

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

In the matter of an Application under Article
12(1), 126 of the Constitution of the Democratic
socialist Republic of Sri Lanka.

SC (FR) Application No. 498/2012

Punchi Hewage Ajithsena Silva,
Kutukende Estate
Nikadalupotha, Kurunegala.
Presently,
No. 22/A Mahaviara Road,
Lakshapathiya, Moratuwa.

Petitioner

Vs.

1. Bank of Ceylon,
No 4, Lanka Banku Mawatha, Colombo 01.
2. Chief legal officer,
Bank of Ceylon,
No 4, Lanka Banku Mawatha, Colombo 01.
3. P.A.G Weerakoon Banda
Chief Manager Properties,
Bank of Ceylon,
No 4, Lanka Banku Mawatha, Colombo 01.

4. D.N.J Costa,
Assistant General Manager
Bank of Ceylon, Colombo 01.

5. S Liyanawala
No. 1 No 4, Lanka Banku Mawatha,
Colombo.

6. Hon. Attorney- General,
Attorney General's Office,
Colombo 12.

Respondents

Before: Priyantha Jayawardena PC, J
P. Padman Surasena, J
E. A. G. R. Amarasekara, J

Counsel: Pradeep Kumarasinghe for the Petitioner

Ms. Yuresha de Silva SSC, for the Respondents

Argued on: 28th of January, 2019

Decided on: 29th of February, 2024

Priyantha Jayawardena PC, J

Facts of the application

The petitioner filed the instant application alleging that the respondents exercised powers contrary to the provisions of the Bank of Ceylon Ordinance, No. 53 of 1938 (as amended) (hereinafter referred to as the “Bank of Ceylon Ordinance”) in refusing to refund the money after the property mortgaged to the bank was re-sold to a third party. Thus, it violated his Fundamental Rights guaranteed under Article 12(1) of the Constitution.

The petitioner stated that the Katukenda Trading Company Limited (hereinafter referred to as the “borrowing company”), obtained a sum of Rs. 1,000,000 as a loan from the Wellawatte branch of Bank of Ceylon (hereinafter referred to as the “bank”). As a security for the said loan, the petitioner, being a director of the said borrowing company, mortgaged his personal property (hereinafter referred to as the “mortgaged property”) under a Mortgage Bond No. 2636 dated 3rd of January, 2000 which was attested by Chandani Mathew, Notary Public. The petitioner stated that he paid a sum of Rs.1,128,000/- in settlement of the loan. However, despite the said payments, the bank exercised the powers under the said Ordinance and auctioned the said property. However, as there were no bidders at the said public auction, the bank purchased the mortgaged property that was worth about Rs.17,500,000/- for only a sum of Rs.1000/-.

Furthermore, the petitioner stated that upon hearing that the bank was opting for a resale, he introduced one of his relations to the bank in order to purchase the property under reference for a sum of Rs. 12,500,000/- and to settle the mortgage. However, the former Assistant General Manager of the Bank refused to sell the property to his relative and stated that being the new owner of the mortgaged property, the Bank would decide to whom the property would be sold. Subsequently, the respondent bank is alleged to have sold the said property to a third-party on the 2nd of October, 2009.

The petitioner further stated that since the mortgaged property is worth about Rs.17,500,000/- and the loan was obtained only for Rs. 1,000,000/-, he had requested the Chairman of the bank to give him the details of the outstanding sum, the interests and other dues on the loan granted to him.

Furthermore, the petitioner stated that the respondents by letters dated 22nd of May, 2012 and 18th of June, 2012 informed him that they would respond to the petitioner's letters in due course. However, by letter dated 27th of July, 2012 the bank informed that it was unable to disclose the details requested by the petitioner as the said bank is the present owner of the said property.

In the meantime, the bank had instituted case Nos. 5333/M and 5334/M at the District Court of Mount Lavinia for the recovery of Rs.900,000/- due from the said borrowing company in respect of two different loans granted to the said company.

In these circumstances, the petitioner stated that he was entitled to know the total amount for which his mortgaged property was resold and the outstanding total of the said loan at the time the property was re-sold in order to recover the balance from the proceeds of the said sale in terms of section 27 of the Bank of Ceylon Ordinance.

After the application was supported, the court granted the petitioner leave to proceed for the alleged violation of the petitioner's Fundamental Rights enshrined in Article 12(1) of the Constitution.

Objections of the 3rd respondent

The 3rd respondent who is the Chief Manager of Properties of the bank filed objections and stated that borrowing company applied for the said loan on the 17th of January, 2000 at an interest rate of 17% per annum. Further, the petitioner who was a director of the said borrowing company furnished the guarantee to secure the loan. Thereafter, the said loan was granted by the bank. However, the petitioner failed to settle the said loan. Further, he denied that the petitioner paid a sum of Rs.1,128,000/- in settlement of the loan. Accordingly, the bank auctioned the said mortgaged property to recover the money due to the bank on the said loan. However, as no one bought the said property, the bank purchased the said mortgaged property at the public auction in terms of section 30(1) of the Bank of Ceylon Ordinance for a sum of Rs.1,000/-.

Thereafter, the bank made an application to the District Court of Colombo to eject the petitioner from the said property and for the delivery of possession of the mortgaged property in terms of section 29 of the Bank of Ceylon Ordinance. Thereafter, the bank obtained an Order to take possession of the said property through courts. However, as the petitioner failed to vacate the

premises in question, the bank made an application in terms of section 325 of the Civil Procedure Code to the District Court and the court made Order dated 2nd of June, 2008, directing the petitioner to vacate the premises in question, on or before the 3rd of August, 2008.

Moreover, while the mortgaged property remained as a property of the bank following the purchase of the same at the public auction, the petitioner failed to pay the money due to the bank in respect of the said loan in terms of section 30 of the said Ordinance. Thus, the bank took steps to resell the property in terms of section 31 of the Bank of Ceylon Ordinance and the property was resold on the 2nd of October, 2009.

The 3rd respondent further stated that the proceeds of the resale of the said property is a private transaction between the bank and the new buyer of the said property as the bank was the owner of the said mortgaged property at the time of the resale. In the circumstances, the 3rd respondent stated that neither the bank nor any of the respondents had violated the Fundamental Rights of the petitioner.

Submissions on behalf of the petitioner

The counsel for the petitioner submitted that even though the petitioner's mortgaged property was resold in the year 2009 by the bank, he was not informed of the sale price and whether there was any excess money after the loan was recovered from the bank. Further, it was submitted that the petitioner filed the instant application as the bank refused to provide any details pertaining to the sale of the property in question. Moreover, the powers bestowed upon the bank under the Bank of Ceylon Ordinance only provide for a speedy recovery of dues from debtors and not to unjustly enrich by refusing to pay the excess money after reselling a mortgaged property.

Submissions on behalf of the respondents

The learned Senior State Counsel for the respondents submitted that the petitioner is not entitled to receive the balance of the proceeds from the transactions pertaining to the property in question, as there is no statutory or legal requirement to pay the excess money of the proceeds of the resale to the original borrower. Further, the requirement to pay the excess money from proceeds of the sale of the property is applicable only for the sale of the property at the public

auction in terms of section 27 of the Bank of Ceylon Ordinance. Further, due to the absence of a third party at the public auction, the mortgaged property was purchased by the bank in terms of section 30(1) of the Bank of Ceylon Ordinance.

However, as the property in question had not been purchased by a third party at the public auction, the bank purchased the said property at a nominal value of Rs. 1,000/- in terms of section 30(1) of the Bank of Ceylon Ordinance. Thus, the petitioner in the instant application cannot claim the balance of the proceeds from the sale of the property under section 27 of the Bank of Ceylon Ordinance. It was further submitted that sections 27 and 31 of the Bank of Ceylon Ordinance enable the bank to re-sell the property purchased by the bank to a third party.

Furthermore, it was contended that in any event the bank is not under any obligation to pay the balance of the proceeds to the petitioner, as at the time the property was sold the owner of the said property was the bank and not the petitioner. Hence, the petitioner is not entitled to receive the balance of the proceeds of the sale of the property in question, as there is no statutory or legal requirement to pay the balance of the proceeds of the sale to the original borrower.

Is the petitioner entitled to obtain the balance of proceeds from the resale of the mortgaged property?

In terms of section 16 read with sections 17 and 19 of the Bank of Ceylon Ordinance, when a loan is granted by the bank and is defaulted, the board of directors may, by resolution, authorise to take possession of the mortgaged property given as security for the loan, to recover the monies due to the bank. Further, the board may resolve to sell the mortgaged property to recover the monies due to the bank under section 19 of the said Ordinance which states as follows;

“Subject to the provisions of section 20 the board may by resolution to be recorded in writing authorize any person specified in the resolution to sell by public auction any movable or immovable property mortgaged to the bank as security for any loan, overdraft, advance or other accommodation in respect of which default has been made in order to recover the whole of the unpaid portion of such loan, overdraft, advance or other accommodation, and the interest due thereon up to the date of the sale, together with the moneys and

costs recoverable under section 26, and thereafter it shall not be competent for the borrower or any person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to and in the property made or registered subsequent to the date of the mortgage to the bank, in any court to move to invalidate the said resolution or the subsequent sale for any cause whatsoever, and no court shall entertain any such application”.

[emphasis added]

Furthermore, section 27 of the said Ordinance states that any excess money left over from the sale of the mortgaged property must be returned to the borrower. It states;

“If the mortgaged property is sold, the board shall, after deducting from the proceeds of the sale the amount due on the mortgage and the money and costs recoverable under section 26, pay the balance remaining, if any, either to the borrower or any person legally entitled to accept the payments due to the borrower, or where the board is in doubt as to whom the money should be paid, into the District Court of the district in which the mortgaged property is situate or kept:

Provided however that where the borrower has made default in respect of any other loan, overdraft, advance or accommodation granted to him by the bank, the board shall, in lieu of paying of such balance to the borrower or any person legally entitled to accept the payments due to the borrower or depositing in court, as aforesaid, deposit such balance in the District Court of the district in which the property mortgaged as security for such other loan, overdraft, advance or accommodation is kept or situate.”

However, if the property is not purchased at the public auction, the bank will purchase the said property for a nominal amount and resell it to recover the money due to the bank in terms of section 31 of the Bank of Ceylon Ordinance which reads as follows;

*“(1) If the property sold has been **purchased on behalf of the bank** and the sale is not cancelled under section 30, the board may, at any time, resell the*

property and transfer to the purchaser by endorsement on a certified copy of the certificate referred to in subsection (3) of section 28, all the right, title and interest which would have been acquired by the purchaser at the original sale.

(2) An endorsement made under this section shall be liable to the same stamp duty and charges as a certificate to a purchaser at the original sale and shall

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(a) in the case of movable property, immediately on the endorsement being made, and

(b) in the case of immovable property, upon registration in the office of the Registrar of Lands, have the effect of vesting the property in the purchaser as though the sale under this Ordinance had not taken place.”

The respondent submitted that the petitioner is not entitled to the balance of proceeds from the **resale** of the mortgaged property as section 27 of the Bank of Ceylon Ordinance only stipulates the procedure to be followed during the sale of the property at the public auction. Thus, it was argued that since the mortgaged property was purchased by the bank at a nominal price of Rs. 1,000/-, there is no balance to be refunded to the petitioner in terms of section 27 of the Bank of Ceylon Ordinance.

As stated above, once a loan is defaulted the board may pass a resolution to sell the property mortgaged to the bank in order to recover the money due to the bank. Thereafter, in terms of section 19 of the Ordinance, a public auction should be held to sell the mortgaged property. Contingent upon the absence of bidders to purchase the said property, the bank will proceed to purchase the property for a nominal sum of Rs. 1,000/- under sections 30 and 31 of the said Ordinance. However, the bank must re-sell the property to recover the money that is due to the bank.

Sections 18(3), 23 and 30 of the Bank of Ceylon Ordinance facilitates a borrower to pay the money due to the bank and redeem the mortgaged property. It is pertinent to note that even after a property was purchased by the bank at the public auction, the bank should hand over the property to the borrower upon the settling of the sums due to the bank. Thus, it is apparent that

the bank cannot recover more than what is due to the bank by selling a mortgaged property. In fact, the bank cannot recover more than what is stated in the resolution passed by the board.

Further, *Stroud's Judicial Dictionary of Words and Phrases (3rd edition)*, Volume 3 at page 262 defines the word 'sale' as "undoubtedly, in general, implies an exchange for money...". Further, Black's Law Dictionary (11th Edition) at page 1603 defines 'sale' as "the transfer or property or title for a price." Furthermore, *Webster's Third New International Dictionary of the English Language Unabridged* defines the word 'resale' as "1. the act of selling again usually to the next link in a chain of distribution, 2. a sale at second hand, 3. an additional sale to the same buyer." A careful analysis of the interpretations given to the words 'sale' and 'resale' show that the transfer of a property for consideration to a buyer.

Section 20 of the said Ordinance has used the word 'sell'. Further, in section 31 of the said Ordinance, the legislature has used the word 'resell'. However, section 27 of the Ordinance has used the word 'sold'. Therefore, a careful analysis of the words 'sell' and 'resell' used in sections 19 and 31 respectively in the Bank of Ceylon Ordinance shows that a different meaning is not given to the word 'sold' in section 27 of the said Ordinance. Therefore, section 27 is applicable to both sections 20 and 31 of the Bank of Ceylon Ordinance.

A careful consideration of the provisions of the Bank of Ceylon Ordinance shows that the bank is not authorised by the said Ordinance to make a profit by selling the mortgaged property purchased at a nominal price at a public auction. Further, it would result in unjust enrichment to the bank as the market value of the mortgaged property is often much higher than the amount of the loan obtained by mortgagors.

In the aforementioned circumstance, I am of the view that the restrictive interpretation given to section 27 of the Bank of Ceylon Ordinance by the learned Senior State Counsel for the respondent, based on the words "sale" and "resale", is untenable. Thus, the bank retaining the excess money of the proceeds from a resale of the mortgaged property to a third party contravenes the provisions of the said Ordinance. Particularly section 27 of the said Ordinance.

Conclusion

In the foregoing circumstances, I hold that the petitioner is entitled to the excess money from the resale of the mortgaged property, if any. Further, the petitioner is entitled to have the details of the amount the property was sold for, and the money due from him to the bank at the time

the property was sold to the third party. Hence, the refusal to furnish such information was a violation of the petitioner's fundamental rights enshrined in Article 12(1) of the Constitution by the 1st respondent.

Hence, I direct the bank to disclose the full amount derived from the resale of the property to the third party, the total sum of money that was owed by the borrower and to pay the excess amount from the said transaction, if any, with interest to the petitioner.

No costs.

Judge of the Supreme Court

P. Padman Surasena, J
I agree

Judge of the Supreme Court

E. A. G. R. Amarasekara, J
I agree

Judge of the Supreme Court