

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

DFCC Bank PLC,
No. 73/5, Galle Road,
Colombo 03.
1st Defendant-Appellant

SC APPEAL NO: SC/APPEAL/144/2022

SC LA NO: SC/HC/LA/45/2020

CHC CASE NO: HC/484/2018/MR

Vs.

Laththuwa Handi Harindu
Dharshana,
No. 35, Kandy Road,
Kiribathgoda, Kelaniya.
Plaintiff-Respondent

Schokman &
Samerawickreme,
No. 290, Havelock Road,
Colombo 05.
2nd Defendant-Respondent

Before: Hon. Justice Vijith K. Malalgoda, P.C.
 Hon. Justice Janak De Silva
 Hon. Justice Mahinda Samayawardhena

Counsel: N.R. Sivendran with Upendra Kalehewatta for the 1st
Defendant-Appellant.
Mokshini Jayamanne for the Plaintiff-Respondent.

Argued on: 08.06.2023

Written Submissions:

By the 1st Defendant-Appellant on 13.01.2023

By the Plaintiff-Respondent on 05.06.2023 and 04.07.2023

Decided on: 27.02.2024

Samayawardhena, J.

The plaintiff filed this action in the Commercial High Court against the 1st defendant bank and the 2nd defendant auctioneer seeking a declaration that the resolution passed by the board of directors of the bank on 27.03.2018 in terms of section 4 of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, as amended, is a nullity. By this resolution the board of directors of the bank resolved that the mortgaged property of the plaintiff be sold by public auction to recover the dues to the bank.

The Commercial High Court by order dated 23.06.2020 issued an enjoining order followed by an interim injunction preventing the bank from auctioning the property on 07.08.2018 or on any subsequent date without following the proper procedure stipulated in the Act.

The Court took the view that the bank failed to give proper notice of sale in terms of section 9 of the Act, since notice of sale had been given by the auctioneer, not by the bank.

The short question to be decided by this Court is whether the notice of sale as mandated by section 9 must be given by the bank or if it can alternatively be given by the auctioneer.

In terms of section 4, the board of directors of the bank may by resolution to be recorded in writing authorize any person specified in the resolution to conduct the auction.

4. Subject to the provisions of section 7 the Board may by resolution to be recorded in writing authorize any person specified in the resolution to sell by public auction any property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover the whole of the unpaid portion of such loan, and the interest due thereon up to the date of the sale, together with the money and costs recoverable under section 13.

In the resolution relevant to this case, it is expressly stated that the board resolved to authorize the 2nd defendant auctioneer to conduct the public auction.

Section 8 requires the notice of resolution to be published in the gazette and newspapers, and copies of the same to be sent to the borrower.

8. Notice of every resolution under section 4 authorizing the sale of any property shall be published in the Gazette and in at least three daily newspapers, in the Sinhala, Tamil and English languages and copies of such notice shall be dispatched to the borrower, if he is alive, and to every person who has, in respect of that property, registered his address as required by section 2 and if that property consists of the interest of a lessee under a lease from the State, to the Land Commissioner.

The requirements of section 8 have been complied with by the bank. In other words, the bank informed the plaintiff in writing that the board of directors of the bank passed a resolution authorizing the 2nd defendant to sell the mortgaged property by public auction to recover the dues to the bank.

Section 9 of the Act reads as follows:

9. Notice of the date, time and place of every sale authorized by a resolution under section 4 shall, not less than fourteen days before the date fixed for the sale be published in the Gazette and copies of such notice shall be—

(a) dispatched to the borrower, if he is alive, and to every person to whom notice of any resolution is required to be dispatched under section 2,

(b) pasted on or near the property which is to be sold.

The requirements of section 9 have been complied with by the auctioneer, not by the bank. The crux of the matter is whether the auctioneer's compliance with the requirements of section 9 is sufficient, or if these requirements must specifically be fulfilled by the bank.

Section 9 requires the publication of a notice in the gazette 14 days before the date of the auction, specifying the date, time and place of the auction. The section further requires that a copy of the notice to be dispatched to the borrower and pasted on or near the property to be auctioned.

Section 9 does not state who should take these steps. The requirements under section 9 pertain to the actual conduct of the auction. As stated previously, section 4 empowers the board of directors of the bank to authorize any person specified in the resolution to conduct the public auction, as the board of directors cannot practically conduct the auction.

Accordingly, the person who was authorized by the board to conduct the auction can take required steps under section 9. When section 9 notice is given by the auctioneer specifying the date, time and place of the auction, the bank had already informed the borrower the name of the auctioneer in compliance with section 8 of the Act.

So long as the requirements of section 9 have been complied with by the person who was authorized by the board of directors to conduct the auction, the borrower cannot challenge the auction on the basis that the notice of sale as required by section 9 was given by such person, not by the bank.

No prejudice has been caused to the plaintiff by the fact that notice of sale was given by the auctioneer, not by the bank.

The questions of law upon which leave to appeal was granted are as follows:

- (a) When the bank by resolution under section 4 of the Act authorizes “any person” to sell the property by public auction, whether that person could take steps to notify the date of sale under section 9 of the Act?
- (b) Did the learned High Court Judge err in law by misinterpreting sections 4 and 9 of the Act?

I answer the questions of law in the affirmative.

The order of the Commercial High Court dated 23.06.2023 is set aside and the appeal is allowed with costs.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.

I agree.

Judge of the Supreme Court

Janak De Silva, J.

I agree.

Judge of the Supreme Court