

**HARJANI AND ANOTHER
VS
INDIAN OVERSEAS BANK AND OTHERS**

COURT OF APPEAL
SALEEM MARSOOF, P. C. (P/CA) AND
SRIPAVAN, J
C. A. NO. 1854/2003,
MAY 20, 2004,
JUNE 29, 2004 AND
JULY 8 AND 12, 2004

Writ of certiorari – Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 - Sale by public auction – Private Bank- is writ jurisdiction available? - Banking Act, No. 30 of 1988.

The petitioners sought to quash the Resolution of the 1st respondent – Indian Overseas Bank – adopted under section 4 of Act, No. 4 of 1990, whereby it had been resolved to sell by public auction, the property which was mortgaged to the 1st respondent Bank on the basis that it is *ultra virus* the provisions of the Act.

The 1st respondent Bank contended that the 1st respondent is a private Bank incorporated abroad which is engaged in the business of banking and is a licensed commercial bank and that it is not a public entity carrying out public functions and since it is a company which is not incorporated under any statute

enacted in Sri Lanka, and discharging functions which are not administrative in nature is not amenable to prerogative remedies.

Held :

1. The 1st respondent bank has sought to take advantage of the provisions of the Recovery of Loans by Banks (Special Provisions) Act relating toparate execution; these powers have been conferred by statute on any bank as defined in section 22 of the Act.
2. The Act lays down a special procedure for the exercise of the powers conferred on such banks.

Per Saleem Marsoof, P. C. (P/CA).

"I am of the opinion that this Court is bound to exercise supervisory jurisdiction over the exercise of such powers despite the fact that some at least of these Banks are local or foreign Banking Companies."

APPLICATION for a writ of certiorari – preliminary objection.

Cases referred to :

1. *Trade Exchange (Ceylon) Ltd., vs Asian Hotels Corporation* – (1981) 1 Sri LR 67
2. *Mendis vs Seema Sahitha Panadura Janatha Santhaka Pravahana Sevaya and others* – (1995) 2 Sri LR 284.
3. *Office Equipment Ltd., vs Urban Development Authority* – CA 1062/2000 – CAM 5.9.2003)
4. *Regina vs National Joint Council for the Craft of Dental Technicians* – (1953) 2 WLR 342.
5. *R vs Electricity Commissioner Ex parte* – *London Electricity Joint Committee Company Ltd.,* - (1924) 1 KB 171 at 205.
6. *O' Reilly vs Mackman* – (1983) 2 AC 237 at 279.
7. *R vs Criminal Injuries Compensation Board Ex parte Schofield* 1971 1 WLR 926.
8. *Ex parte Tong* – (1976) 1 WLR 1239.
9. *Ex parte Clowes* – (1975) 1 WLR 1353.
10. *Ex parte Cummins* – (1992) 4 Admin. LR 747.

11. *R vs Criminal Injuries Compensation Board ex parte P* – (1995) – 1 WLR 845.
12. *R vs Criminal Injuries Compensation Board Ex parte Lain* – (1967) 2 All ER 770 at 778.
13. *R vs Panel on Takeover and Mergers Ex parte Datain* – (1987) 1 QB 815.
14. *R vs International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd.*, (1993 1 All ER 422.
15. *The Governor and Company of the Bank of Scotland, Petitioners* – (1989) BCLC 700.
16. *R vs Fimbra Ex parte Cochrane* – (1991) BCLC 106.
17. *S. I. B. Anor vs Fimbria & Anor* (1992) – Chancery 268.
18. *R vs. Lautro Ex parte Ross* – (1992) 1 All ER 422.
19. *Saheer and others vs Board of Governors, Zahira College and others* (2002) 3 Sri LR 405.
20. *Board of Trustees of Maradana Mosque vs the Minister of Education and Another* – 68 NLR 217.

S. C. B. Walgampaya, P. C. with *L. K. I. Perera*, and *Rashani Meegama* for petitioners.

A. R. Surendran, P. C., with *K. V. S. Ganesharajan* for 1st respondent.

Cur. adv. vult.

November 4, 2004

SALEEM MARSOOF P/CA

The Petitioners filed this application seeking a writ of certiorari to quash the resolution of the 1st Respondent Bank adopted under Section 4 of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 as subsequently amended, whereby it had been resolved to sell by public auction the property which was mortgaged to the 1st Respondent Bank by the Petitioners. The 1st and 2nd Petitioners claim that they executed the Mortgage Bond marked 'A' bearing No. 4965 dated 8th February 2001 attested by D. M. Swaminathan, Notary Public, as security for the overdraft

facility provided to the 3rd Respondent by the 1st Respondent Bank. In the said Bond, the Petitioners are described as "sureties" and the 3rd Respondent is the "principal debtor". The Petitioners state that the Local Management Committee of the 1st Respondent Bank has adopted a resolution purportedly in terms of Section 4 of the Recovery of Loans by Banks (Special Provisions) Act to sell by public auction the property mortgaged to the 1st Respondent Bank by the Petitioners in view of the defaults made by the Petitioners and the 3rd Respondent in the repayment of monies due on the aforesaid Mortgage Bond. They claim that the said resolution, which has been published in the Gazette of the Democratic Socialist Republic of Sri Lanka dated 15th August 2003 marked C1 and certain newspapers of 16th August 2003 marked C2, is *ultra vires* the provisions of the Recovery of Loans by Banks (Special Provisions) Act insofar as in terms of the said Act, only a property mortgaged by a person to whom a loan is granted by the Bank, is liable to be sold by public auction. The Petitioners also sought an order restraining the 1st Respondent Bank and the 2nd Respondent Auctioneer from selling by public auction the land belonging to the Petitioners in pursuance of the said resolution, and this Court has issued a stay order which has been extended from time to time.

The 1st Respondent Bank is a legal entity incorporated under the Banking Companies (Acquisition and Transfer Undertakings) Act of India, and is a licensed commercial Bank within the meaning of the Banking Act No. 30 of 1988. Upon service of notice, the 1st Respondent Bank appeared before Court and objected *in limine* to the jurisdiction of the Court to hear and determine this application, on the basis that the application has been made against a private bank which is not amenable to the writ jurisdiction of this Court. The 1st Respondent Bank moved to file objections to the extension of the stay order on this basis while reserving its right to file a Statement of Objections on the merits of the case after the disposal of the jurisdictional objection. Thereafter the 1st Respondent Bank filed its limited Statement of Objections to the extension of the interim order on 19th of November, 2003 and the matter was fixed for inquiry on the preliminary objection raised by the 1st Respondent Bank. On 20th May, 2004 the matter was taken up for inquiry, and after hearing submissions of Counsel, the Court directed both parties of the 1st Respondent Bank. After written submissions were filed, the matter was taken up for further oral submissions on 12th July, 2004, on which date further submissions were made by learned Counsel for the Petitioners and the 1st Respondent.

In the oral and written submissions of the learned President's Counsel for the 1st Respondent, it has been stressed that the 1st Respondent is a private company incorporated abroad which is engaged in the business of banking. Counsel has also emphasized that the 1st Respondent is not a public entity carrying out public functions. Learned President's Counsel contends that the 1st Respondent, being a company which has not been incorporated under any statute enacted in Sri Lanka, and discharging functions which are not administrative in nature; is not amenable to prerogative remedies. It is strenuously contended that our Courts in cases such as *Trade Exchange (Ceylon) Ltd., v. Asian Hotels Corporation*⁽¹⁾ and *Mendis v. Seema Sahitha Panadura Janatha Santhaka Pravahana Sevaya and Others*⁽²⁾ have clearly held in unambiguous terms that prerogative remedies will not lie against companies when they are engaged in private business activities. Learned President's Counsel for the 1st Respondent also relied on the recent decision of this Court in *Office Equipment Limited v. Urban Development Authority*.⁽³⁾ where Sripavan, J. reiterated that the activities of private persons, whether natural or juristic are outside the bounds of Public law or what we call Administrative law.

It has been submitted by learned President⁽²⁾ Counsel for the 1st Respondent that it is trite law that the prerogative writs of certiorari and prohibition will lie only against statutory authorities exercising administrative functions. Learned Counsel relies on what he describes as a classic exposition of the law by Professor Wade (H. W. R. Wade & C. F. Forsyth, *Administrative Law* (2000) 8th Edition at pages 600 and 601) wherein it is proclaimed that "certiorari and prohibition have become general remedies which may be granted in respect of any decisive exercise of discretion by an authority having public functions, whether individual or collective." He also relies heavily on the decisions of the Queens Bench Division in the case of *Regina v. National Joint Council for the Craft of Dental Technicians*⁽⁴⁾ holding that the prerogative writs are only issued to inferior courts, bodies set up by statute which have been entrusted by Parliament with duties of an administrative and judicial nature and whose jurisdiction might affect the rights of subjects, and to statutory arbitrators to whom by statute the parties must resort.

Learned President's Counsel for the Petitioners has relied on the oft quoted dictum of Lord Atkin in *R. v. Electricity Commissioners ex parte London Electricity Joint Committee Company Ltd.*⁽⁵⁾ at 205 for his contention

that certiorari is available “whenever any body of persons having the duty to act judicially act in excess of their legal authority”. It is worth noting in passing that in *O’ Reilly v. Mackman*⁽⁶⁾ at 279 Lord Diplock sought to abridge the Atkinian formula further by dropping the words “having the duty to act judicially”, so that the decisions and determinations of every body of persons having legal authority to determine questions affecting the rights of the subjects are subjected to judicial review. Learned President’s Counsel for the Petitioners emphasizes that the above dictum does not seek to confine the persons who are amenable to certiorari to statutory bodies, and it applies to “any body of persons” whether statutory or not. He submits that the dynamism of law has driven the traditional remedy of certiorari away from its “familiar moorings by the impetus of expanding judicial review” (H. W. R. Wade & C. F. Forsyth, *Administrative Law*, 8th Edition page 627). As Professor Wade observes, Courts have through their decisions extended the pale of judicial review “to bodies which, by the traditional test, would not be subject to judicial review and which, in some cases, fall outside the sphere of government altogether.” (*ibid.*) A variety of commercial, professional, sporting and other activities are regulated by powerful bodies which are devoid of statutory status, and Courts in Sri Lanka and elsewhere have demonstrated a willingness to ‘recognize the realities of executive power’ and to review the decisions of a number of such bodies. In their desire to prevent the abuse of ‘executive power’ in the hands of these powerful non-statutory bodies, the courts have ventured to review the decisions of these bodies. The limits of this new jurisdiction have been explored in a series of decisions such as *R v Criminal Injuries Compensation Board, ex parte Schofield*⁽⁷⁾, *ex parte Tong*⁽⁸⁾, *ex parte Cummins*⁽⁹⁾, *R v Criminal Injuries Compensation Board ex parte P*⁽¹¹⁾, As Lord Parker, C. J. observed in *R v Criminal Injuries Compensation Board ex parte Lain*⁽¹²⁾

“The exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined. They have varied from time to time, being extended to meet varying conditions. At one time the writ only went to an inferior Court. Later its ambit was extended to statutory tribunals determining a *lis inter partes*. Later, again it extended to cases where there was not *lis* in the strict sense of the word, but where immediate or subsequent rights of citizens were affected.”

It is noteworthy that the decision in *R v Panel on Takeovers and Mergers ex parte Datafin*⁽¹³⁾ extended the application of prerogative remedies to the London Takeover Panel, which is a non-statutory body regulating the

conduct of takeovers and mergers in the London Stock Exchange on a voluntary basis through a process of self regulation. In *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Limited*,⁽¹⁴⁾ the English Courts have held that the London Stock Exchange, which has been constituted as a limited liability company, is subject to judicial review. In decisions such as *the Governor and Company of the Bank of Scotland, Petitioners; Rv FIMBRA, ex parte Cochrane*⁽¹⁶⁾ *SIB & Anor v FIMBRA & Anor*⁽¹⁷⁾ and *R v LAUTRO, ex parte Ross*⁽¹⁸⁾ the Courts have held that although judicial review is not available in the context of purely contractual powers, the authority of a contractual nature which various self-regulating organizations have over their members help these organizations to perform their public functions, and accordingly the failure of such an organization to perform a contractual obligation may be subjected to judicial review. The rationale for making such non-statutory bodies amenable to prerogative remedies appears to be that they are discharging functions of a public nature.

Learned President's Counsel for the 1st Respondent has also invited attention to the decision of this Court in *Saheer and others v. Board of Governors Zahira College and Others*.⁽¹⁹⁾ This is a landmark decision which has a bearing on the issue arising in the instant case, and involves Zahira College, the premier Muslim educational institution in Colombo which is the property of the Maradana Mosque. On or about 21st August 1961 the school was vested in the Government in terms of the order made by the Minister of Education in terms of Section 4 (1) of the Assisted Schools and Training Colleges, (Supplementary Provision) Act, No. 8 of 1961. The said vesting was challenged by the Board of Trustees of the Maradana Mosque, and in a celebrated judgement reported as the *Board of Trustees of Maradana Mosque v. the Minister of Education and Another*⁽²⁰⁾ the Privy Council set aside the said order, and the ownership of the school reverted to the Board of Trustees of the Maradana Mosque. The school continued to be administered by the Board of Trustees of the Maradana Mosque till the enactment of the Zahira College, Board of Governors (Incorporation) Act, No. 18 of 1982 by which its administration was vested in a Board of Governors consisting *inter alia* of representatives of the Executive Committee of the Maradana Mosque, the Old Boys Association, the Welfare Society, and the Parent-Teachers Association of the said school. In *Saheer and others v. Board of Governors Zahira College and Others (supra)* the Petitioners sought a writ of certiorari to challenge the decisions taken by

the said Board of Governors to run an international school in the premises of Zahira College. The Respondents resisted the application *inter alia* on the basis that the Petitioners are parents of children studying at Zahira College who had a contractual relationship with the school for the enforcement of which *certiorari* and other prerogative remedies would not lie. Despite the private ownership of the school and the contractual nexus that the petitioners had with the school, this Court extended the reach of judicial review on the basis that the Board of Governors of Zahira College was exercising public functions. As Nihal Jayasinghe, J observed at page 411 of the judgement :-

“The powers of the Board of Governors as spelt out in the Act cannot be abused or exceeded. When it does writ would lie. Within the scheme of national education, the Board of Governors is a statutory public authority receiving and spending State funds, being subject to government regulations in the admission of students, employment of teachers, etc. As Wade says *certiorari* and prohibition are designed to prevent excess or abuse of power by public authorities.”

The other decisions cited by the learned President's Counsel for the 1st Respondent do not help him very much. For instance, the recent case of *Office Equipment Limited v. Urban Development Authority*, (*supra*) was a case where there was at best a monthly tenancy of Store No. 137 at Chalmers Granaries, and the dispute involved the question as to whether a prerogative writ was available to enforce an alleged promise to provide alternative accommodation in the event the Respondent required the Petitioner to vacate the premises rented out by it. While the decision of this Court was governed by pragmatic considerations such as the unsuitability of prerogative remedies for the determination of disputed facts, Sripavan, J also emphasized that “the action of private individuals or bodies that are based on contract without any statutory underpinning are not subject to judicial review by way of writ of *certiorari*.” In fact, the earlier decision of this Court in *Trade Exchange (Ceylon) Ltd., v Asian Hotels Corporation* (*supra*) falls on the same side of the line. That was a case in which the Petitioner who had been given permission to run a batik shop in the premises of the Hotel Lanka Oberoi for a period of one year, sought the writ of *certiorari* to quash a decision made by the company that owned that hotel not to extend the premises for another year. Court refused to

give relief by way of *certiorari* despite the fact a public corporation owned a major proportion of the shares in the company. The reasoning of the Court was that prerogative relief was totally inappropriate for a dispute which was of a commercial nature. In fact at pages 70 to 71 of the judgement, Sharvananda, J. observed as follows:-

“As Professor Wade in his book on *Administrative Law*, 4th Edition, at p. 529 stated. “Consequently the existence of statutory power may be treated as the touchstone, though the Court has recently admitted one exception in *R. v. Criminal Injuries Compensation Board ex p. Lain* and summed up the law as at p. 540.: “*Certiorari* and prohibition are designed to prevent the excess and abuse of power by public authorities. The powers of public authorities are conferred by statute in almost all cases. So that it is usually safe to assume that statutory power is in question.” Originally, *certiorari* and prohibition lay to control the functions of inferior courts, namely, judicial functions. But the notion of what is ‘a Court and a ‘judicial function’ has undergone great revolution, so that today these remedies have grown to be comprehensive remedies for the control of all kinds of administrative as well as judicial acts.”

The other case relied on by learned President’s Counsel for the 1st Respondent was *Mendis v Seema Sahitha Panadura Janatha Santhaka Pravahana Sevaya and Others (supra)*. The question that arose in that case was whether a member of a company had acted in violation of the Articles of Association of the company in refusing to intervene by way of writ. S. N. Silva, J. (as he then was) observed at page 291.-

“It is thus seen that prerogative remedies such as *Certiorari* and *Prohibition* lie in situations where statutory authorities wielding power vested by Parliament exercise these powers to the detriment of a member of the public. The essential ingredient is that a member of the public who is affected by such a decision has to submit to the jurisdiction of the authority whose action is subject to review. In other words, there is an unequal relationship between the authority wielding power and the individual who has to submit to the jurisdiction of that authority. The principles of administrative law that have evolved such as the doctrine of *ultra vires*, error on the face of the record, rules of natural justice, requirement of procedural fairness and the reasonableness of decision,

coupled with the remedies by way of prerogative writs, lie to correct any illegality or injustice that may emanate from this unequal relationship. It is in this context that the view has been firmly held that relationships that are based on contract, without any statutory underpinning and actions of companies and private individuals and bodies, are not subject to judicial review by way of the Writs of Certiorari and Prohibition."

In the light of these decisions it is necessary to consider whether the writ of *certiorari* is available against a private banking company such as the 1st Respondent. The gist of the 1st Respondent's submission is that writ would not lie against a company which is not a statutory body. The said Respondent has sought to take advantage of the provisions of the Recovery of Loans by Banks (Special Provisions) Act relating to *parate execution*. In fact in terms of the said Act the 1st Respondent had the option of either adopting a resolution under Section 4 to sell by public auction the property mortgaged to it or authorize a person by resolution in terms of Section 5 of the Act to take over possession to manage the said property and to utilize its produce or profits for the settlement of the loan. These powers have been conferred by the statute on any 'Bank' as defined in Section 22 of the Act. The Act lays down special procedures for the exercise of the powers conferred on such Banks, and I am of the opinion that this Court is bound to exercise supervisory jurisdiction over the exercise of such powers despite the fact that some at least of these Banks are local or foreign Banking companies.

For the foregoing reasons, the preliminary objection taken on behalf of the 1st Respondent Bank is overruled and the said Respondent is directed to file its Statement of Objections on or before 1st December 2004, on which date the case will be mentioned in open Court. The stay order issued by this Court on 28th October, 2003 is extended till the final determination of this case.

SRIPAVAN, J. - I agree.

Preliminary objection overruled; matter set down for argument.