

**ABEYKOON AND ANOTHER**  
**v.**  
**NATIONAL SAVINGS BANK**

COURT OF APPEAL  
DE SILVA, J.,  
WEERASURIYA, J.  
CA NO. 694/96.  
D.C. PANADURA NO. 2575/SPL  
DECEMBER 18, 1998.  
JANUARY 12, 1999.

*National Savings Bank Act, No. 30 of 1971 – Mortgage of Property – Default – Resolution – Public auction – Purchase by Bank – Certificate of sale – Compliance with s. 2 of the Prevention of Frauds Ordinance – Generalia specialibus non derogant.*

The petitioner-respondent (Bank) instituted action seeking ejectment of the defendant-petitioners from the property in question. It was averred that the defendant-petitioners had mortgaged the property to the petitioner-respondent and as they had defaulted the Bank had passed a Resolution to sell the property by public auction. At the public auction, the petitioner-respondent (Bank) had purchased the property on a certificate of sale.

It was contended that the certificate of sale which purports to pass title to the purchaser is invalid in law as it was not in compliance with s. 2 of the Prevention of Frauds Ordinance.

**Held:**

1. S. 55 of the National Savings Bank Act contains express provisions for the passing of title to immovable property on a Certificate of Sale signed by the Bank. The title bestowed by the Certificate of Sale becomes valid by operation of law.
2. Upon an examination of the provisions of s. 55 it is clear that the legislature has recognised disposition of immovable property otherwise than by conveyance executed before a Notary.

The certificate is legally valid and passes title to the purchaser.

3. However, the learned District Judge was in error in disposing of the main application when in fact he had to decide the preliminary objections.

**APPLICATION** in Revision from the judgment of the District Court of Panadura.

**Cases referred to:**

1. *Haramanis Perera v. Johana Perera* – 3 NLR 306 at 313.
2. *Baiya v. Karunasekera* – 56 NLR 265 at 268.
3. *Appuhamy v. Appuhamy* – 3 SCC 61 at 67.
4. *Saverimuttu v. Thangavelaudhan* – 55 NLR 529 at 532.

*E. D. Wickramanayake with Ms Anandi Cooray* for respondent-petitioners.

*Adrian Pereira*, SSC for the petitioner-respondent.

*Cur. adv. vult.*

May 07, 1999.

**WEERASURIYA, J.**

The petitioner-respondent (hereinafter referred to as the respondent), instituted action in the District Court of Panadura under chapter XXIV of the Civil Procedure Code, seeking ejectment of the defendant-petitioners (hereinafter referred to as the petitioners) from the property described in the schedule to the petition in terms of section 56 of the National Savings Bank Act, No. 30 of 1971 as amended. The respondent averred that the petitioners had mortgaged the property to the respondent in a sum of Rs. 680,000 and that they had defaulted in the payment of the said sum due to the respondent and thereafter the property was sold by public auction pursuant to a Board resolution. The respondent further disclosed that the property was purchased at the said public auction by the respondent. The petitioners filed a statement of objections against the order *Nisi* and the matter was fixed for inquiry. Thereafter, the petitioners raised two preliminary objections at the inquiry and learned District Judge by his order dated 17.10.96, allowed the application of the respondent. It is from the aforesaid order that the present application for revision has been filed.

At the hearing of this application, the petitioner raised two matters namely –

- (a) that the District Judge purporting to reserve his order on the preliminary objection disposed of the main application;
- (b) that the certificate of sale which purports to pass title to the purchaser is invalid in law as it was not in compliance with section 2 of the Prevention of Frauds Ordinance.

Section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840 declares that the following classes of contracts shall be of no force or avail in law unless in writing and signed by two witnesses in the presence of a Notary and duly attested by him.

- (1) Any sale, purchase, transfer, assignment or mortgage of land or other immovable property.
- (2) Any promise, bargain, contract or agreement for effecting any such object or for establishing any security, interest or encumbrance affecting land or other immovable property.
- (3) Any contract or agreement for the future sale or purchase of land or other immovable property.

The significance of the requirements under section 2 of the Prevention of Frauds Ordinance could be seen from the following observations of Lawrie, J. in *Haramanis Perera v. Johana Perera*<sup>(1)</sup> at 313:

*"The Ordinance No. 7 of 1840 was passed to provide more effectually for the prevention of frauds and perjuries. In Ceylon two of the evils to be prevented were forgery and perjury. Confidence was placed in the integrity of Notaries Public; the legislature enacted that no writing permanently affecting immovable property should be valid unless executed before a Notary."*

Further, in *Baiya v. Karunasekera*<sup>(2)</sup> at 268 Gratiaen, J. observed that a valid notarial instrument does not by itself pass title to land, other steps being required effectively to transfer title. Delivery of the deed is the minimum prerequisite for this purpose as constituting constructive delivery of the land itself.

In *Appuhamy v. Appuhamy*<sup>(3)</sup> at 67 Berwick, J. observed that –

*"The notarial execution and the registration of the deed . . . with delivery of the deed takes the place of the old Dutch symbolical delivery before the Judge and registration of the proceedings among the acts of Court . . . contract of sale plus symbolic delivery equal to dominium."*

Section 55 of the National Savings Bank Act provides –

- (a) that if the mortgaged property is sold the Bank shall sign a certificate of sale and thereupon all the rights, title and interest of the debtor to and in the property shall vest in the purchaser;
- (b) that a certificate of sale signed by the Bank shall be conclusive proof with respect to the sale of property;
- (c) that every certificate of sale shall be liable to the stamp duty and charges fixed for conveyance of immovable property and to any registration or other charges authorised by law.

Since the enactment of the Prevention of Frauds Ordinance, transfer of immovable property can be made only by means of a notarial conveyance. Thus, section 2 has been framed to take within its scope all transactions relating to land excepting –

- (a) leases at will or for any period not exceeding one month, and

- (b) contracts or agreements for the cultivation of paddy-fields or chena lands for any period not exceeding twelve months if the consideration for such contract or agreement shall be that the cultivator shall give to the owner any share of the crop or produce.

The notarial conveyance form the contract of sale and it is by virtue of the effect which the law attributes to a notarial conveyance that the purchaser obtains his right to be placed in possession of the property.

In the case of *Saverimuttu v. Thangavelaudhan*<sup>(4)</sup> at 532 the Privy Council in considering the scope of the Prevention of Frauds Ordinance observed that –

*" It is evident that the aim of the Prevention of Frauds Ordinance is to prevent frauds by making evidence other than the evidence of a notarially attested document. Their Lordships think that the departure permitted by law from the general rule should not be extended as any undue extension would interfere seriously with the object sought to be achieved by the statute law of Ceylon."*

It is to be noted that section 55 of the National Savings Bank Act contain express provisions for the passing of title to immovable property on a certificate of sale signed by the Bank. The title thus bestowed by the certificate of sale becomes valid by operation of law. It would be seen that the requirement in section 55 of the National Savings Bank Act by expressly providing for passing of title on a certificate of sale without a notarial attestation directly conflicts with section 2 of the Prevention of Frauds Ordinance. Therefore, it is vital to consider whether these competing considerations effectively harm the objectives of section 2 of the Prevention of Frauds Ordinance. Insofar as this aspect is concerned it is noteworthy that effectiveness and sanctity leading to the finality of the certificate of sale is secured by section 3 of National Savings Bank Act with the stipulation to affix the seal of the Bank (which is in the custody of the Board of Directors) in the presence of two members of the Board who are mandated to sign the instrument in token of their presence.

Finally, it is necessary to consider whether the National Savings Bank Act being a later specified enactment takes precedence over the provisions of the Prevention of Frauds Ordinance by the application of the principle "*generalia specialibus non derogant*" in the interpretation of statutes. It would be clear that upon an examination of the provisions of section 55 of the National Savings Bank Act, that the legislature has recognized disposition of immovable property otherwise than by conveyance executed before a Notary.

Bindra's Interpretation of Statutes (8th edition 1997 page 510) referring to the conflict between general and special statutes, states that –

*But, if they cannot be fairly read in such a way as to give full meaning to each consistently with the other, then one must give way and the one to give way will be the general provision."*

Therefore, it seems to me that the certificate of sale is legally valid and passes title to the purchaser.

The learned District Judge was in error in disposing of the main application, when in fact what he had to decide was on the question of preliminary objections. In the circumstances, District Judge is directed to proceed with the inquiry relating to other objections raised by the petitioner.

Subject to the above condition, this application is dismissed with costs.

**DE SILVA, J.** – I agree.

*Application dismissed;*  
*District Judge directed to proceed with inquiry.*