

HAJI OMAR
v.
WICKRAMASINGHE AND ANOTHER

SUPREME COURT
FERNANDO, J.
EDUSSURIYA, J., AND
J. A. N. DE SILVA, J.
SC APPEAL (CHC) NO. 12/2001
HC CIVIL NO. 36/98/1
DC COLOMBO NO. 5033 SPL
NOVEMBER 13 AND 27, DECEMBER 04, 2001

Interim injunction – Basis and scope of interim relief – Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990.

In an action for invalidating a sale of property mortgaged to the Seylan Bank (2nd respondent) an interim injunction to prevent the issue of the certificate of sale was refused by the trial court (presumably as the certificate of sale had already been issued); whereupon, the plaintiff (the 1st respondent) filed a petition seeking an order on the purchaser (the appellant) and the Bank, *inter alia*, restraining them from demolishing or alienating the property. The High Court issued an interim injunction to that effect. That order was set aside by Amerasinghe, J. in SC Appeal (CHC) No. 28/98 SCM of 16th February, 1999, where it was held "the basis of injunctive relief should be the plaint and the prayers contained therein; it is not designed to prevent other activities of the parties to an action".

At the trial Counsel for the 2nd defendant-appellant (the purchaser) raised the following issue as issue No. 13 :

"In view of the judgment of the Supreme Court in SC Appeal (CHC) No. 28/98, SC (Spl.) LA (HC) No. 14/98 can the plaintiff have and maintain this action?"

Of consent, the High Court Judge heard that issue as preliminary issue of law and answered it in favour of the plaintiff (the 1st respondent).

Held:

- (1) Although the plaintiff in his action questioned the validity of the sale of the property, the main relief he claimed was a permanent injunction

restraining the issue of the certificate of sale. Since that certificate had already been issued, the plaintiff sought an interim injunction which was unrelated to the cause pleaded by him. Such relief was denied by the Supreme Court on the basis that the certificate of sale had been issued. The validity of that certificate was not questioned at any stage, nor did the plaintiff seek an order invalidating or setting aside the certificate of sale. That certificate was in law conclusive proof that all the provisions of the Act had been complied with (section 15 (2) of the Act).

- (2) In the circumstances, issue No. 13 should have been answered in the negative.

Cases referred to:

1. SC Appeal (CHC) No. 28/98 SCM of 16th February, 1999.*
2. *National Development Bank of Sri Lanka v. Serendib Aisa (Pvt) Ltd. and Another* – (1999) 2 Sri LR 56.
**Haji Omar v. Wickramasinghe and Another* (1999) 1 Sri LR 82.

APPEAL from the judgment of the High Court.

Sanjeewa Jayawardena with Priyanthi Gunaratne for the 2nd defendant-appellant.

Nihal Jayamanne, PC with J. M. Wijebandara for plaintiff-respondent.

Cur. adv. vult.

February 20, 2002

FERNANDO, J.

While agreeing with the conclusions and order of Edussuriya, J. I wish¹ to state my reasons more fully.

When Amerasinghe, J. made his order dated 16. 02. 99 in SC Appeal (CHC) No. 28/98, he did so on the basis that a certificate of sale had been issued on 01. 12. 97. The validity of that certificate had not been questioned either in the plaint filed on 17. 12. 97, or in any other pleading or submission. Accordingly, that order proceeded on the undisputed basis that a *valid* certificate of sale had been issued.

Even thereafter, the plaintiff-respondent-respondent (the plaintiff) ¹⁰ took no steps to question that certificate. The issues suggested by him related to other matters : the validity of the resolution, the timely payment of the balance purchase price, and the publication of the notice of sale. There was no consequential issue as to the validity of the certificate and / or as to setting aside of the certificate.

It is in that background that issue No. 13 must be considered. While it is true that that issue might have been framed with greater particularity, it is clear that it did raise the question whether – in view of the issue of a valid certificate of sale – the title of the borrower (the plaintiff) had vested in the purchaser (the 2nd defendant-appellant) ²⁰ and the certificate was in law conclusive proof that all the provisions of the Act had been complied with.

Even now there is no dispute as to the validity of the certificate. Section 15 (1) of the Act provides that upon the issue of the certificate the title of the borrower vests in the purchaser, and section 15 (2) makes the certificate "conclusive proof with respect to the sale . . . that all the provisions of [the] Act relating to the sale . . . have been complied with". That includes the passing of the resolution, the notice of sale, the payment of the price, and the sale. Accordingly, none of the reliefs prayed for in the plaint can be granted. ³⁰

The decision of Amerasinghe, J. in *NDB v. Serendib Asia (Pvt) Ltd.* [1990] 2 Sri LR 56, has been cited. That is distinguishable for several reasons. There the Bank had fixed the upset price of property, mortgaged for Rs. 9.4 million, at Rs. 1,000, and the Bank itself had bought the property at that price. Here, the property had been bought by a third party and at a substantial price. There allegations of fraud, abuse of power, unlawful conduct, etc., had been made against the purchaser-Bank; here the purchaser was a *bona fide* purchaser for value against whom no impropriety was alleged. In that case, the

certificate of sale was challenged on the ground stated, but in this 40
case the certificate of sale is not challenged in any way; and although
certain antecedent steps have been questioned no grounds have been
specified. Further, Amerasinghe, J. did not decide the serious
questions of law and fact which arose, but left them for determination
by the trial Judge, granting interim relief in order to preserve the *status*
quo. Here the interim injunction stage had been passed, and the trial
Judge had to determine the questions of law and fact which arose
: the fact that a valid certificate had been issued was admitted, and
he had, therefore, to determine only its legal effect : that title had
passed and that the Act had been complied with. Having regard to 50
the state of the pleadings, he had no option but to answer issue
No. 13 in the affirmative.

February 20, 2002

EDUSSURIYA, J.

The plaintiff-respondent had mortgaged the immovable property
described in the schedule to the plaint by three mortgage bonds
referred to in paragraph 4 of the plaint, to the 1st defendant-respondent
Bank in order to secure the repayment of a loan taken from the 1st
defendant-respondent Bank.

Admittedly, on the plaintiff-respondent defaulting in the payment 60
of the said loan the 1st defendant-respondent had by letter dated 8th
August, 1996, informed the plaintiff-respondent that steps would be
taken to sell the said property and recover the money due.

It was further admitted (paragraph 6 of the plaint) by the plaintiff-
respondent that the Board of Directors of the 1st defendant-respondent
Bank had passed a resolution to recover the money due with interest

at 30% by selling the said property by public auction and published the said resolution in the *Daily News*, *Dinamina* and a Tamil newspaper and the *Government Gazette* of 25th April, 1997. It was also admitted by paragraph 7 of the plaint that it was published in the *Island* and *Divaina* newspapers of 24th October, 1997, that the said property would be sold by public auction on 07th November, 1997. 70

In paragraph 8 of the plaint the plaintiff-respondent has stated that on a date prior to 07th November, 1997, on the plaintiff having a discussion with the legal officer of the 1st defendant-respondent Bank, that although the legal officer agreed to have the mortgaged property conveyed in the name of the 1st defendant-respondent and grant a period of two months to the plaintiff-respondent to pay the outstanding sums of money, the 1st defendant-respondent sold the said property by public auction on 7th November, 1997 and that the 2nd defendant-appellant had purchased the said property for a sum of Rs. 12,025,000 and paid 10% of the purchase price and that the 2nd defendant-respondent is bound to pay the balance within thirty days of that date. 80

In paragraph 11 of the plaint the plaintiff-respondent has averred that the 2nd defendant-respondent had failed to pay the balance of the purchase price within thirty days and / or "does not know whether the said balance sum has *not* been paid thereafter," and therefore the said sale is invalid, and as such in terms of the provisions of section 15 of Act No. 4 of 1990 the 1st defendant-respondent cannot issue a certificate of sale. The plaintiff-respondent has, however, averred that the resolution passed by the 1st defendant-respondent Bank is not in conformity with section 4 of the said Act but does not give the reason for so stating. The plaintiff-respondent though pleading that the publication of the sale was not in accordance with section 9 of the said Act has failed to give any reason for stating so. The plaintiff-respondent then sought (a) a declaration that the said resolution is invalid and (b) that therefore the said sale is also invalid, (c) that the 2nd defendant-respondent did not become the owner of 90

the property described in the schedule to the plaint on his purchasing 100 the said property, (d) a permanent injunction restraining the 1st defendant-respondent from issuing a certificate of sale to the 2nd defendant-respondent and (e) an interim injunction to the said effect and till then an enjoining order on the same lines. So, that it is clear from the plaint (1) that the plaintiff does not state why the resolution passed by the Board of Directors of the 1st defendant Bank is inconsistent with section 4 of the Act nor does he state why the auction sale was not in conformity with section 9 of the said Act and (2) that although in paragraph 11 of the plaint the plaintiff-respondent has averred that the 2nd defendant-respondent has not paid the balance 110 sum within thirty days of the auction, in subparagraph (c) of the prayer to the plaint the plaintiff prays for a declaration that the 2nd defendant-respondent has not become the lawful owner of the said property by virtue of the said purchase, since a sale or purchase is completed only on the entire purchase price being paid. The Sinhala words used in the plaint are "මුදලට ගැනීමෙන්" which imply that the entire purchase price has been paid by the purchaser.

What is more important in this connection is that according to section 15 (1) of the said Act the title of the borrower vests in the purchaser only on the issue of the certificate of sale. 120

It is common ground now that the certificate of sale had been issued on 12th December, 1997, five days prior to the date of the plaint, and registered on 19th December, 1997. The plaintiff-respondent thereafter on 18th March, 1998, sought revised injunctive relief by petition and affidavit P7 and P7A to restrain the 1st defendant-respondent and/or the 2nd defendant-appellant from demolishing the buildings standing on the property which forms the subject-matter of this action, causing damage to the same and / or selling the said property or encumbering the said property by mortgaging or leasing it. 130

The Commercial High Court decided the question of the issue of the interim injunction on written submissions being tendered by both

parties, in favour of the plaintiff-respondent and issued an interim injunction as prayed for as set out above.

The 2nd defendant-appellant then applied for leave to appeal from the said order issuing the interim injunction, and on leave being granted argued the said appeal (SC Appeal (CHC) No. 28/98). After a hearing, this Court made order on 16th February, 1999, setting aside the order of the High Court on the ground that the basis of injunctive relief sought was not, as it should have been, the plaint dated 17th December, 1997, and the prayers contained therein. Amerasinghe, J. went on to state that interim relief is designed to prevent the frustration of the Court's order if the reliefs prayed for in the plaint are eventually granted: it is not designed to prevent other activities of the parties to an action. 140

Thereafter, when the case came up for trial several issues were raised by parties. Then, on 30th June, 2000, the 2nd defendant-appellant's Counsel raised the following issue as issue number 13. :

"In view of the judgment of the Supreme Court in SC Appeal 150 (CHC) No. 28/98, SC (Spl) LA (HC) No. 14/98 can the plaintiff have and maintain this action?"

On parties then agreeing that if the said issue which is an issue of law is answered in favour of the 2nd defendant-appellant the action will have to be dismissed, the Court took up the said issue for decision as a preliminary issue and accordingly both parties tendered written submissions, and thereafter on 9th October, 2000, the said issue was answered by Court in favour of the plaintiff-respondent, on the basis that this Court had not in its order of 16th February, 1999, made a determination on the substantive relief claimed by the plaintiff in the 160
plaint.

Counsel for the 2nd defendant-appellant contended that the finding by this Court that the certificate of sale had been issued prior to the institution of the action read with section 15 (2) of Act No. 4 of 1990 must result in a dismissal of the action and therefore the issue in question should have been answered in favour of the 2nd defendant-appellant.

Counsel went on to contend that the certificate of sale is final and conclusive of the title of the purchaser and cannot be challenged and that the plaintiff-respondent being aware of this sought the issue of permanent injunction to restrain the issue of the certificate of sale and since the certificate of sale had been issued prior to the institution of the action the Supreme Court held that the application for the interim injunction restraining the issue of the certificate of sale was misconceived. Counsel further submitted that consequently the action is also misconceived and must be dismissed. 170

The question is what is the substantive relief claimed by the plaintiff in the plaint?

Having made bald allegations in the plaint to the effect that (1) the resolution passed by the Board of Directors was not in conformity with section 4 of Recovery of Loans by Banks Act, No. 4 of 1990 and (2) the notices relating to the sale of the property in question had not been published in accordance with section 9 of the said Act, the plaintiff-respondent sought the following reliefs (1) that the resolution of the Board of Directors of the 1st defendant-appellant was invalid (2) that the auction sale conducted on 7th November, 1997, was invalid, (3) that the purchase by the 2nd defendant-appellant of the property described in the schedule to the plaint did not make the 2nd defendant-appellant the lawful owner of the said property (4) an interim injunction restraining the 1st defendant-appellant issuing a certificate of sale in terms of section 15 of the said Act to the 2nd defendant-appellant and (5) a permanent injunction on the same terms as the interim injunction. Therefore, reliefs 1, 2 and 3 are reliefs on which the plaintiff based his main relief for an order restraining the issue of the certificate of sale. 180

It is common ground that the certificate of sale had been issued prior to the institution of this action, and it is on this basis that Amerasinghe, J. in his order held that the application for an interim injunction restraining the issue of the certificate of sale was misconceived. Consequently, the main relief claimed by the plaintiff, 200 namely a permanent injunction restraining the issue of the certificate of sale cannot be granted.

Therefore, this action must necessarily fail and cannot be maintained, since the plaintiff has not sought an order invalidating or setting aside the certificate of sale.

The relief claimed by the plaintiff, namely that title to the property in question did not pass on the 2nd defendant-appellant purchasing the said property at the sale will not help the plaintiff, inasmuch title passes only on the certificate of sale being issued as in the case of a Fiscal's sale where title passes only on the Fiscal's 210 conveyance being issued.

Counsel for the plaintiff-respondent has drawn the attention of Court to the decision in the case of *National Development Bank of Sri Lanka v. Serendib Asia (Pvt) Ltd., and Another* 1999 – 2 SLR 56 which dealt with the question whether it is open to a borrower under the National Development Bank Act, No. 2 of 1979 to move to invalidate a sale conducted under the provisions of the said Act.

Amerasinghe, J. held in that case that section 50 of the said Act (which is the same as section 15 (1) of Act No. 4 of 1990) does not preclude the borrower from moving the Court to invalidate the 220 sale, since the plaintiff-respondent had in that case alleged fraud and abuse of authority, etc.

With due respect to Amerasinghe, J. it is my view that where it is not open to a person claiming *through or under any disposition whatsoever of the right, title or interest of the borrower to and in the property* to move to invalidate a sale, certainly it cannot be said that the borrower on whose right, title and interest in the property a third

party's claim is based, has a right to move to invalidate the sale. After all when a resolution is passed under parate execution rights the borrower is in the same position as a judgment debtor, and when the certificate of sale is issued "the judgment debtor" cannot have rights which a person claiming through "the judgment debtor" does not have since the third party's rights flow the judgment debtor. ²³⁰

Counsel for the plaintiff-respondent drew the attention of Court to issues raised by the 2nd defendant-appellant at the trial. However issue No. 13 in my view overrides those issues inasmuch as both parties agreed to the said issue being decided by Court as a preliminary issue of law, on which the outcome of the case rested.

In any event, in this case the plaintiff has not prayed for the certificate of sale to be set aside, and further Amerasinghe, J. has stated in *National Development Bank of Sri Lanka v. Serendib Asia (Pvt) Ltd., and Another (supra)* that the plaintiff had alleged fraud and abuse of authority, and commercial unreasonableness, whereas in the case before us now only bald allegations that the resolution was not in conformity with section 4 of Act No. 4 of 1990 and that the sale was not published in accordance with section 9 of the said Act have been made although at the same time producing with the plaint a copy of the said resolution as published in the newspapers as well as the publications of the sale in the *Government Gazette*. Issue No. 13 is accordingly answered in the negative. ²⁴⁰ 250

For the above-mentioned reasons I allow the appeal and set aside the order of the Commercial High Court and dismiss the plaintiff-respondent's action, with costs in both Courts fixed at Rs. 25,000 payable by the plaintiff-respondent to the 2nd defendant-petitioner-appellant.

J. A. N. DE SILVA, J. – I agree.

Appeal allowed.