

**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, Mandamus and Prohibition in
terms of Article 140 of the Constitution.

1. WTL Automobiles (Private) Limited
310, Negombo Road, Welisara,
Ragama.
2. Indika Sampath Merenchige
25, St Nicholas Mawatha,
Wattala.

Petitioners

C.A.Writ No.0098/2023

Vs

1. Nations Trust Bank PLC
242, Union Place,
Colombo 2.
2. Gihan Cooray
Chairman, Nations Trust Bank PLC.
3. Hemantha Gunathilake
4. Conrad D'Souza
5. Rachini Rajapaksa
6. Russel De Mel
7. Savanth Sebastian
8. Sherin Cader
9. C. Wickremasuriya
10. Arjun Fernando
11. Dr. R. Shanmuganathan
12. C.K. Hettiarachchi
13. Dr. Sanjeewa Jah

3rd to 13th Directors
Nations Trust Bank Plc,
242, Union Place, Colombo 2.

14.M. H. T. Karunaratna
Licensed Auctioneer
50/3, Vihara Mawatha,
Kolonnawa.

Respondents

Before : **Hon: N. Bandula Karunarthna, J. (P/CA)**
: **Hon: M. Ahsan R. Marikar, J.**

Counsel : P Radhakrishnam with Anoma Piyadarshani and
Sanjaya Marambe for the Petitioner

Written Submission : By the Petitioners – Not Filed
By the Respondent – Not Filed

Argued on : 03.04.2023

Decided on : 08.06.2023

M. Ahsan R. Marikar, J.

Introduction

- 1) The Petitioners have instituted this action to obtain the reliefs prayed for in the prayer of the petition dated 14th February 2023. The Petitioners supported this application and sought notices and the interim reliefs prayed for in the prayer (b) and (c) in the petition dated 14th February 2023.
- 2) At this stage we have to consider, on the said reliefs prayed for by the Petitioners, if notices and interim orders can be issued against the Respondents.
- 3) The prayers sought by the Petitioners for the interim relief application are as follows;
 - (a) issue Notice of this application on the Respondents in the first instance;
 - (b) grant interim relief by issuing a Stay Order staying the 1st to 14th Respondents or any one or more of them from taking any further steps under the impugned Board Resolution dated 16.12.2022 (marked P19b) to auction the land and premises more fully described

in the schedule hereto until the final determination of this application by Your Lordships' Court;

- (c) make Interim Order directing the 1st Respondent Bank to tender to Court the detailed Loan Account Statements in respect of all loans granted to the 1st Petitioner Company;

Facts of the Petitioners' case

- 4) The Petitioners have contended that the 1st Petitioner is a duly Incorporated Company in terms of the Companies Act No. 7 of 2007 and is engaged in the primary business of import and sale of motor vehicles. The 2nd Petitioner is the Director of the 1st Petitioner's Company.
- 5) The Petitioners have contended that they have obtained a term loan facility of Rs. 48,000,000/= from the Respondent's Bank which was secured by a mortgage bond. The offer letter for the said loan facility and the mortgage bond are marked and produced as P2(a) and P2(b).
- 6) In the said term loan facility, the Petitioners have obtained a part of the finances of the purchase cost of the land described in the schedule. The said land referred to in the schedule had been developed by the 1st Petitioner Company into a modern motor vehicle showroom with a three-story office complex which is presently valued at Rs. 298,000,000. The valuation report is marked and produced as P4.
- 7) From 2014 to 2018, the Petitioners have received credit facilities from the 1st Respondent Bank which is referred to in paragraph 6 of the petition. Offer letters related to the said credit facilities are marked as P5(i) to P5(viii). Further, an overdraft facility which was obtained by the Petitioners for Rs. 57,000,0000 was secured by the P6 mortgage bond.
- 8) Besides these known facilities, the 1st Respondent Bank having done a credit review had extended the existing facilities as referred to in paragraphs 9 to 14, which were secured by the offer letters and mortgage bonds marked and produced as P8, P9(a), and P9(b).
- 9) After obtaining the said facilities, the Petitioners had to face the economic constraints during the pandemic period. Due to the economic crisis, the Petitioners were unable to conduct the business as it was and the importation of motor vehicles were suspended from 19th March 2020. Due to this, the 1st Petitioner Company was tremendously hindered and reached a complete halt.

- 10) The 1st Respondent had granted another loan on 21st September 2020 by the offer letter marked as P12, to settle the then outstanding amounts and restructured the entire credit facility by amalgamating term loan facilities I to IV and granted a grace period to repay the said facilities from 1st July 2021 to 31st July 2021. A copy of the said letter is marked and produced as P13.
- 11) However, due to the curtailment of the importation of vehicles and the collapse of the business during the pandemic period, the Petitioner was unable to repay the said term loan facilities granted by the Respondent Bank. During this period, the Central Bank of Sri Lanka had issued circulars granting a grace period for the borrowers to repay the loan facilities.
- 12) The 1st Respondent Bank had refused to grant reliefs which was referred to in Circular No. 2 of 2022 and issued a Letter of Demand to repay the outstanding loan facilities which was arbitrary and unreasonable.
- 13) The Petitioners have emphasized that they have not defaulted the loan facilities as it is envisaged in the Recovery of Loans by Banks (Special Provisions) Act No. 04 of 1990, as the default was purely on state policy. Therefore, steps taken by the 1st Respondent Bank which is referred to in paragraphs 39 and 40 of the petition is arbitrary and unreasonable.
- 14) In the said circumstances the Petitioners have pleaded to quash the Board Resolution passed by the 1st Respondent Bank and to grant the reliefs prayed for by the Petitioners in prayers (a) to (h) in the petition dated 14th February 2023.

Disputed Facts

- 15) When this matter was called to support on the 3rd of April 2023, the Counsel for the Petitioners made oral submissions to issue notice and to grant the interim reliefs prayed for in the petition dated 14th February 2023.
- 16) The President's Counsel Chandaka Jayasundara appeared for the Respondents and objected to any interim reliefs prayed for in the prayer of the petition and to issue notices.
- 17) Considering the oral submissions made by the Counsel for the Petitioners and the Counsel for the Respondents, the facts pertinent to the petition and the documents, the following disputed facts should be considered to decide whether notices and interim orders can be issued or not.

- 1) Have the Petitioners obtained term loan facilities and overdraft facilities from the 1st Respondent Bank subjected to the offer letters and the mortgage bonds marked and produced with the petition?
- 2) If so, is there a contractual obligation between the Petitioners and the 1st Respondent Bank?
- 3) If so, can the Petitioners seek to invoke the Writ jurisdiction of this court?

Have the Petitioners obtained term loan facilities and overdraft facilities from the 1st Respondent bank subjected to the offer letters and the mortgage bonds marked and produced with the petition?

- 18) The Petitioners had obtained several term loan facilities and overdraft facilities from the 1st Respondent Bank. This fact has not been denied by the Petitioners.
- 19) On perusal of P2(a) offer letter, P2(b) mortgage bond, P5(i) to P5(viii) letters of credit and P6 mortgage bond which had been entered between the Petitioners and the 1st Respondent Bank, it is evident that the Petitioners had obtained financial facilities.
- 20) Further, the documents marked as P7 to P9(a), P12 and P13 confirm that the Petitioners had obtained further credit facilities from the 1st Respondent Bank.
- 21) When the Petitioners were obtaining the said term loan facilities, they had entered into mortgage bonds by mortgaging the property referred to in the schedule to the petition.
- 22) On perusal of the aforesaid documents, it is obvious that the Petitioners have obtained the term loan facilities and the overdraft facilities subject to the mortgage bonds and by agreeing to the offer letters had accepted the said loans.

If so, is there a contractual obligation between the Petitioners and the 1st Respondent Bank?

- 23) Upon accepting the offer letters referred to as P2(a), P5(i) to P5 (viii), P7, P9(a), P12, and P13, a contractual obligation had been entered between the Petitioners and the 1st Respondent.
- 24) The aforesaid documents are duly signed by the Directors of the 1st Petitioner Company and the relevant officers of the 1st Respondent Bank. Thus, the terms and conditions referred to in the said loan facilities had been specified and parties had agreed to the said term loan facilities and placed their signatures.
- 25) The parties have agreed on the mode of payment and the action that is to be taken in the event of a default in payment in the said letters of offer. In addition,

both parties have with consent entered into the said mortgage bonds marked and produced as P2(b), P6, and P8, and the said mortgage bonds had been duly executed.

- 26) The Directors of the 1st Petitioner Company had placed their signatures and agreed to the terms and conditions referred to in the aforesaid mortgage bonds.
- 27) The aforesaid letters of offer and the mortgage bonds had confirmed that the Petitioners and the 1st Respondent entered a contractual obligation to grant loan facilities, subject to the terms and conditions referred to in the offer letters and the mortgage bond.
- 28) Thus, it is abundantly clear that both parties have entered into a contract when the Petitioners were obtaining the financial facilities from the 1st Respondent Bank.
- 29) Referring to the aforesaid facts and the documents, I am of the view that the Petitioners have entered into a contract with the 1st Respondent Bank when obtaining the financial facilities.

If so, can the Petitioners seek to invoke the Writ Jurisdiction of this court?

- 30) The Petitioners have sought to invoke the Writ Jurisdiction, to quash the Board Resolution passed by the 1st Respondent Bank and to suspend the recovery of outstanding capital and interest until the final determination of this case.
- 31) The said objections raised by the Petitioners are based on the Central Bank Circulars which were issued during the pandemic period to safeguard the borrowers due to the hardships faced by them. The Petitioners have produced the said circulars as P15 and P16(a).
- 32) The contention of the Petitioners is, due to the pandemic period they were unable to conduct their business as usual and their business was affected due to the importation restriction of importing vehicles. To support this, they have marked the Gazette Notification which had been issued to restrain the importation of vehicles from 2020.
- 33) On the said grounds, the Petitioners have taken up the position that the resolution to auction the Petitioners' property is arbitrary and illegal.
- 34) When considering the Petitioners' position, to consider the application under Writ Jurisdiction, an illegal act or arbitrary decision or unlawful decision should have taken place to draw the judicial review procedure of this court.

35) It is decided in **Geeganage v. Director General, Customs**¹ that

“By way of preface, I may say that the arguments put forward by the eminent President’s Counsel for the Petitioner might, perhaps, have been more acceptably addressed to a court exercising appellate and not supervisory jurisdiction – the latter jurisdiction being the one invoked by the Petitioner in his petition seeking, under the judicial review procedure, a quashing of the aforesaid decision made by the 2nd Respondent. The arguments advanced on behalf of the Petitioner are based solely on factual matters inviting the Court of Appeal more or less, to substitute its view in the interpretation of factual matters or situations dealt with in the written submissions... the submissions seem to be oblivious of the distinction between appeal and review procedure. If one appeals against a decision, one is claiming that it is wrong, or incorrect. The Court of Appeal if it is persuaded of the merits of the case may allow the appeal and so it substitutes its views for that of the court is not concerned with the merits of the case, that is, whether the decision is right or wrong. In review (as opposed to appeal) the court only considers whether the decision is lawful or unlawful.”

In the instant application, the Petitioners have failed to satisfy this court of any illegal or arbitrary conduct of the Respondents. The Circulars issued by the Central Bank had been valid up to 31st December 2022. There is no restriction thereafter for the 1st Respondent to act on non-payment of the loan facilities granted to the Petitioners.

36) Presidents Counsel Chandaka Jayasundara appeared for the Respondents and argued that the term loan facilities and the overdraft facilities had been granted to the Petitioners from 2014 onwards and the grace period had been given as per the Central Bank Circulars.

37) Due to the failure of the Petitioners to repay the said loan facilities, the 1st Respondent had rescheduled the said facilities by P16(d) document.

38) However, due to the long delay and the non-payment of the financial facilities by the Petitioners, the 1st Respondent had demanded the overdue payment by Letter of Demand dated 21st November 2022 and the resolution to auction the mortgaged property had been passed.

¹ [2001] 3 SLR 273 at page 182-3.

- 39) The said procedure followed by the 1st Respondent are solely based on the terms and conditions of the offer letters and the mortgage bonds.
- 40) Thus, I do not see any violation or arbitrary act of the 1st Respondent violating the Circulars issued by the Central Bank. Therefore, the action taken by the 1st Respondent is within the purview of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990.
- 41) As I have said in the above paragraphs, this is a contractual obligation between the Petitioners and the 1st Respondent. The 1st Respondent was the lender and the Petitioners were the borrowers. The Petitioners had borrowed the financial facilities as per the terms and conditions referred to in the letters of offer and mortgaged the property as per the terms agreed upon.
- 42) On that, I refer C.G. Weeramantry's 'The Law of Contracts'. In the said book the definition given for the contract is as follows;

*"Any definition of contract must necessarily stress the promise which gives it birth and the attribute of enforceability or legal recognition whence it derives its vital force. These two elements will be found to dominate all definitions of the concepts, and without them no definition is possible."*²

*"An appreciation is required of the inadequacy of any one definition to cover all operative facts that are necessary or sufficient to create a contract."*³

*"It is a promise or set of promises which the law will enforce."*⁴

*"With due regard to these considerations and with due sense of the difficulties involved, we may therefore attempt a definition of contract as follows: A contract is a promise, or promise mutually exchanged, setting up, against the promisor or promisors, duties of performance which the law will recognize or enforce at the instance or for the benefit of the promisee or promisees, or of a third party intended to be benefited."*⁵

² C.G. Weeramantry, 'The Law of Contracts' (The Y.M.B.A. Press, Colombo, 1967) 82.

³Ibid 83.

⁴ Ibid; the word 'enforce' in this definition does not bear the meaning of enforceability as in specific performance, where actual performance is enforced of the obligation undertaken, but rather the meaning of actionability at law.

⁵ C.G. Weeramantry, 'The Law of Contracts' (The Y.M.B.A. Press, Colombo, 1967) 83.

- 43) In light of the aforesaid reference, and as the Petitioners and the 1st Respondent had signed and agreed to the offer letters and the mortgage bonds, my considered view is this application does not have any merit for the judicial review to invoke the Writ Jurisdiction of this court.
- 44) On that, in consideration of the decision **Samaraweera v. Minister of Public Administration**⁶ it was decided that, *rules applicable to commercial contracts have no statutory force; no mandamus.*

“Even though a statutory body is a party to a commercial contract, the other party cannot seek mandamus against the statutory body to enforce its performance even if “Rules” made by such statutory body apply to and are part of such commercial contract, if the “Rules” do not have statutory force as they were not created under a specific conferment of power by statute for the purpose.”

Further it is specified in **Galle Flour Milling (Pvt) Limited vs. Board of Investment of Sri Lanka and another**⁷ as it is a case where a Writ of Certiorari was sought for quashing the termination of an agreement between the Petitioner and the Board of Investment. The Respondents raised a preliminary objection that the Petitioner was seeking relief based on a breach of a contractual right and therefore the Petitioner cannot maintain the said application.⁸

“An analysis of the relationship that existed between the parties reveals that as it was purely a contractual one of commercial nature, neither certiorari nor mandamus will lie to remedy the dispute over the rights of the parties. The purported breach of such rights (and) the grievances between the parties arise entirely from a breach of contract even if one of the parties was a statutory or public authority.”

Tillekewardena. J⁹ then had considered, whether the Respondent being a statutory authority would lend to the commercial arrangement between the parties, a statutory flavour, thus enabling the petitioner in that case to invoke the writ jurisdiction of this Court.

⁶ [2003] 3 SLR 64.

⁷ [2002] BLR 10.

⁸ Ibid.

⁹Galle Flour Milling (Pvt) Limited vs. Board of Investment of Sri Lanka and another [2002] BLR 10.

Then it was expressed that, *even though the power to enter into a contract arises from the statute, the terms and conditions between the parties were entirely contractual and that the decision that was sought to be quashed was purely contractual.*

"Therefore, the exercise of powers by parties in terms of the agreement exclusively arises through the contract and though one of the parties is a public authority rights of the parties are not amenable to writ jurisdiction."

- 45) As per the aforesaid decisions, it is abundantly clear that this application is based on a contract and a commercial transaction, where the parties can seek their reliefs in a different forum.

Conclusion

- 46) For the reasons set out above we do not see any merit to invoke the Writ Jurisdiction for the reliefs sought by the Petitioners by the petition dated 14th February 2023. On that we dismiss the petition and award cost to be payable to the Respondents by the Petitioners.

Judge of the Court of Appeal

N. Bandula Karunarathna J. (P/CA)

I agree.

President of the Court of Appeal