ATAPATTU AND OTHERS
v.
PEOPLE'S BANK AND OTHERS

SUPREME COURT.
FERNANDO, J.,
DHEERARATNE, J. AND
WADUGODAPITIYA, J.
S.C. APPEAL NOS. 20/96 AND 76/96
C.A. APPLICATIONS NOS. 539 AND 814/94
SEPTEMBER 23, 1996.

Redemption of Land – Finance Act No. 11 of 1963 as amended by Act No. 33 of 1968 and Law No. 16 of 1973 – Substitution of successor for a deceased applicant – Section 71 of the Finance Act.

Held:

Upon the death of an applicant for the acquisition of a land under section 71 of the Finance Act No. 11 of 1963 as amended, there can be substitution of a "Specified heir" viz. a person mentioned in Section 71(2)(a) – in the prescribed order of priority – as well as of a testate heir. Whether the application was duly constituted, or whether the Bank ought to exercise its discretion to vest the premises in favour of the substitute, should not be considered at the stage of substitution but only after a substitute has stepped into the shoes of the deceased and has acquired the necessary status to present his case.

Quaere, whether a testate heir who is entitled to apply for substitution has a preferent right over the "specified heirs".

Cases referred to:

1. *Emaliyana Perera v. People's Bank* (1985) 1 Sri L.R. 43 (C.A.), (1987) 1 Sri L.R. 181 (S.C.)
2. *Kanagasabapathy v. People's Bank S.C.* Appeal No. 124/75 S.C. Minutes 27 August 1976.
3. *Wickramasinghe v. Sri Lanka State Trading Corporation* (1994) 3 Sri L.R. 41.
4. *Ceylon Estates Staffs Union v. Land Reform Commission* (1987) 2 Sri L.R. 203, 207-8.
5. *Amarajeewa v. University of Colombo* (1993) 2 Sri L.R. 327.
6. *Muhandiram v. Salam* (1947) 49 N.L.R. 80.
7. *Hevavitharane v. De Silva* (1961) 63 N.L.R. 68, 72.

8. *Narasingh Das v. Mangal Dubey* (1983) 5 Allahabad 163, 172.
9. *Setha v. Weerakoon* (1948) 49 N.L.R. 225.
10. *Saravanamuttu v. Solamuttu* (1924) 26 N.L.R. 385, 390.
11. *Wickremabandu v. Herat* (1990) 2 Sri L.R. 348, 361.
12. *Shanmugam v. Commissioner for Registration of Indian and Pakistani Residents* (1962) 64 N.L.R. 29, 33.
13. *Jailabdeen v. Danina Umma* (1962) 64 N.L.R. 419, 422.
14. *Wijewardene v. People's Bank*, S.C. Appeal No. 3/80 S.C. Minutes 20 May, 1981.

APPEAL from the judgment of the Court of Appeal.*

In S.C. Appeal No. 20/96

Walter Perera with *Nimal Ranmukhaarachchi* for appellants.

Anil Obeysekera, P.C. with *Sanjeewa Jayawardena* for 1st and 2nd respondents *W. D. Weeraratne* for 3rd respondent.

In S.C. Appeal No. 76/96.

P. A. D. Samarasekara, P.C. with *Jayantha de Almeida Gunaratne* and *Kirthi Sri Gunawardene* for Appellant.

S. Fernando, S.C. for 1st respondent.

Bimal Rajapakse for 2nd respondent.

Cur. adv. vult.

December 19, 1996.
FERNANDO, J.

An important question of law arises in these appeals: whether there is a right to substitution, in the place of a deceased applicant, in proceedings for the redemption of land under section 71 of the Finance Act, No. 11 of 1963, as amended by Act No. 33 of 1968 and Law No. 16 of 1973.

* 1995 – 2 SLR 352

Section 71 authorises the People's Bank to acquire the whole or any part of any agricultural, residential or business premises if the conditions specified in subsection (1) are satisfied. Section 71 provides further:

"(2) No premises shall be acquired under subsection (1) –

(a) Unless an application in that behalf has been made to the Bank by the original owner of such premises or, where such original owner is dead or is of unsound mind or otherwise incapable of acting, by the spouse or any descendant of such person, or if there is no surviving spouse or descendant of such person, by a parent, brother or sister of such person; or ...

(c) Unless the Bank is satisfied that the average statutory income of the person making the application and of the other members of the family of which he is the head, computed under the provisions of the written law relating to the imposition of income tax, for the three years of assessment immediately preceding the date on which such application was made by him, does not exceed a sum of ten thousand rupees; or ...

(3) The question whether any premises which the Bank is authorised to acquire under this part of this Act should or should not be acquired shall be determined by the Bank and every such determination of the Bank shall be final and conclusive and shall not be called in question in any court."

Section 91 provides:

"Any premises vested in the Bank in consequence of an application made to the Bank for the acquisition of such premises by any person entitled to make such application under the preceding provisions of this part of this Act may be let by the Bank to such person or where such person is dead, to the surviving spouse, if any, or any descendant of such person upon such terms as will enable the person to whom such premises are

let to become the owner thereof after making a certain number of half-yearly payments as rent."

FACTS

SC Appeal No. 20/96

The material facts are these. In 1972 three persons conditionally transferred their interests in the land which is the subject-matter of the proceedings. On 30.6.83 the transferee conveyed her rights to the 3rd respondent. One of the transferors had died in the meantime, and her husband (the 1st appellant) and the other two transferors applied on 30.6.83 to the People's Bank, the 1st respondent, for the redemption of that land under section 71. While that application was pending those two transferors also died, and the Attorney-at-law who had been appearing for the applicants asked that "their heirs" – it does not appear from the record whether those heirs were named or identified in any way – be substituted in their place. He did not claim to be acting on behalf of those heirs. The 3rd respondent objected. On 24.6.92 the 2nd respondent, who was the Bank's inquiry officer, refused substitution. She reasoned that, although under the law of succession upon the death of a person all his heirs succeeded to his rights, yet under section 71(2) (a) all the heirs need not apply for redemption: under that section it was enough if one of the heirs specified therein made the application; and accordingly, that provision disclosed no intention that the law of succession should apply. Further, in the event of death **after** an application was filed, the section itself did not provide for substitution, of any or all the heirs of a deceased applicant; and since the law of succession was inapplicable, there was no basis on which substitution could be allowed. In that way the 2nd respondent refused substitution, but without giving the heirs or the legal representatives of the deceased applicants an opportunity of being heard. Upon substitution being disallowed, what was left was only the surviving applicant's claim to an undivided one-third share. The policy of the Bank was not to vest undivided shares; that had been upheld in *Emaliyana Perera v. People's Bank* [1], and so she therefore recommended to the Board of Directors of the Bank that the application be dismissed.

The 1st appellant, together with the 2nd and 3rd appellants (alleging that they were heirs of the two deceased applicants and that the applicants Attorney-at-law had moved for their substitution) applied to the Court of Appeal for Certiorari to quash the 2nd respondent's order and Mandamus to allow substitution. Learned President's Counsel who then appeared for the Bank tendered written submissions, stressing that the right to apply for redemption is personal to an applicant, because section 71(2)(b) refers to his statutory income; and also that there was no provision, express or implied, for substitution. However, in what he termed an "After-thought" to those submissions, he suggested that section 71 gave the Bank power to acquire property, subject to certain pre-conditions; one was that "an application must be made to the Bank by a person named in section 71(2)"; "an application is merely a starter of acquisition proceedings"; once the application is made, the presence of the applicant is no longer necessary, because he is not equated to a plaintiff or petitioner; and upon the conclusion of the proceedings, even if the applicant is dead, section 91 enables the Bank to let the vested premises to the surviving spouse or a descendant. His conclusion was that the Act sought to introduce a "welfare measure", to remedy a particular mischief, and its purpose would be achieved if an interpretation was adopted which would permit an application to proceed notwithstanding the death of the applicant.

The Court of appeal held, however, the Bank could only entertain an application made by the original owner or a person specified in the section; that in *Kanagasabapathy v. People's Bank* [2], it had been held that an application could not be made by a transferee or assignee; that in the absence of any provision enabling substitution, the refusal to substitute was justified. The Court also upheld the rejection of the 1st appellant's application (citing *Emaliyana Perera v. People's Bank*) (*supra*) on the ground that the policy decision not to acquire undivided interests was within jurisdiction, and could not be challenged because of the ouster clause in section 71(3), read with section 22 of the Interpretation Ordinance.

SC Appeal 76/96

The position in this appeal is somewhat different. The original transfer in 1958 was by two persons, mother and son, of an undivided three-fourths share in five lands; thereafter the mother died; and in 1969 the son applied for the redemption of all five lands. That application was made to the State Mortgage Bank (in terms of the Act as it stood then), and was transferred to the People's Bank in terms of Law No. 16 of 1973. The proceedings in respect of four lands resulted in vesting orders, but there was a delay in respect of the fifth. The original transferees instituted a partition action in respect of that land; the son died in 1991, leaving a Last Will under which the sole beneficiary was the appellant, his sister's son; the partition decree allotted a one-fourth share to the appellant, and the remaining three-fourths to the original transferees or their heirs, expressly subject to the pending application made to the Bank for redemption. The appellant then asked the Bank to re-open that application, but was told that the matter had been laid by because of certain cases pending in the Court of Appeal. Later the Bank informed the appellant that since the partition decree made the three-fourths share subject to the pending application for redemption, that application could be proceeded with. But on 9.8.94 the Bank told the appellant that, following the decision of the Court of Appeal in a similar matter (CA Application No. 927/85, CAM 10.6.94) that substitution cannot be effected, the Bank had dismissed the application for redemption.

The appellant applied to the Court of Appeal for Certiorari to quash the decision of 9.8.1994 and Mandamus to direct substitution. The Court of Appeal dismissed that application holding that upon the death of an applicant, the spouse or descendant could not automatically be substituted, but must make a further application; and that the appellant being neither the spouse nor a descendant, but only the heir under a Last Will, had no right to make an application for redemption under section 71.

Since both appeals involved the interpretation of the same provisions, they were heard together.

Submissions

Mr. Walter Perera and Mr P. A. D. Samarasekera, PC, on behalf of the respective appellant submitted that the right to make an application for redemption was not purely personal, that section 71 (2)(a) recognised that if the transferor had died before making the application, certain other persons – namely, the surviving spouse, and failing a surviving spouse, any descendant, and failing a surviving spouse or descendants, a parent, brother or sister (whom I will refer to as the "specified heirs") – could make that application; and that if the transferor died after he made the application, one of the "specified heirs"could be substituted. If they had the greater right of making the application itself, they must necessarily have – so it was argued – the lesser right of being substituted. Mr. Samarasekera went one step further, that a testate heir was also entitled to substitution.

Mr. Sanjeewa Jayawardena, on behalf of the 1st and 2nd respondents in SC Appeal 20/96 submitted that although the specified heirs were entitled to make an application for redemption, where the original transferor was already dead, the Legislature had intentionally refrained from making similar provision in the event of death ***pendente lite***. He contended that section 71(2)(c) made the financial circumstances of the applicant and the members of his family a condition precedent to the exercise of the jurisdiction to vest the premises, and that that provision could not be applied to the person substituted – because it could result in difficulties and anomalies; thus even where that condition was satisfied in relation to the original (deceased) applicant, it might happen that the substitute was a wealthy person with an income exceeding the specified amount. The Legislature never intended that premises should be vested for the benefit of such persons. He contended also that the Court of Appeal had no jurisdiction to review orders made in redemption proceedings, because of the ouster clause.

He also submitted that the original transferees had sold the property to a ***bona fide*** purchaser, that therefore the original application was not properly constituted, and that accordingly there

could be no substitution. We indicated to him, however, that the questions for determination in appeal related to substitution and the jurisdiction of the Court of Appeal; and not the merits of the application for redemption, which would have to be determined by the Bank only if substitution was allowed, and only after hearing the person substituted.

Mr. S. Fernando, SC, and Mr. Bimal Rajapakse, for the respondents in SC Appeal 76/96 also contended that in the absence of any enabling provision in the statute, the presumption is that substitution is not permissible. They also urged that in any event there could be no substitution of the appellant, who did not fall into the class of "specified heirs".

SUBSTITUTION

Section 71 creates a (contingent) right of redemption in favour of a transferor of land. Such a right seriously derogates from the contractual and proprietary right of the transferee. However, such statutory interference with common law rights is by no means unique. Sometimes the law allows one person to enjoy a right in derogation of the legal rights of another. Thus a beneficiary under an express or constructive trust has rights in respect of property vested in another because the statute considers it equitable. Our Rent laws confer on a tenant the right to continue in occupation of the rented premises, despite the termination of the contract of tenancy, and sometimes even contrary to its terms; and to that right certain of the tenant's heirs may succeed on his death (see section 36 of the Rent Act). Under the Industrial Disputes Act, a Labour Tribunal is empowered to re-instate an employee in his employment, even though his services had been lawfully terminated by the employer in strict compliance with the contract of employment and the common law. (I must mention in passing that although there is no express provision in the Industrial Disputes Act, permitting substitution upon the death of a party, the precedents favour substitution: see *Wickremesinghe v. Sri Lanka State Trading Corporation* [3], *Ceylon Estates Staffs Union v. Land Reform Commission* [4], *Amarajeewa v. University of Colombo* [5].

Section 71 is thus just one more instance in which the Legislature has empowered a statutory Tribunal create rights in derogation of the express terms of a contract and the common law. The decision of that Tribunal recognises, or perhaps creates, a statutory, as distinct from a contractual, right to a re-transfer (compare the "equity of redemption" which a mortgagor has in English law despite express contrary provision in the mortgage: see Halsbury, Laws of England's, 4th ed, vol. 32, para 407).

There is no doubt that the right to make an application for redemption is not "personal" to the original transferor in the sense that he alone can apply, and that it terminates upon his death: section 71(2) empowers a successor to make an application if he fell within the category of the "specified heirs", and thus demonstrates that at least to that extent it survives. Section 71 therefore manifests an undeniable legislative intention not to make the right of redemption personal to the transferor. That right is of the same nature as a right to claim a re-transfer, which has been held not to be personal: *Muhandiram v. Salam* [6], Further, the fact that section 91 empowers the Bank to let (on rent-purchase terms) the vested premises to the surviving spouse, if any, or a descendant, where the applicant is dead also tends to exclude a legislative intent to make the right personal.

If then section 71(2) is to be interpreted as not permitting substitution, the result would be that upon the death of the applicant the application would abate. However, since that was without an adjudication on the merits, a "specified heir" would be entitled to make a fresh application; and if that applicant were then to die, yet another "specified heir" could make a third application; and so on. In other words, that interpretation would mean that although a "specified heir" could not be substituted, yet an indefinite number of further applications could be made by "specified heirs", one after the other. I doubt whether the Legislature intended that land redemption should involve such technicality. Since the right to apply is not personal, I would hesitate to hold that the right of an applicant, just because he took an extra step on the road to getting back the land which he had

transferred, suddenly deteriorated in quality, and became exclusively personal to him, no sooner he made his application. If at all his right did change in any way, it only became stronger or greater. In the absence of express contrary provision therefore, "specified heirs" continue to enjoy at least the same right of succession upon death **after** an application was filed, as they did before it was filed.

What happened in SC Appeal 20/96 illustrates the anomalies that the contrary view would perpetuate. Because two applicants died, the 2nd respondent held that the third could not proceed, because his application, considered in isolation became one in respect of an undivided interest; thereafter, even if "specified heirs" of the two deceased applicants made fresh applications, they too would fail for the same reason. However, if all three applicants had died, their "specified heirs" could collectively have made a fresh application. And, arguably, if the surviving applicant withdrew his application and joined the "specified heirs" of the other two in making a fresh application, that too might have been entertained. I do not think section 71 was intended to be a minefield through which applicants could emerge unscathed only through such tactical manoeuvres.

The absence of statutory provision expressly permitting substitution has been stressed. But to give undue weight to that is to ignore fundamental assumptions which underlie legislation conferring judicial and administrative remedies: that the Legislature intended that disputes should be determined, rather than avoided or postponed, that they should be decided after hearing both sides, rather than with one side unrepresented and therefore unheard, and that fair procedures should be respected. In relation to procedural issues of this kind, in choosing between two interpretations – one which would allow the dispute to be heard and determined ***inter partes***, and the other which would either prevent it being decided, or result. In effect, in a decision being made ***ex parte*** – Courts and Tribunals must not:

> "... act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as

permissible till it is shown to be prohibited by the law. As a matter of general principle prohibitions cannot be presumed" (*Hewavitharane v. de Silva* [7]; citing *Narasingh Das v. Mangal Dubey* [8]).

Although those observations were made in reference to the Civil Procedure Code, the principle is one of the fundamentals of fair procedure which all Tribunals should respect.

There is another aspect of the matter which is crucial to SC Appeal 76/96. Even a right which is purely personal often changes its character after litigation for its enforcement has commenced: there may then arise a right in respect of the subject-matter of the litigation itself, which can, in the event of the death of a party, devolve on his legal representative. An example from the law of delict is illustrative:

"Although the Aquilian action passes to the executor, it is to be noted that he can recover only for actual loss suffered by the estate. In an action for personal injuries, therefore, although he can claim for the deceased's medical and hospital expenses, he has no claim in respect of the pain and suffering caused to the deceased by his injuries. And if the deceased dies from his injuries, although he can claim for the deceased's funeral expenses as well as for his medical and hospital expenses, he has no claim in respect of future loss to the estate by reason of the death ...

It should be observed that the above mentioned rules are subject to the qualification that there has not been ***litis contestatio*** before the death. For the effect of ***litis contestatio***, which in the modern law is deemed to take place at the moment the pleadings are closed, is to freeze the plaintiff's rights as at that moment, and thus, in the event of his dying before the action is heard, to confer upon his executor all the rights which he himself would have had if he had lived." (McKerron, Law of Delict, 6th ed, p.132)

As for when ***litis contestatio*** takes place in our law, see *Setha v. Weerakoon*[9]. In the law of contract, Weeramantry (Law of Contracts, vol. 2, p.871) observes:

> "In certain limited classes of contracts death brings about a termination of contractual rights by operation of law. These are contracts involving rights and duties of a purely personal character ... in all other cases, all contractual rights and duties pass upon death to the representative of the deceased person, and the obligation is therefore not extinguished, but survives in favour of or against the representative of the estate of the deceased."

The subject-matter of the litigation, the ***res litigiosa***, is even capable of being ceded or assigned (Lee, Roman-Dutch Law, 5th ed, p. 238; *Saravanamuttu v. Solamuttu* [10]).

As I have noted earlier, under the Industrial Disputes Act too substitution is possible.

In that background, it cannot be said that the rights which a deceased applicant had in respect of pending redemption proceedings were not capable of devolving upon his legal representatives.

I must now turn to the submission that section 71(2)(c) stipulates a condition precedent, that an applicant's family income should not exceed a prescribed maximum; that this applies to a "specified heir" who makes the application; and that therefore substitution should not be allowed, because then a person who does not satisfy that condition may nevertheless obtain the benefits of redemption. There is some justification for this contention, as the Legislature intended that that the benefits of redemption should accrue to poor people who had lost their property. Why then should a person who was not entitled, in the first instance, to make an application himself, be allowed to come in as a substitute? This is certainly a relevant consideration. However; even if substitution is not permitted, a similar anomaly can occur at a later stage: if an impoverished applicant dies after the property is vested in the Bank, it may be disposed of, under

section 91, to an heir who did not satisfy that condition. Further, that anomaly cannot be taken in isolation: the converse case must also be considered. If a desperately poor transferor, the sole breadwinner of a family consisting of an invalid spouse and several minor children, dies after application was filed, was it the legislative intent that his family, now benefit of its sole support, be denied the benefits of redemption? Why should an interpretation be adopted which would deny both the undeserving and the deserving? Of course, in the latter case it can be urged that an heir could make a fresh application. But that would not be possible if prescriptive period of ten years (section 71(2) (aa)) had elapsed. In these circumstances, I do not think that fundamental principles which make substitution just and equitable should give way to the possibility of such anomalies, particularly because there is another factor which reconciles all these conflicting considerations – which is consistent with the fundamental principles involved, whilst advancing the remedy and suppressing the mischief, and dispensing with the need for successive applications. Section 71 does not compel the Bank to acquire premises simply because the pre-conditions in subsection (2) are satisfied, and the fact that the Bank has a discretion has been recognised in *Emaliyana Perera v. People's Bank.* (*supra*) One matter which the Bank may legitimately take into account is the relative financial position of the parties: thus if during the pendency of the proceedings, a destitute applicant becomes wealthy, and a once-affluent transferee becomes poor, the Bank may – having regard to the purpose of the statute – decline to vest the premises, thus excluding redemption for the benefit of the "Undeserving". That same discretion will apply to a substituted applicant (see also section 71(2)(e)).

I therefore hold that upon the death of an applicant, there can be substitution of a "specified heir" – in the prescribed order of priority – as well as of a testate heir. Whether the application was duly constituted, or whether the Bank ought to exercise its discretion, to vest the premises, in favour of the substitute, should not be considered at the stage of substitution, but only after a substitute has stepped into the shoes of the deceased and has acquired the necessary status to present his case. I must add that I do not express

any opinion as to whether the 2nd and 3rd appellants in SC Appeal 20/96 and the appellant in SC Appeal 76/96, are the proper persons to be susbtituted, because that is a matter to be determined after notice to all those who may have the right to succeed to the interests of the deceased. All that I do decide is that the Bank and the Court of Appeal erred in law in holding that there could not be substitution of "specified heirs" and testate heirs.

OUSTER CLAUSE

Since section 71(3) enacts that every determination of the Bank shall be final and conclusive and shall not be called in question in any court, it was contended that the effect of section 22 of the Interpretation Ordinance, as amended by Act No. 18 of 1972, was that a decision by the Bank refusing substitution could not be reviewed by the Court of Appeal in the exercise of its writ jurisdiction under Article 140.

There is an apparent conflict between the ouster clause (which is pre-Constitution legislation), and Article 140. While generally a Constitutional provision,being the higher norm, must prevail over statutory provision, there are some constitutional provisions which enable pre-Constitution written law to continue to apply. The first is Article 16(1), which is inapplicable here, because that deals only with inconsistency with fundamental rights. The second is Article 168(1), which provides:

> "Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the Constitution, shall, ***mutatis mutandis***, and except as otherwise expressly provided in the Constitution, continue in force."

However, this would make the ouster clause operative only "except as otherwise expressly provided" in Article 140. The meaning of that phrase was considered by a bench of five Judges in *Wickremabandu v. Herath* [1], in relation to a similar question, whether the ouster clause in section 8 of the Public Security Ordinance

derogated from the Jurisdiction of this Court under Article 17 and 126. H. A. G. de Silva, J, and I held that the conferment of jurisdiction of this Court by those Articles was express contrary provision, with the result that Article 168(1) did not make the ouster clause operative ***vis-a-vis*** the fundamental rights jurisdiction. The Privy Council held in *Shanmugam v. Commissioner for Registration of Indian and Pakistani Residents* [12], that

> "to be express provision with regard to something it is not necessary that that thing should be specially mentioned; it is sufficient that it is directly covered by the language however broad the language may be which covers it so long as the applicability arises directly from the language used and not by inference from it."

Articles 17 and 126 constitute "express provision", because they directly confer jurisdiction; although they make no specific mention of the ouster clause in section 8, the language used is broad enough to confer an unfettered jurisdiction. The position is the same in regard to Article 140: the language used is broad enough to give the Court of Appeal authority to review, even on grounds excluded by the ouster clause.

But there is one difference between those Articles and Article 140. Article 140 (unlike Article 126) is "subject to the provisions of the Constitution". Is that enough to reverse the position, so as to make article 140 subject to the written laws which Article 168(1) keeps in force? Apart from any other consideration, if it became necessary to decide which was to prevail – an ouster clause in an ordinary law **or** a Constitutional provision conferring writ jurisdiction on a Superior Court, "subject to the provisions of the Constitution" – I would unhesitatingly hold that the latter prevails, because the presumption must always be in favour of a jurisdiction which enhances the protection of the Rule of Law, and against an ouster clause which tends to undermine it (see also *Jailabdeen v. Danina Umma* [13]). But no such presumption is needed, because it is clear that the phrase "subject to the provisions of the Constitution" was necessary to avoid

conflicts between Article 140 and other Constitutional provisions – such as Article 80(3), 120, 124, 125, and 126(3). That phrase refers only to contrary provisions in the Constitution itself,and does not extend to provisions of other written laws, which are kept alive by Article 168(1). Where the Constitution contemplated that its provisions may be restricted by the provisions of Article 138 which is subject to "any law".

There is another reason why this particular ouster clause is of no avail in these appeals. It purports to protect from review only a **determination** by the Bank whether any premises should or should not be acquired; it does not purport to apply to distinct preliminary or incidental matters, such as the substitution of parties.

UNDIVIDED INTERESTS

Since the policy decision of the Bank, upheld in *Emaliyana Perera v. People's Bank*, has been referred to by the Court of Appeal, I must add that no policy decision of that kind can be inflexible. As held in *Wijewardene v. People's Bank* [14], cited in *Emaliyana Perera v. People's Bank* (*supra*), the power conferred on the Bank, by section 71(1), to acquire property includes the power to acquire undivided interests. While it is true that practical difficulties may often justify a decision not to acquire undivided interests, that policy cannot be applied when there are no such difficulties. Thus the Bank may be justified in refusing to vest an undivided half-share, where the other half-share remains vested in the original transferee, because of the practical difficulty of giving possession. But that same justification would not exist where the balance share is vested in, say, the applicant for redemption himself, or a member of his family; or where during the pendency of the redemption proceedings a partition decree transforms the undivided share of the original transferee, to which the application relates, into a divided lot, so what the Bank is asked to vest is no longer an undivided share. In the circumstances, the dismissal (in SC Appeal 20/96) of the 1st Appellant's application was wrong in law.

CONCLUSION

I therefore set aside the judgment of the Court of Appeal in both appeals, and quash the orders dated 24.6.92 and 9.8.94 made by the Bank, and its inquiring officer, refusing substitution and dismissing the application for redemption. However I do not direct the Bank to effect substitution for the respective applicants, but only to consider the applications for substitution giving notice to the "specified heirs" of the deceased applicants. Further, in SC Appeal 76/96, while holding that the testate heir was entitled to apply for substitution, I refrain from expressing any opinion as to whether he had a preferent right over the "specified heirs", as the latter were neither noticed nor heard.

In each appeal I direct the Bank to pay appellants sum of Rs. 5,000/- as costs in both Courts.

DHEERARATNE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Appeals allowed.