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

National Development Bank PLC
Formerly of
National Development Bank Limited,
No. 40, Nawam Mawatha,
Colombo 2.

Plaintiff

SC/CHC/Appeal No. 39/2010

Commercial High Court
Case No. HC (Civil) 274/2007/MR

Vs.

1. Nelka Rupasinghe alias Rupasinghe Arachchilage Nelka alias R.A. Nelka Nanayakkara
   Galgodawatta, Talduwa,
   Ahangama.

2. Ahangama Gamage Nandawathie
   Galgodawatta,
   Talduwa, Ahangama.

1st & 2nd Defendants.

And

1. Nelka Rupasinghe alias Rupasinghe Arachchilage Nelka alias R.A. Nelka Nanayakkara
   Galgodawatta, Talduwa,
   Ahangama.

2. Ahangama Gamage Nandawathie
   Galgodawatta,
   Talduwa, Ahangama.

1st & 2nd Defendant-Appellants

Vs.

National Development Bank PLC
Formerly of
National Development Bank Limited,
No. 40, Nawam Mawatha,
Colombo 2.

Plaintiff-Respondent

* * * * *

BEFORE : **Tilakawardane, J.**
Sripavan.J. &
Wanasundera, PC.J.

COUNSEL : Rohan Sahabandu PC. for 1st & 2nd Defendant-Appellants.

Romesh de Silva, PC. with Geethaka Goonewardane for Plaintiff-Respondent.

ARGUED ON : **27-09-2013**

DECIDED ON : **21-03-2014**

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Wanasundera, PC.J.

This appeal has come up to the Supreme Court as an appeal from a judgment of the Provincial High Court of the Western Province holden at Colombo and exercising Civil Commercial Jurisdiction, as provided in Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996. The judgment of the aforementioned Commercial High Court of Colombo is dated 09.09.2010.

The Plaintiff-Respondent (hereinafter referred to as the Respondent-Bank) is the National Development Bank PLC of No. 40, Navam Mawatha, Colombo 2 and the 1st and 2nd Defendant-Appellants (hereinafter referred to as the Appellants) are Nelka Rupasinghe (hereinafter referred to as the 1st Appellant and Ahangama Gamage Nandawathie (hereinafter referred to as the 2nd Appellant) from Ahangama.

The facts of this case play an important role in deciding this appeal and as such I will place them here in summary form. The 1st Appellant became the owner of Lot 6 in Plan 1243 of an extent of 34A 0R 5P and Lot 8 of an extent of 15A 1R 30P by deeds of transfer No. 247 and 248. Altogether, the 1st Appellant was the owner of about 50 acres of land. The 2nd Appellant became the owner of Lot 4 , Lot 9 and Lot 10 of Plan 1243 of an extent of 25A 0R 27P, 0A 2R 18P and 25A 0R 27P by deeds of transfer 245, 249 and 250 adding up to again about 50 acres. The 1st Appellant applied for a loan of 7 million from the Respondent Bank for the project of replanting tea on her land and she mortgaged her land to the Respondent to get a loan of 7 million on 18.12.2000, by deed No. 183. On the same day, i.e. 18.12.2000, the 2nd Appellant also mortgaged her property to morefully secure the same loan of the 1st Appellant to be received from the Respondent Bank by deed No. 184. So, the 2nd mortgage deed No. 184 was a 'further and additional mortgage' as very well indicated on top of the document, i.e. deed No. 184.

By January 2001, the Respondent Bank had disbursed Rs.3.8 million to the 1st Appellant. She had continued to pay monthly the interest component for the month, but failed to pay off the loan capital component. Out of the full loan payment applied for by the 1st Appellant, Rupees 3.2 million was never disbursed to her. As she failed to pay back the loan actually given to her, i.e. 3.8 million, the Respondent auctioned both the lands of the 1st Appellant and the lands of the 2nd Appellant, i.e about 100 acres of land and the Respondent Bank bought the land for 1 million and issued a Certificate of Sale to the Respondent Bank itself and registered the Certificate of Sale dated 20.08.2003 in the Land Registry. The law requires that a Fiscal's conveyance be executed upon issuing a Certificate of Sale but this has not been done by the Respondent. Yet, it is registered in the Land Registry to establish the fact of ownership. The Certificate of Sale No. 443 include all the blocks of lands belonging to the 1st Appellant and all the blocks of lands belonging to the 2nd Appellant. But in the Schedule they are in two separate parts, namely Part I and Part II.

The main argument in this matter was in effect, questioning whether the Certificate of Sale obtained by the Respondent Bank on 20.08.2003 including the 1st Appellant's (the borrower) lands as well as the 2nd Appellant's (the guarantor, the 3rd party mortgagor) lands, prohibits in law, the Respondent-Bank, from filing a hypothecary action to recover the monies due from the 1st Appellant. The Appellants argued that according to the registered Certificate of Sale, the Respondent Bank is the owner of the mortgaged lands and as such the Respondent Bank cannot file a hypothecary action to recover the money from the mortgagors. The Respondent Bank argued that the Certificate of Sale for the said lands obtained by it earlier, is a nullity in law as per the judgment in SC. Appeal cases 05 and 09/2004(1) decided on 01.04.2005 by the Supreme Court and thus the Respondent Bank is not the owner of the lands and therefore it can recover the monies due, by way of a hypothecary action.

I observe that the cause of action i.e. non-payment of the instalments of the loan, arose in Colombo because it was agreed that monies shall be paid at the head office of the Respondent- Bank. Therefore the Commercial High Court had

jurisdiction to hear the case. The evidence before Court was that a loan of 7 million rupees was requested by the 1st Appellant from the Respondent- Bank and it was agreed that the loan would be given to replant tea on the estate that the 1st Appellant bought anew. (Which is in Part I of the Schedule to the Certificate of Sale). The Respondent Bank disbursed only Rs.3.8 million in 2 installments. At the time of this case, the 1st Appellant had paid about 4 lakhs of rupees to stop the sale but finally the Respondent Bank auctioned the lands of both the Appellants and bought the same for 1 million rupees and issued a Certificate of Sale in favour of the Respondent-Bank itself. It was registered on 20.08.2003 at the Land Registry. So, on the face of the record the OWNER of the lands after 20.08.2003 was the Respondent-Bank.

Thereafter on 06.08.2007, the Respondent Bank filed this hypothecary action in the Commercial High Court. By this time, the Respondent Bank appeared to be the owner of the lands, according to the entries in the Land Registry. The lands of the Appellants were owned by the Respondent-Bank. In other words, the hands of the Appellants were tied up not allowing them to touch the lands even to find a way to pay the bank, the money due and owing to the bank from the date of the Certificate of Sale i.e. 20.08.2003. There's no way that the Respondent Bank can ever claim any interest from the Appellants after 20.08.2003 because in the minds of the Appellants the Respondent-Bank was the owner of the lands. In the eyes of the world, the Respondent-Bank was the owner of the lands as the Certificate of Sale was registered in the Land Registry. The Respondent-Bank had closed the deal on 20.08.2003 and the Respondent-Bank could recover the dues with the property obtained, up to the maximum value of the land.

Thereafter, on 01.04.2005, which is 1 year and 8 months after the Certificate of Sale, the 5 Judge Bench judgment in 4 cases, taken up together, namely ***Chelliah Ramachandran and another vs. Hatton National Bank and 3 others,*** (SC. Appeal No. 05/2004), ***V. Anandasiva and 12 others Vs. Hatton National Bank and 3 others*** (SC. Appeal No. 9/2004), C***. Ukwatte and another Vs. DFCC Bank and another*** (SC. Spl. LA. No. 31/2004) and ***M.D. Karunawathie***

and 5 others Vs. DFCC Bank and another (SC. Spl. LA. No. 32/2004), was pronounced by the Supreme Court.

By that judgment, it was held that "**The Provisions of the Recovery of Loans by Bank (Special Provisions) Act No. 4 of 1990 will not apply in respect of a mortgage given by a guarantor or any person other than a borrower to whom a loan has been granted by a Bank for the economic development of Sri Lanka"**. It was thus held that the impugned resolutions of the Board of Directors of the Bank to sell the lands of a 3rd party mortgagor were in excess of statutory power granted by Act No. 4 of 1990. The mortgaged property of the guarantors which did not belong to the borrowers should not be subject to parate-execution to recover the loan due from the borrower.

It was submitted to this Court in the instant case, by the Respondent-Bank that due to the aforementioned judgment of SC. Appeal Nos. 05 & 09/2004, and SC. Spl. LA. Nos. 31/2004 & 32/2004, the Respondent-Bank, on its own, decided that the Certificate of Sale in the instant case is a nullity. The Respondent-Bank further submitted that this decision of the Respondent-Bank was informed to the Appellants by letter dated 20.03.2007 and thereafter the Respondent-Bank proceeded to file the present hypothecary action in the Commercial High Court.

The Respondent-Bank decided on its own, that the Certificate of Sale is a nullity. The Respondent-Bank did not want to let loose the property which they bought and already registered in the Land Registry. Instead, the Respondent-Bank wanted to go at the borrower and the guarantor a second time by way of a hypothecary action. The Respondent Bank could institute a hypothecary action to recover the balance due on the outstanding sum owed after the sale of the land in the 1st Schedule.

The Respondent-Bank's decision to auction the properties of the guarantor to recover the loan taken by the borrower is legally wrong as one can proceed by way of parate execution only against the borrower. They have, however, transgressed the boundaries when it comes to the guarantors in view of the decision in S.C. Appeal Nos. 5 & 9/2004 and SC. Spl. LA. Nos. 31 & 32/2004.

As such the auction to sell the guarantor's lands is not valid. The Respondent-Bank is entitled to auction only the borrower's properties which is in Part I of the Certificate of Sale.

By the Certificate of Sale No. 443 the Bank has legally become the owner of only the lands mentioned in Part I of the Schedule. I am of the view that the said Certificate of Sale should be amended to include only the borrower's lands and forwarded for registration, thus specifically releasing the lands in Part II of the Schedule from the ownership of the Respondent-Bank. The Respondent-Bank shall be entitled to have and to hold the lands referred to only in Part I of the Schedule to the Certificate of Sale No. 443. The said Certificate of Sale is valid against the first Appellant only.

For the reasons set out in this judgment, I set aside the judgment of the Learned Judge of the High Court (Civil) of the Western Province holden in Colombo in case No. HC.(Civil) 274/2007/MR dated 09.09.2010, subject to the above. The 1st Appellant [borrower] is entitled for costs in a sum of Rs. 100,000 (One Hundred Thousand) payable by the Respondent Bank.

Judge of the Supreme Court

Tilakawardane, J.

I agree.

Judge of the Supreme Court

Sripavan.J.

I agree.

Judge of the Supreme Court