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

S.C. Appeal No. 126/2012
SC Spl LA 193/2011
WP/HCCA/COL/12/2009 [RA]
D.C. Colombo Case No. 7957 Spl

In the matter of an Application for Leave to Appeal and/or Special Leave to Appeal from the Judgment of the Provincial High Court of the Western Province [Civil Appellate] holden at Colombo, under and in terms of Section 5C of Act No. 54 of 2006.

Amaradasa Liyanage,
Kosmodara Ihalawatte, Kotapola,
Carrying on business as a sole proprietor under the name and style of "Kosmodara Tea Factory".
Respondent-Respondent-Petitioner

Vs.

Sampath Bank PLC,
No. 11, Sir James Pieris Mawatha,
Colombo 02.
Petitioner-Petitioner-Respondent

BEFORE : **TILAKAWARDANE.J**
EKANAYAKE J &
WANASUNDERA. P.C. J

COUNSEL : Sanjeewa Jayawardane, P.C., with Ms. Sandamali Munasinghe for the Respondent-Respondent-Petitioner-Appellant.

Chandaka Jayasundara with Tharindu Rajakaruna for the Petitioner-Petitioner-Respondent-Respondent.

ARGUED ON : 25.11.2013.

DECIDED ON : 04.04.2014

TILAKAWARDANE.J

Special Leave to Appeal was sought by the Respondent-Respondent-Petitioner by the Petition dated 04.11.2011 in Application S.C. (Spl) LA No. 193/2011, in order to enable an Appeal against the judgment in case no. WP/HCCA/COL-12/2009[RA] by the High Court of Civil Appeals in Colombo. When the case was taken up for support before the Supreme Court on 10.07.2012, the Counsel for the Petitioner-Petitioner-Respondent raised the following preliminary objections:

I. The Respondent-Respondent-Petitioner has suppressed the fact that the Commercial High Court has refused to grant an interim injunction to prevent the sale which is the subject matter of the present Application;

II. The fact that an Appeal was made against the above order to the Supreme Court in S.C. H.C.L.A. 45/2006 and this Court has refused to grant relief was also suppressed;

The Counsel appearing for the Respondent-Respondent-Petitioner submitted that none of the material referred to above appear from the pleadings before the present case and, as all the documents, including the written submissions in the case, has been made available to this Court, there does not appear to be a suppression of material facts.

The Court accepted this submission and affirmed that there was no suppression of material facts as far as the present case was concerned and the preliminary objections were

overruled.

Subsequent to hearing the submissions of the Counsel, Leave to Appeal was granted by this Court on 10.07.2012 on the following questions of law:

1. Was there, in this case, a proper certificate signed by the Board of the Respondent Bank as contemplated by Section 15(2) of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 read with the definition of "Board" in Section 22 of that Act?

2. Did the High Court of Civil Appeals err in Law by failing to appreciate the significance and importance of the fundamental statutory pre-conditions imposed by Sections 8 and 9 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 in holding that the certificate issued under Section 15(1) will have the conclusive effect stipulated in Section 15(2) of the Act, with respect to the impugned sale?

3. Did the High Court of Civil Appeals err in Law when failing to hold that in the special circumstances of this case, it was unwarranted to hold that the purported Certificate of Sale was valid and that it, in effect, cured the violation of the procedural requirements set out in the statute?

The facts relating to this Appeal are as follows. The Respondent-Respondent-Appellant having obtained credit facilities from the Petitioner-Petitioner-Respondent [hereinafter referred to as the Respondent] on 29.12.2000, hypothecated the property depicted as lot B, C and D in Plan No. 2427 prepared by S. Rasappa, Licensed Surveyor. However, subsequent to torrential rain and flooding in 2003, the abovementioned property was severely damaged and the Appellant defaulted on his payments. Subsequently, on 26.08.2004, a resolution to sell the property was passed by the Board of Directors, in accordance with the **Recovery of Loans by Banks [Special Provisions] Act No. 4 of 1990** [hereinafter referred to as the Recovery of Loans by Banks Act] and the Resolution was published in the Sinhala newspaper 'Dinamina'

on 11.10.2004 as well as in the Gazette on 11.02.2005.

Upon receiving knowledge of the resolution authorizing the sale of the property by public auction, the Appellant instituted action in the Commercial High Court in Colombo by the Plaint dated 24.02.2005 wherein he sought to obtain an order to stay the auction, which was unsuccessful. Aggrieved by this order, the Appellant further sought Special Leave to Appeal from the decision of the Commercial High Court on 28.02.2007 but the Application was dismissed on the basis that they did not appear before Court.

Subsequently, on 23.03.2007, a Notice of Auction was published in the Gazette while a letter informing the Appellant of the auction to be held on 10.04.2007 was dispatched by registered post on 04.04.2007. At the public auction, the Respondent, purchased the said property for a sum of Rs. 1000/-, and subsequently, requested the Appellant to vacate the premises by letter dated 25.06.2007. As this request was not complied with, the Respondent instituted action in the District Court in terms of ***Section 16*** of the **Recovery of Loans by Banks Act** by Petition dated 27.07.2007 in case No. 7957 SPL. ***Section 16*** states that where

> *"The purchaser of any immovable property sold in pursuance of the preceding provisions of this Act shall, upon application made to the District Court of Colombo or the District Court having jurisdiction over the place where that property is situated, and upon production of the certificate of sale issued in respect of that property under Section 15 be entitled to obtain an order for delivery of possession of that property".*

Thus, Section 16 clearly allows the purchaser of any such property sold in accordance with the Act to make an application to the District Court to obtain an order for delivery of possession. While, on 27.07.2007, the District Court judge issued an order nisi, having heard the submissions of the Counsels, refused to make the order absolute on 12.06.2009. An appeal from this decision was made to the High Court of Western Province on 07.07.2009 by the Respondent, upon which, on 23.09.2011, the order was made absolute.

Aggrieved by this decision, the Appellant filed an application in this Court seeking an Order to set aside the judgment of the High Court and affirm the Order of the District Court.

Having listed out this narrative, the most pertinent issues that merit consideration are primarily concerned with the Certificate of Sale issued in accordance with the **Recovery of Loans by Banks Act.** Therefore, at the heart of this case lies the fundamental issue regarding the validity of the Certificate of Sale. This Certificate, issued according to the **Recovery of Loans By Banks (Special Provisions) Act No. 4 of 1990** has been challenged on several grounds by the Petitioner, which will be dealt by this Court on two levels.

Firstly, the issue that is presented to this Court is whether the Certificate of Sale No. 2860, issued under ***Section 15(3)*** and certified by A. M. K. A. Goonetilleke on 24.05.2007, is valid. In determining the validity of the Certificate, **Section 15(2)** of the above Act has been cited:

> *"A certificate **signed by the Board** under subsection (1) shall be conclusive proof with respect to the sale of any property that all the provisions of this Act relating to the sale of that property have been complied with"*(Emphasis added).

The argument of the Counsel appearing on behalf of the Appellant can be summarized as follows: as the Recovery of Loans by Banks Act is concerned with the encroachment of property rights; it is a legislative enactment that must be subjected to strict interpretation, especially given that its provisions allow Banks to resort to parate execution as opposed to any other form of debt recovery action. Thus, such a strict interpretation would warrant the conclusion that the Certificate of Sale issued under **Section 15** be signed by *all* members of the Board of Directors.

The above mentioned Certificate was signed by Mr. Edgar Gunarathne and Mr. Anil Suneetha Amarasuriya, the Chairman and Managing Director respectively of Sampath Bank Limited and not the *entire* board. The Counsel supported this contention with reference to **The State Mortgage and Investment Bank Law No. 13 of 1975** and its consequent amending act

which amended the provision that '*the board shall sign a certificate of sale'* to *'any two members of the Board shall on behalf of the Board sign a certificate of sale',* as well as other legislative enactments including the **National Development Bank Act No. 02 of 1979, the Bank of Ceylon Ordinance** and the **People's Bank Act No. 43 of 1973**. In conclusion, the Counsel argued that if the intention of Parliament were to allow two members of the Board to sign the Certificate, it would have made its intention known in the words chosen.

In this regard, this Court feels it appropriate to make reference to the manner in which the Court may interpret legislative enactments. In **Bindra's Interpretation of Statutes** (*9th Edition*), it was stated that

> *"If the words of the statutes are explicit and unambiguous, there can be no resort to external aid for their construction. Language, which is plain and easily understood, should be looked at without extensive aid for the meaning intended"*

Thus, when interpreting ***Section 15(2)***, **Section 22** of the said Act defines 'Board' as follows:

> *"'Board' in relation to a Bank means the Board of Directors of the bank or any body of persons by whatever name or designation called for the time being charged with the management or administration of such bank".*

In the light of this provision, Court does not see cause to refer to any external aids in order to interpret ***Section 15(2)*** given that the provision is unambiguous and clear. Given this reality, stringent interpretation requires that the Board must sign the Certificate of Sale and that the signatures of two such members are insufficient.

However, the Court feels that this is an inadequate reason to invalidate the Certificate of Sale, especially given the fact that the Certificate itself has been signed by two members, and is not one that has not been signed at all. In fact, it appears to us that what presents itself as the Certificate is only subject to a **procedural irregularity** and it would be disproportionate to

allow such a minor shortfall to entirely invalidate the Certificate of Sale, thereby creating a chain reaction wherein the auction itself would be invalid.

It is the opinion of this Court that such minor procedural irregularities can be readily rectified and that, given the nature of the inadequacy, it does not merit a declaration that the validity of the Certificate of Sale is undermined.

Having resolved that the Certificate of Sale is indeed valid, and can be rectified effectively, the next issue that merits the discussion of this Court is whether the Certificate is *conclusive*. With regard to this matter, reference must be made to ***Section 15(2)*** again, which states that such a Certificate signed by the Board "*shall be **conclusive proof** with respect to the sale of any property that all the provisions of this Act relating to the sale of that property have been complied with".*

The Counsel for the Appellant has relied heavily on the decision of Amarasinghe J in **National Development Bank v Serendib Asia (Pvt) Ltd and Another (1999)** *(2 SLR 56)* wherein the following was elucidated:

> "*Admittedly, Section 50(2) states that the certificates signed by the General Manager under Section 50(1) shall be conclusive proof, with respect to its sale of property, that all the provisions of the National Development Bank Act relating to the sales of the mortgaged properties have been complied with.*
>
> *Yet, in my view, it does not preclude the Court from considering whether both in fixing the upset price under Section 46 and in purchasing the properties at Rs. 1, 000 under each of the three bonds, the Appellant had acted lawfully, in good faith, and in a commercially reasonable manner, although in terms of Section 46, the Appellant was not bound by the upset price".*

It appears to this Court that the principles set forth in the above dicta are acting lawfully, in

good faith and in a commercially reasonable manner. It does not speak of the Court being in a position to evaluate whether the provisions of a particular Act have been complied with prior to the issuance of the Certificate of Sale. This case particular dealt with the setting of the upset price and therefore, must be distinguished from the present case wherein the issue is whether the Certificate of Sale in itself is conclusive proof that the provisions of the Act has been complied with.

In terms of considering whether the Certificate of Sale is conclusive, the case of **Hatton National Bank v Marimuttu [2004]** reported in the *Bar Association Law Report* is relevant. In this case, similar to the present case, a property was sold at an auction upon a resolution passed by the Board of Directors of a Bank and a Certificate of Sale was issued. Thereafter, the Bank made an Application to the District Court for an order for delivery of possession. The issue relevant in the present consideration was whether the Certificate of Sale was conclusive. In this regard, Amaratunga J stated

> *"…the existence of a case where the legality of the sale and the Resolution are being challenged, in itself is not a ground to refuse the Application of the Bank. In terms of Section 15(2) of the Recovery of Loans by Banks Act,* ***a certificate of sale is conclusive proof with respect to the sale of any property*** *and that all the provisions of the Act relating to the sale of that property have been complied with. Thus, despite the existence of a case where the sale itself and the certificate of sale have been challenged is not a ground to disregard the conclusive effect"* [Emphasis added].

Similar sentiments were expressed in **Haji Omar v Wickramasinghe and Another (2002)** *(1 SLR 113)* where the Petitioner argued that the Certificate of Sale could not be issued as the notices were irregular and that the resolution passed by the Board was not in conformity with the Act. In this case, Fernando J elucidated that

> *"Section 15 (1) of the Act provides that upon the issue of the certificate the title of the borrower vests in the purchaser, and section 15 (2) makes the certificate "conclusive*

> *proof with respect to the sale . . . that all the provisions of [the] Act relating to the sale . . . have been complied with". **That includes the passing of the resolution, the notice of sale, the payment of the price, and the sale**"* [Emphasis added].

Therefore, this Court notes that the validity of the Certificate issued has been challenged on vexatious grounds i.e. upon the Certificate being signed by two members of the Board rather than all members of the board, an irregularity that is readily remediable without any adverse effects. Furthermore, given that the Certificate of Sale is, on all counts, valid, it appears to be conclusive proof that all provisions of the Act have been complied with. Thus, in accordance with ***Section 15*** of the Act:

> *"If the mortgaged property is sold, the Board shall issue a certificate of sale and thereupon all the right, title, and interest of the borrower to, and in, the property shall vest in the purchaser; and thereafter it shall not be competent for 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 of the property to the bank, in any court to move or invalidate the sale for any cause whatsoever, or to maintain any right title or interest to, or in, the property as against the purchaser".*

This legislative provision is included in the Act with good reason: while ***Section 15*** dictates that the right, title and interest of the borrower will vest in the purchaser and that the issuance of a Certificate of Sale is conclusive proof that the provisions of the Act have been complied with, it states so in order to protect the rights of the purchaser, be it the Bank itself or a third party. Allowing the Certificate of Sale to not prove to be conclusive would be to open a Pandora's box of sorts wherein prospective buyers of property at a public auction would be greatly discouraged from doing so as, if the Court finds that the Certificate is not conclusive, it will open the option of reverting the rights vested in the purchaser back to the borrower.

Therefore, this Court finds that the Certificate of Sale is both valid and constitutes conclusive

proof that the provisions of the Act have been complied with. Hence, the Respondent is well within his rights to seek the delivery of possession of the property in terms of ***Section 16****.*

However, given the narrative of this case, Court feels it imperative to address the concerns of the Appellant with regard, especially, to the allegations made.

The charges made by the Appellant are numerous. It was contended that the resolution passed by the Board was published only in one Sinhala newspaper on 08.01.2005 and was not published in an English and Tamil newspaper or in the Gazette as required by the Act. It was further alleged that the Appellant was not given notice of the resolution by letter. Relevant here is paragraph 10 of the Petition dated 04.11.2011 the Appellant claims the following:

> *"Surprised and bewildered by this sudden turn of events [i.e. subsequent to receiving the letter from the Respondent to deliver vacant possession of the property], the Petitioner, upon further inquiry became aware that:*
>
> *a) The Respondent had only published the purported resolution passed by the Respondent bank in one Sinhala paper i.e. Dinamina newspaper on 08.01.2005.*
> *b) The Respondent had failed and neglected to publish the purported resolution in the gazette or newspapers of either English or Tamil. Furthermore…..the Petitioner had not been given any notice whatsoever of the said purported resolution.*
> *c) The Respondent had completely and utterly failed and neglected to publish the Notice of Sale in the Gazette".*

Several points merit the consideration of this Court. Firstly, the Appellant adamantly informed this Court that he had absolutely no notice of the publication of the resolution in the paper until after receiving the letter dated 25.06.2007.However, in case no. 40/2005 instituted before the High Court wherein an order to stay the auction was sought by the Appellant, he admits knowledge of the publishing of the resolution in the Sinhala newspaper in paragraph 19 of the

Plaint. Furthermore, though he alleges that the Respondent neglected to publish the resolution in the Gazette and did not give notice of said resolution, the same paragraph also carries an affirmation of knowledge of a Notice of Sale published in the Gazette on 11.02.2005.

In addition to the facts admitted by the Appellant, it is clear to the Court upon further inquiry that the Respondent published a Notice of Sale on 23.03.2007 and further, a letter dated 03.03.2007 informing the Appellant of the scheduling of the Auction for 10.04.2007, was sent by registered post.

Such inconsistencies in argument as well as blatant misrepresentations of fact by the Appellant make it extremely difficult for this Court to accept that the provisions of the Act had not been complied with, especially when evidence presented before Court suggest otherwise. Therefore, it must be affirmed that, in the eyes of this Court, ***Section 8*** which requires Notice of resolution to be published in the newspapers as well as the Gazette and ***Section 9*** which requires a Notice of Sale being dispatched to the borrower both have been complied with.

Another concern raised by the Appellant was the fact that an upset price was not fixed by the Respondent thereby resulting in the property being sold for Rs. 1000/-. It was fervently argued that the failure to do so was absurd and unreasonable as the property was valued at over Rs. 85 Million. However, ***Section 11*** clearly states that

> *"The Board may fix an upset price below which the property shall not be sold to any person other than the bank to which the property is mortgaged".*

Section 11 clearly indicates that the fixing an upset price is not mandatory and, given that the remainder of the provisions have been complied with, this Court does not see a formidable reason which effectively bars the Respondent from purchasing the property for Rs. 1000/-.

A final point of contention made by the Counsel appearing from the Appellant was that his

client was given insufficient time to make the payments as required. It was the view of the Counsel that the intention behind providing the debtor notice of the auction was to provide him with an opportunity to pay the sum of monies owed, even at that stage and that in the present case, the Appellant was denied this right as he was informed of the sale subsequent to the conclusion of the auction. While on one hand it has already been established that the Appellant was given notice of the auction, the Court must also consider the fact that the initial resolution to sell the property by auction, was passed on 26.08.2005 whereas the property was actually sold on 10.04.2007: nearly two years after the passage of the resolution. It is clear to this Court that the Appellant, therefore, enjoyed the option to make the necessary payments for a considerable period of time had he so wished and his failure to do so cannot be excused by an '*alleged'* lack of notice.

The ambit and purpose of the **Recovery of Loans by Banks Act** is, in essence, to recover monies due to the Bank while ensuring that the Bank does not enjoy an unjust enrichment. The provisions of the Act, by allowing parate execution, is to facilitate the process of collecting monies due, without lengthy court proceedings, and to do so in a fair and reasonable manner. This objective should therefore not be hindered by minor procedural irregularities such as the absence of the signatures of all Board members on the Certificate of Sale, for such minor irregularities cannot have much impact on the rights of the borrower.

Minor procedural irregularities cannot, further, be grounds upon which actions may be instituted for such actions would only amount to the abuse of the process of Court which must not be allowed. In the present case, monies due remained unpaid for a total of four years prior to the auction taking place and to challenge the sale of property on the basis of a minor irregularity in documentation will undoubtedly remain unsuccessful.

In these circumstances, the present Appeal is dismissed and the judgment of the High Court case No. HCCA/Rev/12/2009 is affirmed. We also award costs in a sum of Rs 75,000/- to the Bank.

Sgd.

JUDGE OF THE SUPREME COURT

EKANAYAKE. J

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

WANASUNDERA. P.C.J

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

MK