

**HATTON NATIONAL BANK LTD.**  
**v**  
**JAYAWARDANE AND OTHERS**

SUPREME COURT  
JAYASINGHE, J.  
TILAKAWARDANE, J.  
MARSOOF, J.  
SC (CHC) APPEAL 6/06  
SC LA (CHC) 73/2005  
CHC 108/2004 (01)

*Recovery of Loans by Banks (Sp. Prov.) Act 4 of 1990 – Sections 15(1), 15(2), 15(3), 16 – Parate Execution – Property of 3rd parties mortgaged – Cannot be sold – Directors property mortgaged – Could the property be parate executed? Civil Procedure Code – Section 207. Principle of Laesio Enomes – Not applicable when Bank re-sells property? Lifting the veil of incorporation.*

The respondents were directors of Company N obtained banking facilities and to secure the loans granted hypothecated the properties belonging to the respondent Directors. As the Company defaulted the petitioner Bank adopted a resolution in terms of Law 4 of 1990, to sell the property by way of parate execution. The defendant-respondents instituted action in the Commercial High Court (CHC 252/2001 (1)) and sought an enjoining order to restrain the Bank from conducting the public auction. The enjoining order granted was later dissolved the special leave to appeal application filed in the Supreme Court against the order dissolving the enjoining order was rejected. Later the defendant-respondents withdrew the action.

Subsequently the property was sold by public auction and purchased by the petitioner Bank.

The defendant-respondents instituted action again in the Commercial High Court and sought an order that, the purported auction sale is a nullity and the auction should be declared null and void on the ground of *laesio enomes*.

The Commercial High Court granted an interim injunction, holding that the relief claimed in the present case was different from the case – CHC 252/2001 and that the ratio in *Ramachandra v Hatton National Bank* is applicable and

the petitioner Bank cannot sell the property of the Directors, mortgaged to secure the loan taken by the petitioner Bank.

**Held:**

- (1) On examination of the reliefs claimed in Case No. 252/2001 (1) and the relief claimed in the instant case, though they do not appear to be identical, but based on the resolution adopted by the Bank and the consequent procedural steps the Bank would take in terms of the resolution, the Commercial High Court erred in holding that the reliefs claimed are dissimilar.

**Held further**

*Per Nihal Jayasinghe, J.*

"The 1st and 2nd respondents cannot hide behind the veil of incorporation of Company N whilst being the alter ego" of the said Company of which the 1st respondent has been the Managing Director and the 2nd respondent who is the wife of the 1st respondent has been a Director."

- (2) Although the independent personality of the Company is distinct from its Directors and shareholders Courts have in appropriate circumstances lifted the veil of incorporation. In particular Courts have been vigilant not to allow the veil of incorporation to be used for some illegal or improper purpose or as a device to defraud creditors.

*Per Nihal Jayasinghe, J.*

"It is quite obvious that the 1st and 2nd respondents being Directors of the Company benefited from the facilities made available to the said Company by the petitioner Bank and to that extent they cannot claim that the mortgages which secured the said facilities fall within the category of "third party mortgagee" as contemplated in the majority judgments of the Court in *Ramachandra v Hatton National Bank*".

*Per Nihal Jayasinghe, J.*

"It would be an exercise totally illogical to seek to differentiate the 1st and 2nd respondents as third party mortgagors".

- (3) In terms of section 19 if the Bank purchased the property the Bank is obliged to resell the property within a reasonable period in order to recover the amount due to the Bank. Since the actual sale of property purchased by the Bank comes after the resale of the property under section 19, and the property is resold by the Bank under section 10 – there cannot be an application to set aside the sale on the basis of *laesio enormis*."

**APPEAL** from an order of the Commercial High Court.

**Cases referred to:**

1. *Ramachandra v Hatton National Bank* – (distinguished)
2. *Haji Omar v Wickremasinghe* – 2002 – 1 Sri LR 105
3. *Salomon v A. Salomon and Co. Ltd.* – 1897 – AC 22
4. *Merchandise Transport Ltd. v British Transport Commission* – 1962 – 2QB 173
5. *Jones v Lipman* – 1962 1 WLR 832
6. *Atlas Maritime Co. SA v Avalon Maritime Ltd.* – 1991 – 4 All ER 769 at 779

*Romesh de Silva*, PC with *Palitha Kumarasinghe* PC and *Sugath Caldera* for appellants.

*Mohan Peiris* PC with *M.C.M. Muneer* and *Ms. Nuwanthi Dias* for respondents

July 31, 2007

**NIHAL JAYASINGHE, J.**

The 1st plaintiff-respondent (hereinafter referred to as the 1st respondent) was the owner of the property morefully described in schedule 1 of the plaint and the 1st respondent and the 2nd plaintiff (hereinafter referred to as the 2nd respondent) were joint owners of the property morefully described in schedule 2 of the plaint. The 1st respondents at all times material to this application was the Managing Director and the 2nd respondent Director of Nalin Enterprises Private Limited. The said Nalin Enterprises obtained certain banking facilities from the defendant-petitioner Bank(hereinafter referred to as the petitioner) against the recovery of which, upon default of Nalin Enterprises, the 1st and 2nd respondents hypothecated the properties described in schedules 1 and 2 of the plaint. It was urged on behalf of the plaintiffs-respondents that the 1st and 2nd respondents were not borrowers or beneficiaries of the facilities granted by the petitioner Bank but merely guarantors to the loan granted to Nalin Enterprises. Since Nalin Enterprises defaulted making payment as agreed upon the petitioner Bank in terms of section 4 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 adopted a Resolution to sell the properties described in the schedules to the plaint by way of Parate Execution at a public auction in order to recover the unpaid loan installments. Accordingly the public auction was fixed

for 24.10.2001. It is to be noted that 2nd plaintiff as the Attorney of the 3rd respondent filed partition action No. 19430/P on the basis that the 3rd respondent is the owner of the land and building and sought an enjoining order preventing the auction scheduled for 24.10.2001. The Court however refused to grant the enjoining order but issued notice of interim injunction. The District Court of Colombo having considered the Petitioner's objection in the partition action dismissed the application for interim injunction and subsequently terminated the proceedings. After the enjoining order was refused on 15.10.2001 the 1st and 2nd respondents instituted action No. 252/1(i) in the Commercial High Court for enjoining order and an interim injunction preventing the sale fixed for 24.10.2001 suppressing the filing of the partition action 19430/P and the refusal of the enjoining order by the District Court and obtained an enjoining order from the Commercial High Court. The Commercial High Court after inquiry refused the application for interim injunction on the basis of suppression of the partition action and held that the Bank was entitled to sell the property mortgaged to the bank as security for loans in default. Thereafter the 1st and 2nd respondents sought leave to appeal SCLA 18/2003 against the said order which was dismissed by the order dated 26.06.2003 by the Supreme Court. Subsequently the said case No. 252/2001(i) was withdrawn in the Commercial High Court and was dismissed and decree entered accordingly.

The petitioner Bank by letter of 11.09.2003 informed the respondents that the petitioner Bank had purchased the said property and certificate of sale issued in petitioner's favour.

The respondents thereafter instituted another action HC Civil 108/04(i) on 31.05.2004 in the Commercial High Court against the petitioner seeking -

- (a) A declaration that the purported auction sale conducted in respect of the properties referred to in the schedules to the plaint is null and void.
- (b) That the said auction be declared null and void on the ground of *Laesio Enormis*.
- (c) The petitioner be restrained from taking any steps to eject the occupants including the respondents from the premises in the 1st and 2nd schedules to the plaint until the final determination of this matter.

- (d) The petitioner be restrained by way of interim injunction from selling, alienating or transferring the properties described in the 1st and 2nd schedules to the plaint to third parties pending the determination of this action.

The Commercial High Court on 25.10.2005 granted an interim injunction as prayed for by the respondents. It is against this order the petitioner Bank has invoked the jurisdiction of this Court.

The petitioner contended that the High Court failed to consider the fact that the Case No. 252/2001(i) had been dismissed and by the said dismissal the respondents forfeited their right to agitate the same matter in any other court. That the Court also failed to consider the fact that the liability of the 1st and 2nd respondents to repay the said facilities was joint and several along with the said Nalin Enterprises Private Limited. That in terms of section 16 of the Act No. 4 of 1990 the petitioner is entitled to make an application for delivery of possession of the property and any interim injunction issued would be inconsistent with the statutory right of the petitioner to have vacant possession through judicial intervention. It is the contention of the petitioner Bank that as there were no bidders at the auction held for the sale of the property set out in the schedules the petitioner Bank purchased the property and the Board of Directors issued a certificate of sale under section 15(1) of the Act.

Section 15(1) provides that -

"If the mortgaged property is sold, the Board shall issue a certificate of sale and thereupon 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 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 subsequent to the date of the mortgage of the 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."

Section 15(2) provides that -

"A certificate signed by the Board 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". 100

Section 16(1) provides that -

"The purchaser of any immovable property sold in pursuance of the preceding provisions of this Act shall, upon application made to the District Court of Colombo or the District Court having jurisdiction over the place where the property is situate, and upon the production of the certificate of sale issued in respect of that property under section 15 shall be entitled to obtain an order for delivery of possession of that property".

After the respondents supported for notice of interim injunction on 01.06.2004 and the same served on the petitioner the petitioner filed its objections and prayed for dismissal of the application for interim injunction. Parties thereafter agreed to dispose of the said inquiry by way of written submissions. Subsequently, on the application of the petitioner Court permitted the petitioner to tender additional written submission in view of the Divisional Bench judgment *Ramachandra v Hatton National Bank*<sup>(1)</sup> and in the said written submissions the petitioner contended that - 110

- (a) The 1st and 2nd respondents and the said Nalin Enterprises instituted action in the Commercial High Court No. 252/2001(i) praying for a declaration that the resolution adopted by the petitioner is illegal and therefore null and void and no force or avail in law and prayed for an interim injunction preventing the Bank from auctioning the property. 120
- (b) That the learned High Court Judge of the Commercial High Court dismissed the respondents' application for interim injunction.
- (c) That the application for leave to appeal against such order to the Supreme Court No. 18/2003 was dismissed by the Supreme Court. 130

- (d) That the said 252/2001(i) was dismissed and decree entered accordingly.
- (e) That decree entered in Case No. 252/2001(i) operates as *res judicata*.

Section 207 of the Civil Procedure Court enact that

"All decree passed by the Court shall, subject to the appeal, when an appeal is allowed, be final between the parties, and no plaintiff shall hereafter be non-suited.

Explanation – Every right of property, or to money, or to damages, or to relief of any kind which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue or not in the auction, becomes, on the passing of the final decree in the action, a *res adjudicata*, which can not afterwards be made the subject of action for the same cause between the same parties."

It is the submission of the petitioner that when there is a decree in an action instituted by a person on a particular property right, damage or other relief, the parties to the said action cannot institute further proceedings for the same property, right, damage or the relief whether any matter was put in issue or not. That the respondents who instituted action to set aside the resolution adopted by the Bank on the basis that the resolution is null and void cannot institute another action after the dismissal of the previous action for a declaration that the auction conducted in pursuance of the said resolution is null and void. While the said matter was pending for order on the written submissions filed on 04.04.2005 the respondents instituted action No. 20693/L in the District Court of Colombo for a declaration that the property described in the schedule thereto has not been vested with the petitioner in view of the decision of the Divisional Bench in *Ramachandra v Hatton National Bank (supra)* and prayed for an enjoining order and interim injunction preventing the petitioner from possessing the property. The respondents having obtained the enjoining order *ex-parte* dispossessed the petitioner who was in possession of the said property on the strength of the enjoining order. Consequently, the

District Court dismissed the application 20693/L.

It is in this context that the Commercial High Court by its order 170 on 25.10.2005 issued interim injunction:

- (a) Preventing the petitioner from ejecting the respondents and those holding under them and claiming title to the property,
- (b) Restraining the respondent Bank reselling the property described in the schedule to the plaint.

The learned High Court Judge held that

"as far as the reliefs prayed by the plaintiffs are concerned it cannot be strictly construed that the reliefs prayed for in this case and the earlier case are similar or identical in any form. 180 Consequently, I should express in my inability to apply section 207 as being a bar to the institution and maintainability of this action by the plaintiff."

On examination of the reliefs claimed in Case No. 252/2001(i) and the relief claimed in Case No. 108/2004(1) though they do not appear to be identical, but based on the Resolution adopted by the Bank and the consequent procedural steps the Bank would take in terms of the Resolution. The learned Judge of the Commercial High Court was in error in holding that the reliefs claimed are dissimilar.

It has been urged by the plaintiff-respondents that in terms of 190 the judgment in the case of *Ramachandra v Hatton National Bank (supra)* property mortgaged by a third party who is not a borrower cannot be sold by way of Parate Execution under and in terms of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990. There is of course as urged by the plaintiff a bar preventing the petitioner from Parate Execution of the land mortgaged by a third party who is not a borrower after the judgment of *Ramachandra*. What the plaintiff-respondents are seeking to accomplish in this application is to invite the Court to adopt the reasoning of *Ramachandra v Hatton National Bank (supra)* to the 200 circumstances of the present case which in my view is a far cry.

The petitioner contended that in view of the certificate of sale that has been issued the matter is finally laid to rest and there



cannot be any scope for challenging the validity of the certificate of sale and submitted that even though the property was purchased for a sum of Rs. 1000/- for want of competitive buyers, when a sum of Rs. 34 million and interest thereof from 1990 is due and therefore the sale is void on the ground of *laesio enormis* is not tenable in law. Counsel submitted that *laesio enormis* is not applicable for public auctions conducted with the authority of statute or court and that in any event Parate Execution is available in terms of Act No. 4 of 1990. After Parate Execution and certificate of sale issued, which is enforced under the provisions of Civil Procedure Code *Laesio enormis* is not applicable. In *Haji Omar v Wickremasinghe*<sup>(2)</sup> Supreme Court held that -

"..... it is my view that where it is not open to a person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to and in the property to move to invalidate a sale certainly it cannot be said that the borrower on whose title and interest in the property a third party's claim is based, has right to move the invalidate the sale."

That in terms of section 19 of the Act if the Bank purchased the property the Bank is then obliged to resell the property within a reasonable period in order to recover the amount due to the Bank. Since the actual sale of property purchased by the Bank comes after the resale of the property under section 19 and the property is resold by the Bank under section 19 there cannot be an application to set aside the sale on the basis of the principle *laesio enormis*.

In my considered opinion, the 1st and 2nd respondents cannot hide behind the veil of incorporation of Nalin Enterprises (Pvt) Ltd, while being the "alter ego" of the said company of which the 1st respondent has been the Managing Director and the 2nd respondent, who is the wife of the 1st respondent, has been a Director. Although the independent personality of the company as distinct from its directors and shareholders has been recognized by the Courts since the celebrated decision of *Salomon v A. Salomon and Co. Ltd.*<sup>(3)</sup>, Courts have in appropriate circumstances lifted the veil of incorporation. In particular, Courts have been vigilant not to allow the veil of incorporation to be used for some illegal or improper purpose or as a device to defraud creditors -

*Merchandise Transport Ltd. v British Transport Commission*<sup>(4)</sup> and *Jones v Lipman*<sup>(5)</sup>. As Staughton L.J. observed in *Atlas Maritime Co. SA v Avalon Maritime Ltd.*<sup>(6)</sup> at 779 -

"To *pierce* the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To *lift* the corporate veil or *look behind* it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose."

250

As far as this case is concerned, it is quite obvious that the 1st and 2nd respondents, being Directors of Nalin Enterprises (Pvt) Ltd.; benefited from the facilities made available to the said company by the petitioner Bank, and to that extent they cannot claim that the mortgages which secured the said facilities fall within the category of "third party mortgage" as contemplated in the majority judgments of this Court in "*Ramachandra v Hatton National Bank* (*supra*).

The 1st and 2nd plaintiff are integrated to Nalin Enterprises and when Nalin Enterprises sought to obtain facilities from the petitioner Bank the borrowers are in fact the said Nalin Enterprises along with the 1st and 2nd plaintiffs. It would be an exercise totally illogical to seek to differentiate the 1st and 2nd plaintiffs as third party mortgagers within the meaning of *Ramachandra v Hatton National Bank* (*supra*).

260

I accordingly set aside the order dated 25.10.2005 of the Commercial High Court marked 'G'. Application of the plaintiff-respondents for interim injunction as prayed for in the prayer of the petition is dismissed with costs.

**TILAKAWARDANE, J.**                    —           I agree.

**MARSOOF, J.**                         —           I agree.

*Appeal allowed.*

*Interim injunction vacated.*