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

In the matter of an application in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka

C.W.Jaysekera (deceased)

No.4 Stadium Cross Road,

Anuradhapura

Petitioner- Appellant

R.M.D.A.P.W.M.Kanthi Yatawara

No.4 Stadium Cross Road

Anuradhapura

Case No. CA(PHC) 255/2006

Substituted Petitioner-Appellant

H.C. Anuradhapura Case No. HC/Writ/15/2002 **Vs.**

1. Municipal Council,Anuradhapura
2. B.K.L.Daisi,Mayor,Municipal Council Anuradhapura

2a. H.P.Somadasa,Municipal Council

Anuradhapura.

Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Senany Dayaratne with Eshanthi Mendis for Substituted Petitioner-Appellant

D. Karunaratne for Respondents-Respondents

Written Submissions tendered on:

Substituted Petitioner-Appellant on 03.07.2018

Argued on: 09.05.2018

Decided on: 26.07.2018

Janak De Silva J.

This is an appeal against the order of the learned High Court Judge of the North Central Province holden in Anuradhapura dated 10.11.2006.

The Petitioner-Appellant (Appellant) instituted proceedings in the High Court of the North Central Province holden in Anuradhapura against the Respondents-Respondents (Respondents) and sought, inter alia, the following relief:

(a) A writ of certiorari quashing all steps taken by the Respondents to evict the Appellant from the premises in dispute despite the legal ability to give it to the Appellant;
(b) A writ of mandamus directing the Respondents to act under the provisions of the Local Authorities Housing Act and vest the said premises on the Appellant;
(c) Without prejudice to prayer (b), a writ of mandamus directing the Respondents to give the premises in dispute to the Appellant at least on a rent basis;
(d) An interim order preventing the Respondents from acting under ඔඇ. 12 and evicting the Appellant until the final determination of this application.

The Appellant was at one time an employee of the 1st Respondent-Respondent (1st Respondent). He was provided with a house at No. 4 Stadium Cross Road, Anuradhapura from 15.02.1982 (ඔඇ.1). He retired from service on 28.03.2001. Then he made an application to vest the said house on him in terms of the Local Authorities Housing Act (ඔඇ.6, ඔඇ.7 and ඔඇ.8). This was rejected and he was served with a quit notice dated 23.05.2002 issued under section 3(5) of the Local Authorities Quarters (Recovery of Possession) Act. Then he invoked the writ jurisdiction of the High Court of the North Central Province holden in Anuradhapura.

Writ of Certiorari

The Appellants prayer for a writ of certiorari is misconceived in law. In *Dayananda v. Thalwatte* [(2001) 2 Sri.L.R.73] this Court held that the failure to specify the writ that is being prayed for renders the application bad in law. Similarly, where an applicant seeks to quash an exercise of power due to illegality, irrationality or procedural impropriety, it must be specified for example by reference to the particular decision. An applicant for a writ of certiorari cannot call upon the Court to go on a voyage of discovery by scrutinizing all actions taken by the person exercising power like in this case where the prayer is for "a writ of certiorari quashing all steps taken by the Respondents to evict the Appellant from the premises in dispute despite the legal ability to give it to the Appellant". That itself is a ground for rejection of relief.

In any event, even if it is contended that the prayer is a reference to the quit notice marked ඉඵ.12, still the application must fail for the reasons set out below.

Clearly the Appellant came into occupation of the premises in dispute on a contractual basis. This is established by ඉඵ.1. The premises in dispute was given to the Appellant as he was an employee of the 1st Respondent. Upon the retirement of the Appellant, the 1st Respondent was entitled to retake possession. That was a decision taken in the context of the contractual relationship between parties and a writ of certiorari is not available in those circumstances. In *Jayaweera v. Wijeratne* [(1985) 2 Sri.L.R. 413] the Court of Appeal held that the case before it was one where there is an ordinary contractual relationship of principal and agent and therefore the remedy of certiorari is not available to the petitioner in that case.

In order to overcome this difficulty, the learned Counsel for the Substituted Petitioner-Appellant (Substituted Appellant) relied on *Nanayakkara v. Institute of Chartered Accountants of Sri Lanka and Others* [(1981) 2 Sri.L.R. 52], *Latiff v. Land Reform Commission* [(1984) 1 Sri.L.R. 118], *Jayaratne v. Wijeratne* [(1985) 2 Sri.L.R. 413], *Ariyaratne v. Sri Lanka Institute of Architects* [(2001) 3 Sri.L.R. 288] and *Ariyaratne v. The National Insurance Corporation and Others* [(2003) 2 Sri.L.R. 212] and submitted that the relationship between the Appellant and the 1st Respondent has a statutory flavor as the instant dispute does not arise from the rental agreement per se, but from

the failure of the Respondents to reasonably exercise the statutory discretion vested in them by section 3(1) of the Act read with the policy decision reflected in ෙඇ.2.

The learned counsel for the Substituted Appellant sought to rely on sections 3(1) and 5A of the Act to establish a right or legitimate expectation on the part of the Appellant to obtain the premises in dispute. It was his submission that these two sections were stand-alone sections. He argued that section 3(1) of the Act gives the 1st Respondent discretionary power whereas section 5A of the Act is mandatory in nature.

Section 3(1) of the Act reads:

> "(1) Subject as hereinafter provided, a local authority may, either upon a resolution passed in that behalf at a duly constituted meeting of that local authority or upon the direction of the Minister, let to any person any house-
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> (a) which has vested in that local authority under section 2; or
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> (b) which has been, or may be, constructed by that local authority within the administrative limits of that local authority for the purpose of residence, on such terms as will enable that person to become the owner of that house and the land appertaining thereto after making certain number of monthly payments as rent."

Section 5A of the Act reads:

> "(1) Where prior to the 15th day of October, 1979, a house to which this Act applies has been let to any person under the provisions of section 3(1) and the monthly rental of such house immediately prior to such letting did not exceed twenty-five rupees, the local authority within the administrative limits of which that house is situated shall, by an instrument of disposition, transfer, free of charge, that house to that person.
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> (2) Where prior to the 15th day of October, 1979, a house to which this Act applies has been let to any person otherwise than under the provisions of section 3 (1) and the monthly rental of that house does not exceed twenty-five rupees, the

local authority within the administrative limits of which that house is situated shall, by an instrument of disposition, transfer, free of charge, that house ..."

The fundamental question that arises for determination is whether the house at No. 4 Stadium Cross Road, Anuradhapura comes within the scope and ambit of Local Authorities Housing Act No 14 of 1964 as amended (Act). Section 12 of the Act reads:

" house to which this Act applies" means-

(a) any house which has vested in a local authority under section 2 of this Act, or
(b) any house which has been, or may be, constructed by a local authority for the purpose of residence within the administrative limits of that local authority;

Section 11A of the Act reads:

"Nothing in this Act shall apply to, or in relation to, any house to which this Act applies which has been let by a local authority to an officer or servant of that local authority as official quarters."

The letter ඔ.1 clearly indicates that the premises in dispute was allocated to the Appellant as "official quarters". In fact, this is the same conclusion that the Supreme Court arrived at in S.C. (F/R) 63/2013. That was a fundamental rights application filed by the Appellant against the Respondents alleging that he had a legitimate expectation of becoming the owner of the house he was occupying in terms of the Act. The Appellant claimed he was occupying a house built by the State under the "Low cost housing scheme" which is now vested in the 1st Respondent. The Supreme Court further took the view that there is nothing to indicate that the house at No. 4 Stadium Cross Road, Anuradhapura is a low-cost house.

The learned Counsel for the Substituted Appellant has gone to great lengths to try and establish that this finding of the Supreme Court was based on insufficient evidence. I have no hesitation is rejecting this submission. It is the Appellant who filed the application in the Supreme Court and the burden was on him to place all relevant material to assist the Supreme Court in its

determination of the application. If that has not happened it is the fault of the Appellant and not the Supreme Court.

In any event, it is clear on the evidence before Court that section 5A of the Act applies only where prior to the 15th day of October, 1979, a house to which this Act applies has been let to any person under the provisions of section 3(1) of the Act. According to එළ.1, the premises in dispute was given to the Appellant from 15.02.1982. This is one of the grounds relied upon by the learned High Court Judge to reject the application of the Appellant and I am in agreement with this conclusion.

The learned Counsel for the Substituted Appellant has submitted that "official quarters" referred to in section 11A of the Act must be read as referring to "scheduled quarters" of which there are only seven within the purview of the 1st Respondent and the premises in dispute is not one of them and therefore falls within the purview of the Act. There was no such evidence before the High Court and I have no hesitation in rejecting this subtle attempt to bring in new facts by way of written submissions.

Accordingly, the Appellant has failed to contradict that the relationship between the Appellant and the 1st Respondent is based per se on the rental agreement. He has also failed to establish that the premises in dispute comes within the scope and ambit of the Act.

There is the further issue of failure to exhaust alternative remedies.

The general principle is that an individual should normally use alternative remedies where available rather than judicial review [*R. (Davies) v. Financial Services Authority* (2004) 1 W.L.R. 185; *R. (G) Immigration Appeal Tribunal* (2005) 1 W.L.R. 1445]. Our Courts have held that where a party fails to invoke alternative remedies judicial review can be refused. [*Rodrigo v. Municipal Council Galle* (49 N.L.R. 89); *Gunasekera v. Weerakoon* (73 N.L.R. 262); *Obeysekera v. Albert & others* (1978-79) 2 Sri.L.R. 220); *Rev. Maussagolle Dharmarakkitha Thero and another v. Registrar of Lands and others* (2005) 3 Sri.L.R. 113]. The general principle is applicable even where the alternative remedy is an administrative procedure, such as in this case and Courts will require the party seeking judicial review first to exhaust such administrative procedure before invoking the discretionary power of judicial review [*R (Cowl) v. Plymouth City Council* (2002) 1 W.L.R. 803;

R. v. Barking and Dagenham LBC Ex. P. Lloyd (2001) L.G.R. 421; *R. (Carnell) v. Regents Park College and Conference of Colleges Appeal Tribunal* (2008) E.L.R. 739].

In order to negate such a principle, the learned Counsel for the Substituted Appellant relied on the decision in *Somasunderam v. Forbes* [(1993) 2 Sri.L.R. 362] and the reference by Bandaranayake J. (at page 367) to Halsbury's Laws of England (4th Ed., Vol. II) page 805 at paragraph 1528 which reads:

> "There is no rule in certiorari as there is in mandamus, that it will lie only where there is no other equally effective remedy, and provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute."

However, Bandaranayake J. in fact held (at page page 369):

> "On the other hand there may be instances where the law provides for satisfactory relief under the statute. A Court may in the exercise of its discretion withhold review in such situations. But it is the duty of the Court to consider whether certiorari is more appropriate in the circumstances."

The quit notice marked ඔ්.12 was issued under section 3(1) of the Local Authority Quarters (Recovery of Possession) Law No. 42 of 1978. Section 2 of the said Law states that the provisions of this Law (a) shall apply to all local authority quarters and (b) shall be deemed at all times to have been, and to be, an implied condition of the occupation by persons of such quarters.

Section 4(1) of the said Law gives any person aggrieved by the service of a quit notice the right to appeal to the Minister. In terms of section 4(2) of the said Law, where an appeal is preferred under subsection (1) the quit notice served on the appellant in respect of such quarters shall cease to take effect till the determination of the appeal. Section 4(3) of the said Law states that the Minister may, on an appeal under subsection (1), make an order (a) allowing the appeal or (b) disallowing the appeal wholly or subject to the condition that the execution of the quit notice shall be stayed for the period stated in the order.

In my view these provisions clearly establish that the administrative remedy provided in the said Law is adequate and efficacious. The Appellant failed to exhaust the statutory right of appeal. This was a matter considered by the learned High Court Judge in rejecting the application of the Appellant. I see no reason to disagree with the learned High Court Judge.

For the foregoing reasons, the application for a writ of certiorari must fail.

Writ of Mandamus

In *Weligama Multi Purpose Co-operative Society Ltd. v. Daluwatte* [(1984) 1 Sri.L.R. 195] the Supreme Court held that Mandamus lies to secure the performance of a public duty, in the performance of which an applicant has sufficient legal interest. To be enforceable by Mandamus the duty to be performed must be of a public nature and not of a merely private character. A public duty may be imposed by statute, charter or the common law or custom.

The learned High Court concluded that the Appellant has failed to establish a public duty to vest the premises in dispute on him. In view of the factual matters referred to earlier, I am in agreement with this conclusion of the learned High Court Judge. Hence the application for a writ of mandamus must fail.

For the foregoing reasons, I see no reason to interfere with the order of the learned High Court Judge of the North Central Province holden in Anuradhapura dated 10.11.2006.

The appeal is dismissed with costs fixed at Rs. 50,000/=.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal