

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

In the matter of an appeal in terms of
Section 5(2) of the High Court of the
Provinces (Special Provisions) Act No 10
of 1996 as amended by High Court of the
Provinces (Special Provisions)
(Amendment) Act No 54 of 2006.

SC / Appeal / 150/2011

SC (HC) LA 59/2011

HC/Civil/44/2006/(1)

Seylan Bank Limited

Presently known as Seylan Bank PLC

No. 69 Janadhipathy Mawatha,

Colombo 01.

Presently at Ceylinco-Seylan Towers,

No. 90, Galle Road, Colombo 03.

Plaintiff

Vs.

1. Construction and Personal

Servicers (Pvt) Ltd,

No. 88, Horton Place,

Colombo 07.

2. Madhavan Lanka (Pvt) Ltd.

No. 65/19,

Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

Defendant

AND NOW BETWEEN

Madhavan Lanka (Pvt) Ltd.

No. 65/19,

Sir Chittampalam A. Gardiner
Mawatha,

Colombo 02.

2nd Defendant Appellant

Vs.

Seylan Bank Limited

Presently known as Seylan Bank PLC

No. 69 Janadhipathy Mawatha,

Colombo 01.

Presently at Ceylinco-Seylan Towers,

No. 90, Galle Road, Colombo 03.

Plaintiff Respondent

Construction and Personal Servicers
(Pvt) Ltd,

No. 88, Horton Place,

Colombo 07.

1st Defendant Respondent

BEFORE : SISIRA J. DE ABREW, J.
UPALY ABEYRATHNE, J.
ANIL GOONARATNE, J.

COUNSEL : Mayura Gunawansa instructed by K.U.
Gunasekera for the 2nd Defendant Appellant
S.R. De Livera instructed by De Livera
Associates for the Plaintiff Respondent

WRITTEN SUBMISSION ON: 30.01.2012 (2nd Defendant Appellant)
15.03.2012 (Plaintiff Respondent)

ARGUED ON : 27.10.2016

DECIDED ON : 29.06.2017

UPALY ABEYRATHNE, J.

At the hearing of the evidence for the case of the Plaintiff Respondent before the Commercial High Court of Colombo, the 2nd Defendant Appellant made an application to issue a commission to ascertain the market value of the property of the mortgage bond bearing No 27 dated 04.04.1997. The said property had been sold in auction and the mortgage bond had been released by the Plaintiff Respondent. After hearing the objection raised by the Plaintiff Respondent the learned High Court Judge of the Commercial High Court has refused the said application. This appeal is from the said order dated 10.06.2011.

Leave to appeal has been granted on the grounds set out in paragraph 10 (b) and (e) of the petition of appeal dated 28.06.2011. In the said paragraphs,

the Appellant has averred that the learned High Court Judge has failed to consider the vital importance and relevance of evidence obtain through a commission for valuation of the mortgaged property in adjudication of the dispute between the parties and has failed to evaluate the true purpose of a commission in arriving at a conclusion.

The Plaintiff Respondent (hereinafter referred to as the Respondent) instituted an action in the Commercial High Court of Colombo against the 1st and 2nd Defendant seeking for a judgment inter alia to recover a sum of Rs 17,093,036.95 with interest as prayed for and auction the property described in the Mortgage Bond bearing No 177 produced with the plaint marked 'C'. The 2nd Defendant Appellant (hereinafter referred to as the Appellant) has admitted the signing of the mortgage bond bearing No 177 dated 18.06.1996. The 1st Defendant Respondent has admitted the current account referred to in paragraph 3 of the plaint.

The Appellant in his answer averred that subsequent to executing the mortgage bond bearing No 177, the 1st Defendant Respondent on the request of the Plaintiff Respondent had executed mortgage bond bearing No. 27 dated 04.04.1997. On the said premise the Appellant contended that the consequent to entering in to the 2nd mortgage bearing No. 27, by novation of contract between the Appellant and the Plaintiff Respondent, the rights of the Plaintiff Respondent Bank has been restricted the said mortgage No 27. The Appellant's contention is that since the Plaintiff Respondent Bank has chosen the said mortgage bond No. 27 to recover the dues of the Appellant, the Bank is not entitled to sell the mortgaged property in the mortgage bond bearing No 177.

It was the position of the Plaintiff Respondent that the mortgage bond bearing No 177 marked 'C' is in the nature of a continuing security up to a value of Rs. 15 million. I carefully examined the said mortgage bond bearing no 177 dated 18.6.1996. The said mortgage bond 177 clearly states that Construction & Personal Services (Pvt) Limited as the Obligor and Madhavan Lanka (Pvt) Limited as the Mortgagor have entered in to the said mortgage bond with the Plaintiff Respondent Bank. In terms of clause (a), (b), (c), (d), (e) and (f) of the said mortgage bond, the Defendant Respondent have agreed to have the said mortgage bond as a continuing security for the purposes stated in the said clauses.

Clause (a) of the said mortgage bond No 177 reads thus;

“All and every the sums and sum of money which shall or may at any time and from time to time and at all times hereafter be or become the owing and payable to the Bank by the Obligor/Mortgagor upon or in respect of any and every overdraft or overdrafts of or on the said current account now had by the Obligor/Mortgagor with the Bank at its Colombo office or branches or which hereafter may be opened by the Obligor/Mortgagor with the Bank whether at its Colombo office aforesaid or at any of its other officers or branches and whether in the name of the Obligor/Mortgagor or otherwise and the floating balance from time to time due upon all or any such accounts current or current account and the sum or sums of money which upon the closing of such accounts current and current account shall be found to be due owing and payable to the Bank”.

Said clause and also clauses (b), (c), (d), € and (f) clearly stipulates that until the said bond No 177 is discharged, the bond is still valid. The mortgage

bond bearing No 27 does not contain any clause invalidating the effect of the said clauses of mortgage bond No 177 or restricting its scope to any sum of money which may due upon the Appellants' current accounts subsequent to entering of mortgage bond bearing No 27. The mere execution of the subsequent mortgage bond No 27 can in no way extinguish the rights under the mortgage bond bearing No 177.

It must be noted that the mortgage bond bearing No 27 marked '2 V 1 (G 1)' too is in the nature of a continuing security up to a value of Rs. 5 million. I examined the said mortgage bond bearing no 27 dated 04.04.1997. It is clearly seen from the said mortgage bond that Construction & Personal Services (Pvt) Limited as the Obligor and one Suppiah Alagaswamy Kandaswamy Naidu as the Mortgagor have entered in to the said mortgage bond with the Plaintiff Respondent Bank. In terms of clause (a), (b), (c), (d), (e) and (f) of the said mortgage bond, the Defendant Respondent have agreed to have the said mortgage bond as a continuing security for the purposes set out in the said clauses.

It is clear from the terms and conditions of the of the said two mortgage bonds that both are two separate securities provided for by the 1st and 2nd Defendant and one Suppiah Alagaswamy Kandaswamy Naidu in respect of the overdraft facilities obtained and to be obtained by them in future from the Plaintiff Respondent Bank. In fact, property in mortgage bond bearing No 27 had been sold and the proceeds of sale have been credited to the relevant account in a sum of Rs 4,750,000/=. The 2nd Appellant was not a party to the said mortgage bond No 27. Neither the sale of mortgaged property in mortgage bond No 27 nor the sale proceeds or the value of the said property has been disputed by the parties to the said mortgage bond.

On the other hand, according to Clause (b), at page 11 of the said mortgage bond No 177, the Appellant has specifically agreed that the mortgage bond No 177 will not be affected by any security that the Bank may at any time and from time to time thereafter hold.

Hence the 2nd Appellant has no status to call in question the said transaction or to seek permission of court to issue a commission to ascertain the market value of the property in the said mortgage bond No 27.

In the circumstances, I see no reason to interfere with the order of the learned High Court Judge dated 10.06.2011. Hence, I dismiss the appeal of the appellant with costs. The learned High Court Judge is directed to proceed with the trial.

Appeal dismissed.

Judge of the Supreme Court

SISIRA J. DE ABREW, J.

I agree.

Judge of the Supreme Court

ANIL GOONARATNE, J.

I agree.

Judge of the Supreme Court