

IN THE COURT OF APPEAL OF THE DEMCORATIC SOCIALIST REPUBLIC OF SRI
LANKA

In the matter of an application
for leave to appeal

Court of Appeal No: CALA 41/2007

District Court of Mt-Lavinia No: 486/2003/P

D.M.S. Abhaya Kumara

Intervient-Petitioner

Vs.

H.A. Premawathie

Plaintiff-Respondent and

Others

Before: Eric Basnayake J

Counsel: Dr. Sunil Cooray with Ms. S. Cooray for the Intervient-Petitioner

Ranjan Suwandaratne with Somarath Fernando for the Plaintiff-

Respondent

Palitha Kumarasinghe P.C. with Nuwan Rupesinghe for the 9th

Defendant-Respondent-Respondent

Argued on: 30.9.2011

Written submissions tendered on: For the 9th Defendant-Respondent-
Respondent-1.11.2011

For the Intervenient-Petitioner and Plaintiff-Respondent: 6.2.2012

Decided on: 10.8.2012

Eric Basnayake J

1. The intervenient-petitioner (petitioner) filed this leave to appeal application to have the order dated 31.1.2007 of the learned Additional District Judge of Mt-Lavinia set aside. By this order the learned Judge had refused to allow the petitioner to intervene and to be added as a party to this case.

2. One Sriyani Peiris became the owner of the land which is the subject matter by deed No. 9897 of 6.11.1991. Sriyani Peiris together with her husband who is the 1st defendant in this case had obtained a loan from the National Savings Bank on a mortgage executed under reference No. 408/96/6/1. At the time of execution of this mortgage Sriyani Peris was the sole owner and there was no co-ownership.

3. Sriyani Peris had died intestate on 9.8.1997. Her estate was administered in the District Court of Mt. Lavinia in case No. 1115/00/T. The plaintiff-respondent (plaintiff) as the mother of the deceased, filed partition action No. 486/2003 in

the District Court of Mt. Lavinia on 28.11.2003 to have the subject matter partitioned among the plaintiff and 1st to 8th defendants. The National Savings Bank had been made the 9th defendant for the reason that a loan had been taken on a mortgage.

4. The 9th defendant filed proxy on 6.9.2004 and a statement of claim was filed on 15.12.2004. An amended statement of claim was filed on 18.7.2006. The 9th defendant moved for a dismissal of the action.

5. The mortgagor having defaulted payment, the 9th defendant took steps under the Recovery of loans by Banks (Special Provisions) Act, No. 4 of 1990. The property was advertised for public auction in the Government Gazette of 17.3.2006 as property belonging to the National Savings Bank (9th defendant).

6. The petitioner being the highest bidder was successful in purchasing this property at the auction sale for a sum of Rs. 2,700,000. He was issued with a certificate of sale on 2.8.2006. On 12.10.2006 the petitioner made an application to the District Court of Mt.Lavinia to intervene in this case.

7. The learned Judge after an inquiry dismissed the application for intervention on the basis that the intervenient petitioner had purchased a portion of this land after the registration of *lis pendens*. The learned Judge based his decision on two judgments namely Shirantha vs. Sirisena and others (1998) 3 Sri L.R. 19 and Abeyratne vs. Rosalin (2001) 3 Sri L.R. 308. However what the petitioner had

bought was the whole land which was the subject matter of the mortgage and the partition case.

Submission of the learned counsel for the plaintiff

8. The learned counsel submitted that the alienation of this property by the 9th defendant (NSB) should be construed as a voluntary alienation which attracts the provisions of Section 66 of the Partition Law No. 21 of 1977. Section 66 is as follows:-

66 (1):-After a partition action is duly registered as a *lis pendens* under the Registration of Documents Ordinance **no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates shall be made or effected until the final determination of the action** by dismissal thereof, or by the entry of a decree by partition under section 36 or by the entry of a certificate of sale.

(2) Any voluntary alienation, lease or hypothecation made or effected in contravention of the provisions of subsection (1) of this section shall be void: (emphasis added).

Provided that any such voluntary alienation, lease or hypothecation shall, in the event of the partition action being dismissed, be deemed to be valid.

(3) Any assignment, after the institution of the partition action, of a lease or hypothecation effected prior to the registration of such partition action as a *lis pendens* shall not be affected by the provisions of subsections (1) and (2) of this section.

Submission of the learned counsel for the petitioner

9. The learned counsel for the petitioner submitted that Section 66 applied only to voluntary alienations and not to necessary or forced alienations and that a Fiscal's sale of the share of some of the co-owners pending a partition suit is valid. Section 66 prohibits alienation by owners during the pendency of the partition proceedings. Fiscal's transfer does not come within that section. The purchaser at a Fiscal's sale acquires title not from the owner but adversely to the owner by operation of law. The learned counsel submitted that the sale conducted under Act No. 4 of 1990 is equivalent to a Fiscal's sale. The learned counsel further submitted that Section 66 of the Partition Law applies to hypothecation of undivided shares. In this case the petitioner had purchased the entire property of the mortgagor whose land is the subject matter of the partition case.

Submissions of the learned President's Counsel for the 9th defendant

10. The learned President's Counsel further advanced the argument of the learned counsel for the petitioner. The learned counsel submitted that since the monies due on the loan had been defaulted, the Board of Directors of the 9th defendant adopted a Resolution under the Recovery of loans by Banks (Special Provisions) Act, No. 4 of 1990 to sell the property mortgaged with the bank in

order to recover the defaulted sum. The Resolution was published as required by law.

11. The 9th defendant published notice of the auction and at the auction held on 4.4.2006, the property was purchased by the petitioner. A certificate of sale was issued by the 9th defendant under section 15 of the Act No. 4 of 1990. The petitioner was placed in possession of the property as the lawful sole owner.

12. The learned counsel submitted that the District Court issued summons for Contempt of Court against the 9th defendant for auctioning the property while the partition case was pending and this prompted the petitioner to make an application on 12.10.2006 for intervention. The learned counsel submitted that the 9th defendant has a legal right under the statute to recover the defaulted payment. Section 4 of the Act No. 4 of 1990 is as follows:-

Subject to the provision of Section 7, the Board may by Resolution...authorize.....to sell by public auction any property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover the whole of the unpaid portion of such loan....

The learned President's Counsel submitted that subject to Section 7, the bank is entitled to adopt a Resolution to auction the mortgaged property without recourse to courts. Section 7 expressly permits auctioning of the properties even after the death of the borrower and the Bank is entitled to *parate execution* even when the property is transferred to another by voluntary conveyance or by the operation of law upon the death of the borrower. Section 7 (1) is as follows:-

Save as otherwise provided in subsection (2) the provisions of section 4 shall apply in the case of any default.....
notwithstanding that the borrower may have died or that any right, title or interest whatsoever in the property mortgaged to the Bank as security for the loan may have passed by the voluntary conveyance or operation of law to any other person (emphasis added).

13. The learned President's Counsel submitted that as per sub section (2) of Section 7, letters of administration has been issued to the 1st defendant (husband of the deceased) and thus the 9th defendant was entitled to proceed with the sale. The learned counsel further submitted that inspite of the publicity given with regard to the sale no objections were taken by any party in the partition case.

14. The learned counsel submitted that according to the certificate issued by the 9th defendant in terms of section 15 (1) of the Act No.4 of 1990, the property was vested with the purchaser and thus the petitioner became the absolute owner of the property without any encumbrances. The parties to the partition action have been precluded by Section 15 to move any court to invalidate the sale. Section 15 (1) is as follows:-

If the mortgaged property is sold, the Board shall issue a certificate of sale and thereupon all the rights, title, and interest of the borrower to, and in, the property shall vest in the purchaser; and thereafter it shall not be competent for any person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to, and in, the property made or registered subsequent to the date of the mortgage of the property to the

bank, in any court to move or invalidate the sale for any cause whatsoever, or to maintain any right title or interest to, or in, the property as against the purchaser(emphasis added). Sub sections (2) to (6) not reproduced.

15. When a resolution is passed under *parate execution*, the borrower is in the same position as a judgment debtor, and when the certificate of sale is issued “the judgment debtor” cannot have rights which a person claiming through “the judgment debtor” does not have since the third party’s rights flow from the judgment debtor (Edusuriya J in *Haji Omar v. Wickramasinghe and another* (2002) 1 Sri L.R. 105 at 113-114).

16. The learned President’s Counsel submitted that the Partition Law and the Recovery of loans by Banks (Special Provisions) Act, No. 4 of 1990 make no provision to prohibit auctioning property on a Resolution passed by Banks while a partition case is pending in respect of the same property. “A Fiscal’s sale of property subject to partition action is not held void so that debtors would not be encouraged to defraud creditors under the pretext of partition actions (K.D.P. Wickramasinghe, *Law of Partition in Ceylon* at pg 201).

17. Section 69 (2) of the Partition Law makes provision to have such buyers as a party. Section 69 (2) is as follows:-

(1) Where a person is a party to a partition action and his right, title and interest to or in the land to which the partition action relates are sold, during the pendency of the partition action, in execution of, or under any decree, or order or process of any court, the purchaser of

any such right, title and interest at the sale be entitled to be substituted for that person as a party to the partition action,.....

18. The learned President's Counsel submitted that in the absence of any statutory bar, Licensed Banks are entitled to proceed to auction a property mortgaged to a Bank while a partition case is pending in respect of that property. He further submitted that otherwise, when a bank is about to auction a property to recover monies due from a defaulter, the defaulter may abuse the partition law by filing a partition case after transferring a minute undivided share to another and place their property beyond the reach of the creditors for an indefinite period.

19. The learned counsel further submitted that what has been mortgaged is the entire corpus in the partition case. The petitioner has purchased this whole land and has become the sole owner of this property. The learned counsel submitted that what section 66 of the Partition Law prohibits is voluntary alienation of undivided shares and to that extent section 66 has no application to the facts of this case.

20. The learned counsel submitted that the petitioner has become an essential party to present his case and to present the certificate of sale which has a conclusive effect. The learned counsel further submitted that with the sale of the property the mortgaged rights have been wiped off and new rights created. The learned counsel submitted that all the right, title and interest of the borrower shall vest in the purchaser (petitioner).

21. I am inclined to accept the submissions of the learned President's Counsel and the learned counsel for the petitioner that the Recovery of loans by Banks (Special Provisions) Act has created rights independent of the Partition Law. I am of the view that the prohibition contained in Section 66 of the Partition Law has no application to a purchaser in favour of whom a certificate has been issued under section 15 of the Act No.4 of 1990.

22. It is in vain that steps were taken to charge the 9th defendant for contempt of court for auctioning the property. It is this action that prompted the petitioner to come forward. I am of the view that the learned Judge had erred by not giving any attention to the provisions of the Recovery of loans by Banks (Special Provisions) Act, No. 4 of 1990. By so doing the learned Judge had only assisted the wrongdoer at a time when there was no dispute that the property had been mortgaged to the 9th defendant and that the borrower had defaulted payment.

23. Could the court assist the heirs of the borrower to file a partition, charge the lender for contempt of court and deprive the purchaser from presenting his case? Interventions are not permitted in partition cases to prevent long delays and the resultant injustice to parties. These parties are the co-owners who claim a definite share. In order to consider a share, there should be a corpus. When there is no corpus how can there be a partition? The entire corpus had been alienated according to law.

24. What the learned Judge should have done was to inquire in to the alienation and dismiss the partition action as there was no corpus. The entire corpus is occupied by the petitioner. The petitioner had purchased the entire property at a public auction held on a Resolution passed under the provisions of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990.

25. For that reason I am of the view that the learned Judge had erred in law by not making the petitioner a party to this case. Therefore I set aside the order dated 31.1.2007 of the learned Judge. I allow the appeal with costs payable by the plaintiff, to the petitioner, in this court and the court below. Appeal allowed.

Judge of the Court of Appeal