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 Mandamus under and in terms of Article 140 of the Constitution of The Democratic of Sri Lanka

C.A. (Writ) Application

No. 20/2017

Ceylinco Homes International (Lotus Tower) Limited,

No. 428/47, Eden Gardens,

Samagi Mawatha, Hokandara South,

Petitioner

Vs.

01. **Dr.R.H.S.Samarathunga,**

Secretary to the Treasury.

The Secretariat, Lotus Road,

Colombo 01.

02. **Kalinga Indatissa,**

Competent Authority-appointed under the Revival of underperforming Enterprises or Underutilized Assets Act No. 43 of 2011.

No.325 1/1, Thimbirigasyaya Road , Colombo 05.

03. **Urban Development Authority,**
7th Floor, Sethsiripaya, Battaramulla.

04. **Sino Lanka Hotels & Spa (pvt) Ltd ,**
No. 267, Union Place, Colombo 02.

05. **Hon. Attorney General**
Attorney General's Department, Hulftsdrop,
Colombo 12.

Respondents

Before : P.R.Walgama, J (P / CA) &
S.Thurairaja, P.C, J

Counsel : J.C. Weliamuna with Pasindu De Silva for the Petitioner.
ASG. Dilrukshi Dias Wickramasinghe, PC With Indula Rathnayaka , SC for Respondents.

Judgment delivered on : 30.05.2017

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Order

S.Thurairaja, P.C. J.

The Petitioner filed this Petition, on the 5th May 2017 and moved the following reliefs from the Court.

".....(b) Grant and issue a mandate in the nature of Writ of Certiorari quashing the decisions and to divest / take over to the State and / or any other authority and / or legal entity, the property leased to the petitioner Company reflected in P2 and / or any other document/s incidental thereto;

(c) Grant and issue a mandate in the nature of Writ of Certiorari quashing the directions/ decisions made by Secretary to the treasury and Competent authority acting on misrepresentations of law to take over the property in issue;

(d) Grant and issue mandate I the nature of Writ of Mandamus on the Respondents to restore the leasehold rights of the property in issue to the Petitioner Company;

(e) Grant and issue a mandate in the nature of Writ of Mandamus on the Respondents to make good the financial loss caused to the Petitioner by the impugned takeover of the Petitioner Company's property in issue;

(F) Grant and issue an interim order restraining the Respondents from selling / transferring / leasing / pledging the property reflected in P2 and / or any other document/s incidental thereto, pending and until the final determination of this application;

All respondents were represented by the Honorable Attorney General and objected for issuance of notice and interim relief.

The Petitioner sought to challenge the taking over /Divesting of property under REVIVAL OF UNDERPERFORMING ENTERPRISES OR UNDERUTILIZED ASSETS Act number 43 of 2011. It agreed between parties that the act was certified on the 11th November 2011 and immediately brought into implementation. It is also evident that the said property was taken over by the State authorities immediately after the law came into force.

The Petitioner submits that there is a discrepancy between the Sinhala and the English the said act.

The learned Additional Solicitor General, who is representing all Respondents, raised preliminary objection to the fact that, the Petitioner is guilty of laches and this Court is not the proper forum to canvass the legality of the legislation.

Considering the available materials before the Court it appears that the said property in issue was taken over by the State under the powers vested under the said REVIVAL OF UNDERPERFORMING ENTERPRISES OR UNDERUTILIZED ASSETS Act number 43 of 2011. Unlike the other laws this act specifically provides the properties to be vested with the State. It is clearly mentioned in the schedule of the said act. Item number 14 of the second schedule especially provide the description of this property. Respondents are empowered to act under the said act. As we noticed this act was passed in the parliament and certified on the 11th November 2011. The Constitution of the Democratic Socialist Republic of SriLanka has made provision to challenge the act at the bill stage and not thereafter, further it provides the forum also. The Petitioner had the opportunity to challenge the said legislation at the appropriate stage. Not after 5 ½ years. Challenging validity of legislation at the Writ jurisdiction is in my view inappropriate.

For completeness I wish to consider the other factors pleaded in the petition and the submissions by both Counsels.

It is admitted that the Petitioner had accepted substantive portion of the compensation paid for the divesting of the property. This shows that the Petitioner had accepted the divesting and the matter to be finalized is the quantum of the compensation. After accepting the

compensation, the Petitioner challenging the taking over, does not come within the realm of the writ jurisdiction.

The present petition is filled after lapse of more than 5 ½ years and the Petitioner had not explained the reasons for the delay, hence the Petitioner is guilty of laches.

Our Courts time and again had decided that unexplained delays will make a petitioner guilty of laches, and that alone is sufficient to refuse of issuance of notice.

In **Biso Menike vs. Cyril de Alwis and Others (1982) 1 SLR 368**. (Supreme Court Decision) Justice sharvananda, J held:

A Writ of Certiorari is issued at the discretion of the Court. It cannot be held to be a Writ of right or one issued as a matter of course. But exercise of this discretion by court is governed by certain well-accepted principles. The court is bound to issue a Writ at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, like submitting to jurisdiction, laches, undue delay or waiver. As Lord Greene M.R., in Rex vs. Stafford Justices (1940) 2 K.B 33 at page 43 stated –

> ***"Now, in my opinion, the order for the issue of Writ of Certiorari is, except in Cases where it goes of course, strictly in all cases a matter of discretion. It is perfectly true to say that if no special circumstance exists and if all that appears is a clear excess of jurisdiction, then a person aggrieved by that is entitled ex debito justitiae to his order. That merely means this, in my judgment, that the court in such circumstances will exercise its discretion by granting the relief. In all discretionary remedies it is well known and settled that in certain circumstances. I will not say in all of them, but in a great many of them the court, although nominally it has discretion, if it is to act according to the ordinary principles upon which judicial discretion is exercised, must exercise the discretion in a particular way and if a judge at a trial refuses to do so then the Court of Appeal will set the matter right. But when once it is established that in deciding whether or not a particular remedy shall be granted the Court is entitled to inquire into the conduct of the applicant, and circumstances of the case, in order to ascertain whether it is proper or not proper to grant the remedy sought, the case must in my judgment be one of discretion."***

The proposition that the application for Writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and the longer the injured person sleeps over his rights without any reasonable excuse the chances of his success in a Writ application dwindle and the court may reject a Writ application on the ground of unexplained delay.

> ***"Laches is such negligence or omission to assert a right and taken in conjunction with the laps of time, more or less great, and other circumstances causing prejudice to an***

adverse party operate as a bar in a court of equity" Ferris – Extra-Ordinary Legal Remedies – Para 176.

"Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equal to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be unjust, is founded upon mere delay, that delay of cause not amounting to a bar by any statute of Limitation, the validity of that defense must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which might affect either party or cause a balance of justice or injustice in taking the one course or the other, so far as related to the remedy," Lindsey petroleum Co., vs. Hurd (1874) L.R., 5 P.C 221 at 239.

An application for a Writ of certiorari should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed. What is reasonable time and what will constitute undue delay will depend upon the facts of each particular case. However the time lag that can be explained does not spell laches or delay. If delay can be reasonably explained, the Court will not decline to interfere. The delay which a Court can excuse is one which is caused by the applicant pursuing a legal remedy and not a remedy which is extra-legal. One satisfactory way to explain the delay is for the petitioner to show that he has been seeking relief elsewhere in a manner provided by the Law.

Considering all available materials, the Court finds that this is not a proper case for the Court to issue notice hence issuance of Notice is refused.

Notice refused.

JUDGE OF THE CORT OF APPEAL

P.R. Walgama, J (P /CA)

I agree.

PRESIDENT OF THE COURT OF APPEAL