

SITHI FAIZA SHUM  
v.  
PEOPLE'S BANK AND OTHERS

SUPREME COURT.  
G. P. S. DE SILVA, C.J.,  
KULATUNGA, J. AND  
RAMANATHAN, J.  
S.C. APPEAL NO. 91/94  
C.A. NO. 1968/79  
NOVEMBER 11, 1994.

*Writ of Certiorari – Finance Act, No. 11 of 1963 as amended by Law No. 16 of 1973, Sections 71(1), (2), 2(a), (c) and (d), 72(2) – Vesting order – Natural justice.*

**Held:**

Part VIII of the Finance Act, No. 11 of 1963 as amended provides for the redemption by acquisition of agricultural, residential or business premises the ownership of which had been lost at any time before or after 10 January 1964 but not earlier than 01 January 1952 *inter alia* by being sold in execution of a mortgage decree against the owner of such premises (referred to as "original owner").

Section 71(1) of the Act authorises the People's Bank to acquire such premises.

Section 71(2) provides for the conditions precedent to acquisition.

(1) The application for acquisition must be made by the original owner of the premises or if he is dead or of unsound mind or otherwise incapacitated, by the spouse, or any other descendant of such person, or if there is no such surviving spouse or descendant, by a parent, brother or sister of such person (S. 71(2)(a)).

(2) The Bank has to be satisfied that the average statutory income of the applicant and of the other members of the family of which he is the head computed under income tax law, for the three years of assessment immediately preceding the date of the application does not exceed Rs. 10,000. (S. 71(2)(c)).

(3) The Bank must be satisfied that such premises are reasonably required for occupation as a residence for the owner of such premises or any member of the family of such owner. (S. 71(2)(d)).

Where the statutory income of the original owner (3rd respondent now deceased) and his family was not investigated to see if it did not exceed the limit fixed by law, and where the question of the appellant's claim that the premises were

reasonably required for occupation as a residence for the appellant (present owner) and the members of her family had not been duly decided by the Bank, the impugned vesting order should not have been made.

The duty of making the correct decision is exclusively on the bank and there is no burden on the owner of the premises. The failure of the appellant to controvert the applicant's claim does not *per se* absolve the bank from discharging its duty.

The applicant's absence at the inquiry was due to illness. It cannot be said that the appellant was content to limit her case to making written objections and in the circumstances it was wrong to have faulted the appellant for failing to give evidence. Hence there was a failure to observe the rules of natural justice.

The impugned acquisition was void.

**Case referred to:**

1. *Sai Nona v. Maggie Silva* [1989] 2 Sri L.R. 11.

**APPEAL** from judgment of Court of Appeal.

*S. Rudramoorthy* for petitioner.

*Kumar Paul, S.C.* for 1st respondent Bank.

*Faiz Musthapha, P.C.* with *Jayampathy Wickremaratne* for 4th and 5th respondent.

*Cur adv vult.*

December 09, 1994.

**KULATUNGA, J.**

The appellant made an application to the Court of Appeal for a writ of certiorari to quash an order made by the 2nd respondent (Minister of Finance) under S. 72(2) of the Finance Act, No. 11 of 1963 as amended by Law, No. 16 of 1973 vesting in the 1st respondent (People's Bank) certain premises owned by the appellant. The said order was gazetted pursuant to a determination by the 1st respondent under S. 71(3) of the Act to acquire the said premises in the purported exercise of its power under S. 71(1). The Court of Appeal dismissed the appellant's application. Hence this appeal.

Special leave to appeal was granted on the following questions:

Is the order for the vesting of the property in dispute bad –

(a) for the failure on the part of the 1st respondent to satisfy itself as to the existence of the requisite conditions precedent under relevant provisions of the Finance Act No. 11 of 1963 as amended by Law No. 16 of 1973;

(b) for failure on the part of the 1st respondent to observe the rules of natural justice in holding an inquiry into the application for redemption made by the 3rd, 4th and 5th respondents?

Part VIII of the Finance Act No. 11 of 1963 as amended provides for the redemption by acquisition of agricultural, residential or business premises the ownership of which had been lost at any time before or after the 10th of January 1964 but not earlier than 1st January, 1952 *inter alia* by being sold in execution of a mortgage decree entered by a Court against the owner of such premises (referred to as "original owner"). S. 71(1) of the Act authorises the People's Bank to acquire such premises. S. 71(2) provides for the conditions precedent to such acquisition. The conditions relevant to the present case are:

(1) The application for acquisition should be made by the original owner of the premises or if he is dead or is of unsound mind or otherwise incapacitated, by the spouse or any other descendant of such person, or if there is no such surviving spouse or descendant, by a parent brother or sister of such person (S. 71(2) (a)).

(2) The Bank has to be satisfied that the average statutory income of the applicant and of the other members of the family of which he is the head computed under income tax law, for the three years of assessment immediately preceding the date of the application does not exceed ten thousand rupees. (S. 71(2) (c)).

Section 71(2) states that if these conditions are not satisfied no premises shall be acquired under S. 71(1).

(3) The bank is also barred from acquiring any premises if the bank is satisfied that such premises are reasonably

required for occupation as a residence for the owner of such premises or any member of the family of such owner (S. 71(2) (d)).

The impugned acquisition was effected on the application of the original owner (3rd respondent) and his two sons (4th and 5th respondents). The 3rd respondent died during the pendency of the Court of Appeal application whereupon the 4th, 5th, 6th and 7th respondents being his children were substituted. The appellant is the present owner of the premises. She is a married woman having children. She challenges the impugned acquisition on the following grounds.

(a) That the 1st respondent decided to acquire the premises without being satisfied at a proper inquiry that the statutory income of the 3rd respondent and of the members of his family did not exceed the amount fixed by S. 71(2) (c). The 1st respondent also failed to consider the appellant's claim that she reasonably required the said premises for occupation as a residence for herself and her family.

(b) That the 1st respondent made the said decision on the basis of evidence recorded at an *ex parte* inquiry without affording the appellant any opportunity of impeaching such evidence at a subsequent inquiry or informing the appellant of the fact that such evidence had been recorded. There was thus a breach of the rules of natural justice.

The relevant facts are as follows:

The 3rd respondent mortgaged premises No. 853, Galle Road, Katukurunda to one Zaheed by deed No. 1357 dated 12.07.1951. The same were purchased by Zaheed at a sale in D.C. Kalutara case No. 30585 (MB) and were transferred to him by Fiscal's conveyance No. 13521 dated 25.06.57. Zaheed gifted the said premises to his daughter, the appellant by deed No. 105 dated 21.05.68. Thereafter, on 17.05.69 the 3rd, 4th and 5th respondents made the aforesaid application for the acquisition of the premises. Notice of the said application for the acquisition was given to the appellant only on

03.03.75. After further delay, by a notice dated 22.10.75 parties were summoned for an inquiry on 12.11.75. The inquiry commenced on 12.11.75 and was continued on 27.02.76. On these dates parties were present and represented by Counsel. As per notes of inquiry (Exhibits 'F' and 'B') no evidence was led on these dates. The inquiry was confined to hearing of legal submissions on the statutory pre-conditions for a valid acquisition. The inquiring officer was the Manager, Land Redemption Department of the 1st respondent bank.

By a letter dated 04.06.76 the inquiring officer summoned the parties for further inquiry on 07.07.76. By her letter dated 02.07.76 (Exhibit A) dispatched by registered post on 06.07.76 and accompanied by a medical certificate, the appellant applied for a postponement of the inquiry on the ground of illness. However, the inquiry was held, *ex parte*. In his objections filed before the Court of Appeal the inquiring officer states that the said application was received only after the inquiry had been terminated and the party had departed. But, according to the annexed report 1R1 the inquiring officer states that the appellant had submitted a medical certificate that she was ill and unable to attend the inquiry. However, as that was the third day of inquiry, he allowed the applicant's lawyer to lead the evidence of the applicant and the Grama Sevaka Kalutara district. That evidence was to the effect that the income of the applicant (3rd respondent and his family) was meagre; and the appellant was a very wealthy person owning several houses and properties; hence the premises were not reasonably required for occupation as a residence for the appellant or any member of her family.

The appellant was not informed of the fact that such inquiry was held on 07.07.76. Instead, the inquiring officer by his letter dated 14.10.76, purporting to be a reply to the appellant's letter dated 02.07.76, informed the appellant that if the appellant was objecting to the redemption of the premises under the Finance Act, he may submit his reasons in writing on or before 15.11.76 (Exhibit C). In reply, the appellant's Attorney-at-Law addressed the inquiring officer a letter dated 12.11.76 stating *inter alia*, that the appellant objected to the proposed acquisition as the premises were reasonably required for occupation as a residence for the appellant and the

members of her family (Exhibit E). After the lapse of two years the inquiring officer acting on behalf of the 1st respondent addressed the appellant a notice in terms of S. 71(4) of the Act that the 1st respondent had determined that the premises shall be acquired (Exhibit I).

The appellant states that upon the receipt of the said notice, her Attorney-at-Law attempted to obtain information of the decision from the 1st respondent but without success. In July 1979 her Attorney-at-Law was issued a copy of the proceedings of inquiry. However, a copy of the inquiring officer's recommendation was not given. The appellant next received a letter dated 02.08.79 from the 1st respondent informing her that the 2nd respondent had, by order dated 03.07.79, published in Gazette Extraordinary No. 44/11 dated 11.07.79 under S. 72(2), vested in the 1st respondent the premises in suit (Exhibits 'J' and 'K'). This was followed by a notice dated 22.10.79 addressed to the appellant by an officer authorised to take possession of the premises whereby she was informed that possession of the premises will be taken over on 22.11.79 (Exhibit 'L'). Whereupon, on 15.11.79 the appellant filed her writ application before the Court of Appeal. On 19.11.79 the Court of Appeal stayed further proceedings for the acquisition of the premises pending the final determination of the application.

In dismissing the appellant's application the Court of Appeal has not considered whether on the available material, it can be concluded that the statutory income of the 3rd respondent and the members of his family did not exceed the limit fixed by law; and whether the appellant's claim that the premises were reasonably required for occupation as a residence for the appellant and the members of her family had been duly decided before the impugned vesting order was made.

The Court of Appeal held that the procedure adopted by the 1st respondent did not result in a failure of natural justice. The following is a summary of the reasons adduced by that Court for its conclusion.

1. The appellant failed to make arrangements for Counsel to represent her on 07.07.76 and apply for a postponement.

2. The appellant failed to request for an opportunity to cross examine the deponents of the affidavit annexed to the 3rd respondent's application or the witnesses to be called in support of the application.

3. The appellant made no request to give evidence on her behalf, but was content to submit written objections through her Attorney-at-Law.

4. The appellant was not prejudiced by the failure of the 1st respondent to send her the proceedings of 07.07.76 because parties are presumably capable of ascertaining what transpires at inquiries in proceedings to which they are interested parties.

In *Sai Nona v. Maggie Silva* <sup>(1)</sup> this Court has fully considered the nature of the Bank's duty in making a decision to acquire premises under the Finance Act and the principles applicable to the holding of a fair inquiry in that regard. The Court held:

(a) The duty of making the correct decision is exclusively on the Bank and there is no burden on the owner of the premises.

(b) 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 prejudice caused.

(c) 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.

With all due respect to the Court of Appeal, I cannot agree with the approach it adopted in the case. Thus the Court appears to have assumed that if the claims made in an application for an acquisition are not controverted by the owner, the conditions precedent to a valid acquisition are satisfied. This is against the principle that the duty of making the correct decision is exclusively on the Bank. As such, the failure of the appellant to controvert the applicant's claim would not

*per se* absolve the 1st respondent from discharging its duty. As regards the preconditions as to income, there is no satisfactory evidence as to the statutory income of the 3rd respondent and of the members of his family during the relevant period. There is also no finding, reached after a proper inquiry and sufficient evaluation of the evidence, that the premises are not reasonably required for occupation as a residence for the appellant and her family.

On the complaint of failure of natural justice, I am unable to agree with the reasoning of the Court below. The appellant's absence at the inquiry on 07.07.76 was due to her illness. She was therefore not in default. The Court was in error in taking the view that the appellant has been remiss in failing to retain Counsel to appear at the inquiry for the purpose of obtaining a postponement. Secondly as already said above the mere failure on the part of the appellant to controvert the 3rd respondent's claim cannot justify a decision to acquire the premises. Hence the Court erred in blaming the appellant for failing to request for an opportunity to cross-examine the 3rd respondent's witnesses. Thirdly, it cannot be said that the appellant was content to limit her case to making written objections. Her Attorney-at-Law sent written objections in response to a request by the inquiring officer to do so in circumstances where she was totally unaware of the inquiry held on 07.07.76. By her letter dated 02.07.76 she applied for a postponement on the ground of illness; and when in reply to that letter the inquiring officer requested her to submit her objections in writing, in the absence of a disclosure of the inquiry held on 07.07.76 she could not have believed that any prejudice would be caused to her by limiting her case to making written objections. In the circumstances, the Court also erred when it faulted the appellant for failing to give evidence.

I have no doubt that the failure of the inquiring officer to disclose to the appellant the proceedings of 07.07.76 caused grave prejudice to the appellant in that she was deprived of the opportunity of controverting the evidence led in her absence. She was lulled into a sense of security by the request to her to tender her objections in writing. Hence, the Court of Appeal was wrong in presuming that in the normal course the appellant ought to have put herself upon inquiry as to what transpired on 07.07.76.



In the result, I hold that the impugned acquisition is void. I allow the appeal, set aside the judgment of the Court of Appeal and direct the issue of a writ of certiorari quashing the determination to acquire the premises No. 853, Galle Road, Katukurunda, Kalutara and the vesting order No. 42, published in Gazette Extraordinary No. 44/11 dated 11th July, 1979. I also direct the 1st respondent to pay the appellants costs in a sum of Rs. 5000/- (Rupees Five Thousand).

**G. P. S. DE SILVA, C.J.** – I agree.

**RAMANATHAN, J.** – I agree.

*Appeal allowed.*

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