

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

In the matter of an application for an order
in the nature of writ of mandamus under
Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

1. Rajeswari Nadarajah
6/1, Frankfurt Place,
Colombo 04.

C.A. (Writ) Application No.403/2008

PETITIONER

Vs

1. Hon. Bandula Gunawardena,
Minister of Trade Marketing,
Development, Co-operative and
Consumer Services,
330, Union Place,
Colombo 04.
2. Hon. Mahipala Herath,
Provincial Chief Minister, Provincial
Minister of Law & Peace, Finance &
Planning, Local Government,
Education & Technology, Estate
Welfare, Public Transport Co-

operative Development, Housing,
Sports, Electricity, Cultural & Youth
Affairs,

Sabaragamuwa Provincial Council,
Secretariat Complex
New town, Ratnapura.

3. A.P.G. Kithsiri,
Commissioner of Co-operative
Development/Registrar of Co-
operative Societies,
CWE Secretariat Building
6th Floor, Vauxhall Street,
Colombo 02.
4. Sunil Premachandra
Commissioner of Cooperative
Development/Registrar of
Cooperative Societies of
Sabaragamuwa Province,
Sabaragamuwa Provincial Council,
New Town, Ratnapura.
5. Yatiyanthota Multipurpose Co-
operative Societies Limited,
Main Street, Yatiyanthota.

RESPONDENTS

BEFORE

: Deepali Wijesundera J.

COUNSEL

: Palitha Kumarasinghe PC with
Chinthaka Mendis for the
Petitioner.

Nayomi Kahawita SC for the 1st
to 4th Respondents.

D.P. Kumarasinghe PC with
Mahendra Kumarasinghe and
Channa Nilanduwa for the 5th
Respondent.

ARGUED ON

: 08th July, 2014

DECIDED ON

: 30th September, 2014

Deepali Wijesundera J.

The petitioner has filed this application for a writ of Mandamus against the 1st and 2nd respondents to compel them to derequisition the petitioner's property and also for a writ of Mandamus to compel the 3rd, 4th and 5th respondents to hand over vacant possession of the premises in question.

Both parties have agreed that the petitioner is the owner of the premises in suit, and that the 5th respondent is in occupation of the said premises. The said premises had been requisitioned for the use of the 5th respondent by Requisition Order no.101 dated 24/04/1974 under *Sec. 10(1) of the Co-operative Societies (Special Provisions) Act no. 35 of 1970* published in the *Government Gazette no. 108/09 of 26/04/1974*, this is marked and produced as **P2**. The premises in suit is the land and premises called Bilingaha Kotuwewatta with the building called 'Nathan Building' situated in Main Street, Yatiyanthota. This building and premises was requisitioned for the use of 5th respondent under *sec. 10(1) of the Co-operative Societies (Special Provision) Act*.

Sec. 10 (1) reads thus;

The Minister may by Order (in this Act referred to as a "requisitioning Order") published in the Gazette, requisition, with effect from such date as shall be specified in the Order, any immovable property in order that it may be temporarily used by a principal society for the purposes of any business of such society.

Sec. 13 sets out how compensation is paid to a requisitioned property and Sec. 17 sets out how this compensation is determined by the minister.

Submitting documents **P8**, **P9** and **P10** the petitioner stated that both he and his predecessor in title made an appeal to the respondents to de-requisition and hand back the premises in suit to the petitioner. The petitioner's counsel stated after the petitioner's predecessor in title made the said request the 5th respondent issued a notice dated 04/01/2001 (marked **P11**) under *Sec. 2 of the Land Acquisition Act* to acquire the premises in suit. The petitioner has filed a writ application in this court to quash the said notice and by order, marked **P13** this court has quashed the said notice and issued a writ of Prohibition to stop the acquisition of the said premises. The petitioner at length submitted that the 5th respondent had another building of their own to shift their offices and business in the premises in suit but without doing so continued to occupy this premises for over 30 years which was taken over for temporary use.

The learned counsel for the petitioner citing the judgment in *Bandarawela Multipurpose Co-operative Society Vs Periannen Nadaraja and Others CA (PHC) 75/2008* submitted that the 5th respondent has occupied the building for beyond the purpose set out in the act and has therefore acted ultra vires. He further stated permanent use of a property can only be possible where there has been an acquisition under the provisions of the Land Acquisition Act as provided

in *Sec. 34(1) of the Co-operative Societies Law No. 5 of 1972* which entails the payment of the market price of the property to the owner.

Citing the judgment in *De Silva Vs Athukorala Minister of Lands and another (1993) 1 SLR 283* the petitioner stated this court has jurisdiction to issue a writ of Mandamus to direct the minister to issue a derequisitioning order in respect of the petitioner's property. This judgment is given in a case where a property was taken over under the Land Acquisition Act to be used for a public purpose where the element of public benefit has faded away. This case does not apply to the instant case.

Learned counsel for the petitioner further stated that the 5th respondent is not a tenant of the petitioner as stated in the 5th respondent's objection and document marked **R6** which states about monthly rent which is similar to **P5** where it is stated a monthly sum of compensation as stated in *Sec. 17 of the Co-operative Societies Act*.

Petitioner further stated that there is no delay in the instant application since the 5th respondent continued to occupy a property which was initially requisitioned for temporary use under the said Act.

The respondents submitted that the 5th respondent is the lawful tenant of the petitioner in respect of the said premises under the tenancy agreement marked as R6. The 5th respondent submitted that the other building referred as an appropriate building is not suitable for the 5th respondent to move the said business which has 117 employees working and a 43280 membership.

The learned counsel for the respondents submitted that the 5th respondent is a tenant of the petitioner and subsequent to the requisition order the 5th respondent entered into a tenancy agreement with the original owner of the premises in suit K.S. Nadarajah and has marked the tenancy agreement as X. The respondents submitted a writ of mandamus can not be granted to eject a person who is a tenant of the petitioner.

The learned counsel for the respondents further submitted that when there is a private agreement between parties a writ does not lie.

Citing the judgments in *Mageswaran Vs University Grant Commission and others in 2003 2 SLR 282* and *Podinona Vs Urban Council Horana (1981) 2 SLR 145* stated that when there is a contract

between the parties it is not amenable to prerogative writs. He further stated that the petitioner had misrepresented and suppressed facts and the contract of tenancy.

On perusal of the document marked 'X' it is evident that there has been a tenancy agreement between the 5th respondent and the petitioner's predecessor in title.

Document X states;

ගිවිසුම් පත්‍රයයි.

සීමා සහිත යටියන්තොට විවිධ සේවා සමූපකාර සමිතිය පළමුවන පක්ෂය වශයෙන්ද, කොළඹ 11, අංක 82, පළමුවන හරස්වීදියේ, කේ.එස් නඩරාජා මහතා දෙවන පක්ෂය වශයෙන්ද, දෙවන පක්ෂයට අයත් යටියන්තොට නගරයේ පිහිටි අංක 5 සහ 7 දුරණ "නාදන්" ගොඩනැගිල්ලේ ගෙවල් කුලිය සම්බන්ධයෙන් එකඟතාවයට පැමිණ, 1976-12-15 දින යටියන්තොට දී අත්සන් තබන ලද ගිවිසුම් පත්‍රය.

This is a legitimate document, a contract of tenancy agreed upon by both parties as stated by the 5th respondent the petitioner has failed to mention that there has been a contract between the parties for the very reason that if he did so a writ can not lie.

The next argument of the respondents was that there is unexplained delay and that the petitioner is guilty of laches. The petitioner stated that there was no delay but that the 5th respondent continued to occupy the premises which was given temporarily. This cannot be accepted. The petitioner's premises were requisite in 1974 and only after 34 years the petitioner moved to de-requisitioned the premises. Even after the Court of Appeal judgment in the acquisition case which was given in favour of the petitioner she did not move to get the premises de-requisitioned. Only four years after the judgment the petitioner has filed the instant application. The petitioner has not given a proper acceptable explanation for the very long delay. The only conclusion this court can come to is that there has been a contract of tenancy between the parties. A writ of Mandamus is a discretionary remedy which can be granted when there is no other remedy available.

In Thajudeen's case **Ranasinghe J.** has stated ***".....even though all other requirements for securing the remedy have been satisfied by the applicant the court will decline to exercise its discretion in his favour if a specific alternative remedy like a regular action equally convenient, beneficial and effective is available"***

The petitioner has failed to show that a legal duty is owed to herself by the respondents. In the circumstances I do not see any basis upon which a writ of Mandamus can be issued on the respondents. Accordingly the application is dismissed without costs.

JUDGE OF THE COURT OF APPEAL.