NATIONAL DEVELOPMENT BANK OF SRI LANKA
v.
SERENDIB ASIA (PVT) LTD. AND ANOTHER

SUPREME COURT
AMERASINGHE, J.,
GUNAWARDANA, J. AND
GUNASEKERA, J.
S.C. APPEAL (CHC) NO. 16/98
H.C. (CIVIL) NO. 33/97/1
OCTOBER 21, 1998

Jurisdiction – Statutory ouster of jurisdiction – Sections 46 and 50 of National Development Bank Act, No. 2 of 1979 – Jurisdiction of the court to determine the validity of a purchase by the Bank of property mortgaged to the Bank.

The appellant Bank decided under section 41 of the National Development Bank Act, No. 2 of 1979 to sell by public auction immovable and movable property mortgaged to the Bank on three mortgage bonds as security for a loan of Rs.10,900,000. At the auction there were no bidders, whereupon the Bank purported to purchase the properties at the price of Rs.1,000 for the property covered by each bond. The respondent debtors filed action in the High Court seeking to set aside the purchase made by the Bank alleging *inter-alia* that the Bank had acted "wrongfully and fraudulently in abuse of its powers under the National Development Bank Act" and for an interim injunction restraining the disposition of the properties.

Held:

1. Sections 46, 50 (1) and 50 (2) of Act No. 2 of 1979 did not oust the jurisdiction of the High Court to hear and determine the action.

2. Section 50 (1) precludes any person claiming through or under the borrower under any disposition made after the date of the mortgage from seeking to invalidate the sale of mortgaged property in any court. That section is not a bar against the borrower from moving the court to invalidate the sale.

3. Section 46 of the Act empowers the Board of Directors to fix the upset price of the property which would bind persons other than the Bank. Section 50 (2) provides that the certificate of the General Manager is

conclusive evidence of the sale and that the provisions of the Act relating to the sale have been complied with. These provisions do not preclude the court considering whether the Bank acted lawfully, in good faith and in a commercially reasonable manner.

APPEAL from the judgment of the High Court.

Romesh de Silva, PC with *Geethaka Gunawardana* for the defendant-apppellant.

A. P. Niles with *Arjuna Kurukulasuriya* for the plaintiffs-respondents.

Cur. adv. vult.

January 26, 1999.

AMERASINGHE, J.

The appellant is the National Development Bank of Sri Lanka. The first respondent is a company and the second respondent is the Managing Director of that company. The second respondent intended to set up a beer brewery and restaurant. He applied to the appellant for a loan of Rs.10,900,000 to enable him to meet the expenses of that project. The appellant agreed to provide the required sum of money on condition there was adequate security for the loan. Security was provided by the execution of two mortagage bonds : (*a*) mortgage bond No. 337 offered a land as security to cover a sum of Rs. 9,400,000; and (*b*) mortgage bond No. 338 offered the machinery and accessories of the project to cover a sum of Rs. 1,500,000. The loan of Rs. 10,900,000 was granted.

According to the respondents, when a request was made for a further sum of Rs. 5,000,000 for the project, the appellant said it would consider the proposal if additional security was offered. The second respondent and his brothers then executed mortgage bond No. 359. Mortgage bond No. 359 makes no reference to the need to secure the additional loan of Rs. 5,000,000.

The appellant's case is that mortgage bond No. 359 was executed to provide additional security in respect of the loan of Rs. 10,900,000.

From a perusal of document X4, it seems that the appellant was concerned with the lack of progress in the implementation of the project and indeed its very viability and therefore required "further security" (vide X6). On the other hand, it seems that the respondents were in fact seeking "additional finance" from the appellant "to complete the project" (vide X8). The addtional capital required by the respondent, was not provided and the project was not completed. The exact nature of what transpired between the parties would need to be established by evidence elicited in the main trial. These observations and conclusions are based on preliminary evidence and therefore of a tentative nature.

The mortgagors it seems failed to liquidate their debt as agreed upon between themselves and the mortgagee and therefore the mortgagee, the defendant-appellant, it seems took the steps prescribed by law to sell the mortgaged properties with a view to paying itself out of the proceeds. The prescribed steps included the passing of Board Resolutions on the 27th of December, 1991, in terms of section 41 of the National Development Bank of Sri Lanka Act, No. 2 of 1979, to sell the mortgaged properties by public auction for the recovery of the debts owed to the appellant (vide X9 and X10) and the publication in newspapers of such resolutions (vide X11,12,13) and in the *Gazette* (vide X14). The authorized auctioneer advertised the sale in the newspapers (vide X15 and X16). The auction was fixed for the 23rd of March, 1993. However, the sale could not be conducted as a result of an enjoining order sought and obtined by the plaintiffs-respondents in case Nos. 3688/Spl. and 3689/Spl. After due inquiry between the parties, the enjoining order was vacated and the interim injunction was removed. An attempt to move the Court of Appeal by way of revision and leave to appeal against the order of refusal to grant the interim injunction was unsuccessful. (CA Appl. Nos. 11/93 and 112/93 CA Minutes, 31st December, 1993).

Free to proceed, or so it was supposed, the defendant-appellant again advertised the sale of the properties on the 2nd of September, 1993. However, due to an enjoining order obtained on the 1st of September, 1993, in case No. 3782/Spl., the sale did not take place. But, after hearing both parties, the court vacated the enjoining order

on the 2nd of November, 1993. The appellant once again fixed and advertised the sale of the properties mortgaged under bonds No. 337 and 359 to take place on the 21st of September, 1994. The property mortgaged under bond No. 338 was to be sold on the 21st of April, 1995.

According to the appellant, the market values of the immovable properties mortgaged under bonds No. 337 and 359 were, upon the basis of a valuation obtained from an independent source (vide X26) assessed at Rs. 11,250,000 and Rs. 27,500,000, respectively. They were determined by the Board of Directors of the appellant as the "upset" – the minimum price. There does not appear to have been such an evaluation in respect of the movable properties secured by bond No. 338.

What happened at the auction sales? According to the appellant, there were "no bidders". The appellant purchased the immovable properties mortgaged under bonds No. 337 and 359 and the movable properties mortgaged under bond No. 338. The purchase price for the properties covered by the three bonds was Rs. 1,000 each.

The respondents then filed action in the Provincial High Court of the Western Province praying, *inter alia*, for a declaration that the purchases by the appellant were invalid; that any resale or disposition of the properties shall be null and void; for an injunction restraining the resale or disposition of the properties; and for an interim injunction restraining the appellant from reselling or disposing of the properties until the determination of the action. By its order dated the 11th of November, 1997, the Court allowed the application for the interim injunction prayed for.

Leave to appeal was granted on the following questions:

(1) Did the High Court misdirect itself in the application of the provisions contained in section 46 with sections 50 (1) and 50 (2) of the National Development Bank Act, No. 2 of 1979 as, amended by Act No. 10 of 1990 and Act No. 10 of 1992?

(2) Did the High Court have jurisdiction to hear and determine this matter?

(3) In the circumstances of this case, as set out in the plaint and statement of objections, was the plaintiff in any event entitled to an interim injunction?

Act No. 10 of 1990 and Act No. 10 of 1992 have no bearing on the matters before the High Court. The relevant provisions are sections 46 and 50 (1) and 50 (2) of Act No. 2 of 1979. Section 46 states as follows: "The Board of Directors may fix an upset price below which the property shall not be sold to any person other than the Bank". Section 50 (1) states: "If the mortgaged property is sold, the General Manager on a specific authorization by the Board of Directors shall issue a certificate of sale and thereupon 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 for any person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to and in the property made or registered after the date of the mortgage of the property to the Bank, in any Court to move to invalidate the sale for any cause whatsoever, or to maintain any right, title or interest to or in the property as against the purchaser". Section 50 (2) states: "A certificate signed by the General Manager under sub-section (1) shall be conclusive proof, with respect to the sale of any property, that all the provisions of this Act relating to the sale of that property have been complied with".

In the matter before us, the General Manager, on a specific authorization by the Board of Directors, issued a certificate of sale. The contention of the appellant is that once a certificate of sale is issued, it is not open to any person, including a borrower, to challenge the right, title or interest of the purchaser; the appellant in this case, therefore, cannot have and maintain this action. The Court has no jurisdiction to inquire into the matter. The learned Judge of the High Court, however, was of the view that sections 50 (1) and (2) did not oust the jurisdiction of the Court. The view of the learned Judge of the High Court was that a certificate issued in terms of section 50 (1) vests the right, title and interest in the purchaser and thereafter

it shall not be competent for (1) any person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to and in the property; (2) made or registered after the date of the mortgage to the Bank, to move to invalidate the sale. The section does not preclude the *borrower* from moving the Court to invalidate a sale. I find myself in agreement with the view of the learned Judge of the High Court, for that is the plain meaning of the words in section 50.

Learned counsel for the appellant submitted that section 46 read with sections 50 (1) and (2) precluded the plaintiffs-respondents from maintaining an application for an interim injunction. Admittedly section 50 (2) states that the certificates signed by the General Manager under section 50 (1) shall be conclusive proof, with respect to its sale of the property, that all the provisions of the National Development Bank Act relating to the sales of the mortgaged properties had been complied with. Yet, in my view, it does not preclude the Court from considering whether both in fixing the upset price under section 46 and in purchasing the properties at Rs.1,000 under each of the three bonds the appellant had acted lawfully, in good faith and in a commercially reasonable manner, although in terms of section 46, the appellant was not bound by the upset price.

The plaintiffs-respondents seek to set aside the purchases made by the defendant-appellant alleging, *inter alia*, that the defendant-appellant had acted "wrongfully and fraudulently in abuse of its powers under the National Development Bank Act". These are matters that the Court will have to consider in the circumstances of the case established by evidence having regard to the relevant principles of law that are applicable.

The only question that remains is whether, in the circumstances of this case, as set out in the plaint and statement of objections, the plaintiffs-respondents are entitled to the interim injunction prayed for. The plaintiffs-respondents allege unlawful conduct, fraud, abuse of authority and commercial unreasonableness. There are certainly serious questions of law and fact in the sense that they are not frivolous or vexatious questions to be tried: There is a *prima facie* case made

out, in the sense that the plaintiffs-respondents seem to have somewhat more than an arguable case, although at the end of the trial the learned Judge of the High Court may legitimately arrive at different conclusions on the law and the facts. Perhaps, as learned counsel for the defendant-appellant has submitted, the views expressed by the learned Judge in granting the injunction on the questions of unjust enrichment, trust, excess and so on, may prove to be unwarranted. The learned Judge was certainly not required to, and was not, passing any concluded views on the substantive questions of law or fact; he was expressing preliminary and *prima facie* impressions, as was appropriate at this stage. On the questions of balance of convenience and equities, learned counsel for the appellant submitted that the respondents were defaulters who owed the Bank a large sum of money and had made no attempt whatever to liquidate their debts. On the other hand, if the properties are sold by the appellant, without adequately protecting the interests of the plaintiffs-respondents, grave prejudice is likely to be caused to the debtor, if the case stated by the plaintiff is established. I agree with the appellant that "a wrongdoer should not benefit from the wrong doing".

However, the application of that principle would in my view, be more appropriate when the trial had been concluded and the wrongdoer and wrong doing have been identified with greater certainty.

For the reasons set out in my judgment, I dismiss the appeal with costs and affirm the order of the High Court dated the 11th of November, 1997.

GUNAWARDANA, J. – I agree.

GUNASEKERA, J. – I agree.

Appeal dismissed.