

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

In the matter of an application for  
Leave to Appeal under and in terms  
of Section 5(2) of the High Court of  
the Provinces (Special Provisions)  
Act No. 10 of 1996 read with Chapter  
LVIII of the Civil Procedure Code.

1. Muthu Jeewarathnam

2. Sellappan Mehaletchumi  
No. 14,  
Ebenzer Place,  
Dehiwela.

**Plaintiffs**

**SC Appeal No. 54/2015**

SC (HC) Leave to Appeal  
Application N. 16/2013

High Court Case No. H.C. (Civil) 290/2012(MR)

**Vs**

Commercial Bank of Ceylon PLC  
Commercial House,  
No. 21, Bristol Street,  
Colombo 01.

**Defendant**

**AND NOW**

Commercial Bank of Ceylon PLC  
Commercial House,  
No. 21, Bristol Street.  
Colombo 01.

**Defendant-Petitioner**

**Vs**

1. Muthu Jeewarathnam
  
2. Sellappan Mehaletchumi  
No. 14,  
Ebenzer Place,  
Dehiwela.

**Plaintiffs-Respondents**

Before : Priyantha Jayawardena PC, J  
A. L. Shiran Gooneratne, J  
Mahinda Samayawardhena, J

Counsel : Harsha Amerasekara PC with K. Peiris for the Defendant-Appellant  
Dr. Sunil Coorey for the Plaintiff-Respondent

Argued on : 14<sup>th</sup> November, 2022

Decided on : 5<sup>th</sup> July, 2023

## **Priyantha Jayawardena PC, J**

### **Facts of the case**

This is an appeal to set aside the Order of the Commercial High Court dated 12<sup>th</sup> of March, 2013 granting an interim injunction restraining the *parate execution* of a mortgaged property until the conclusion of the trial.

The 2<sup>nd</sup> plaintiff-respondent (hereinafter referred to as “the 2<sup>nd</sup> respondent”), who is the wife of the 1<sup>st</sup> plaintiff-respondent (hereinafter referred to as “the 1<sup>st</sup> respondent”), had obtained a housing loan of Rs. 8 Million on the 12<sup>th</sup> of April, 2005 from the defendant-appellant (hereinafter referred to as “the appellant bank”) by mortgaging the property described in the schedule to the plaint as security, which is owned by her. In addition to the above security, the 1<sup>st</sup> respondent had given a personal guarantee to secure the said loan.

Thereafter, the 2<sup>nd</sup> respondent had obtained another loan of Rs. 6 Million on the 17<sup>th</sup> of January, 2007 from the appellant bank against the same property by entering into a secondary mortgage. Further, the said loan was settled in full by the 2<sup>nd</sup> respondent and the secondary mortgage bond had been discharged by the appellant bank.

Subsequently, the respondents had jointly obtained another loan of Rs. 5 Million on the 25<sup>th</sup> of February, 2008 from the appellant bank by entering into a secondary mortgage as security against the same property.

After some time, the respondents had defaulted on the repayment of both the said loans. Hence, the appellant bank had sent a letter of demand dated 14<sup>th</sup> of February, 2011 to the respondents, requesting them to settle the money due to the appellant bank.

However, as the respondents did not pay the money due on the aforesaid loans, the appellant bank had passed a resolution for the sale of the said mortgaged property by *parate execution* to recover the sum due on the aforesaid loans.

The said resolution dated 20<sup>th</sup> of December, 2011 states *inter alia*, to sell the mortgaged property by public auction for the following reasons:

- (a) recovery of a sum of Rs. 4,670,691/- with further interest at 12% per annum from the 17<sup>th</sup> of September, 2011 together with costs of advertising and any other incurred less payments (if any) since received; and
- (b) recovery of a sum of Rs. 9,129,306/- with further interest on a sum of Rs. 5 Million per annum from the 17<sup>th</sup> of September, 2011 to date of sale together with costs of advertising and any other incurred less payments (if any) since received.

In the circumstances, the respondents instituted action against the appellant bank in the Commercial High Court on the 30<sup>th</sup> of May, 2012 alleging that the resolution passed by the appellant bank to *parate execute* the said mortgaged property to recover both the aforesaid loans is unlawful as the appellant bank was not entitled to treat the loan of Rs. 8 Million in default. Further, the respondents prayed for an interim injunction staying the sale of the mortgaged property by *parate execution*.

Thereafter, the learned High Court Judge, by his Order dated 12<sup>th</sup> of March, 2013 granted an interim injunction restraining the appellant bank and any persons acting under it from selling the said mortgaged property until the conclusion of the said case in the Commercial High Court.

Being aggrieved by the said Order of the Commercial High Court, the appellant bank appealed to this court and this court granted leave to appeal on the following questions of law:

- “ii) the Learned High Court Judge erred gravely in law and misdirected himself in law in failing to consider the provisions of s.12 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 by which the Defendant Bank has been specifically empowered by the legislature to adopt a resolution of the manner of ‘X14’ and take steps thereunder;
- v) the Learned High Court Judge gravely erred in law and misdirected himself in law in failing to take cognizance of the fact that the Plaintiffs were expressly barred from obtaining the relief prayed for in the plaint in law;
- vi) the Learned High Court Judge gravely erred in law and misdirected himself in law in failing to consider and/or apply and/or properly apply the tests required for the grant of an interim injunction in the delivery of his Order.”

Further, the learned counsel for the respondents raised the following question of law to be considered by this court:

“In any event in the totality of the circumstances of this case and in view of the amendments brought to Act No. 01/11 (Section 5(A) and Section 22) and as further amended by Act N. 19/11, was a High Court Judge in event right in granting the interim injunction.”

**The Learned High Court Judge erred gravely in law and misdirected himself in law in failing to consider the provisions of s. 12 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 by which the Defendant Bank has been specifically empowered by the legislature to adopt a resolution of the nature of ‘X14’ and take steps thereunder**

In respect of the above question of law, the issue that needs to be considered is whether the appellant bank has been conferred with the power under section 12 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 (hereinafter referred to as the “Recovery of Loans by Banks Act) to adopt a resolution to authorise the sale of a mortgaged property for the recovery of money due on two or more loans when the respondents have defaulted only on one loan.

In terms of section 3 read with section 4 of the Recovery of Loans by Banks Act, whenever a default is made in the payment of any sum due on any loan granted to a borrower, the Board of Directors of the bank may, *inter alia*, pass a resolution to sell the mortgaged property by public auction to recover the whole of the unpaid portion of such loan.

However, in terms of section 5A(1) of the said Act, a bank is not entitled to recover a loan under the said Act if the principal sum of the loan does not exceed Rs. 5 Million. Further, the interest accrued on such a loan or the penalty imposed thereon shall not be taken into consideration when calculating the principal sum borrowed by a borrower from the bank. Thus, the said section contemplates situations where the principal sum given as a loan or money advanced should be more than Rs. 5 Million to fall within the purview of the Act.

In the instant appeal, the principal amounts borrowed from the appellant bank are Rs. 8 Million and Rs. 5 Million. Thus, both loans exceed the Rs. 5 Million threshold stipulated in the said section. Hence, the bank is entitled by law to invoke the provisions of the said Act to recover both loans granted to the borrower.

In the circumstances, the appellant bank has passed a resolution under section 4 of the said Act to recover the total sum of the money due on the mortgage bond as well as on the secondary mortgage loan by authorising the sale of the property.

Further, the appellant bank has published a notice of the resolution in the Gazette dated 11<sup>th</sup> of May, 2012 and in three daily newspapers, and copies of such publications were sent to the respondents in terms of section 8 of the Recovery of Loans by Banks Act. Nevertheless, the respondents had not settled the arrears due to the appellant bank on the Rs. 5 Million loan. Therefore, the appellant bank had advertised the sale of the mortgaged property to recover the total sum due to it in respect of both loans under section 9 of the said Act and served copies of the notices of sale on the respondents.

Section 12 of the Recovery of Loans by Banks reads as follows:

*“(1) In any case where two or more loans have been granted by a Bank on the security of the same property and, default made in the payment of any sum due upon any one or more of such loans, the foregoing provisions of this Act shall apply notwithstanding that default may not have been made in respect of the other loan or any of the other loans and the Board may, in any such case, by resolution under section 4 authorise the sale of the property for the recovery of the total amount due to the Bank in respect of both or all of the loans, as the case may be, and these provisions shall apply accordingly.*

*(2) Nothing in section 3 to 15 (both sections inclusive) shall be read or construed as prohibiting a Bank from recovering the amount due on a mortgage bond in accordance with the provisions of any other law.”*

[emphasis added]

Accordingly, the words “notwithstanding that default may not have been made in respect of the other loan” referred to in section 12(1) means that where two or more loans have been granted to a borrower against the security of the same property and if a borrower defaults to repay any one or more of those loans, the bank is entitled to pass a resolution under section 4 of the said Act to authorise the sale of the mortgaged property for the recovery of the total amount due to the bank in respect of all the loans granted to a borrower even though the borrower has not defaulted on the other loans granted to him by the bank.

If the said section is interpreted to mean that, when two or more loans have been granted on the security of the same property, a bank is not entitled to sell the mortgaged property to recover the money due on loans that are being defaulted merely because the other loans have been serviced without any default, the bank would not be able to recover the money due on the defaulting loan. Such an interpretation would render the said section nugatory.

Thus, the appellant bank is entitled to pass a resolution in terms of section 12(1) of the said Act for the sale of the mortgaged property to recover the total amount due on both of the aforesaid loans, even though there was no default in the re-payment of the loan of Rs. 8 Million since both of the aforesaid loans have been granted on the security of the same property.

Therefore, I am of the view that the appellant bank is entitled to sell the said mortgaged property to recover the total sum due to the bank on both of the aforesaid loans.

However, section 14 of the said Act stipulates that if there is any excess money remaining from the proceeds of sale of the said mortgaged property, it should pay the balance remaining, if any, to the borrower after deducting from the amount due on the mortgage and the money and Costs recoverable under section 13 of the said Act.

In the circumstances, I am of the opinion that the learned High Court Judge erred in law in failing to hold that the appellant bank has been specifically conferred power under section 12 of the Recovery of Loans by Banks Act to adopt the resolution marked and produced as 'X14' to take steps to sell the said mortgaged property to recover the outstanding money due on both of the aforesaid loans.

**The Learned High Court Judge gravely erred in law and misdirected himself in law in failing to consider and/or apply and/or properly apply the tests required for the grant of an interim injunction in the delivery of his Order**

The learned High Court Judge, by his Order, granted an interim injunction restraining the appellant bank from selling the said mortgaged property until the conclusion of the said case in the Commercial High Court.

However, as stated above, the appellant bank is entitled to sell the mortgaged property to recover the money due to the bank. In view of the aforementioned findings and taking into consideration

the other facts and circumstances of the case, I am of the opinion that the respondents have failed to establish a prima facie case in favour of them and that the balance of convenience lied in favour of the appellant bank, as section 12 of the Recovery of Loans by Banks Act allows the bank to sell the mortgaged property to recover the money due to them.

Therefore, I am of the view that the High Court Judge erred by not properly applying the aforementioned tests required for the grant of an interim injunction and issuing an interim injunction preventing the appellant bank from *parate executing* the mortgaged property.

### **Conclusion**

In the circumstances, I am of the view that the following questions of law should be answered as follows;

“the Learned High Court Judge erred gravely in law and misdirected himself in law in failing to consider the provisions of s.12 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 by which the Defendant Bank has been specifically empowered by the legislature to adopt a resolution of the nature of ‘X14’ and take steps thereunder.”

Yes

“the Learned High Court Judge gravely erred in law and misdirected himself in law in failing to consider and/or apply and/or properly apply the tests required for the grant of an interim injunction in the delivery of his Order.”

Yes

Due to the foregoing answers, the other questions of law need not be considered.

Therefore, the appeal is allowed. I set aside the order of the learned High Court Judge.



No costs.

Judge of the Supreme Court

A. L. Siran Gooneratne, J

I Agree

Judge of the Supreme Court

Mahinda Samayawardhena, J

I Agree

Judge of the Supreme Court