

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

C. A. 581/99 (F)

D. C. Kandy - No. 14533/L

Wickramasinghe Mudiyanse
Bisso Menike,
Godamaditha, Pethigepitiya,
Pallebowala.

PLAINTIFF

1. People's Bank,
Sir Chittampalam A Cardiner
Mawatha,
Colombo.
2. Douglas Wijeratne,
Authorized Officer,
People's Bank,
Colombo.
3. W. Nelson Henricus Fernando,
Godamaditha,
Pethigepitiya
Pallebowala.

DEFENDANTS

AND NOW

1. People's Bank,
Sir Chittampalam A Cardiner
Mawatha,
Colombo.
2. Douglas Wieratne,
Authorized Officer,
People's Bank,
Colombo.
3. W. Nelson Henricus Fernando,
Godamaditha,
Pethigepitiya
Pallebowala.
- 3a. Augustin Fernando,
Pethigepitiya
Pallebowala.

**SUBSTITUTED DEFENDANT-
APPELLANT**

VS

Wickramasinghe Mudiyanse
Bisso Menike,
Godamaditha, Pethigepitiya,
Pallebowala. (*Deceased*)

PLAINTIFF-RESPONDENT

1a. Mahamudannayake
Mudiyanse Aberatna Banda,
Kithulpe, Pallebowala

**SUBSTITUTED PLAINTIFF-
RESPONDENT**

BEFORE : **M. M. A. GAFFOOR, J.**

COUNSEL : Sunil Abeyaratne for the 1st and 2nd Defendant-
Appellants

Asoka Serasinghe for the 3rd Defendant-Appellant

Murshid Maharroof with Amali Kankanamage
and Shoaib Ahamed for the Substituted Plaintiff-
Respondent

**WRITTEN SUBMISSIONS
TENDERED ON** : 23.08.2018 (Further Written Submission) - by the
3rd Defendant-Appellant)

30.08.2018 – by the 1st and 2nd Defendant-
Appellants

10.09.2018 – by the Substituted Plaintiff-
Respondent

DECIDED ON : **07.01.2019**

M. M. A. GAFFOOR, J

This is a *rei-vindicatio* action filed by the Plaintiff-Respondent (hereinafter referred to as Plaintiff-Respondent) in the District Court of Kandy against the 1st, 2nd and 3rd Defendant-Appellants seeking for following reliefs *inter alia*;

- I. A declaration that the Plaintiff-Respondent is the owner of the premises which was described in the schedule to the Plaint.
- II. For ejectment of the 3rd Defendant-Appellant.

In this matter, Plaintiff-Respondent stated in her Plaint *inter alia* that the land and premises described in the Plaint was belonged to W. N. Henricus Fernando (3rd Defendant). The said W. N. Henricus Fernando executed the Deed of Conditional Transfer bearing No. 2327 dated 15.10.1959 marked as P1 attested by C. M. L. De Silva, Notary Public to one M. M. Punchi Banda upon the condition that a sum of Rs.5000/- to be paid within four years from the date of the said deed. And also, there is no interest mention in the said deed on the repayment of Rs.5000/-. However the said 3rd Defendant-Appellant failed to pay the sum of Rs.5000/- before the lapse of the said four years period, hence the said M. M. Punchi Banda became the lawful owner of the said property. Thereafter, the said M. M. Punchi Banda gifted the said property to his wife Bisu Menike, the Plaintiff-Respondent by Deed No. 2826 dated 17.05.1978 marked as P4 attested by T. A. Shahabdeen, Notary Public of Kandy.

Thereafter, on an application made by the 3rd Defendant-Appellant to the 1st Defendant-Appellant bank requesting to acquire the said land under Finance Act No. 11 of 1963. After finishing an inquiry, 1st Defendant-Appellant bank, published in Gazette bearing No. 1481/1 dated 01.02.1969 and had acquired the said property under Section 72 of the Finance Act No.11 of 1963. Thereafter the appellant bank had made an attempt to take over possession of the said property from the said M. M. Punchi Banda and it was prevented by him. Thereafter the appellant bank filed an action in the Magistrate Court against the

Plaintiff-Respondent's predecessor the said Punchi Banda to eject from the said land under Section 72(5) of the Finance Act No.11 of 1963. However the learned Magistrate of Kandy by the order dated 02.02.1976 rejected the application of the appellant bank and discharged the said Punchi Banda.

Thereafter the appellant bank on or about 09.06.1983 filed an action against Plaintiff-Respondent in this matter by case bearing No. 13839/L and had obtained an *ex-parte* order to eject from the said property after the Plaintiff-Respondent made an application to vacate the *ex parte* order, parties entered into a settlement on 08.06.1984. The said case was laid by subject to the Plaintiff-Respondent filing action against the appellant bank before 1st of December 1984 and accordingly, the Plaintiff-Respondent filed this action within the said period on the 27th of November 1984. In the interim period, the appellant bank contrary to the undertaking executed the *ex parte* decree in the said Case bearing No. 13839/L and ejected the Plaintiff-Respondent from the property and took over the possession.

Therefore, the Plaintiff-Respondent filed this action for a declaration of title and to restore the Plaintiff-Respondent in possession and to eject 3rd Defendant-Appellant from the said property. The learned District Judge gave judgment dated 12.03.1999 in favour of the Plaintiff-Respondent. Thereafter being aggrieved by the said judgments the appellants have appealed against the same to this Court.

In an action for *rei vindicatio*, the plaintiff must prove and establish his title. And the plaintiff action is for a declaration of title alleging that the defendant was disputing his rights as the owner. In such case when the title is admitted the burden is on the defendant to establish the legality of his possession.

In *Abeykoon Hamine vs. Appuhamy* [(1950) 52 NLR 41], Dias, SPJ. quoted with approval, the decision of a Bench of four judges in *De Silva v. Goonetilleke* [(1931) 32 NLR 27] where Macdonell, C.J., had occasion to observe that-

“There is abundant authority that a party claiming a declaration of title must have title himself. -”To bring the action rei vindication plaintiff must have ownership actually vested in him”- 1 Nathan p.362, s.593.....This action arises from the right of dominium...”The authorities unite in holding that plaintiff must show title to the corpus in dispute, and that if he cannot, the action will not lie”.

In this matter, it was an admitted fact that the Plaintiff-Respondent proved her title. In the case of *Gunasekara & another vs. Latiff* [(1999) 1 SLR 365], it was held that ordinarily the plaintiff has the right to begin, but where the defendant admits plaintiff’s story and contends on some point of law or additional facts to be alleged by him that the plaintiff is not entitled to any part of the relief he claims, the defendant has the right to begin. (Also see: *Kathiramathamby vs. Arumugam* [38 C.L.W. 27])

However, the Defendant-Appellants in this matter have taken up the position that the 1st and 2nd Appellants were acted upon the statutory power vested on them under Section 71 of the Finance Act.

Section 71 of the Finance Act No. 11 of 1963 states as follows,

(1) Subject to the provisions of subsection (2),the Bank is hereby authorized to acquire the whole or any part of any agricultural, residential or business premises, if the Bank is satisfied that those premises were, at any time before or after the appointed date but not earlier than the first day of January, 1956,-

(a) sold in execution of a mortgage decree entered by a court against the owner of such premises (hereafter in this Part of this Act referred to as the " original owner"); or

(b) transferred by the owner of those premises (hereafter in this Part of this Act referred to as the " original owner ") or his heirs, executors or administrators to any other person or the heirs, executors or administrators of any other person in satisfaction of a debt which was due from the original owner or his predecessor in title to that other person and which was secured by a mortgage of those premises subsisting immediately prior to the transfer; or

(c) transferred by the owner of those premises (hereafter in this Part of this Act referred to as the " original owner") or his heirs, executors or administrators to any other person, at the request of a mortgagee of those premises, in satisfaction or part satisfaction of a debt which was due from the original owner or his predecessor in title to that mortgagee and which was secured by a mortgage of those premises subsisting immediately prior to the transfer; or

(d) transferred by the owner of such premises to any other person after receiving from such other person a sum of money as consideration for such transfer and upon the condition that, on the repayment by the transferor, (hereafter in this Part of this Act referred to as the " original owner ") of that sum together with interest thereon within a specified period such other person will re-transfer those premises to the original owner.

(2) No premises shall be acquired under subsection (1) -

(a) unless an application in that behalf has been made to the Bank by the original owner of such premises or, where such

original owner is dead or is of unsound mind or otherwise incapable of acting, by the spouse or any descendant of such person; or

(b) unless the Bank is satisfied that the average statutory income of the person making the application and of the other members of the family of which he is the head, computed under the provisions of the written law relating to the imposition of income tax, for the three years of assessment immediately preceding the date on which such application was made by him, does not exceed a sum of ten thousand rupees; or

(c) if the Bank is satisfied-

(i) that the premises to which the application relates are reasonably required for occupation as a residence for the owner of those premises or any member of the family of such owner or for the purposes of any trade, business, profession, vocation or employment of such owner or any member of his family and that such owner or member of his family has no other premises which could be used for the purpose for which the premises to which the application relates are being used, or

(ii) that the premises to which the application relates were, prior to the date of registration of the notice referred to in paragraph (b) of subsection (4), purchased bona fide for valuable consideration by the owner of such premises from the person to whom such premises were sold or transferred in any of the circumstances specified in subsection (1) or from any other person to whom such premises were subsequently transferred by such person; or

(d) unless, in the case of an application relating to any agricultural premises, the Bank is satisfied that the applicant is not the owner of any other agricultural premises exceeding ten acres in extent.

(3) The question whether any premises which the Bank is authorized to acquire under this Part of this Act should or should not be acquired shall be determined by the Bank and every such determination of the Bank shall be final and conclusive and shall not be called in question in any court.

(4) Where the Bank has determined that any premises shall be acquired for the purposes of this Part of this Act, the Bank shall- Every notice under paragraph (b) shall be registered by the Registrar of Lands in the manner provided 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 the premises the prescribed particulars of which are set out in such notice.

(a) notify such determination to the owner of such premises; and

(b) cause a notice to be delivered or transmitted to the proper Registrar of Lands for registration, setting out the prescribed particulars relating to those premises and stating that those premises are to be acquired under this Part of this Act.

According to this section, it is clear that the appellant bank has the right to acquire a property which belongs to Section 71(1) of the said Act. However, the said Subsection 1(d) clearly claims that the bank has right to acquire a property in the event of conditional transfer on the repayment by the transferor, of that sum together with interest thereon within a specified period such other person will re-transfer those premises to the original owner.

However, this section was amended by No. 16 of 1973 Finance and Ceylon State Mortgage Bank (Amendment Act (No. 16 of 1973) would not apply for the same property since the acquisition taken place in 1969 under Finance Act No. 11 of 1963.

Therefore, it is clear that there is no interest mentioned in the conditional transfer to acquire by the appellant bank under Section 71(d) of the Finance Act No. 11 of 1963. Therefore it is clear no right exists to acquire the said property by the appellant bank under this Act.

In these circumstances, I am of the view that the learned District Judge has very carefully and correctly analyzed all the evidence placed before him for his conclusion.

In this appeal, Plaintiff-Respondent raised Preliminary objection and submitted that the Section 72(7) of the Finance Act No.11 of 1963 is a speedy Jurisdiction and therefore it has not created or granted a right of appeal against an order made in the exercise of such special jurisdiction.

In ***Bakmeewewa Authorised Officer of the People's Bank vs. Konara Raja*** [(1989) 1 SLR 231], it was held by Justice G. P. S. De Siva that,

“The jurisdiction exercised by the District Court under Section 72(7) and (8) of the Finance Act as amended is a special jurisdiction and there is no right of appeal from an order in the exercise of such jurisdiction, unless a right of appeal is expressly provided for in the Act. No right of appeal is provided in the Act. Hence the District Court had no jurisdiction to entertain an application for stay of execution pending appeal under Sec. 763(2) of the Civil Procedure Code.”

This was further discussed by Justice S. Eva Wanasundera PC J. in the recent case of *Hetti Kankanamlage Gunasingha vs. People's Bank & Don Wimalasiri Dissanayake*, [bearing No. S. C. Appeal No. 77/15, which was decided on 13.07.2017].

Therefore, in the above-stated reasons, I dismiss this appeal with cost fixed as Rs. 15,000/-.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL