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[2014] 1 SRI L.R. - PART 5

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DIGEST

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31A (2) states that where any vehicle, vessel, boat, craft, machinery or other equipment is used in contravention of the provisions of subsection (1) any Police Officer shall have the power to seize any such vehicle, vessel, craft, boat, equipment or machinery along with any article or substance found thereon.

Further Section 31A (3) prohibits the release of such vehicle, vessel, craft, boat, equipment or machinery seized under the provisions of subsection (2), unless an order of court permitting such release has been obtained.

The aforementioned provisions contained in the Coast Conservation Act demonstrate in no ambiguous manner the obvious intention of the Legislature towards the implementation of the scheme as embodied in that Act. In contrast, no such draconically worded scheme to confiscate vehicles is introduced in the commission of an offence under the Mines and Minerals Act. The Legislature in enacting the provisions of the Mines and Minerals Act in its own wisdom has adopted a comparatively lenient and tolerant attitude with regard to the vehicles of whatever nature that are used in the transportation of minerals and contemplated only on the machinery and equipment used in the commission of the offence.

In *Shantha Vs. The Attorney-General and Another* [(1)] in the Court of Appeal, it was pointed out by Sarath N. Silva, J [later the Chief Justice] that under Section 54 of the Excise Ordinance, the excisable article or materials or the apparatus used in the commission of the offence could have been confiscated and the motorcycle used for the transport is not liable for confiscation. Elaborating further the Court highlighted that the Magistrate has not indicated the provision under which the motorcycle was confiscated and therefore set aside the order of confiscation.

In *Perera Vs. Van Sanden*[2] Cannon J held that where the accused was convicted, under a defence regulation, of buying cement without a permit and the Magistrate ordered the confiscation of the cement, in the absence of the provision for forfeiture, in the penalties paragraph No. 52 of the Defence (Miscellaneous) Regulations, the Magistrate had no power to order confiscation. Section 413 of the Criminal Procedure Code did not justify the Magistrate's order as the words "for the disposal of" in the Section were not sufficiently wide enough to include confiscation.

The decision in *Perera Vs. Van Sanden (supra)* is justified in the light of the dictum of MacDonnell CJ made in the case of *Police Sergeant vs Raman Kankan*[3] where His Lordship stated that "the Courts must remember that the forfeiture or confiscation is a penal provision and the power to confiscate should clearly be given by law".

Silva Vs Muthai[4] concerns the violation of Regulation 6 (e) of the Defence (Purchase of Foodstuffs) Regulations, 1942, which provided that transporting country rice from one district to another is an offence and in such a case the vehicle or vessel in which certain produce has been transported may, after notice to the owner of the vehicle or vessel, be confiscated. Moseley SPJ held that the bull in the circumstances of the case was unable to be regarded as a vehicle or vessel.

In *Govindan Vs. Magoor Pitchche*[5] the accused was convicted under Section 53 (4) of the Police Ordinance, with obstructing a public road by a sherbet cart containing sherbet, aerated waters for sale, and was fined Rs. 5, and an order was made forfeiting the cart and its contents. Ennis J held that the order as to forfeiture was wrong.

Commenting on the long standing assumptions of Statutory Interpretation Lord Diplock in *Fothergill v. Monarch Airlines*(6) stated that "the Court is a mediator between the State in the exercise of its Legislative power and the private citizen"

In the case of *De Saram Vs Wijesekara*(6), it was held that the provisions dealing with the disposal of properties under the Code of Criminal Procedure is never intended to authorise a court to order the forfeiture in any case where there is no express penal provision in law requiring or permitting forfeiture of property on the commission of any offence.

It is axiomatic that in exercising the Judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what has been enacted. On the contrary, Courts do not impute to the legislature an intention to abrogate or deprive the citizens of their possessory rights affecting properties by attempting to read into the Legislation what the Legislature in reality did not intend. In this particular appeal the interpretation given to the relevant Section in the lower Courts could not have been intended by any stretch of imagination. Deprivation of property rights should not be contemplated unless such an intention is clearly and explicitly manifested to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment of such rights.

A reproduction of a pertinent comment by Maxwell from the fourth edition of Maxwell on Statutes would throw light on the concept against deprivation of rights without the expression of clear intention. It states that it is the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intention with irresistible clearness.

The Constitution in Article 28 promulgates that the exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka *inter alia* to uphold and defend the Constitution and the law; to respect the rights and freedoms of others; and to protect nature and conserve riches.

As far as the various confiscatory provisions in several Enactments are concerned, Court has to necessarily presume that the Legislature knew well, the confiscatory provisions affecting vehicles contained in the Legislative Enactments prior to the passing of the Statute titled "The Mines and Minerals Act" and exact expressions used to favour confiscation of the vehicles. Hence, I am of the view that it is not without significance that the legislature vested with exclusive right to deprive the citizens of their property rights, had clearly thought it fit not to use the word "vehicle" or any other words of similar meaning in the Mines and Minerals Act.

In this background to construe the intention of the Legislature in any other manner would amount to making the statutory expression senseless of it and give an undue extended meaning to the word "equipment" which could never have been in the contemplation of the Law Maker even in the remotest possibility. Now, it should be crystal clear that the Parliament had never intended to enforce through court a draconic measure such as the one incorrectly construed in the order of the learned Magistrate and that of the learned Judge of the High Court.

To permit the construction of the provisions regarding forfeiture in the relevant Statute unvaried, in my opinion would amount to condoning an attempt to legislate which

is not within our domain. The duty of courts is to carry out the intention of the Parliament. It is by making sense of the Enactment the Legislative wisdom is given effect to and not by giving extended meaning to the language especially when such an extended meaning would result in the deprivation of a right.

It is appropriate to quote the assertion of Lord Hoffman in R v. Secretary of State for Home Department; Ex parte Simms [2002] 2 AC 115 at 131 where His Lordship stated that "the principle of legality means that Parliament must squarely confront what it is doing and accept the political costs. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual".

A physical count of the Motor Traffic Act shows that the word "vehicle" has been used there at 302 places. In terms of Section 240 of the Motor Traffic Act, "vehicle" is a conveyance that is designed to be propelled or drawn by any means, whether or not capable of being so propelled or drawn and includes a bicycle or other peddle powered vehicle and trailer carriage, cart, coach, tram car and mechanically propelled and/or electrically and/or solar energy propelled vehicle or vehicle propelled by liquid petroleum gas or vehicle propelled by alternative fuel and any artificial contrivance used or capable of being used as a means of transportation on land but does not include a railway locomotive. The word "equip-

ment" is never contemplated under the Motor Traffic Act or the other Enactments to equate it to a "vehicle" or a mode of transport nor can it be identified as machinery.

If the Statute lacks the quality of being unequivocal, it is left to the Parliament, in exercise of the legislative power of the People, to look into it, and contemplate measures, in its own wisdom for taking steps that it may deem necessary. Until then, it is our duty to interpret it, as between the state and its subjects, unmoved by the social conditions and/or other considerations outside the purview of the judicial function.

In terms of the same Section "motor vehicle" means (a) any mechanically and/or electrically, and /or solar energy propelled vehicle or vehicle propelled by liquid petroleum gas or vehicle propelled by alternative fuel including a tractor or trailer which is intended or adapted for use on roads but does not include a road-roller;

(b) any mechanically and/or electrically and/or solar energy propelled vehicle, or vehicle propelled by liquid petroleum gas or vehicle propelled for alternative fuel or intended for use on land in connection with an agricultural or constructional purposes such as levelling dredging, earth-moving, forestry or any similar operation but does not include a road-roller;

Under Section 50 of the Vehicles Ordinance a "vehicle" includes carriages, carts, coaches, tram cars and mechanically propelled vehicles, and every artificial contrivance used or capable of being used as a means of transportation on land.

The authorities cited by the learned Senior State Counsel, in my opinion are not applicable to the present issue. The

issue before court is more in the nature of a set of non-complex facts and how best the law could be applied to them, in the best possible manner as stated in the statute and without stepping out from the Mines and Minerals Act. In such an event, the only interpretation that could be and ought to be given to the confiscatory provisions contained in the Mines and Minerals Act is that no vehicles or other means of transport had been in the contemplation of the Legislature, to be made subject to confiscation.

The learned Senior State Counsel contended that we must supplement the written words (machinery and equipment) so as to give force and life to the intention of the Legislature. No doubt as contended by the learned Senior State Counsel the court must set to work on the constructive task of finding the intention of the legislature. However it is to be noted that the intention of the Legislature plays an important role only when the Statute is not clear or cannot be applied in reference to its plain meaning. However in this case no such necessity arises to gather the Legislative intent.

He further invited us to implement this, taking into consideration the social conditions which give rise to it and of the mischief which it intended to prevent. Adverting us to certain decisions, the State invited us to give effect to the confiscatory clause in the Act, by not altering the material of which the Act is woven, but by ironing out the creases. I regret my inability to respond to this invitation in a positive manner, as an interpretation given on the lines suggested by the State would definitely alter the material of which the piece of Legislation in question is woven. As regards the wording of the confiscatory clause in the Act, I find no creases or wrinkles

in the Act and as a matter of Law the Legislation in question is crease proof.

In the circumstance, I set aside the order of confiscation of the vehicle as it is not forfeitable to the State under the provisions of the Mines and Minerals Act.

This judgment would be applicable with necessary changes to appeals bearing numbers CA (PHC) 108/2012 (HCR/ RATNAPURA 18/2011), CA (PHC) 107/2012

(HCR/RATNAPURA/23/2011) and CA (PHC) 119/2012 (HCR/RATNAPURA/90/2010)

*The emphases made in this judgment are all mine.

SUNIL RAJAPAKSE, J. – I agree.

Post scriptum

This being the last decision I make, in my judicial career aggregating to a period of well –nigh three and half decades, I avail of the opportunity to acknowledge my indebtedness to the Bar both official and unofficial for making my task easier.

A.W.A SALAM J. (P/CA)

ABEYGUNASEKARA VS. MALKANTHI AND OTHERS

COURT OF APPEAL
CHITRASIRI, J.
CA 137/98
DC GAMPAHA 31388/L
MAY 6, 2014

Rei Vindication action – Alleged title deed not a Deed of Transfer but a Mortgage? Laesio enormis – No proper consideration – Could the deed be declared null and void? Vendor not receiving the real value – Civil Procedure Code Section 545

The Plaintiff Appellant sought to have Judgment declaring that she is entitled to the land in question by virtue of deed pleaded and Deed 1449 (P3). The Defendants contended that P3 is not a Deed of Transfer but a Deed of Mortgage and that P3 should be declared null and void. The Learned District Judge having accepted the position taken up by the defendants dismissed the plaint and revoked the deed but subject to the conditions in the judgment.

Held

(1) The property has been valued at Rs. 114,200/- it was the value of the property in the year during which period the deed P3 had been executed. There is no reason to reject the evidence of the valuer.

(2) It is abundantly clear that no proper consideration had been received by the 2nd Defendant, for the property she alleged to have sold, the value of the property is around six times more than the money received by the 2nd Defendant as the same price when she executed P3. Vendor had not received the real value.

(3) When the title referred to in P3 is bad, the transferee of the deed or his successors will have no title to part with.

Held Further:

(4) Though the Learned District judge has imposed a condition – to pay damages – in the Judgment, no reliefs had been prayed for to have such damages. No evidence is found, to pay such an amount of damages (Rs. 50,000/-). It is erroneous to have awarded damages to pay the Plaintiff by the 2nd Defendant – direction to pay damages by the 2nd Defendnat to the Plaintiff cannot be allowed to stand.

APPEAL from a Judgment of the District Court of Gampaha.

Sumith Senanayake with *Damitha Weerakoon for Plaintiff – Appellant.*

S. A. D. S. Suraweera for Substituted Defendant – Respondents.

10th June 2014

CHITRASIRI, J.

This is an appeal seeking to set aside the judgment dated 27th February 1998 of the learned District Judge of Gampaha. In the petition of appeal, the plaintiff-appellant (hereinafter referred to as the plaintiff) has also sought to have a judgment as prayed for in the plaint dated 17th August 1988.

In that plaint the plaintiff sought to have a judgment declaring that she is entitled to the land morefully described in the schedule to the plaint by virtue of the deeds that she has pleaded including that of the deed bearing No.1449 marked P3 in evidence. The defendants in their answer has averred that the aforesaid deed 1449 marked P3 should not be treated as a deed of transfer but it should be treated as a deed executed in order to secure a loan obtained from one Kingsley Dias. Accordingly, the defendants have prayed that the said deed 1449, it being one of the deeds which the plaintiff relies on to claim title, be declared null and void.

By the aforesaid judgment, learned District Judge having accepted the position taken up by the defendants. dismissed the plaint and made order revoking the deed 1449 marked P3. However, it is to be made effective subject to the conditions referred to in the said judgment dated 27.02.1998. Conditions so imposed are to pay Rupees Fifty Thousand (Rs. 50,000/-) with interest accrued thereto, to the plaintiff by the 2nd defendant-respondent. (hereinafter referred to as the 2nd defendant) Both Counsel submitted that though the learned District Judge has imposed such a condition in the impugned judgment, no reliefs had been prayed for, to have such damages. Moreover, no reasons are given by the trial judge, for the awarding of damages in that manner. No evidence too, is found to pay such an amount as damages. Therefore, it is erroneous to have awarded damages to pay the plaintiff by the 2nd defendant in a sum of Rupees Fifty Thousand (Rs. 50,000/-) with interest payable thereto. Hence, the direction to pay damages by the 2nd defendant to the plaintiff cannot be allowed to stand.

On the face of the aforesaid deed 1449 (P3), it is a deed of transfer by which the 2nd defendant has alleged to have sold her rights to the aforesaid Kingsley Dias. Heirs of Kingsley Dias have transferred their rights in the deed marked P3, to the plaintiff by executing the deed bearing No. 7490 marked P2. In the answer of the defendants, they have taken up the position that deed No. 1449 was executed not as an outright transfer but it was executed as a security for a loan obtained by the 2nd defendant and has pleaded that it amounts to a mortgage. They have also taken up the defence of *laesio enormis*. Defendants also have stated that the plaintiff cannot claim clear title to the property

referred to in the deed P2 since no testamentary proceedings have been instituted to administer the estate of Kingsley Dias in terms of Section 545 of the Civil Procedure Code. Having looked at the evidence, learned District Judge decided to revoke the deed marked P3 on the basis that no proper consideration had been passed to the vendor in that deed namely to the 2nd defendant when it was executed. His findings in this regard are as follows.

"ඒ අනුව පැ. 3 ඔප්පුවේ සඳහන් වටිනාකම පිළිනොගැනීමටත් එහි වටිනාකම අඩුවෙන් දමා ඇති වටිනාකම් යන කරුණු මත එම ඔප්පුව අවලංගු විය යුතුය"

[Vide proceedings at page 218 in the appeal brief]

Admittedly the 2nd defendant became entitled to the property put in suit by virtue of the deed bearing No. 9113 having purchased the land from Krishanthi Samarasinghe on 26.12.1979. 2nd defendant alleged to have sold her rights to Kingsley Dias by executing the deed 1449. As mentioned before, the 2nd defendant sought to have the said deed 1449 be declared as a deed executed as a security for a loan obtained from Kingsley Dias and has further sought to have the same revoked on that basis.

The execution of the deed 1449 marked P3 had been admitted by the parties at the commencement of the trial in the District Court. Vendor to that deed is the 2nd defendant in this case. On the face of that deed, the 2nd defendant has transferred the property referred to in the schedule to the plaint to Kingsley Dias. The plaintiff has bought the property by deed marked P2 from the wife and the children of Kingsley Dias after his death. The position of the 2nd defendant is that the plaintiff cannot claim title if the vendee to the deed 1449 did not have clear title for his heirs to part with the same.

Therefore, the issue in this instance is to determine whether the deed No. 1449 marked P3 is in fact an outright transfer or not. The Issue No. 3 raised on behalf of the defendants is directly on this point. In accordance with the deed P3, the property had been transferred for a sum of Rupees Eighteen Thousand (Rs. 18,000/-). However, the 2nd defendant in her evidence has stated that she received only Rupees Fifteen Thousand (Rs. 15,000/-) and the balance Rupees Three Thousand (Rs. 3,000/-) was set off against the interest to be accrued until the said Rupees Fifteen Thousand (Rs. 15,000/-) is returned to Kingsley Dias. The witness Gertrude Jayasinghe who is the wife of Kingsley Dias from whom the plaintiff has purchased the property has admitted that Rupees Fifteen Thousand (Rs. 15,000/-) was given by her husband to the 1st defendant and the balance money was paid as the fees for the broker. [vide proceedings at pages 72 & 73 in the appeal brief]. Therefore it is clear that the maximum consideration passed at the time of the execution of the deed marking P3 was only Rupees Eighteen Thousand (Rs. 18,000/-).

This property in question had been valued by Jagath Liyanaarachchi and he has prepared a valuation report of the same and it was marked as V4 in evidence. In that report he has assessed the property for a sum of Rupees One Hundred Fourteen Thousand and Two Hundred. (Rs. 114,200/-) It was the value of the property in the year 1983 during which period the deed P3 had been executed. He, in his evidence has stated the manner in which he arrived at the aforesaid valuation. He has taken into consideration the value of the properties adjacent to the property in dispute when he came to his findings. He is a person who is having experience for over 26 years having attended to the matters connected with

Court proceedings. I do not find any question posed to him even in cross-examination suggesting any other amount as the value of the property. Under those circumstances, I do not see any reason to reject the valuation of the property, arrived at by the witness Jagath Liyanaarachchi who prepared the valuation report marked V4. (vide at page 301 in the appeal brief)

Having considered the evidence;

- ⋆ as to the value of the property at the time the deed P3 was executed; and
- ⋆ the sale price referred to in the aforesaid deed which was the full consideration passed as the sale price;

it is abundantly clear that no proper consideration had been received by the 2nd defendant, for the property she alleged to have sold to Kingsley Dias. Indeed, the value of the property is around six times more than the money received by the 2nd defendant as the sale price when she executed the deed P3. In the light of those circumstances, I do not see any wrong when the learned District Judge decided to revoke the deed 1449 marked P3 on the basis that the vendor who is the 2nd defendant did not receive the real value of the property when she sold the property to Kingsley Dias. Hence, I am not inclined to interfere with his decision to revoke the deed P3.

When the title referred to in the deed marked P3 is bad, the transferee of that deed or his successors will have no title to part with. Therefore, the heirs of Kingsley Dias did not have clear title to transfer it to the plaintiff. Accordingly, the plaintiff cannot claim good title by executing the deed marked P2 though the mere execution of the deed had been admitted by the 2nd defendant at the commencement of the trial. Therefore, it is correct to conclude that the plaintiff is not entitled to claim title through the deed P2.

Learned Counsel for the respondents also submitted that the deeds marked V1 and V2 would indicate that Kingsley Dias had been in the habit of executing deeds of transfer having given loans to various people. The evidence reveals that Kingsley Dias had been only a pensioner at material times. Therefore, the said contention of the learned Counsel for the respondents also cannot be rejected when deciding the question as to the real nature and character of the deed 1449 marked P3.

Learned Counsel for the plaintiff-appellant submitted that once the 2nd defendant has taken up a defence in terms of Section 545 of the Civil Procedure Code, he is prevented from challenging the defects in the title of Kingsley Dias whose estate had not been administered under the said Section 545. Even though the 2nd defendant has taken up both the defences simultaneously, Court will not be in a position to ignore the infirmities of the title claimed by the plaintiff since this action is filed to obtain a declaration of title depending on the very same title of the person namely Kingsley Dias whose estate had not been administered according to law. It is clear that both the defences have been taken up in order to challenge the title of the plaintiff. Therefore, I am not inclined to agree with the aforesaid contention of the learned Counsel for the appellant.

For the aforesaid reasons, this appeal is dismissed with costs. Furthermore, as referred to hereinbefore in this judgment, the plaintiff is not entitled to have the damages awarded by the learned District Judge as mentioned in his judgment dated 27th February 1998.

Appeal dismissed.

DFCC BANK VS. MUDITH PERERA AND OTHERS

SUPREME COURT
SALEEM MARSOOF, P.C. J
HETTIGE,P.C. J
DEP. P.C. J.
SC 150/2000
SC SPL LA 188/10
CA 535/10 [WRIT]
FEBRUARY 2, 2012
APRIL 25, 2012
MAY 30, 2012

Constitution Article 140 – Recovery of Loans by Bank [Sp. Prov] Act 4 of 1990 – Mortgage Act No. 6 of 1949 – Parate Execution – Loan by company – Seeking writ of certiorari – Action against Bank? – Validity – Should the action be against the Board of Directors? Who is a borrower – Essential Parties? Bank? Board?

Company S of which M was a Director borrowed a certain sum of money from the Bank on the security of the property of M – a Director. The company defaulted.

On an application made by M the Court of Appeal restrained the Bank from selling the mortgaged property by public auction. The Bank sought special leave to appeal. Two matters considered by the Supreme Court were [1] is the appellant a borrower and [2] Are the members of the Board of Directors essential parties?

Held:

(1) There is no basis to apply the obvious narrow principle laid down in Hatton National Bank Vs. Jayawardane.

(2) The doctrine of lifting the veill plays a small role in British Company Law, once one moves outside the area of particular contracts or statutes. The creation or purchase of a subsidiary company with minimal liability, which will operate with the parent's fund and on the parents directions but not to expose the parent to liability, may not seem to some the most honest way of trading, but it is extremely common in the international shipping industry and

perhaps elsewhere. To hold that it creates an agency relationship between the subsidiary and the parent would be re-volutionary doctrine. The Court of Appeal did not err in law by determining on a *prima facie* basis for the purpose of considering interim relief, that the appellant was not a borrower.

(2) In the context of the Recovery of Loans by Bank Act No. (Sp. Pro)s 4 of 1990, it is obvious that the loan that is sought to be recovered under its provisions should have been granted or advanced by the Bank and not its Board of Directors.

(3) It is the Bank that stands to gain when it exercises the right of parate execution and the Board of Directors is simply its managing body that takes decisions primarily for the benefit of the shareholders.

Per Saleem Marsoof, J:

"I am of the opinion that the decision of the Court of Appeal in Ukwatte's case in which interim relief prayed for was refused on the basis that the members of the Board of Directors of the Board that passed the resolutions sought to be quashed were not cited as respondents to the writ application is irreconcilable with the principle enunclated by the House of Lords in *Saloman Vs. Saloman* - which has been consistently and universally followed."

Court of Appeal did not err in determining that cogent reasons had been furnished by M for not complying with the principles in Ukwatte's case.

Cases referred to:-

(1) *Hatton National Bank vs. Jayawardane* - 2007 - 1 Sri LR 181

(2) *Ukwatte Vs. DFCC Bank 2004* - 1 NLR 164

(3) *Ramachandra and others vs. Hatton National Bank* - 2006 01 Sri LR 393 at 399

(4) *Saloman Vs. A. Saloman and Co. Ltd* - 1897 - Al 22

(5) *Muditha Perera for not complying with the principle in Ukwatte Vs. DFCC Bank*

(6) *Atlas Maritime Co. SA v. Avalon Maritime LTD. The Coral Rose* [1991] 4 All ER 769

Nigel Hatch PC with *P. Abeywardane* and *S. Illangage* for appellant.

David Weeraratne with *A. K. Chandra Kantha* for respondent.

25th March 2014

SALEEM MARSOOF J.

This appeal arises from an order made by the Court of Appeal on 17th September, 2010, in the course of a writ application filed in terms of Article 140 of the Constitution in the Court of Appeal by the Petitioner-Respondent, Weliwita Don Kusumitha Muditha Perera (hereinafter sometimes referred to as "Muditha Perera"). By the said order, the said Muditha Perera was granted interim relief as prayed for in prayer (c) to the amended petition filed by him against the 1st Respondent-Appellant, DFCC Bank (hereinafter sometimes referred to as "the DFCC Bank) restraining the DFCC Bank from selling by public auction the property mentioned in Mortgage Bond bearing No. 1811 dated 25th May 2009, attested by A. M. M. Rauf, Notary Public.

It may be mentioned that the said Muditha Perera had cited three more parties as respondents to his amended petition filed in the Court of Appeal, namely, the Legal Officer and Managing-Director of the DFCC Bank, who are the 1st and 2nd Respondent-Respondents to this appeal, and the Sewagama Rice Products (Pvt) Ltd., the present 3rd Respondent-Respondent. Sewagama Rice Products (Pvt) Ltd., of which, the said Muditha Perera and one Weliwita Don Neel Perera, are Directors, admittedly borrowed a sum of Rs. 25,000,000 from the said Bank on the security of the aforesaid mortgage executed by the said Muditha Perera and the said Wellwita Don Neel Perera, who are admittedly co – owners of the property which was so mortgaged.

Pursuant to an application for special leave to appeal being filed in this court by DFCC Bank, this Court has granted

special leave to appeal against the aforesaid order of the Court of Appeal on the following questions of law set out in paragraph 17 (a) (f) of the amended petition filed by the said Bank:-

(a) Did the Court of Appeal err in law by determining that the Appellant was not a "borrower" within the meaning of the Recovery of Loans by Banks (Special Provisions) Act No. 4 1990 having regard to the decision of the Supreme Court in *HNB v. Jayawardene* [(1)]

(b) Is the ratio of the decision of the Supreme Court in *HNB V. Jayawardene (supra)* that a Director of a Corporate entity who mortgages his property as security for loans obtained by the corporate entity is a borrower within the meaning of the Recovery of Loans by Banks (Special Provisions) No. 4 of 1990;

(c) Was the decision of the Supreme Court in *HNB v. Jayawardene (supra)* being in the Court of Appeal and/or not capable of any distinction in its application to the instant case;

(d) Has the Court of Appeal failed to follow the principle of binding precedent and/or stare decisis;

(e) Has the Court of Appeal misdirected itself in law by determining that the Appellant-Respondent has established a *prima facie* case and was entitled to the interim relief having regard to all the material before the Court of Appeal including the Appellant Bank's oral and written submissions;

(f) Has the Court of Appeal erred in law by determining that cogent reasons had been furnished by the Appellant-Respondent for not complying with the principle in *Ukwatte Vs. DFCC Bank*[2].

At the hearing, learned Counsel agreed to confine the argument to the two substantive questions set out above as (a) and (f).

Although I was one of the Judges of the Divisional Bench of this Court that heard and decided *HNB v. Jayawardena(supra)* which is expressly referred to in some of the questions on which special leave was granted, and most notably in question (a) above, learned Counsel also graciously stated at the commencement of the hearing that they had no objections whatsoever to my being a member of the Bench that heard this appeal.

The two main questions for consideration at the hearing were questions (a) and (f), which are both substantive questions of law. I shall now consider these question in turn.

Is the Appellant a "borrower"?

The questions is whether the Appellant Muditha Pererea is a "borrower" within the meaning of the Recovery of Loans by Bank (Special Provisions) Act No. 4 of 1990, as subsequently amended, having regard to the decision of the Supreme Court in *Hatton National Bank v Jayawardana (supra).*

To answer this question, it would be necessary to look closely at the material facts of this case, but I consider it useful

to first explain very brief the importance of this question from the perspective of its legislative and legal antecedents.

Prior to the enactment of the Recovery of Loans by Banks (Special Provisions) Act of 1990, any Bank that lent money on the security of a mortgage had to rely on the provisions of the Mortgage Act No. 6 of 1949, as subsequently amended, to obtain a "hypothecary decree" from Court in terms of Section 48(1) of the Act to have the mortgage enforced. S. N. Silva CJ in his erudite majority judgment in *Ramachandran and Others v. Hatton National Bank*[2] at page 399, described the Mortgage Act as a "piece of erudition", after explaining in his immaculate style how our own Common Law founded on Roman-Dutch law differed both from Roman Law and English law in regard to the ability to sell the secured property without recourse to court at pages 395 to 399 of his judgment, and went on to highlight the features of the Mortgage Act of 1949 and the concept of the "hypothecary action" it introduced. It is not necessary for the purposes of this decision, to repeat his very useful exposition of the law found in those pages.

What is material for this decision is to consider, as a Five Judge Bench of this Court (S. N. Silva CJ., Bandaranayake Jayasinghe J., Udalagama J., and Dissanayake J.), did in *Ramachandran's case*, the category of persons against whom the parate execution provisions of the Recovery of Loans by Bank (Special Provisions) Act of 1990, will operate. This is because it is only against a person belonging to such a class that the Board of Directors of a Bank may pass a resolution authorising sale by public auction any property mortgaged to the bank by him as security for any loan in respect of

which default has been made in order to recover the whole of the unpaid portion of such loan, together with the money and costs recoverable under section 13 of the said Act. In *Ramachandran's case,* the majority of the judges favoured a strict interpretation of the provisions of the Act in keeping with the Rule of Law and the existing legal position, to restrict the said class to those who had borrowed money by mortgaging property owned by them to exclude from this category mere "guarantors" who were not party to the loan agreement with the Bank. However, Shirani Bandaranayake J. (as she then was), in her dissent, favoured a broader interpretation to include "third party mortgagors" who were not party to the loan provided by the Bank.

It is also important to understand the legal reasoning on the basis on which this Court arrived at its majority decision, as that decision is binding on the Bench before which this appeal was argued. S. N. Silva CJ in *Ramachandran's case*, sought to identify the category of persons against whom parate execution was intended to be provided by the Act as follows at page 404 of his judgment:-

> "The submission of Counsel for the Petitioner [in *Ramachandran's case*), is that the class of persons is clearly identified in the provisions of the Act commencing from Section 2 itself. Section 2(1)(a), requires 'every person to whom any loan is granted by a Bank on the mortgage of property' to register with the Bank the address to which a notice to him may be sent. I am inclined to agree with this submission since a Resolution of the Board to sell by Public Auction, as empowered by Section 4, has to be dispatched to this address in terms of section 8. Similarly, the notice of sale in terms of section 9 should be dispatched to that address.

There is a clear link in the provisions between the taking of a loan and the mortgage. The law will apply where a mortgage is given by the person to whom the loan is granted. In Sections 7, 14, 15, 16 and 17 this person is identified as the 'borrower'. The borrower is none other than the person to whom a loan is granted and who is required in terms of Section 2 to register his address with the Bank. In terms of Section 14 where the mortgaged property is sold and an amount in excess of what is due to the Bank is recovered, such amount has to be paid by the Bank to the borrower. This clearly established that it is only the property mortgaged by a borrower that could be sold by a Bank to recover a loan granted to him. If the provisions are extended by a process of interpretation to cover a mortgage given by a guarantor, Section 14 will bring about a preposterous result in which the guarantor's property is sold and the excess recovered is paid by the Bank to the borrower. It is when confronted with their unanswerable contention, that the Counsel for the Banks submitted that the term borrower should be interpreted to include any debtor and that where a loan is in default the guarantor would be a debtor. T*he words 'borrower', 'guarantor' and 'debtor' have specific significance attaching to them in legal proceedings. These distinctions cannot be removed and the application of the special provisions law extended to encompass guarantors in view of the serious implications of its provisions as revealed in the preceding analysis." (Emphasis added)*

It is the submission of the learned Counsel for Muditha Perera, who claims to be a "third party mortgagor" against whom the provisions of the Recovery of Loans by Banks (Special Provisions) Act would not operate, that the majority

decision in Ramachandran's case is applicable to the facts and circumstances of his case, while learned President's Counsel for the DFCC Bank submits that the decision of this Court in *Hatton National Bank v. Jayawardena (supra)* is applicable. In the latter case, this Court (Jayasinghe J., Thilakawardane and Marsoof J.), considered the special circumstances of that case appropriate to lift the veil of incorporation of Nalin Enterprises (PVT) Ltd., which was the corporate body that had obtained the loan from the Bank in question, to ascertain whether the two guarantors who were Directors of the said company constituted the alter ego that would indirectly benefit from the non-payment of the loan.

In the impugned decision of the Court of Appeal, that court (Rohini Marasinghe J.) considered both decisions in the context of an application for interim relief to restrain the holding of an auction to sell by public auction, the immovable property of the Petitioners – Respondents. Having done so, her Ladyship went on to analyse the factual position in the light of the applicable law, and observed as follows:-

> "The 1st Respondent Bank had called upon the Company and the mortgagor to enter into the Mortgage Bond to grant security. Accordingly, the Petitioner (Muditha Perera) has mortgaged the immovable property mentioned in the relevant Bond as security for the repayment of the loan. *It is a clause in the Bond that the Company should not utilize any portion of its funds in the loan to the benefits of its shareholders. According to the attestation clause the Bank as the obligee has agreed to pay the sum in the loan to the 4th Respondent Company (Sewagama Rice Products (pvt) Ltd)* as the abligor. The Petitioner stated the legal person who borrowed the money is the 4th

Respondent Company. It was the Petitioner's position that the Divisional Bench of the Supreme Court that interpreted the Act No. 4 of 1990 *Ramachandra and Ananda Silva v. Hatton National Bank (supra)* had clearly ruled that the Bank can levy parate execution of immovable property in a mortgage Bond *only if the property belonged to the borrower and thus as the petitioner is not the borrower,* the resolution passed to sell the mortgage property in Bond No. 1811 is illegal and is of no force and avail in Law."

The Court of Appeal went on to make the following pertinent observation, in regard to the submissions made by learned Counsel:-

The English courts have upheld the principle in *Saloman V. Soloman & Company*[4], to mean that the rights and liablities of Directors are different to those of the share-holders. The position of the Patitioner was that the Bond No. 1811 clearly shows the borrower was the 4th Respondent Company, and the Petitioner was Guarantor. Nowhere does the English Law inclusive of Company Law deem a Managing Director of a Company as a borrower of a loan solicited and granted to the Company by a Bank or a person, although the Managing Director had given a security by way of mortgage binding himself jointly and severally with the Company. The Petitioner urged that in the subsequent case of *HNB v. Jayawardena (supra)* is either obiter or could be distinguished and cannot be accepted as a general proposition of Law which make a Managing Director who had given a mortgage of immovable property as a surety is considered a borrower of the Company. He also relied on the English cases cited in the judgment which he explained in his submissions. He also stated that in the Case of *HNB V.*

Jayawardena (supra), Justice Jayasinghe had said that the Directors in that case had been borrowers in fact with Nalin Enterprises and had benefited with the Loan facility. Thus as the judgment does not reveal the relevant mortgage documents in the case, the decision could be correct if the loan mentioned in the Bond of the case had been solicited both by the Company and Directors and had been granted to both without any restriction on them to use the money in the loan.

It is in these circumstances, that the Court of Appeal concluded that Muditha Perera had established a *prima facie* case and that he is not the borrower within the principle of Ramachandran's case, and that *Jayawardane's* case can be distinguished. The Court of Appeal accordingly granted interim relief restraining the conduct of the auction of the mortgaged property, on the following basis:-

> If the Bank's Resolution to sell the property in bond No. 1811 is outside the jurisdiction granted to a Bank under Act No. 4 of 1990 all subsequent steps will be of no avail in law and therefore are null and void. I am satisfied that the Petitioner has established a *prima facie* case and I am of the opinion that irreparable loss and damage would be caused to the Petitioner if an interim order is not granted to stop the auction at least till the next date. This order is made *inter partes* with the learned President's Counsel for 1, 2 and 3 Respondents making lengthy submissions on law and facts. I make this order especially because the points of Law raised by petitioner are of very substantial importance.

I am in agreement with the submission of the learned Counsel for Muditha Perera that in all the circumstances of

this case, as would appear from the various passages of the order of the Court of Appeal I have chosen to quote in this judgment, there is no basis to apply the obviously narrow principle laid down in *Hatton National Bank v. Jayawardane (supra)*. At has been observed by Gower and Davies, Principles of Modern Company Law, (Eighth Edition 2008), pages 208-209.

> The doctrine of lifting the veil plays a small role in British company law, once one moves outside the area of particular contracts or statutes Even where the case for applying the doctrine may seem strong, as in the under capitalised one-person company, which may or may not be part of a larger corporate group, the courts are unlikely to do so. As Staughton L. J. remarked in *Atlas Maritime Co. SA v. Avalon Maritime Ltd. The Coral Rose* at 779, "The creation or purchase of a subsidiary company with minimal liability, which will operate with the parent's funds and on the parent's funds and on the parent's directions but not expose the parent to liability, may not seem to some the most honest way of trading. But it is extremely common in the international shipping industry and perhaps elsewhere. To hold that it creates an agency relationship between the subsidiary and the parent would be revolutionary doctrine."

I accordingly answer substantive question (a) above in the negative, and hold that, in all the circumstances of this case, the Court of Appeal did not err in law by determining on a *prima facie* basis, for the purposes of considering interim relief, that the Appellant was not a "borrower" within the meaning of the Recovery of Loans by Banks (Special Provisions) No 4 of 1990 having regard to the decision of the Supreme

Court in both *Ramachandran and Others V. Hatton National Bank and HNB v. Jayawardena. (supra)*

Are the Members of the Board of Directors Essential Parties?

I now have to consider substantive question (f) on the basis of which leave to appeal was granted by this Court against the impugned order of the Court of Appeal, which is whether the said court erred in law by determining that cogent reasons had been furnished by Muditha Perera for not complying with the principle in *Ukwatte Vs. DFCC Bank*[5]

It is convenient to first refer to the approach of the Court of Appeal to this question, which is revealed by the following passage in its order:-

> "Counsel for the Respondent raised a legal objection citing the case of *Ukwatte v. DFCC Bank (supra)*, to the effect that the Petitioner (Muditha Perera) is not entitled to a writ of certiorari because the writ must be prayed against the Board of Directors. Although on the face of it, it is a valid legal objection, the petitioner has given sufficient reasons in the petition as to why he did not make the members of the Board Respondents to this application. In paragraph 31 supported by the affidavit he states that he had requested the Branch Manager of the 1st Respondent Bank at Polonnaruwa, for a true copy of the Resolution passed by the Bank and the Petitioner had been informed that no such Resolution had been passed prior to the date of P13. The Petitioner had then gone to the head office of the 01st Respondent to ask for the copy and thereafter he had sent the letter P15 through his Attorney-at-Law requesting the names of the