

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

In the matter of an application for a mandate in
the nature of Writ of Certiorari.

S.A.S.Karunawathie Perera,

No.245/3 D.S.Senanayake Veediya,

Kandy.

Petitioner

C.A. Writ Application No: 613/2007

Vs

D.R. 2350

1. People's Bank No.75 Sir Chiththampalam A
Gardiner Mawatha, Colombo 02.
2. W.Karunajeewa,
Chairman, People's Bank No.75 Sir
Chiththampalam A Gardiner Mawatha,
Colombo 02.
3. Sarojini Gabadage,
Inquiring Officer,
Land Redemption Department,
1st Floor ,Welikada Plaza,
Rajagiriya.
4. S.N.K.Kamala Guruge
215, 2/8, Udyanaya Road,
Colombo 6.

5. P.G.J.Sithy Sawahir
6. M.G.M.G.M.Mohamed Hanafie,
Both of 245/3, D.S.Senanayake Veediya,
Kandy.
7. Public Trustee,
No.2, Bullers Road Colombo 7.

Respondent

BEFORE : S. SRISKANDARAJAH, J.

COUNSEL : Chamantha Weerakoon Unambuwa,

for the Petitioner

Kushan de Alwis with Kaushalya Nawaratne

for the 1st to 3rd Respondents.

Manohara de Silva PC

for the 4th Respondent.

Argued on : 30.06.2010

Decided on : 06.06.2011

S.Sriskandarajah J,

The Petitioner in this application has sought a writ of certiorari to quash the decision of the 1st Respondent People's Bank dated 12.06.2007 marked P8(a) to acquire the property in question under Section 71(4) of the Finance Act No.11 of 1963 as amended. The Petitioner and the 4th Respondents are two sisters and their mother Ceciliyanona

Rajapakse was the original owner of the property in question. She mortgaged the property on two bonds to one S.I.de.La Motte. The bonds were put in suit and judgement was entered in favour of the creditor de La Motte. He died and his estate was administered by the Public Trustee 7th Respondent. At the auction held by court the Public Trustee purchased the property in question and became owner thereof.

On representation made by the heirs of the deceased mortgagor to the Public Trustee he had agreed to transfer the said property. An agreement was entered into and an advance of Rs.10,000/- was accepted by the Public Trustee from the Petitioner. Thereafter, the Petitioner filed action in District Court of Kandy case No.13226/L to compel the Public Trustee to execute a conveyance in her favour. While this proceedings were pending the 4th Respondent a child (descendant) of the original owner made an application to the People's Bank for redemption in terms of Section 71(1) of the Finance Act No.11 of 1973 as amended. After an inquiry the Bank made a decision to acquire the property by its decision dated 09.07.1992. In the meantime a conveyance has been made in favour of the Petitioner by the Registrar of District Court of Kandy in pursuance of an order made in case No 13226/L.

Subsequently the 1st Respondent Bank by its decision dated 24.08.1992 reversed the decision made on 09.07.1992. The decision to revoke the order was challenged by the 4th Respondent by way of writ of certiorari in CA Application No 710/92. The Court of Appeal issued a writ to quash the said order of revocation on the ground that no fair hearing was given to the parties affected by the said order and directed the Bank to hold a fresh inquiry to decide whether the decision to acquire the said property should be reversed. At the inquiry the Petitioner, W.M.G.M.Lebbe Mohamed Mubarak who is the husband of the 5th Respondent and the father of the 6th Respondent and the 4th Respondent gave evidence. After the conclusion of the evidence written submissions were tendered by the Petitioner and the 4th Respondents. The 3rd Respondent recommended that the property in question be acquired by the Bank. By notice dated

12.06.2007 marked P8(a) the 1st Respondent Bank notified the Petitioner under Section 71(4) of the Finance Act that the 1st Respondent Bank has decided to acquire the property in question.

The Petitioner in this application challenged the aforesaid decision on three grounds; firstly the Petitioner contended that the said decision was made on an erroneous conclusion that the Petitioner is not the current owner of the premises. In arriving at this conclusion due consideration was not given to the fact that the transfer of the property by Deed No.589 to the Petitioner was in terms of a court order entered into on 29.01.1982 on which date the Petitioner became entitled to the said property subject to the performance by her of her under taking to pay Rs.45,000.00 on 3.02.1982 well before the prohibition notice dated 17.02.1982 was given. The Registrar of the District Court, in executing the said transfer merely gave effect to the order of court.

The policy and the purpose of Part VIII of the Finance Act lay down a mechanism to enable persons who have lost their property in circumstances set out in Section 71(1) of the said part of the Act with the assistance of the People's Bank. It is an admitted fact that the Bank on an application made by the 4th Respondent who is a descendant of the original owner of the said property entertained the application of the acquisition of the said property. When the Bank entertains an application for redemption of the said property certain mandatory steps have to be taken by the Bank in relation to the said property. This is provided under Section 71(2A) of the Finance Act No 11 of 1963 as amended by Finance and Ceylon State Mortgage Bank (Amendment) Law, No 16 of 1973 as follows:

71(2A) Where the Bank entertains an application for the acquisition of any premises referred to in subsection (1), the Bank shall-

- (a) Cause notice of the fact to be sent by registered post to the owner of the premises : and

- (b) Cause a copy of such notice to be delivered or transmitted to the proper Registrar of Lands for registration, setting out the prescribed particulars relating to such premises and stating that such premises may be acquired under this part of this Act.

Every notice under paragraph (b) shall be registered by the Registrar of Lands in the manner prescribed in the Registration of Documents Ordinance for the registration of an instrument affecting or relating to land and shall be deemed for such purposes to be an instrument affecting or relating to premises the prescribed particulars of which are set out in such notice.

Provided that if the Bank determines that such premises shall not be acquired for the purposes of this part of this Act, the Bank shall forth with cancel such notice and give written information of the cancellation to the Registrar of Lands who shall register such cancellation.

By the above provisions once the notice of an application for acquisition of a property is issued by the Bank and registered in the relevant land registry it is considered as an instrument affecting the premises. Until such notice is cancelled by the Bank by a written notice there will be an encumbrance on the said premises. Therefore if the land is sold after the issue of this notice it will be subject to the said encumbrance. Therefore when the Bank decides to acquire the said land it could by a vesting order acquire the said land irrespective of the right of a subsequent owner of the property. The Bank in the instant case issued the prohibition notice on 17.02.1982. The Deed No 589 was executed in favour of the Petitioner in relation to the said premises on 05.04.1982 attested by C.N.Gnanasekaram, Notary Public. The requirement of the registration of the prohibition notice in the Land Registry is to notice a prospective buyer the encumbrance attached to the premises. The Petitioner who has purchased the premises with the encumbrance has to face the consequences. The Petitioner's claim that the said property was not sold by the owner of the property who was prohibited to sell the

property by the prohibition notice but under a court order by the Registrar of the Court and therefore the ownership of the property has passed to the Petitioner without any encumbrance has no merit. The Register is performing an official function on an order of court in executing the deed on behalf of the owner of the property. He cannot transfer any right other than the right the owner has in the said property. The owner's right is subject to the right of the bank to acquire the said property. Hence the title obtained by the Petitioner is also subject to the right of the Bank to acquire the said property.

The Petitioner also challenged the acquisition on the basis that the 4th respondent is not a person entitled to make an application under Section 71(1) of the said Act. The 4th Respondent as a descendant of the original owner has the capacity to redeem the property and hence the provision of Part VIII of the Finance Act cannot be invoked. Whether the 4th Respondent a descendant of the original owner who made the application under the relevant provision has the capacity to redeem the property mortgaged by the original owner is a question of fact. It is the inquiring officer who is empowered by the statute has the power to inquire into and determine this question. In this case he has determined that the 4th Respondent is entitled to make this application. A Court exercising judicial review considers the legality of an order and it rarely interferes in an order made based on facts unless it is irrational. The Petitioner has not established that the said decision is irrational.

The Petitioner has also challenged the decision on the basis that the premises cannot be acquired by the Bank as it has no power to do so under Section 71(2)(d) of the Finance Act, as it is reasonably required by him for his residence. The 4th Respondent submitted that the Petitioner has sold part of the premises and leased out the balance portion of premises No 245/3 leaving a single room for herself and she is at present residing at Pinnagolla Estate Thalathuoya. Hence the 4th Respondent submitted that the claim of the Petitioner that this premises is reasonably required by the Petitioner is false. As I

have observed above the question whether the Petitioner reasonably required the said premises for residence is a question of fact and this matter was considered by the inquiring officer and she has decided to acquire this property. In these circumstances this court is not inclined to interfere with the decision of the Respondents to acquire the said premises.

For the aforesaid reasons this court dismisses the application of the Petitioner without costs.

Judge of the Court of appeal