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

In the matter of an Application for Special Leave to Appeal under Article 128(2) of the Constitution read with the provisions of the High Court of Provinces (Special Provisions) Act, No. 10 of 1996.

SC Appeal No. 74/2021
SC (Special) LA No. 91/2021
HC (Civil) No. 202/2019/MR

1. Upul Chaminda Perera Kumarasinghe
No. 3/C, Gangarama Road,
Kovinna, Andiambalama.

2. Airport City Club Hotel Ltd.,
No. 3/C, Gangarama Road,
Kovinna, Andiambalama.

PLAINTIFFS

-Vs-

Pan Asia Banking Corporation PC,
No. 450, Galle Road,
Colombo 03.
Having its Branch Office at No. 71,
Negombo Road,
Ja-Ela.

DEFENDANT

AND NOW (BY AND BETWEEN)

1. Upul Chaminda Perera Kumarasinghe
No. 3/C, Gangarama Road,
Kovinna, Andiambalama.

2. Airport City Club Hotel Ltd.,
No. 3/C, Gangarama Road,
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PLAINTIFF-APPELLANTS

-Vs-

Pan Asia Banking Corporation PC,
No. 450, Galle Road,

Colombo 03.
Having its Branch Office at No. 71,
Negombo Road,
Ja-Ela.

DEFENDANT-RESPONDENT

BEFORE: Hon. Buwaneka Aluwihare, PC, J
Hon. P. Padman Surasena, J
Hon. Janak De Silva, J

COUNSEL: Mr. Sanjeewa Dasanayake with Ms. Dilini Premasiri instructed by Ms. D. Jimininge for the Plaintiff-Appellants.
Mr. Chandaka Jayasundera, PC with Mr. Priyantha Alagiyawanna and Mr. Isuru Weerasooriya instructed by Mrs. Nayani Jayasinghe for the Defendant-Respondent.

ARGUED ON: 28.10.2021.

WRITTEN SUBMISSIONS: 21.09.2021 for the Plaintiff-Plaintiffs.
25.10.2021 for the Defendant-Defendant.

DECIDED ON: 11.10.2023

JUDGEMENT

Aluwihare, PC, J,

The Plaintiffs-Plaintiffs (hereinafter referred to as 'Plaintiffs') preferred this Appeal to this Court by way of Petition dated 7th May 2021. On the 6th August 2021, having heard the submissions of counsel for each party, the court granted leave to appeal. The factual circumstances of this appeal and the questions of law which warrant determination have been set out below.

The Factual Circumstances of this Appeal

As set out in the accepted Offer Letter dated 8th August 2016 (marked 'R1'), addressed to the 2nd Plaintiff-Plaintiffs (hereinafter referred to as '2nd Plaintiff') by the Defendant-Defendant Bank (hereinafter 'Defendant bank'), the following facilities were offered on terms and conditions listed in the letter:

Facility No. 1

A Term Loan of Rs. 20,000,000 to part finance a purchase of property to be repaid in 72 equated monthly instalments with a grace period of 12 months "during which

interest to be serviced monthly commencing 30 days from the date of grant of facility. After the grace period, 72 equated monthly instalments of Rs. 422,900/27 each" (*vide* 'R1'). Security for this facility was to be furnished in the form of a Primary Floating Mortgage Bond of Rs. 90 million over the 'property situated at Andiambalama depicted as Lot No. 2 and 5 in plan No. 6961 in extent of 3R 25.8P.

Facility No. 2

A Term Loan of Rs. 70,000,000 to part finance the construction cost of a hotel to be repaid in 72 equated monthly instalments with a grace period of 12 months "during which interest to be serviced monthly commencing 30 days from the date of grant of facility. After the grace period, 72 equated monthly instalments of Rs. 1,480,150/93 each" (*vide* 'R1'). Security for this facility too was listed as "same as security of Facility No.1".

A Joint and Several Personal Guarantee from the Directors for Rs. 90 million was given as additional security for both facilities.

The Directors of the 2nd Plaintiff, including the 1st Plaintiff who owned 70% shares of the 2nd Plaintiff company undertook the obligations which flow from the mentioned facilities by signing the Offer letter (marked 'R1'). In pursuance of the accepted offer, the 2nd Plaintiff entered into loan agreements for the two facilities dated 9th August 2016 (marked 'R2' and 'R3'). The Plaintiffs admitted to submitting the following as securities for repayment of the said Loan facilities with interest and charges.

a. the 2nd Plaintiff as the obligor/mortgagor mortgaged with the Defendant Bank, the land described in the 2nd Schedule (Lot 5) to the Plaint by Mortgage Bond No. 298 dated 12th August 2016.
b. the 2nd Plaintiff as obligor and the 1st Plaintiff as the mortgagor mortgaged with the Defendant Bank, the land described in the 1st schedule (Lot 2) to the Plaint by Mortgage Bond No. 300 dated 12th August 2016.

The certified copy of the Loan Ledger of the loan of Rs. 20 million produced as 'R4' notes that, as at 2nd April 2018, a sum of Rs. 20, 278, 983.95 was owed to the Defendant by the 2nd Plaintiff company. The certified copy of the Loan Ledger for the

loan of Rs. 70 million produced as 'R5' notes that as at 2nd April 2018, a sum of Rs. 72,495,623.17 was owed to the Defendant by the 2nd Plaintiff company. Accordingly, the Plaintiffs owed the Defendant a total sum of Rs. 92,774,607.12 as at 2nd April 2018.

By two letters of demand dated 11th April 2018 ('R6' and 'R6(a)'), the Defendant Bank demanded that the Plaintiffs provide the said sums, with interest from 3rd April 2018. The letters also note that if the amounts demanded were not paid with interest, the Defendant Bank would take steps under the Recovery of Loans by Banks (Special Provisions) Act, No. 04 of 1990 (hereinafter sometimes referred to as 'the Act') to auction the mortgaged properties.
On 25th April 2018, the Board of Directors of the Defendant Bank resolved to auction the said properties mortgaged to the Bank in order to recover the said sums of Rs. 92,774,607.12 and interest from 3rd April 2018. The said resolution was published in the Government Gazette and in Newspapers in all three languages ('A28(ii)'-'A28(vii)') and also copied to the 1st and 2nd Plaintiffs via covering letters dated 13th June 2018 ('R7' and 'A28(i)').

The public auction of the said property was fixed for 16th July 2018. The Defendant published the auction notice in the Government Gazette on 14th June 2018 and in Newspapers in all three languages ('A29(ii)'-'A29(vii)'). The Plaintiffs were also informed of the same by letters dated 26th June 2018 ('A28(i)'-'R8') along with copies of the Gazette Notice and Newspaper publications. By letter dated 29th June 2018 ('R8(b)'), the Plaintiffs agreed to deposit Rs. 4 million on or before 4th July 2018, requesting the Defendants to suspend the auction.

The Defendants claim that they suspended the said auction, acting on the representation and undertaking of the Plaintiffs. It is also submitted that the Plaintiffs did not repay the loans as undertaken by the Defendant. By letter dated 3rd October 2018, the Defendant requested the Plaintiffs to settle monies due the Defendant.

Since the Plaintiffs failed to settle the loans, the public auctions of the properties was, once again fixed for 12th November 2018, and the Defendant published the auction notice in the Government Gazette on 25th January 2019 and in Newspapers in all

three languages ('A30(ii)'-'A30(vi)') before the said publications. The Defendant also informed the 1st and 2nd Plaintiffs of the scheduled auction by covering letters dated 29th October 2018 along with copies of the Gazette and Newspaper Publications ('R10' and 'A30(i)'). The Defendant claims that this auction was also suspended at the request of the Plaintiffs due to several representations, promises and undertakings of the Plaintiffs to repay the amounts due.

By Offer letter dated 11th December 2018 ('R11'), the Defendant offered to reschedule the repayment contingent upon a deposit of Rs. 700,000 by the Plaintiffs. However, the Plaintiffs had failed to make such a deposit.

Thereafter, the Defendant had requested the Plaintiffs to settle the total arrears by letter dated 26th December 2018 ('R12'), which conveys that if the Plaintiffs fail to do so, or the parties fail to arrive at a settlement, the Defendant will proceed to *parate* execute the property. Indicating that the arrears was not settled, and no settlement was arrived at, the public auctions of the properties was once again fixed for the third time on the 28th February 2019 and the relevant notice was published in the Government Gazette and Newspapers on 25th January 2019 in all three languages ('A33(i)'-'A33(vii)'). Notice of the above scheduled auction, along with copies of the Gazette and Newspaper notifications was conveyed to the 1st and 2nd Plaintiffs with covering letters dated 6th February 2019 ('R13', 'A33(i)').

By filing a Plaint dated 21st February 2019 (X1), the Plaintiffs instituted action in the Commercial High Court against the Defendant praying for *inter alia*:

- a declaration that the resolution adopted by the Board of Directors of the Defendant dated 25th April 2018 was illegal, wrongful and a document which cannot be enforced by law;
- a declaration that the Defendant does not have any right to adopt a consolidated resolution to auction for two separate properties stated in the Mortgage Bonds marked 'A35' and 'A36' (referred to above);
- a declaration that no right is devolved based on the above Mortgage Bonds.

The Plaintiffs also sought as interim relief:

- an enjoining order preventing the Defendant and its agents from selling the

properties sought to be auctioned by the resolution (A28(ii)) and inter alia engaging in further activities based on the notices of sale of the properties until the determination of the interim injunction;

- an interim injunction preventing the Defendant and its agents from selling the properties sought to be auctioned by the resolution (A28(ii)) and inter alia engaging in further activities based on the notices of sale of the properties until the final determination of the action.

Pursuant to this action, the Commercial High Court issued an enjoining order as prayed for by the Plaintiffs. Due to the enjoining order, the auction which was fixed for 28th February 2019 was suspended. Thereafter, on 17th July 2019, the Defendant filed a Statement of Objections (X3). Subsequent to inquiry carried out by written submissions, the learned High Court Judge delivered an Order (X6) dated 21st April 2021 vacating the enjoining order and dismissing the application of the Plaintiffs for an interim injunction.

Being aggrieved by the said order, the Plaintiffs invoked the appellate jurisdiction of this court urging that the said order is contrary to law.

On the 6th of August 2021, having heard the submissions of counsel for each party, the court granted leave to proceed on the following questions of law.

(1) Has the learned High Court Judge failed to give his judicial mind to the fact that the impugned resolution was passed for a consolidated sum thereby depriving the Plaintiffs of their right to secure their loan to the maximum limit of each mortgage bond?

(2) Has the learned High Court Judge failed to identify that if the interim order sought is not given, the Defendants are permitted to recover an amount exceeding the amounts pledged by the Mortgage Bonds marked 'A35' and 'A36' to the plaint which is contrary to the provisions of Sections 10,11 and 14 of Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 as amended?

(3) Has the learned High Court Judge failed to identify that if the interim order sought is not given, it will prejudice Plaintiffs to remedies available in terms of Sections 10 and 11 of Recovery of Loans by Banks (Special Provisions) Act, No.

4 of 1990 (as amended) to deposit the upset price and release the scheduled properties from auction?

Further to granting leave to proceed, this court also issued an interim order dated 6th August 2018 staying the operation of the order of the Commercial High Court dated 21st April 2021 along with an interim order spare in the operation of the above order of the Commercial High Court and an ordered parties to maintain the status quo until final determination of the case.

The Position of the Plaintiffs

The principal position of the Plaintiffs is that although the two plots of land pledged as securities by the two mortgage bonds (A35 and A36) are situated next to each other, they are considered two separate plots of land belonging to two separate parties. The Plaintiffs submitted that the title to such lands were obtained in the following manner, by the following parties:

1. By virtue of **Deed of Transfer bearing No. 22** dated 1st May 2016, attested by N.M.R Cooray Notary Public, **the 1st Plaintiff** seized and possessed the land described as **Lot 02** in the Plan bearing No. 6961 dated 4th December 2015 made by K.R.S. Fonseka, Licensed Surveyor, containing in extent 1R.35.80P.
2. By virtue of **Deed of Transfer bearing No. 39** dated 12th August 2016, attested by N.M.R Cooray Notary Public, the **2nd Plaintiff** seized and possessed the land described as **Lot 05** in the Plan bearing No. 6961 dated 4th December 2015 made by K.R.S. Fonseka, Licensed Surveyor, containing in extent 1R.30P.

It is the Plaintiffs' position that their case presents exceptional and extraordinary circumstances and that the Defendant Bank cannot arbitrarily recover the loss borne of default by way of *parate execution* and that the Defendant must act in a 'commercially reasonable manner' (*vide* the Plaintiffs' written submission dated 21st September 2021) in compliance with the terms of the respective mortgage bonds and the rules of law.

As final relief, the Plaintiffs seek that the order of the learned High Court Judge (X6) be varied, and an interim injunction be issued to preserve the properties in their possession and title until the Commercial High Court resolves the substantial matters

at trial.

The Plaintiffs submitted, relying on His Lordship Chief Justice Sarath N. Silva's judgement in ***Ramachandra and another v. Hatton National Bank*** **[2006] 1 SLR 393** that as per the process of recovery under the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990, parties' prejudiced by any decision of the Board of Directors has no remedy besides agitating their grievance prior to the auction sale as no notice is provided to the defaulter prior to the passing of the resolution, and that consequently, the process contravenes the principles of natural justice.

The Plaintiffs also complained that by passing a single Resolution in respect of both properties mortgaged to it, the Defendant had failed to set an 'upset price' for each property and had consequently deprived the Plaintiffs the opportunity to release at least one property by paying the amount recoverable. The Plaintiffs submitted that such conduct by the Defendant was 'commercially unreasonable', considering the economic strife caused by Covid-19 and other struggles singular to the Plaintiffs. On the aforementioned grounds, the Plaintiffs prayed for an interim injunction to preserve their possession of the properties and variation of the order of the learned Judge of the Commercial High Court (X6).

The Position of the Defendant Bank

Principally, the Defendant submitted that the Order of the learned High Court Judge is correct in all aspects and should not be set aside or varied. Buttressing this view, the Defendant submitted that the Plaintiffs have failed to establish a *prima facie* case for the grant of an Interim Injunction (*vide* ***Felix Dias Bandaranaike v. State Film Corporation*** **[1981] 2 SLR 287** and ***DFCC Bank PLC v. Fathima Ruzana Fakurdeen*** **SC Appeal No. 133/2014 S.C Minutes 24.03.2016**).

The Defendant submitted that as admitted by both parties, the 2nd Plaintiff failed to repay the facility for Rs. 70 million and the facility for Rs. 20 million, that as at 2nd April 2018, the 2nd Plaintiff was in default of a sum of Rs. 92,774,607.12 and outstanding interest on capital of Rs. 88,639,658.09. Furthermore, the Defendant submitted that above computation accounted for repayments made till 2nd April 2018 as established by the Loan Ledgers marked 'R4' and 'R5'. As per the ledgers, no

repayments have been made after 23rd January 2018.

The Defendant then adverted to Section 3 of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990. Relying on the Section, the Defendants submitted within the meaning of the Act, where the Plaintiffs failed to fully repay the facilities obtained inclusive of interest, the Plaintiffs were in default. Accordingly, the Defendant submitted that acting under Section 4 of the Act, the Board of Directors adopted the Resolution to *parate execute* the mortgaged properties.

Furthermore, it was also noted by the Defendant that resorting to *parate execution* was lawful, correct and necessary to maintain daily commerce which would benefit society at large (*vide* ***People's Bank v. Telepix (Pvt) Limited*** [2010] BLR 235).

Responding the Plaintiffs' contention that the Resolution passed by the Defendant was bad in law as it relates to two separate properties, the Defendant submitted that the Plaintiffs are estopped from raising such contention as the Defendant had on two previous occasions passed resolution to *parate execute* the same properties and on both occasions, the Plaintiffs did not find fault with the form or contents of the resolution. Instead, on both occasions, the Plaintiffs provided various undertakings to repay the loans. The Defendant submitted that the Plaintiffs have acquiesced to their unfavourable position by engaging the previous resolutions and providing undertakings and are therefore barred from adopting a contrary position. Additionally, the Defendant submitted that the Plaintiffs' position is, in any event, without merit as they have not referred to any provision of law which prohibits the Defendant from passing one resolution in respect of two properties mortgaged for the purposes of two facilities given to the same borrower.

The Defendant also submitted that the principal contract between the 2nd Plaintiff and the Defendant is contained in the Offer Letter where it offered the facilities (R1) and the Loan Agreements (R2 and R3). Further, they submitted that as observed by the learned High Court Judge in the Order (p. 9), as per the loan agreements, both loans were secured by Lot No. 2 and 5 in Plan No. 6961 as joint security for both facilities.

Of final note, is that the Defendant has refuted the Plaintiffs' claim that the 2nd

Plaintiff is not a willful defaulter. The Defendant submitted that the Plaintiffs have also defaulted on loans given by Hatton National Bank PLC and DFFC Bank PLC, and two more cases for which *parate execution* proceedings are ongoing before the Commercial High Court and the District Court of Negombo.

The Questions of Law

(1) **Has the learned High Court Judge failed to give his judicial mind to the fact that the impugned resolution was passed for a consolidated sum thereby depriving the Plaintiffs of their right to secure their loan to the maximum limit of each mortgage bond?**

Upon perusal of the order of the learned High Court Judge, it is evident that the learned Judge has provided ample consideration to the contentions advanced by the Plaintiffs regarding the security for each loan facility.

Noting that the central relief sought by the Plaintiffs was to an interim injunction to prevent the Defendant from auctioning the properties (at page 6 of X6), the learned Judge declared that the Plaintiffs grievances over not being able to enjoy the security of each loan to the maximum extent of each mortgage bond must be considered in light of the justifications advanced by the Plaintiffs for their failure to make payments owed the Defendant. Moreover, noting that Section 4 of the Act permits the Board of Directors to pass resolution to *parate execute* any property mortgaged to the Bank as security for a loan defaulted upon in order '*to recover the whole or the unpaid portion of such loan, and interest due thereon…*', and that as per the elements in the three consequential tests laid down in ***Felix Dias Bandaranaike v. State Film Corporation*** **[1981] 2 SLR 287,** the learned Judge held that for an interim injunction to be granted, it is incumbent upon the Plaintiffs to establish that they have a strong *prima facie* case against the Defendants and that they would suffer irreparable and irremediable damage if such relief is not granted.

The learned Judge also had observed (at page 9 of X6) that the Resolution passed by the Defendant clearly set out the outstanding amount due under the two mortgage bonds and the Plaintiffs had the option to make payment in respect of one facility or

both and get one or both lands released. The outstanding amounts set out in the Resolution seemingly correspond to the Loan Ledgers R4 and R5. Additionally, no material produced indicates that the Plaintiffs had made any attempt to make any repayments and get at least one property released. If the Plaintiffs wished to have at least one property released, they could have provided an undertaking to the Defendant to that effect such as the previous occasions where the auctions were suspended.

It is also pertinent to note that the learned High Court Judge, citing ***Yashoda Holdings (Pvt) Ltd. V. People's Bank*** **[1998] 3 SLR 382** and ***Inglis v. Commonwealth Trading Bank of Australia*** **[1972] 126 CLR 161** correctly observed (at pages 10-11) that the Bank's right to recover loans by the power of sale as mortgagee will not be prevented or interfered with by the court except on exceptional circumstances where it is shown that irremediable damage would be caused without such intervention. The Plaintiffs complaint regarding a single resolution being passed is particularly perplexing when considering that they had found no issue with the single resolution on the previous occasions for the auction of the properties (*vide* A28(ii)-A28(vii) and A30(ii)-(vi)).

Nothing in the law prevented the Bank from passing a single resolution to recover loans by *parate executing* two separate properties. The focus of the resolution is the Board's exercise of power over loans owed to them, not the property concerned. The law must be read in a manner which assists expediency while adhering to principles of natural justice, not a device which hampers commerce. The Court is bound to assist expediency, particularly where the legislature has legislated for that exact purpose.

As concluded by the learned High Court Judge, upon perusal of the Loan Agreements (R2 and R3), I too observed that the Plaintiffs have secured the facilities by providing Lots 2 and 5 in Plan No. 696 as joint security. In the portion titled "On the security of", the following is written.
"(1) Primary Floating Mortgage Bond for Rs. 90.0 Mn over the property situated at Andiambalama depicted as Lot No. 2 and 5 in Plan No. 6961 in extent of 3R.25.8P."

Both these agreements are signed and endorsed by Directors of the 2nd Plaintiff and the Plaintiffs have admitted to their contents. This lends credence to the Defendant's position that the Defendant lawfully, and quite appropriately, passed the same and

single resolution in respect of both Lot Nos. 2 and 5.

Moreover, this court has on previous occasions too, refused to intervene and prevent Banks from exercising their lawful rights on mere grounds of procedural impropriety. In ***Amaradasa Liyanage v. Sampath Bank PLC*** **(S.C. Appeal No. 126/2012, S.C Minutes 04.04.2014)**, this court noted that, (in the said case) the validity of the Certificate of Sale pursuant to a Resolution issued had been challenged on vexatious grounds i.e. upon the Certificate being signed by two members of the Board rather than all members of the board. Noting that this was an irregularity that could be readily remedied without any prejudice to the rights of the borrower, the court refused to overturn the High Court Judgement which was appealed against. Similarly, the validity of a Resolution which merely consolidated amounts and properties mortgaged to it for facilities in common is not a ground upon which the Plaintiffs appeal could succeed.

For these reasons, I am inclined to answer this question in the negative. It is my opinion that the learned Judge of the Commercial High Court has adequately addressed his judicial mind and had arrived at the appropriate conclusion.

(2) Has the learned High Court Judge failed to identify that if the interim order sought is not given, the Defendants are permitted to recover an amount exceeding the amounts pledged by the Mortgage Bonds marked 'A35' and 'A36' to the plaint which is contrary to the provisions of Sections 10, 11 and 14 of Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 as amended?

It was the Plaintiffs' submission that by passing a single resolution in respect of both properties, the Defendant prevented the Plaintiffs from availing remedies/steps they were entitled to, in terms of Sections 10, 11 and 14 of the Act.

Section 10 of the Act states as follows:

"10. (1) If the amount of the whole of the unpaid portion of the loan, together with

interest payable and of the moneys and costs, if any, *recoverable by the Board under section 13* ***is tendered to the Board at any time before the date fixed for the sale, the property shall not be sold, and no further steps shall be taken*** *in pursuance of the resolution under section 4 for the sale of that property.*

(2) ***If the amount of the instalment in respect of which default has been made, and of the moneys and costs, if any,*** *recoverable by the Board under section 13* ***is tendered to the Board at any time before the date fixed for the sale, the Board may in its discretion direct that the property shall not be sold and that no further steps shall be taken*** *in pursuance of the substitution under section 4 for the sale of that property.*

Accordingly, where the Resolution is passed and the borrowers are noticed, Section 10 envisages two options.

1. The borrower could settle the entire outstanding amount to the Bank including the costs recoverable under S. 13. If done so, the Bank cannot auction the property as it has no discretion in the matter.
2. Alternatively, the borrower could settle only the portion of the loan in arrears and costs recoverable. If done so, the Bank retains the discretion to decide whether to proceed with the auction.

Crucially, the Defendants cannot prevent the Plaintiffs from making payments in the manner specified under S. 10(1) or S. 10(2). Therefore, it would be incorrect to state that the Plaintiffs were 'prevented' from availing Section 10 of the Act by the Defendant Bank. For the purposes of commercial expediency, it is my view that Banks would in fact prefer such payments. This is evident in the fact that the Bank suspended previously scheduled auctions on two occasions, upon receiving undertakings from the Plaintiffs. As the Plaintiffs had not made any payments in accordance with the aforementioned provisions of Section 10, the Defendant was not bound to suspend the auction.

Section 11 states that;

"The Board may fix an upset price below which the property shall not be sold to any parson other than the bank to which the property is mortgaged."

As this portion of the judgement directly relates to the third question under which

leave to appeal was granted, it will be substantially dealt with later on.

Section 14 states as follows.
"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 situated."

Section 14 contemplates the payment of any balance sum a borrower may be entitled to once the mortgaged property is sold. In my view, the Plaintiffs cannot seek to prevent the sale or auction of mortgaged property by arguing that if sold, it will not be entitled to any remaining balance, as it is evident that sale proceeds may not always yield a balance after deducting from the proceeds of the sale the amount due on the mortgage and the moneys and costs recoverable under section 13.

Therefore, this question of law is also answered in the negative.

(3) **Has the learned High Court Judge failed to identify that if the interim order sought is not given, it will prejudice Plaintiffs to remedies available in terms of Sections 10 and 11 of Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 (as amended) to deposit the upset price and release the scheduled properties from auction?**

As per Section 11 of the Act, the Board of Directors of the Bank to which the property is mortgaged may fix an upset price, an amount lower than which the property shall not be sold to any person other than the bank. Section 17 of the Act provides that where the property auctioned and sold has been purchased on behalf of the Bank, upon the borrower paying the amount due in respect of the loan, the Board of Directors of the Bank may cancel any scheduled resale of the property.

"The Board may fix an upset price below which the property shall not be sold to any parson other than the bank to which the property is mortgaged."

The operative term in Section 11 is the word '**may**'. Section 11 bestows a degree of discretion upon the Bank to determine whether an upset price may be fixed to purchase the property to itself, and then, if such intention is indicated, allow the Borrowers to re-purchase the property from the Bank. It is evident that such discretion was vested in the Board of Directors of the Bank because it may have to consider whether purchasing the property in its own name may be in its own interest. As in any purchase, a property does not carry the same relative commercial value to each prospective purchaser. The extent, the structure, its proximity to a metropolis and potential value for resale are all factors which take precedence in the Bank's considerations prior to evaluating the defaulter's concerns. Accordingly, the Plaintiffs cannot claim that the Defendant Bank acted 'unreasonably' when the Defendant Bank has provided ample consideration and opportunity for repayment to the Plaintiffs and then proceeded to act lawfully, within its rights, to ensure that it does not bear any losses due to the Plaintiffs' failure to honour debt obligations.

Therefore, I answer this question too in the negative.

Conclusion

It is clear that the Plaintiffs have sought an interim injunction to prevent the Defendant from *parate* executing the mortgaged properties. *Parate Execution* is a right the Defendant is entitled to execute lawfully as per the Recovery of Loans by Banks (Special Provisions) Act of 1990 as amended.

I wish to reiterate the role of the Court in matters relating to recovery of loans by banks under the Recovery of Loans by Banks Act, as eloquently expressed by Justice Tilakewardena in ***Amaradasa Liyanage v. Sampath Bank PLC*** **(S.C. Appeal No. 126/2012, S.C Minutes 04.04.2014) at p. 12:**

"*The ambit and purpose of the Recovery of Loans by Banks Act is, in essence, to recover monies due to the Bank while ensuring that the Bank does not enjoy an unjust enrichment. The provisions of the Act, by allowing parate execution, is to facilitate the process of collecting monies due, without lengthy court proceedings, and to do so in a fair and reasonable manner. This objective should therefore not be hindered by minor procedural irregularities… for such minor irregularities cannot have much*

impact on the rights of the borrower.
Minor procedural irregularities cannot, further, be grounds upon which actions may be instituted for such actions would only amount to the abuse of the process of Court which must not be allowed."

The plaintiffs cannot seek the intervention of the court to prevent the Defendant Bank from lawfully exercising their rights in terms of a valid contract, without making a case for irreparable and irremediable damage. Courts cannot and should not be treated as the refuge of all defaulting creditors.

The Plaintiffs' appeal to vary the Order of the learned High Court Judge dated 21st April 2021 (X6) and issue an interim injunction is hereby dismissed.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA
I agree.

JUDGE OF THE SUPREME COURT

JUSTICE JANAK DE SILVA
I agree.

JUDGE OF THE SUPREME COURT