Privy Council Appeal No. 39 *of* 1959

The Land Commissioner - - - - - - - - *Appellant*

v.

M. Ladamuttu Pillai Kathirkaman Pillai and another - - *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1960

Present at the Hearing :

LORD TUCKER
LORD KEITH OF AVONHOLM
LORD JENKINS
LORD MORRIS OF BORTH-Y-GEST
MR. L. M. D. DE SILVA

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

This is an appeal from the Judgment of the Supreme Court of Ceylon dated the 31st January, 1958. The Supreme Court by a majority (Basnayake, C.J. and Pulle, J., K. D. de Silva, J. dissenting) allowed the appeal of the substituted plaintiff in the action from the Judgment and Decree of the District Court (L. B. de Silva, D.J.) dated the 13th November, 1953, dismissing his action with costs. By their Judgment and Order the Supreme Court directed an injunction to issue in favour of the substituted plaintiff restraining the defendants from taking steps under Ordinance No. 61 of 1942 to acquire certain land. One of the main questions raised in the appeal is whether upon a proper interpretation of the provisions of section 3 of that Ordinance (the Land Redemption Ordinance) the Land Commissioner had the power to determine that the land in question should be acquired. Other questions in the appeal raised issues relating to the procedure followed and the remedies sought.

The second respondent, who for convenience may be referred to as Elaris, was formerly the owner of a number of different allotments of land. One of these which consisted of several contiguous allotments amounting in total to approximately 42 acres in extent was known as Keeriyankalliya estate. It may be referred to as the Estate.

Elaris mortgaged this land (the Estate) and also other lands. On the 30th September, 1925, by Mortgage Bond No. 391 (P.1) he mortgaged the Estate together with certain other lands by a primary mortgage in favour of three mortgagees, one of whom was called Sockalingam, for Rs. 50,000. Elaris bound himself to repay that sum to the mortgagees or any one of them on demand. The mortgagees were correal creditors. On the 8th April, 1930, by a further Mortgage Bond No. 533 (P.2) Elaris mortgaged certain lands which included the Estate, in favour of five mortgagees for Rs. 25,000. One of those mortgagees was Sockalingam: another was a man called Sekkapa. On the 8th March, 1931, by a further Mortgage Bond, No. 2339, Elaris mortgaged certain lands which included the Estate in favour of a man called Dabarera for Rs. 20,000. It will be seen that the Estate was common to all three mortgagees.

By a plaint dated the 31st January, 1933, Sockalingam instituted an action (Case No. 7365) against Elaris in the District Court of Negombo and joined Dabarera as a second defendant. By his plaint Sockalingam put the secondary bond (P.2) in suit and set out the amount which was owing by Elaris for principal and interest. Dabarera as the holder of the Mortgage created under Bond No. 2339, was made a party in order that he should show cause why the mortgaged premises or any of them should not be sold so as to effect the recovery of the amount owing. Sockalingam claimed judgment for the principal and interest due under the Mortgage Bond (P.2) and, in default of payment, an order for the judicial sale of the land comprised in the mortgage and for an order that, if such sale did not yield sufficient to pay the principal and interest, Elaris should pay the amount of the deficiency with interest.

On the 23rd June, 1933, a decree as asked for was entered in favour of Sockalingam: the sale of the land was to take place in default of payment within four months from the date of the decree.

By a Deed of Transfer No. 4010, dated the 4th May, 1935 (P.5), Elaris as vendor transferred the Estate and certain other lands to Sockalingam and Sekappa: the transfer was in the proportion of an undivided two-third share to Sockalingam and an undivided one-third share to Sekappa. The lands other than the Estate were some but not all of the other lands covered by the first and second mortgages. The Deed recited that the transfer was in consideration of the sum of Rs. 75,000. The attestation clause certified "that the full consideration above-named was set off in full satisfaction of the claim and costs due in Case No. 7365 D.C. Negombo and the principal and interest due on mortgage bond No. 391 dated 30th September, 1925 . . . and that the vendor undertook to release the lands appearing in this deed from tertiary mortgage bond bearing No. 2339 dated 8th March, 1931."

Thereafter in October, 1940, Sockalingam transferred an undivided one-third share of the land which he had acquired under the Transfer Deed No. 4010 to the heirs of Muthiah (one of the correal creditors under Mortgage P.2): Sockalingam transferred his remaining one-third share to Velayuthan (another of the correal creditors under Mortgage P.2). In 1945 by Deed No. 761 dated the 24th February, 1945, Sekappa, Velayuthan, and the heirs of Muthiah as vendors transferred the entire interest in the Estate and the other lands which had been the subject of Deed of Transfer No. 4010: the transfer which was for a consideration of Rs. 75,000 was to Ladamuttu Pillai. He therefore became the sole owner of the Estate and of the other lands which have been referred to above.

On the 16th May, 1945, Elaris made a request to the Land Commissioner to take action under the provisions of the Land Redemption Ordinance No. 61 of 1942.

Section 3 of that Ordinance was in the following terms:—

> "3. (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 that 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—
>
> (*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.
>
> (2) Every acquisition of land under sub-section (1) shall be effected in accordance with the provisions of sub-section (5) and shall be paid for out of funds provided for the purposes of this Ordinance under section 4.
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> (3) No land shall be acquired under sub-section (1) until the funds necessary for the purpose of such acquisition have been provided under section 4.

(4) 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.

(5) Where the Land Commissioner has determined that any land shall be acquired for the purposes of this Ordinance, the provisions of the Land Acquisition Ordinance, subject to the exceptions, modifications and amendments set out in the First Schedule, shall apply for the purposes of the acquisition of that land ; and any sum of money which may, under such provisions be required to be paid or deposited by the Land Commissioner or by Government by way of compensation, costs or otherwise, shall be paid out of funds provided for the purposes of this Ordinance under section 4."

The Land Commissioner asked Ladamuttu to show cause why the Estate should not be acquired. Thereafter on the 12th May, 1947, the Land Commissioner made a "determination" to acquire the Estate on behalf of the Government.

On the 3rd July, 1947, by Ordinance No. 62 of 1947 certain amendments of the Land Redemption Ordinance No. 61 of 1942 were made. By one amendment of section 3 of the last-mentioned Ordinance there was added immediately after clause (*b*) of sub-section 1, the following :—

"(*c*) transferred by its owner or his executors or administrators to any other person, at the request of a mortgagee of that land, in satisfaction or part satisfaction of a debt which was due from that owner or his predecessor in title to that mortgagee and which was secured by a mortgage of that land subsisting immediately prior to the transfer.

The preceding provisions of this sub-section shall not apply to such undivided shares of an agricultural land as were sold or transferred within the period specified in those provisions and in the circumstances and manner set out in any of the preceding clauses (*a*), (*b*) and (*c*), but, where those shares were converted after the sale or transfer into any divided allotment or allotments by a partition decree of any court or by a duly executed deed of partition, those provisions shall apply to such allotment or allotments, and accordingly the word 'land' occurring in this Ordinance shall be construed to include such undivided shares which have been converted after sale or transfer as aforesaid into any divided allotment or allotments."

On the 7th February, 1949, Ladamuttu was notified of the determination of the Land Commissioner of the 12th May, 1947, to acquire the Estate. Later Ladamuttu as plaintiff commenced an action in the District Court of Colombo against the Attorney General of Ceylon and "The Land Commissioner, Colombo." By his plaint in the action filed on the 23rd July, 1949, the plaintiff pleaded that he was a bona fide purchaser for value without notice and pleaded that the Land Commissioner had no power under Ordinance No. 61 of 1942 to acquire the lands from him and he claimed an injunction restraining the defendants jointly or in the alternative from taking steps under that Ordinance to acquire the lands. By their answer on the 2nd March, 1950, the defendants asserted that the Land Commissioner had power to acquire the Estate according to the provisions of section 3 of the Land Redemption Ordinance No. 61 of 1942: they further pleaded as follows:—"the 2nd defendant's determination to acquire the Keeriyankalliya estate under the provisions of the said Ordinance is final and conclusive and cannot be questioned in these proceedings and this Court has therefore no jurisdiction to entertain the present action."

On the 9th March, 1950, the Land Acquisition Act, No. 9 of 1950, was passed.

The provisions of section 3 sub-section 5 of the Land Redemption Ordinance No. 61 of 1942 were amended. The Land Acquisition Ordinance (which had regulated the procedure of acquisition) was repealed and it was provided that where the Land Commissioner determines under section 3 sub-section 4 of the Land Redemption Ordinance that any land should be acquired the purpose for which that land was to be required was deemed to be a public purpose and the provisions (with exceptions, substitutions and modifications) of the Land Acquisition Act were to apply for the purposes of the acquisition of that land. As a result of the amendments made by the Land Acquisition Act it was provided that " where the Land Commissioner determines that any land shall be acquired for the purposes of the Land Redemption Ordinance the Minister shall make a written declaration that such land is needed for a purpose which is deemed to be a public purpose and will be acquired under this Act and shall direct the acquiring officer of the province or district in which such land is situated to cause such declaration in the Sinhalese, Tamil and English languages to be published in the Gazette and exhibited in some conspicuous places on or near such land." The " acquiring officer " with reference to any land means the Government Agent of the province or the Assistant Government Agent of the district in which that land is situated or any other prescribed officer.

The impontance of these amendments is that consequent upon them it did not lie with the Land Commissioner after a determination by him under section 3 of the Land Redemption Ordinance to " take steps " to acquire the land.

Ladamuttu died in the early part of 1951 and on the 11th March, 1953, his son (to whom letters of Administration had been granted) was substituted as the plaintiff in the action. Elaris petitioned to be added as a third defendant and was joined as the third defendant.

The action was tried in the District Court on the 30th September and the 6th November, 1953. During the hearing it was stated on behalf of the substituted plaintiff that it was conceded that the Attorney-General could not be sued and that the action against him should be dismissed.

The learned District Court Judge gave judgment on the 13th November, 1953, dismissing the action. He held that the Land Commissioner had had power to order the acquisition of the property. In the course of his judgment he said :—

> " It was held in 54 N.L.R. 457 that in spite of the entering of a Hypothecary Decree, the debt is still due on the Mortgage for purposes of section 3 (1) (*b*) of the Land Redemption Ordinance. The fact that the land was transferred in satisfaction of two Mortgage Debts secured by this property, does not take this case outside the provisions of this section.
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> It was also argued that as secured lands were hypothecated by these two Bonds P.1 and P.2, only one of which was transferred in satisfaction of the two debts the transaction fell outside the scope of this section. I am unable to accept this contention. All that this section requires is that the land sought to be acquired, should have been transferred in satisfaction or part satisfaction of the debt which was due from the transferor to the transferee and that it should have been secured by way of mortgage for such debt. The fact that other lands were also bound by way of Mortgage for this debt is quite immaterial."

Questions arose as to whether the Land Commissioner could be sued as such and the learned Judge held that he could. The issues framed during the trial and the answers given by the learned District Court Judge were as follows:—

> " 1. Is the land in question capable of acquisition under section 3 of the Land Redemption Ordinance, No. 61 of 1942?—Yes

2. Did the Land Commissioner on or about 12.5.47 make a determination under section 3 (4) of the Land Redemption Ordinance, No. 61 of 1942, that Kiriyankaduru (sic) Estate be acquired?—Yes.

3. Was the said estate on or about 12.5.47 a land of the description contained in section 3 (1) (*b*) of the Land Redemption Ordinance, No. 61 of 1942?—Yes.

4. Is the Land Commissioner's determination with regard to the acquisition of Kiriyankaduru Estate final?——His decision on facts is final the question of law whether he had authority to acquire a particular land is subject to review by this Court.

5. If so can the correctness of the said determination be questioned in these proceedings?——Vide answer to Issue 4.

6. Is plaintiff entitled to proceed against the 1st defendant as representing the Crown to obtain an order of Injunction against the Crown?—No.

7. Can plaintiff maintain this action against the 2nd defendant as the Land Commissioner without suing the officer who made the order in question by name?—Yes.

8. Is the plaintiff a bona fide purchaser for value from the original transferees of the said lands from the 3rd defendant?—Yes.

9. If, so, is the 2nd defendant empowered to acquire lands from him?—Yes."

From that Judgment the substituted plaintiff appealed to the Supreme Court with the result, as stated above, that, by a majority, the appeal succeeded. In a careful and comprehensive Judgment the learned Chief Justice held that the Land Commissioner had no authority in law to acquire the Estate. He held that section 3 (1) (*b*) did not apply to a case in which the lands transferred were some only of lands secured by a mortgage. In dealing further with the provisions of section 3 (1) (*b*) the learned Chief Justice said:—

"Learned counsel bases his contention that the transfer P5 does not fall within the ambit of section 3 (1) (*b*) on the following considerations:—

(*a*) What was transferred was not the lands themselves but undivided shares in the lands. The transfer of a land and of an undivided share in a land is not the same. The section contemplates transfer of a land or lands and not undivided shares in a land or lands.

(*b*) The transfer to Sekappa was not in satisfaction or part satisfaction of a debt which was due from Elaris Perera to Sekappa. It was in satisfaction of the debt due on bond P1 in favour of Sockalingam, Subramaniam and Arunasalam.

The submission that the section applies only to the transfer of the land securing the debt and not to the transfer of an undivided share in it, is sound. The section refers to land and not to undivided shares in land. An undivided share in a land is not the same as the land itself and the transfer of an undivided share in a land is not a transfer of the land. Learned counsel for the Crown did not seriously resist this argument.

Learned counsel also submitted that once Sockalingam instituted action for the recovery of the money due on bond P2, Sekappa who was party to that bond lost his right to proceed against Elaris Perara, the obligation created thereby being joint and several.

It is correct that 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. The moment Sockalingam instituted the action on the bond Elaris Perera's right to choose the co-creditor to whom he would pay the debt ceased and his debt became payable to Sockalingam alone."

After referring to various authorities he continued:—

> "The foregoing citations support learned Counsel's contention that Sekappa's right to claim the debt from Elaris Perera ceased on the institution of the mortgage action by Sockalingam and that the transfer to Sekappa was not therefore a transfer in satisfaction or part satisfaction of a debt due from Elaris Perera to Sekappa. Clearly then the transfer, apart from it being a transfer of undivided shares, does not for this additional reason, come within the ambit of section 3 (1) (*b*)."

In regard to procedural matters the learned Chief Justice held that the Land Commissioner could be sued *nomine officii* and that action could also be maintained against the Attorney-General and that the Court was entitled to consider whether the Land Commissioner had exceeded his powers under the Ordinance. Pulle, J., delivered a judgment which was in accord with that of the Chief Justice. De Silva, J., was of a different opinion. He held that it was not necessary that the land transferred should be co-extensive with the land secured by the mortgage. He further held that even though Sockalingam alone had sued on the mortgage bond P2 Elaris did not cease to be indebted to Sekappa as a mortgagee under that mortgage bond. De Silva, J., would therefore have dismissed the appeal as he considered that the substituted plaintiff had failed to establish that the land in question (the Estate) did not come within the provisions of section 3 (1) (*b*).

In the result the appeal was allowed and it was ordered " that judgment be entered for the substituted plaintiff directing that an injunction be issued restraining the defendants jointly or in the alternative from taking steps under Ordinance 61 of 1942 to acquire the lands described in the Schedule hereto ". The Schedule described other lands as well as the Estate. The Decree in the form as set out must have been entered *per incuriam* for the determination of the Land Commissioner was limited to the Estate whereas the injunction would cover other lands as well as the Estate. But quite apart from this there are substantial reasons which lead their Lordships to the conclusion that the Judgment cannot stand. In the first place under the Judgment an injunction is issued against the Attorney-General whereas in the District Court it had been conceded that the action as against the Attorney-General should be dismissed. In the second place the injunction as framed and as claimed in the Plaint in the action would restrain the taking of any step under Ordinance 61 of 1942 to acquire the Estate (leaving aside the question concerning the other lands referred to above). But the only determination that was made by the Land Commissioner was that which was made under 3 (1) (*b*) on the 12th May, 1947, and after that date Ordinance 61 of 1942 was amended. As stated above it was amended by Ordinance 62 of 1947. As a result Ordinance 61 of 1942 now includes paragraph (*c*) of sub-section (1) of Section 3. The injunction as framed would prevent the Land Commissioner from making a new determination and from endeavouring to justify it as being warranted by the provisions of Ordinance 61 of 1942 in the form in which it stood after the 3rd July, 1947.

These objections to the Decree of the Court leave untouched the questions as to the effect of bringing proceedings against the Land Commissioner. There is the further question that the injunction would appear to ignore the changes in regard to acquiring land which were effected by the Land Acquisition Act No. 9 of 1950.

For the reasons given their Lordships consider that the Order made by the Decree of the Supreme Court cannot be supported and that the objections to the Order presented on behalf of the Land Commissioner must prevail. It may here be stated that Elaris did not appear and was not represented before their Lordships' Board.

In argument before the Board Sir Frank Soskice, on behalf of the substituted plaintiff, while not abandoning a claim to the issue of an injunction stated that his client would be content if a declaration were

made to the effect that " the determination made by the Land Commissioner on the 12th May, 1947, to acquire the Keeriyankalliya Estate pursuant to section 3 (1) (*b*) of the Land Redemption Ordinance No. 61 of 1942 was *ultra vires* and void ".

Important questions are raised (*a*) as to whether on the 12th May, 1947, the circumstances were covered by and were within the wording of Section 3 (1) (*b*) of the Land Redemption Ordinance and (*b*) as to the appropriate procedure for seeking determination of the issues raised by the plaintiff and the substituted plaintiff.

Under the provisions of section 3 (1) (*b*) of the Land Redemption Ordinance the Land Commissioner was authorised to acquire the Estate on behalf of the Government if satisfied that the Estate was part of agricultural land which was transferred by its owner " 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 ". The Estate was owned by Elaris. It was transferred together with certain other lands to Sockalingam and Sekappa. The words in the Ordinance " to any other person " must, their Lordships conclude, be interpreted as including any other person or persons. If then the land including the Estate which was transferred by P.5 was transfererd to Sockalingam and Sekappa, was such transfer in satisfaction or part satisfaction of a debt which was due from Elaris to Sockalingam and Sekappa?

It was contended that the " land " was not transferred within the meaning of Section 3 (1) (*b*) of the Land Redemption Ordinance in that only undivided shares in the land were transferred to different persons. Their Lordships cannot accept this contention. The " land " was transferred by Elaris. The circumstance that as between the two transferees one took an undivided two-third share and the other an undivided one-third share does not alter the fact that the land (which included the Estate) was transferred by Elaris.

Was such transfer in satisfaction or part satisfaction of a debt? It was contended that it was not inasmuch as the Deed of Transfer (P.5) of the 4th May, 1935, recited that the transfer which was of the Estate together with certain other lands was in consideration of the sum of Rs. 75,000 " well and truly paid " by Sockalingam and Sekappa. It was submitted therefore that the real nature of the transaction was that it was an out and out sale of land for a consideration of Rs. 75,000. The actual wording in the Deed was:—" in consideration of the sum of Rupees Seventy-five thousand (Rs. 75,000) of lawful money of Ceylon well and truly paid to me by the said vendee (the receipt whereof I do hereby admit and acknowledge) . . . ". It was earlier recited that the vendor had agreed with Sockalingam and Sekappa, " hereinafter sometimes called or referred to as the vendee ". But in the attestation clause signed by the Notary Public it was certified " that the full consideration above-named was set off in full satisfaction of the claim and costs due in Case No. 7365 D.C. Negombo and the principal and interest due on Mortgage Bond No. 391 dated 30th September, 1925, attested by T. A. Fernando, Notary Public and that the said vendor undertook to release the lands appearing in this Deed from tertiary mortgage bond bearing No. 2339 dated 8th March, 1931 . . . ".

It is provided by the Notaries Ordinance (1907. Volume 3 Legislative Enactments of Ceylon Cap. 91) that a notary in attesting any deed or instrument executed or acknowledged before him must state whether any money was paid or not in his presence as the consideration or part of the consideration of the deed or instrument and if paid the actual amount in local currency of such payment (see section 30 (20)).

The terms of the attestation clause point to the conclusion that no money was paid by Sockalingam and Sekappa in the presence of the Notary Public and it seems clear that instead of there being any payment of Rs. 75,000, that amount was set off in full satisfaction of the claim

and costs due in case No. 7365 and the principal and interest due on mortgage bond No. 301 (P.1). In considering the word " debt " as used in section 3 (1) (*b*) their Lordships see no reason to exclude a debt due under a mortgage decree founded upon a mortgage bond. The various lands (one part of which was the Estate) were however transferred by Elaris to Sockalingam and Sekappa in satisfaction of debts due from Elaris to Sockalingam. The claim in Case No. 7365 was a claim by Sockalingam alone. The principal and interest due on Mortgage Bond No. 391 was due to Sockalingam and others. Sekappa was not a party to such Mortgage Bond. Their Lordships cannot therefore resist the conclusion that though the land covered by the transfer P.5 was transferred by Elaris to Sockalingam and Sekappa it was not transferred in satisfaction of a debt or debts due to Sockalingam *and* Sekappa. On this ground their Lordships consider that the determination made by the Land Commissioner on the 12th May, 1947, was not warranted by the provisions of section 3 (1) (*b*) of the Land Redemption Ordinance.

It was submitted by Mr. Gratiaen that if the lands transferred by Elaris had been transferred to Sockalingam alone the provisions of section 3 (1) (*b*) of the Land Redemption Ordinance would have been applicable and he submitted that inasmuch as the transfer to Sockalingam and Sekappa was in satisfaction of two secured debts (the debt secured by the Mortgage Bond P.1 and the debt created by the Mortgage Decree P.4) which Sockalingam could release alone, the transfer had the same legal effect as a transfer to Sockalingam alone. Mr. Gratiaen submitted that after a transfer to Sockalingam he (Sockalingam) could have transferred the land or an interest in it to someone else and that if at Sockalingam's wish the transfer by Elaris was in the first instance to Sockalingam and to someone else then the transfer should not be regarded as being outside the provisions of section 3 (1) (*b*). This submission involves substituting for the words " transferred . . . to any other person " the words " transferred . . . to or to the order of any other person ". On the facts of the present case the land was transferred to two persons in satisfaction of debts due to only one of them. Their Lordships are mindful of the fact that resort to the provisions of the Land Redemption Ordinance may lead to the expropriation of land (albeit on the payment of compensation) and they consider that the wording of the Ordinance must be shown to be strictly applicable before a " determination " can validly be made.

The circumstance that when by the Deed of Transfer of the 4th May, 1935 (P.5), Elaris transferred the Estate and other lands to Sockalingam and Sekappa he (Elaris) undertook to release the lands appearing in the Deed from the tertiary mortgage bond (as the attestation clause shows) does not alter the conclusion that the lands were transferred to Sockalingam and Sekappa in satisfaction of the debts due from Elaris to Sockalingam.

Reference must be made to certain other submissions which were advanced in support of the contention that the Land Commissioner was not warranted in making his determination of the 12th May, 1947. It was said that the debt due from Elaris under Mortgage Bond No. 533 (P.2) became merged in the Judgment in Case No. 7365 in the District Court of Negombo and that the transfer by Elaris was, as a result, not in satisfaction or part satisfaction of a debt " which was immediately prior to such transfer secured by a mortgage of the land ". It was said that though after the Judgment the mortgage continued to exist for some purposes yet it did not secure the judgment debt. Their Lordships have concluded that the lands transferred by Elaris (which lands included the Estate) were transferred in satisfaction of the debt secured by the Mortgage Bond of the 30th September, 1925 (P.1), and of the claim and costs due in Case No. 7365. But their Lordships see no reason to differ from the conclusion in *Perera* v. *Unantenna* 54 Ceylon New Law Reports 457. In that case it was held that where a land is mortgaged and the mortgage is put in suit and decree is entered against the mortgagor for the payment

of the amount due on the mortgage bond, a subsequent voluntary conveyance by the mortgagor in favour of the mortgagee, the consideration for which is set off in full settlement of the amount due on the decree, is a transfer as contemplated in section 3 (1) (*b*).

It was further said that inasmuch as some only of the lands which were mortgaged were transferred by the Deed of Transfer of the 4th May, 1935 (P. 5) the provisions of section 3 (1) (*b*) were for that reason inapplicable. It was said that those provisions were designed to cover ordinary cases where an owner of a piece of land borrows money on the security of a mortgage of such piece of land and then transfers it to the lender in satisfaction of the loan. Their Lordships see no reason to define or to limit the circumstances under which the provisions of section 3 (1) (*b*) become applicable or to seek to apply any other test than that which is directed by the language of the Section. Nor can their Lordships accede to the submission that section 3 (1) (*b*) cannot apply to a case where the lands transferred are some only of the lands secured by mortgage.

The Land Commissioner is authorised to acquire "the whole or any part" of agricultural land which was transferred in the manner described in (*b*). The Estate was a part of the land transferred. The land was transferred by its owner Elaris. It was transferred to Sockalingam and Sekappa. Was it transferred to them in satisfaction or in part satisfaction of a debt (or debts) due from Elaris to them being a debt (or debts) secured (immediately prior to the transfer) by a mortgage of the land? For the reason already stated their Lordships consider that this question must be answered in the negative and that the determination of the Land Commissioner was not warranted by the provisions of the Section.

It cannot be said that the transfer of the land was to Sockalingam alone inasmuch as the Deed of Transfer expressly states that it was to both Sockalingam and Sekappa.

Their Lordships need only briefly advert to a point that was originally pleaded in the action but which was not taken before their Lordships' Board. It was pleaded that the determination of the Land Commissioner to acquire the Estate under the provisions of the Ordinance was final and conclusive and could not be questioned in the proceedings and that the Court had no jurisdiction to entertain the action. Such pleading was doubtless framed with the provisions of sub-section 4 of Section 3 in mind. Their Lordships consider that any question of finality in the Land Commissioner's determination can only arise in regard to his exercise of individual judgment as to whether he should or should not acquire any land which he "is authorised to acquire under sub-section 1". His personal judgment can only be brought to bear upon the question as to whether or not he should acquire land that is covered by the wording of sub-section 1. The antecedent question as to whether any particular land is land which the Land Commissioner is authorised to acquire under the provisions of sub-section 1 is not one for his final decision but is one which, if necessary, must be decided by the courts of law.

These being their Lordships' conclusions upon the substantive as opposed to the procedural issues which present themselves in this appeal the question arises as to what course should be followed. After the death of Ladamuttu the substituted plaintiff decided to continue the action and to proceed to claim relief in the form in which it had originally been sought. The first prayer was for an injunction restraining the defendants jointly or in the alternative from taking steps under Ordinance 61 of 1942 to acquire lands described in the Schedule to the Plaint. As already pointed out the determination had been under the provisions of section 3 (1) (*b*) but by the date of the Plaint Ordinance 61 of 1942 had been amended to include section 3 (1) (*c*). An injunction in the terms asked for would therefore have precluded the making of a new determination under the terms of section 3 (1) (*c*) if such a new determination were thought to be competent. Furthermore before the action came to trial and before the action was continued by the substituted plaintiff the law as to

the procedure to be followed in the acquisition of land (after a determination by the Land Commissioner) had been changed. By the time that the action came to trial the holder of the office of Land Commissioner was not the same person as the holder at earlier relevant dates. At the trial of the action important procedural issues were debated but then the Attorney-General was by consent dismissed from the action. Thereafter, on appeal, the substituted plaintiff obtained the judgment in his favour which directed that an injunction (in the terms originally asked for) should be issued restraining the defendants jointly or in the alternative. In view of all the circumstances and of the course that this litigation has taken and of the fact that the Attorney-General was a party but no longer is their Lordships cannot think that at this stage of the litigation it would be appropriate to accede to an application that some form of declaration should be made.

It is to be remembered that the Plaint was in July, 1949. The action was brought following upon a notification to the plaintiff by the Land Commissioner on or about the 7th February, 1949. The determination of the Land Commissioner had been in May, 1947. The learned Chief Justice records in his judgment that the Land Commissioner at the time of the determination was Mr. (later Sir Arthur) Ranasinha. When the action was instituted the Land Commissioner was Mr. Amarasinghe. Even the successor of the latter was no longer in office at the time when the case was under appeal in the Supreme Court.

It is provided by section 463 of the Civil Procedure Code that if the Government undertake the defence of an action against a public officer the Attorney-General shall apply to the Court and that upon such application the Court shall substitute the name of the Attorney-General as a party defendant in the action. It is provided by Section 464 that if such application is not made by the Attorney-General on or before the day fixed in the notice for the defendant to appear and answer to the plaint the case shall proceed (subject to certain exceptions) as in an action between private parties. But in the present litigation the Attorney-General was made a defendant and was then with the concurrence of the substituted plaintiff dismissed from the proceedings.

Their Lordships do not think that without hearing the Attorney-General it would be appropriate to pass opinion upon all the procedural issues which were discussed by the learned Chief Justice in his judgment though some of these call for consideration. While their Lordships must reserve their opinion upon the question (which in view of the conclusions reached by their Lordships does not immediately arise) as to whether in circumstances such as those in the present case any injunction against the Attorney-General could or ought to be granted their Lordships consider that if the authority of a Land Commissioner to make a determination under Section 3 of the Land Development Ordinance is challenged the appropriate procedure is by way of an application for certiorari (see *Leo* v. *Land Commissioner* 57 N.L.R. 178). The Land Commissioner as the judicial tribunal the validity of whose action is being tested may then conveniently be brought before the higher Court so that if necessary his decision or order may be brought up and quashed. If in some particular case it can be shown that a determination has not been within the competence of a Land Commissioner and if an application is made which results in an order to bring up and quash his determination then the difficulties which the present proceedings bring into relief are avoided. It was Mr. Amarasinghe who was the Land Commissioner in July, 1949, when these proceedings began and whose proxy was filed and on whose behalf an Answer was presented. If a declaration were now to be made—who would be bound? If an injunction were to be granted—who would be enjoined? It was sought to be said that the Land Commissioner is a Corporation Sole. Their Lordships do not find support for this view in the provisions of the Land Development Ordinance of 1935. In the Interpretation Section (Section 2) it is laid down that " Land Commissioner " means " the officer appointed by the Governor under Section 3 of this Ordinance and includes any officer of this Department authorised by him

in writing in respect of any particular matter or provision of this Ordinance". The Land Commissioner is not expressly created a Corporation Sole by any legislative enactment nor is it laid down that he may sue or be sued in a corporate name. Furthermore no legislative enactment seems to reveal any intention to incorporate. If, following upon a determination by the Land Commissioner (which if made within his powers is made " in the exercise of his individual judgment ") land is acquired, such land does not vest in the Land Commissioner. If there had been a desire to incorporate the Land Commissioner there could have been express words of incorporation. Thus in the case of the Public Trustee it is enacted by Section 3 of the Public Trustee Ordinance of 1930 as follows:—" The Public Trustee shall be a Corporation sole under that name with perpetual succession and an official seal and may sue and be sued under the above name like any other corporation sole."

All these considerations including the absence of any evident intent to incorporate lead their Lordships to reject the submission that the Land Commissioner can be regarded as a Corporation Sole. (Compare *MacKenzie-Kennedy* v. *Air Council* [1927] 2 K.B. 517.)

In view of the decisions which their Lordships have reached and expressed in regard to the relief which was sought in the District Court and in the Supreme Court and which after the changes made in 1950 was the relief which the substituted plaintiff persisted in claiming and in view of the absence of the Attorney-General as a party to the proceedings subsequent to those in the District Court their Lordships must refrain from pronouncing upon other procedural questions which are discussed in the Judgment of the learned Chief Justice. Although Their Lordships are of the opinion that the Land Commissioner was not entitled to make the determination that he did under Section 3 (1) (*b*) of the Ordinance of 1942 Their Lordships consider, for the reasons stated above, (1) that the Order of the Supreme Court cannot stand and (2) that it would not be appropriate at this stage of the litigation to accede to the application that some form of declaration should be made.

Accordingly Their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the Order and Judgment of the Supreme Court be set aside and that the action should be dismissed with costs. The first respondent must pay the costs of the hearing before their Lordships' Board and in the Supreme Court.

(39253) Wt. 8109—53 100 8/60 D.L.

In the Privy Council

THE LAND COMMISSIONER

v.

M. LADAMUTTU PILLAI KATHIRKAMAN PILLAI AND ANOTHER

DELIVERED BY
LORD MORRIS OF BORTH-Y-GEST

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