SAI NONA
v.
MAGGIE SILVA AND ANOTHER

SUPREME COURT
H. A. G. DE SILVA, J., BANDARANAYAKE. J., AND KULATUNGA, J.
S.C. No. 33/86
SC LA No. 20/86
CA APPLICATION No. 1014/79
JULY 10, 11, 17, 19, 20, 27 AND AUGUST 01, 1989

Acquisition under the Finance Act by People's Bank – Section 71(1)(2)(3)of the Finance Act, No. 11 of 1963 amended by Law, No. 16 of 1973 – Natural justice

The premises sought to be acquired by the Bank under section 71 of the Finance Act No. 11 of 1963 amended by Law No. 16 of 1973 were owned by CK the husband of the appellant. He by Deed No. 21446 of 05.02.1964 sold it to D subject to the right to obtain a retransfer of the land upon payment of the sum of Rs. 1,250/- with interest at 16% p.a. within 3 years of 05.02.1964. CK died on 26.04.65 leaving no issue and without obtaining a reconveyance. D transferred the land to M a sister of CK by Deed No. 423 of 17.06.65. The Supreme Court in another case held the transfer to M was subject to the condition in Deed No. 21446. S the widow of CK made an application

dated 02.09.76 to the People's Bank for redemption of the premises by acquisition under s. 71(3) of the Finance Act.

M. filed objections to the acquisition and the parties were summoned for an inquiry on 15.11.77. M was present with her lawyers. S was present also but moved for a postponement as her lawyer could not be present. This was refused. The inquiring officer of the Bank made order that in the event of S's lawyers filing objections these should be copied to both Counsel representing M. Thereafter submissions against the acquisition were recorded in the presence of the parties including junior Counsel of S who had arrived by then. S. then applied for a date for her senior Counsel to appear and make his statement. This was fixed for 14.12.77. On 28.11.77 the Attorney for S submitted written counter objections. There was no proof of service of these counter-objections on the counsel for M by the lawyers of S or by the Bank. On 14.12.77 the lawyer of M had appeared but S was absent and unrepresented. On 15.12.77 M's lawyer wrote praying for dismissal of S's application. On 14.12.77 the Bank had written to M's lawyer to call over to make his submissions before 25.02.77. M wrote to the Bank nominating her lawyer to attend the Bank for discussions. On 13.10.78 the Bank found against M and made his determination to proceed with the acquisition.

Held –

(1) The Bank is not compelled to adopt a particular procedure but what procedure it adopts must be made known to the parties. If any party is prejudiced for want of such knowledge it may result in a denial of natural justice depending on the extent of the prejudice caused.

(2) The notices of the inquiry give the impression that the scheduled inquiry is a formal inquiry. When on 15.12.77 the inquiry was postponed to 14.12.77 the petitioner-respondent (M) was entitled to expect the formal inquiry to continue.

(3) The failure to issue a copy of the objections which the inquiring officer himself had ordered to be copied to the lawyer of the other party discloses a lack of the judicial spirit required of an inquirer.

(4) While seeking the submissions of S's lawyer the Bank's only contact with M was for the purpose of persuading her to amicably settle the dispute.

(5) the duty of making the correct decision was exclusively on the Bank and there was no burden on the lawyer of the owner to activate the Bank.

(6) Whether or not the failure to permit oral hearings would constitute a denial of natural justice will depend on the facts and circumstances and the issue in each case.

Cases referred to:

1. *Perera* v. *Perera* 41 NLR 344, 346
2. *Maggie Silva* v. *Sai Nona* 78 NLR 313
3. *Perera* v. *People's Bank* [1985] 1 Sri LR 39
4. *Emaliyana Perera* v. *People's Bank* [1987] 1 Sri LR 181
5. *Morgan* v. *United States* 298 US 468

6 *Goldberg* v. *Kelly* US 397, 254 at 297

7 *Board of Education* v. *Rice* [1911] AC 179

8 *Local Government Board* v. *Arlidge* [1915] AC 120, 140

9 *Wiseman* v. *Borneman* [1969] 3 All ER 274

10 *Shariff* v. *Commissioner for Registration of Indian and Pakistani Residents* 67 NLR 433

11 *Pett.* v. *Greyhound Racing Association Ltd.* [1968] 2 AC 545, 549

12 *Board of Trustees of Maradana Mosque* v. *Minister of Education* 68 NLR 217

13 *Kanda* v. *Government of the Federation of Malaya* [1962] AC 322

14 *R* v. *Wareham Magistrate's Court, ex parte Seldon* [1988] 1 All ER 746, 753

15 *Clayton* v. *Chief Constable of Norfolk* [1983] 1 All ER 984, 992

16 *R* v. *Assim* [1966] 2 All ER 887 – 888

APPEAL from judgment of the Court of Appeal

N.R.M. Daluwatte, P.C. with *J.C. Boange* for 1st respondent-appellant (widow of original owner seeking acquisition)

Dr. H.W. Jayewardene, Q.C. with *Bimal Rajapakse, Harsha Amersekere* and *H. Cabral* for the petitioner-respondent (present owner)

Faiz Mustapha, P.C. with *Migel Hatch* for 2nd respondent-respondent (Bank)

Cur adv. vult.

September 21, 1989.

KULATUNGA, J.

This is an appeal by the 1st respondent-appellant (hereinafter referred to as the appellant) from a judgment of the Court of Appeal dated 31.01.86 by which that Court quashed a determination dated 18.01.79 made by the 2nd respondent-respondent (The People's Bank) for the acquisition of certain premises owned by the petitioner-respondent in terms of Section 71(1) of the Finance Act No.11 of 1963 as amended by Law No. 16 of 1973. The Court of Appeal held that the petitioner-respondent was entitled to a writ of certiorari quashing the said determination on the ground that it had been made without giving a fair hearing to the petitioner-respondent, in violation of the principles of natural justice.

The premises sought to be acquired by virtue of the impugned determination consist of a land called Paragahawatte alias Kosgahawatte (2 Acres. 0R. 36P.) which was originally owned by one Cornelis de Silva Karunaratne, the husband of the appellant who by

deed No. 21446 of 05.02.64 sold it to Daniel Fernando subject to the condition that if the vendor repaid the vendee the sum of Rs. 1250/- with interest thereon at the rate of 16% per annum within a period of 3 years from 05.02.64, the vendee would reconvey the premises to the vendor. The vendor Karunaratne died on 26.04.65 without obtaining the reconveyance. Daniel Fernando transferred the said land to the petitioner-respondent, a sister of the said Karunaratne by deed No. 423 dated 17.06.65.

Dr. H.W. Jayewardene, QC, learned Counsel for the petitioner-respondent submitted that by this Deed No. 423, the petitioner-respondent redeemed the premises from Daniel Fernando and became the absolute owner thereof. He argued that the obligation on the heirs of the original owner Karunaratne is joint and several and hence it was competent for the petitioner-respondent to redeem the entirety of the premises.

Mr. Daluwatte, PC, learned Counsel for the appellant contended that the obligation on the heirs of Karunaratne is joint and hence the discharge of the obligation and the Deed had to be joint. He cited Weeramantry Vol. I parts III & IV (1967) Sections 543 and 559 and the decision in *Perera v. Perera* (1) in support.

These submissions are relevant to the question as to the extent of the said premises which the appellant was entitled to redeem through the People's Bank by an acquisition under the Finance Act No. 11 of 1963 as amended by Law No. 16 of 1973 and the jurisdiction of the People's Bank in that regard, an issue which the petitioner-respondent raised both before the said Bank and in her application to the Court of Appeal but in respect of which we do not have a finding either by the Bank or by the Court of Appeal.

I am of the view that in the absence of a finding by the Court below or by the People's Bank it would not be appropriate for this Court to detemine the aforesaid issue for the first time. However, as I shall discuss later in this judgment, the submissions of Counsel on this issue are of relevance in considering whether the Court of Appeal was right in its opinion that the impugned determination for the acquisition of the property was made without giving a fair hearing to the petitioner-respondent, in violation of the principles of natural justice.

According to the amended answer filed by the appellant in DC Negombo 1208/L (exhibit 'B') and the decision in *Maggie Silva v. Sai*

Nona (2) the transfer of the said premises by Daniel Fernando to the petitioner-respondent on deed No. 423 was subject to the condition contained in deed No. 21446 whereby the original owner Karunaratne reserved for himself, his heirs, executors, administrators and assigns the right to obtain a reconveyance of the same before 05.02.67.

According to the pleadings before the Court of Appeal, the said Karunaratne died issueless and without leaving a last will and leaving as his heirs the appellant (his wife) who would be entitled to 1/2 of his estate and other heirs including the petitioner-respondent (his sister) who would be entitled to the balance 1/2.

None of the heirs including the appellant on whom the right to obtain a reconveyance of the said premises had devolved upon the demise of the said Karunaratne applied for any reconveyance from the petitioner-respondent within the stipulated period ending on 05.02.67. Consequently, the petitioner-respondent became the absolute owner of the said premises. As the appellant continued to possess the premises even after 05.02.67 the petitioner-respondent sued her for a declaration of title, ejectment and damages in DC Negombo 1208/L and succeeded in appeal to the Supreme Court. *Maggie Silva v. Sai Nona* (Supra).

Pursuant to the order of the Supreme Court, the appellant was ejected from the said premises and possession thereof was given to the petitioner-respondent. Thereafter, the appellant made an application dated 02.09.76 to the People's Bank for the redemption of the premises by acquisition in terms of the provisions of the Finance Act No. 11 of 1963 as amended.

The People's Bank inquired into the appellant's application and on 18.01.79 made its determination under Section 71(3) of the Act for the acquisition of the premises under reference (exhibit 'K1'). This was communicated to the petitioner-respondent on 19.01.79 (exhibit 'K'). The petitioner-respondent challenged the said determination in the Court below on two grounds namely want or excess of jurisdiction and violation of the principles of natural justice.

Briefly, the position taken by the petitioner-respondent in the Court below was that after the Supreme Court declared her rights to the premises under reference as the absolute owner the provisions of the Finance Act had no application and the appellant had no rights whatsoever against her; that in any event in view of the fact that the

appellant's entitlement as an heir being only to 1/2 of the estate of Karunaratne, the original owner of the premises, she could not claim any rights to the entirety of the said premises. The petitioner-respondent also urged that the Bank had denied her a fair hearing before making the impugned determination in that whilst it was her expectation, induced by the conduct of the Bank, that a formal inquiry in the presence of both parties would be held before making the final decision, the Bank failed to make such inquiry.

A determination under Section 71(3) of the Act is reviewable for want of or excess of jurisdiction either if the bank is not authorised by Section 71(1) to acquire the same or if Section 71(2) restricts the right of the Bank to acquire the same. The finality clause contained in Section 71(3) immunes a termination which conforms to the said provisions – *Perera v. People's Bank* (3), *Emaliyana Perera vs. People's Bank* (4). However the judgment of the Court of Appeal shows that Counsel for the People's Bank had contended that in view of the finality clauses and the provisions of Section 22 of the Interpretation Ordinance as amended by Act No. 18 of 1972, the determination of the Bank can be challenged only on the ground that it is contrary to the rules of natural justice. Counsel for the appellant had made some submissions relevant to the issue of want of or excess of jurisdiction but the Counsel for the petitioner-respondent appears to have been content to present his case only on the ground that the impugned decision is not in accordance with the principles of natural justice; and the Court decided the case only on that ground. I shall now proceed to consider the facts relevant to the impugned inquiry.

In her written objections to the proposed acquisition forwarded to the Bank, the petitioner-respondent set out the background facts ending with the consolidation of her title to the premises in dispute in terms of the Supreme Court judgment in 78 NLR 313 and contended that the provisions of Section 71 of the Finance Act have no application and that in any event in view of the devolution of rights of the original owner on his heirs, the applicant may claim interests only in respect of a half share of the premises; and as such the appellant's application (for an acquisition of the entire property) is not tenable (exhibit 'E').

Thereafter, the parties were summoned for an inquiry on 15.11.77. They were also informed that in default of appearance, a decision will be taken on the available material (exhibit 'H'). On 15.11.77, the

petitioner-respondent was present with messrs J.L. Fernandopillai and E.B.K. de Zoysa, Attorneys-at-law. The appellant was also present and applied for a date as her lawyer was not free on that day. This was refused. The inquiring officer also made an order that in the event of the appellant's lawyer filing any submissions it should be copied to both Counsel representing the petitioner-respondent. Thereafter, submissions against the acquisition were recorded in the presence of the parties including the junior Counsel for the appellant who had arrived by this time.

The record of the proceedings had on 15.11.77 (exhibit 'X') shows that on that day, Counsel for the petitioner-respondent had confined his submissions to an outline of the background facts of the case at the end of which he urged that the petitioner-respondent be permitted to retain the property sought to be acquired and strongly objected to the proposed acquisition. The appellant was not ready to make submissions and applied for a date for her Senior Counsel to appear and to make his statement; this was fixed for 14.12.77 at 2.00 p.m..

On 28.11.77, Mr. Nagahawatte, Attorney-at-Law submitted written counter objections on behalf of the appellant (exhibit 'Y') and by a covering letter which is in the Bank file of papers applied for a date to support the same. The Bank's file which had been submitted on the directions of the Court of Appeal shows that on 08.12.77 the Bank had written to Mr. Nagahawatte fixing 19.12.77 to support the counter objections on which Mr. Nagahawatte failed to appear. This is also admitted in the affidavits filed on behalf of the Bank in the Court of Appeal.

There is no evidence to establish that the counter objections filed by Mr. Nagahawatte had been copied to the petitioner-respondent's lawyers as ordered by the inquiring officer on 15.11.77. The said objections allege that Daniel Fernando was not competent to transfer the property until after 05.02.67 and as such the transfer to the petitioner-respondent on deed No.473 dated 17.06.65 is invalid. The said objections do not answer the challange to the proposed acquisition based on the ground of the devolution of interests of the original owner Karunaratne on his heirs and assume that the appellant is competent to redeem the entirety of the premises through the Bank.

It is significant that despite the lapse of Mr. Nagahawatte to copy the appellant's counter objections to the lawyers for the

petitioner-respondent in terms of the inquiring officer's order on 15.11.77, the Bank failed to cause the same to be served on them or on the petitioner-respondent or to summon the petitioner-respondent or her representative to appear on 19.12.77 for which date Mr. Nagahawatte had been specially noticed.

In the meantime there is no record in the Bank file of the proceedings had on 14.12.77 to which date the inquiry had been postponed on 15.11.77. However, according to a letter dated 15.12.77 addressed to the Bank by Mr. E.B.K. de Zoysa Attorney-at-Law for the petitioner-respondent (exhibit 'I') Mr. M.K.D.S. Gunatilake had appeared for the petitioner-respondent on 14.12.77 for the inquiry but the appellant was absent. In the said letter Mr. de Zoysa states that on 15.11.77, Counsel had made submissions against the appellant's application and prays for a dismissal of the application on the ground of the failure of the appellant to appear on 14.12.77.

According to the Bank file, on 14.12.77 the Bank had written to the petitioner-respondent to come for a discussion and Mr. Nagahawatte to call over to make his submissions, before 25.02.77. The affidavits filed by the Bank in the Court of Appeal state that Mr. Nagahawatte failed to call over as requested. On 02.03.78, the petitioner-respondent sent a letter to the Bank through Mr. M.K.D.S. Gunatilake in reply to the Bank's letter of 14.12.77 authorising him to hold discussions and reminding the Bank that her Counsel had made submissions on her behalf on 15.11.77. She also renewed her request for a dismissal of the appellant's application for default of appearance on 14.12.77 (exhibit 'J').

Official minutes on folio 51 of the Bank file indicate that on 02.03.78, the inquiring officer acting on the instructions of the Manager, Land Redemption Branch had endeavoured to persuade the representative of the petitioner-respondent to amicably settle the dispute but that the representative was not agreeable to enter into a settlement. Thereafter, on 09.03.77, Mr. M.K.D.S. Gunatilake wrote to the Bank applying for a copy of the written statement which had been submitted with reference to the proposed acquisition by the appellant or by her lawyer on payment of the usual charges. This shows that he had now become aware of the existence of the counter objections which had been made in support of the acquisition. However, there is no evidence in the Bank file that a copy of the counter objections had been issued as requested.

On the other hand, according to an undated letter written by the bank to Mr. Nagahawatte, Attorney-at-Law enclosing a copy of the objections made by the petitioner-respondent (folio 61 of the Bank file) the Bank had called for counter submissions more particularly regarding Clause 13 i.e. on the legal issues arising from the devolution of title consequent to the death of the original owner of the land. Mr. Nagahawatte's undated counter submissions had been received and filed at folio 63 of the Bank file. These facts are also admitted in the affidavits filed on behalf of the Bank in the Court of Appeal.

On 13.10.78, the Manager Land Redemption Branch made his final report on the proposed acquisition wherein he states inter alia, "the objection based on the interests of heirs cannot be maintained under the provisions of the Finance Act as Law No. 16 of 1973 considers the wife stepping into the shoes of the husband to redeem a land lost on a conditional transfer and therefore matters of testamentary dispositions are not taken into consideration". He therefore recommends that a determination be made to acquire the property (folio 66 of the Bank file). On 08.12.78, the Board of Directors of the Bank, acting on the said report, decided to acquire the property.

During the argument, the learned Queen's Counsel objected to the Counsel for the appellant reading from the Bank file any documents other than those which have been formally produced. I have examined the entire Bank file as this Court is not affected by the said objection in that firstly, the material I have discovered merely confirms or clarifies the case for the parties to this appeal; secondly, it is within the power of a Court exercising review jurisdiction to call for and examine the record, in the interests of justice and for the effectual exercise of such jurisdiction; thirdly, I also venture to advance the criticism that with all respect to the Court of Appeal, we are hampered by the fact that the judgment in appeal has failed to examine the issues in some depth but for which failure this appeal may not have presented so much difficulty as appeared to exist at the hearing; fourthly, it would be impossible to properly apply the relevant legal principles to the case without a thorough ascertainment of the facts.

Mr. Daluwatte, PC in support of the appeal submitted that the Court of Appeal was in error in quashing the impugned determination on the ground that it had been made in violation of the rules of

natural justice; that in deciding the question, each case must be considered on its own facts and circumstances; that no rigid rule can be laid down; that the view taken by the Court of Appeal is technical; and the conclusion that the bank failed to hold a fair inquiry was reached without a proper application of the relevant legal principles to the facts of this case.

The learned President's Counsel contended that the petitioner-respondent was given an adequate opportunity of presenting her case; that no hindrance or impediment was placed by the Bank in that regard; that consequently she submitted her written objection to the acquisition (exhibit 'E'); that on 15.11.77 her Counsel made oral submissions (exhibit 'X'); that her submission based on intestate succession has no relevance; that in any event the said submission in respect of which the Bank obtained the submissions of the appellant's Counsel is a matter of law and such consultation did not prejudice the petitioner-respondent; that the failure to issue a copy of the appellant's counter submissions (exhibit 'Y') caused no prejudice to the petitioner-respondent; that no legal bar to the acquisition has been shown to exist; that the grounds urged against the acquisition only go to the discretion of the Bank which cannot be questioned by certiorari; that the only ground adduced in the Court of Appeal was the alleged denial of natural justice; that a fair hearing was given at the inquiry on 15.11.77; and that the admissions in the exhibits 'X' and 'J' rebut the complaint as to the lack of a sufficient inquiry.

Mr. Daluwatte, PC complained that the finding of the Court of Appeal was due to the erroneous opinion it entertained namely that the bank was obliged to continue the oral hearing after 15.11.77 and to dismiss the application for default of appearance on the part of the appellant on 14.12.77 whereas the law does not require such hearings. He submitted that the Court of Appeal thought in terms of an inquiry in that sense and not an adequate opportunity to be heard, which is all that the law requires. He urged that the procedure adopted by the Bank was neither unreasonable nor unfair.

Dr. H.W. Jayewardene, QC opposing the appeal contended that the Court of Appeal reached the correct conclusion on a review of the relevant facts and its judgment is fully justified in the light of the applicable law. He submitted that the scope of the audi alteram partem rule is now wider and means the right to a fair hearing and determination of the broadest amplitude; that it is a principle of justice

rooted in the Common Law in England and embedded in the due process clause (14th Amendment) in the American Constitution; and accordingly the State shall not deprive any person of life, liberty or property, without an opportunity to be heard in defence of his rights. He drew our attention to Section 22 of the Interpretation Ordinance (Cap.2) as amended by Act No. 18 of 1972 which has codified the principle relating to natural justice.

The learned Queen's Counsel argued that under Section 71(1) of the Finance Act No. 11 of 1963 as amended by Law No. 16 of 1973 the People's Bank has to be satisfied of the case for acquisition after giving a fair opportunity to the party affected to be heard which is a fundamental requirement of the common law in such cases. He contended that the Bank had failed to give a fair hearing to the petitioner-respondent before making its decision in that–

(a) it failed to provide the petitioner-respondent with a copy of the application for acquisition;

(b) it misled the petitioner-respondent to the belief that the formal inquiry which commenced on 15.11.77 would be continued when it was postponed for 14.12.77 but failed to continue the inquiry or to dismiss the application for acquisition for default of appearance by the appellant or to make a decision on the available material as stated in the notices of inquiry (exhibits 'P' and 'H');

(c) it failed to provide the petitioner-respondent with a copy of the appellant's counter objections (exhibit 'Y');

(d) it heard the Attorney-at-Law for the appellant behind the back of the petitioner-respondent on the very issue raised by the latter, namely, the legal issue arising from the devolution of title consequent to the death of the original owner of the land. Neither the petitioner-respondent nor her lawyer was informed of such further inquiry.

It was also submitted that the statements of the petitioner-respondent in exhibits 'I' and 'J' that her lawyers had made submissions on all the matters should be considered in the context i.e. those statements were made when she was unaware of the hearing which the Bank was giving to the appellant and that in any event even if her lawyers had been remiss in stating her case or in pursuing steps she was entitled to a fair hearing at the hands of the

Bank having regard to the consequences of a decision to acquire her land. Our attention was also drawn to the fact that the bank has not appealed against the judgment of the Court below. This, it was submitted, is another ground against interfering with that judgment.

Learned Counsel cited a large number of authorities all of which are no doubt very helpful for a full appreciation of the legal principles involved in this sphere. However, I shall refer only to those authorities which are immediately relevant to the issues before us.

Both in Britain and America, the right to a hearing connotes much the same opportunities and formalities such as the right to an oral hearing; to be apprised of the case on the other side; to present evidence and argument; to rebut adverse evidence by cross-examination and other appropriate means; to have a reasoned decision; to have a transcribed record of the hearing; and to appear with Counsel. Legal Control of Government (Administrative Law in Britain and the United States): Schwartz and Wade (1972) 249.

However, in both systems there are no rigid rules as to which of those opportunities and formalities should be conformed to ensure a fair hearing except that in the United States, in view of the fact that this right is rooted in the Constitution. Courts tend to narrow down the distinction between the procedure in Courts and before administrative tribunals which distinction is evident in Britian, e.g. as regards the need for personal hearings by the decision making authority – *Morgan v. United States* (5). The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard – *Goldberg v. Kelly* (6).

The Courts in Sri lanka have invariably resorted to English decisions for elucidation. The following dicta of the Lord Chancellor in *Board of Education v. Rice* (7) are in point.

> "In such cases the Board of Education will have to ascertain the law and ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is the duty lying upon anyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view".

In the case of *Local Government Board v. Arlidge* (8), Lord Parmoor added the following refinement as a guide to the application of the principle of natural justice:

> "Where, however, the question of propriety of procedure is raised in a hearing before some tribunal other than a Court of Law there is no obligation to adopt the regular forms of legal procedure. It is sufficient if the case has been heard in a judicial spirit and in accordance with the principles of substantial justice.
>
> In determining whether the principles of substantial justice have been complied with in matters of procedure, regard must be had necessarily to the nature of the issue to be determined and the constitution of the tribunal".

Lord Morris in *Wiseman v. Borneman* (9) stated –

> "We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But this analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action".

These decisions lay down the principle that a tribunal acting in a quasi judicial capacity must ascertain the law and the facts hearing the case in a judicial spirit. In the absence of specific provision, it may adopt its own procedure provided that such procedure is substantially fair by the parties to the controversy having regard to the nature of the issues involved, and the constitution of the tribunal. The procedure to be applied would depend on the circumstances of each case. It is apparent that the flexibility of procedure is permitted not for the convenience of the tribunal but in the interest of efficiency and justice to the affected parties.

It follows that apart from reiterating the general principles and deciding the case before us in conformity with such principles, it would not be advisable to lay down any rigid procedure which may be followed by the People's Bank in making a determination under

Section 71 of the Finance Act No. 11 of 1963 as amended. Thus, in a particular case, the issues may be limited to the ascertainment of the existence of the requisite preconditions under section 71 of the Act in which event each party would be aware of the case for the other side without the necessity for deep research or acute legal controversy; and the procedure appropriate to such a case may be determined accordingly. The instant case is different in that it involves a complicated question of law consequent upon the devolution of interests on the heirs of the original owner of the premises sought to be acquired. Whether the procedure adopted by the bank has been fair has to be decided in that context and in the light of the conduct of the bank which came in for considerable criticism by the learned Counsel for the petitioner-respondent.

I now proceed to examine the submissions of learned Counsel. I do not agree that the failure to issue a copy of the application for acquisition to the petitioner-respondent can be subject to serious criticism even though it might have been helpful if the same were made available. As required by Section 71(2A)(a) of the Act, the Bank has notified her of the fact of such application (exhibit 'C'). There is no legal requirement as to the form in which an application may be made; nor is there any provision which enjoins the bank to furnish a copy of the application to the owner of the premises. In its notice under Section 71(2A) the bank has referred to the relevant provisions of the law under which the applicant's application was being entertained which in my view is sufficient compliance with the law. The said notice was followed up by a request to the petitioner-respondent to forward her objections if any to the proposed acquisition (exhibit 'D') which she did by exhibit 'E'.

I do not agree with the submission that the objections of the owner only go to the discretion of the bank and that the issue based on intestate succession to the original owner of the premises is irrelevant. The decision of the Supreme Court in 78 NLR 313 declaring the petitioner-respondent to be the owner of the premises under deed no.473 is not open to challenge. However, that decision may not be an absolute bar to an application for acquisition of such premises. In the context, the intestate succession to the original owner is relevant in that it raises the issue as to whether the appellant is entitled to seek to redeem the entirety of such premises which issue was raised in the objections of the petitioner-respondent.

The complaint that the bank has failed to continue the formal

inquiry which was commenced on 15.11.77 and thereafter entertained submissions for the appellant behind the back of the petitioner-respondent is worthy of examination. No doubt the bank is not compelled to adopt a particular procedure but what procedure it adopts should be made known to the parties. If any party is prejudiced for want of such knowledge, it may result in a denial of natural justice depending on the extent of the prejudice caused.

The notices of inquiry (exhibit 'P' and 'H') give the impression that the scheduled inquiry is a formal inquiry. The notices require the parties to attend, and inform that in default a decision would be made on the available material. I therefore agree that when on 15.11.77 the inquiry was postponed to 14.12.77, the petitioner-respondent was entitled to expect the formal inquiry to continue. In the absence of information to her of any change of the procedure and notice of the counter objections (exhibit 'Y') filed on behalf of the appellant, the petitioner-respondent had reason to apply for dismissal of the application for default of the appellant's appearance on 14.12.77 on the assumption that her objections to the proposed acquisition had not been answered.

The inquiring officer himself was aware of the need to hold a fair inquiry. This is borne out by the fact that he directed that any submissions which may be made by the appellant's lawyer should be copied to the petitioner-respondent's lawyers. Written counter objections (exhibit 'Y') were made but not copied as directed; nor did the Bank issue a copy thereof to the petitioner-respondent or her lawyers. It does not appear to have been done even after her representative M.K.D.S. Gunatilake made a written request for it on 09.03.78.

In the meantime, on 08.12.77, the Bank fixed 19.12.77 for the appellant's lawyer to support the counter objections when he could have been heard in the presence of the petitioner-respondent on 14.12.77 to which date the inquiry had been postponed on 15.11.77. Even thereafter the inquiring officer was well aware of the need to hold a fair inquiry. This is borne out by the fact that he called upon both parties to call over on 25.02.78. Mr. Nagahawatte failed to turn up whilst the petitioner-respondent's representative met the inquiring officer on 02.03.78 and confirmed the opposition to the proposed acquisition.

By letters 'I' and 'J', the petitioner had clearly requested the bank

to reject the appellant's application on the ground of the latter's default of appearance on 14.12.77. If the Bank wished to entertain written submissions the Bank should have informed the petitioner-respondent of the fact that the inquiry was not complete and given her the opportunity of countering any further submissions in favour of the acquisition. However, the Bank kept her in the dark. On the other hand, Mr. Nagahawatte was supplied with a copy of the petitioner-respondent's objections and was requested to make his submissions particularly on the legal issue consequent upon the devolution of title on the death of the original owner. It was therefore natural that the petitioner-respondent was completely taken by surprise when she received the impugned determination (exhibit 'K1') on 19.01.79.

Mr. Daluwatte, PC argued that the failure to give a copy of the counter objections of the appellant to the petitioner-respondent did not prejudice the latter as these objections did not add to the relevant material known to both parties and that any additions only comprised mere legal submissions. Considered in isolation this may be correct. Even on the law, I find that these counter objections do not touch the vital issue of law which the petitioner-respondent raised. Yet it is not possible to exonerate the Bank on this lapse. Firstly, the failure to issue a copy of the objections which the inquiring officer himself had ordered to be copied to the lawyers of the other party discloses a lack of the judicial spirit required of an inquirer. Secondly, the Bank did not stop with this lapse but continued to seek the submissions of the appellant's lawyer in favour of the acquisition whilst the only contact with the petitioner-respondent on 02.03.78 was for the purpose of persuading her to amicably settle the dispute.

It is true that the non-disclosure of a report or a legal opinion may not prejudice a party in a particular case. Thus in *Local Government Board v. Arlidge* (Supra) it was held that the non-disclosure of the report of the inquiring inspector to the Board which made the impugned order was not material. Lord Parmoor was of the opinion that the view of the inspector on a matter of law would not be material and proceeded to illustrate it thus at page 148:

> "If the respondent was desirous of raising, as a matter of law, any question as to the constitution of the tribunal, the non-disclosure of the report, or the right to give oral testimony, all the material to raise any of these questions was open to him quite apart from any information to be obtained from an

inspection of the inspector's report. Any opinion expressed by the inspector on such matters could in no way have altered the legal obligation".

The said report was made after a public inquiry into the appeal of Arlidge against a closing order attended by Arlidge and his solicitor who led evidence on behalf of Arlidge and after an inspection of the house affected by the order.

In *Shariff v. Commissioner for Registration of Indian and Pakistani Residents* (10) in which the Privy Council directed the quashing of a refusal to register the appellant as a citizen of Ceylon, the facts and findings were as follows: The appellant's application was investigated by the Deputy Commissioner. An inquiry was held with the attendance of the appellant and his Counsel. At various stages of the inquiry, the Deputy Commissioner obtained reports on the issue of the genuineness of an education certificate produced by the appellant but without a full disclosure of such reports to the appellant. One such report was favourable to the appellant. This he eventually rejected and held the education certificate to be a fabrication without adequate inquiry and in circumstances in which appellant's Counsel might have been made to believe that his submission in favour of the acceptance of the certificate as genuine would be upheld. The Deputy Commissioner also failed to give adequate notice to the appellant or his Counsel as to the case against the appellant. It was held that the principles of natural justice were not complied with by the Deputy Commissioner.

In the instant case, the inquiring officer engaged in obtaining submissions and clarifications from the appellant's lawyer whilst the petitioner-respondent would have continued to rely on the case put forward by her, confidently hoping that the application for the acquisition of her property would be rejected, an attitude induced by the fact that she was not informed of the case for the other side. In the end, the inquiring officer adopted the submissions of her opponent without any opportunity being given to her to comment or correct such submissions, on the most vital issue in the case.

Another unsatisfactory feature of this inquiry is that whilst the inquiring officer was throughout dealing with the appellant's lawyer, he always communicated with the petitioner-respondent and failed to seek the advice of her lawyer. The duty of making the correct

decision is exclusively on the Bank and as such the contention that the burden was on the owner of the land to activate her lawyer is not tenable. Having regard to the complicated issues in the case, the inquiring officer, if he was keen to make a correct decision, ought to have obtained further submissions from the petitioner-respondent's lawyer also. Alternatively, if she was informed about the consultations which were taking place it is probable that she too would have continued to engage the services of her lawyer.

I must not be understood to lay down that in every case of an acquisition the Bank is required to ensure that the issues are argued by lawyers or that they must hold oral hearings. Section 41(2) of the Judicature Act No. 2 of 1978 gives the right of representation by an Attorney-at-Law in such cases. However, whether the failure to permit oral hearings would constitute a denial of natural justice will depend on the facts and circumstances and the issues in each case. The Bank may exercise its discretion as to the form of inquiry; where appropriate they may send for the lawyer for one of the parties to obtain any clarification provided that the case for the other party is not prejudiced and the parties are not kept in the dark as to the general procedure adopted in the particular case. Subject to these remarks, I quote the following observations of Lord Denning in the case of *Pett v. Greyhound Racing Association Ltd.* (11) at 549.

> "It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence..... If justice is to be done, he ought to have someone to speak for him; and who better than a lawyer who has been trained for the task?"

In the case of *Board of Trustees of Maradana Mosque v. Minister of Education* (12) where an order under Section 11 of the Assisted Schools and Training Colleges (Special Provisions) Act No.5 of 1960 placing Zahira College, an unaided school, under the management of the Director of Education on the ground of certain contraventions of the provisions of the Act was challenged, the Privy Council held that the impugned order had been made without a fair hearing, inter alia, for the reason that the Director had failed to inform the Board of Trustees of the observations on the point made by a group of teachers in their letter to him.

In the case of *Kanda v. Government of the Federation of Malaya*

(13), Kanda, an Inspector of Police who had been dismissed, appealed to the Privy Council. One of his complaints was that the inquiring officer had been provided with the report of the Board of Inquiry which held the preliminary inquiry which contained statements highly prejudicial to him which report was not available to him. Although the facts of this case have no similarity to the case before us, the following observations of Lord Denning in declaring the dismissal to be void for lack of opportunity to Kanda to correct and contradict the report are appropriate for an application of the scope of the principle of fairness.

> "If the right to be heard is to be a real right which is worth anything, it must carry with it the right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made against him; and then he must be given a fair opportunity to correct or contradict them. This appears in all cases from the celebrated judgment of Lord Loreburn, LC in *Board of Education v. Rice* down to the decision of their Lordships in *Ceylon University v. Fernando*. It follows, of course, that the Judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other".

The frontiers of the audi alteram partem rule are ever widening. Thus in *R. v. Wareham Magistrate's Court, ex parte Seldon* (14) McCullough, J. said –

> "Thus the question is not one of the implication into the provisions under consideration of a rigid requirement applicable in every case. It is one of fairness. In some cases fairness will require steps to be taken which in other cases it will not require".

In the same case McCullough, J. proceeded to cite a passage from *Clayton v. Chief Constable of Norfolk* (15) in which Lord Roskill said –

> "As Sachs J. said in *R. v. Assim* (1966) 2 AER at 887-888 it is impossible to lay down a general rule applicable to every case which may arise, but if justices ask themselves, before finally ruling, the single question, what is the fairest thing to do in all the circumstances in the interest of every one concerned?, they are unlikely to err in their conclusion, for the aim of judicial process is to secure a fair trial and rules of practice and

procedure are designed to that end and not otherwise".

So if the inquiring officer of the People's Bank asked himself what is the fairest thing to do in all the circumstances in the interest of every one concerned?, he might have given the petitioner-respondent an opportunity of meeting Mr. Nagahawatte's undated submissions which are in the Bank file and which were never disclosed to the petitioner-respondent. In the light of his failure to do so and the other circumstances which I have assessed, I am of the opinion that the impugned determination is void as it has been made without giving a fair hearing to the petitioner-respondent. Accordingly, I affirm the judgement of the Court of Appeal and dismiss the appeal with costs payable by the appellant.

The People's Bank did not appeal but was made the 2nd respondent to this appeal by the appellant. Although the 2nd respondent filed written submissions in support of the appeal, Mr. Faiz Musthapa, PC for the 2nd respondent very properly decided that the 2nd respondent will not participate in the hearing of the appeal.

H.A.G. DE SILVA, J., – I agree.
BANDARANAYAKE, J., – I agree.

Appeal dismissed.