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/253/2022

1. Kane Apparels (Private) Limited
   No.909/5D,
   Adhikaram Mawatha,
   Ethul Kotte.
2. Warnakulasooriya Nelson Nihal Benises Fernando
   No.909/5D,
   Adhikaram Mawatha,
   Ethul Kotte.
3. Adambarage Kalyani Fernando
   No.909/5D,
   Adhikaram Mawatha,
   Ethul Kotte.

PETITIONERS

Vs.

1. People's Bank
   Sir Chittammpalam A. Gardiner Mawatha,
   Colombo 02.

2. Sujeewa Rajapakse
   Chairman
   People's Bank
   Sir Chittammpalam A. Gardiner
   Mawatha,
   Colombo 02.
3. Ranjith Kodituwakku
   Chief Executive Officer
   People's Bank
   Sir Chittammpalam A. Gardiner
   Mawatha,
   Colombo 02.
4. Lankaputhra Development Bank
   No.34, Maitland Crescent,
   Colombo 07.

   NOW

   Regional Development Bank
   No.933, Kandy Road,
   Kelaniya.
5. National Development Bank
   No.40, Nawam Mawath,
   Colombo 02.

RESPONDENTS

Before : Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel : Geoffrey Alagaratnam, P.C. with Andrew Keshav for the Petitioners
Jaliya Bodinagoda for the 1st, 2nd and 3rd Respondents
4th and 5th Respondents have been released from these proceedings

Argued on: 21.03.2023

Written submissions: Petitioners - 25.05.2023, 06.09.2023
1st, 2nd and 3rd Respondents - 24.07.2023

Decided on: 17.10.2023

Sobhitha Rajakaruna J.

The Petitioners secured a mortgage for a property, through Mortgage Bonds No.3330 and No.1091 attested by two different Notaries, with the 1st Respondent - People's Bank ('Bank') as security for six loan facilities, two of which included facilities granted in U.S. dollars. As a result of the Petitioner's default on such loan facilities the Bank after passing a resolution auctioned the mortgaged property on 26.04.2014. Since there were no bidders at the auction, the Bank purchased the property and accordingly the Certificate of Sale No.6144 dated 08.05.2014 was issued.

Instead of resale, by its very nature, described in section 29R of the People's Bank Act No.29 of 1961 ('Act') the Bank received compensation from the State on 29.10.2020 due to the acquisition of the said mortgaged property under the Land Acquisition Act No.9 of 1950.

The letter dated 16.03.2017 marked "P3" which was issued by the Bank stipulates that the total outstanding in respect of all six facilities as of 26.04.2014 is 109,550,000/- LKR. The said figure includes the outstanding sum in respect of the loans granted in U.S. dollars as well and accordingly, the exchange rate applied therein was 132.40 LKR (1 U.S. dollar = 132.40 LKR). The amount of compensation paid to the Bank by the State in view of the above acquisition was 170,365,000/- LKR and as noted above, it was paid only on 29.10.2020.

The Commercial High Court case bearing No. HC/CIVIL/11/2014/MR is an action filed against the above-named Petitioners and the 1st and 3rd Respondents by the above-named 4th

Respondent as a consequence of a default by the Petitioners in respect of a different facility granted by the said 4th Respondent. The Bank, considering an application made by the Petitioners, took steps to deposit a sum of 31,312,475.45 LKR to the credit of the said Commercial High Court case which was subsequently settled among the said Petitioners and the other relevant Respondents. The terms of the settlement are marked as "P7".

The Petitioners state that there was a surplus of 60,815,000/- LKR when the total sum outstanding as at 26.04.2014 (109,550,000/- LKR) is deducted from the total compensation (31,312,475.45 LKR) received by the Bank. This emanates from the requirement under section 29L of the said Act that if the mortgaged property is sold, the Bank, after deducting from the proceeds of the sale the amount due on the mortgage and the moneys and costs recoverable, shall pay the balance remaining, either to the debtor or any person legally entitled. It is apparent that the Bank has deposited the said sum of 31,312,475.45 LKR to the credit of the aforesaid case out of the said total compensation amounting to 170,365,000/- LKR and indeed, there should be a balance of 29,503,475.45 LKR.

The claim of the Petitioners in the instant Application is that the Bank is withholding the said amount of 29,503,475.45 LKR unlawfully. The defense of the Bank upon such claim is that the Bank would be entitled to apply the exchange rate applicable as at 29.10.2020 when recovering the outstanding amount of the two loans granted in U.S. dollars. The Forex rate as at 29.10.2020 was 184.40 LKR. The other allegation raised by the Petitioners against the Bank is that claiming for cost and expenses up to 29.10.2020 is unlawful. The 29.10.2020 is the date where the Bank received compensation for the aforesaid acquisition but it appears that both parties have formulated their arguments to a considerable degree considering it as the date of the purported resale.

In light of the above, the questions which need resolution by this Court are:

1) Whether the Bank is permitted to adopt foreign currency fluctuations when recovering the facility granted in U.S. dollars?
2) Whether it is lawful for the Bank to recover costs and expenses incurred by the Bank during the period between the date of *parate execution* and the date of resale (or the date the Bank received compensation from the State)?

Whether the Bank is Permitted to Adopt the Foreign Currency Fluctuations when Recovering the Facility Granted in U.S. dollars.

The Petitioners' cogent argument is that the Bank is not entitled to recover anything other than the amount declared in 'P3' which reveals the total outstanding as at 26.04.2014 (the date of the auction/*parate execution*). The outstanding amount in reference to the six loan facilities including the two loans granted in U.S. dollars is set down in the said letter 'P3'. It is important to observe that the total outstanding regarding the U.S. dollar loans has been calculated based on the exchange rate prevailing on 26.04.2014. The Petitioners are not challenging such calculation and have placed greater reliance on the figures in "P3" as an underpinning to the assertions throughout their arguments. The Petitioners' purported grievance is that the Bank when calculating the outstanding sum in reference to the U.S. dollar loans has applied the Forex rate prevailed as of 29.10.2020 giving regard to the foreign currency fluctuation. In addition to "P3", the Bank relies on the Statement of Accounts marked "1R1" by which a complete comparison has been made between the outstanding amounts as at 26.04.2014 and 29.10.2020.

The Petitioners argue that the subject Mortgage Bonds do not stipulate any provision that permits the Bank to make any claim based on foreign currency fluctuations. Anyhow, the fact remains that the Bank lent the Petitioners in the currency of U.S. dollars concerning two facilities out of those six loans granted in favor of the Petitioners.

The Bank is a financial institution established under the laws of the Country and its capital in terms of section 12 of the Act is mentioned in Rupees (LKR). Hence, the U.S. dollar is considered a foreign currency for all business of the Bank. Eventually, the fluctuation of the foreign currency is a consequential occurrence which is outside the Bank's direct control.

Woodhouse AC Israel Cocoa SA v Nigerian Produce Marketing Co [1972] A.C.741 is a case where the Nigerian Produce Marketing Board sold Woodhouse a quantity of cocoa under contracts providing for delivery c.i.f. Liverpool. The purchase price was expressed in Nigerian currency, followed by the Nigerian pound, which was equivalent to the pound sterling. The pound

sterling was discounted prior to payment, while the Nigerian pound preserved its value. Despite the sellers' promise to accept pounds sterling in the discharge of the buyer's abilities, the House of Lords held that the money of account was still Nigerian currency. Although this Court is not bound by the dicta of the said case at this instance, the following pronunciation of Lord Pearson in the said judgment is vital:

> *"Although commercial men may not be familiar with the terminology of the distinction between "money of account" and "money of payment," they must be very familiar with the difference between "price" and "terms of payment," which are the usual headings in a sale of goods contract."*

I am unable to make a specific focus in this judgment on 'money of account' and 'money of payment' in relation to the aforesaid Mortgage Bonds Nos. 3330 and 1091 as neither the Petitioners nor the Bank has tendered to Court the copies of the respective Mortgage Bonds. However, I have considered the facts and circumstances of this case relating to this area of law through the pleadings and submissions of both the learned Counsel. It can be assumed that the absence of any reference to foreign currency fluctuations in the respective Mortgage Bonds is an admission between both the Petitioners and the Bank.

I am aware that the effects of exchange rate volatility are common to international trade and any bank transaction carried out in foreign currency. Depending on the state of the economy, the Central Bank of Sri Lanka (CBSL) occasionally permits floating foreign exchange or stabilizes it. The correlation between such volatility and trade may cause profits or losses during the business and such volatility cannot be controlled by a single bank. Therefore, foreign currency fluctuation should be considered as a norm within the trade carried out in foreign currency and the exception thereto is explicitly restraining from the applicability of such fluctuations. Thus, if the parties to any such contract do not wish to be bound by foreign currency fluctuations they should, in my view, explicitly declare such conditions in the respective agreement but not vice versa. Therefore, the absence of a clause specifically incorporating the applicability of foreign currency fluctuations in a contract or a mortgage bond would not excuse any of the parties from the risk of incurring losses due to such fluctuations.

The general perception is that banks play a unique and pivotal role in the economy, with a privileged status that distinguishes them from other financial institutions. They are the foundation of the current financial environment, providing a safe financial atmosphere for individuals and corporations to store their assets, get credit, and conduct transactions. Lord Denning M.R. in ***United Dominions Trust Ltd. v. Kirkwood (1966) 1 All.E.R.968*** observed that:

> *"Bankers are a privileged class. They are exempt from the vexatious restrictions which are imposed on other money lenders. They are an exclusive circle to which entry is limited. It is important that we should know what these privileges are; for we will see that Parliament when granting them has never defined who is a banker."*

Although Lord Denning made this statement over half a century ago, his views can apply even to the present-day economy. This is because banks are critical to the financial system's stability, serving as intermediaries to secure the flow of capital and credit throughout society. As such the foreign currency reserve of a bank is vital right throughout their banking business. When the bank facilitates a borrower with foreign currency, the intention of such a bank under normal circumstances may be to recover such loan in the same currency. This can be easily identified as part and parcel of the banking business through which the bank generates revenue. If a borrower to whom the bank lends foreign currency defaults, the bank may need to top up the foreign currency reserve by borrowing foreign currency from the local market at the prevailing Forex rates as managing its foreign currency reserves is crucial to the business of the bank.

In this sense, if one assumes that the 1st Respondent Bank has requested the Petitioners to settle the sum outstanding in the foreign currency loan on the date of resale (rather the date the Bank received compensation) particularly in U.S. dollars, the Petitioners would still have to deal with the same consequences because they would be required to purchase U.S. dollars at the same exchange rate on the local market. The risks involved when dealing with foreign currency would be common to a bank as well as to the borrower. However, my considered view is that no party to an agreement should engage in biased practice based on foreign currency fluctuations and the principles of fairness are the guidelines to assess such biased practice.

In light of the above, I take the view that the loans granted to the Petitioners by the Bank in U.S. dollars are subject to foreign currency fluctuations when calculating the total outstanding amount even though such fluctuations are not expressly laid down in the respective Mortgage Bonds. Undoubtedly, recovery of any additional sum due to the application of foreign currency fluctuation does not fall within the ambit of recovering costs under section 29L of the said Act as claimed by the Petitioners since such provisions do not relate to loss of that nature. The Bank at the time of auctioning the property and also at the purported resale (the date of the receipt of compensation) has calculated the outstanding amount in reference to the U.S. dollar loans, adopting the Forex rates prevailing on such specific dates. Moreover, taking into consideration the overall circumstances of this case I cannot find any evidence where the Bank has engaged in biased practice by adopting the Forex rates in calculating the total sum outstanding.

Whether it is lawful for the Bank to recover costs and expenses incurred by the Bank during the period between the date of parate execution and the date of resale.

Now I must advert to the second question involved in the instant Application. The Manager - Special Assets Unit of the People's Bank in his affidavit, which is annexed to the Statement of Objections of the 1st to 3rd Respondents affirms that from the time the property was vested with the 1st Respondent Bank until handing over the possession of the said property to the State, the 1st Respondent incurred charges to maintain the property and the such charges are recoverable in terms of section 29L[1] of the said Act.

[1] Section 29L - "Besides the amount due on any loan, the Board may recover from the debtor, or any person acting on his behalf
(a) all moneys expended by the Bank, in accordance with the covenants contained in the mortgage bond executed by the person to whom the loan was granted, in the payment of premiums and other charges in respect of any policy of insurance effected on the property mortgaged to the Bank, and in the payment of all other costs and charges authorized to be incurred by the Bank, under the covenants contained in such mortgage bond and executed by the debtor;
(b) the costs of advertising the sale and of selling the mortgaged property; and
(c) in any case where the property mortgaged as security for the loan consists of the interest of the debtor for under a lease from the State, and such property has been surrendered to the State in accordance with the provisions of section 29S, all moneys paid to the State by the Board on such surrender as moneys due to the State by the Board on such surrender as moneys due to the State by the debtor under the said lease:0
Provided that the costs incurred under paragraph (b) shall not exceed such percentage of the loan as may, from time to time, be fixed by resolution of the Board."

As opposed to such a stance of the Bank, the Petitioners referring to section 29N(1) argue that once the certificate of sale is issued all the rights, title, and interest of the debtor to and in the property shall vest in the purchaser. The Bank heavily relying on the provisions of section 29L claims that all moneys expended by the Bank including the payment of all costs and charges authorized to be incurred by the Bank, under the covenants contained in the respective Mortgage Bonds can be recovered by the Board of the Bank in addition to the amount due on any loan. The Petitioners' contention in this regard is that the costs incurred between the original sale and the resale do not fall within the scope of the provisions of section 29L.

On a careful perusal of the provisions of section 29N(1)[2], it implies that there is no ambiguity on the conclusive effect of a certificate of sale when transferring the rights, title and interest of the debtor in respect of the property to any purchaser. What needs to be noted in the instant Application is that the purchaser referred to here is the Bank and not a third party purchaser. The Bank purchased the property as there were no bidders at the auction. In view of the recovery process laid down in the Act, when the purchaser is the respective bank, the effective process of recovering the loan does not cease at the time a certificate of sale is issued in favor of such bank. This is because the bank would not be indemnified at that point and the bank may properly be compensated, in such an instance, only at the stage of resale. This scenario may be different when the purchaser is anybody other than the bank.

The scheme of the recovery process stipulated in the Act is to provide a speedy mechanism to recover the total outstanding at any stage of such process probably even until the date of resale. The Petitioners in the instant Application have failed to repay the outstanding within the time period stipulated in the Mortgage Bond. Moreover, they have not made an attempt to purchase the property at the auction or at any time before the purported resale/acquisition of property by the State. Hence, I take the view that the provisions in section 29N(1) by which the rights, title and interest of the debtor vested in the purchaser, will not be a proxy for the

[2] Section 29N -
"(1) If the mortgaged property is sold, the Board shall issue a certificate of sale and thereupon all the rights, title, and interest of the debtor to and in the property shall vest in the purchaser; and thereafter it shall not be competent for any person claiming through or under any disposition, whatsoever, of the right, title or interest of the debtor to and in the property made or registered subsequent to the date of the mortgage of the property to the Bank, in any court to move or invalidate the sale for any cause whatsoever, or to maintain any right title or interest to or in the property as against the purchaser."

debtor to declare "freedom" or nonliability provided that the Bank is the purchaser at the auction.

For the reasons said forth above, I hold that it is lawful for a bank to recover costs and charges incurred by the bank even during the period between the date of *parate execution* and the date of resale. Although I have arrived at the above conclusion I need to emphasize that such costs should be calculated strictly in accordance with the provisions of section 29L. The Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 also spells out almost similar provisions in its section 13. It is important to examine the provisions of section 29L of the Act by breaking those provisions into several limbs. During such an exercise, it can be easily assumed that a bank is entitled only to recover all moneys expended by the Bank, in accordance with the Mortgage Bond,

> i.) in the payment of premiums and other charges in respect of any policy of insurance effected on the property mortgaged to the Bank, and
>
> ii.) in the payment of all other costs and charges authorized to be incurred by the Bank, under the covenants contained in such mortgage bond
>
> iii.) the costs of advertising the sale and of selling the mortgaged property; (provided that the costs incurred under this shall not exceed such percentage of the loan as may, from time to time, be fixed by resolution of the Board.)
>
> iv.) all moneys paid to the State by the Board of the Bank as moneys due to the State by the Board on a surrender mentioned in section 29L(c).

The above first limb relates to a policy of insurance while the third limb deals with selling the mortgage property. What is applicable to the issue in hand is the above second limb which describes certain costs and charges. However, the Bank under the said second limb would not be able to recover costs and charges unless such costs and charges are mandatorily authorized to be incurred by the Bank beforehand, under the covenants contained in such Mortgage Bonds. The contents of the fourth limb are not applicable to the particular issues of this case.

At this stage, I must advert to the Statement of Accounts reflected in "1R1" wherein the Bank raises a claim of 5,990,000/- LKR as charges recoverable under section 29L. I am afraid that

security bills, electricity and water payments mentioned therein cannot be recovered by the Bank unless such payments/costs are specifically authorized to be incurred by the Bank under the respective Mortgage Bonds. The Bank has failed to give an adequate breakdown or any proof of payment mentioned under the relevant row of the table stipulated in "1R1". Therefore, I am compelled to make an observation that the Bank is not entitled to recover the charges and the costs mentioned in the row marked as number 7 of "1R1" unless and until the Bank tender a justification in that regard to the Petitioners or to another forum of adjudication as the case may be.

Conclusion

In the circumstances, I cannot agree with the proposition of the Petitioners that their liability in terms of the mortgages under reference, owed to the Bank, ceased/froze at the time of *parate execution.* As mentioned earlier, the sum that is to be recovered in reference to the loans granted in U.S. dollars can be calculated based on the foreign exchange fluctuations prevailing on the date of receipt of compensation from the Bank from the State. Anyhow, the reasons for such findings cannot be entangled with the assertions of the Petitioners upon the delay in the resale. It is true that in terms of section 29S[3] the Bank should not hold such property for a longer period than it is necessary to enable the Bank to resale the property. In view of the reliefs sought by the Petitioners in the prayer of the Petition, I am of the opinion that the grounds relating to the purported delay cannot be considered as a primary issue of the instant Application. However, I am convinced with the alleged explanation given by the Bank through the bundle of documents marked "1R2" for the purported delay for resale.

[3] Section 29S - "If at any sale in pursuance of the preceding provisions of this Act, the Bank has purchased any property sold or default in the payment of a loan, the Bank shall not hold such property for a longer period than it is necessary to enable the Bank to re-sell the property for such a sum as will cover the total amount due to the Bank on account of loan, interest, expenses and costs:
Provided that where such property consists of the interest of a lessee under a lease from the State, the Board may, instead of reselling such property, surrender the lease to the State on such terms and conditions as may be agreed upon between the Board, the Minister and the Minister in charge of the subject of State lands."

In light of the above, I hold that the Petitioner is not entitled to any of the reliefs prayed for in the prayer of the Petition and my such finding is subject to the observation made above in reference to the charges described in row marked as number 7 of "1R1". Thus, I proceed to dismiss this Application. I order no cost.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal