

27, 1960

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No. 26 of 1959

IN THE PRIVY COUNCIL

ON APPEAL  
FROM THE SUPREME COURT OF CEYLON

UNIVERSITY OF LONDON  
W.C.L.  
- 7 FEB 1961  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

B E T W E E N

FC 930

THE LAND COMMISSIONER, Colombo Defendant-Appellant

and

(1) VASARA PINTO JAYEWARDENE,  
(2) BERTRAM AUGUSTUS PINTO  
JAYEWARDENE, both of Hildon  
Place, Bambalapitiya in  
Colombo, Ceylon ... Plaintiffs-Respondents

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C A S E FOR THE RESPONDENTS

RECORD

1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon dated 12th February 1958 dismissing an appeal from a Judgment of the District Court of Colombo dated the 6th November 1953. pp.40-47  
pp.30-35

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2. The main question raised in this appeal is one of the construction to be placed on section 3 of the Land Redemption Ordinance No. 61 of 1942.

3. The Respondents (Plaintiffs in the action) by their plaint dated 24th March 1952 set out the accrual of the cause of action, as follows:- pp. 9-12

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"2. One Francis Pieris Suriyapperuma was the owner of certain lands called (1) Moragahalanda (2) Talpediwila Cumbura (3) Nagahalandewatte (4) Meegahawatte situated at Dompe in Gangaboda Pattu of Siyane Korale (5) Several contiguous allotments of land called Delgahawatte, Alubogahalande and

RECORD

Handinnehenewatte situated in the villages Dompe and Hunukandana in Gangaboda Pattu aforesaid.

- p.9 11.26-29            3. By bond No. 1987 dated 30th January, 1932 the said Francis Pieris Suriapperuma mortgaged the said lands to one Cyril Pinto Jayewardene as security for the repayment of a sum of Rs.5,500 lent to the said Francis Pieris Suriapperuma.
- p.9 11.30-31            4. The said bond was put in suit in D.C. 10 Colombo Case No. 840 and decree entered on 24th January, 1935.
- p.9 1.32 -  
p.10 1.4                5. By deed No. 2210 dated 20th July, 1935 the said Francis Pieris Suriapperuma in pursuance of an agreement with the said Cyril Pinto Jayewardene conveyed to the said Cyril Pinto Jayewardene three of the said lands and an undivided  $\frac{1}{2}$  of another land in satisfaction of the amount due on the said decree. The said lands are more fully described in the schedule hereon. The said Cyril Pinto Jayewardene thereupon entered into possession of the said lands. 20
- p.10 11.5-7            6. The said Cyril Pinto Jayewardene died intestate on or about 7th August, 1937 leaving as his heirs the plaintiffs who are his widow and child who became thereupon entitled to the said lands.
- p.10 11.8-12            7. The defendant who is the Land Commissioner has given notice to the plaintiffs that he intends to acquire the two lands called Nagahalandawatta and Moregahalanda in terms of section 3 of the Land Redemption Ordinance and has already taken certain steps towards the acquisition of the said lands. 30
- p.10 11.13-16           8. The plaintiffs state that the said lands do not fall within the description in section 3 of the Land Redemption Ordinance, No. 61 of 1942 and are not therefore subject to acquisition by the defendant under the said Ordinance. 40
- p.10 11.17-19           9. A cause of action has therefore accrued to the plaintiff to sue the defendant for an injunction restraining him from the

acquisition of the said lands."

4. The Respondents therefore prayed:-

p.10 ll.23-33

- (1) for a permanent injunction restraining the appellant from the acquisition of the two lands; and
- (2) for an interim injunction restraining the defendant from taking any steps towards the said acquisition pending the determination of this action.

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The said interim injunction was granted by the District Court of Colombo on the 26th May 1952.

pp.21-22

5. The Appellant by his answer dated 16th July 1952 while denying that any cause of action had accrued to the Respondents took up the following position:-

pp.23-24

"7. Further answering the defendant states -

p.23 l.29 -  
p.24 l.5

- (a) that on or about the 31st of December, 1950, the then Land Commissioner determined under section 3(4) of the Land Redemption Ordinance as amended by Ordinance 62 of 1947, and Act 9 of 1950, that the lands called Nagahalandawatte and Moragahalandewatte should be acquired, after being satisfied bona fide, that the said lands were of the description set out in Section 3(i)(a) and/or Section 3(i)(b) of the Land Redemption Ordinance, No. 61 of 1942 as amended by Ordinance 62 of 1947 and Act 9 of 1950.

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8. As matters of law the defendant states that the plaintiffs cannot have and maintain this action against the Land Commissioner as:-

p.24 ll.6-15

- (a) his determination under Section 3 (4) of the Land Redemption Ordinance is final;

- (b) that the Land Commissioner having been bona fide satisfied that the

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lands were of the description set out in Section 3(i) of the Land Redemption Ordinance, the Land Commissioner's determination that the lands should be acquired cannot be canvassed in a Court of Law.

p.24 11.16-21 9. As a further matter of law the defendant states that this action is wrongly constituted against the Land Commissioner in as much as any steps for the acquisition of the lands will be taken by the Minister and not by the Land Commissioner." 10

6. At the trial of the action the following issues were framed and answered as under:-

ISSUE.

ANSWER

p.25 11.9-12 "1. Are the lands in question capable of being acquired under Section 3 of the Land Redemption Ordinance? (It is admitted that the Land Commissioner made a determination under Section 3, Sub-section 4 of the Land Redemption Ordinance). 20  
No.

p.25 11.14-16 2. Even if issue 1 is answered in favour of the plaintiff is the plaintiff entitled to an injunction restraining the Land Commissioner from taking steps to acquire them? Yes.

p.25 11.17-18 3. Is the action properly constituted as against the Land Commissioner? 30  
Yes.

p.25 1.19 4. Is the Land Commissioner's determination final and conclusive? No.

p.25 11.20-21 5. If issue 4 is answered in the affirmative, can the said determination be canvassed in a Court of Law? Does not arise.

pp.26-27 7. At the trial the 2nd Respondent Bertram Augustus Pinto Jayawardene gave evidence. The 40

Appellant called one Mr. A.C.L. Abeyesundera an Assistant Land Commissioner.

p.28

8. On the 6th of November 1953 the Additional District Judge of Colombo (Mr. G.M. De Silva) entered Judgment for the Respondents as prayed for with costs.

pp.30-33

9. In his judgment Mr. De Silva, A.D.J. set out the facts as follows:-

pp.30-33

10 "ONE Francis Peiris Suriyapperuma borrowed a sum of Rs. 5,500 from Cyril Pinto Jayawardena and as security for the loan he hypothecated five allotments of land described in the schedule to the mortgage Bond No. 1987 of 3.1.1932. This bond was put in suit in case No. 840 of this Court in 1934 and a hypothecary decree was entered in favour of Jayawardene for a sum of Rs. 7,170.62 with interest at 13½ per cent. from 3.5.1934 and thereafter on the aggregate at 9 per cent interest and cost of suit. About an year later in full satisfaction of the decree Francis Peiris Suriyapperuma by Deed No. 2210 of 30th July, 1935, P2 conveyed to Jayawardene lands Nos. 1, 3 and 5 and a half share of the land No. 2 described in the schedule to the mortgage bond. By effecting this transfer Suriyapperuma was able to save from being sold under the mortgage decree his residing land Meegahawatte which is the fourth land in the schedule and a half share of the field called Talpediwela, the entirety of which had been mortgaged.

p.30 11.6-  
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Cyril Pinto Jayawardene is dead and the two plaintiffs are his widow and son respectively."

10. De Silva, A.D.J. dealt with the contention of the Appellant that the determination of the Land Commissioner under Section 3 (4) was final and could not be canvassed:-

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" This question as to the finality of the decision of the Land Commissioner to acquire land under Section 3 of the Land Redemption Ordinance came up for consideration before the Supreme Court in M.S. Perera vs. Unantenne

p.30 11.34-  
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reported in 54 New Law Reports page 457 where His Lordship the Chief Justice states as follows:-

p.30 1.40 -  
p.31 1.5

"On this matter I prefer the respondents contention that the function of the Land Commissioner or any delegate of his consists of two components: first the formulation of the question to be decided and secondly the answering of that question in relation to the particular land. I agree with the second finding which is one of fact cannot be canvassed, but I am of the opinion that an incorrect formulation of the question to be decided is open to challenge".

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p.31 11.6-10

In this case it is the first finding of the Commissioner which is challenged. In view of this decision the objection that this Court has not jurisdiction to examine whether the two lands in question are of the description set out in Section 3 of the Ordinance cannot be sustained."

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11. De Silva, A.D.J. next considered the question whether the lands involved fell within the ambit and scope of Section 3:-

p.31 1.11 -  
p.32 1.31

"Section 3 of the Land Redemption Ordinance enacts:-

"(1) The Land Commissioner is hereby authorised to acquire on behalf of Government the whole or any part of any agricultural land, if the Land Commissioner is satisfied that the land was, at any time before or after the date appointed under section 1, but not earlier than the first day of January, 1929, either -

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- (a) sold in execution of a mortgage decree, or
  - (b) transferred by the owner of the land to any other person in satisfaction or part satisfaction of a debt which was due from the owner to such other person and which was, immediately prior to such transfer, secured by a mortgage of the land."
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It is contended by the plaintiffs that the conveyance by Suriyapperuma to Cyril Pinto Jayawardene of the two lands which are sought to be acquired by the Land Commissioner is not a transfer as contemplated in Section 3(1)(b) of the Land Redemption Ordinance in that the consideration for the transfer is not only the satisfaction of the mortgage debt but also the release of one of the mortgaged properties in its entirety and a half share of another from the liability to be sold in execution of the mortgage decree.

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The argument of the learned Counsel for the plaintiffs is that what is contemplated in Section 3(1)(b) is that the mortgaged land if there be one only and all the mortgaged lands if there be many must be transferred by the mortgagor to the mortgagee to constitute such a transfer as to empower the Land Commissioner to act under that Section. It is pointed out that in this case Suriyapperuma had mortgaged five lands, but in full satisfaction of the debt he had transferred to the mortgagee only three lands and a half share of the fourth and by entering into this arrangement he was able to save his residing land and a half share of a field.

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The learned Crown Counsel submits that this Section presents no difficulty of interpretation, and the construction put on it by the learned Counsel, for the plaintiffs is unwarranted. Words must be construed in their ordinary meaning and not in a restricted sense; when so considered he argues the deed of transfer executed by Suriyapperuma is in satisfaction of the debt due from him to Cyril Pinto Jayawardena and therefore the two lands in question come within the meaning of this Section.

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This Ordinance interferes with the existing rights of the subject and their contractual rights and obligations. Where a mortgaged property had been sold by the mortgagor to the mortgagee in satisfaction of the debt the Land Commissioner is empowered to expropriate the owner on payment of compensation and reconvey the land to the

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original owner. This is a drastic provision having far-reaching effects. Even today a mortgagee buys a mortgaged property at an execution sale or by private treaty and runs the risk of being dispossessed of the property. It is a canon of construction that a statute which takes away vested rights has to be construed strictly. Supposing a person mortgages a land and borrows a thousand rupees and later being unable to redeem the mortgage he sells the land to the mortgagee for Rs. 2,500, the debt at that time being Rs.1,500 he cannot be said to have transferred the land in satisfaction of the debt due, for there is a further consideration of Rs.1,000 for the transfer. Similarly, where a person mortgages several lands and obtains a release of one or more such lands by transferring the rest, the consideration for such transfer is in satisfaction of the debt and the release of some lands. In my view on a strict construction of this Section its operation has to be limited to such transfers as have been effected in satisfaction or part satisfaction of the debt only but, if there is any other consideration present, it does not fall within the ambit of this Section. In this case there is such other consideration and I hold that the Land Commissioner has no jurisdiction to acquire the two lands in question".

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12. De Silva, A.D.J. finally dealt with the contention of the Appellant that the Land Commissioner as such could not be sued:-

p.32 l.32 -  
p.33 l.17

"It has been submitted that the Land Commissioner is not a legal persona and the action against him is not properly constituted. The suggestion of the learned Crown Counsel was that the section should have been instituted against the Attorney General. He relied on an English Case Hutton vs. The Secretary of State for War 43 Times Law Reports page 106 where it was held that an action will not lie against a Crown official, as such for a wrong done in exercise of a statutory authority. Tomlin J. says:-

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"First it was said by the Attorney-General and indeed not disputed by Mr. Schiller



that an action against the Crown would not lie. There were methods by which relief might be obtained against the Crown but not by action.

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If this action was instituted against the Attorney-General the plaintiffs would have been met with the plea that no action lies against the Crown and an injunction such as asked for in this Case is not available against the Crown. In England there is the remedy by way of petition of rights which is not known to our law.

Basnayake, J. says in Samarasekera vs. D.C. Secretary Matara. 51 N.L.R. page 19:

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"There are generally officers of the Crown who for certain purposes are in the nature of a corporation sole. Such quasi corporations sole are familiar in our Statute law, as for example the Attorney-General under the Civil Procedure Code and the Ceylon Savings Bank Ordinance, the Government Agent under the Land Settlement Ordinance."

To this category may be added the Land Commissioner under the Land Redemption Ordinance.

I hold that the action is properly constituted and that the plaintiff are entitled to the relief they seek."

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13. On the 13th November 1953 the Appellant appealed to the Supreme Court of Ceylon. The appeal first came up before Basnayake C.J. and K.D. de Silva, J, and as there was a difference of opinion between them it was directed that the appeal should be listed before a Bench of three judges. The appeal eventually came up on the 7th February 1958 before Basnayake, C.J., Pulle, J. and K.D. de Silva, J.

pp.36-38

p.39

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14. Pulle J. (Basnayake C.J. agreeing) dismissed the appeal with costs. K.D. de Silva J. in a dissenting judgment allowed the appeal.

p.40-42

15. Pulle J. in the course of judgment stated:-

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p.40 11.23-  
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"The appeal raises broadly the questions:

- (a) whether the action is properly constituted against the Land Commissioner who is sued by only his official name,
- (b) whether the provision in section 3(4) is a bar to the court granting an injunction, and
- (c) whether the conditions laid down in section 3(1)(b) subject to which the Land Commissioner was empowered to acquire the lands in question were satisfied."

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16. Dealing with the first question Palle J. stated:-

P.41 11.6-12

"Whether an action like the present one against the Land Commissioner nomine officii can be maintained was argued at length in the case of Ladamuttu Pillai v. Attorney-General and others (S.C. 457/D.C. Colombo Case No. 288/Z). My Lord, the Chief Justice, has in his judgment stated the reasons for answering the question in the affirmative. I agree with those reasons and have nothing to add to them."

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The said case of Ladamuttu Pillai v. Attorney-General was also decided by a Bench of three judges. It is reported at page 313 of Volume 59 of the Ceylon New Law Reports. It was held in that case by Basnayake C.J. and Palle J. (K.D. de Silva, J. dissenting) that:-

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(a) "Where a statute encroaches upon the property rights of the subject and its language admits of more than one construction, that which is in favour of the subject and not one against him must be preferred.

(b) A statutory functionary like the Land Commissioner may be sued nomine officii.

(c) When a statute provides that a decision made by a statutory functionary shall be "final" or "final and conclusive", the words "final" and "final and conclusive" do not

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have the effect of ousting the jurisdiction of the Courts to declare in appropriate proceedings that the decision of the public functionary, when he has acted contrary to the statute, is illegal.

(d) When one of joint and several creditors institutes an action to recover a debt, payment to the other co-creditors does not extinguish the debt.

10 (e) Certiorari does not exclude a regular action when both the remedies are available.

20 (f) Held (K.D. De Silva, J., dissenting), that, under section 2 (x) of the Interpretation Ordinance, words in the singular number include the plural. Accordingly, section 3(1)(b) of the Land Redemption Ordinance applies only to a transfer of the entire land where only one land is mortgaged or to a transfer of all the lands where more than one land is mortgaged. Where several lands are mortgaged as security for a debt, the section would not apply to a transfer of undivided shares in a land or lands. Inasmuch as the Land Redemption Ordinance constitutes a serious intrusion on the property rights the subject, it should be strictly construed and its scope should be strictly confined by preferring a construction in favour of the subject and against the acquiring authority.

30 (g) Held further (per BASNAYAKE, C.J., and PULLE, J.), (1) that where there are joint and several mortgagees and one of them institutes action on the mortgage bond, a subsequent transfer of the mortgaged property by the mortgagor in favour of any of the other co-mortgagees cannot come within the ambit of section 3(1)(b).

40 (h) (iii) that section 3(4) of the Land Redemption Ordinance does not preclude a person from challenging in a regular action the legality of the determination of the Land Commissioner to acquire a land.

(i) (iv) that an injunction under section 86 of the Courts Ordinance can be issued against the Land Commissioner restraining him from taking steps to acquire a land unlawfully."

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17. Pulle J. next went on to deal with the second question:-

p.41 11.13 -  
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"The answer to the second question does not, in my opinion, admit of a doubt, Sub-section 4 of section 3 answers itself: It reads

'The question whether any land which the Land Commissioner is authorised to acquire under sub-section (1) should or should not be acquired shall subject to any regulations made in that behalf, be determined by the Land Commissioner in the exercise of his individual judgment and every such determination of the Land Commissioner shall be final.'

Before any finality can be claimed for a determination by the Land Commissioner to acquire a land it is essential to establish that the land comes within the provisions of section 3 (1). The plaintiffs asserted that the lands "do not fall within the description in section 3 of the Land Redemption Ordinance, No. 61 of 1942, and are not therefore subject to acquisition by the defendant under the said Ordinance".'

If that be the fact the provision in sub-section 4 cannot defeat their claim to have the Land Commissioner restrained from acquiring the lands."

18. Pulle J. dealt with the third question:-

p.41 1.31 -  
p.42 1.38

"I come now to the last and important question, namely, whether the contention on behalf of the Land Commissioner is correct that the lands he sought to acquire fall within the description in section 3(1)(b).

One Francis Suriyaperuma by a bond dated the 30th January, 1932, mortgaged the two lands sought to be acquired and three others to Cyril Pinto Jayawardene, as security for a loan of Rs.5,500. The bond was put in suit on 3rd May, 1934, and

on the 13th July 1934, a decree was entered ordering the mortgagor to pay Rs.7170/62, with interest and costs of suit. The properties were declared specially bound and executable for the payment of this sum. The decree provided that the order to sell would be stayed if certain payments indicated in the decree were made. The decree was not executed.

10 By a deed dated 20th July, 1935, the mortgagor conveyed to Cyril Pinto Jayawardene in consideration of a sum of Rs.8,000 the two lands sought to be acquired, a third land of the extent of 17A.1R. 2P and an undivided half share of a field called Talpediwila Cumbure. In other words all the lands mortgaged were transferred by the mortgagor except his residing land called Meegahawatte and an undivided half share of Talpediwila Cumbure.

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The learned trial Judge held against the defendant because in his opinion the consideration for the transfer in favour of the mortgage was not merely the judgment debt but also the release from the mortgage of the entirety of Meegahawatte and a half share of Talpediwila Cumbure and that, therefore the transfer could not be said, within the meaning of section 3(1)(b), to be in satisfaction or part satisfaction of a debt due from the mortgagor to the transferee. If the learned Judge's interpretation of the section is that it is a condition precedent to the exercise of the power of acquisition that all the lands bound by the mortgage must be transferred, I am in agreement with him. Can it be said that the debt in question was secured by a mortgage of the lands transferred? The question cannot be answered in the affirmative because the debt was secured not only by the mortgage of the lands transferred but also by the mortgage of the entirety of Meegahawatte and the remaining half share of Talpediwila Cumbure. The security for the debt was a mortgage of all the five lands and not two lands and an undivided share of a third.

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The interpretation of section 3(1)(b) was the subject of a lengthy argument in *Ladamuttu*

RECORD

Pillai v. Attorney-General and others. I adhere to the view I expressed in that case that unless all the lands mortgaged are transferred in satisfaction or part satisfaction of the debt secured there is no room for the application of section 3(1)(b).

It was submitted for the plaintiffs that section 3(1)(b) had no application because it could not be said that, immediately prior to the transfer, the debt created by the decree was secured by a mortgage. The correctness of the ruling in M.S. Perera v. Unatenna (54 N.L.R. 457) was questioned before us. I concurred in the judgment in that case and, having reconsidered it, I see no reason for thinking that it was wrongly decided.

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In the result the appeal fails and should be dismissed with costs."

p.43

19. Basnayake C.J. in a separate judgment agreed with Pulle J.

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pp.44-45

20. In a dissenting judgment K.D. De Silva J. stated:-

p.44 1.14 -  
p.45 1.4

"It was contended on behalf of the respondents that the provisions of section 3(1)(b) would apply only to a case where all the lands mortgaged had been transferred by the owner to the mortgagee in satisfaction of the mortgage debt. This same question arose for decision in the case of Iadamuttu Pillai v. Attorney-General and others (S.C. 457/D.C. Colombo Case No. 288/Z) and there I took the view that a transfer of all the lands mortgaged was not a condition precedent to proceedings being taken under section 3(1)(b) and I still adhere to that view. If the legislature intended to restrict the application of the provision only to cases where all the mortgaged lands had been transferred to the mortgagee it could have stated so, in clear and unambiguous terms. Without unduly straining the language of section 3 (1)(b), I do not think it can be said, that the legislature contemplated the application of this provision only to cases where all the mortgaged lands have been transferred. The object of this Ordinance

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10 was to render assistance to a class of debtors who got into difficulties during an abnormal period of financial stress. If the view put forward on behalf of the respondents is to prevail that object would be defeated to a very large extent. According to that view if a person borrowed a sum of Rs.50,000 by hypothecating ten lands - nine of which were very valuable - as security for the loan and he later transferred to the mortgagee the nine valuable lands in satisfaction of the debt he would not be entitled to obtain any relief through the intervention of the Land Commissioner even though the 10th land which he did not transfer was worth only Rs.100. It is difficult to believe that the Legislature, in passing this Ordinance, intended to countenance such a situation.

20 In my view the lands in question come within the purview of section 3(1)(b) and the Land Commissioner was entitled to acquire them. I would therefore allow the appeal and dismiss the plaintiffs' action, with costs costs in both Courts."

30 21. The Appellant was granted conditional leave to Appeal to Her Majesty in Council from the said Judgment and Decree of the Supreme Court of Ceylon on the 6th May, 1958. Final leave was granted on the 10th July, 1958.

pp.50-51

p.55

22. The Respondents respectfully submit that the appeal should be dismissed with costs for the following amongst other

R E A S O N S

- 40 (1) BECAUSE the Land Commissioner may be sued nomine officii;
- (2) BECAUSE an injunction can be granted against the Land Commissioner restraining him from taking steps to acquire land under the Land Redemption Ordinance;
- (3) BECAUSE Section 3(4) of the Land Redemption Ordinance does not have the effect of ousting the jurisdiction of

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the Courts to declare in appropriate proceedings that the Land Commissioner has acted either contrary to the Ordinance, or ultra vires or illegally;

- (4) BECAUSE Section 3(1)(b) of the Land Redemption Ordinance applies to a case of a transfer, in satisfaction or part satisfaction of the debt, of the entire land where only one land is mortgaged and of all the lands where more than one land is mortgaged; 10
- (5) BECAUSE the lands in this case did not fall within the description in Section 3(1)(b) of the Land Redemption Ordinance;
- (6) BECAUSE the Land Commissioner was empowered to acquire lands which only fell within the description of the said Section 3(1)(b);
- (7) BECAUSE the judgment of the District Court is right; 20
- (8) BECAUSE the judgment of the majority of the Supreme Court is right.

SIRIMEVAN AMERASINGHE



No. 26 of 1959

IN THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE SUPREME COURT OF CEYLON

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B E T W E E N

THE LAND COMMISSIONER, (Defendant  
Colombo Appellant

- and -

{1) V.P. JAYEWARDENE  
{2) B.A.P. JAYEWARDENE Respondent

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C A S E FOR THE RESPONDENTS

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