance is marked as **P26,** the Notice of sale published in the Government Gazette dated 16-08-2019 under Section 22 of the said Ordinance is marked as **P29** and the Notice of auction is marked as **P30**. Being aggrieved by the said Resolution passed by the 1st Respondent Bank, in the instant Application, the Petitioner is seeking *inter-alia* the following reliefs;

1. A Writ of Prohibition restraining the 1st and 2nd Respondents from taking any steps in terms of P26.
2. A Writ of Prohibition restraining the 1st and 2nd Respondents from taking any steps in terms of the publications depicted in P29 and P30.
3. A Writ of Certiorari quashing the publications marked P26, P29 and P30.
4. A Writ of Certiorari quashing the Resolution dated 22-05-2019 depicted in P26.
5. A Writ of Prohibition restraining the 1st Respondent from selling by public auction the properties mortgaged to the 1st Respondent by Mortgage Bonds 1240 (1R5) and 1241 (P9a) both dated 24-05-2010 attested by E.K.H.M. Karunathilake , Notary Public acting under the provisions of the Bank of Ceylon Ordinance.

The contention of the learned Counsel for the Petitioner is that the resolution dated 22-05-2019 and the steps taken accordingly under Section 21 of the Bank of Ceylon Act are illegal, *ultra-vires*, unreasonable and unlawful on the grounds that;

1. The Petitioner has never been involved with the business of the 3rd Respondent Company at any time and is therefore, a 3rd party in respect of the facilities secured by Mortgage Bonds 1241 and 1240. As such, the *parate* execution is not permitted against the 3rd party.

2. The impugned Resolution is bad in law on the footing that two borrowers (facilities) have unlawfully been amalgamated.
3. The amount due from the 3rd Respondent is less than 03 Million, and therefore, the *parate* execution is not permitted in terms of the provisions of the Recovery of Loans by Banks (Special Provisions) Act, No. 1 of 2011.
4. The Notice of Resolution has not been communicated to the Petitioner under Section 21 of the Bank of Ceylon Ordinance.

First of all, I shall deal with the preliminary legal objections raised by the learned State Counsel.

1. It is contended that the instant Writ Application cannot be maintained as the previous Writ Application, namely CA/Writ/466/2015 was withdrawn without reserving the right to file a fresh Application. It is pertinent to be noted that the Writ Application bearing No. CA/Writ/466/2015 was filed against the Resolution passed on 09-09-2015, and the instant Writ Application has been filed to challenge the Resolution passed on 12-04-2019. Since both Writ Applications are pertaining to two different Resolutions, the outcome of the previous Writ Application is not a bar to proceed with the Application in hand.
2. The learned State Counsel submits that the Application is liable to be dismissed *in limine* on the basis that the members of the Board of Directors of the Bank of Ceylon who made the impugned Resolution have not been made parties to this Application.
   In this regard, I refer to the observation made by the Supreme Court in **DFCC Bank Vs. Mudith Perera and others[1]**, which reads thus;
   "*As per* Saleem Marsoof, J.
   In my opinion, it is the Bank that stands to gain when it exercises the right of parate execution, and the Board of Directors is simply its managing body that takes decisions primarily for the benefit of its shareholders. It is clear from the decision of the House of Lords in Salomon v A. Salomon and Co. Ltd. (1897) AC 22 that the company has a personality distinct from its shareholders and board of directors, and the same principle
   applies to Banking companies. I am therefore of the opinion that the decision of the Court of Appeal in Ukwatte v DFCC Bank 2004 (1) Sri LR 164, in which interim relief prayed for in that case was refused on the basis that the members of the Board of Directors of the Bank that passed the resolutions sought to be quashed by certiorari, were not cited as respondents to the writ Application, is irreconcilable with the principle enunciated by the House of Lords in Salomon v A. Salomon and Co. Ltd., which has been consistently and universally followed."

[1] SC-Appeal No. 150/2010. SC Minute dated 25-03-2014.

In view of the above decision of the Supreme Court, it is settled law that the members of the Board of Directors of the 1st Respondent Bank need not be made parties to this Application.

In these circumstances, it is the view of this Court that the preliminary legal objections raised by the learned State Counsel are devoid of merits.

I shall now deal with the merits of this Application. The contention of the learned Counsel for the Petitioner is that the Petitioner has never been involved in the business of the 3rd Respondent Company at any time and therefore, is a third party in respect of the facilities secured by Mortgage Bond Numbers 1240 and 1241.

As per the document marked as P5B (Article of Association of the 3rd Respondent Company), the Petitioner is one of the Directors of the said Company. The Application for a Bank guarantee made on behalf of the 3rd Respondent Company marked as 1R1a has been signed by the Petitioner as a Director. The loan Application marked as 1R3 made on behalf of the 3rd Respondent is also signed by the Petitioner as a Director. The Mortgage Bonds bearing Nos. 1240 and 1241 have been signed by the Petitioner in his capacity as a Director of the 3rd Respondent. The document marked as 1R4 is the minutes of the Board of Directors of the 3rd Respondent Company, the Petitioner has in fact, in his capacity as "Chairman" chaired the meeting at which a decision was taken to obtain loans, overdrafts, Bank guarantees and letters of credit facilities from the Bank of Ceylon. It is pertinent to be noted that a decision to enter into the Mortgage Bonds in disputes was also taken at the same meeting chaired by the Petitioner. Moreover, it is borne out from the document marked 1R17 that the Petitioner has drawn allowances from the 3rd Respondent Company for his role as a Director. In these respects, it is abundantly clear that the Petitioner, as a working Director (Chairman) of the 3rd Respondent Company, has played a major role in the business transactions of the 3rd Respondent Company, and therefore, he can not be considered as a 3rd party as far as the said Mortgage Bonds are concerned.

The 2nd contention of the learned Counsel for the Petitioner was that the impugned Resolution passed by the 1st Respondent Bank, amalgamating two separate Borrowers, namely the 3rd Respondent individually and the Petitioner and the 4th Respondent jointly, is bad in law. It is pertinent to be noted that in terms of the provisions of Section 25 of the Bank of Ceylon Ordinance, the Bank is empowered to combine both Mortgage Bons in suit as those Bonds are executed concerning the same property. Section 25 of the said Ordinance is reproduced as follows;

> *"In any case where more than one loan, overdraft, advance or other accommodation has been granted by the Bank on the security of the same*

property and default is made in the payment of any sum due upon any one or more of such loans, overdrafts, advances or other accommodation, the foregoing provisions of this Ordinance shall apply notwithstanding that default may not have been made in respect of any of the other loans, overdrafts, advances or other accommodation, and the board may, in any such case, by resolution under Section 19 authorize the sale of the property for the recovery of the total amount due to the Bank in respect of all such loans, overdrafts, advances and other accommodation, as the case may be, and the provisions of this Ordinance shall apply accordingly."

In the circumstances, the impugned Resolution, with the amalgamation of both financial facilities, passed by the 1st Respondent Bank is lawful, and therefore, the question of the threshold of the amount for the *parate-execution* does not arise.

The learned Counsel for the Petitioner argued that the Notice under Section 21 of the Bank of Ceylon Ordinance has not been given to the Petitioner. The learned State Counsel appearing for the 1st Respondent has denied the above contention and however failed to produce a copy of the Notice, to meet this argument.

Under Section 21 of the said Ordinance, the Resolution authorizing the sale of the property shall be published in the Government Gazette and three daily newspapers in Sinhala, Tamil and English. The Notice shall be sent under registered post to the borrower.

Indeed, there is no material before Court to substantiate the fact that Notice under Section 21 has been dispatched to the Petitioner. However, it is evident, that Notice of sale under Section 22 of the said Ordinance has been served with the Petitioner. Thereafter, the Petitioner invoked the Writ jurisdiction of this Court as well. In these circumstances, it appears to this Court that there is no material prejudice caused to the Petitioner for not giving Notice under Section 21. In this regard, I refer to the observation made by the Supreme Court in **Gunaratne Vs. Abeysingha**[2]. This is the case where the Competent Authority, under the provisions of the State Lands (Recovery of Possession) Act No. 7 of 1979 (as amended), had given 15 days Notice to the unauthorized occupant whereas Section 3 of the said Act mandates to give 30 days Notice. The learned Magistrate dismissed the Application on the basis that the Competent Authority has not adhered to Section 3 of the said Act which has subsequently been affirmed by the Court of Appeal. The Supreme Court set aside the Orders of the learned Magistrate and the Court of Appeal and observed that;

"*Although nullification is the natural and usual consequence of disobedience, breach of procedural or "formal rules is likely to be treated as mere irregularity if*

[2] 1988-1SLR-p255

*no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or 'decision that is impugned."*A

As far as the facts and circumstances of this Application are concerned, this Court is mindful of the fact that there is no material predjudice caused to the Petitioner for not serving Notice under Section 21 of the said Ordinance. Therefore, in view of the above decision of the Supreme Court, I hold that giving Notice under Section 21 of the Bank of Ceylon Ordinance, is not mandatory.

For the foregoing reasons, the Application is dismissed. No costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

S. U. B. KARALLIYADDE, J.

I agree.

JUDGE OF THE COURT OF APPEAL