

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

**S.C. Appeal No. 45/11
S.C. HC. CA. LA. No. 266/10
High Court of Appeal Leave
to Appeal Application No.
111/2009
D.C. Colombo Case No.
DLM/328/08**

In the matter of an application for Leave to Appeal under and in terms of the provisions of Section 5(c) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read together with the provisions of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka against the order of Their Lordships of the High Court of Appeal of the Western Province holden at Colombo delivered on 30.06.2010.

A. Arangallage
No. 3/3, Rajakeeya Mawatha,
Colombo 7.

Plaintiff-Petitioner-Petitioner-Appellant

Vs.

1. Pauline Herath
No.24B, Alfred Place,
Colombo 3.
 2. Bank of Ceylon
Bank of Ceylon Building,
No. 4, Lanka Banku Mawatha, Colombo 1.
- Defendant-Respondent-Respondent-
Respondents

BEFORE : **TILAKAWARDANE, J**
MARASINGHE, J &
ALUWIHARE, PC, J

COUNSEL : S. Parathalingam, PC with Kushan D' Alwis, PC, and
Kaushalya Navaratne for Plaintiff-Petitioner-Appellant.
Chandana Prematillake with Gratton Perera instructed by
Michael Fernando for 1st Defendant-Respondent-
Respondent.
Ms. S. Nanayakkara for 2nd Defendant-Respondent – Bank.

ARGUED ON : 10/02/2014

DECIDED ON : 04.04.2014

HON. SHIRANEE TILAKAWARDANE, J

Leave to Appeal was sought by the Plaintiff-Petitioner-Petitioner via the Petition dated 10.08.2010 in Application S.C. (CHC) CALA No. 266/10, in order to enable an Appeal against the Judgment in Case No. WP/HCCA/COL/111/2009/LA by the Provincial High Court of Civil Appeal of the Western Province. Having heard the submissions of the respective Counsel, this Court granted Leave to Appeal on 26.04.2011 on the questions of law set out in paragraph 14(i), 14(iii) of the Petition as modified as follows:

14(i). Does the Plaintiff-Petitioner-Petitioner have ex facie disclosed a prima facie case against the 1st Defendant-Respondent-Respondent?

14(iii). In any event and without prejudice to the aforesaid, does the passage quoted in paragraph 335 in page No. 329 of Law of Contracts by C. G. Weeramantry from Voet 18.5.16, have no application in the backdrop of development of Modern Law?

Furthermore, Leave was also granted on the question of law set out in paragraph 14(ii) of the Petition, amended as follows:

14(ii). Is the auction sale in question an ordinary sale by public auction which attracts the doctrine of laesio enormis?

On 10.02.2014, it was decided to treat the above ground of appeal i.e. 14(ii) as the main point for determination in the Appeal.

The narrative relevant to this case is unfolded as follows: the Plaintiff-Petitioner-Petitioner (hereinafter referred to as the Petitioner) and his wife, by virtue of Deed No. 1129 dated 19.06.1985, became owners of the property more fully described in the Schedule to the Plaint marked P1.

The Petitioner proceeded to obtain a loan of Rs. 2, 550, 000/- from the 2nd Defendant-Respondent-Respondent (hereinafter referred to as the 2nd Respondent) by mortgaging the premises in suit by Mortgage Bond No. 799 dated 10.05.1988.

On 10.10.1983, the 1st Defendant-Respondent-Respondent (hereinafter referred to as the 1st Respondent) instituted action against the Petitioner via D.C. Colombo Case No. 2327/SPL and was later transferred to the Commercial High Court. By judgment delivered by the Commercial High Court on 31.10.2000, the Petitioner was order to pay the 1st Defendant a sum of Rs. 3, 215, 586.48 along with interest on the said sum from 31.10.1986. Though the Petitioner appealed against this decision to the Supreme Court in S.C. (CHC) 26/00, he was unable to pay the brief fees and be present in Court on the day the case was heard (allegedly due to a bona fide mistake). As a result, on 11.10.2004, the Supreme Court dismissed the case.

As the Petitioner did not abide by the determination of the Commercial High Court, the 1st Respondent then obtained a writ on 25.02.2005, seized the abovementioned property and took steps to auction the said half share of the Petitioner. However, on 26.08.2005, the Petitioner filed a Petition and Affidavit in the High Court and the High Court Judge directed him (the Petitioner) to deposit a sum of Rs. 4 million in order to stay the sale but neither the Petitioner nor his Attorneys were present in Court on this date nor was the direction complied with.

Therefore the auction took place on 02.09.2005, as there were no circumstances impeding it, and the 1st Respondent purchased the half share held by the Petitioner for Rs. 8, 025, 000/-. No objections were raised by the Petitioner within thirty days of receiving the Fiscal's Report and accordingly, the Court confirmed the sale. No objections were raised by the Petitioner within 30 days and the Court confirmed the sale on 08.11.2005. The Fiscal Conveyance No. 2179 was written on 13.02.2006.

Though no objections were raised by the Petitioner at this stage, in 2008, the Petitioner instituted D.C. Colombo Case No. 328/08/DLM against the 1st and 2nd Respondents praying for a declaration that Conveyance No. 2179 dated 13.02.2006 is void on the principle of *laesio enormis* and further prayed for an Interim Injunction restraining the 1st Defendant from transferring, mortgaging and alienating the alleged rights of the 1st Defendant. The Learned Additional District Judge of Colombo, on 22.09.2009, refused the Application for an Interim Injunction.

Aggrieved by this Order, the Petitioner sought Leave to Appeal from the High Court by instituting WP/HCCA/COL/LA Application No. 111/2009 but Leave was refused on 30.06.2010. The present case before this Court is an Appeal against the Order in Case No. 111/2009 and where as adverted to above, Leave to Appeal was granted on the abovementioned questions of law on 26.04.2011.

This Court will first deal with the main ground on which this case was argued by the counsel which was the contention whether the auction sale in question is an ordinary sale by public auction which attracts the doctrine of *laesio enormis*.

The principle of *laesio enormis* is succinctly summarised by C. G. Weeramantry in **The Law of Contracts**, Volume I, p. 332 as follows:

“A contract may be avoided by Court on the ground of laesio enormis either when the purchaser pays more than double the true value of the thing or the vendor sells the thing for less than half its value.... Where the consideration is less than half (or more than twice) the true value of the property, the sale is voidable on the ground of laesio enormis unless there is some special consideration present in the case which bars the application of the principle”.

Keeping this principle in mind, it becomes clear that its conditions bear some resemblance to the facts of the present case. Prior to the auction, a valuation of the premises in suit was

obtained. In the Valuation Report of W. M. Wickremaratne (P10), the property was valued at Rs. 88, 576, 000/-. Accordingly, half share of the said property was then valued at Rs. 44, 000, 000/-. Consequently, in D.C. Colombo Case No. 328/08/DLM instituted by the Petitioner, it was alleged by him that the value of the said property, at the time of the conveyance (No. 2179) according to the Valuation Report of K. Arthur Perera was Rs. 209, 275, 000/- and therefore, half share of the said property was valued at Rs. 104, 637, 5000/-.

In light of such facts, the Counsel argued that the alleged consideration tendered in the execution of Conveyance No. 2179 is less than one fifth of the value of the half share of the said land contained in the said valuation report. It was further argued that in light of the Valuation Report marked P12, the consideration tendered was grossly below the true value of the property, thus attracting the principle of *laesio enormis*. As a result, the Counsel averred that Conveyance No. 2179 is void in law and in fact due to the operation of the said principle.

In light of this argument, this Court notes that the principle of *laesio enormis* has been recognized and applied by Superior Courts previously. However, in the present case, it is imperative to ascertain whether the facts of the case fall within any of the accepted exceptions to this rule as it has been strongly argued that the principle does not apply to sales made under the authority of the Court.

In support of this contention, several authorities have been cited. *J. W. Wessels* in **The Law of Contracts in South Africa (1937)** (*Vol. II at p. 1345*) stated that

“In Holland, the remedy was not allowed when a sale had been made by public auction under a judicial decree in execution of a judgment”.

As per Voet in **The Selective Voet being the Commentary on the Pandects**, *Volume III* (Paris Edition of 1829), *XVIII. 5. 16 (p. 350)*,

“Remedy does not apply to sales in execution – nor again does the remedy apply if the sale has taken place by public auction on the Order of a judge with a view to the execution of a judgment”.

In view of this, *C. G. Weeramantry* in **The Law of Contracts**, *Volume I*, p. 335, citing Voet, specifically states that

“Laesio enormis does not lie in the following cases:-

3. *The remedy does not lie in the case of sales made under authority of Court but it lies in ordinary sales by public auction”.*

Similarly, in **Law of Property**, Volume III (2nd Edition), *Wijeyadasa Rajapakshe P.C.* at p. 312 expressly states that

“Enormis laesio does not apply to a sale made by Order of a Court or when directions had been given to an heir by a testator to sell property at a certain price.”

Given this exception, this Court must ascertain whether Conveyance No. 2179 was executed subsequent to *an ordinary sale by public auction or a public auction conducted under the authority of the Court*. It must be made clear that if the present case falls within the parameters of the former, the principle of *laesio enormis* will apply whilst if is consistent with the latter, the applicability of the principle is negated.

In order to distinguish whether the auction itself was an ordinary sale by public auction, the facts pertinent to the case are important. The chain of events that preceded the auction can be summarised as follows: the Petitioner, not having satisfied the judgment and decree given by the Commercial High Court on 30.10.2000 in Case No. 73/97/01, even after the Supreme Court had dismissed the Appeal against the aforementioned judgment, the 1st Respondent obtained a writ on 25.02.2005 and consequently seized the property on 06.04.2005. Subsequently, the date for the sale of the premises in suit by auction was set on 02.09.2005. Though the Petitioner filed a Petition to stay the sale, due to non-appearance of the Petitioner and non-compliance of the condition laid out by the High Court Judge (who directed that Rs. 4 million be deposited to stay the sale), the sale progressed and the only bid (by the 1st Respondent) of Rs. 8, 025, 000/- was accepted. The Petitioner did not object to the sale, in terms of **Section 282** of the *Civil Procedure Code* and accordingly, the Court confirmed the sale on 08.11.2005 and the Fiscal Conveyance was written on 13.02.2006.

Given the above facts, especially the Writ obtained by the 1st Respondent on 25.02.2005, the confirmation of the sale by the Court on 08.11.2005 and the Fiscal Conveyance written on 13.02.2006, it becomes abundantly clear that the sale did take place under the authority of the Court and therefore, clearly does not attract application of *laesio enormis*.

However, this Court must also reflect upon the argument made by the Counsel for the Petitioner who stated that the comments made by C. G. Weeramantry in **The Law of Contracts**, Volume I, p. 335 indicates that the principle of *laesio enormis* lies against ordinary sales by public auction **even if the said auctions are conducted under the authority of the Court**. This Court strongly disagrees with this contention for the following reasons.

The exception states that “*The remedy does not lie in the case of sales made under authority of Court but it lies in ordinary sales by public auction*”. Therefore, it indicates that the principle is indeed applicable in an ordinary sale by public auction: this fact is not in dispute.

However, this Court notes the present case does not qualify as an *ordinary sale*. The auction conducted subsequent to which Conveyance No. 2179 was concluded, was one that was done under *the authority of the Court*. In other words, it is a sale conducted in execution of the judgment in Case No. 73/97/01 as the Petitioner did not satisfy the judgment nor pay the brief fees as directed by the Commercial High Court. The sale was made subsequent to an auction facilitated by a Writ of Execution granted by Court, the auction was conducted by the Fiscal of the Commercial High Court, and further the auction was confirmed by the Court, and therefore, clearly a **sale made under authority of the Court**, which clearly brings the present case within the ambit of the exception.

Another factor that disallows the applicability of the principle arises from the fact that the 1st Respondent was not a *mala fide purchaser*. C. G. Weeramantry in **The Law of Contracts**, Volume I, p. 335, citing Voet, states that

“*The action is a personal one and only lies against the guilty party or a mala fide purchaser from him*”.

The 1st Respondent cannot be termed a *guilty party* in any sense of the word: the 1st Respondent instituted legal action against the Petitioner, obtained Judgment in her favour in Case No. 73/97/01, the auction was conducted by means of a legally obtained Writ, and the Court finally obtained a legal order which confirmed the Sale. In no way can the 1st Respondent be considered a participant in bad faith and as such, the principle of *laesio enormis* cannot be applied to the present case.

Furthermore, the Petitioner’s prayer to set aside the Conveyance No. 2179 on the basis of *laesio enormis* could not be granted for additional reasons. Relevant here is **Section 282 (2)** of the *Civil Procedure Code* which states that

“The decree-holder, or any person whose immovable property has been sold under this Chapter, or any person establishing to the satisfaction of the court an interest in such property, may apply by petition to the court to set aside the sale on the ground of a material irregularity in publishing or conducting it; but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the court that he has sustained substantial injury by reason of such irregularity, and unless the grounds of the irregularity shall have been notified to the court within thirty days of the receipt of the Fiscal's report”.

It is abundantly clear that though the Petitioner had the legal right to apply by Petition to Court to set aside the sale on the basis of *laesio enormis*, he chose not to do so within the stipulated time period. Instead, this Court notes that Case No. 328/08 DLM was filed in the District Court of Colombo against the 1st and 2nd Respondents on 15.12.2008. In this case, an ex parte enjoining order was obtained but the order was challenged in the High Court. The High Court proceeded to reject the Appellant's Application for an interim injunction. In light of **Section 282 (2)** of the *Civil Procedure Code*, Court notes that *“no sale shall be set aside on the ground of irregularity.....unless the grounds of the irregularity shall have been notified to the Court within **thirty days of the receipt of the Fiscal's Report**”*. The Registrar's Report clearly recounted the manner in which the auction was conducted and was dated 06.09.2005. However, the Petitioner instituted action to set aside the sale in 2008, three years later.

Furthermore, **Section 282(1)** states that

“The Fiscal shall report to the court every sale of immovable property made by him or under his direction within ten days after the same shall have been made. And no sale of immovable property; shall become absolute until thirty days have elapsed subsequent to the receipt of such report, and until such sale has been confirmed by the court”.

In the present case, having received no objections to set aside the sale, the Court confirmed the sale on 08.11.2005 in accordance with the abovementioned provision. Thus, in accordance with **Section 282 (1)** and **Section 282 (2)**, the sale cannot be set aside.

The Court further notes the unnecessary delays and the failure of the Petitioner to take action when essential. Having appealed against the judgment of the Commercial High Court in Case No. 73/97/01 to the Supreme Court in Case No. S.C. (CHC) 26/2000, the Petitioner was absent and unrepresented causing the Supreme Court to abate the case. Further, while the judgment in

Case No. 73/97/01 was given in 2000, the Petitioner did not satisfy the decree, prompting the 1st Respondent to obtain a Writ of Execution in 2005. The Petitioner had ample time to satisfy the decree but made no attempt to settle the matter. The Petitioner also filed a Petition to stay the sale of the premises by auction on 26.08.2005, but failed appear in Court and pay the Rs. 4, 000, 000/- as ordered by the High Court Judge to stay the sale. Therefore, there was no bar for the sale to take place. The Petitioner further did not object to the sale nor attempt to have it set aside within thirty days as provision is made by **Section 282** of the *Civil Procedure Code*. Cumulatively, these material facts indicate that the Petitioner does not have a prima facie case against the 1st Respondent.

The Court also finds it relevant to assess whether the application for an Interim Injunction can be supported if action was instituted within the required time period in accordance with **Section 282** of the *Civil Procedure Code*. In this regard, **Silva v. Dias et al. (1910)** (13 NLR 125) is pertinent. In this case, it was held that

“A person seeking to set aside a Fiscal’s sale on the ground of material irregularity must lead direct evidence to prove that the sale of the property at an under value was due to the irregularity...”

In the present Supreme Court case, no such irregularity is alleged by the Petitioner. The only assertion made is restricted to the fact that the property sold for an inadequate price. As stated in the above case, *“...a mere allegation of inadequacy of price without proof that it was the effect of the irregularity, on the ground of which the sale is impeached, is not sufficient evidence of substantial damage caused by such irregularity”*. (Emphasis added).

Furthermore, in **Tasadduk Rasul Khan v. Ahamad Husain (1893)** (ILR. 21. Cal. 66), the Privy Council held that there must be *direct evidence* to prove that the low price was the result of the alleged irregularity and this reasoning was affirmed in **Muttukumaraswamy v. Nannitamby (1904)** (4 Tam. 34). The present case clearly lacks such direct evidence indicating that the low price was the result of an irregularity.

Therefore, this Court must agree with Lord Hutchinson in **Silva v. Dias et al. (1910)** (13 NLR 125) where he stated that

“When the Court is satisfied that the things sold have been sold for much less than their market value, it does not necessarily follow that the low price was in consequence of an irregularity; for we all know that absurdly low prices are common at Fiscals’ sales which are conducted quite regularly”.

Thus, a property being sold at an inadequate price alone does not infer the existence of an irregularity nor is it always the direct result of a material irregularity. What is important in such a situation is to consider the nature of the property as well as that of the alleged irregularity.

Under these circumstances, the Appeal is dismissed and the decision of the High Court in WP/HCCA/COL/LA/111/2009 and that of the District Court in Case No. 328/08/DLM is affirmed. The Court also order Costs in a sum of Rs 100.000/- against the Appellant.

Sgd.

JUDGE OF THE SUPREME COURT

MARASINGHE, J

I agree

Sgd.

JUDGE OF THE SUPREME COURT

ALUWIHARE, PC, J

I agree

Sgd.

JUDGE OF THE SUPREME COURT