

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

In the matter of an Application for Writs in the nature of *Certiorari*, *Mandamus* and *Prohibition* to the Court of Appeal of the Democratic Socialist Republic of Sri Lanka under Article 140 of the Constitution of the Republic.

Chandrakala Subramaniam,  
No: J/1/4, Labour Flats,  
State Road, Colombo 14.

**Petitioner**

CA (Writ) Application No: 111/2015 Vs.

1. The General Manager,  
National Housing Development Authority,  
Sri Chittampalam A. Gardiner Mawatha,  
Colombo 02.
2. National Housing Development Authority,  
Sri Chittampalam A. Gardiner Mawatha,  
Colombo 02.
3. Mahalingam Muniamma,  
J/G/1, Labour Flats,  
Stace Road,  
Colombo 14.

**Respondents**

**Before** : A.L. Shiran Gooneratne J.

**Counsel** : Harsha Fernando with Chamith Senanayake instructed by Jagath Talgaswattage for Petitioner.

Manohara Jayasinghe, SC for 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

C.E. De Silva for 3<sup>rd</sup> Respondent.

**Argued on** : 18/09/2017

**Written Submission on:** 12/01/2018

**Judgement on** : 16/03/2018

**A.L. Shiran Gooneratne J.**

By Petition dated 2<sup>nd</sup> March 2015, the Petitioner, inter alia, is seeking an order in the nature of a writ of Mandamus to compel the 1<sup>st</sup> and or 2<sup>nd</sup> Respondents to evict the 3<sup>rd</sup> Respondent, alleged to be in unauthorized possession of premises bearing address, J/G/1, Labour Flats, State Road, Colombo 15, (hereinafter referred to as the “said premises”) and upon eviction to restore vacant possession of the said premises to the Petitioner, in terms of the relevant provisions of the National Housing Development Authority Act No. 17 of 1979, ( hereinafter referred to as the “NHDA Act” ) in pursuant to agreement marked P3, dated 30<sup>th</sup> November 2006.

Upon a probate granted in favour of the Petitioner, (Chandrakala Subramaniam) on 30<sup>th</sup> November 2006, in Testamentary case bearing No:

36483/T, by the District Court of Colombo, the 2<sup>nd</sup> Respondent (National Housing Development Authority, herein after referred to as the NHDA) entered into a sale agreement (P3), with the Petitioner. However, the Petitioner contends that the continued unlawful possession of the said premises by the 3<sup>rd</sup> Respondent, (Mahalingam Muniamma) has deprived the Petitioner of her legitimate right of possession, lawfully acquired by said agreement dated 30<sup>th</sup> November 2006, (P3) entered into with the NHDA. The Petitioner further contends that the NHDA on its part has failed in its statutory duties to protect the rights of the Petitioner, by failing to recognize the Petitioner in terms of the said agreement dated 30<sup>th</sup> November 2006.

Statement of objections to the Petition was filed by the 3<sup>rd</sup> Respondent. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not file objections. However, at the hearing, the State Counsel made oral submissions on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and has tendered written submissions.

The facts relevant to this application briefly, are as follows;

Chithrawaduw Kandasami, (the mother of the petitioner) with her children, more fully described in paragraph 7 of the petition, lived in the said premises, and made monthly payments to the NHDA, as the lawful tenant of the said premises by agreement application No. 235332/2. Nadaraja Kirumani the brother of the petitioner also lived in the said premises with his wife, the 3<sup>rd</sup> Respondent continued to live in the same premises after the death of her husband.

Chithrawaduw Kandasami died testate, where all her rights and obligations concerning the said premises were given to the petitioner by last will dated 20/12/1997, a copy of which is marked P1. The petitioner as the executor of the last will was granted probate dated 04/05/2005, marked P2, by the District Court of Colombo in Testamentary case bearing No. 36483/T.

The probate obtained in the said case was challenged by the 3<sup>rd</sup> Respondent in case bearing No. 9732/RE, instituted in the District Court of Colombo, a copy of the Complaint is attached marked P5. In paragraph 10 of the said complaint the 3<sup>rd</sup> Respondent claims that the 1<sup>st</sup> Defendant, the petitioner in this case, has suppressed and/ or misrepresented material facts in case bearing No. 36483/T, and, the 3<sup>rd</sup> Respondent has filed statement of objections to the said testamentary action, inter alia, seeking to be recognized as the lawful tenant of the said premises.

The Petitioner, (1<sup>st</sup> Defendant in case bearing No. 9732/RE) after filling proxy through her registered Attorney at Law, failed to prosecute the said case diligently, and the case proceeded for trial ex parte, and an order was made against the Petitioner.

The subsequent application by the Petitioner to purge default in the District Court of Colombo and the revision application to the Provincial High Court of Civil Appeal of the Western Province, to vacate the initial order of the District Court of Colombo, was decided against the Petitioner.

The Petitioner has drawn attention of court to section 64 (1) of the NHDA Act, and states that it mandates the 1<sup>st</sup> Respondent, where it is lawful for the landlord to file action in a case, where the occupier of a building fails to comply with the provisions of subsection 1 of Section 63 for the ejection of the said occupier, from the portion or land thereof. However, the 1<sup>st</sup> Respondent (NHDA) has informed court that they will not file answer in case bearing No. 9732/RE, which the Petitioner contends is, in violation of its statutory obligations.

It is noted that the 3<sup>rd</sup> Respondent instituted action in the District Court of Colombo in case bearing No. 9732/RE, within less than a month of the petitioner entering into the said Sale Agreement with the NHDA. After been noticed, by motion dated 4/4/2007, the NHDA (2<sup>nd</sup> Defendant), informed court that it will not file answer and abide by what ever decision given by court. Therefore, the Petitioner (the 1<sup>st</sup> Defendant in the said District Court case) was aware of the stand taken by the NHDA way back in 2007. At the time, the petitioner did not complain to the NHDA or to any other appropriate forum of non-compliance of its statutory obligations. The petitioner has made a demand to the NHDA to defend title by letter dated 15/12/2014, marked P8, after a lapse of over seven years from the institution of the case in the District court of Colombo. On this ground of undue delay alone, this petition should fail. Meanwhile the petitioner (1<sup>st</sup> Defendant), having filed proxy moved for a date to file statement of objections in order to proceed with the case.

The petitioner, in written submissions filed of record, at page 4 states,

*“With the issuance of probate (P2) and signing of P3, the Petitioner attempted to seek possession of the premises. The 3<sup>rd</sup> Respondent and her son illegally refused to give possession and prevented entry of the petitioner. The petitioner then made a complaint to the police and action under section 66 of the Primary Courts Procedure Act No. 44 of 1979 was instituted”.*

Going by the documents annexed to the petition, action under Section 66 of the Primary Courts Procedure Act was initiated in the year 2002. Therefore, the above statement is chronologically and factually incorrect. This amounts to a clear ground of misrepresentation of facts. The assurance of probate and the agreement entered into by the petitioner with the NHDA came much later than the order in case bearing No: 33815/4 which is dated 13/09/2002, where the Learned Magistrate ordered the relevant parties to maintain the status quo to prevent a possible breach of the peace by the respective parties. Therefore, the Petitioner was well aware that the 3<sup>rd</sup> Respondent was refusing and preventing the entry of the petitioner to the said premises, well before signing the agreement with the NHDA, dated 30/11/2006.

As noted earlier, the petitioner was a party noticed to the District Court of Colombo, Case No. 9732/RE, dated 20/12/2006, instituted by the 3<sup>rd</sup> Respondent seeking inter alia, for a declaration that her tenancy with the NHDA was lawful. In

this action the 3<sup>rd</sup> Respondent has challenged the Last Will No. 53 dated 20<sup>th</sup> December 1997 (P1), concerning the rights and obligations of the said premises given to the petitioner. As the executor of the said Last Will, the petitioner was granted probate by the District Court and thereafter, the NHDA entered into an agreement with the petitioner in respect of the said premises. Accordingly, the basis in which the probate was granted and the subsequent Sale/ Tenancy agreement entered into with the NHDA, was challenged in this case. In the circumstances the District Court had the jurisdiction to go into the disputed factual issues arising out of the said agreement and the merits of the Last Will, challenged by the 3<sup>rd</sup> Respondent. The District Court is the appropriate forum to look into such questions of fact interwoven with issues of law and to try contested facts on oral evidence as appropriate. The petitioner having entered the said forum to defend the said claim by the 3<sup>rd</sup> Respondent, failed to prosecute the case diligently and also has failed to completely exhaust the statutory entitlement of the available appellate procedure. Therefore, the order given by the District Court Colombo, in favour of the 3<sup>rd</sup> Respondent stands.

The Petitioner is aggrieved that the NHDA has not discharged its statutory obligations by not filling answer in the District Court Case No. 9732/RE. Letter dated 15/12/2014 marked P8, written by the petitioner to the NHDA demands that the NHDA resist the said District Court action on behalf of the petitioner. The undue delay caused in writing the said letter to the NHDA is not explained by the

Petitioner. No court can compel a defendant to resist an action when such party informs court that it wishes to abide by any decision given by court. Such adherence to court procedure by a party on notice, can not in our view, be considered as a violation of a statutory obligation which would attract judicial review.

In the case of *Perera vs. National Housing Development Authority (2001) 3 SLR 50*, held that,

*“writ being a discretionary remedy the conduct of the applicant is also very relevant. The conduct of the applicant may disentitle him to the remedy”*

As such, if the Petitioner's failure to prosecute her case diligently at the appropriate forum, is redressed, it would amount to a vindication of the petitioner's conduct, to abuse the judicial process.

Therefore, in all the above circumstances, I refuse to grant any of the reliefs prayed for by this Petition.

Accordingly, the Petition is dismissed without costs.

JUDGE OF THE COURT OF APPEAL