

**PEOPLE'S BANK AND SEVEN OTHERS  
V. YASASIRI KASTHURIARACHCHI**

SUPREME COURT

TILAKAWARADANE, J.

SRIPAVAN, J., AND

RATNAYAKE, J.

S. C. APPEAL NO. 11/2010

S. C. (SPL.) L.A. NO 294/2009

C. A. (WRIT) NO. 188/2009

JUNE 30<sup>TH</sup>, 2010

JULY 2<sup>ND</sup>, 9<sup>TH</sup> 2010

***Constitution Article 4(c) – Civil Procedure Code – Section 34, 207 and 406 – principle of res judicata – a final judgment passed by a competent court, having jurisdiction, will bar a subsequent action between the same parties upon the same cause of action? Collateral estoppel – Parate execution – Peoples Bank Act 29 of 1981 – 32 of 1996***

The Court of Appeal issued a restraining order against the Respondent – Appellants from proceeding with the auction and sale of the property scheduled on 7<sup>th</sup> November 2009, until the final determination of the aforesaid application by the Court of Appeal.

The Supreme Court granted Special Leave to Appeal on the following issues –

- (1) Does the order of the Court of Appeal dated 5<sup>th</sup> November 2009 nullify and/or stay and/or suspend the Court of Appeal judgment in the Writ Application bearing No. 1268/98 and the judgment of the Supreme Court in Case No. S.C. (Spl.) L.A. 60/08?
- (2) Does the Commercial High Court of Colombo Case No. 213/07/MR bar the Respondent – Appellant from proceeding with the sale by public action of properties set out in the Resolution dated 10<sup>th</sup> July 1997?

**Held:**

- (1) The decision of the Supreme Court dated 3<sup>rd</sup> December 2008 denying leave to appeal against the judgment of the Court of Appeal decision dated 29<sup>th</sup> February 2008, whereby the Court of Appeal held that the Parate Resolution dated 10<sup>th</sup> July 1997 was valid and refused to quash the said Resolution is final and conclusive and cannot be reviewed and or rescinded by any other Court. The judgment of the Supreme Court in S.C. (Spl.) L.A. 60/08 [C.A. Application 1268/98 acts as a complete bar to a proceeding by the same party which once again seek to question the validity of Parate Resolution dated 10<sup>th</sup> July 1997.

In light of the judgment of the Supreme Court in S.C. (Spl.) L.A. 60/08, the later Application in C.A. Writ 188/09 cannot also succeed in view of the principle of 'collateral estoppel' whereby a party is barred from re-litigating an issue already finally determined against such party in an earlier decision.

- (2) When there is a strong *prima-facie* case in favour of the party seeking the relief, it is permissible to grant interim relief which give substantially the whole of the relief claimed in the action.

Per Shiranee Tilakawardane, J., -

"The Petitioner – Respondent has also raised the objection that this Court, in granting an interim order to proceed with the sale by the Respondent –Appellant, has acted *per incuriam* – or that this Court cannot by way of interim order grant the final relief prayed for in an Application.

In this context it is relevant to refer to the decision of the Court of Appeal in *Shell Gas Lanka Limited v. Samyang Lanka (Pvt.) Limited*<sup>(1)</sup>, where the Court held that it is permissible to grant interim relief which gave substantially the whole of the relief claimed in the action, especially as the facts in this case disclose plainly that there is a strong *prima facie* case in favour of the party seeking the relief."

- (3) The Petitioner – Respondent was presented with ample opportunity to raise issues of fraud and illegality against the Resolution.

Having failed to raise such an argument in the intervening years, the belatedness of this defence clearly reflects that this is an after-thought and indicative of a concoction and clearly manipulative and abuse of legal process.

**Case referred to:**

*Shell Gas Lanka Limited v. Samyang Lanke (Pvt.) Limited* – (2005) 3 Sri L.R. 14

**APPEAL** from an interim order of the Court of Appeal.

*S.A. Parthalingam, P.C., with Kushan D Alwis, Hiran Jayasuriya and Nishkan Parthalingam* for the Respondent – Appellants.

*Faiz Musthapa, P.C., with Anil Silva, P.C., and Riyad Ameen* for Petitioner – Respondent.

*Cur.adv.vult.*

July 09<sup>th</sup> 2010

**SHIRANEE. TILAKAWARDANE, J.**

The Appeal is filed against the interim order of the Court of Appeal, dated 5<sup>th</sup> November 2009 in CA Writ Application 188/2009, wherein a Stay Order was issued restraining the Respondent-Appellants from proceeding with the auction and sale of the property scheduled on 7<sup>th</sup> November 2009, until the final determination of the Application bearing No. CA Writ No 188/09 by the Court of Appeal.

This Court granted Special Leave to Appeal on 11<sup>th</sup> February 2009 on the question of law set out in paragraph 31 (b) and (c) of the Petition; granted relief in terms of paragraph (c) and (e) of the prayer to the Petition dated 16<sup>th</sup> December 2009 and directed that the record in Court of Appeal Writ No. 188/09 be sent to this Court forthwith.

This Court granted Special Leave to Appeal specifically on the following issues;

- 1. Does the order of the Court of Appeal dated 5<sup>th</sup> November 2009 nullify and/or stay and/or suspend the Court of Appeal judgment in the Writ Application bearing No. 1268/98 and the judgment of this Court, in Supreme Court Case No. SC (SPL) LA 60/08?**
- 2. Does the Commercial High Court of Colombo Case No. 213/07/MR bar the Respondent-Appellant from proceeding with the sale by public auction of properties set out in the Resolution dated 10<sup>th</sup> July 1997?**

The 1<sup>st</sup> Respondent-Appellant adopted the Resolution (marked as P5) dated 10<sup>th</sup> July 1997 in terms of Section 29D of the People's Bank Act No. 21 of 1961 as amended by Act No. 32 of 1986 for the recovery of a sum of Rs. 165,091, 129/35 payable by Yahsodha Holdigs (Pvt) Limited, (herein-after referred to as the Company). The Resolution P5 referred to Mortgage Bonds bearing Nos: 3185, 3186, 3567, and 3568 and the 1<sup>st</sup> Respondent-Appellant sought to sell by public auction the properties mortgaged under the said Mortgage Bonds.

On 1<sup>st</sup> December 1998, the Company instituted a Writ Application before the Court of Appeal bearing CA Application No. 1268/98 seeking a Writ of Certiorari to quash the said Resolution dated 10<sup>th</sup> July 1997. The Writ was canvassed only on two grounds (1) that it was a third party mortgage – and (2) that the Respondent-Appellant had no power to sell the properties as they were not specified in the original offer letter and consequently the Resolution was *ultra vires*. The Court of Appeal by its judgment dated 29<sup>th</sup> February 2008,

dismissed this Application and held against the Company on both grounds.

Special Leave to Appeal against the judgment was denied by the Supreme Court on 3<sup>rd</sup> December 2008. It is important to note that following the decision of the Supreme Court to deny special leave to Appeal on the judgment, the Resolution is finally deemed to be valid in law and capable of execution by the 1<sup>st</sup> Respondent-Appellant.

Thereafter the Respondent-Appellant published notices of auction sale to sell by public auction the several properties referred to in the Parate Resolution dated 10<sup>th</sup> July 1997.

In the meantime a case for the execution of the mortgage bonds bearing No. HC (Civil) No: 213/2007 MR was filed by the Respondent-appellant on 9<sup>th</sup> July 2007 before the Commercial High Court. The Respondent-Appellant in his submissions specifically stated that this step was taken due to the delay in delivery of the Court of Appeal Judgment in case No. CA Application No. 1268/98, the uncertainty of its outcome, coupled with the fear that in the meantime that even regular action on the Mortgage Bonds would be prescribed in Law. The Company filed answer in the case on 15<sup>th</sup> January 2009. That case is presently pending judicial determination before the Commercial High Court. Counsel for Respondent-Appellants submitted that the Petitioner-Respondent Company could pursue whatever monetary claims through their claim in reconvention and recover any monies, if they are due.

The said action in the Commercial High Court was instituted without prejudice to its rights under CA Writ Application 1268/98. Clearly the High Court case has been

instituted by the 1<sup>st</sup> Respondent-Appellant as a precautionary measure in order to avoid the mortgage bonds from being prescribed, during the pendency of the Writ Application No. 1268/98, as at that time there was no certainty of its outcome.

On 25<sup>th</sup> March 2009, the Petitioner-Respondent, being the Managing Director of the Company, instituted the present Writ Application bearing No. 188/09 on 25<sup>th</sup> March 2009, in the Court of Appeal, on the principal ground that, “while the dispute is being adjudicated by the Commercial High Court in case No. HC (Civil) 213/07 MR, which is exercising judicial power, the Respondent-Appellant cannot act in a manner which would result in usurpation of that power and make the exercise of that power a nullity,” [vide paragraph 41(c) of the Petition marked A.]

The Counsel for the 1<sup>st</sup> Respondent-Appellant specifically submitted that the present Application is a blatant attempt to challenge and assail the same Parate Resolution adopted by the 1<sup>st</sup> Respondent-Appellant on 10<sup>th</sup> July 1997, upon which the Court of Appeal and the Supreme Court had delivered final judgment, declaring it a valid Resolution.

The Court of Appeal issued notice on the Writ Application No. 188/09 on 15<sup>th</sup> June 2009. Interestingly, Hon. Anil Gooneratne J, Judge of the Court of Appeal in his Order stated;

“I am inclined to refuse notice in this Application more particularly, for the reason that there was a prior judicial pronouncement between the same parties, on the same issue and the Application in hand is filed with slight variation.

However this Writ Application needs to be handled very carefully and my brother the Hon. President of this Court had the occasion to discuss this matter with me on many times prior to finalizing this Order”.

It is a pity that this view expressed by Hon. Anil Gooneratne J was not given effect to.

After the objections had been filed in the Court of Appeal in the above case, the 1<sup>st</sup> Respondent-Appellant by letter dated 20<sup>th</sup> October 2009 fixed the sale for 7<sup>th</sup> November 2009. In response, the Petitioner-Respondent filed an Application for an interim stay order against the sale on 28<sup>th</sup> October 2009. The Court of Appeal granted an interim order staying the sale of property by the 1<sup>st</sup> Respondent-Appellant on 5<sup>th</sup> November 2009. This Appeal has been filed by the Respondent-Appellant against this Order of the Court of Appeal.

In the present Appeal, the Counsel for the Respondent-Appellants also argued that the Petitioner-Respondent has breached the principle of “*uberrima fides*” and therefore under the law the Stay Order dated 28<sup>th</sup> October 2009 could not have been granted by the Court of Appeal.

The Respondent-Appellant contends that by instituting the Writ Application CA 188/09, the Petitioner –Respondent has sought to quash the Parate Resolution dated 10<sup>th</sup> July 1997, which he could not do in Law. In this Application dated 25<sup>th</sup> March 2009, the Petitioner-Respondent has prayed for a Writ of Certiorari to quash the Resolution dated 10<sup>th</sup> July 1997 and an interim order deliberately restricting the Respondent –Appellant from auctioning the property which formed the subject matter of the said Resolution.

In the said Writ Application CA No: 188/09 the Petitioner-Respondent has further stated specifically that the mortgage

bonds which formed the subject matter of the Parate Resolution dated 10<sup>th</sup> July 1997 (paragraph 38) were *inter alia* 'fraudulent and illegal' and unenforceable in law and therefore could not have formed the subject matter of the said Resolution."

In the petition submitted to the Court of Appeal in the Application No. 1268/98, the Petitioner-Respondent has clearly admitted that facilities were granted to the company by the 1<sup>st</sup> Respondent-Appellant and that the property more fully described in the mortgaged bonds bearing Nos. 3185, 3186, 3567 and 3568 – which form the subject matter of the Parate Resolution – were mortgaged to the 1<sup>st</sup> Respondent-Appellant and specifically states that the "mortgage bonds were executed" in respect of facilities obtained by the Petitioner-Respondent. Significantly this Application did not allude to the Bonds being 'fraudulent and illegal', but instead at paragraph 9, explicitly conceded that "the property more fully described in the schedule hereto was mortgaged to the 1<sup>st</sup> Respondent-Appellant", the annexed affidavits dated 17<sup>th</sup> March 2008, was signed by the Petitioner-Respondent in the present case as the Chairman and Managing Director of the Company.

Therefore, with regard to the very same Parate Resolution the Petitioner Respondent and has taken up a position which wholly contradicts its previous position taken in the case bearing No. 1268/98, a case that finally ruled on the Resolution.

The Respondent-Appellant submits that under the circumstances the Petitioner –Respondent has breached the principle, of "*uberrima fides*" of utmost good faith and that the Court of Appeal erred in granting an Interim Order stopping the auction of the said properties.



In response, the Petitioner-Respondent submitted that the allegation of suppression is totally unfounded and that the Petitioner-Respondent has specifically disclosed in CA Application No. 1268/98 in which reference was made to the relevant mortgage bond in the instant Application. The Petitioner Respondent also submitted that the issue of *uberrima fides* was not included as a ground when granting leave to appeal and as such cannot be raised by the Respondent-Appellant.

Having considered the arguments raised by both parties, it is abundantly clear that the Petitioner-Respondent in seeking to quash the Parate Resolution dated 10<sup>th</sup> July 1997 by way of Writ Application No. 188/09 has taken up a wholly new position which contradicts the original position taken up in the previous Writ Application filed on the same subject matter bearing number No. 1268/98. Close scrutiny of the arguments reveal clearly that the Petitioner-Respondent has pleaded contradictory and mutually inconsistent facts in order to subvert the sale of properties scheduled for 10<sup>th</sup> July 2010 by the Respondent-Appellant.

The main issue in this case which was the validity of the Parate Resolution dated 10<sup>th</sup> July 2010 was raised in the Writ Application 1268/98 and the Court of Appeal by its decision dated 29<sup>th</sup> February 2008 held the Resolution was valid and refused a Writ of Certiorari to quash the said Resolution. The Supreme Court on the 3<sup>rd</sup> December 2008 denied leave to appeal against the judgment of the Court of Appeal. Therefore the Resolution dated 10<sup>th</sup> July 1997 has been determined conclusively to be valid and executable by the decision of this Court on 3<sup>rd</sup> December 2008. This is final and conclusive and cannot be reviewed and/or rescinded by any other Court.

It is clear that the present Writ Application by the Petitioner-Respondent is a deliberate and calculated attempt to prevent the Respondent-Appellant from proceeding with the auction sale and to circumvent and pervert the effect of the decision of the Court of Appeal and this Court in the said Writ Application No: 1268/98, affirmed by this Court. I find that the Court of Appeal has erred in granting the interim stay order which had the effect of subverting the express intention and direction of the decision in the Writ Application No. 1268/98 on the same subject matter and between, in effect, the same parties.

In this context, the Petitioner-Respondent has raised further the argument that while the Petitioner in CA Application 1268/98 was the company – Yashoda Holdings, the Petitioner in the instant case is not the company but the Petitioner –Respondent, who is the Managing Director of the Company and therefore he was not a party in that case and he is a third party.

It is significant to note at this juncture, that as set out above, that the very same Parate Resolution dated 10<sup>th</sup> July 1997 was challenged by the Company – Yashodha Holdings Pvt. Limited by way of the Writ Application No. 1268/98 on 1<sup>st</sup> December 1998.

Petitioner-Respondent is the same Chairman/Managing Director of the company –Yashodha Holding Pvt. Limited and the Company is fully owned and controlled by the Petitioner –Respondent. All the benefits from the company accrue to the Petitioner-Respondent and his family. Despite the corporate veil, the Company – Yashodha Holdings and the Petitioner-Respondent are in fact one and the same entity and represent the same interest. Clearly this was pith and substance of the

finding by the Court of Appeal in its Judgment delivered on 29<sup>th</sup> February 2008 in Writ Application No. 1268/98.

I find that this argument by the Petitioner-Respondent is without merit. The learned Judges of the Court of Appeal have found specifically in their decision dated 29<sup>th</sup> February 2008 in CA Writ Application 1268/98 that the Petitioner – Respondent – Mr. Yasasiri Kastutiachchi, cannot be considered as a third party as against the Company – Yashoda Holdings. The effect of this decision is that the Petitioner – Respondent and the Company are considered to be one and the same entity for the purpose of the present Writ Application No. 188/09.

I find that the judgment of this Court in SC (SPL) LA 60/2008 [C. A. Appl 1268/98] acts as a complete bar to a proceeding by the same party which once again seeks to question the validity of Parate Respondent dated 10<sup>th</sup> July 1997.

The decision of the Supreme Court is binding on all lower Courts. For modern legal systems, judicial precedents are relevant information for anyone seeking to find law. Furthermore, precedent rules have emerged in accordance with which the “*ratio decidendi*” of a superior Court must be applied by Courts lower in a judicial hierarchy. The decision of the Supreme Court has the distinct advantage of being final on the question of the Resolution passed by the 1<sup>st</sup> Respondent – Appellant.

I further hold that the Respondent-Appellant, in light of the judgment of this Court in SC (SPL) LA 60/08, the later Application in CA Writ 188/09 cannot also succeed in view of the principle of ‘collateral estoppel’, whereby a party is barred from re-litigating an issue already finally determined against such party in an earlier decision.

The Petitioner-Respondent has also raised the objection that this Court, in granting an interim order to proceed with the sale by the Respondent-Appellant, has acted per-incuriam – or that this Court cannot by way of interim order grant the final relief prayed for in an Application.

In this context it is relevant to refer to the decision of the Court of Appeal in *Shell Gas Lanka Limited v. Samyang Lanka (Pvt) Limited* <sup>(1)</sup>, where the Court held that it is permissible to grant interim relief which gave substantially the whole of the relief claimed in the action, especially as the facts in this case disclose plainly that there is a strong prima facie case in favour of the party seeking the relief.

The Petitioner-Respondent further submitted that the proceedings with the auction sale during the pendency of the Commercial High Court Case No. 213/2007 offends the rule of separation of powers enshrined in Article 4 (c) of the Constitution.

However in this context it is pertinent to note that the powers that are being challenged are the judicial powers exercised by the apex Court and therefore this submission is not tenable in law.

The Respondent-Appellant has also raised the issue of undue delay on the part of the Petitioner-Respondent in raising the issue of fraud and illegality with respect to the Resolution dated 10<sup>th</sup> July 1997. Between the date when CA Writ Application No. 1268/98 was filed and the date of the present Writ Application No. 188/09 the Petitioner – Respondent was presented with ample opportunity to raise issues of fraud and illegality against the Resolution.

Having failed to raise such an argument in the intervening years, the belatedness of this defence clearly reflects that this

is an afterthought and indicative of a concoction and clearly manipulative and abuse of the legal process.

In all these circumstances I answer the 1<sup>st</sup> question of law on which Special leave was granted in the affirmative and the 2<sup>nd</sup> Question of Law in the negative. I allow the appeal of the Respondent-Appellants and set aside the order of the Court of Appeal in Writ Application bearing No. 188/09 dated 5<sup>th</sup> November 2009.

I further hold that the 1<sup>st</sup> Respondent-Appellant is entitled to proceed with the sale by public auction under the Resolution of the 1<sup>st</sup> Respondent-Appellant dated 10<sup>th</sup> July 1997. I also order costs in a sum of Rs. 100,000/= to be paid by the Petitioner-Respondent to the 1<sup>st</sup> Respondent-Appellant.

**SRIPAVAN J.** – I agree.

**RATNAYAKE, J.** – I agree.

*1<sup>st</sup> Respondent appellant entitled to proceed with the sale by public auction.*

*Appeal allowed.*