

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

Handun Harsha Prabath De Silva
43, Katana Road
Thimbirigaskatuwa
Negombo

S.C. [SPL] LA No.147/15
CA Writ Application
No.293/2015

Petitioner- Petitioner

Vs.

Seylan Bank PLC
90, Galle Road
Colombo 03.

Respondent- Respondent

BEFORE : **B.P.ALUWIHARE, PC, J.**
PRIYANTHA JAYAWARDNE, PC,J.
K.T.CHITRASIRI,J.

COUNSEL : Faisz Musthapha, PC with Thushani Machado for the
Petitioner-Petitioner

Palitha Kumarasinghe, PC with Priyantha Alagiyawanna
for the Respondent-Respondent

ARGUED ON : **12.01.2016**

DECIDED ON : **23.02.2016**

CHITRASIRI, J.

When this matter was taken up for hearing to consider granting of special leave to proceed with the application, learned President's Counsel for the respondent submitted that the issuing of an interim order by this Court on 25.08.2015 is in violation of Rule 42 of the Supreme Court Rules.

In support of this view he submitted that the aforesaid Rule 42 of the Supreme Court Rules could not have invoked by this Court since it can only be used to obtain a stay order staying execution of a decree entered in an action. He further submitted that the relief prayed for in this application is to restrain the respondent Bank from auctioning the property of the petitioner and not to stay a decree being executed. Accordingly, he contended that the stay order issued on 25.08.2015 by this Court is contrary to the aforesaid Rule 42. Therefore, Mr.Kumarasinghe P.C. moved this court to vacate the said order dated 25.08.2015 since it is an order made without jurisdiction.

Rule 42 of the Supreme Court rules are to be read with Rule 43 thereto as both the Rules are connected to each other. Those Rules 42 and 43 of the Supreme Court Rules read thus:

Rule 42 -

“Where an application for special leave to appeal, or a notice of appeal, has been lodged with the registrar in compliance with the provisions of these rules, or special leave to appeal has been granted, and the petitioner or the appellant seeks to stay execution of the judgment in respect of which the application or appeal is made, the Registrar shall submit the application for the stay of execution of the judgment to a Judge of the Supreme Court”

Rule 43 (1)*“The Judge to whom an application for the stay of execution of a judgment is submitted –*

(a) may order the stay of execution of such judgment till the determination of the application for special leave to appeal, or of the appeal, as the case may be;

Provided that where such application has been made, or is supported, without notice to the adverse party, the Judge may order the stay of execution of the judgment if he is satisfied

that the matter was of such urgency that the applicant could not reasonably have given such notice; in such event he may make an interim order for the stay of execution of the judgment for a limited period, not exceeding ten days, sufficient to enable the adverse party to be given notice of such application, and to be heard in opposition thereto, on a date to be then fixed, in Chambers, or in open Court, or

(b) may direct that the application be supported after notice to the adverse party, in Chambers or in open Court.

Upon sufficient cause being shown, any Judge of the Supreme Court may set aside any such interim order.

(2) Any order, or interim order, for the stay of execution of a judgment shall be forthwith communicated by the Registrar to the Court or tribunal concerned.

(3) Where an order has been made for the stay of execution of judgment till the determination of an application for special leave to appeal –

(a) if special leave to appeal is granted, the petitioner may make a further application for the stay of execution of judgment till the final determination of the appeal, and the Court may make such order thereon as it considers expedient; and

(b) if special leave to appeal is not granted, the Registrar shall forthwith notify the Court or tribunal concerned.”

Plain reading of the aforesaid rules indicate that those could be invoked only to stay execution of a decree. Admittedly, there is no decree entered by a court of law in this instance to execute. Hence, on the face of it, the contention of Mr. Kumarasinghe P.C. seems to be correct.

However, it is the duty of this Court to ascertain the underline meaning of Rule 42 in order to give a purposive interpretation to it, upon considering

the intention of the creatures of the said Rules. There is no doubt as to the applicability of Rule 42 if there is a decree entered by a court. Such a mechanism is not available to a person who is to lose his property which is to be auctioned under the provisions contained in the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 even if there had been a violation of the provisions of the law referred to in the said Act No.4 of 1999. The petitioner in his application to the Court of Appeal alleges such an allegation. Therefore, it is the duty of the Court to ascertain a way out to remedy a situation where there is no clear rule to cater to such a situation, as alleged in this case.

When such silence in the law is found, the manner in which the court should act is referred to in **Maxwell on the Interpretation of Statues [12th Edition]** and in that it states thus:

“Question is whether the words of an Act do or do not apply to particular facts, “the court or tribunal may be assisted by legal principles or by so-called rules of construction, but these cannot solve the question”. [at page 39]

Moreover, **Maxwell** in the same 12th Edition states that a statute should not be construed as taking away the jurisdiction of Courts in the absence of clear and unambiguous language to that effect. [at page 153] The above authority permits Court to look for a remedial measure in order to find an answer to a grievance of a person who alleges a violation of the provisions of the aforesaid Act No.4 of 1999 and is in need for a stay order till the issue is finally decided.

Furthermore, the authorities in our jurisdiction also support the position referred to above. In **Jinadasa and another vs. Sam Silva and others [1994 (1) SLR at page 232]** it was held as follows:

“since there is no legislation governing the matter, the power to restore the application to re-list is in the exercise of the Court inherent jurisdiction.”

In **L.C.H.Peiris vs. The Commissioner of Inland Revenue [65 NLR 457] Sansoni,J** held thus:

“It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, ...”.

As mentioned hereinbefore, no clear rule is found for the petitioner in this appeal to have an interim order in order to stay the auction being held until the matters complained of are looked into by the court. Therefore, having considered the authorities referred to above, I am of the view that this Court is empowered to fill the said lacuna by allowing the petitioner to make an application invoking jurisdiction under Rule 42 of the Supreme Court Rules by moving for an interim order until a decision is finally made in this appeal.

Moreover, the idea behind Rule 42 is to prevent execution of a decree entered in an action when there is an application pending in appellate courts to review a judgment delivered in an action in which the decree is to be executed. The application before the Court of Appeal in this case was to have a

Writ of Certiorari and a Writ of Prohibition issued to prevent the property owned by the petitioner being auctioned and not to challenge a judgment of an original court. Therefore, there is no decree as such to execute in this instance. Applications filed in this Court as well as in the Court of Appeal do not speak of a decree. Those are the circumstances under which this Court is invited to look at the issue at hand.

For clarity, I will now refer to the law relevant to the instant issue as well. Application to the Court of Appeal was to examine the validity of the decision of the Board of Directors of the respondent Bank that was made in terms of the provisions contained in the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990. The aforesaid Act empowers the Board of Directors of a Bank to take possession of a mortgaged property and to auction the same without having recourse to Courts. The extent to which such a process is lawful had been extensively discussed by S.N.Silva J (as he was then) in **Ramachandran and another Vs. Hatton National Bank Ltd [2006(1) SLR at 393]** It was also discussed by **Jayasinghe, J in the case of Hatton National Bank Ltd vs. Jayawardane and others. [2007 (1) SLR at 181]**

As mentioned hereinbefore in this judgment, the provisions contained in the Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990 do not provide any methodology to challenge in a court of law of the validity of auctioning the mortgaged property by a bank upon a resolution being passed by its Board of Directors. If such an opportunity is given to a party whose

property is to be auctioned, certainly then he will have a decision from a court to review. No such opportunity is available to the petitioner in this case.

At the same time it is to be noted that issuing a certificate of sale, consequent to an auction in terms of Section 15 of the aforesaid Act No.4 of 1999, would become a situation similar to a decree being executed in a civil suit as it has the same consequences. Said section 15 of the Act No.4 of 1999 reads thus:

“Upon issuing a certificate of sale 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 to any person claiming through or under any disposition whatsoever of the right, title or interest subsequent to the date of the mortgage 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.”

Under the said Section 15 of the Act No.4 of 1990, the proprietary rights of the person, whose property is to be auctioned will come to an end. Accordingly, it seems that auctioning a property under the said Act No.4 of 1990 will have the same effect as of execution of a decree entered by Court. Therefore, it is not incorrect to allow the petitioner to invoke jurisdiction under Rule 42 of the Supreme Court Rules to move for an interim order particularly because no clear rule is found to cater to a situation as arisen in this instance.

Moreover, at the time the Supreme Court Rules were made, a situation similar to the circumstances of this case may not have foreseen by

its creatures. Therefore, it is necessary to consider whether such an instance too should be covered by Rule 42 to ensure achieving the ends of justice. In the event such a decision is not made, then the person who came to court by way of filing a writ application will be without a remedy, particularly when violation of the provisions contained in the Recovery of Loans by Bank (Special Provisions) Act No.4 of 1990 is found. Therefore, my opinion is that the law referred to in Rule 42 should be extended to obtain relief even to an application similar to the case before us.

Having considered all those matters referred to above, it is my opinion that a person who has a complain to make before the proper court by way of a writ application as to any violation of the provisions of the Act No.4 of 1999, he must be given the right to invoke jurisdiction under Rule 42 of the Supreme Court Rules to obtain an interim order until the matter is looked into by this Court. If no such decision is made then a person aggrieved by the procedure adopted in holding the auction will have no forum to complain. As a result such a person may even run the risk of losing his property despite the presence of irregularities as alleged in this instance.

In the circumstances, it is my opinion that the application to stay the proceedings referred to in Part II of the Supreme Court Rules of 1990 published in the Gazette [Extra Ordinary] No.665/32 dated 7th June 1991 shall apply to an application for special leave of this Court in a case filed by way of a writ in order to canvass a decision to sell the property mortgaged to a

Bank in terms of the provisions contained in the Recovery of Loans by Bank (Special Provisions) Act No.4 of 1990.

For the aforesaid reasons, I decide that the application made to this Court for an interim order is to be considered as an application made under Rule 42 of the Supreme Court Rules. Therefore, it is not an invalid application. Accordingly, the interim order made by this Court on 25.05.2015 is to be considered as a valid order.

In the circumstances, the application for Special Leave is to be considered by this Court now.

JUDGE OF THE SUPREME COURT

B.P.ALUWIHARE PC, J.

I agree

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDNE PC, J.

I agree

JUDGE OF THE SUPREME COURT