1959 *Present :* **Basnayake, C.J., and Pulle, J.**

L. A. MENDIS SILVA, Appellant, *and* THE CEYLON STATE MORTGAGE BANK, Respondent

S. C. 43—D. C. Colombo, 36721

Ceylon State Mortgage Bank Ordinance, as amended by Ordinance No. 10 of 1947—Mortgage of property to Bank—Default of borrower in payment of instalments—Parate execution—Permissibility—Liability of Bank for loss suffered by borrower—Sections 53 (1) (cc), 63 (1), 63 (3) (a) (b), 66 (1).

Unless it has exercised its powers negligently, the Ceylon State Mortgage Bank is not liable to pay damages suffered by a debtor in consequence of parate execution levied by it, under section 63 of the Ceylon State Mortgage Bank Ordinance, against the property mortgaged to it by the debtor.

On 17th September 1953 the plaintiff borrowed from the Ceylon State Mortgage Bank a sum of Rs. 150,000 repayable in 25 years by equal half-yearly payments of Rs. 5,027·75. He mortgaged as security a land and eight new houses built on it in two rows of four separated by a roadway. The mortgage bond was in a form prescribed by Schedule A of the Ceylon State Mortgage Bank Ordinance. The proviso to clause 3 (i) of the bond reads as follows :—

" Provided, however, and it is hereby expressly agreed that the Bank may in exercising the said power of sale and incidental powers as aforesaid (and by special resolution of its Board of Directors to that effect published in the Gazette) sell any land mortgaged to it as security either in its entirety or in two or more separate blocks or in both such ways, at any public sale or sales held under the said Ordinance. "

When the plaintiff defaulted in the payment in full of the first two instalments, a special resolution was passed by the Board of Directors under Section 63 (1) authorising an auctioneer to sell the mortaged property " in his office, No. 227, Hultsdorp Street, Colombo ". At the auction sale held on 23rd July 1955 the mortgaged property, which was worth Rs. 342,000, was knocked down to a sole bidder for Rs. 165,000 (only Rs. 500 more than the upset price).

Held, (i) that the words " at his office, No. 227, Hultsdorp Street, Colombo " in the special resolution of the Board of Directors could bear the meaning " at 227 Hultsdorp Street where the auctioneer conducts his business of selling property ".

(ii) that the Bank did not commit a breach of any legal duty by selling the eight houses as a single unit and not separately.

(iii) that in the absence of any negligence in the conduct of the sale the Bank was not liable for the loss suffered by the plaintiff.

Observations that a legislative measure intended to benefit the subject has in its operation in the present case produced a result which, though not illegal, is revolting to one's sense of justice and fair play.

2—J. N. B 21258–1,995 (2/60)

APPEAL from a judgment of the District Court, Colombo.

Sir Lalita Rajapakse, Q.C., with *E. S. Amarasinghe, Norman Abeyesinghe* and *D. R. P. Goonetilleke*, for the Plaintiff-Appellant.

H. W. Jayewardene, Q.C., with *Walter Jayawardene* and *L. C. Seneviratne*, for the Defendant-Respondent.

Cur. adv. vult.

December 11, 1959. BASNAYAKE, C.J.—

I have had the advantage of reading the Judgment prepared by my brother Pulle. I am in entire agreement with him both on the law and the facts. I share his views on the cruel fate that the plaintiff has suffered at the hands of the State lending institution whose aid he sought. No private money lender would have been permitted by the Courts to act in the way the defendant has done. This case should serve as a warning to the Legislature against entrusting vast powers to State agencies without adequate safeguards. The State Mortgage Bank and other State agencies should in wielding the wide powers entrusted to them bear in mind the words of Shakespeare

> " O, it is excellent
>
> To have a giant's strength ; but it is tyrannous
>
> To use it like a giant. "

PULLE, J.—

The plaintiff who is the appellant was the owner of a land at Ratmalana. Its extent is one acre and he had built on it eight houses in two rows of four separated by a 30 ft. roadway. There was a difficulty in procuring a supply of electricity to these houses with the result that the local authority could not issue a certificate of conformity for their occupation at the times material to this case.

On 17th September, 1953, the plaintiff borrowed from the State Mortgage Bank a sum of Rs. 150,000 repayable in 25 years by equal half-yearly payments of Rs. 5,027·75, to include principal and interest, and mortgaged as security the land and the houses by a bond of the same day. The plaintiff's plan was to get quickly a supply of electricity and thereafter to sell each house with vacant possession. Had this plan succeeded the events which have brought disaster on him might not have occurred. Unfortunately the plan miscarried. He attributed the failure to sinister forces conspiring to buy up the houses at prices much below their market value. Probably there was an element of truth in it judging by news

items in the press that the houses would be acquired by the Crown in the process of extending the limits of the aerodrome. Early in 1954 he tried to sell the houses by public auction. There was not a single bidder. Earlier advertisements in some Indian newspapers brought no response and on 17th March, 1954, the date on which the first instalment of Rs. 5,027.75 was due, he had no money to pay it. In July 1954 he advertised for offers to purchase the houses on easy terms of payment. This, too, proved unsuccessful. The second instalment due on 17th September, 1954, was unpaid. There was now due with penalty interest Rs. 12,313·42 to pay which he was given time till 23rd December, 1954. He paid only Rs. 6,160·67. Time was given till 14th March, 1955, to pay the balance. Again he defaulted and the Bank in the exercise of its statutory powers had the property sold by auction on 23rd July, 1955. The property was knocked down to a sole bidder on behalf of a syndicate for Rs. 165,500, only Rs. 500 more than the upset price. The certificate of sale under section 66 (1) of the Ceylon State Mortgage Bank Ordinance was signed on 31st August, 1955.

On 3rd August, 1955, the plaintiff commenced proceedings in case No. 626/Z of the District Court of Colombo praying, *inter alia*, for an injunction restraining the Bank from signing any certificate of sale and for a declaration that the sale held on 23rd July, 1955, was null and void and ineffective in law. While case No. 626/Z was pending the Bank was threatened with legal proceedings by the purchaser. It had no alternative but to sign the certificate. The plaintiff was apparently advised that after the certificate of sale was signed there was no purpose in proceeding with case No. 626/Z and that action was accordingly withdrawn and formally dismissed on 20th October, 1955. On the following day he commenced the present action claiming damages against the Bank in the sum of Rs.360,000 on grounds of fraud, negligence, illegality and breach of trust. The learned trial Judge rejecting all these grounds held against the plaintiff and dismissed the action with costs. At the argument in appeal reliance was placed only on two grounds, first, that the sale was not conducted by the auctioneer strictly in terms of the resolution of the Bank and, secondly, that the Bank had exercised its powers negligently and that the plaintiff had in consequence suffered damages.

Before the loan was given the Bank caused three valuations of the property to be made. One of them was by the Chief Valuer of Government in whose opinion the land and the houses were worth Rs. 342,000 (D 100). It becomes immediately apparent that when the property was sold at the auction held on 23rd July, 1955, the plaintiff suffered a loss exceeding Rs. 150,000. He wants to make the Bank answerable for this loss and the question we have to determine is whether on the facts found by the learned trial Judge the Bank incurred a liability in law to compensate him.

I think it is not out of place to mention at this stage that in his dealings with the Bank the plaintiff was wanting in tact and ultimately damaged

his own cause. The more he elaborated in his correspondence the difficulties in the way of selling the houses by private treaty, the more he ran the risk of creating the impression, erroneous though it might be, that the security given for the loan had depreciated in value. Lured apparently by a comparatively low rate of interest and payments spread out over a number of years he bartered away the precious right that a mortgage debtor has that his creditor must seek his remedy in a court of law. Evidently he did not appreciate at the time he signed the bond that the Bank was entitled to levy parate execution against the property in the event of any default in making the stipulated payments. He has laid himself open to severe criticism of some of the methods he employed to prevent the sale from going through. Two days before the sale, namely, on 21st July, 1955, he granted a lease D53 to one Peeris Dias of the eight houses for a term of 10 years. It was perhaps thought that if the lessee took possession of the houses intending bidders might have been scared away and that in those circumstances the Bank would have been forced to stay execution. At the sale a notice was distributed, purporting to be under the hand of the lessee, that if any one purchased a house for less than Rs. 45,000 or all the houses for less than Rs. 360,000 the purchaser or purchasers would not get possession. We were told that this was the reaction of a debtor driven to desperation by the harsh attitude adopted by the Bank. Be that as it may, his conduct was fraught with danger mostly to himself. The Bank heavily fortified by the Ordinance which created it and a succession of amendments to it was in an impregnable position. It was in vain to kick against the goad.

The special resolution of the Board of Directors of the Bank authorising the sale of the property mortgaged was passed on 25th March, 1955. The legality of the resolution is not in question but only its implementation, except on one point which I shall mentien later. Paragraph (*b*) of the resolution (Vide D 40A) was as follows :

> " That in terms of section 63 (1) of the Ceylon State Mortgage Bank Ordinance, Mr. P. H. Wijesinghe, Licensed Auctioneer of Colombo, be authorised and empowered to sell *in his office*, No. 227, Hultsdorp Street, Colombo, all that allotment of land comprising two contiguous lots marked C6 and C7 . . . . together with eight new bungalows etc. "

It is not in dispute that the notice of the resolution and the notice of the date, time and place of the sale were given in strict conformity with the requirements of sub-section 3 (*a*) and (*b*) of section 63 of the Ordinance, as amended. A submission was made that the advertisements, having regard to the value of the property, were insufficient. It was based on the evidence of the auctioneer who stated that he would have spent about Rs. 1,000 on advertising whereas the amount expended by the Bank was Rs. 500. There is hardly any substance in this argument. The efficacy of an advertisement does not depend solely on the money spent thereon. One sees in this case itself that the plaintiff after spending

a substantial sum in advertising, both here and in India, the sale of the houses by private treaty and public auction failed to conclude a bargain with any purchaser. In advertising the sale the Bank went even beyond the requirements of the Ordinance. There were three advertisements in the. "Times of Ceylon" and a like number in the "Ceylon Daily News".

It was contended both in the trial court and here that the sale was not in compliance with the resolution of 25th March, 1955. The argument is that the sale was not held at the "office" of the auctioneer. That the auctioneer had an office at No. 227, Hultsdorp Street, is common ground but it was argued that the hall within the premises No. 227, in which the property was auctioned was not the auctioneer's "office". The auctioneer's evidence is that he had a table and some furniture in a small room at the back of the premises. To go to that room one has to enter by the main door of the verandah which leads immediately to the hall where the sale was held. Several Proctors had their offices in the rooms of the house and one Proctor Abeyegoonewardene had his office in the hall. According to the auctioneer he used to hold auction sales on Saturdays in that hall with the consent of his landlord and apparently without objection from any one. It would appear that since 1943 every sale advertised to take place in his "office" had been conducted in the hall. His name board was exhibited conspicuously at the entrance to the premises and on the 23rd July, 1955, he had arranged a table in the hall on which he had placed a plastic board with his name on it. There were about 25 chairs to accommodate bidders. Any one entering the hall could see that the advertised sale was about to be conducted in the hall. The learned trial Judge's finding is that there was no "irregularity or illegality in the conduct of the sale in the hall at No. 227, Hultsdorp Street." I do not find it possible to dissent from this finding. In my opinion the words, "at his office, No. 227, Hultsdorp Street" can bear the meaning "at 227, Hultsdorp Street, where the auctioneer conducts his business of selling property". In that view no illegality can be attached to the sale.

Before dealing with the rest of the submissions I ought to mention that in the court below there were allegations of fraud, collusion and corruption which, if established, would have had serious consequences for the Bank. They have been rejected by the District Judge and not pressed before us. The only other ground urged was that the Bank was in breach of duty which it owed to the plaintiff to so conduct the sale as to obtain a fair value for the land and houses. Before I deal with the items of alleged negligence a few observations are called for.

The mortgage bond executed by the plaintiff is in a form prescribed by the Ordinance. (Vide section 53 (1) (*cc*) as amended by the Ceylon State Mortgage Bank Amendment Ordinance No. 10 of 1947). That form is in Schedule A to the principal Ordinance. The proviso to clause 3 (i) of the Bond reads,

" Provided, however, and it is hereby expressly agreed that the Bank *may* in exercising the said power of sale and incidental powers as aforesaid (and by special resolution of its Board of Directors to that effect published in the Gazette) sell any land mortgaged to it as security either in its entirety or in two or more separate blocks or in both such ways, at any public sale or sales held under the said Ordinance. "

Basing himself on the evidence of the auctioneer that if he had been employed by the owner to sell the houses he would have auctioned them separately, learned Counsel submitted that the Bank acted in manner prejudicial to the interests of the plaintiff by selling the houses as a single entity and was, therefore, in breach of a duty owing to the plaintiff.

Learned Counsel for the plaintiff cited passages from text books and reports of cases to show that a statutory body in the purported exercise of its powers may be guilty of negligence and answerable in damages to the person damnified. The correctness of this proposition, within well known limits, cannot be doubted but the question is how far that proposition is applicable to the facts of this case. (*Vide* Salmond on Torts 1953 ed. pp. 50 *et seq.*) Then it was argued that an obligation to exercise the standard of care of a *diligens paterfamilias* may arise out of a contract the breach of which would give rise to an action for damages (*Cape Town Municipality v. Paine* [1]). This proposition too is unexceptionable. This is well exemplified in the case of a usufructuary mortgagee who is required to exercise his right of possession without causing loss to the mortgagor. It seems to me that from the bare fact that it would have been more profitable for the plaintiff, as owner, to have instructed an auctioneer to sell the houses separately it does not follow that the Bank was in breach of any duty in selling the land and houses as a single unit. *Inter se* these houses did not enjoy any easements because they belonged to one owner. On a reading of section 66 of the statutory form of the certificate of sale I do not see how the Bank could have given to a single purchaser of any one house the easements which are vital to the beneficial enjoyment of a house especially in an urban area. Under section 66 what becomes vested in a purchaser is the " right, title and interest of the debtor to and in " the property sold. Over and above the easements enjoyed by the property as a whole, none could be created by the Bank for the benefit of an individual purchaser. If only the portions enclosed by the walls of each house had been sold, how could the Bank dispose of the area constituting the roadway ?

There are, however, in my opinion weightier reasons for holding that the Bank was not in breach of any legal duty by not selling the eight houses separately. The contract, or, what comes to the same, the statute, clearly conferred a discretion on the Bank either to sell the land in its

[1] (*1923*) *A. D. 207.*

entirety or in two or more blocks. No *mala fides* is imputed to those who, on behalf of the Bank, took the decision to sell the land in its entirety. The case of *Geddes v. Proprietors of Bann Reservoir* [1] was relied on by learned Counsel for the plaintiff. As I ventured to remark in the course of the argument that case is clearly distinguishable. There the statutory authority had two ways of performing one single act of taking water from a reservoir to the River Bann along a silted stream. It was in their power to remove the silt and thus avoid flooding. They did not and were held liable in damages for flooding the plaintiff's land. The application of the principle in the *Bann Reservoir case* is dealt with by Lord Atkinson in *Lagan Navigation Company v. Lambeg Bleaching, Dyeing and Finishing Company, Limited* [2] and by the Court of Appeal in *E. Robins & Son, Limited v. Minister of Health* [3]. In the present case the statute conferred expressly two powers in the alternative and, in the absence of bad faith, it is not competent for a court of law to say that the Bank in carrying on its business should have exercised one power rather than another.

There remain only two other matters which call for comment. It was said that the resolution of the Board of Directors to sell the property at Hultsdorp and not at the spot was evidence of negligence. The learned trial Judge has dealt with this matter and I agree with the reasons given by him for holding in favour of the Bank. The plaintiff's effort to sell the houses at the spot on 4th February, 1954, proved abortive and could hardly encourage his creditor to repeat the experiment.

The last point is that the Bank was remiss in not publishing that it was not the intention of Government to acquire the land in the process of enlarging the aerodrome. In reply to a letter by the plaintiff to the Ministry of Transport and Works he was informed by P11 of 11th April, 1955, " that it is not at present the intention of Government to acquire the land on which your buildings stand for purposes of Airport Development. It is regretted, however, that it is not possible to make a public announcement of this in the press ". By a letter of 22nd April, 1955, P12, the plaintiff was informed by the Ministry that he was free to make use of its letter of 11th April, 1955. P 16 of 1st July, 1955, shews that the plaintiff distributed a printed notice which carried a copy of P11.

I do not see why the Bank should have involved itself in some correspondence between the plaintiff and the Ministry of Transport and Works. Suppose the Bank had published P11 as part of its advertisements, it would have been helpless if an intending purchaser asked for more detailed information concerning the " present " intention of Government not to acquire the property. Some official communications are

[1] *3 App. Cases 430.* [2] *(1927) A. C. 226.*
[3] *(1939) 1 K. B. 520.*

misleading not on account of what is said but on account of what is not said. It would not have been wise for the Bank on its own responsibility to have published P11 without understanding fully its implications. It is, in my view, the proper attitude of any party to a transaction not to make or publish any statement which might thereafter be challenged even as an innocent misrepresentation. Advertising the sale was in the hands of the Bank and having conformed to the express requirements of the statute it was perfectly free to decide for itself what further information it ought to give. An omission to give any further information is not an act of negligence.

In my opinion the appeal fails on all the points urged on behalf of the plaintiff and should be dismissed with costs.

It is distressing to contemplate that the State Mortgage Bank Ordinance intended presumably to provide credit facilities on good landed security to Ceylonese in need of capital has been an instrument of ruin to the plaintiff. It is not the function of the courts to indulge in criticism of the policy underlying any legislative measure, but it is plainly their duty to point out that a piece of legislation intended to benefit the subject has in its operation produced a result revolting to one's sense of justice and fair play. The plaintiff could not have suffered as great a loss even if his creditor had been a rapacious money lender. As I have said earlier, the property mortgaged valued at Rs. 342,000 was sold for Rs. 165,500. The Bank had at no time any reason to believe that the property had depreciated in value. The contrary was established by the evidence called for the Bank. As an investment the Bank enjoyed a large margin of safety, even if interest calculated at a penal rate and the premia on insurance had been unpaid for a few years or, at least, until such time as the plaintiff was in a position to surmount the difficulties which beset him. The basic cause of the plaintiff's undoing is the most unusual power conferred by the Ordinance on the Bank to levy execution even if a single instalment was unpaid on the due date. It would have been wiser had some provision been made for the debtor to obtain a moratorium from an appellate tribunal, be it judicial or even administrative, if the tribunal was satisfied that the Bank was adequately protected against any loss of capital or interest. In the absence of such a provision the machinery of the Ordinance has moved blindly like a Juggernaut and crushed the plaintiff. The Bank can derive satisfaction that its debts have been paid to the last farthing. The purchasers at the auction sale can derive even greater satisfaction in that they were able to buy eight newly built houses in an urban area at a time of acute housing shortage for less than half the value at which they were estimated on behalf of the Bank, but the object of the supposed bounty of the legislature is left to rue the day he yielded to the temptation of applying to the State Mortgage Bank for a loan.

Appeal dismissed.