

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

Sumudu Sanjeevane Nanayakkara
No.95, Cemetery Road, Mirihana
Nugegoda.

Plaintiff

SC Appeal 53/2017
SC/HCCA/LA 9/2016
WPHCCA/Col/ 184/2014/LA
DC Colombo DSP/70/2013

Vs

1. Hatton National Bank PLC,
No.479, TB Jayah Mawatha
Colombo10
Having a branch Office at No.63,
Moratuwa Road, Piliyandala.
2. Don Ashok Ranjan Vitharana
No.326/2 Pitakotte,
Kotte

Defendant

AND

Sumudu Sanjeevane Nanayakkara
No.95, Cemetery Road, Mirihana
Nugegoda.

Plaintiff-Petitioner

Vs

1. Hatton National Bank PLC,

No.479, TB Jayah Mawatha
Colombo10
Having a branch Office at No.63,
Moratuwa Road, Piliyandala.

2. Don Ashok Ranjan Vitharana
No.326/2 Pitakotte,
Kotte
(DECEASED)

2a. Dona Sriyani Malkanthi Vitharana
2b. Dona Chandani Kamal Vitharana
2c. Dona Roshani Kumari Vitharana
2d. Don Sudantha Niroshan Vitharana

All of No.326/2, Pitakotte, Kotte
Defendant-Respondents

AND NOW BEWEEN

Sumudu Sanjeevane Nanayakkara
No.95, Cemetery Road, Mirihana
Nugegoda.

Plaintiff-Petitioner-Appellant

Vs

1. Hatton National Bank PLC,
No.479, TB Jayah Mawatha
Colombo10
Having a branch Office at No.63,
Moratuwa Road, Piliyandala.

2a. Dona Sriyani Malkanthi Vitharana
2b. Dona Chandani Kamal Vitharana
2c. Dona Roshani Kumari Vitharana
2d. Don Sudantha Niroshan Vitharana

All of No.326/2, Pitakotte, Kotte

Defendant-Respondent-Respondents

Before : Sisira J De Abrew J
 Anil Goonetratne J
 NalinPerera J

Counsel : Kuwera de Zoysa with Niranjan de Silva and Pradhara Kotambage
 for the Plaintiff-Petitioner-Appellant
 Priyantha Alagiyawanna for 1st Defendant-Respondent-Respondent

Written Submission

Tendered on : 25.4.2017 by the Plaintiff-Petitioner-Appellant
 9.10.2017 by the 1st Defendant-Respondent-Respondent

Argued on : 17.10.2017

Decided on : 28.11.2017

Sisira J De Abrew J

Notices were sent by this court to the 2a to 2d Defendant-Respondent-Respondents on 20.1.2016 and 3.3.2016. But they have not responded to the said notices. The case was taken up for hearing on 17.10.2017.

The Plaintiff-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) has pleaded the following facts in her plaint. She was in need of Rs. 5 million in December 2009 to purchase a land. The 1st Defendant-Respondent-Respondent (hereinafter referred to as the 1st Defendant Bank) was not willing to grant her a loan of five million as she did not have sufficient income to repay the loan. However the Manager of the Piliyandala branch of the 1st Defendant Bank informed the Plaintiff-Appellant and the 2nd Defendant-Respondent-Respondent (hereinafter referred to as the 2nd Defendant-Respondent) who is a friend of the

Plaintiff-Appellant that a loan of Rs.5 million could be granted to the 2nd Defendant-Respondent who had an acceptable income if the property of the Plaintiff-Appellant which is the property in suit was transferred to the 2nd Defendant-Respondent who would mortgage it to the 1st Defendant Bank. Thereafter, by deed No 4586 dated 14.12.2009 attested by V. Balasubramaniam, Notary Public, the Plaintiff-Appellant transferred the property in suit to the 2nd Defendant-Respondent; on the same day the 2nd Defendant-Respondent by Mortgage Deed No.616 dated 14.12.2009 attested by A.M.D.K Adikary Notary Public mortgaged it to the 1st Defendant Bank; and the 1st Defendant Bank on 14.12.2009 granted the loan of Rs.5 million to the 2nd Defendant-Respondent. The 1st Defendant Bank in their answer admits that Rs.5 million was released to the Plaintiff-Appellant. The Plaintiff-Appellant thereafter started repaying the loan by depositing loan installments in the 2nd Defendant-Respondent's bank account maintained with the 1st Defendant Bank. Later the Plaintiff-Appellant could not continue to deposit loan installments in the said account and the 1st Defendant Bank by resolution dated 6.12.2012 decided to act in terms Section 4 of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 and sell the property in suit by public auction. This resolution has been produced as P7(b). The Plaintiff-Appellant thereafter filed this action in the District Court of Colombo seeking, inter alia, an interim injunction preventing the 1st Defendant Bank and its servants from holding the public auction fixed for 22.4.2013 or any subsequent auction pursuant to the aforementioned resolution of the 1st Defendant Bank in relation to the property in suit pending hearing and final determination of this action. The above facts have been pleaded by the Plaintiff-Appellant in her plaint filed in the District Court.

The learned District Judge by his order dated 28.10.2014, refused to grant the said interim injunction. Being aggrieved by the said order of the learned District Judge, the Plaintiff- Appellant appealed to the Civil Appellate High Court (hereinafter referred to as the High Court) and the said High Court by its order dated 27.11.2015 refused to grant leave to appeal. Being aggrieved by the said order of the High Court, the Plaintiff-Appellant has appealed to this court. This court by its order dated 14.3.2017, granted leave to appeal on questions of law stated in paragraphs 13(c),(d),(f) and (g) of the petition of appeal dated 6.1.2016 which are set out below.

1. Did their Lordships of the Honourable Provincial High Court of the Western Province holden in Colombo exercising Civil Appellate Jurisdiction and the learned Additional District Judge of Colombo err in Law in not envisaging that the special procedure contained in the recovery of loans by Banks (Special Provisions) Act No.4 of 1990 as amended cannot be invoked by the 1st Defendant Bank to auction the property in suit especially in light of the subsequent amending Acts to wit: Recovery of Loans by Banks (Special Provisions) (Amendments) Act No.1 of 2011 and Recovery of Loans by Banks (Special Provisions) (Amendment) Act No.19 of 2011 ?
2. Did their Lordships of the Honourable Provincial High Court of the Western Province holden in Colombo exercising Civil Appellate Jurisdiction and the learned Additional District Judge of Colombo err in Law in not envisaging that the special procedure contained in the recovery of loans by Banks (Special Provisions) Act No.4 of 1990 as amended cannot be invoked by the 1st Defendant Bank to auction the property in suit to recover a sum of Rs.4,448,354.13/= ?

3. Did their Lordships of the Honourable Provincial High Court of the Western Province holden in Colombo exercising Civil Appellate Jurisdiction and the learned Additional District Judge of Colombo err in Law in not envisaging the true meaning that the phrase **“Principal Amount”** referred to in Section 5A of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 as amended **is not a Static amount and that a calculation is necessary to determine the “Principal amount borrowed due at the time of default” based on the loan installments already paid?**
4. Did their Lordships of the Honourable Provincial High Court of the Western Province holden in Colombo exercising Civil Appellate Jurisdiction and the learned Additional District Judge of Colombo err in Law in **not envisaging that at the time of default the principal amount borrowed due and owing to the 1st Defendant Bank on the Loan granted was less than 5 Million Rupees?**

Learned counsel for the 1st Defendant Bank contended that the Plaintiff-Appellant has no status to file this case as the 1st Defendant Bank had granted the loan to the 2nd Defendant-Respondent. I now advert to this contention. Although the loan of Rs.5 million was granted to the 2nd Defendant-Respondent, the property in suit was transferred by the Plaintiff-Appellant on 14.12.2009 to the 2nd Defendant-Respondent who mortgaged it to the 1st Defendant Bank on the same day. Further the 1st Defendant Bank has admitted in paragraph 6 of their answer that the money amounting to Rs.5 million was released to the Plaintiff-Appellant. Learned President's Counsel for the Plaintiff-Appellant relying on the deed No.4586 and the Mortgaged bond No 616 contended that the 2nd Defendant-Respondent was holding the property in trust on behalf of the Plaintiff-Appellant.

When I consider all the above matter, I feel that there is merit in the contention of learned President's Counsel. Therefore I am not prepared to dismiss the appeal on the contention of learned counsel for the 1st Defendant Bank.

Learned President's Counsel for the Plaintiff-Appellant relying on section 5A of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 as amended by Act No.1 of 2011 and Act No.19 of 2011 contended that if the remaining balance of the principal amount borrowed is less than Rs.5 million the bank could not sell the property mortgaged by public auction acting in terms of section 4 of the said Act. But learned counsel for the 1st Defendant Bank did not agree with this contention and contended that if the original amount of the loan granted to the borrower was Rs.5 million or above Rs.5 million, then the bank has the power to act in terms of section 4 of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 and sell the property mortgaged to the bank by public auction. I now advert to this contention. Section 5A of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 as amended by Act No.1 of 2011 reads as follows.

*5A. (1) No action shall be initiated in terms of section 3 of the principal enactment for the recovery of any loan in respect of which default is made, nor shall any steps be taken in terms of section 4 or section 5 of the aforesaid Act, where the **amount** of such loan is less than rupees five million*

*Provided however, at the time of default when calculating the **amount** due and owing to the Bank on the loan granted to such defaulter, the interest accrued on such loan and any penalty imposed thereon, shall not be taken into consideration.*

This Act came into operation on 28.11.2011. But by Act No.19 of 2011 which was certified on 31.3.2011 the word '**amount**' in the above section was replaced with words 'principal amount borrowed'. Therefore Section 5A the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 as amended by Act No.1 of 2011 and Act No.19 of 2011 reads as follows:

5A. (1) No action shall be initiated in terms of section 3 of the principal enactment for the recovery of any loan in respect of which default is made, nor shall any steps be taken in terms of section 4 or section 5 of the aforesaid Act, where the **principal amount borrowed** of such loan is less than rupees five million:

Provided however, at the time of default when calculating the **principal amount borrowed** due and owing to the Bank on the loan granted to such defaulter, the interest accrued on such loan and any penalty imposed thereon, shall not be taken into consideration.

Before the enactment of Act No.19 of 2011, when the borrower of a loan was in default the bank had to calculate, at the time of default, **the amount** due and owing to the bank on the loan granted to the borrower. However the amount so calculated did not include the interest and any penalty imposed on the borrower. After the enactment of Act No.19 of 2011, the words 'at the time of default when calculating the **principal amount borrowed** due and owing to the bank' must be carefully considered. After the enactment of Act No.19 of 2011, when a borrower of a loan is in default, the bank has to calculate, at the time of default, the **principal amount borrowed** due and owing to the bank. Here again the amount so calculated did not include the interest and any penalty imposed on the borrower. What is meant by the phrase 'principal amount borrowed due and owing to the bank'? It means the balance of the principal amount borrowed. In other words it means the balance of the original amount of the loan granted to borrower. If this interpretation is not given there was no necessity to enact the Act No.19 of 2011.

If the contention of learned counsel for the 1st Defendant Bank is correct, then the property (mortgaged to the bank) of a person who did not pay any amount on a loan of Rs.4.9 million cannot be sold by the bank in public auction but the property (mortgaged to the bank) of a person whose balance is only 0.1million on a loan of Rs.10 million can be sold by bank in public auction because he had taken a loan of more than Rs.5 million. This means bigger defaulter's property is protected but not the small defaulter's property. Is this procedure reasonable? Can this kind of interpretation be given to Section 5A of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 as amended by Act No.1of 2011 and Act No.19 of 2011? The answer should be in the negative. After considering all the aforementioned matters, I hold that prior to and after the enactment of Act No.19 of 2011, if the **original** amount of the loan granted was less than Rs.5 million, the bank cannot, in a case of default, sell the property mortgaged by public auction; and that after the enactment of Act No.19 of 2011, if the **balance** amount of the **original** amount of the loan is less than Rs. 5 million, the bank cannot, in a case of default, sell the property mortgaged by public auction in terms of Section 4 of the Act even if the original amount of the loan was Rs.5 million or above.

In the present case, the loan granted was Rs.5 million. The unpaid amount of the loan including interest according to the resolution is Rs. 4,448,354/13. Therefore the balance of the principal amount of the loan due and owing to the bank should necessarily be less than Rs.5 million. The 1st Defendant Bank has passed the resolution dated 6.12.2006 marked P7(b) to sell the property mortgaged to the bank by public auction. For the aforementioned reasons, I hold that the said resolution is not legal.

When I consider all the aforementioned matters, I am of the opinion that the Plaintiff-Appellant has put forward a strong *prima facie* case. Then should the court issue an interim Injunction? In *Felix Dias Bandaranayake Vs State Film Corporation* [1981] 2 SLR page 287 Justice Soza held:

“In deciding whether or not to grant an interim injunction the following sequential tests should be applied

1. Has the plaintiff made out a strong prima facie case of infringement or imminent infringement of a legal right to which he has title, that is, that there is a serious question to be tried in relation to his legal rights and that the probabilities are that he will win.

2. In whose favour is the balance of convenience-the main factor being the un-compensatable disadvantage or irreparable damage to either party?”

Justice Soza at page 302 Observed as follows:

“In Sri Lanka we start off with a prima facie case. That is, the applicant for an interim injunction must show that there is a serious matter in relation to his legal rights, to be tried at the hearing and that he has a good chance of winning. It is not necessary that the plaintiff should be certain to win.”

I have earlier pointed out that the resolution passed by the 1st Defendant Bank is not legal. Considering all the above matters, I hold that the Plaintiff-Appellant has put forward a strong *prima facie* case and that there is a serious question to be tried in relation to the rights of the Plaintiff-Appellant. For all the aforementioned reasons, I hold that the learned District Judge was wrong when he refused to grant the interim injunction as prayed for in paragraph (f) of the prayer to the plaint and the High Court was wrong when it dismissed the petition of appeal of the Plaintiff-

Appellant. For all the aforementioned reasons I set aside the order of the learned District Judge dated 28.10.2014 and the order of the High Court dated 27.11.2015 and grant relief prayed for in paragraph (f) of the prayer to the plaintiff. The learned District Judge is hereby directed to issue the interim injunction as prayed for in paragraph (f) of the prayer to the plaintiff.

In view of the conclusion reached above, I answer the above questions of law in favour of the Plaintiff-Appellant. For the above reasons, I allow the appeal. The Plaintiff-Appellant is entitled to the costs of all three courts.

Appeal allowed.

Judge of the Supreme Court.

Anil Gooneratne J

I agree.

Judge of the Supreme Court.

Nalin Perera J

I agree.

Judge of the Supreme Court.

