

CHANDRASENA
v.
LEELA NONA AND OTHERS

COURT OF APPEAL.
WEERASEKERA, J. AND
WIGNESWARAN, J.
C.A. 80/92 (F).
D.C.COLOMBO 15128/L.
DECEMBER 9, 1996, JANUARY 24 AND JULY 14, 1997.

State Mortgage and Investment Bank Law 13 of 1975 – Mortgage – failure to redeem – Public Auction – Certificate of sale – Conclusiveness section 59 (2) – Restoration of possession and ejectment – Order Nisi sections 60(1) (2) (3) (4) of Law 13 of 1975.

The Premises were mortgaged to the State Mortgage and Investment Bank by Mr & Mrs J. On the failure to redeem the mortgage, the premises were put up for sale by public auction, after sale a Certificate of Sale was issued in favour of the original petitioners in terms of section 60(1) Law 13 of 1975. In terms of section 60(2) of the said Law they moved by summary procedure for restoration of possession and the ejectment of the respondent-respondents. Order Nisi was issued. After inquiry the learned District Judge rejected the plea that the respondent-respondent was a tenant of the premises, but, on the basis that he was a trespasser he discharged the order on the footing that section 60(1) did not extend to a trespasser. It was contended that the purpose of section 60(3) and (4)

of Law 13 of 1975 was to restrict the ejection of two specific categories of occupants viz: debtors and tenants, and any person outside these categories could be ejected only by recourse to the general law.

Held:

(1) The thinking of the legislature has been to see that the Bank which is a state lending institution recovered amounts lent by it with interest, in order to do so it assured the buyer by legislature quick and effective method of recovery of possession. The most reasonable interpretation that could be given to section 60 is that all persons other than those enumerated or falling within section 60(3) and (4) would be liable to be ejected by the operation of the conclusiveness of the Certificate of Sale, given under section 59(2) and its consequential enabling provisions contained in section 60(1) – 60(2).

Per Weerasekera, J.

"Good and prudent Banking practice would have to be sacrificed if we are to interpret section 60(3) and (4) dealt with the only persons or categories of persons to whom section 60 applied and therefore did not include trespassers. It is my view that the central concept on which section 59(2) and section 60(1) have been promulgated is to eject trespassers. Section 60(3) and (4) deal with trespassers who may be entitled to certain rights. If it were not so against which category of persons would section 60(1) operate?"

APPEAL from the judgment of the District Court of Colombo.

Case referred to:

Imbuldeniya v. D. de Silva – 1987 – 1 SLR 367 at 371.

A. K. Premadasa P.C., with *C. E. de Silva* for 2nd petitioner-appellant.

L. V. P. Wettasinghe for 2nd defendant-respondent.

1st defendant-respondent absent and unrepresented.

S. Mahenthiran for Substituted 1st petitioner-respondent.

Cur. adv. vult.

September 21, 1997.

WEERASEKERA, J.

The petition of appeal has been filed by only the 2nd petitioner-appellant. The 1st petitioner in the original application before the District Court died after the filing of the appeal and the substituted 1st petitioner-respondent was substituted in his place.

I have examined the original case record and the docket maintained by the Court of Appeal and find that the substitution

effected and the appearances of Counsel have been incorrectly recorded with regard to the appeal to the Court of Appeal and even in the written submissions. I have corrected the appearances of Counsel in the caption hereinbefore set out in my judgment.

I propose to recapitulate the events that led to this appeal. The original petitioners before the District Court viz. the husband of the present substituted 1st petitioner-respondent and the 2nd petitioner-appellant by their petition dated 28.08.90 pleaded the original mortgage of premises morefully described in the schedule thereto by Mr. & Mrs. Jayathillake on Bond 335 of 04.03.86 with the State Mortgage and Investment Bank. On the failure to redeem the said mortgage it was pleaded that the premises were put up for sale by public auction. After sale a Certificate of Sale (P4) was issued in favour of the original petitioners in terms of section 60(1) of the State Mortgage & Investment Bank Law No. 13 of 1975. In terms of section 60(2) of the said Law they moved by way of summary procedure for the restoration of possession and the ejection of the respondent-respondents. Order nisi was duly issued and in pursuance of objections filed by the respondent-respondents who pleaded that they were tenants of one Rita Fernando, inquiry was fixed.

At the inquiry the 1st respondent-respondent being absent order nisi was made absolute as against her.

The 2nd respondent-respondent supported his objections by evidence by himself and documents.

The learned District Judge rejected the claim of the 2nd respondent-respondent that he was the tenant of the premises in suit. But on the basis that he was a trespasser he discharged the order nisi on the footing that sections 60(3) and 60(4) of Act No. 13 of 1975 specified, to the exclusion of others, the persons against whom an ejection order was by law permissible and that the provisions of section 60(1) did not extend to a trespasser. This appeal is from that order discharging the order nisi against the 2nd respondent-respondent dated 28.02.92.

Rita Fernando, the alleged landlord of the 2nd respondent-respondent, purported to rent the premises on 14.04.88. The right to

occupancy under such agreement terminated on 14.03.91 by 2D1. But Rita Fernando had transferred all her right, title and interest by Deed No. 285 of 25.02.86 to Mr. & Mrs. Jayathillake who in turn had mortgaged the premises in suit to the State Mortgage & Investment Bank by Bond No. 335 of 04.03.1986. The Certificate of Sale in favour of the original 1st petitioner and the 2nd petitioner-appellant was on 25.06.1990. When the alleged tenancy agreement (2D1) was entered into in 1991, Rita Fernando had already parted with her rights. It is now settled law following the decision of *Imbuldeniya v. D. de Silva*⁽¹⁾, at page 371 that "A person without any title to a particular piece of property may grant a tenancy thereof to another person. Such a tenancy is valid between the landlord and tenant but is not binding on the true owner".

The learned District Judge in the circumstances of the facts of this case concluded correctly that inasmuch as the Rent Act gave no protection to the tenant against a person who is not his landlord but the true owner that the 2nd respondent-respondent in this case did not have the protection of the Rent Act and was therefore a trespasser vis-a-vis the true owner.

It was argued on behalf of the 2nd respondent-respondent that the purpose of sections 60(3) and (4) of Law No. 13 of 1975 was to restrict the ejection to two specific categories of occupants namely debtors and tenants, and any person outside these two categories could be ejected only by recourse to the general law.

I have given my best consideration to this argument and the reasoning of the learned District Judge when he refused to make the decree nisi absolute.

It is my considered view that Law No. 13 of 1975 not only intended to provide financial assistance to mortgagors but also provided for the recovery of the mortgaged amount in the event of non payment, as any prudent lending institution would do. To do so, the Law provided that when there was a failure to redeem a mortgage the means for the recovery of the mortgaged amount was by Sale. The Sale had to carry with it a reasonable securement that it would

recover what had been lent. To achieve this result it provided for Sale by public auction and an adequate guarantee for the buyer to recover possession of the property sold. The statutory provisions in this regard was contained in section 60 of the Law. It went further and specified the method of seeking recovery of possession as, what use would it be to a buyer without possession? An ordinary action by way of regular procedure is not unknown to be a cumbersome process. No buyer is going to invest money to purchase a property without possession being guaranteed. No lending institution could recover its money without an enterprising buyer. The Statute therefore by section 59 whilst vesting the purchaser and holder of a Certificate of Sale absolute title, provided under section 60(1) for the right of recovery upon the production of the Certificate of Sale in Court by way of summary procedure as set out in section 60(2). The thinking of the legislature in my view has been to see that the State Mortgage & Investment Bank which is a State Lending Institution recovered amounts lent by it with interest. In order to do so it assured the buyer by legislation a quick and effective method of recovery of possession. If not for such provisions no prospective buyers would dare bid at a public auction held under the provisions of the State Mortgage & Investment Bank Law No. 13 of 1975 and the Bank would not be able to recover what it had lent. Not only did Certificate of Sale convey legal title but it also vested with the purchaser a right of recovering possession speedily. Even so the provisions of Law No. 13 of 1975 *inter alia* dealt with certain categories of occupiers of properties under section 60(3) and 60(4). The most reasonable interpretation that could be given to the provisions of section 60 is that all persons other than those enumerated or falling within section 60(3) and 60(4) would be liable to be ejected by the operation of the conclusiveness of the Certificate of Sale given under section 59(2) and its consequential enabling provisions contained in section 60(1) and section 60(2). Under section 60(3) and section 60(4) the type of persons dealt with are persons who are otherwise "entitled" to certain rights and not "trespassers". Good and prudent banking practice would have to be sacrificed if we are to interpret that sections 60(3) and (4) dealt with the only persons or categories of persons to whom section 60 applied and therefore did not include trespassers. It is my view that the central concept on which sections 59(2) and 60(1) have been promulgated is to eject trespassers section 60(3) and (4) deal

with trespassers who may be entitled to certain rights. If it were not so, against which category of persons would section 60(1) operate? If sections 60(3) and section 60(4) were to apply in isolation sections 59(2), 60(1) and 60(2) of the State Mortgage & Investment Bank Law would become meaningless. It is my considered opinion therefore that the first category of persons that section 60(1) and (2) conceives of and against whom an order for delivery of possession is available by way of summary procedure is the class of persons who would fall within and be described as 'trespassers'. Thereafter, of these, namely, those falling within the category of trespassers if any of them would fall within the category specified in sections 60(3) and (4), the District Court would take steps against them in the manner provided in the said sections. The legislature cannot be understood to have given a state lending institution such as the State Mortgage & Investment Bank a reasonable and justifiable benefit with one hand and then taken it away totally with the other. Such illogical motives cannot be attributed to the framers of the Law. The purpose for which the State Mortgage and Investment Bank was established was to "assist in the development of agriculture, industry and housing by providing financial and other assistance in accordance with the law". Nothing is more logical than for the legislature to provide the statutory means by which a State lending institution could recover what has been lent and to see that such an end is achieved.

I am therefore of the view that the learned District Judge has completely misdirected himself and misconceived of the purpose of sections 59 and 60 of the said Law.

For these reasons I allow the appeal since the conclusion of the learned District Judge is not tenable in law.

I set aside the order dated 14.05.91 and make order that the decree nisi issued on the 2nd respondent-respondent be made absolute.

The 2nd petitioner-appellant will be entitled to taxed costs of appeal from the 2nd respondent-respondent.

WIGNESWARAN, J. – I agree.

Appeal allowed.