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

In the matter of an Appeal against the Judgement dated 01.10.2015 of the Civil Appellate High Court of the Southern Province Holden in Tangalle in terms of section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

SC Appeal 179/2016
SC(HCCA)LA No.373/15
SP/HCCA/TA/18/2011(F)
DC Walasmulla Case No. S/112

1. Thelikorale Arachchige Pemadasa
No. 295, In front of Bus Depot.
Embilipitiya

2. Thelikorale Arachchige Susara Dhammika
"Sithumina" Uswewa Tangalle

Plaintiffs

Vs.

1. Ruhunu Development Bank,
Head office
No. 382A, Anagarika Dharmapala Mawatha, Pamburana, Matara.

2. Hettiarachchilage Ariyadasa
" Tharanga", Katuwana Road, Middeniya.
Defendants

And Now Between

Hettiarachchilage Ariyadasa
"Tharanga", Katuwana Road, Middeniya.

2nd Defendant-Respondent-Appellant

Vs.

1. Ruhunu Development Bank,
   Head office
   No. 382A, Anagarika Dharmapala Mawatha, Pamburana, Matara.

1A Pradeshiya Sanwardena Bank
   Head Office
   No. 933, Kandy Road, Wedamulla, Kelaniya.

1B Pradeshiya Sanwardena Bank
   Circular Road, Uyanwatte, Matara.

1st Defendant-Respondent-Respondents

2. Thelikorale Arachchige Pemadasa
   No. 295, In front of Bus Depot.
   Embilipitiya.

1st Plaintiff-Respondent

3. Thelikorale Arachchige Susara Dhammika
   "Sithumina" Uswewa Tangalle

2nd Plaintiff-Apellant-Respondent

Before : Jayantha Jayasuriya, PC, CJ
Vijith K. Malalgoda, PC, J.
Janak de Silva, J.

Counsel : W.Dayaratne, PC with R. Jayawardana instructed by C Dayaratne for the 2nd Defendant-Respondent-Appellant.

Dr. Jayatissa de Costa, PC with N.A.. Gunarathne for the 2nd Plaintiff-Appellant-Respondent.

Yuresha de Silva , DSG for the 1B Defendant-Respondent-Respondent.

Written submissions filed	:	1A and 1B Defendant-Respondent-Respondents on 30.08.2017 2nd Plaintiff-Appellant-Respondent on 27.11.2017 2nd Defendant-Respondent- Appellant on 22. 10.2021
Argued on	:	12.07.2023
Decided on	:	27.03.2024

Jayantha Jayasuriya, PC, CJ

The 2nd defendant-respondent-appellant (herein after referred to as the "appellant") impugns the judgement of the Civil Appellate High Court of Tangalle dated 01.10.2015. The Civil Appellate High Court set aside the judgment of the District Court and decided in favour of the plaintiffs.

The 1st plaintiff-respondent (hereinafter referred to as the "1st plaintiff-respondent") and the 2nd plaintiff-appellant-respondent (hereinafter referred to as the "2nd plaintiff-respondent") jointly instituted action in the District Court naming *inter alia* the appellant and the 1st defendant-respondent-respondent (hereinafter referred to as the "respondent bank") as defendants.

The 1st plaintiff-respondent obtained a loan of Rs 200,000/= from the respondent bank and pledged the property that was more fully described in the schedule to the plaint, as security. The 2nd plaintiff-respondent (who is the brother of the 1st plaintiff-respondent) was the lawful owner of the aforesaid property. Two and half years later the 1st plaintiff-respondent had been informed that the board of directors of the respondent bank decided to auction the aforesaid property as the 1st plaintiff respondent failed to repay the aforesaid loan. Accordingly, the respondent bank proceeded with the auction and had initially purchased the property on the basis that there was no proper bid at the auction. Accordingly, the respondent bank has issued a Certificate of Sale under Section.15(1) of the Recovery of Loans by Banks Act, No 4 of 1990. Subsequently, the appellant purchased the aforesaid property from the respondent bank.

The 1st and 2nd plaintiff-respondents in their plaint *inter alia* prayed for declarations that the auction and the subsequent sale are illegal. Further, they sought an order directing that the undisturbed possession of the aforesaid land be handed over to the 2nd plaintiff-respondent, upon payment of all dues including the interest and charges to the respondent bank.

The trial in the District Court proceeded on sixteen issues; eleven of them were raised by the plaintiffs and five were raised by the respondent bank. The two plaintiff-respondents and the chief recovering officer of the respondent bank had testified for the plaintiffs and the manager of the Ambalantota Branch of the respondent bank had testified for the defendants.

The evidence led at the trial revealed that the 1st plaintiff-respondent is the borrower and the beneficiary of the loan granted by the respondent bank. The 1st plaintiff-respondent defaulted the repayment of the loan of Rupees two hundred thousand. The 2nd plaintiff-respondent had pledged the aforesaid property to the respondent bank by the mortgage bond no 2208 dated 30th September 1998 and was the guarantor to the loan obtained by the 1st plaintiff-respondent. Thus, the board of directors of the 1st defendant bank passed a resolution to auction the property which had been pledged to it by the mortgage bond No.2208. Thereafter the respondent bank proceeded with the auction as described hereinbefore.

Plaintiffs alleged that the respondent bank undervalued the property which is worth Rs.500000/- and further alleged that they were not informed of the auction in advance. They alleged that the auction had already been held by the time they received the notice regarding the auction. However, the respondent bank refuted these allegations and had presented evidence to establish that notices regarding the auction was published in newspapers in all three languages, published in the gazette and in addition, notices were displayed in public. Furthermore, it was said that several requests were made to the 1st plaintiff-respondent to settle the said loan, and as at 28th March 2001, Rs.277,540.33 was due to be paid by the 1st plaintiff-respondent to the respondent bank.

The learned District Judge by his judgment dated 27.10.2011 dismissed the 1st and 2nd plaintiff-respondents' case. The learned judge had considered whether the respondent bank had acted in accordance with the provisions of the Recovery of Loans by Banks (Special Provisions) Act No 4 of 1990 (hereinafter referred to as the "Act") and had observed that the respondent bank had issued the certificate of sale as provided in the Act in relation to the disposal of the property concerned. The learned trial judge had therefore concluded that the court lacks jurisdiction to

decide on the issues raised at the trial. Accordingly, the learned trial judge answered issues no. 1 and 8 – "whether the property that had been pledged to the respondent bank to secure the loan obtained by the 1st plaintiff respondent belonged to the 2nd plaintiff respondent" and "whether the property belonging to the 2nd plaintiff-respondent had been initially purchased on behalf of the respondent bank for Rs 1000/- and thereafter resold to the appellant for Rs 200,000.00", in the affirmative and answered the other issues stating "as a certificate of sale has already been issued by the respondent bank to the appellant, the court lacks jurisdiction to determine any matter relating to the issuance of the said certificate of sale"; and had dismissed the case of the 1st and 2nd plaintiff-respondents.

The 2nd plaintiff-respondent appealed to the Civil Appellate High Court and impugned the aforesaid judgement of the District Court.

Learned judges of the Civil Appellate High Court, set aside the judgement of the District Court while allowing the appeal and decided to "give the judgment (in) favour of the plaintiffs as prayed for in the plaint". The District Court was "directed to enter the decree accordingly". The Civil Appellate Court held that the "resolution of the board of directors, of the first defendant bank (respondent bank) to go for *parate execution* in respect of the property in question is illegal, and null and void ….". They further held that "all the steps taken after the resolution in respect of the same property are also illegal and null and void …". Learned judges of the Civil Appellate High Court answered five of the eleven issues (issues no 7,8,9,10 and 11) raised by the 1st and 2nd plaintiff respondents at the trial in the affirmative. They are: issue no 7 – whether the auction conducted by the bank was inconsistent with the provisions in the Act No 4 of 1990? Issue no. 8 – whether the property belonging to the 2nd plaintiff was acquired by the bank for Rs 1000.00 and sold it to the 2nd defendant for a sum of Rs. 2000.00? issue no 9 – Has the bank followed the lawful procedure in acquiring the property concerned? Issue no. 10 – If so whether the auctioning of the property described in the schedule of the plaint is unlawful? issue no. 11 whether the plaintiff is entitled to the relief claimed in the plaint if the aforesaid issues are answered in favour of the plaintiffs?

The learned Civil Appellate High Court judges further allowed the "second plaintiff" (2nd plaintiff respondent) to "redeem the property after paying the balance of principal amount of the loan and the interest thereof up to the date of resolution".

The 2nd defendant appellant impugns the aforesaid judgment of the Civil Appellate High Court and this Court granted leave to appeal on the following questions of law:

(a) Is the said judgement illegal and contrary to law?

(b) Did their Lordships of the Civil Appellate High Court seriously misdirect themselves when they interpreted section 15(1) of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 by holding that the District Court has jurisdiction to invalidate a certificate of sale when it is clearly stated in the said section that after entering the certificate of sale and registered the same, the said certificate of sale cannot be challenged in any court to move to maintain any right title or interest to or in the property against the purchaser?

(c) Did their Lordships of the Civil Appellate court err in law when they considered the judgement of *National Development Bank of Sri Lanka Vs Serendib Asia(Pvt) Limited and Another* where it was held that the High Court has jurisdiction to go into trial to ascertain whether the Bank has acted wrongfully when the certificate of sale was issued under section 50 (1) of the National Development Bank Act, but in the instant case the certificate of sale was entered under Section 15(1) of the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 and thereafter followed the tender procedure too to sell the property to the 2nd defendant?

(d) Did their Lordships of the Civil Appellate High Court err in law when they set aside the judgement mainly on the ground that the Mortgagor who is the 2nd Plaintiff is not the borrower and therefore in terms of the Judgement of *Ramachandran and Another Vs Hatton National Bank and Another* the *parate execution* cannot be extended to the property of a mere Mortgagor other than to the property of a borrower, which judgement has been considered by the Learned District Judge too, but their Lordships failed to consider the jurisdiction of the 2nd Plaintiff the Mortgagor to challenge the certificate of sale issued under the statute whereas in the said judgment too it

was held that the remedy is to challenge the said certificate or the resolution only by way of a writ of certiorari which was the ground on which the Learned District Judge held that there is patent want of jurisdiction in the District Court?

(e) In view of the 2nd plaintiff-appellant's failure to make the 1st plaintiff a party to his appeal in terms of section 755 and 758 of the Civil Procedure Code should the said appeal be dismissed?

It is common ground that the 1st plaintiff-respondent defaulted the repayment of the loan of rupees two hundred thousand obtained from the respondent bank and the property concerned belonging to the 2nd plaintiff respondent was pledged as security in obtaining the said loan. The respondent bank thereafter took steps as provided in terms of Recovery of Loans by Banks (Special Provisions)Act No.4 of 1990, in purchasing the property at the auction and thereafter reselling it to the 2nd defendant-respondent.

Section 15 (1) of the Act reads:
"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"; and section 15(2) of the Act reads:
"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".

The learned trial judge having considered the aforesaid provisions and relevant jurisprudence had come to the conclusion that the District Court had no jurisdiction to grant the relief claimed by the plaintiffs as such relief would have a direct impact on the validity of the certificate of sale issued by the respondent bank. The learned judge had further observed that according to ***Ramchandran et al v Hatton National Bank et al*** [2006] 1 SLR 393 and ***Hatton National Bank***

Ltd v Jayawardane et al [2007] 1 SLR 181, even though a bank has no authority to invoke provisions authorizing *parate execution* in relation to a property belonging to a third party pledged as security to a loan obtained from the bank, the District Court has no jurisdiction to make a determination on the validity of a sale conducted under the provisions of the Act due to the statutory scheme as discussed hereinbefore. The learned trial judge is of the view that it is the Court of Appeal that has the jurisdiction to examine the legality of the certificate of sale and grant relief.

In contradistinction to the aforesaid views of the District Court, the learned judges of the Civil Appellate High Court had observed that "… if a mortgagee bank proceeds with the *parate execution* in respect of the property of a mere guarantor or a mortgagor, I hold that such a bank denies the proprietary rights of a guarantor or a mortgagor in respect of the mortgaged property. When there is such a denial of any right recognized by law, such a mortgagor or a guarantor has a cause of action accrued to him to assert his denied rights in a District Court as provided in Section 5 to section 217 of the Civil Procedure Code. When there is a remedy under the Civil Procedure Code available to such a person in the District Court, he may not be able to invoke the writ jurisdiction of the Court of Appeal as it is only a discretionary remedy available to a person". In reaching this decision the Civil Appellate High Court followed the dicta of ***Ramachandran*** (supra).

It is also pertinent to observe that the learned judges of the Civil Appellate High Court had further held that the respondent bank had acted "fraudulently and unreasonably". The learned judges had reached this conclusion on the basis that the "bank had sold on an *exparte* decision taken by the bank itself a property worth Rs 500,000/= just for Rs 1000/=". In this regard it is pertinent to observe that a sale of a mortgaged property where the value of such property is greater than the amount that is due to the bank is not unlawful or illegal under the legislative scheme provided under the Act. In fact the possibility of such a situation is recognized and any unreasonableness is remedied by the Act itself.

Section 14 of the Act reads:

"If the mortgaged property is sold, the bank shall, after deducting from the proceeds of the sale the amount due on the mortgage and the moneys and costs recoverable under section 13, pay the balance remaining, if any either to the borrower or any person legally entitled to accept the payment due to the borrowers 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 mortgage property is situate".

There is no evidence in the instant matter that there was excess funds accumulated to the bank after the resale. The fact that the sale price was lower than the value of the property as stipulated in the mortgage bond *per se* is insufficient to attribute fraud or unreasonableness to the respondent bank. Furthermore, there is no evidence to substantiate that the respondent bank acted outside the parameters of the legislative framework or that their conduct contravened the provisions of the Act. Reaching the decision to invoke the *parate execution* process by the directors of the bank cannot be faulted on the basis that the bank acted exparte. Therefore, the learned judges of the Civil Appellate Court had misdirected themselves when holding that the respondent bank acted fraudulently and unreasonably.

At this stage it is also pertinent to note, that the judgment in a seven judge Bench of this Court which deliberated *inter alia* on the following legal issue was delivered on 13th November 2023 - ***Sunpac Engineers (Private) Ltd and another v DFCC Bank PLC and others***, SC Appeal 11/2021 (SC minutes of 13.11.2023):

"Has the Board of Directors (within the meaning of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990) the power to, by resolution to be recorded in writing, authorize a person specified in the resolution to sell by public auction any property mortgaged to the Bank (whether by the borrower or any other person) as security for any loan in respect of which default has been made in order to recover the whole of such unpaid portion of such loan together with the money and costs recoverable under section 13 of the said Act?" (page 8)

Justice Samayawardhena (with the agreement of Justice Aluwihare and Justice Fernando) while answering the aforesaid question in the affirmative, overruled the majority decision in **Ramachandran** (supra). Justice Nawaz in his separate opinion also overruled the majority decision in **Ramachandran** (supra) and Justice Thurairaja and Justice Wickremasinghe in their separate opinions accepted the reasonings of Justice Nawaz on legal issues while Justice Amarasekara also departed from the majority decision in **Ramachandran** (supra).

Decisions of all seven justices therefore clearly accept that under the provisions of the Act, it is lawful for a bank to invoke provisions in the Act and effect *parate* execution in relation to a property pledged as security to a loan when the borrower had defaulted despite the fact that such property belongs to a third party.

The decision of this Court in ***Sunpac Engineers (private limited)*** (supra) directly affects the root of the reasoning in the judgment of the Civil Appellate High Court which is impugned in the instant appeal.

The learned Civil Appellate High Court judges as discussed hereinbefore, proceeded on the basis that the respondent bank by initiating *parate execution* in relation to the property belonging to the 2nd plaintiff-respondent (mortgagor) to recover the dues from the 1st plaintiff - respondent (borrower) denied the proprietary rights of the 2nd plaintiff respondent and hence the latter had a cause of action accrued to him under section 5 to section 217 of the Civil Procedure Code. Furthermore, the learned Civil Appellate High Court judges held that the respondent bank flouted the rules of natural justice by the decision to go for *parate execution* without resorting to legal action. It is on this basis that the learned Civil Appellate high Court judges held that the District Court which has the jurisdiction to hear and determine the issue denied the right of the plaintiff without going through the evidence placed before it.

However, as discussed hereinbefore, as per the dicta of the full bench decision of this Court in ***Sunpac Engineers (private limited)*** (supra) the respondent bank has acted within the powers vested on it under the provisions in the Act when it took steps to auction the property concerned – the property pledged to secure the loan obtained by the 1st plaintiff respondent - and issued the

certificate of sale. Hence the provisions of section 15(2) of the Act that such certificate of sale stands as conclusive proof that all the provisions of this Act relating to the sale of such property have been complied with.

Under these circumstances in my view the learned District Judge was correct in holding that he did not have jurisdiction to hear the case in which the plaintiffs prayed *inter alia* for an order to hand over the undisturbed possession of the relevant corpus to the 2nd plaintiff upon full settlement of all dues including interest and charges to the respondent bank and the learned judges of the High Court erred when they decided to give the judgment in favour of the plaintiffs as prayed for in the plaint and allowed "the second plaintiff to redeem the property after paying the balance of principal amount of the loan and interest thereof up to the date of resolution".

In view of these findings enumerated hereinbefore I proceed to answer the legal issue "is the said judgement illegal and contrary to law?" in the affirmative and in my view the need to examine the rest of the legal issues does not arise. Therefore, I allow the appeal and set aside the impugned judgment of the Civil Appellate High Court, namely the judgment of the Civil Appellate High Court of Tangalle dated 01.10.2015 in HCCA/TA/18/2011F.

Chief Justice

Vijith K. Malalgoda,, PC, J.
I agree.

Judge of the Supreme Court

Janak de Silva, J.
I agree.

Judge of the Supreme Court