

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA

In the matter of an Application for mandate in
the nature of Writ of Certiorari and Mandamus
in terms of Article 140 of the Constitution.

Hassen Lebbe Mohamed Nizam,
No.89/2, Lady Gordon's Road,
Kandy.

Petitioner

C.A. Writ Application No.1097/2006

CHP BR No.2686

CHP File No.CH/D/6541

Vs

- 1.Dr.M.S. Jaldeen
- 2.R.W.M.S.B. Rajapakse
3. Dilshan Jayasooriya

All Members of the Ceiling on Housing
Property Board of Review
No.G-10, Vipulasena Mawatha Housing
Scheme, Sri Vipulasena Mawatha,
Colombo 10.

4. The Commissioner for National Housing
Department of National Housing,
Sethsiripaya, Battaramulla
5. Gnoi Bintan Moomin,
No.504/6 Peradeniya Road
Kandy
6. K. Engonona Wickremasinghe
504/1, Peradeniya Road,

- Kandy
7. Mulin Medawatte Gedera,
504/3, Peradeniya Road,
Kandy
 8. M.C.De La Motte,
No.36, Windsor Place,
Dehiwala
 9. W.M.H.L. Mohamed Farook
504, Peradeniya Road,
Kandy.

Respondents

BEFORE : S. SRISKANDARAJAH, J, P/CA

COUNSEL : Hemasiri Withenachchi,
for the Petitioner,
Nuwan Peiris,
for the 4th Respondent,
J.C.Boange,
5th and 7th Respondents

Argued on : 06.05.2011

Written Submission : 30.06.2011

Decided on : 13.09.2012

S.Sriskandarajah.J.

The Petitioner and his brother the 9th Respondent are joint owners of premises bearing Nos.504/1A, 504/1, 504/2, 504/3, 504/4, 504/5 and 504/6, Peradeniya Road, Kandy, by virtue of Deeds of Transfer bearing No.8707 and No.8908, both dated

15/09/1981. The Petitioner submitted that these premises, together with other premises were originally owned by one George E. De La Motte, who had died leaving last will No.3168 dated 12/05/1950 which was admitted to probate in D.C. Kandy Case No.1196/T. In terms of the last will, the son of the deceased, viz., Hans C. De La Motte became entitled to the said premises. According to the Petitioner, the said H.C.De La Motte was married at the time of the Ceiling on Housing Property Law came into operation in 1973, and had six minor children out of the wedlock. The Petitioner submitted that the said H.C. De La Motte was not an excess house owner under the said law, and the said H.C.De.La Motte died intestate on 27/04/1996, and prior to his death, he had entered into an agreement with the Petitioner and the 9th Respondent to sell the said premises. The Petitioner further submitted that the 8th Respondent, who is the widow of the said H.C.De La Motte, obtained letters of administration and in the said letters of administration, the Court granted sanction for the sale of the said premises to the Petitioner and the 9th Respondent, accordingly the deeds were executed in favour of the Petitioner and the 9th Respondent by the 8th Respondent in her capacity as the Administratrix.

By letter dated 2/02/1993, addressed to the late H.C.De La Motte, the 4th Respondent informed that the said premises had been vested as surplus houses under Section 8(4) of the Ceiling on Housing Property Law. The Petitioner and his brother appealed to the Board of Review against the said vesting as they have become the owners of the said premises for valuable consideration. The Board of Review dismissed the said appeals. The Petitioner submitted that while the appeal were pending before the Board of Review, the 5th Respondent had proceeded to publish the vesting of the said premises Nos.504/1 to 504/6 by notice dated 2/07/1998 published in the Government Gazette No.1038 dated 24/07/1998.

The Petitioner sought a Writ of Certiorari in C.A. Writ Application No.1228/38 to quash the said vesting order. At the hearing of the said Writ Application, of consent,

the Court of Appeal quashed the decision of the Commissioner dated 24/07/1998 and directed to hold a fresh inquiry into the Application made by the tenant to purchase the said houses.

In view of the said order an inquiry was held by the Commissioner of National Housing with the participation of the relevant parties and after due consideration of the evidence placed before the Commissioner of National Housing, he had decided that the late H.C. De La Motte was an excess house owner and the said decision was communicated to the Petitioner by letter dated 4th of July 2001 marked P13 and annexed to the petition. The Petitioner and the 9th Respondent appealed against the said decision to the Board of Review. The Board of Review dismissed the appeal by its order dated 3rd May 2006 marked P16, after affording an opportunity for the parties to present their case. The Petitioner in this Application had sought a Writ of Certiorari to quash the said order.

The Petitioner contended that in the Petition of Appeal submitted to the Board of Review that he had referred to the fact that after the inquiry by the 4th Respondent, they had come to know that late George E. De La Motte's estate had been administered in D.C. Kandy Case No.1196/T and that he had left behind six children. The Petitioner submitted that he had annexed copies of the Last Will marked X1, Inventory marked X2 and Probate marked X3 in respect of the said estate of late George E. De La Motte to the Petition of Appeal. At the hearing of the said appeal, the admissibility of the said documents X1 to X3 and the bearings those documents have on the matters in issue were urged before the Board of Review. The Petitioners submitted that the said documents were not taken into consideration by the Board of Review, whereas those documents would have provided vital evidence to show that the late George E. De La Motte had six children and hence he was not an excess house owner. The Petitioner submitted the failure of the Board of Review to admit these documents and consider the contents of those documents is an error of law and, therefore, the decision of the Board

of Review has to be quashed by a Writ of Certiorari. The 4th Respondent submitted that the Petitioner in the appeal to the Board of Review had not prayed to consider or admit new evidence that was provided for the first time in appeal by documents marked X1, X2 and X3,. The Respondents further submitted that these documents cannot be admitted at the stage of an appeal as these are not fresh evidence.

Section 39 of the Ceiling on Housing Property Law, No.1 of 1973 provides for appeals against the decision of the Commissioner. It is an admitted fact that by the documents marked X1, X2 and X3 the Petitioner attempted to establish the fact that the deceased George E. De La Motte had six children and therefore he is not an excess house owner. This evidence was not produced before the Commissioner of National Housing at the inquiry held by the Commissioner to determine the question whether George E. De La Motte was an excess house owner at the time the CHP Law came into operation. The Petitioner made attempts to submit these documents with the Petition of Appeal to the Board of Review when an appeal was preferred against the decision of the Commissioner of National Housing. Even though the Board of Review has the power to call for witnesses and admit documents in terms of Section 39(2) read with Section 32, it cannot take into consideration documents that were not placed before the Commissioner of National Housing unless and until it is shown to the satisfaction of the Board of Review that the said evidence is a fresh evidence. The basis of reception of fresh evidence was set out in *Ladd Vs. Marshall [1954] All ER 745*. In that case Lord Denning at page 748 A-B, outlined them in the following passage:

“In order to justify the requirement of fresh evidence or new trial, there, 3 conditions must be fulfilled: first It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumable

to be delivered or, in other words, it must be apparently credible although it need not be incontrovertible.

In this case the documents marked X1, X2 and X3 would have been obtained by the Petitioner if he has exercised due diligence. In *Herefordshire Investment Limited Vs. Bubb (2000) 1 WLR 2318*, the English Court of Appeal emphasized that strong grounds were required to allow fresh evidence in the face of a final decision. As the Petitioner has failed to produce this evidence before the Commissioner, he cannot now seek to produce this evidence before the Board of Review as the Board of Review proceedings is an appellate proceedings. Further, the Petitioner had made only a reference in relation to these documents in the appeal made to the Board of Review, but he had not made an application before the Board of Review to admit these documents and to lead evidence in relation to the material that he was relying on, there was neither a prayer in his petition to admit these documents nor had he made a separate application before the Board of Review to admit these documents. In these circumstances the Board of Review had not made an order in relation to these documents. In view of Section 39(3) the decision of the Board of Review is final and cannot be called in question in any court. The Petitioner has not shown any valid grounds to set aside the order of the Board of Review and, therefore, this court dismisses this Application without cost.

President of the Court of Appeal