

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

***In the matter of an Appeal under and in
terms of the provisions of Section 5(c) of the
High Court of the Provinces (Special
Provisions) (Amendment) Act No. 54 of 2006
read together with the provision of Article
128 of the Constitution of the Democratic
Socialist Republic of Sri Lanka***

SC Appeal No. 31/2023

SC/HCCA/LA/358/2019

WP/HCCA/REVISION APP NO.

18/2016

DCC/261/2014/DSP

People's Bank

No. 75,

Sir Chittampalam A. Gardiner Mawatha,

Colombo 02.

PETITIONER

Vs.

Gamage Don Chandana Haththotuwa,

No. 204, Veluwana Road,

Dematagoda.

RESPONDENT

AND BETWEEN

People's Bank.

No. 75,

Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

PETITIONER-PETITIONER

Vs.

Gamage Don Chandana Haththotuwa,
No. 204, Veluwana Road,
Dematagoda.

RESPONDENT-RESPONDENT

AND NOW BETWEEN

People's Bank,
No. 75,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

PETITIONER-PETITIONER-
PETITIONER-APPELLANT

Vs.

Gamage Don Chandana Haththotuwa,
No. 204, Veluwana Road,
Dematagoda.

RESPONDENT-RESPONDENT-
RESPONDENT

BEFORE: **JAYANTHA JAYASURIYA, PC, CJ**
MURDU N.B. FERNANDO, PC, J AND
S. THURAIRAJA, PC, J

COUNSEL: Kushan De Alwis, PC with Chamath Fernando for the Petitioner-
Petitioner-Petitioner-Appellant

Nuwan Bopage with Chathura Weththasinghe and Hansaka
Chandrasinghe for the Respondent-Respondent-Respondent

WRITTEN Respondent-Respondent-Respondent on 13th September 2023

SUBMISSIONS: Petitioner-Petitioner-Petitioner-Appellant on 06th March 2024

ARGUED ON: 27th March 2024

DECIDED ON: 08th November 2024

THURAIRAJA, PC, J

1. The instant case is an appeal against the dismissal of a revision application filed before the High Court of Civil Appeal of the Western Province Horden in Colombo against an order dated 09th February 2017 of the District Court of Colombo.

BACKGROUND OF THE CASE

2. The Respondent-Respondent-Respondent (hereinafter 'Respondent') above named and his mother, late Diasy Haththotuwa (née Jayawardena), had obtained several loan facilities from the Petitioner-Petitioner-Petitioner-Appellant Bank (hereinafter 'Appellant') by mortgaging the land and premises described in the Schedule to the

Petition of the Appellant. Due to the default of such mortgagees to settle the monies due under the said mortgage bonds, the Board of Directors of the Appellant Bank had unanimously adopted a resolution to auction the mortgaged property in order to recover the outstanding sums.

3. After taking steps under the *People's Bank Act, No. 32 of 1986* (hereinafter sometimes the 'Act'), the Bank had auctioned the property on 27th August 2000. As there were no bidders at the said auction the Appellant Bank itself had purchased the said property on a Certificate of Sale No. 408 dated 06th September 2000.
4. The position of the Appellant is that all rights, title and interest of the Respondent in the said property was thereby vested with the Appellant and that the Respondent thereafter wrongfully and unlawfully failed and neglected to hand over vacant and peaceful possession of the said property to the Appellant.
5. On this basis, the Appellant had instituted a case against the Respondent by Petition dated 22nd October 2003 in the District Court of Colombo bearing Case No. 6881/SPL under and in terms of the *People's Bank Act, No. 29 of 1961* as amended against the Respondent and said Daisy Haththotuwa. During the pendency of this case, this Court delivered the judgment in ***Ramachandra v. Hatton National Bank***¹ which changed the paradigm which existed with respect to the parate execution of 3rd party mortgages.
6. The Appellant states that they withdrew the said District Court case, reserving the right to file a new application, to consider the effects of the said judgment due to the uncertainty created vis-à-vis parate execution of 3rd party mortgages by the same.

¹ [2006] 1 Sri L.R. 393. Now overruled by *Sunpac Engineers (Private) Ltd & Another v. DFCC Bank & 11 Others*, SC Appeal 11/2021, SC Minutes of 13th November 2023

7. Subsequently, the Appellant had instituted a fresh case bearing No. DSP 261/2014 by Petition dated 11th December 2014 in the District Court of Colombo under Section 29P of the *People's Bank Act* as amended seeking an order for delivery of possession. The Appellant states that, at the time of filing this second Petition, the original of the aforementioned Certificate of Sale has been misplaced and/or lost subsequent to the withdrawal of the earlier petition.
8. The Respondent contends that when the Appellant Bank passed the resolution to auction the mortgaged property and attempted to auction the same, his mother, late Diasy Haththotuwa (nee Jayawardena), instituted action bearing No. 5712/SPL in the District Court of Colombo seeking to prevent the Appellant Bank from so auctioning the property. The District Court had subsequently issued an enjoining order on 24th August 2000 preventing the Appellant from auctioning the property.
9. The Respondent further states that the Appellant carried out this auction in contravention of this enjoining order, thus rendering the auction, as well as all other actions pursuant thereto, illegal. However, neither the legality of the auction nor the validity of the Certificate of Sale have been placed as questions before this Court.
10. Following the aforementioned 2014 Petition filed by the Appellant, the learned District Judge has issued an order nisi in favour of the Appellant. However, at the conclusion of the inquiry, the learned Judge has opted to dissolve the said order nisi by order dated 09th February 2016, on the basis that the Appellant's case was already prescribed while also taking into account the Appellant's failure to produce the original certificate of sale.
11. Aggrieved by the said order of the District Court, the Appellant had filed a revision application before the High Court of Civil Appeal of the Western Province Holden in Colombo. The High Court of Civil Appeal, by judgment dated 01st August 2019 has dismissed the revision application without costs.

12. The learned Judges of the High Court of Civil Appeal have found that the District Court erred in its finding that the action was prescribed. The Judges have also found the failure on the part of the Appellant to procedure the original Certificate of Sale to not be fatal to the application.
13. However, despite the findings that the District Court had erred as such, the revision application was yet rejected on the basis that the Respondent was in a position to establish a prescriptive right over the said property as a period of 10 years had lapsed when the Appellant filed the application in 2014.
14. Being aggrieved by the said judgment of the High Court of Civil Appeal, the Appellant has preferred the instant appeal.

QUESTIONS OF LAW

15. On 17th February 2023, leave was granted on the questions of law set out hereinbelow, with the fourth question being one raised by the learned Counsel for the Respondent as a consequential question of law at that stage:
 - i. *Whether their Lordships of the Civil Appellate High Court erred in law dismissing the Application of the Petitioner on the basis that the Respondent is in a position to establish a prescriptive right to the said property?*
 - ii. *Did their Lordships of the Civil Appellate High Court err in law and fact by holding that the proper remedy available for the Petitioner is to vindicate its title in a re-vindicatio action?*
 - iii. *Did their Lordships of the Civil Appellate High Court misdirect themselves with regard to the provisions contained in Section 29P of the People's Bank Act, No. 32 of 1986*

as amended, read together with provisions of Chapter XXIV of the Civil Procedure Code?

- iv. *Whether an application under Section 29P of the People's Bank Act, No. 32 of 1986 could be considered as an action within the meaning of section 10 of the Prescription Ordinance as well as under section 06 of the Civil Procedure Code.*

ANALYSIS

16. As this appeal may be dispensed with based on the answers to the third and fourth questions of law alone, I wish to first consider the same.

Third and Fourth Questions of Law

17. Section 29P of the *People's Bank Act*, as amended by *People's Bank (Amendment) Act No. 32 of 1986*, provides as follows:

*(1) 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 that property is situate, and upon production of the certificate of sale issued in respect of that property under section 29N, be entitled to obtain an order for delivery of possession of that property.*

*(2) Every **application** under subsection (1) shall be made, and shall be disposed of, by way of summary procedure in accordance with the provisions of Chapter XXIV of the Civil Procedure Code; and on all documents filed for the purpose of each such application and on all proceedings held thereupon...*

*(3) Where any immovable property sold in pursuance of the preceding provision of this Act in the occupancy of the **debtor** or **of some person on his behalf** or **of***

some person claiming under a titled created by the debtor subsequently to the mortgage of the property to the Bank, the District Court shall order delivery to be made by putting the purchaser or any person whom he may appoint to receive possession on his behalf, in possession of the property....²

18. The Appellant highlighted that Section 29P of the *People's Bank Act* refers to an 'application', as can be observed above, whereas the *Prescription Ordinance* refers to 'actions'. Based on this, it was the Appellant's position that an application to recover possession under Section 29P of the Act was not an action within the meaning of the *Prescription Ordinance*, thus making the *Ordinance* inapplicable vis-à-vis such applications.
19. *Per contra*, the Respondent submitted that every application to a court for relief or remedy obtainable through the exercise of the court's power of authority, or otherwise to invite its interference, constituted an action.
20. Order for delivery of possession sought under Section 29P of the *People's Bank Act* is akin to an order under Section 287 or Section 288 of the *Civil Procedure Code*. This is clearly set out in Section 29P(5) of the *People's Bank Act*, which provides,

"Every order under subsection (3) or subsection (4) shall be deemed, as the case may be, to be an order for delivery of possession made under section 287 or section 288 of the Civil Procedure Code, and may be enforced in like manner as an order so made, the debtor and the purchaser being deemed, for the purpose of the application of any provision of that Code, to be the judgment-debtor and judgment-creditor, respectively."

² Emphasis added

21. Section 287 of the *Civil Procedure Code* provides for the purchase of a fiscal sale to apply to court for an order for delivery of possession, after the fiscal conveyance, when the property sold is in the occupancy of the judgment-debtor or of some person on his behalf, or some person claiming under a title created by judgment-debtor subsequent to seizure. This Section, too, refers to an 'application' by the purchaser.
22. Section 29P of the *People's Bank Act* is also identical to Section 16 of the *Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990*.
23. Section 5 of the *Civil Procedure Code* defines an 'action' as "*a proceeding for the prevention or redress of a wrong*". Where Section 6 of the Code provides that "[e]very application to a court for relief or remedy obtainable through the exercise of court's power or authority, or otherwise to invite its interference, constitutes action". Section 6 should be read not as a definition of the term 'action' but as an illuminative provision of the definition already provided in Section 5.³
24. Many decisions of the past from this Court have discussed the meaning of the term and what constitutes an 'action'. While the authorities are less than straightforward, what becomes abundantly clear is that while an action must disclose a cause of action,⁴ an application need not. As defined in Section 5, 'cause of action' is the wrong for the prevention or redress of which an action may be brought.
25. An application under Section 29P of the *People's Bank Act* or Section 16 of the *Recovery of Loans by Banks (Special Provisions) Act* can be made by a purchaser of a property subjected to parate execution for the purpose of obtaining an order for possession thereof. These provisions must necessarily be interpreted with reference to the purpose

³ See U.L. Abdul Majeed, *A Commentary on Civil Procedure Code and Civil Law in Sri Lanka* Vol. 1 (Revised 2nd edn, 2017) 74

⁴ See Section 40 of the *Civil Procedure Code*

of these Acts, which is to expedite the debt recovery process and related banking activities.

26. The general purpose and nature of Section 16 of the *Recovery of Loans by Banks (Special Provisions) Act* was described by Samayawardhena, J. in ***DFCC Bank v. Warnakulasuriya Chandima Prasad Rajitha Fernando***⁵ as follows:

"Under section 16(1), the Court is not expected to have a full trial or full inquiry and make an order on the merits of the substantive case, if any. The Court makes a perfunctory order for delivery of possession upon production of the certificate of sale. The intervention of the Court is sought at this stage primarily to prevent the breach of peace in the execution of a non-judicial order."

27. Furthermore, with regard to the nature of the procedure set out in Section 16 of the *Recovery of Loans by Banks (Special Provisions) Act*, Samayawardhena, J. referred to ***Jayasundera v. Hatton National Bank***⁶ and ***Hatton National Bank v. Thejasiri Gunethilake***⁷ with approval and said that "...the entire chapter XXIV of the Civil Procedure Code on summary procedure is inapplicable and the limited function of the District Court in this instance is to act as a court of execution in respect of an extra judicial order made by the Board of Directors of the bank".⁸

⁵ SC Appeal 33/2019, SC Minutes of 26 February 2024, at 5

⁶ CA/1479/2004, CA Minutes of 05 August 2005

⁷ [2016] 1 Sri L.R. 276

⁸ *DFCC Bank v. Warnakulasuriya Chandima Prasad Rajitha Fernando* SC Appeal 33/2019, SC Minutes of 26 February 2024, at 15

28. It is to this limited extent that the provisions of Chapter XXIV of the *Civil Procedure Code* apply to proceedings under Section 16 of the *Recovery of Loans by Banks (Special Provisions) Act*.
29. While these views have been expressed with regards to Section 16 of the *Recovery of Loans by Banks (Special Provisions) Act*, they can be extended to the question at hand as Section 29P of the *People's Bank Act* is identical and both Acts serve similar purposes.
30. As such, I am of the view that the procedure set out in Section 29P of the *People's Bank Act* is not an 'action' as contemplated in the *Prescription Ordinance* and Section 6 of the *Civil Procedure Code* for it does not fall within the ambit of an "application to a court for **relief or remedy**".

31. To this extent, I am in agreement with the finding of the High Court of Civil Appeal that

*"...The cause of action that had occurred to the Petitioner-Petitioner [the Appellant Bank] against the Respondent-Respondent in respect of this loan transaction had already come to an end after the auction. The cause of action does not exist anymore. Therefore, the application made by the Petitioner-Petitioner to recover possession is not an action within the meaning of the Prescription Ordinance, but a mere application to recover possession under the Provisions of the People's Bank Act."*⁹

32. Accordingly, the third and fourth questions of law are answered in the following manner:

Question of Law: *"Did their Lordships of the Civil Appellate High Court misdirect themselves with regard to the provisions contained in Section 29P of the People's Bank Act, No. 32 of 1986 as amended, read together with provisions of Chapter XXIV of the Civil Procedure Code?"*

⁹ Judgment of WP/HCCA/COL/18/2016/RA dated 01 August 2019, at 3

Answer: As I cannot find any analyses on Chapter XXIV of the *Civil Procedure Code* which runs contrary to the above findings in the judgments of the High Court of Civil Appeal, this question of law is answered in the negative.

Question of Law: "*Whether an application under Section 29P of the People's Bank Act, No. 32 of 1986 could be considered as an action within the meaning of section 10 of the Prescription Ordinance as well as under section 06 of the Civil Procedure Code.*"

Answer: In accordance with the findings hereinabove, this question, too, is answered in the negative: An application under Section 29P *People's Bank Act* cannot be considered an action within the meaning of Section 10 of the *Prescription Ordinance* and Section 6 of the *Civil Procedure Code*.

First Question of Law

33. Having found that an application under Section 29P *People's Bank Act* is not an action within the meaning of Section 10 of the *Prescription Ordinance*, the High Court of Civil Appeal had thereafter gone on to dismiss the revision application before it on the basis that the Respondent was in a position to establish a prescriptive right.
34. This is a self-contradictory conclusion. Section 3 of the *Prescription Ordinance* entitles a '**defendant in any action**' to a decree in his favour where such defendant establishes proof of undisturbed and uninterrupted possession of the land or immovable property in suit by a title adverse to or independent of that of the claimant or plaintiff in such action for a period longer than ten years.
35. If an application under Section 29P *People's Bank Act* is not an action within the meaning of Section 10 of the Ordinance, it cannot be an action within the meaning of Section 3 of the Ordinance.

36. Moreover, as the Appellant submitted, with the support of many judicial authorities, evidence of mere possession is insufficient for the purpose of Section 3 of the *Prescription Ordinance*. The Respondent has not set up a claim of prescriptive rights and adduced evidence to that effect before the District Court.
37. Accordingly, I answer the first question of law in the affirmative. Learned Judges of the High Court of Civil Appeal have erred in law dismissing the Application of the Petitioner on the basis that the Respondent is in a position to establish a prescriptive right to the said property.

Second Question of Law

38. The conclusion that the proper remedy would have been in an action *rei vindicatio* was reached on the erroneous finding that the Respondent was in a position to establish prescriptive rights.
39. As the answer to the first question of law was in the affirmative, the Appeal must be allowed on that basis alone. Therefore, the answer to this question of law is inconsequential.
40. I do not see it necessary to engage in the academic exercise of considering when a *rei vindication* action must be preferred instead of an application under Section 29P *People's Bank Act*.

CONCLUSION OF THE COURT

41. In view of the answers to the questions of law, the Appeal is allowed. Other objections taken by the Respondent before the District Court have not been placed for consideration before this Court.

42. Therefore, I set aside the order of the District Court of Colombo dated 09th February 2016 and the Judgment of the High Court of Civil Appeal dated 01st August 2019 and direct the District Judge to make the order *nisi* entered in the said application absolute as pleaded in paragraph (e) of the prayer to the Petition before this Court.

Appeal Allowed.

JUDGE OF THE SUPREME COURT

JAYANTHA JAYASURIYA, PC, CJ

I agree.

CHIEF JUSTICE

MURDU N.B. FERNANDO, PC, J

I agree.

JUDGE OF THE SUPREME COURT