

**NIZAM**  
**vs**  
**NATIONAL DEVELOPMENT BANK**

COURT OF APPEAL.  
SOMAWANSA, J. (P/CA) AND  
WIMALACHANDRA, J.  
CA 671/2004 (REV.).  
DC COLOMBO 6692/SPL.  
SEPTEMBER 16, 2005.

*National Development Bank of Sri Lanka No. 2 of 1979, sections 51, 51(2)-  
Board resolution to sell-public auction - Bought by Bank - Recovery of vacant  
possession - Non tendering of the original of the alleged certificate of sale -  
Fatal ?*

The petitioner- respondent parate-executed the property in question and at the ensuing public auction the Bank purchased the property, and thereafter filed application in the District Court for the recovery of vacant possession. The respondent-petitioner objected to the grant of the order in favour of the Bank, on the basis that the Bank had failed to comply with section 51(1), as it had failed to tender the original of the alleged certificate of sale either with the application for delivery of possession of property or at any stage thereafter. The District Court overruled the objection and entered decree *nisi* in favour of the petitioner-respondent and thereafter entered order absolute. The respondent-petitioner moved in revision.

**Held :**

- (1) In order to meet the objection of the respondent-petitioner, the petitioner-respondent Bank should have produced the original certificate of sale.
- (2) The defects highlighted in the alleged certificate generates a doubt as to the genuineness of the document and that it is not in the prescribed form - Form B  
The purported copy filed is not in conformity with Form B.
- (3) The Land Registry extracts produced do not take away the requirement of producing the original certificate of sale.

**APPLICATION** in revision from an order of the District Court of Colombo.

1. *Ikram Mohamed*, PC with *A. T. Shayama Fernando* for respondent-petitioner.
2. *Romesh de Silva*, PC with *Geethaka Gunawardane* for petitioner-respondent.

*Cur. adv. vult.*

September 16, 2005.

**ANDREW SOMAWANSA, J. (P/CA)**

The respondent-petitioner by this application is seeking to invoke the revisionary jurisdiction of this Court to set aside the order of the learned District Judge of Colombo dated 09.04.2004 marked A6 and for an order discharging the order *nisi* entered in the instant case and or dismissing the application made by the petitioner-respondent Bank marked A1.

When this matter was taken up for argument both counsel agreed to tender written submissions initially and reserved their rights to make oral submissions thereafter if necessary. However having filed their written submissions both parties invited Court to decide the matter and deliver judgment on the written submissions already tendered.

The relevant facts are as follows : The respondent-petitioner mortgaged his residential premises to the petitioner-respondent Bank by way of preliminary and secondary mortgages for financial facilities obtained in a sum of Rs. 7 million. As there was default in the repayment of the loan the petitioner-respondent Bank passed a resolution to sell the premises by public auction and at the auction, premises in suit were purchased by the petitioner-respondent Bank itself and a certificate of sale bearing no. 413 dated 26.12.2002 is alleged to have been issued in favour of the petitioner-respondent Bank. The petitioner-respondent Bank thereafter filed application in the District Court of Colombo in terms of Section 51 of the National Development Bank of Sri Lanka Act, No. 2 of 1979 as amended for the recovery of vacant possession of the premises by way of summary procedure. Court entered order *nisi* in favour of the petitioner-respondent and the respondent-petitioner filed his objections marked A2 and thereafter amended objections marked A3. Thereafter both parties tendered their written submissions and the learned Additional District Judge of Colombo by his order dated 09.03.2004 marked A over-ruled the objection taken by the respondent-petitioner and made the order *nisi* that has been entered an order absolute. It is from the aforesaid order that the respondent-petitioner has preferred this application for revision.

The thrust of the argument of counsel for the respondent-petitioner in this Court as well as in the original Court was that the petitioner-respondent Bank has failed to comply with the provisions of Section 51(1) of the National Development Bank of Sri Lanka Act, No. 2 of 1979 as amended in that the petitioner-respondent failed to tender the original of the alleged certificate of sale either with the application for delivery of possession of property or at any stage thereafter. The petitioner-respondent in paragraph 4 of their objections filed in this Court admit this fact by saying -

“The certificate of sale that has been filed in the District Court case was the true copy duly certified by the Notary who attested the same. The original of the said certificate of sale is in the custody of the petitioner-respondent Bank and could be produced at the hearing of this matter”.

It is to be noted that right along in the original Court as well as in this Court in their objections that were tendered and also in their written submissions have pin pointed the fact that the alleged certificate of sale has not been produced in Court in terms of section 51(1) of the National Development Bank of Sri Lanka Act, No. 2 of 1979 and as such the petitioner-respondent is not entitled in law to obtain an order for delivery of possession of property in question. In the circumstances he submits that the impugned order is an order which the learned Additional District Judge was not entitled in law to make without the original certificate of sale being produced in Court and hence the aforesaid order is contrary to the express provisions of the Act and is an order made without the certificate of sale and should thus necessarily be set aside. I would say there is merit in this submission for in the original Court as well as in this Court the respondent-petitioner raised this objection and it was up to the petitioner-respondent to meet this challenge by producing the original certificate of sale which the petitioner-respondent has failed to do. The averment in the petitioner-respondent's objections in paragraph 4 that the original of the certificate of sale is in the custody of the respondent Bank and could be produced at the hearing of this matter is no averment that could meet the objection of the respondent-petitioner. In order to meet this objection the petitioner-respondent should have produced the original certificate of sale. However the petitioner-respondent has failed to produce the same.

It is useful at this stage to consider the provisions contained in section 51(1) of the aforesaid Act, No. 2 of 1979.

"The purchaser of any immovable property sold in pursuance of the preceding provisions of this Act shall, upon application made to the District Court of Colombo or the District Court having jurisdiction over the place where that property is situate, and upon production of the certificate of sale issued in respect of that property under section 50, be entitled to obtain an order for delivery of possession of that property".

As submitted by counsel for the respondent-petitioner other defects high lighted in the alleged certificate of sale marked as P3 generates a doubt as to the genuineness of the document marked P3. It is to be seen that the purported seal appearing on the alleged certificate of sale shows that the certificate of sale marked P3 is only a true copy as stated by Attorney-at-Law for the defendant-petitioner-respondent. It is also interesting

to observe that as per the certificate of sale no. 413 marked P3 the attesting Notary is one T. Shihan Anthoneyz. However on top of page 01 of the said certificate of sale his seal has been scored off and Attorney-at-Law and Notary Public Karalliyadda's seal has been placed therein. There is no explanation as to why this was done. It is also contended by counsel for the respondent-petitioner that provisions contained in section 50(3) of the National Development Bank Act has not been complied with as the certificate of sale is not in the form B in the Schedule to the Act which require that the purchase price be mentioned with the words-

“Which has been duly certified to the Bank in part (or full as the case may be) satisfaction of the sum due as aforesaid’.

Here again it would appear the document marked P3 does not indicate that this requirement has been complied with.

While conceding that the certificate of sale cannot be challenged in a Court of law the question arises as to whether the alleged certificate of sale (a true copy with such anomalies) could be accepted as the certificate of sale. I would answer in the negative in spite of the undertaking given to produce the original. The Land Registry extracts marked P4 does not take away the requirement of producing the original certificate of sale. In any event, as stated in paragraph 11 of the written submissions of the respondent-petitioner did not or does not seek to invalidate the sale and all what the respondent-petitioner sought to do was to establish that the purported copy of the certificate of sale filed of record is not in conformity with form B and that the said copy of the certificate of sale is not a document upon which an order could be obtained for the delivery of possession of the property. Thus it appears that the reasoning of the learned District Judge is erroneous and cannot be permitted to stand.

For the foregoing reasons, I would hold that there are exceptional circumstances for this Court to invoke its extraordinary jurisdiction to allow the instant application for revision of the order of the learned District Judge. Accordingly I would allow the application for revision and set aside the order of the learned District Judge dated 09.04.2004 marked A6 and make order discharging the order *nisi* entered in this case with costs fixed at Rs. 20,000/-.

**WIMALACHANDRA, J** – I agree.

*Application allowed.*