

1973 Present: Deheragoda, J., Wimalaratne, J., and
Sirimane, J.

SUBANERIS, Petitioner, and THE CEYLON STATE
MORTGAGE BANK and another, Respondents

S. C. 390/71—Application by way of Certiorari

Ceylon State Mortgage Bank Ordinance (Cap. 398), as amended by Ceylon State Mortgage Bank and Finance (Amendment) Act No. 33 of 1968—Sections 70 B and 70 C—Conditional transfer of an undivided share of a land—Failure of the transferor to comply with the condition—Vesting of ownership of the undivided share in the transferee—Right of State Mortgage Bank to acquire the share—Effect of a partition action in respect of the land containing the undivided share—Land Acquisition Act, s. 4 (6)—Partition Act, s. 48 (1)—Certiorari.

Where, after a conditional transfer of an undivided share of a land is executed, the transferee becomes owner of that share upon the failure of the transferor to comply with the condition, Section 70 B (1) (d) of the Ceylon State Mortgage Ordinance authorises the State Mortgage Bank to acquire from the transferee (or his successor-in-title) the undivided share on behalf of the transferor. But if the transferor makes his application to the Bank after the land has been partitioned and a divided lot in lieu of the undivided share has been allotted under the partition decree, the divided lot cannot be acquired in terms of that Section.

APPPLICATION for a writ of *certiorari* to squash an order made by the Ceylon State Mortgage Bank.

On 25th November 1960 an undivided share of a land called Delgahawatte was transferred by its owner, the 2nd respondent in the present *certiorari* application, on condition that if the sum of money received by him as consideration was repaid by him to the transferee within a specified period, the share would be re-transferred to him. As the condition was not fulfilled by the transferor, the transferee became the owner. On 9th February 1968 the present petitioner, who was a successor-in-title of the transferee, filed a partition action for the partition of Delgahawatte. On 25th July 1969, by final decree in that action, Lot 2 was allotted to him. Subsequently, on 9th June 1971, he was informed by the Ceylon State Mortgage Bank that, upon an application made by the transferor after the final decree in the partition action had been entered, the Bank had determined that Lot 2 would be acquired in terms of the provisions of Chapter VA of the Ceylon State Mortgage Bank Ordinance. The present application was for the quashing of that determination.

K. Shanmugalingam, for the petitioner.

W. D. Gunasekera, for the respondent.

Cur. adv. vult.

May 24, 1973. DEHERAGODA, J.—

This is an application by way of *certiorari* for the quashing of determination made by the Ceylon State Mortgage Bank, the 1st respondent, to acquire from the petitioner, under the provisions of Chapter VA of the Ceylon State Mortgage Bank Ordinance (Chapter 398 of the 1956 edition of the Legislative Enactments of Ceylon) as amended by the Ceylon State Mortgage Bank and Finance (Amendment) Act No. 33 of 1968, (hereinafter sometimes referred to as "the Ordinance"), an allotment of land marked Lot 2 which had been allotted to the petitioner under the final decree in partition action No. P 4418 of the District Court of Galle. The person at whose instance the acquisition is sought to be made is cited as the 2nd respondent.

On 1960.11.25 by deed No. 4475 the 2nd respondent transferred an undivided $\frac{3}{8} + \frac{5}{32}$ share of a land called Delgahawatte to one Babun reserving to himself the right to obtain a re-transfer

within a period of 1 1/2 years from that date. The 2nd respondent failed to obtain a re-conveyance within the stipulated 1 1/2 years and thereafter Babun transferred his undivided 17/32 share of the land to one Arnolis by deed No. 13427 dated 1962.05.28, reserving to himself the right to re-purchase within a period of one year from the date of transfer. Babun having failed to exercise the option to re-purchase within the stipulated time, Arnolis transferred the said undivided share of the land to the petitioner by deed No. 5526 dated 1964.01.18. Four years later, on 1968.02.09, the petitioner filed a partition action, No. P 4418 in the District Court of Galle, for the partition of Delgahawatta. On 1969.07.25, by final decree in that action, Lot 2 in extent 1 acre 1 rood and 28.17 perches was allotted to the petitioner.

The 2nd respondent had thereafter applied to the 1st respondent Bank for the acquisition under Chapter VA of the Ceylon State Mortgage Bank Ordinance of the premises which had been transferred by the 2nd respondent with the reservation of a right of re-transfer by deed No. 4475 dated 1960.11.25 already referred to. The 1st respondent Bank thereupon informed the petitioner of its intention to acquire Lot 2 in the final partition plan, which had been allotted to the petitioner by the final decree. The petitioner sent in his written objections to the proposed acquisition and the 1st respondent Bank, after an inquiry, informed the petitioner by letter dated 1971.06.09 that the Ceylon State Mortgage Bank had determined that the premises described in the Schedule to that letter, namely, "Lot 2 of the land called Delgahawatte," shall be acquired in terms of the provisions of Chapter VA of the Ceylon State Mortgage Bank Ordinance. The present application is for the quashing of that determination.

Learned counsel for the petitioner raised the following three points of law, which, according to him, arise on the above facts :—

- (a) The 1st respondent cannot acquire an undivided portion of the premises in terms of section 70B of the Ceylon State Mortgage Bank Ordinance, particularly because possession cannot be taken or handed over of an undivided portion of a land under section 70C subsections (4), (5) and (7) of that Ordinance.
- (b) The final decree in partition action No. P 4418 of the District Court of Galle creates a new title in the petitioner to Lot 2 in the final partition plan and wipes out any previous right, title and encumbrance on that land, and therefore the 1st respondent has no power to acquire that lot under the Ordinance.

- (c) The premises transferred by the 2nd respondent on deed No. 4475 dated 1960.11.25 were an undivided share of Delgahawatta and the 1st respondent Bank cannot now seek to acquire a divided portion of Delgahawatta in terms of section 70B (1) (d) of the said Mortgage Bank Ordinance.

Section 70B (1) (d) of the Ceylon State Mortgage Bank Ordinance runs as follows:—

“70B. (1) Subject to the provisions of subsection (2), the bank is hereby authorized to acquire the whole or any part or share of any agricultural, residential or business premises, if the bank is satisfied that those premises were, at any time not earlier than the first day of January, 1952,—

- (d) transferred by the owner of such premises to any other person after receiving from such other person a sum of money as consideration for such transfer and upon the condition that, on the repayment by the transferor (hereinafter in this Chapter referred to as the “original owner”) of that sum with or without interest thereon within a specified period, such other person will re-transfer those premises to the original owner.”

Section 70B (2) lays down a number of conditions in paragraph (a) to (e), upon which the Bank has to be satisfied before a decision is taken to acquire such premises. Of these, paragraph (b) runs as follows:—

“70B. (2) No premises shall be acquired under subsection (1)—

- (b) unless an application in that behalf has been made to the bank by the original owner of such premises or his spouse or children;”

I shall now proceed to consider the points of law raised by learned Counsel. Regarding the point raised at (a), learned Counsel for the petitioner points out that the provisions of section 70C (4), (5) and (7) speak of taking possession from a person in occupation or in possession of the premises after the making of a vesting order, and that such an act in relation to undivided shares is meaningless. I cannot see any difficulty in either handing over or taking over possession of an undivided share of a land. Such taking over and handing over possession need not be physical; there can be a notional handing over of the rights which in law may be enjoyed by a co-owner of property. Section 70B (1) clearly authorises the acquisition of “the whole or any

part or share of any agricultural, residential or business premises", and section 70C (4), (5) and (7) must be deemed to apply to an acquisition of a share as well as the whole of any land. In any event, even if any difficulties might arise in giving effect to the provisions of section 70C (4), (5) and (7) that by itself cannot negative the express intention of the Legislature contained in section 70B (1). Learned Counsel also referred to the case of *Karunanayake v. C. P. de Silva*¹ (70 N. L. R. 398) and to section 4 (6) of the Land Acquisition Act in support of his view that an undivided interest in a land cannot be acquired under the provisions of that Act. The acquisition under that Act is for a public purpose and unless a land within defined metes and bounds is acquired, it is not possible to fulfil that public purpose; hence the necessity to acquire only a defined portion of land under that Act. There is therefore no necessity to follow, in the case of an acquisition under the Ceylon State Mortgage Bank Ordinance, the same procedure as that prescribed for the acquisition of a defined portion of land under the Land Acquisition Act.

Regarding the point raised at (b), there is considerable doubt as to whether the "interests" which the 2nd respondent claims to have had at the time of the partition action are such as could have been asserted in such an action or could have been preserved intact either by being specified in the partition decree, as for example in the case of a mortgagee's interest, or notwithstanding it, as for example in the case of a monthly tenancy. Section 70B (2) (b) of the Ordinance states that no premises shall be acquired under that section unless an application is made in that behalf to the Bank by the original owner of such premises or his spouse or children, and on the facts of this case as recited earlier, such an application had been made by the 2nd respondent only after the final decree in the partition action had been entered. Section 48 (1) of the Partition Act (Cap. 69 of the 1956 Edition of the Legislative Enactments) makes partition decrees final and conclusive against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decrees relate. At the time the partition action was filed the 2nd respondent had a right only to make an application to the Bank for the exercise of its powers of acquisition of the undivided interests in Delgahawatta and not a right to the land or an interest in the land within the meaning of those expressions as used in section 48 (1) of the Partition Act. I am of the view that such a right or interest that might have accrued to the 2nd respondent could not have accrued to him until at least, upon an application for acquisition in terms of section 70B, a vesting

¹ (1968) 70 N. L. R. 398.

order under section 70C (2) had been made by the Bank. If this view is correct, then the 2nd respondent had no interests whatsoever in the land at the time of the partition action. The question as to whether the "interests" of the 2nd respondent have been wiped out by the final decree in the partition action does not, therefore, arise. If it was the intention of the Legislature to conserve in a partition decree, such a right as that claimed by the 1st and 2nd respondents, I should have expected that intention to have been expressed in no uncertain terms.

Regarding the point raised at (c), upon a perusal of deed No. 4475 dated 1960.11.25 by which the 2nd respondent transferred an undivided $\frac{3}{8} + \frac{5}{32}$ share of Delgahawatta, it becomes clear that the premises transferred by that deed was only an undivided share of Delgahawatta, and the premises which were undertaken to be re-transferred consist also of the same undivided share of that land. Learned Counsel for the 1st respondent Bank argues that Lot 2 is a divided portion of the land which the 2nd respondent originally owned in common with the other co-owners, having a right to a $\frac{17}{32}$ share of every grain of sand on it, and therefore Lot 2 can now be equated to that undivided share. I do not agree. Lot 2 is a new and separate entity that has emerged as a result of the final decree with its own new boundaries and extent. It has nothing in common with the original land though it is no doubt a part of it. The original land partitioned—its boundaries, extent and the various undivided interests held by co-owners—ceases to exist on the entering of the final decree. The identity of the original premises has been lost in the process of partition.

I accordingly hold that, as the law stands at present, it is only the premises consisting of the undivided share of the land which had been transferred by the 2nd respondent that the 1st respondent Bank is authorised to acquire in terms of section 70B (1) (d) of the Ordinance, and that the divided Lot 2 allotted to the petitioner in partition action No. P 4418 of the District Court of Galle is not the premises so transferred, and that it cannot be acquired in terms of that section.

It is interesting to note that in this case, deed No. 4475 was executed on 1960.11.25 and the petitioner was not informed of an application made by the 2nd respondent for the acquisition of the land under section 70B of the Ordinance until more than ten years later; there does not appear to be any time-limit imposed by the Ordinance for making such an application, thus enabling such an application to be entertained by the Bank even after a considerably longer period has elapsed.

I make order quashing the determination of the 1st respondent Bank to acquire Lot 2 in the final partition decree in case No. P 4418 of the District Court of Galle. In the special circumstances of this case I make no order for costs against the respondents.

WIMALARATNE, J.—

I have had the advantage of reading the judgment of Deheragoda J. and I am in agreement with the order proposed by him. I wish, however, to add my own observations on ground (b) relied upon by learned Counsel for the appellant—namely, the effect of the final partition decree on the rights of the respondents.

Section 48 (1) of the Partition Act of 1951 has the effect of making a final decree conclusive against all persons whomsoever, whatever right, title or interest they have or claim to have in the land partitioned.

Section 9 of the repealed Partition Ordinance No. 10 of 1863 made the decree for partition good and conclusive against all persons whomsoever, whatever right or title they had or claimed to have had in the property partitioned.

The words “right or title” under the Partition Ordinance have been the subject of judicial interpretation on numerous occasions. Two decided cases seem to me to be relevant to the question under consideration. In *Seedin v. Thediya*,¹ 53 New Law Reports p. 63, a husband was held to have lost the “interest” which he had in his wife’s property under the Married Women’s Property Ordinance (No. 18 of 1923). Where, therefore, a woman who possessed an undivided share of a land prior to the commencement of that Ordinance was awarded in a partition decree entered after the commencement of the Ordinance a divided lot in lieu of her undivided share she was held entitled to dispose of that divided lot without the consent of her husband.

In *Sivapiragasam v. Vellaiyan*,² 55 New Law Reports p. 298, a co-owner’s right of pre-emption under the Thesawalamai was held to have been extinguished by a decree for partition in respect of the co-owned property. Gratiaen J. considered it pertinent to quote certain observations of Voet (18.3.9) on the scope of the *jus retractus legalis* (i.e., a right created by law or

¹ (1961) 55 N. L. R. 63.

² (1964) 55 N. L. R. 298.

custom and not by agreement) whereby, in the Rhineland and in Delft, a co-owner's right to pre-empt shares sold to a stranger was recognised in former times:—

“Undoubtedly this right of superseding another who has obtained the ownership in a legitimate mode, being a deviation from the common law and contrary also to freedom of contract must receive a strict interpretation.”

Section 70B (1) of the Ceylon State Mortgage Bank Ordinance, as amended, must, in my view, be interpreted strictly. The premises the Bank is authorised to acquire is, therefore, the undivided 17/32 shares of Delgahawatte transferred by the 2nd respondent on deed No. 4475 of 25.11.60. That share ceased to exist after the decree in the partition action was entered. The share allotted to the co-owner in lieu of that undivided share, namely Lot 2 of Delgahawatte, is not premises the Bank is authorised to acquire under the statute.

Such an interpretation has also the advantage of giving effect to the conclusiveness of partition decrees, based on the principle that such decrees create a new title in the party absolutely good against all other persons whomsoever.

SIRIMANE, J.—I agree.

Application allowed.

