JUDGEMENTS

Ref: 01/05/2005 *Rs. 50.00*

Writs of Certiorari and Prohibition *- Section 36(1) read with Section 11 of the Finance Companies Act No. 78 of 1988 – Whether ground not pleaded could be set up in the course of the hearing, discussed – Powers of Central Bank to investigate persons carrying on finance business, examined- Object of the Finance Companies Act, analysed-Safeguarding the interest of depositors, stressed.*

Okanda Finance (Pvt) Limited Vs: The Monetary Board

C.A. Application No 1758/2002 (Writ)

Decided by SALEEM MARSOOF P.C. J. (P/CA) & SRIPAVAN J. on 22 September, 2004.

Okanda Finance (Pvt) Ltd. filed an application seeking to quash by way of *certiorari*, the notices dated 25th September 2002 (P14) and 27th September 2002 (P15) issued by the Director of the Department of Supervision of Non-Bank Financial Institutions of the Central Bank of Sri Lanka, requiring Okanda Finance to show cause as to why action should not be taken against the said company in terms of Section 36(1) read with Section 11 of the Finance Companies Act No. 78 of 1988 in respect of the failure of Okanda Finance to comply with the request made by the said Director for certain documents and information. Okanda Finance also sought a Writ of Prohibition preventing the Respondents from conducting any further inquiry with respect to the activities of the said company.The Petitioner's argument was that mere acceptance of money by way of interest bearing deposit would not amount to engaging in 'finance business' unless it is accompanied by lending money on interest, or investment of money, or both.Their Lordships determined that the legislative scheme of the Finance Companies Act as revealed from an examination of Sections 11(2) and 43 of the said Act provides for judicial review of the determination of the 2nd Respondent Monetary Board only at a subsequent stage. It is therefore clearly premature for this Court to go into the question whether Okanda Finance is engaged in 'finance business' at a stage of the investigation when the company has just been called upon by the Director of the Department of Supervision of Non-Bank Financial Institutions to provide certain particulars and documents in terms of Section 11(1) of the Act. Their Lordships stressed that the primary objective of the Finance Companies Act is to provide a comprehensive system for the compulsory registration, control and supervision of public companies carrying on finance business in Sri Lanka. The main object of the Act appears to be to safeguard the interests of depositors". After having comprehensively examined the Finance Companies Act and explained the powers of the Central Bank to investigate Finance Companies their Lordships refused the application with costs.

Ref: 02/05/2005 *Rs. 120.00*

Parate Execution *– Recovery of Loans by Banks (Special Provisions)Act, No. 4 of 1990, examined – Basis for 'parate execution' comprehensively discussed – Applicability of the provisions of the Recovery of Loans by Banks (Special Provisions)Act, No. 4 of 1990 on Third Party Mortgagors, analysed.*

Chelliah Ramachandran Vs. Hatton National Bank

S.C.Appeal Nos. 5&9/2004 – S.C. Spl.L.A.Nos. 31 & 32

Decided by SARATH N.SILVA, CJ, SHIRANI BANDARANAYAKE, J., JAYASINGHE, J., UDALAGAMA, J. & DISSANAYAKE, J. on 01st April, 2005.

The issue that came up for determination in this matter was "whether the remedy of 'parate execution' in terms of Act No.4 of 1990 applies to instances where a person other than the borrower has mortgaged property". Since there were several cases pending in the Court of Appeal and the Commercial High Court on this very question, the matter was referred to a Divisional Bench of the Supreme Court. Having analysed the Recovery of Loans by Banks (Special Provisions)Act, No. 4 of 1990, their Lordships found that the Bank was virtually the Judge, Jury and Executioner when exercising powers under this Act, and therefore any decision by the Bank to invoke this Act against their customers must be proceeded with caution. They found that the Bank being one party to the transaction, not only makes the claim or allegation but also decides on the matter and is empowered to take action, directly affecting the property rights of the other party which should otherwise happen only at the end of a judicial process. Their Lordships determined that the provisions contravene the basic safeguard of natural justice. "*nemo judex in re sua*". In conclusion their Lordships, apart from Dr.(Mrs) Shirani Bandaranayake, J. disagreeing, determined that the provisions of the Recovery of Loans by Banks (Special Provisions)Act, No. 4 of 1990, will not apply in respect of a mortgage given by a guarantor or any person other than a borrower to whom a loan has been granted by a Bank for the economic development of Sri Lanka.

Ref: 03/05/2005 *Rs. 35.00*

Writs of Certiorari & Mandamus *– Land acquisition - Rule 5 of the Court of Appeal (Appellate Procedure) Rules 1990 – Whether Minister comes under the definition of*

'public officer', analysed – Time at which amendments to application permitted, examined - Decisions or determinations amenable to writ of certiorari, discussed

Dayaratne Vs. Road Development Authority, *et al*

Court of Appeal Application No. 1790/2003

Decided by SALEEM MARSOOF P.C. J (P/CA) & S.SRISKANDARAJAH J. on 16th December, 2004

The Petitioner filed an application in the Court of Appeal challenging the order or decision made by the Respondents to acquire the Petitioner's land. The Petitioner claimed that although the ostensible purpose of the said proposed acquisition is to widen the Pelmadulla – Embilipitiya highway, land necessary for the said purpose in the vicinity have already been acquired by the Order made under Section 38 proviso (a) of the Land Acquisition Act published in the Gazette Extraordinary bearing No. 1169/11 dated 30th January 2001after the exhibition of another Section 2 notice. The 1st Respondent was the person holding office as the Minister of Lands at the time of filing this application, and the 2nd Respondent was the Minister of Defence, Transport, Highways and Civil Aviation at the relevant time, and both these respondents have been cited by name as well as their respective official designations. The 3rd Respondent is the Road Development Authority, the 4th Respondent is the Divisional Secretary and the 5th Respondent is the Project Engineer attached to the Asian Development Bank Project Office of the Road Development Authority. The Petitioner , *inter alia sought the following reliefs :*

i) a writ of *certiorari* quashing the orders / decisions of the 1st and / or 2nd and / or 3rd and / or 4th and / or 5th Respondents to acquire the Petitioner's land and the notice issued by the 4th Respondent under Section 2 of the Land Acquisition Act marked P15;

ii) a writ of *mandamus* directing the 1st and / or 2nd and / or 3rd and / or 4th and / or 5th Respondents to continue the acquisition proceedings commenced with the notice issued under Section 2 of the Land Acquisition Act (P2a) and the order made under Section 38 proviso (a) of that Act and published in the Gazette marked P3a; and

iii) interim relief restraining the 1st to the 5th Respondents, jointly or severally, from continuing with the impugned acquisition proceedings and taking over any portion of the Petitioner's land.

At the commencement the State raised the following preliminary objections:-

a) Since the 1st and 2nd Respondents do not hold office respectively as Minister of Lands and Minister of Highways, can the Petitioners seek relief as prayed for in prayers (b), (c), (d), and (e) of the prayer to the Petition?

b) Is the notice marked P15, a Their Lordships observed that the first preliminary objection raised an important question relating to the procedure to be followed in the event of a public officer who is a respondent to a writ application ceasing to hold office during the pendency of the application.

Rule 3(8) of the Court of Appeal (Appellate Procedure) Rules 1990, a party may "*with the prior permission of the Court,* amend his pleadings, or file additional pleadings, affidavits or other documents, within two weeks of the grant of such permission, unless the Court otherwise directs." The said Rule expressly provides that after notice has been issued in any case, "such permission shall not be granted *ex parte*". The Petitioner relied heavily on Rule 5(4)(b) read with Rule 5(5) of the Court of Appeal (Appellate Procedure) Rules 1990 that where a Respondent who has been cited both by reference to his name and his designation ceases to hold office while an application filed against him in terms of Articles 140 or 141 of the Constitution is pending before court, the case can proceed against his successor for the time being in such office, "without any addition or substitution of respondent a fresh, proxy or the issue of any notice, unless the Court considers such addition substitution, proxy or notice to be necessary in the interests of justice." After an extensive examination of the Rules, their Lordships upheld the preliminary objections and dismissed the Application without costs.

Ref: 04/05/2005 *Rs. 25.00*

***Writ of Certiorari** – Attitude of Court in respect of decisions that are ultra vires when delays and laches in application are evident – When allegations of laches will succeed, discussed*

Bogawantalawa Plantations Ltd. Vs. Land Reform Commission, et al

C.A.Application No. 836/2000

Decided by **Saleem Marsoof PC, J. (P,C/A) & K.Sripavan, J.** on 19 May, 2004.

The jurisdiction of the Court of Appeal was invoked with a view of having the order made by the 1st Respondent Minister and published in the Gazette Extraordinary,quashed in respect of the estates belonging to the Petitioner. The Petitioner came into possession of these estates by virtue of an order published in the Gazette Extraordinary made under Section 2 of the

JUDGEMENTS

Conversion of Public Corporations or Government Business Undertakings into Public Companies Act No. 23 of 1987, and by virtue of the Memorandum of Record entered into between the Petitioner and the 6th Respondent, the Janatha Estate Development Board. The latter had also executed the Power of Attorney in favour of the Petitioner.The Petitioner contended that the Order which has purportedly been made by the relevant Minister under Section 27A(4) of the Land Reform Law No. 1 of 1972, as subsequently amended, is null and void as it is ultra vires, unreasonable and has been made in violation of rules of natural justice. The Petitioner placed greater reliance on the argument that the impugned order was ultra vires the powers of the Minister under Section 27A (4) of the Land Reform Law as there has been no non-compliance with any condition relating to consideration for the vesting of the said lands in the 6th Respondent.

The State took up two preliminary objections to the application of the Petitioner, namely: (1) that the petitioner is guilty of laches in so far as he has come to Court nearly 9 months after the impugned order, and (2) the Petitioner has no locus standi.Citing several authorities their Lordships observed that our courts have repeatedly pointed out that "the principles of laches have not been applied automatically or arbitrarily or in a technical manner by Courts of Equity themselves.".In regard to the question of locus standi,the Court found that the Petitioner, who is admittedly in possession of the lands in question and has expended enormous sums of money for the development of the estates, is a person affected by the Order, and is therefore entitled to seek redress from the Court by way of prerogative relief. The Court dismissed the preliminary objections and made Order quashing the revesting order made by the Minister.

Desmond Fernando PC

Desmond Fernando studied for a year at the University of Ceylon (Colombo) and then went to Oxford University (which awarded him a B.A. and M.A.). He was subsequently awarded a Study Fellowship (on Legal Institutions and Development) by the Institute of Development Studies, Sussex University. He was called to the Bar by Lincoln's Inn in 1958 and enrolled as an Advocate (now styled Attorney-at-Law) by the Supreme Court of Sri Lanka the same year, He was appointed a President's Counsel in 1990. From the commencement of his career he has appeared without fee in a large number of cases involving human rights issues or where a litigant was unable to secure adequate representation. He is a member of the London Court of International Arbitration. He was elected a Bencher of Lincoln's Inn in 2003. The Benchers constitute the governing body of the English Bar. He has been an Examiner at the Ceylon Law College.

He was a founder member (1971) and Secretary of the Civil Rights Movement (CRM) of Sri Lanka (1978-88)[1]. He was elected a Commissioner of the International Commission of Jurists (ICJ) in 1988, served as a member of its Executive Committee, and subsequently as Vice President. He has been Secretary-General, Vice-President and President (1996-98) of the International Bar Association (IBA)[2] and is an Honorary Life member. As Vice President he helped to set up the Human Rights Institute of the IBA. He is a past Secretary, Vice-President and President of the Bar Association of Sri Lanka[3] and an Honorary Life Member. As President he set up the Human Rights Committee, continuing Legal Education Committee, Legal Aid Committee and New Entrants Committee. He was persuaded to take Office again as President of the Bar Association of Sri Lanka in 2005 and serves currently in that capacity. He served as a distinguished Councillor of Lawasia.

His presentations include an address in 1992 at the Annual General Meeting of the Bar Council of England on Human Rights and the Legal Profession, and an address on human rights to the Arab Lawyers Union. He recently collaborated in a study of 'The Implications of Thesavalamai in a Post Conflict Scenario'.

He has led or served on Missions of the UN Human Rights Commission, the ICJ and the IBA. He has been a Director of The State Mortgage Bank (1965-70), a member of the Panel of Arbitrators under the Industrial Disputes Act (1970-77), and Chairman of the Official Languages Commission (1992-94). He is Chairman of the Family Rehabilitation Centre (FRC)[4] and a Founder/Board Member of the Nadesan Centre for Human Rights through Law[5].

(Endnotes)

[1] CRM is the first civil liberties organization formed in Sri Lanka, and received the Carter Menil Human Rights Prize in 1990.

[2] IBA Vice-Chairman Human Rights Committee 1991-1996. In 1995 as Vice-President IBA helped to set up the Human Rights Institute of the IBA which has sent missions to several countries in relation to the independence of the judiciary and the legal profession and threats to lawyers and judges. It also sends trial observers. As President of the IBA did follow-up work on the missions both by visits and by correspondence. He also attended human rights seminars organized by the Institute in several countries.

[3] He was involved in the affairs of the Bar Council (which later became the Bar Association) since commencement of practice and was twice its Secretary.

[4] Chairman from inception (1994) to date. FRC provides medical, psychiatric and legal services for victims of conflict including torture victims and the families of killed and "disappeared" persons in both Southern Sri Lanka and in the North and the East. It has ten outreach centres in the conflict areas.

[5] Founder Member 1987, Board Member from inception to date. The Centre provides a library, documentation and information service on Sri Lankan and international human rights and humanitarian law for human rights activists, students, lawyers and judges.