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

1. Aqua World Private Limited,
   Suduwella New Road,
   Wennappuwa.

2. Kuranage Marian Stella Rose
   Perera,
   Suduwella New Road,
   Wennappuwa.
   Plaintiffs

SC APPEAL NO: SC/APPEAL/219/2016
CHC CASE NO: HC/CIVIL/120/2014/MR

Vs.

1. DFCC Bank,
   No. 73/5, Galle Road, Colombo 03.

2. Navinda Samarawickrama
3. Anuja Samarawickrama
   (Partners of Shockman and
   Samarawickrama Auctioneer)
   290, Havelock Road, Colombo 05.
   Defendants

AND BETWEEN

DFCC Bank PLC,
No. 73/5, Galle Road, Colombo 03.
1st Defendant-Appellant

Vs.

1. Aqua World Private Limited,
   Suduwella New Road,
   Wennappuwa.

2. Kuranage Marian Stella Rose
   Perera,
   Suduwella New Road,
   Wennappuwa.
   Plaintiff-Respondents

3. Navinda Samarawickrama
4. Anuja Samarawickrama
   (Partners of Shockman and
   Samarawickrama Auctioneer) of
   290, Havelock Road, Colombo 05.
   Defendant-Respondents

Before: Hon. Justice P. Padman Surasena
Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Mahinda Samayawardhena

Counsel: Chandaka Jayasundara, P.C. with Milinda Jayatilaka for the 1st Defendant-Appellant.
Widura Ranawaka for the Plaintiff-Respondents.

Argued on: 19.10.2023

Written Submissions:

By the Plaintiff-Respondents on 02.05.2017 and 10.11.2023

By the 1st Defendant-Appellant on 07.04.2017 and 08.12.2023

Decided on: 07.03.2024

Samayawardhena, J.

The plaintiff filed this action in the Commercial High Court seeking a declaration that the resolution passed by the board of directors of the 1st defendant Bank dated 29.05.2013 to sell the mortgaged property by *parate* execution in terms of section 4 of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, as amended, is unlawful and therefore a nullity. Pending determination of the action, the court issued an interim injunction preventing the Bank from proceeding with the auction. The Bank is before this court against the said order.

Although the resolution had been passed to recover a sum of Rs. 5,443,787/47 together with the interest, the plaintiff by reference to documents issued by the Bank marked P3 and P4 has pointed out that, at the time the resolution was passed, the balance of the principal amount borrowed was less than Rs. five million–to be exact Rs. 4,024,582/37. The Bank does not dispute this fact before this court.

The contention of learned counsel for the plaintiff is, at the time of default, if the balance of the principal amount borrowed was less than Rs. five million, the Bank cannot resort to *parate* execution.

Admittedly, the principal amount borrowed was Rs. nine million. It is the contention of learned President's Counsel for the Bank that the Bank can

resort to *parate* execution, if the principal amount borrowed is more than Rs. five million.

The short matter to be decided by this court is which argument should prevail.

This court in *Nanayakkara v. Hatton National Bank PLC* [2017] BLR 95 held that the argument of learned counsel for the plaintiff should prevail. However, learned President's Counsel for the Bank submits that it does not represent the correct position of the law. I regret my inability to agree with learned President's Counsel for the Bank.

Section 5A was introduced to the principal Act, No. 4 of 1990, by Act No. 1 of 2011. Section 5A was further amended by Act No. 19 of 2011. Section 5A(1), as presently constituted, reads as follows:

> *5A(1) No action shall be initiated in terms of section 3 of the principal enactment for the recovery of any loan in respect of which default is made, nor shall any steps be taken in terms of section 4 or section 5 of the aforesaid Act, where the principal amount borrowed of such loan is less than rupees five million:*
>
> *Provided however, at the time of default when calculating the principal amount borrowed due and owing to the Bank on the loan granted to such defaulter, the interest accrued on such loan and any penalty imposed thereon, shall not be taken into consideration.*

Learned President's Counsel for the Bank relies on section 5A(1) to contend that, when the principal amount borrowed is more than Rs. five million, as in this case, the Bank can resort to *parate* execution. He argues, in such circumstances, the proviso to section 5A(1) has no applicability. He further argues that the proviso is applicable in calculating the principal amount borrowed when a borrower has obtained

multiple facilities secured by a mortgage. This convoluted argument is against the plain meaning of the proviso to section 5A(1).

For the purpose of section 5A, a Bank is not permitted to aggregate multiple loan facilities, all secured by the same mortgage, in order to surpass the threshold of Rs. five million. The principal amount of each loan facility should exceed Rs. five million.

The proviso to section 5A(1) needs no interpretation; it is self-explanatory. It states (a) at the time of default (b) when calculating the principal amount borrowed due and owing to the Bank (c) on the loan granted to such defaulter, (d) the interest accrued on such loan and any penalty imposed thereon, shall not be taken into consideration.

The calculation has to be done at the point of default, and at that point, the principal amount borrowed due and owing to the Bank on the loan granted, should exceed Rs. five million.

Learned counsel for both parties restricted the argument to the following question of law:

> *When the capital to be recovered is less than Rs. five million as at the date of resolution, can the Bank resort to parate execution?*

I answer this question in the negative.

The order of the Commercial High Court dated 19.11.2014 is affirmed and the appeal is dismissed with costs.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.

I agree.

Judge of the Supreme Court