

FERNANDO
v.
ILLUKKUMBURA AND ANOTHER

COURT OF APPEAL.

SIVA SELLIAH, J. AND ABEYWIRA, J.

C.A. No. 754/82.

NOVEMBER 21 AND 27, 1986.

Certiorari and Mandamus – Finance Act No. 11 of 1963 (amended by Act No. 16 of 1973) s. 71 – Refusal by People’s Bank to acquire premises already sold on hypothecary decree – Stipulation by Bank that petitioner should first open a Savings Deposit Account with it – Bank policy.

The petitioner had mortgaged the premises, the subject matter of this application, to the 1st respondent who put the bond in suit, had them sold in execution of the hypothecary decree entered in the said suit and having bought them at the sale and

obtained the auctioneer's conveyance, entered into possession. The petitioner then applied to the People's Bank (2nd respondent) to act under s. 71 of the Finance Act No. 11 of 1963 as amended by Act No. 16 of 1973 and acquire the said premises for his (the petitioner's) benefit. The Bank called upon the petitioner to make a preliminary deposit of Rs. 4,500 with it in a Savings Deposit Account and later requested a further deposit of Rs. 10,000. The petitioner deposited the sum of Rs. 4,500 but was unable to deposit the sum of Rs. 10,000. The Bank after due inquiry refused to acquire the premises in question. The petitioner applied for a writ of certiorari quashing the decision not to acquire and a writ of mandamus restraining the 1st respondent from alienating the premises.

Held—

In arriving at a decision whether to acquire or not the Bank will have to address itself to 3 questions:—

1. Is the land one which the Bank is vested with authority to acquire?
2. Does s. 71 (2) of the Finance Act restrict the right of the Bank to acquire?
3. Will the Bank in the exercise of its discretion acquire the land?

Section 71 (3) provides that the Bank's determination will be final and conclusive and shall not be called in question in any Court but this immunity from judicial review attaches only to the third question and not to the 1st and 2nd questions which involve a quasi-judicial process or a process closely analogous to the judicial and affect the rights of subjects. The determination not to acquire involved the 3rd question and was decided in accordance with the policy of the Bank not to proceed to acquisition where the interests involved are undivided shares in lands and where the applicant was not in possession.

Firstly the Bank was authorised to acquire the premises—s. 71 (1) (a). On the 2nd question the petitioner had failed to place evidence that his average income for the three years immediately preceding the date of application does not exceed Rs. 10,000. Further physical possession even before the application was made was with the 1st respondent and this shows the petitioner had some other place of residence for himself and his family (s. 71 (1) (c)).

The request to the petitioner to deposit Rs. 10,000 was not outside the Bank's legal rights. It was a matter of policy and for the Bank's security.

If the Bank determines it would acquire premises which it is not authorised to acquire under s. 71 (1), premises which it is inhibited from acquiring under s. 71 (2), the conditions of s. 71 (3) are not satisfied and the determination will not be final and conclusive and no immunity will attach to such a determination. The Bank can make a determination which has the stamp of finality only in respect of premises covered by subsections 1 and 2 of s. 71. The preliminary question as to whether the Bank is authorised to acquire the premises in terms of s. 71 (1) or even if so authorised whether it is prohibited from so acquiring them by the provisions of s. 71 (2) can be reviewed by Court and such review is not barred by s. 22 of the Interpretation Ordinance as it is a jurisdictional question.

In the instant case the decision not to acquire is one within the discretion of the Bank. It is a purely administrative decision taken by considerations of its policy. The decision falls under s. 71 (3) and cannot be questioned in any Court.

Cases referred to:

- (1) *Perera v. The People's Bank Redemption Department and Others* – [1985] 1 Sri L.R. 39.
- (2) *Kanagasabapathy and Another v. The People's Bank and Two Others*—S.C. Application No. 124/75—S.C. Minutes of 27.08.1976.
- (3) *Chandralatha Wijewardena v. The People's Bank and Two Others* – S.C. Appeal No. 3/80—C.A. Application No. 597/76.

APPLICATION for writs of certiorari and mandamus.

Faiz Mustapha for the petitioner.

S. Sivarasa with *S. Muttukrishnan* for 1st respondent.

B. Rajapaksa with *P. Abeykoon* for 2nd respondent.

Cur. adv. vult.

January 30, 1987.

ABEYWIRA, J.

The petitioner has filed papers in this Court by way of petition and affidavit dated 11th of June 1982 seeking authority to issue a writ of certiorari to quash the determination of the 2nd defendant, People's Bank made on the 30th of April, 1982 and accordingly notified to the petitioner. It stated that the said Bank, has after due consideration of the application made by the petitioner on the 1st of June 1978 asking it to acquire certain mortgaged premises of the petitioner from the 1st respondent under the relevant provisions of the Finance Act No. 11 of 1963 and its subsequent amendments, decided not to pursue its application and has rejected the same as per the letter of 30th April, 1982.

The petitioner's application to the 2nd respondent Bank was on the basis that his mother was at one time the owner of premises No. 14 situated at 10th Lane Kollupitiya, Colombo 3, and that the said premises, constituting land and building had been donated to him by her. The said premises is stated to be depicted as Lots 4A, 4B and 482 in Plan No. 1024 prepared on the 25th of September 1968 by surveyor A. P. Sameer (P1) and situated at Bambalapitiya within the Municipal limits of Colombo.

The petitioner had thereafter by mortgage bond No. 3491 of 28.09.1973 (Y) mortgaged to the 1st respondent for a consideration of Rs. 21,000 at 15% interest per annum the defined portion, depicted in the said Plan P1 as Lot 4B1 only, consisting of 13.12 perches of soil and all buildings standing thereon subject to the terms and conditions therein. The 1st respondent is thereafter stated to have put the said bond in suit in the District Court of Colombo in Case No. 273 on the 8th of October 1974 and obtained judgment and decree in his favour on the 3rd of December 1975 (Y1 & Y2). The said premises had thereafter been put up for sale by public auction on orders of the District Court and the same had been purchased thereat by the 1st respondent on the 27th June 1977 for a sum of Rs. 32,685.11. The said sale had been confirmed by the Court by its order of the 2nd of September, 1977, after which the auctioneer's conveyance No. 948 of 07.11.1977 had been issued in favour of the 1st respondent and possession given to him by the Fiscal on the 23rd of May 1978 (see Y2).

The petitioner had thereafter on the 1st of June 1978 made an application to the 2nd respondent Bank requesting it to acquire the said mortgaged premises, presently purchased and in the possession of the 1st respondent by virtue of the authority granted to it under section 71 of the Finance Act No. 11 of 1963 as amended by Act No. 16 of 1973 and the other subsequent and relevant amendments to the same. The Bank had after inquiry decided not to proceed with the acquisition proceedings pertaining to the said premises and had given intimation of this to the petitioner by its letter of the 30th of June 1982 (P6A). Thereafter the petitioner has made the present application on the 11th of June 1982 seeking a writ of certiorari as against the 2nd respondent to quash its decision dismissing the application of the petitioner and to order the 2nd respondent to institute and carry on its acquisition proceedings while at the same time he wanted by way of a writ of Mandamus to restrain the 1st respondent from alienating in any way whatsoever the premises which were earlier mortgaged to him by mortgage Bond No. 3491 of 28.09.1973 (Y) and now in his possession by virtue of the decree of the District Court and the auctioneer's conveyance No. 948 of 07.11.1977.

It is the contention of the petitioner that the 2nd respondent People's Bank had the full legal authority to acquire the said premises under section 71 of the Finance Act No. 11 of 1963 as amended by

No. 16 of 1973 and the other relevant sections of this Act but that the said Bank had for no legal or other valid reason rejected the application of the petitioner thereby denying the petitioner the possibility of getting back the premises mortgaged by him to the 1st respondent. He has also stated that he was geared into making the application to the 2nd respondent Bank as he had read in some newspaper advertisement in January 1978 that the 1st respondent had indicated his intention to sell the said premises. Since the petitioner was himself keen to re-purchase the said premises he is stated to have instructed his Attorney Mr. S. Mahasen to negotiate the purchase of it whereupon he came to know that the 1st respondent had wanted at least a sum of Rs. 8,500 for a perch of land of the said premises (vide P2). These facts had made the petitioner make inquiries from the 2nd respondent Bank as to how it would acquire the said premises under the powers vested in it, under section 71 of the Finance Act No. 11 of 1963 as amended by Act No. 16 of 1973 and the other relevant sections of the said Act.

The petitioner has stated that the 2nd respondent Bank had informed him that he should make an initial deposit with the Bank of Rs. 4,500 by opening a Savings Account with the Bank before any application asking it to acquire the mortgage premises under the Finance Act could be considered. It is the contention of the petitioner that he did comply with this request of the Bank and had thereafter made his formal application to the Bank on the 1st of June 1978 and the same being entertained the Bank had issued notices under section 71 (2 a) and (b) of the Finance Act No. 11 of 1963 as amended by Act No. 16 of 1973 both to the Registrar of Lands, Colombo and the 1st respondent on the 2nd of June 1978 (P3) thus indicating that the said premises was property which may be acquired by the 2nd respondent Bank under Part 8 of the Finance Act.

The application made by the petitioner to the respondent Bank is said to have come up for consideration before the Manager, Land Redemption Branch of the 2nd respondent Bank as the Chairman and the Board of Directors with the petitioner and the 1st respondent being represented by their respective Attorneys-at-law who made their oral and written submissions and also produced documentary evidence in support of each party's case (vide P4a to P4e).

Thereafter on the 9th of September 1980 the 2nd respondent Bank is stated to have requested the petitioner to deposit a sum of Rs. 10,000 into the Savings Account with the 2nd respondent on or

before the 30th of September 1980 and also indicated to him that on failure to do so, the application of the petitioner made to the Bank would be dismissed (see P6). The petitioner has stated that due to the then difficult financial position he was in, he was unable to comply with this request and deposit Rs. 10,000 into his Savings Account, while on the other hand in fact he had even had occasion to withdraw from time to time a part of the money already deposited into the Savings Account of the respondent Bank.

The petitioner states that on inquiry made by him thereafter he came to know that the 2nd respondent Bank had sent him a letter in December 1981 calling upon him to deposit moneys into his Savings Account with the Bank so as to bring the sum in his savings account up to Rs. 20,000 and that the same was to be done on or before the 31st of December 1981. Also that a failure to do so would cause the Bank to dismiss his application made to the Bank to acquire the premises originally mortgaged to the 1st respondent. It is the contention of the petitioner that no such letter sent by the Bank, was in actual fact received by him and that he came to know of this only at the inquiry the Bank held on his application. Finally the 2nd respondent Bank by its letter dated the 30th of April 1982 (P6a) had informed the petitioner that the Bank had dismissed his application to have the premises mortgaged to and purchased thereafter by the 1st respondent acquired by the Bank under the powers given to it by the Finance Act. The petitioner had thereafter written to the General Manager of the 2nd respondent Bank on the 19th of May 1982 (P7) appealing to him to reconsider his decision and also indicating his willingness to deposit the entire sum for which the property had been mortgaged in (3) instalments. However, the 2nd respondent Bank had by its letters dated the 31st of May 1982 (P8) addressed to the Registrar of Lands, Colombo and also to the 1st respondent indicated that the notices sent to them earlier by the letters of the 2nd of June 1978 (P3) have been cancelled as authorised by the powers given to the Bank by the proviso to section 71 (2a) (b) of Act No. 16 of 1973.

The petitioner maintains that the said determination by the Bank to dismiss his application made on 1st of June 1978 after inquiry was invalid and of no avail in law being contrary to all law applicable and the evidence led at the inquiry. It is also urged that the order of dismissal is contrary to all principles of natural justice and other legal rights available to the petitioners. Thus it should be set aside and the Bank

should proceed to act under section 71 Act No. 11 of 1963, as amended by Act No. 16 of 1973 and its other subsequent amendments in relation to the right of the Bank to acquire the said premises.

It is also urged that the 2nd respondent Bank had no legal right whatsoever to impose a condition on the petitioner that he should first open a Savings Account with the Bank and also have certain sums of money brought into this savings account before the Bank would decide to inquire into the application made by the petitioner calling upon the Bank to act under section 71 of the Finance Act.

According to the petitioner the application made by him to the 2nd respondent Bank on 1st of June 1978 was well within the purview of the provisions of section 71(1) (a) of Act No. 16 of 1973 and therefore the demands made to the petitioner to open a savings account with this Bank and to deposit certain sums of money before his application could be determined is ultra vires the powers of the Bank under the Finance Act.

The petitioner therefore prays that this Court do issue a writ of certiorari quashing the determination or order of the 2nd defendant Bank made on the 30th of April 1982 (P6A) determining the application made by the petitioner to it on the 1st of June 1978 requesting the Bank to take steps to acquire the premises mortgaged by him to the 1st respondent and subsequently purchased by the 1st respondent under the mortgage decree entered in his favour. Also to have the 2nd respondent to take all the necessary steps as provided for by the Finance Act No. 11 of 1963 as amended by Act No. 16 of 1973 and its other subsequent amendments for the acquisition by the Bank of the said premises.

He further prays for a writ of mandamus directing the 1st respondent, who is presently the legal owner of the said premises and also in possession of the same, to refrain from alienating in any way the said premises which is more specifically depicted in Plan No. 1024 of 25.09.1968 (P1) as Lot 4B1 in extent 13.12 perches together with everything thereon and the buildings.

The 1st respondent has by his affidavit dated the 8th of August 1982 requested the Court to dismiss the application of the petitioner for the reasons stated therein and specially as the decision of the 2nd

respondent not to acquire the said premises after due inquiry under the Finance Act is final and conclusive and not questionable in any Court of law (vide section 71 (3) of Act No. 11 of 1963).

The 2nd respondent People's Bank had tendered its objections to this application of the petitioner by its petition and affidavit of the 3rd of August 1982 whereby it has denied all the averments stated by the petitioner except those which have been specifically admitted by it and has put the petitioner to the strict proof of the rest. The 2nd respondent accepts the averments of the petitioner that his mother Mrs. Cecilia Fernando was at one time the lawful owner of the premises in question and that she had gifted the same to the petitioner who had thereafter by Mortgage Bond No. 3491 of 28.09.1973 (Y) mortgaged the premises depicted as Lot 4B1 in Plan No. 1024 of 25.09.1968 (P1) with the buildings and everything else standing thereon to the 1st respondent for a sum of Rs. 21,000 with interest thereon at 15 per cent per annum and subject to the other conditions stated therein. That the 1st respondent had put the said mortgage bond in suit and after obtaining decree therein, had purchased the same for a sum of Rs. 32,685. 11 on the 27th of June 1977 at the sale by public auction authorised by Court and had thereafter obtained the auctioneer's purchase deed No. 948 of 07.11.1977 and also got himself placed in possession of the said premises by the Fiscal on 23rd May 1978 is admitted. He has denied the averments in paragraphs 4, 12, 18, 19 and 20 of the petition of the petitioner. The 2nd respondent states that it did call upon the petitioner to deposit Rs. 7,650 into a Savings Account opened with the Bank before the application made by the petitioner could be formally entertained by the Bank as it was the normal practice of the Bank to call upon the applicant to deposit at least 1/4th of the amount of compensation payable when entertaining the application which amount would be payable by the Bank to the 1st respondent under the Finance Act. Answering paragraphs 9 and 10 of the petition the 2nd respondent only admits that an inquiry was held where all the parties to the application of the petitioner were represented by their Attorneys-at-Law who presented their evidence in support of each party's claims and also made their written submissions. In reply to the averments in paragraph 11 of the petition it is accepted that the 2nd respondent did send the letter marked P6A intimating to the petitioner that his application to the Bank made on the 1st of June 1978 was dismissed. The 2nd respondent has also accepted the fact that a

letter was sent to the petitioner to deposit Rs. 10,000 into his savings account with the 2nd respondent Bank and also that he was informed by another letter sent in December 1981 to bring the amount lying to his credit in the Savings Account up to Rs. 20,000 on or before the end of December 1981 failing which the application made to the 2nd respondent Bank to acquire the mortgaged premises then in the possession of the 1st respondent would be dismissed.

The 2nd respondent maintains that after the said inquiry it was decided by the Bank that it will have to dismiss the application made to it by the petitioner as the latter had not complied with the requirements called upon him by the Bank to fulfil. It is further urged that the question whether or not the Bank is to pursue the question as to whether it should acquire any premises under the provisions is entirely one within its discretion as provided by section 71 (3) of the Finance Act No. 11 of 1963 and that its finding on this matter is final and not questionable in any Court of law.

The 2nd respondent accordingly prays for the dismissal of the petition filed by the petitioner in this instance.

At the inquiry before this Court the learned Attorney for the petitioner maintained that for the reasons stated in the petition and affidavit, the decision of the respondent Bank not to proceed with the application of the petitioner should be quashed and that the Bank be directed to take due and proper steps under section 71 of Act No. 16 of 1973 to see that the premises mortgaged by the petitioner to the 1st respondent and presently purchased and possessed by the 1st respondent be acquired by the 2nd respondent Bank. It is also stated that the 1st respondent be ordered by a writ of mandamus issued by Court, not to alienate the said premises.

On the main question as to whether a writ of certiorari will lie to order the 2nd respondent Bank to pursue the application made to it by the petitioner on the 1st of June 1978 and thus take all the due and necessary steps under the Finance Act No. 11 of 1963 as amended by Act No. 16 of 1973 after quashing its order of dismissal of the said application by its letter dated the 30th of April 1982 (P6A) this Court finds that section 11 of Act of 1963 as amended by Act No. 16 of 1973 contains largely all the powers granted to the Bank whether it should proceed and act under the said section or not. On this matter we also have the decision of this Court in the case of *Perera v. The*

People's Bank Redemption Department and Others (1) for our consideration. In that case it was held that in arriving at its decision under section 71 of Act No. 11 of 1963 the Bank has to address itself to three (3) questions, namely:

- (1) Is the land one which the Bank is authorised to acquire?
- (2) Does section 71(2) restrict the right of the Bank to acquire?
and
- (3) Will the Bank in the exercise of its discretion acquire the land?

It also stated that section 71(3) of the Act No. 11 of 1963 provides that the determination of the Bank shall be final and conclusive and shall not be called in question in any Court, but that this immunity attaches only to decisions on the (3rd) question and not on the 1st and 2nd questions which involve a quasi-judicial process or a process closely analogous to the judicial and affect the rights of subjects and are accordingly subject to judicial review. Also that the determination not to acquire involved the 3rd question and was decided in accordance with the policy of the Bank not to proceed to acquisition, where the interests involved are undivided shares in lands and the applicant is not in possession. This is a purely administrative decision guided by considerations of policy and not subject to review by certiorari and mandamus. Moreover the decision not to acquire had been made within jurisdiction and in terms of section 71(3) read with section 22 of the Interpretation Ordinance and is final and conclusive and cannot be questioned in any Court. (See also the case of *Kanagasabapathy and Another v. The People's Bank and Two Others* (2) and the case of *Chandralatha Wijewardena v. The People's Bank and Two Others* (3)).

In the present case too it could be safely concluded that the premises mortgaged by the petitioner to the 1st respondent falls within the provisions of section 71(1)(a) of the Finance Act No. 11 of 1963 as amended by Act No. 16 of 1973.

The second matter for consideration is whether even if the premises in question fall within the category of premises referred to under section 71(1)(a) of the Finance Act, yet it would be prohibited from acquiring the same by virtue of the provisions of section 71(2) of the said Act. On this matter the 2nd respondent Bank has by its petition of objections stated inter alia that no evidence whatsoever has been

given to the Bank that the petitioner is one whose average income for the three years immediately preceding the date on which his application is made does not exceed ten thousand Rupees (Rs. 10,000). Also the question as to whether the application could have been considered by the bank as one falling within the limits of section 71(2)(c) is doubtful as the said premises have been in the physical possession of the 1st respondent even before the application was made by the petitioner to the respondent Bank for acquisition thereby showing that the petitioner has had some other place of residence for himself and his family. Also the objection and criticism that the 2nd respondent Bank had no legal right to request the petitioner to open a Savings Account with the Bank and have deposited into this Savings Account certain sums of moneys before the application of the petitioner could be considered, cannot be regarded as without any legal authority, for in its objections the respondent Bank has stated that as a matter of policy and for its own security it does call upon any petitioner to deposit at least a 1/4th amount of the compensation payable.

Thereafter section 71(3) of Act No. 11 of 1963 goes on to state that the question whether any premises which the Bank is authorised to acquire under this part of this Act, shall or shall 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.

Sharvananda, J. as he then was, has in the case of *Chandralatha Wijewardena v. The People's Bank and Two Others (supra)* (3) stated thus:

"If the Bank is satisfied that subsection (1) vests it with authority to acquire the premises and that the restrictions in sub-section (2) do not prohibit the acquisition, then the third question is whether, in the exercise of its discretion the premises should or should not be acquired, and if the Bank decides to acquire the premises under sub-section (3) it makes a decision accordingly. It is that determination that the premises which the Bank is authorised to acquire under sub-section (1) and (2) should or shall not be acquired that is final and conclusive and cannot be questioned in any Court. Therefore if the Bank determines that it should acquire premises which it is not authorised to acquire under sub-section (1), which it is inhibited from acquiring by sub-section (2) the conditions of

section 71 (3) are not satisfied and the determination will not be final and conclusive and no immunity will attach to such determination. The Bank can make a determination which has the stamp of finality only in respect of premises that are covered by the provisions of subsection (1) and (2). The preliminary question as to whether the Bank is authorised to acquire the premises in terms of section 71 (1), or even when so authorised whether it is prohibited from so acquiring by the provisions of section 71 (2) is not one for the final decision of the Bank and can properly be canvassed in a Court. Section 22 of the Interpretation Ordinance as amended by Act No. 18 of 1972 does not bar the agitation of that jurisdictional question."

In this case the decision of the 2nd respondent Bank not to acquire the premises in question after an inquiry into it was held by the Bank is one under section 71 (3), a decision falling within the discretion of the Bank and one which is purely an administrative decision, taken by considerations of its policy. This decision is one falling within the purview of section 71 (3) of the Finance Act and cannot be questioned in any Court.

In the said circumstances no writ of certiorari would be available to the petitioner to have the determination made by the 2nd respondent Bank on the 30th of April 1982 dismissing the application made by the petitioner on the 1st of June 1978 calling upon the Bank to proceed under the provisions of section 71 of the Finance Act and acquire the premises in question quashed, and to seek the authority of this Court to call upon the Bank to proceed with the acquisition of the premises mortgaged to the 1st respondent. Following therefrom no writ of mandamus will lie against the 1st respondent to this application also.

For the aforesaid reasons we hold that the petitioner's application for the issue of the two writs has to be dismissed with costs.

SIVA SELLIAH, J. – I agree.

Application refused.