

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

Ramani Siriwardhane
No. 2/H/18
Jayawadanagama,
Battaramulla.

PETITIONER

C.A 2107/04 (Writ)

Vs.

1. National Housing Development
Authority
30/4, Sir Chittampalam A.Gardiner
Mawatha, Colombo 2

And 3 others

RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL; Manohara de Silva P.C., with Nimal Hippola for the Petitioner
C.S. Nammuni S.C., for 1st & 2nd Respondents
3rd Respondent absent and unrepresented

ARGUED ON: 01.11.2012

DECIDED ON: 31.01.2013

GOONERATNE J.

This is an application for writs of certiorari and mandamus by the Petitioner Ramani Siriwardena against the decision of the 1st Respondent namely the National Housing Development Authority to effect a transfer of the property in dispute in favour of the 3rd Respondent, regarding premises No. 2/H/18, Jayawadanagama, Battaramulla. Perusal of the several journal entries in the docket I find that on 14.10.2005, State Counsel for 1st & 2nd Respondents informed court that no objection would be filed on their behalf. On a subsequent date counsel for 4th Respondent had informed court that no objection would be filed on behalf of the 4th Respondent (vide J.E of 17.5.2006). The 3rd Respondent having filed objection was absent and unrepresented on the date of hearing. At the hearing State Counsel assisted court with submissions but did not seriously resist the powers of this court to review the decision of the 1st & 2nd Respondent in the context of this case.

The learned President's Counsel initially drew the attention of this court to document P3 a letter addressed to R.O.W. Jayasooriya by D G M (Finance) for Chairman of the 1st Respondent authority. The said document refer to an agreement of sale between the said Jayasuriya and the 1st Respondent Authority. The title referred to in document P3, is recovery of instalments, Housing Scheme. P3 reflects that the sale price is

Rs. 465,000/= and the amount paid as Rs. 200,000/- balance as Rs. 265,000/-. Further details of interests instalments are also shown in P3. Family details of Petitioner would also be relevant.

The 4th Respondent was the Petitioner's husband (now divorced). 3rd Respondent is the 4th Respondent's only sister. The Petitioner married the 4th Respondent (P1) and was living in the premises described above which is the premises in dispute with the 3rd Respondent and the parents of the 3rd & 4th Respondents.

The Petitioner's father-in-law was in occupation of the premises from 1983 having entered into a sales agreement mentioned above (P3 & P5a). It is the position of the Petitioner that up to 1986 the Petitioner's father-in-law R.O.W Jayasuriya paid the instalments due with interest to cover a period of 30 years. After 1986 the 4th Respondent had paid the instalments. The said R.O.W. Jayasuriya died on 3.7.1997. The 3rd Respondent was not residing in the property in dispute as averred in paragraphs 10, 11 & 13 of the Petition. The Petitioner maintains that she was occupying the premises in dispute with her daughter although her husband (4th Respondent) divorced her (P5) and decree entered on 21.4.1988. It is her position that she continues to occupy the premises. The Petitioner also state that the instalments, payments due to the above premises had been paid by

her (even after the matrimonial proceedings) to the 1st Respondent Authority. Some documents marked P6A, P6B, P6C & P6D are annexed to the Petition to support the payments of electricity, instalment payment to 1st Respondent, rates etc. by the Petitioner.

Perusal of the objection of the 3rd Respondent (though absent and unrepresented at the hearing), I find that most of the family matters pleaded by the Petitioner are not disputed. Nor has document P3 & P3a being denied. However the instalment payment on the premises in dispute are denied, and it is emphasized that instalment payments were in arrears. I have also considered the averments contained in paragraph 19 of the 3rd Respondent's objections, where various positions are taken to resist the Petitioner's application for writs of certiorari and mandamus.

The Petitioner states that in the divorce action, as a settlement with the 4th Respondent, the 4th Respondent agreed to grant his share of the house in dispute (vide P5). By deed P7 which is a deed renouncing 4th Respondent's interest in the property in dispute and in favour of the Petitioner, (deed No. 1683 of 16.12.1998) are documents relied upon by the Petitioner to establish her case. I also find some official documents and reference made to discussions the Petitioner had with the 1st & 2nd Respondents. I would list the material in the following manner.

- (a) 2nd Respondent informing the Petitioner that the 4th Respondent (ex husband) had transferred his interest to the 3rd Respondent (sister). 4th Respondent had executed an affidavit by document 8A, petitioner through her lawyer intimates her position.
- (b) Memorandum of 2nd Respondent. P9 reference to an agreement of sale between 1st Respondent and 3rd Respondent. Agreement based on an affidavit sent by 4th Respondent.
- (c) Affidavit of 4th Respondent of 17.9.2000 to Chairman of the 1st Respondent (P10). This document indicates 4th Respondent renounced his interest (1/2 share) in favour of Petitioner.
- (d) Letter of 23.2.2011 by 4th Respondent to Chairman 1st Respondent stating that 4th Respondent had not given any rights to the 3rd Respondent. 4th Respondent reiterates the issuance of P10 by P11.
- (e) Minutes of a meeting (P12) held in view of the position stated in 'c' & 'd' above at the Ministry of Urban Development Housing & Construction where both 3rd Respondent and Petitioner was present. Parties had agreed between them that Petitioner pay a sum of Rs. 1700,000/- to the 3rd Respondent being the amount paid by her to the authority. Payment to be made within 4 months. On completion of payment as aforesaid the Respondent to give an affidavit to the authority concerned declaring her intention to give the property to Petitioner. Both have signed P12. Thereafter 1st Respondent to transfer the property to Petitioner
- (f) Another memorandum (P13) incorporate the following as pleaded by Petitioner.
- 1 That as per the agreement for sale entered into between the 1st Respondent Authority and the 3rd Respondent on 05.08.1999 action has been taken to issue the Deed in favour of the 3rd Respondent.
 - 2 That the Petitioner has been unable to prove that the affidavit on which the 3rd Respondent obtained rights over the share3 of Mr. Sherard Egon Weeraratne Jayasuriya is false.
 - 3 That on 08.01.2001 the Petitioner agreed in view of the above the issuance of the deed to the 3rd Respondent is lawful.

- 4 That the Petitioner agreed to pay Rs. 1,700,000/- as the value of the house to the 3rd Respondent.
- 5 That the 3rd Respondent is to transfer the house to the Petitioner after receiving the payment of the said Rs. 1,700,000/-.

It is the position of the Petitioner that the assertions made above (1 – 5 of F) had been made mala fide, without considering the material placed before the 1st Respondent Authority by the Petitioner.

The Petitioner urge that (a) By P10 & P11, 4th Respondent informed the authorities that his ½ share was given to the Petitioner and not the 3rd Respondent. (b) The Petitioner also stress that the Petitioner never agreed to renounce her rights in favour of the 3rd Respondent though she agreed to pay Rs. 1,700,000/- to the 3rd Respondent.

‘a’ & ‘b’ above are two matters emphasized and urged by the Petitioner. However before I deal with same I would refer to the position of mala fides pleaded by the Petitioner. I cannot find a specific reference to a Respondent, alleging mala fides. It is more or less a general statement and this court cannot consider such a plea against any particular Respondent. I observe that if mala fide is alleged against the repository of a power, it must be expressly pleaded and particularized. 1994 (2) SLR 182.

This court has to arrive at a decision in the absence of material contesting or admitting the averments contained in the petition of the Petitioner by the 1st & 2nd Respondents and the 4th Respondent. The 3rd & 4th Respondents would in one sense be the successors to the rights in the premises in dispute. The 4th Respondent according to the material furnished renounced his rights in favour of his former wife the Petitioner to this application. The material placed before this court indicate that the original intended transferee, 3rd & 4th Respondent's father (to the premises) had deposited a substantial amount of money on the sales agreement, and that Petitioner and the 4th Respondent also had contributed to same.

I have also (though the 3rd Respondent was absent and unrepresented) noted the following in paragraph 21 of the affidavit tendered on behalf of the 3rd Respondent. It reads thus:

- (a) As the instalments had fallen into arrears from or about 1996 October, and the original agreement was cancelled, the 3rd Respondent met the 1st Respondent on or about the year 1999 and made representations to the 1st Respondent as a result of which a fresh agreement was entered into on payment of an initial payment of a sum of Rs. 128,486/73 and giving an undertaking to pay the balance sum of Rs. 381,280/12 in instalments. A copy of this agreement has been annexed by the Petitioner marked P15.
- (b) The 3rd Respondent thereafter completed the said payments and the 1st Respondent duly transferred the said premises to the 3rd Respondent.

- (c) The late Richard Oliver Weeraratne Jayasooriya did not own the said premises at the time of his death, as such his heirs could not have inherited the said property on his death.
- (d) The 1st Respondent has transferred the said premises to the 3rd Respondent for a valuable consideration.
- (e) The 3rd Respondent did not give up residence at the said premises but was compelled to seek temporary residence else where due to the quarrels and harassments by the Petitioner.

The position of the Petitioner is that P12 which indicates that both the Petitioner and 3rd Respondents were present in the office of the 1st Respondent. The Petitioner signed P12 which was purported to be a settlement between the Petitioner and 3rd Respondent, and the Petitioner signed P12 as she was under a threat of being evicted from the premises in dispute and Petitioner was compelled to agree to the settlement recorded therein. The valuation of ½ share of the premises at Rs. 1,700,000/- was an over valuation which the Petitioner was called upon to pay in the event a deed was to be executed in favour of the Petitioner. However the settlement had not materialized. In the petition and written submissions it is pleaded that she came to know that the 3rd Respondent has filed action in the District Court (case No. 19922/C) for a declaration of title and eviction of the Petitioner from the premises in dispute (P15). By deed No. 571 of 13.7.2001

the premises in dispute transferred to the 3rd Respondent. The District Court case is pending as intimated by learned President's Counsel for Petitioner.

The grounds urged by the Petitioner seeking the writs prayed for are:

- (a) Decision to sell and transfer the property in dispute to the 3rd Respondent is unlawful, arbitrary and unreasonable.
- (b) A valid agreement to sell entered between the 1st Respondent authority and the late R.O.W. Jayasuriya has never been cancelled.
- (c) 1st Respondent aware that by 8.3.2000 the instalment paid at least from 1996 by the Petitioner and prior to that by 4th Respondent (P8).
- (d) 4th Respondent by a deed of renunciation has renounced his right, to the property in favour of the Petitioner.
- (e) Petitioner continues to occupy the property and is the possession

The National Housing Development Authority Act was enacted to establish an authority and to undertake development projects pertaining to housing and redevelopment projects. The Act contemplates of a variety of functions as contained in Section 5 of the Act. In one sense it is somewhat of social development and or a welfare statute to assist and help the community, on matters pertaining to housing. The authority has the right to alienate land, flats, houses or other living accommodation.

Section 8(1) of the Act reads thus:

- (1) The Authority may, with the approval of the Minister, dispose by way of sale, lease, rent or rent purchase any land, flat, house or other living accommodation held by the Authority, subject to such terms and conditions as may be determined by the Minister and

specified in the instrument of disposition, and in particular, but without prejudice to the generality of the foregoing provisions of this section, a condition to the effect that the disposition effected by such instrument may be cancelled or determined in the event of a failure to comply with any other condition specified in such instrument or in the event of any money due to the Authority under such instrument remaining unpaid for any such period as may be specified therein.

The power of cancellation of instrument is contemplated under Section 11 of the Act. Section 11 reads thus:

Notwithstanding the provisions of any other law to the contrary, no action shall lie against the Authority or any officer or servant of such Authority in respect of the cancellation or determination of an instrument of alienation under the provisions of section 8.

The issuance of a prerogative writ, no doubt is a discretionary remedy of court. It is the discretion of court either to allow or refuse the granting of a prerogative writ. Though delay and certain other matters to resist the application had been taken up by the 3rd Respondent in the pleadings etc. the 3rd Respondent was absent and unrepresented on the date of hearing. This court, though the 3rd Respondent was absent and unrepresented has given serious consideration to all those points urged by the 3rd Respondent. Nevertheless the manner in which the 1st & 2nd Respondent conducted inquiries appears to be flawed and the subsequent decision to execute a transfer deed in favour of 3rd Respondent is a nullity, in

view of the grounds urged by the Petitioner at (a) to (e) of pg. 9 of this judgment. The 4th Respondent and the 3rd Respondent undoubtedly are the only heirs of the late R.O.W. Jayasuriya who entered into a sales agreement and made part payment with the 1st Respondent authority. The 1st Respondent authority need to have a proper inquiry and arrive at a reasonable decision though the power of executing a transfer deed is vested with the 1st Respondent authority. The decision taken by the 1st Respondent to transfer the property in dispute is arbitrary and unreasonable, more particularly when the 4th Respondent had renounced his rights in the premises in favour of the Petitioner. Further one cannot ignore the part payment made to the 1st Respondent authority by the late R.P.W. Jayasuriya, 4th Respondent and the Petitioner.

I have fortified my views, having perused the following authorities.

Wade on Administrative Law – 10th Ed – Chapter 16 titled Decisions, Determinations & Acts pg. 517

At pg. 516...

As the Law has developed, quashing and prohibiting orders have become general remedies which may be granted in respect of any decisive exercise of discretion by an authority having public functions, whether individual or collective. The matter in question may be an act rather than a legal decision or determination, such as the grant or refusal of a licence....”

“..... in the same way a quashing order was granted to quash a medical certificate stating that a boy was an imbecile and incapable of benefiting from attendance at school, when one of the signatory doctors had not himself seen the boy and the question was in any case, for determination by the Board of Education under the Act....”

In *Leelawathie and Another Vs. The Commissioner of National Housing and Others* – *The Appellate Law Recorder 2005(1)* pg. 14. I would refer to certain excerpts of the judgment of Justice K. Sripavan at pg 17 & 18...

No person can incur loss of property by judicial or quasi-judicial proceedings unless and until he has had a fair opportunity of answering the complaint made against him. Accordingly, objectors at public inquiries must be given a fair opportunity to meet adverse evidence, even though the statutory provisions do not cover the case expressly. (*Vide Errington v. Minister of Health 1935 I.K.B 249*) *The House of Lords in Fairmount Investments v. Secretary of State for the Environment 1976 I.W.L.R 1255* held that it was a breach of natural justice for an inspector to make recommendations on the strength of considerations which the objector had not known, were in the inspector's mind and had no chance to deal with.

As observed by Sharvananda, J. (as he then was) in the case of *Sirisena and Others v. Kobbekaduwa, Minister of Agriculture and Lands 80. N.L.R 182* “there are no degrees of nullity, If an act is a nullity, it is automatically null and void and there is no need for an order of the court to set it aside though it is sometimes convenient or prudent to have the court declare it to be so.”

“You cannot put something on nothing and expect it to stay there, it will collapse” – Lord Denning in *McFoy v. United Africa Company Limited 1961 3. All. E.R. 1169* at 1172.

The decision making process of the 1st Respondent authority in the case in hand is flawed. The 1st Respondent has failed to act fairly and reasonably in the interest of justice.

In all the above circumstances I set aside all proceedings had as held before the 1st Respondent authority and hold that the decision to execute a transfer deed in favour of the 3rd Respondent by the 1st Respondent authority is a nullity. I also allow in part a Writ of Mandamus as in sub paragraph 'c' of the prayer to the petition, only as regards the holding of an inquiry as prayed for therein.

Subject to above, application allowed without costs.

JUDGE OF THE COURT OF APPEAL