OKANDA FINANCE (PVT) LTD
v
DIRECTOR, DEPARTMENT OF SUPERVISION OF NON-BANK FINANCIAL INSTITUTIONS AND OTHERS

COURT OF APPEAL.
SALEEM MARSOOF PC, J. (P/CA) AND
SRIPAVAN, J.
CA 1758/02.
JUNE 4,10 AND 29, AND
JULY 7, 28, 2004.

Finance Companies Act, No. 78 of 1988, sections 11, 12 (5), 36 (1), 43 and 48 - Petitioner engaged in financial business? – Failure to comply with order of Central Bank – Could the petitioner impugn the order without a prayer for quashing of same – What is the information that comes within section 11? – Mala fide – Monetary Law Act,No. 8 of 1949 - section 45 (1) – Secrecy.

The petitioner sought to quash the notices issued by the respondent requiring the petitioner company 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, in respect of the failure of the petitioner company to comply with the request made by the 1st respondent by her letter P6 for certain documents and information and further sought to prevent the 1st respondent from conducting any further inquiry with respect to the activities of the company. It was the position of the petitioner company that at no time, it was engaged in finance business.

The petitioner contended that,

(1) No information can be called for in terms of section 11 in that, the respondent has already formed an opinion.

(2) The information called for does not fall with the information that could be called for in terms of *section* 11.

(3) Respondent had acted *mala fide.*

Held:

(i) Despatch of letter P3 (a) does not connote that investigations in terms of section 11 (1) of the Finance Companies Act have been concluded or that an opinion had been formed as contemplated by the last limb of *section* 11 (1). The petitioner company was not in existence at the time P3 (a)

was written, as it was incorporated nearly four months after P3 (a) was written and the letter does not concern the petitioner company at all.

(2) P3 (a) was written in the course of and not after the conclusion of the investigation into the affairs of Okanda Finance. Opinion contemplated in the last limb of section 11 (1) could not have been formed at the time P3 (a) was written. Therefore the 1st respondent is not barred from investigating into the affairs of the petitioner company by reason only of having written P3 (a).

(3) 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.

(4) The amount of information and documentation that can be required in terms of section 11 (1) is considerably wide. There is no doubt that the 1st respondent is entitled to call for particulars and documents to ascertain the true position regarding the business activities of the petitioner company – it is in the interest of depositors that there is a full and complete investigation by the 1st respondent as to whether the purported credit investment and other forms of investments by the petitioner company were in fact disguised deposits mobilized from the public.

This is clearly necessary for the purpose of deciding whether the petitioner was engaged in 'finance businesses'.

(5) The necessity to request for detailed information is also evident from the fact that section 43 of the Finance Companies Act permits judicial review of any determination that may be made by the Monetary Board in terms of section 11 (2).

(6) Allegation of malice has been made belatedly and on frivolous grounds by the petitioner merely to avoid compliance with the law.

"*Per* Saleem Marsoof, J. (P/CA) –

"This is an exercise in futility as the petitioner cannot impugn P6 – the letter calling for certain documents and information without a prayer for the quashing of the order contained in P6 – a ground not pleaded cannot be taken up in the course of the hearing.

APPLICATION for a writ of *certiorari* / prohibition.

Cases referred to:

1. *Salomon* v *Saloman & Co.* – 1897 AL 22.

2. *Trade Exchange (Ceylon) Ltd.* v *Asian Hotels Companies Ltd* – 1981 - 1 Sri LR 67

3. *Viswalingam and others* v *Liyanage and others* –1983 2 Sri LR 311.
4. *Ceylon Mineral Water Ltd.* v *District Judge, Anuradhapura* - 70 NLR 312
5. *D. A. Gunaratne* v *Principal, Godagame Anagarika Dharmapala Kanishta Vidyalaya* – CA 388/02 CAM 17.07.02.
6. *Appapillai Amirthalingam* v *Dayaratne Dissanayake – Commissioner of Elections* – 1980 2 Sri LR 285.
7. *Dawson Silva* v *The Monetary Board of the Central Bank of Sri Lanka* – 1995 – 1 Sri LR 344 at 346.
8. *Benedict and others* v *Monetary Board of the Central Bank of Sri Lanka and others* - (Pramuka Bank case) – 2003 3 Sri LR 68.
9. *Seneviratne and others* v *Urban Council of Kegalle and others* – 2001 3 Sri LR 111-112.
10. *Culasubadhra* v *The University of Colombo* – 1985 1 Sri LR 244 at 264.
11. *J. R. Textiles Industries* v *Minister of Finance* – 1981 2 Sri LR 238 at 286.

Romesh de Silva PC with *Hiran de Alwis* for petitioner.

P. A. Ratnayake PC Additional Solicitor General with *Riad Ameen* State Counsel for respondents.

Cur.adv.vult.

September 22, 2004.
SALEEM MARSOOF, J,.P.C. P/CA

This application is connected to CA Application No. 1757/2001 filed by Okanda Investments (Pvt) Ltd. (hereinafter referred to as 'Okanda Investments') which is said to be a "sister company " of the petitioner, Okanda Finance (Pvt) Ltd. When these cases were taken up for hearing on 4th June 2004, learned Counsel agreed that both these applications may be for convenience taken up for argument and decided together. The matters in dispute and the relief sought in these cases are substantially the same, but as some of the issues that arise in this case do not arise in the order and *vice versa*, it is considered appropriate to deal with these applications in two separate judgments.

Okanda Finance (Pvt) Ltd. (hereinafter referred to as 'Okanda Finance') has filed this 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 (1st respondent,) 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 by her letter dated 12th September 2002 (P6) for certain documents and information. Okanda Finance has also sought a Writ of Prohibition preventing the respondents from conducting any further inquiry with respect to the activities of the said company.

By letter dated 12th September 2002 (P6), the Chairman / Managing Director of Okanda Finance was required by the 1st respondent, Director of the Department of Supervision of Non-Bank Financial Institutions of the Central Bank of Sri Lanka, to produce the following information and documents (set out in the third paragraph of P6) relating to the business of Okanda Finance:

(1) full names and addresses of Directors;

(2) business registration number and date of incorporation of the Company

(3) names of principal officers of the Company;

(4) list of employees;

(5) list of investors / depositors with dates of acceptance of money, capital amount of money accepted, rate of interest (or return) agreed and the total amount collected and outstanding as at 31st March 2002

(6) certified specimens of certificates issued to investors / depositors upon receipt of funds under different schemes;

(7) details of loan schemes,

(8) list of borrowers with amounts granted, dates of granting, rate of interest, and amount outstanding as at 31st March 2002;

(9) certified specimens of instruments used in granting loans under different schemes;

(10) list of investments in treasury bills, bank deposits, or any other companies and outstanding as at 31st March 2002; 50

(11) details of transactions with Okanda Investments (Pvt) Ltd. during the past two years; and

(12) cash book and general ledger for the year ended 31st March 2002.

The respondents contend that the 1st respondent was entitled to call for the above documents and particulars under section 11 of the Finance Companies Act, No. 78 of 1988, as subsequently amended, which is quoted below:

> (1) The Director or any officer authorized by him may require any person or a body of persons to furnish him with such 60 information as he may consider necessary to ascertain whether such person or body of persons is carrying on finance business, and for this purpose, may require the production of, and examine any books or records relating to such person or body of persons, and *if he is of the opinion* that such person or body of persons is carrying on *finance business*, report such fact to the (Monetary) Board.
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> (2) If the Board, on consideration of a report under sub section (1) *determines that a person or body of persons is carrying on finance business,* it shall require such person or 70 body of persons to comply with the requirements of the Act within a specified period of time, and where it fails to do so, shall have the power to give directions and take such steps as it considers necessary to safeguard depositors, including the power to wind up persons or a body of persons, in which event the provisions of section 18 shall, *mutatis mutandis*, apply.
>
> (3) Any person or body of persons required to furnish information or to produce any books or records under subsection (1) shall furnish such information or produce such 80 books, records or documents to an officer authorized by the Director and shall comply with any direction or requirements made under subsection (2).

(4) Without prejudice to the generality of subsection (1) the Board may require any person or body of persons to furnish information as may be necessary to ascertain whether any sum of money accepted, borrowed or solicited by such person or body of persons is a *deposit.*

It has been strenuously contended on behalf of Okanda Finance that the 1st respondent was not entitled to call for the information and documents set out in the third paragraph of P6, as the said company at no time was engaged in finance business. At the hearing of this application, learned President's Counsel appearing for Okanda Finance invited the attention of court to the following definition of the phrase 'finance business' contained in section 46 of the Finance Companies Act:- 90

"finance business" means the business of acceptance of money by way of deposit the payment of interest thereon *and*-

(a) the lending of money on interest ; or

(b) the investment of money in any manner whatsoever; or 100

(c) the lending of any money on interest and the investment of money in any manner whatsoever;

Learned President's Counsel for Okanda Finance submitted that in terms of the aforesaid definition, the 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 or money, or both. Learned President's Counsel contended that Okanda Finance had not taken any money on deposit from the public, and that the investment made by its "sister company" Okanda Investments (Pvt) Ltd. in its business activities would not bring the business of Okanda Investments or Okanda Finance within the definition of 'finance business' as these two companies ought to be treated as one entity. Learned President's Counsel has submitted that there is in fact no violation of the Finance Companies Act when the two companies are taken together. 110

At the outset it may be stated that for the disposal of this application it is not necessary for this court to decide or express any

opinion as to whether Okanda Investments and Okanda Finance should be treated as a single entity for purposes of the Finance Companies Act. No doubt the principle in *Salomon* v *Salomon & Co* (1) (which has been followed by our courts in decisions such as *Trade Exchange (Ceylon) Ltd.* v *Asian Hotels Corporation Ltd.* (2) and *Visvalingam and Others* v *Liyanage and Others* (3) as well as the line of correspondence between Okanda Finance and the 1st respondent will militate strongly against such a contention. However, this is a matter that needs to be investigated by the 1st respondent for the purpose of forming an opinion as to whether Okanda Finance is carrying on finance business and if so, reporting the matter to the 2nd respondent Monetary Board as contemplated by section 11(1) of the Finance Companies Act. Indeed, the position of the respondents is that the question whether Okanda Finance is engaged in finance business or not is one that can only be decided after the investigation commenced in terms of section 11 of the Finance Companies Act with respect to Okanda Finance is concluded. However, the 1st respondent has set out in paragraph 9(d) of her affidavit dated 30th January 2003 the evidence that has hitherto been collated in the course of the investigation, and claims that the said evidence suggests that Okanda Finance was at the relevant time engaged in finance business.

It is necessary to outline the circumstances that culminated in the letter dated 12th September 2002 (P6) and a similar letter of the same date produced in the connected case CA Application No. 1757/2002 marked P6 being written by the 1st respondent, Director of the Department of Supervision of Non-Bank Financial Institutions of the Central Bank of Sri Lanka to Okanda Investments and Okanda Finance calling for certain information and documents set out in the third paragraph of the said letter. It is in evidence that the Department of Supervision of Non-Bank Financial Institutions of the Central Bank of Sri Lanka headed by the 1st respondent had received several petitions from members of the public complaining that certain advertisements have been published in the newspapers by Okanda Investments inviting the public to deposit money with the said company. Copies of the petitions dated 1st July 1998, 18th August 1998 and 12th November 1998 were

produced in CA Application No. 1757/2002 marked respectively 1R1(b) and 1R1(c) along with the affidavit of the 1st respondent filed in that case. To 1R1(a) was also annexed a copy of an advertisement allegedly published by Okanda Investments inviting 160 the public to deposit money with it under a 'Credit Investment Scheme' in return for a payment of 24% interest per annum, The 1st respondent's Department has also taken note of certain advertisements to the same effect that appeared in the Sunday Observer of 15th August 1999 and 4th June 2000 marked respectively 1R2(a) and 1R2(b). The 1st respondent's Department also managed to obtain a specimen certificate issued by Okanda Investments in acknowledgment of such a credit investment a copy of which has been tendered to court marked 1R2(c) in the connected case. 170

It is also in evidence that Okanda Investments submitted to the 1st respondent the Financial Statements for the years 1998/1999, 1999/2000 and 2000/2001 produced in the connected case marked respectively 1R3(a),1R3(b) and 1R3(c) relating to Okanda Investments during the course of investigations conducted by the said Department. It appeared from the aforesaid Financial Statement marked 1R3(a) that Okanda Investments owed the aggregate sum of Rs. 5,381,502/- to about 56 persons as at 31st March 1999. This liability was listed under the category "Non-Current Liabilities" at page 12 of the Financial Statements for the 180 year 1998/1999 marked 1R3(a). The sums so owed ranged from Rs.10,000/- to Rs.400,000/-. It is possible that these sums may have been deposited by the public in Okanda Investments under the aforesaid 'Credit Investment Scheme' in response to the aforesaid advertisements. In the Financial Statements marked 1R3(b) the aforesaid "Non-Current Liabilities" appears to have been renamed as "Credit Investment" whilst in the Balance Sheet it continues to be identified as "Non-Current Liabilities". It appears from Note 7 of the Balance Sheet as at 31st March 2000 contained in the Financial Statements marked 1R3(b) that the number of 190 persons suspected to have deposited money with Okanda Investments under the said 'Credit Investment Scheme' has increased to 100, and the aggregate sum of money suspected to

be deposits appears to have increased to 9,886,504/-. However the Balance Sheet of Okanda Investments as at 31st March 2001 contained in the Financial Statements marked 1R3(c) do not contain any reference to the money suspected to have been deposited.Instead it identifies the sum of Rs.9,886,504/- as a liability to Okanda Finance (Pvt) Ltd. as at 31st March 2000. Learned Additional Solicitor General in the course of his submissions pointed out that if this sum of Rs. 9,886,504/- was the aggregate of the monies originally deposited by the public under the so called 'Credit Investment Scheme', that amount should have continued to be reflected as a liability of Okanda Investments to the depositors in question and it could not represent money owed to Okanda Finance. Learned President's Counsel in the course of his reply submitted that this sum reflected investments by Okanda Investments (Pvt) Ltd. in Okanda Finance. I am of the view that if that be the correct position, the sum of Rs. 9,886,504/- should have been shown as an asset in the accounts of Okanda Investments instead of as a liability. In addition the aggregate of the sum owed to the respective depositors should have continued to be reflected as a liability in the accounts of Okanda Investments. I am of the opinion that the aforesaid submission made on behalf of Okanda Investments and Okanda Finance cannot be reconciled with the Financial Statements of Okanda Investments mentioned above. Furthermore the Financial Statements marked 1R3(c) do not provide any explanation as to what happened to the aggregate sum of Rs. 9,886,504/- owed by Okanda Investments to the said depositors. The omission of this information in the Financial Accounts in question is a cause for concern. Furthermore Okanda Finance was only incorporated on 30th October 2000 and therefore could not have been a creditor to the Okanda Investments as at 31st March 2000 as reflected in the aforesaid Financial Statements marked 1R3(c) this in fact raises serious concerns with regard to the accuracy of the accounts furnished by Okanda Investments. There can be no doubt that the aforesaid transactions have to be investigated further as they involve funds deposited by the public.

It is also in evidence that Okanda Finance published several advertisements in newspapers marked P12(a), 1R1(a) and 1R1(b)

as well as a brochure a copy of which is marked 1R1 (c) soliciting deposits of money from the public under a 'Credit Investment Scheme' in return for payment of interest varying from 13% per annum for investments of 3 months up to a maximum of 24% for a period of 5 years. Concern has also been expressed regarding institutions that are alleged to be accepting deposits including Okanda Finance at certain meetings of the Finance Sector Reforms Committee held on 24th July 2002 and 21st August 2002 as evidenced by the minutes marked 1R2(b) and 1R2(c). It is also in evidence that the Department of the 1st respondent had received a communication dated 29th August 2002 marked 1R2(a) from the Registrar of Companies stating that Okanda Finance was engaged in taking deposits from the public in the form of 'Credit Investment'. It appears from the "draft" Financial Statements of Okanda Finance for the year ending 31st March 2001 and 31st March 2002 marked respectively P10 and P11 that such credit investments amounted to Rs.18,524,010/- at 31st March 2001 and Rs. 50,295,010/- as at 31st March 2002. However unlike in the case of Okanda Investments, the said accounts do not indicate the names or the amounts provided by the said investors who are suspected to be depositors. Similarly Okanda Finance has also described the manner in which the 'Credit Investments' would be utilised in the brochure marked 1R1(c). The said brochure states that the funds would be reinvested in investments involving Hydro Power Projects, Property Development Projects, Teak Plantation Projects, Forestry Projects, Agricultural Projects, and Real Estates Business. While the possibility that Okanda Finance utilised funds so deposited by the public in the aforesaid projects cannot be ruled out without a proper investigation, it appears from P10 and P11 that Okanda Finance has invested sums of Rs.17,496,510/- and Rs. 25,215,852.25 respectively in Okanda Investments. There can be no doubt that the aforesaid transactions have to be investigated further as they involve funds deposited by the public.

Although Okanda Investments and Okanda Finance have in their letters dated 26th August 2002 marked P5 suggested that there was a distinction between 'credit investments' and deposits, and in paragraph 8 of its petition filed in this court Okanda Finance

admits that it "borrows monies" but suggests that is not the same as accepting money by way of deposits, at the hearing of this application learned President's Counsel appearing for Okanda Investments and Okanda Finance did not persist with these subtleties. In any event, in my view, the question whether the aforesaid credit investments were in fact 'deposits' for the purposes of the definition of 'finance business' contained in section 46 of the Finance Companies Act is a matter that requires further investigation. I am however of the opinion that the aforesaid material constituted reasonable and probable cause for the Department of Supervision of Non-Bank Financial Institutions to suspect that Okanda Investments and Okanda Finance had invited the public to make deposits with the said company in return for payment of interest payable annually. It is important to note that the aforesaid definition of 'finance business' requires that money accepted as deposits should be utilised in one of the ways contemplated by paragraphs (a), (b) or (c) therein. In this regard it was submitted on behalf of Okanda Investments and Okanda Finance that the 1st and 2nd respondents treated both Okanda Investments and Okanda Finance as one legal entity and that therefore transactions between the two companies cannot amount to 'finance business'. While this is a matter that is under investigation and it may be premature to come to any conclusions in this regard at this stage, it is also possible that Okanda Investments and Okanda Finance have lent or invested the funds deposited by the public to other persons. These too are matters still under investigation as evident from the information and documents requested from these companies by P6.

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. Learned Additional Solicitor General relied on the decisions of our courts in *Ceylon Mineral Waters Ltd.* v *District Judge, Anuradhapura*(4) and *D.A.Gunasekera* v *the Principal Godagama Anagarika Dharmapala Kanishta Vidyalaya*(5) for the proposition that prerogative relief by way of *certiorari* and *mandamus* are not granted prematurely. In *Appapillai Amirthalingam* v *Piyasekera, Commissioner of Elections* (6) the Court of Appeal refused to intervene in an election related matter as it was premature to do so. In any event, at this stage it is not necessary for this court to decide or express any opinion as to whether Okanda Finance was or is in fact engaged in finance business, the only issue for determination by this court being whether the notices dated 25th September 2002 (P14) and 27th September 2002 (P15) issued by the 1st respondent ought to be quashed on the basis that the 1st respondent was not entitled to call for the information and documents set out in the third paragraph of the letter dated 12th September 2002 marked P6. I am of the opinion that there is overwhelming evidence to justify the action of the 1st respondent in calling for the aforesaid information and documents from Okanda Finance. I also note that Okanda Finance has not sought the intervention of this court to quash the letter dated 12th September 2002 marked 'P6'. This letter was clearly in the custody of Okanda Finance at the time this application was filed, but the said company had opted not to ask for any relief to have it quashed by *certiorari*.

At the hearing of this application, learned President's Counsel for Okanda Finance launched a three pronged attack on the *vires* of the 1st respondent. The submissions of learned President's Counsel in this regard was encapsulated in paragraph 4 of the written submissions which were filed subsequently in the following terms:-

(a) no information can be called for in terms of section 11 of the aforesaid Act, in that the respondent has already formed an opinion;

(b) in any event, the information called for by P6 does not fall within the information that could be called for in terms of

section11; and

(c) the respondent has at all time acted *mala fide.*

For the contention that the 1st respondent has already formed an opinion in regard to the question whether Okanda Finance carried on finance business, and is therefore not entitled to investigate this matter any further, Okanda Finance relied on the letter dated 5th July 2000 marked P3 (a) sent on behalf of the 1st respondent to the Director General of Commerce. This letter appeared to be a reply to a letter dated 3rd July 2000 addressed to the 1st respondent by the Director General of Commerce, a copy of which had not been produced by any of the parties with their pleadings. In the course of the hearing on 29th June 2004 when the learned Additional Solicitor General appearing for the respondents was on his feet, questions arose regarding the context in which the letter dated 5th July 2000 marked P3 (a) had been despatched. Learned Additional Solicitor General graciously agreed to tender to court a copy of the letter dated 3rd July 2000 referred to in P3 (a), along with an appropriate motion filed with adequate notice to learned President's Counsel for Okanda Investments and Okanda Finance to enable him to address court, if necessary, in regard to this document, in the course of his reply to the submissions of the learned Additional Solicitor General. Accordingly, a certified copy of the letter dated 3rd July 2000 was tendered to court with the motion dated 20th July 2004. It was stated in the said motion that there were two annexures to the said letter which were respectively, a copy of the letter dated 17th September 1999 sent by the Chief Legal Officer of Okanda Investments to the Assistant Director of Commerce and a letter 19th January 2000 sent by the Director General of Commerce to the 1st respondent, a copy of the former being attached to the latter, and the letter expressly referred to in the said letter dated 3rd July 2000,and the said two annexures too were tendered to court. The letter dated 17th September 1999 had been written on behalf of Okanda Investments to the Assistant Director of Commerce in pursuance of an application made by the said company to be enlisted as a Credit Agency in terms of the Mortgage Act. In the said letter the Chief Legal Officer of Okanda Investments had expressly stated that the main fields of business

of Okanda Investments are:-

1. Money lending;
2. Accepting Credit Investments; 380
3. Providing Working Capital, as a Credit Agency, to Business Establishments;
4. Providing Credit Facilities for Development Projects; and
5. Hire Purchase business in movable and immovable property.

It would appear that this disclosure prompted the Director-General of Commerce by his letter dated 19th January 2000 to inquire from the 1st respondent whether the approval of the Central Bank was required to carry on the aforesaid business, and as there was no reply from the 1st respondent, the letter 390 dated 3rd July 2000 marked P3(a) was sent as a reminder. In view of the importance of this letter, it is quoted below in full:-

DEPARTMENT OF COMMERCE

P.O.Box 1507, 4th Floor, Rakshana Mandiraya, Colombo 2,
Sri Lanka

My No : COM/MD/7-V 3rd July, 2000.

Director
Department of Supervision of Non-Bank Financial Insts.
41 Renuka Building,
Janadhipathi Mawatha 400
Colombo 1

CENTRAL BANK APPROVAL FOR FINANCIAL SERVICES-

OKANDA INVESTMENTS (PVT) LTD

Further to our letter dated 19th January, 2000, on the above subject. (copy attached).

It would be greatly appreciated if you will inform us whether the approval of the Central Bank is required for this company to carry

out its activities indicated in their letter addressed to us dated 17th September, 1999, a copy of which is also attached herewith for your reference. 410

As this application has been pending for a long time for seeking the approval as a Credit Agency under the Mortgage Act, your early reply will be highly appreciated.

Thank you for your kind co-operation.

Yours faithfully,

Sgd/
D W JINADASA
Assistant Director of Commerce
for Director-General of Commerce

It was in response to this letter that the letter dated 5th July 2000 420 marked P3(a) had been sent on behalf of the 1st respondent to the Director-General of Commerce. This letter was as follows :-

DEPARTMENT OF SUPERVISION OF NON-BANK FINANCIAL INSTITUTIONS

No. 41 Janadhipathi Mawatha, Colombo 1

My No : 24/01/024/0003/001
Your No : COM/MD/7-X

5th July, 2000.
Atten : Mr D W Jinadasa
Assistant Director

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Director-General of Commerce,
Ministry of Internal & International
Commerce & Food,
Department of Commerce,
4th Floor, Rakshana Mandiraya,
Colombo 2

Dear Sir,

CENTRAL BANK APPROVAL FOR FINANCIAL SERVICES-

OKANDA INVESTMENTS (PVT) LTD

Reference : Your letter dated 3rd July 2000, on the above subject. 440

One of the main fields of business of the company is stated to be acceptance of credit investments. However, an investigation conducted by our Department revealed that the company is engaged in the business of acceptance of deposits from the public on interest and lending of money on interest. Such a company is required to obtain registration from the Central Bank under the provisions of the Finance Companies Act, No. 78 of 1988 as amended by the Act, No. 23 of 1991.

The Central Bank is contemplating legal action against the company for violation of the provisions of the Act. 450

Yours faithfully

Sgd/

for Director

Learned Additional Solicitor General has emphasised that P3(a) was only a response from the office of the 1st respondent to the letters dated 19th January 2000 and 3rd July 2000 addressed to the 1st respondent's predecessor in office by the Assistant Director of Commerce seeking certain clarifications in regard to the disclosures made by Okanda Investments in its letter dated 17th September 1999. He submits that the special context in which the 460 letter marked P3(a) was written supports the position that it was not intended to be an opinion referred to in the last limb of section 11 (1) of the Finance Companies Act. He has also pointed out that prior to the writing of the letter marked P3(a), the 1st and 2nd respondents had received several petitions alleging that Okanda Investments and Okanda Finance were accepting deposits from the general public. He submitted that the 1st and 2ndrespondents themselves had noticed some newspaper advertisements during this period, and it was in these circumstances that investigations in regard to the activities of Okanda Investments and Okanda 470 Finance were commenced by 1st and 2nd respondents.

I cannot agree with the submission of the learned President's Counsel for Okanda Finance that the despatch of the letter dated

5th July 2000 marked P3(a) precludes the 1st respondent from calling for information from Okanda Finance in terms of section 11 of the Finance Companies Act. In my view, the despatch of the said letter does not connote that investigations in terms of section 11(1) of the Finance Companies Act have been concluded or that an opinion had been formed as contemplated by the last limb of section 11(1) of the said Act. In fact Okanda Finance was not in existence at the time P3(a) was written as it was incorporated only on 30th October 2000, nearly 4 months after P3(a) was written and the letter does not concern Okanda Finance at all. It is manifest from letter marked P6 that the information contemplated in the first limb of section 11(1) was only requested from Okanda Finance after P3(a) was written. It is therefore plain that P3(a) was written in the course of, and not after the conclusion of, the investigation into the affairs of Okanda Investments. In any event, the opinion referred to in the last limb of section 11(1) is ordinarily formed after calling for the requisite information from the person or a body of persons being investigated in terms of the first limb of section11(1). Thus, to my mind, the opinion contemplated in the last limb of section 11(1) could not have been formed at the time P3(a) was written. 480 490

It is significant to note that the 1st respondent is required to submit a report to the 2nd respondent Monetary Board immediately after the opinion referred to in the last limb of section 11(1) is formed. The section contemplates the opinion to be formed and the report to be submitted personally by the Director of Non-Banking Supervision. It is apparent from section 11(2) that the report should contain considerable details to enable the 2nd respondent Monetary Board to make its determinations as contemplated by that provision. Thus full particulars regarding the number of depositors, their identities, the quantum of their deposits, the manner in which the funds so received have been utilised, dispersed or invested have to be included in the report. Only a detailed report with all material particulars will enable the 2nd respondent to make an informed decision with a view of safeguarding the interest of the public who may have deposited money with Okanda Finance. There is no provision in the Act analogous to section 48, providing for the delegation of the 500 510

functions of the Director of Non-Banking Supervision under section 11 to a subordinate officer such as the one who has signed the letter marked P3(a). Although the said letter had been written on 5th July 2000 neither the officer who signed P3(a) nor the 1st respondent has submitted any report in terms of the last limb of section 11(1) to the 2nd respondent Monetary Board. I therefore have no difficulty in finding that the 1st respondent had not formed an opinion as contemplated by the last limb of section 11(1) of the Finance Act at the time of writing of P3(a). Even if an opinion had been formed, it concerned Okanda Investments, and not Okanda Finance.

It is evident from the Financial Accounts marked 1R3(a) to (c) that Okanda Investments has had transactions with Okanda Finance involving certain funds which the 1st respondents had reasons to suspect had been raised by Okanda Investments from members of the public as deposits. In fact, in the course of oral submissions, learned President's Counsel was heard to say that the transfer of funds from Okanda Investments to Okanda Finance did not amount to an investment as they formed a single entity. This is an important argument which the 1st respondent has to carefully consider before making her report in terms of section 11(1). In fact the information called for by items (1),(2),(3),(4) and (11) in P6 are in my opinion extremely crucial for the 1st respondent in coming to her findings on this issue. Therefore, I am of the opinion that it would be neither reasonable nor prudent to regard the investigations relating to Okanda Investments as well as Okanda Finance as having been brought to a culmination by reason of the writing of P3(a). In my opinion, the 1st respondent is not barred from investigating into the affairs of Okanda Investments or Okanda Finance by reason only of having written P3(a).

Learned President's Counsel for Okanda Finance has also submitted that the information called for by the letter dated 12th September 2002 (P6) does not fall within the information that could be called for under section 11 of the Finance Companies Act. It was submitted on behalf of Okanda Finance at the hearing of this application that section 11(1) only permitted the respondents to ask Okanda Finance the following four questions: (a) Whether the

petitioners accepted money by way of deposits? (b) Whether the petitioner paid interest on such deposits?(c) Whether the petitioners lent the money on interest? (d) Whether the petitioners invested the money? It was further submitted on behalf of Okanda Finance that the information requested in the letter dated 12th September 2002 (P6) and the letter dated 29th August 2002 (P7) were of much greater detail than that which was permitted by section 11(1) of the Finance Companies Act. 550

In this context it is necessary to stress 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. As Kulatunga, J. observed in the course of his judgment in *Dawson Silva v The Monetary Board of the Central Bank of Sri Lanka and Another,*[7] " The main object of the Act appears to be to safeguard the interests of depositors" The said Act confers on the Director of the Department of Supervision of Non-Bank Financial Institutions, which is the Department in the Central Bank to which the subject of finance companies is assigned, and the Monetary Board important powers and functions with respect to finance companies. In terms of section 11(1) of the Act, the said Director or any officer authorized by him may require any person or a body of persons to furnish him with such information as he may consider necessary to ascertain whether such person or body of persons is carrying on finance business. It is also relevant to note that in terms of section 12(5) of the Act, the Director may, where he considers it necessary to ascertain the true condition of the affairs of a finance company and to ascertain whether such finance company is carrying on business in a manner detrimental to its present or future depositors, by notice in writing require any person whom he considers to have information relating to the finance company, to furnish such information to him or to any officer or auditor authorized by him. Section 12(6) of the Act provides that for the purpose of ascertaining the true condition of the affairs of the finance company, the Director may if he considers necessary also examine the business of any company which is or has at any relevant time been a holding company or subsidiary company of the finance company in question, or any subsidiary of a holding company of that finance 560 570 580

company, or an associate company of that finance company.

I have no difficulty in agreeing with the contention of the learned Additional Solicitor General that the ambit of information and documentation that can be requested in terms of section 11(1) of the Finance Companies Act is considerably wider than the confines of the aforesaid four questions. In this regard it is relevant to note that prior to the despatch of P6, the 1st respondent requested the Okanda Finance by item (3) in P4 to furnish documentation regarding the funds that Okanda Finance mobilized from the public. Okanda Finance in paragraph 3 of its letter dated 26th August 2002 marked P5 refrained from denying that it mobilized funds from the public and annexed to the said letter specimens of the financial instruments and other documents used by Okanda Finance in connection with its 'Credit Investments Scheme'. A comparison of this letter with the letter of the same date sent by Okanda Investments to the 1st respondent and annexed to the affidavit of the 1st respondent filed in CA 1757/2002 establishes very clearly that Okanda Finance was at least honest enough to admit that it mobilized funds from the public. However, as would appear from the Minutes of the Meeting which the 1st respondent had on 26th August 2002 with representatives of Okanda Investments and Okanda Finance marked 1R4, M.B. de Silva representing both companies denied accepting deposits and took up the position that they only accepted 'Credit Investments' and 'Green Reward Teak Plantation Project Investments'. In paragraphs 6 to 9 of its petition, Okanda Finance has categorically pleaded that it does not carry on finance business, but only borrows monies from Banks and other financial institutions. It has also expressly stated that it has no investments made by utilizing monies of depositors. Some of these positions are clearly contradicted by the evidence in the possession of the 1st respondent to which reference has already been made, and there is no doubt that the 1st respondent is entitled to call for particulars and documents to ascertain the true position regarding the business activities of Okanda Finance. In particular it is in the interest of depositors that there is a full and complete investigation by the 1st respondent as to whether the purported 'Credit Investments' and the other forms of investments invited by Okanda Finance were in fact disguised deposits mobilized from the public.

This is clearly necessary for the purpose of deciding whether Okanda Finance was engaged in 'finance business' within the meaning of the Finance Companies Act.

Learned President's Counsel for Okanda Finance also submitted that the 1st respondent is only permitted to ask whether the Okanda Finance invested the money it had in its hands, and is 630 not entitled to request for further information regarding the nature of the investments. It was contended by learned President's Counsel for Okanda Finance that the 1st respondent has requested unnecessary details about their investment in terms of item (10) in P6. I consider this an unrealistically narrow view of the ambit of the powers of the respondents. In paragraph 9 of petition filed in this case by Okanda Finance it has been specifically averred that the said company does not invest money received as deposits. However, there is strong evidence as already noted which suggests that Okanda Finance may be directly investing money accepted as 640 deposits. In these circumstances the 1st respondent necessarily has to investigate the affairs of Okanda Finance in greater detail so as to determine whether such investments were made with deposits received from the public. It is clearly inadequate to close the investigation with the negative position taken up by Okanda Finance to the single question as to whether it invested money deposited by the public. It is clear that even the other items of information called for by P6 have been requested with the object of ascertaining whether Okanda Finance was engaged in 'finance business'. It is important to remember that the 1st respondent is 650 required to present a report to the 2nd respondent Monetary Board in terms of section 11(1) of the Act after the investigation is concluded. The report to the 2nd respondent would require considerable details so that the 2nd respondent could make the determination referred to in section 11(2) of the Act. More specifically in terms of section 11(2) the 2nd respondent is empowered to take steps to safeguard the interest of depositors. This is the primary objective of investigation and the other proceedings taken in terms of section 11. The required information has to be gathered through the investigation referred to in section 660 11(1). This is because section 11 does not make express provision

for such an investigation after submission of the report to the 2nd respondent. Thus detailed information regarding the number of depositors, their identities, the quantum of their deposits, the manner in which the funds so received have been invested or utillised etc. must be set out in the report to the 2nd respondent. Otherwise, the 2nd respondent would not be in a position to make an informed determination in terms of section11(2) of the Act with a view of safeguarding the interests of the public who may have deposited money with the Okanda Finance. If the report merely 670 stated that the Okanda Finance accepted deposits and invested those deposits without making reference to the details of such deposits and investments, then, the 2nd respondent would be unable to make informed decisions to safeguard the depositors based on these bare statements alone. The necessity to request for detailed information is also evident from the fact that section 43 of the Finance Companies Act permits judicial review of any determination that may be made by the 2nd respondent Monetary Board in terms of section 11(2) of the Act.

It was also submitted on behalf of Okanda Finance that the 680 information requested included confidential information that could prejudice the said company if they were made available to its competitors. In this regard it is noted that section 45(1) of the Monetary Law Act, No 58 of 1949, as subsequently amended confers secrecy on any information that may be furnished to the 1st respondent. By the same provision the guarantee of secrecy has been extended to several other institutions, including banking institutions, which submit information to the various Departments of the Central Bank that are perhaps relatively more confidential than the information requested from Okanda Finance. If the information 690 requested was vitally confidential as Okanda Finance now contends, it is surprising that it had omitted to state so in the several letters written by it to the 1st respondent marked P5, P8 and P13. This omission to make reference to the confidentiality of the information in the letters written by Okanda Finance suggests that confidentiality was not a concern that it entertained when it avoided furnishing the information and documents called for by P6. The fact that the issue of confidentiality has been raised belatedly for the first time in this application casts doubts about the *bona*

fides of Okanda Finance. In any event, the law does not sanction the withholding of information on the basis of confidentiality alone, except in the very limited circumstances expressly provided for in the Evidence Ordinance. 700

The third ammunition in the three pronged attack on the *vires* of the 1st respondent launched by learned President's Counsel for Okanda Finance was the submission that the respondents were motivated by malice against the petitioners. It was submitted by the Additional Solicitor General appearing for the respondents that the following matters vitiate any inference of malice alleged by Okanda Finance against the respondents: 710

(a) Public interest requires that institutions that accept deposits from the general public are investigated and regulated. Consequently it is in the public interest that institutions that are suspected of accepting deposits from the public, such as Okanda Finance, are investigated.

(b) There are several other institutions, apart from Okanda Investments and Okanda Finance, that are under investigation by the 1st and 2nd respondents for allegedly accepting deposits from the general public. Consequently Okanda Finance has not been singled out for the purpose of investigation in this connection. 720

(c) The evidence that has been collated up to the present stage of investigation suggests that Okanda Finance may be engaged in finance business. Therefore there is adequate justification for investigating Okanda Finance for allegedly accepting deposits from the general public.

(d) The allegation of *mala fides* made by Okanda Finance is belated and it has been advanced in this application for the first time despite several prior correspondence with the 1st and 2nd respondents. 730

There is no doubt that the public interest requires institutions that accept deposits from the general public are investigated, regulated and supervised effectively to avoid financial loss and other dire consequences that may occur as highlighted in the recent decision of this court in *Benedict and Others* v *Monetary*

Board of the Central Bank of Sri Lanka and Others (Pramuka Bank case). (8) In this regard as averred in paragraph 15 of the affidavit of the 1st respondent, some of the institutions that have invited the general public to deposit their funds with them promising to pay high interest rates are not registered and regulated either in terms of the Finance Companies Act or other regulatory legislation such as the Banking Act, No. 30 of 1988 or the Monetary Law Act, No. 58 of 1949, as subsequently amended. Consequently these companies are not required to comply with norms such as capital adequacy ratios, maintenance of liquid assets, restrictions on lending to directors / relatives / related companies and other prudential norms imposed on institutions registered under the aforesaid regulatory legislation. The general public might invest in these companies simply attracted by the high interest rates, and get in to serious Pramuka type difficulties. It was suggested by the learned Additional Solicitor General that the general public might even mistake Okanda Finance as a company that is in fact registered in terms of the Finance Companies Act since it uses the word "Finance" as a part of its company name. Such members of the general public who deposit money run a serious risk of loosing their deposits since the above safeguards applicable to institutions registered under the Banking Act and Finance Companies Act are not applicable to these companies that are not so registered.

It was also stressed by the Additional Solicitor General that Okanda Investments and Okanda Finance were not being singled out, and there are more than 20 other institutions that are under investigation by the 1st and 2nd respondents for allegedly accepting deposits from the general public and enagaging in finance business. This is confirmed by the newspaper advertisement marked P16 filed along with the counter affidavit of Okanda Finance which lists the names of several companies/ institutions as being under investigation for allegedly accepting deposits from the public and engaging in finance business without proper registration under any of the aforesaid regulatory legislation.

The learned Additional Solicitor General has also emphasized that the allegation of *mala fides* has been belatedly raised by Okanda Finance. In the letters of Okanda Finance marked P5, P8

and P13 there is absolutely no suggestion that the respondents have been actuated by malice, and the allegation of *mala fides* has been made for the first time in the application filed in this court. The said allegation has been made on grounds, which if true, would have existed prior to the dates of the aforesaid correspondence. The main ground on which this allegation of *mala fides* has been made by Okanda Finance is that the 1st and 2nd respondent bear malice towards its official M.B. de Silva who was previously 780 employed with the 2nd respondent and that officers who were junior to the said M.B. de Silva were engaged in the investigation against Okanda Finance. If Okanda Finance felt that some of the officers investigating its affairs were for whatever reason biased against it, it should have named these officers and objected to the investigation being conducted by them, but Okanda Finance never availed of the many opportunities it had to do so. In any event, the 1st respondent has stated at paragraph 14 of her affidavit that she has never functioned as junior to the said M.B.E. Silva. Furthermore, the request for information made by the 1st 790 respondent in P4 has been partly complied with by Okanda Finance through P5. If Finance genuinely felt that the 1st and 2nd respondents were acting maliciously, it is unlikely that it would have written P5 and sent its representatives for the discussion that took place with the 1st and 2nd respondents on 26th August 2002. The allegation of malice surfaced only after additional particulars and documents were called for by P6. In this regard it is necessary to refer to the observations of J.A.N. de Silva J. in *Seneviratne and Others v. Urban Council Kegalle, and Others* (9) at 111-112

> "The petitioners have also submitted that there is malice in 800 respect of this acquisition. It is to be noted that question of malice and the absence of a public purpose are linked. In the instant case the presence of a public purpose negatives the allegations of malice. It is also significant to note that the allegation of malice was raised in the counter affidavit .... There must be specific evidence to establish and sustain the allegation of *mala fides.*"

On the question of "malice" it would be relevant to refer to the following observations with regard to standard of proof required for the allegation of *mala fides* to succeed. 810

"The plea of *mala fides* is raised often but it is only rarely it can be substantiated to the satisfaction of court. Merely raising a doubt is not enough. There should be something, specific, direct and precise to sustain the plea of *mala fides*. The burden of proving *mala fides* is on the individual making the allegation as the order is regular on its face and there is a presumption in favour of the administration that it exercises its power in good faith and for the public benefit." Principles of Administrative Law (Jain & Jain, 4th edition1988 page 564". 820

I am of the opinion that the evidence placed by Okanda Finance on the question of *mala fides* does not satisfy the aforesaid standard of proof. Indeed, I am also of the view that the allegation of malice had been made belatedly and on frivolous grounds by Okanda Finance merely to avoid compliance with the law. In the circumstances, the three pronged attack launched by the learned President's Counsel for Okanda Finance, on the *vires* of the 1st and 2nd respondents has to fail.

As noted at the outset, for the disposal of this application it is not necessary for this court to decide or express any opinion as to 830 whether Okanda Finance was or is in fact engaged in finance business. The only issue for this court is whether the notices dated 25th September 2002 (P14) and 27th September 2002 (P15) issued by the 1st respondent ought to be quashed on the basis that for the reasons urged by Okanda Finance the 1st respondent was not entitled to call for the information and documents set out in the third paragraph of the letter dated 12th September 2002 (P6) sent by the 1st respondent calling for certain documents and information. However, this would appear to be an exercise in futility as Okanda Finance cannot impugn P6 without a prayer for the 840 quashing of the order contained in the letter marked P6. As pointed out by this court in *Culasubadhra* v. *The University of Colombo*[10] in writ applications such as this, a ground not pleaded cannot be set up in the course of the hearing. In *J.B. Textile Industries* v *Minister of Finance* [11] 286 Parinda Ranasinghe, J. has observed-

"The petitioners' claim has not been presented in their

petitions, as in the *Padfield* case (supra), in the alternative - that, if the Minister is held not to be under a duty but to be vested with a discretion, then such discretion has not been exercised according to law. That being so, I do not think this court should consider the grant of relief upon a basis not expressly set out in the petitions and in respect of which the respondent was not called upon to meet in his statement of objections."

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For the above mentioned reasons I refuse this application and dismiss the same with costs fixed at Rs. 15,000 payable by Okanda Finance.

SRIPAVAN, J. - I agree.

Application dismissed.