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

*In the matter of an application for Mandates in the nature of writs of certiorari and Mandamus under Article 140 of the Republic of Sri Lanka.*

Wickrama Arachchige Dona Leelawathie

No.328,

Gamunu Mawatha,

Nawagamuwa.

CA Application No: Writ/11/2019 Petitioner

Vs.

1. Divisional Secretary
   Divisional Secretariat,
   Kaduwela.

2. Commissioner General of Lands
   No. 1200/6,
   Mihikatha Medura,
   Land Secretariat,
   Rajamalwatte Road,
   Battaramulla.

3. Secretary

   Ministry of Lands,

   No. 1200/6,
   Rajamalwatte Road,
   Battaramulla.

4. Hon. Minister of Lands
   Ministry of Lands,
   No. 1200/6,
   Rajamalwatte Road,
   Battaramulla.

5. Wickrama Arachchige Dona
   Sumanawathie
   No. 475,
   Sri Sumanathissa Mawatha,
   Nawagamuwa,
   Ranala.

6. The Hon. Attorney General
   Attorney General Department,
   Colombo 12.

Respondents

Before : Sobhitha Rajakaruna, J.

Dhammika Ganepola, J.

Counsel : K. C. Perera with J.D. Douglas for the Petitioner.

Edward Ahangama for the 5th Respondent.

Sabrina Ahamed for the 1st to 4th and 6th Respondents.

Argued on : 01.03.2021

Decided on : 31.03.2021

Dhammika Ganepola, J.

The Petitioner seeks to invoke the jurisdiction of this court by way of a mandate in the nature of a writ of certiorari quashing order of the 1st to 4th Respondents

to issue a grant in favour of the 5th Respondent and also a mandate in the nature of writ of mandamus against the 1st to 4th Respondents requiring them to hold a proper inquiry and issue the grant in dispute to the Petitioner. The facts of the case as follows.

A permit has been granted in terms of the Land Development Ordinance (hereinafter referred to as 'LDO') to one Themis Appuhamy allowing him to occupy the subject land of the case at hand namely, Kurunduwatta situated at Kaduwela. The said Themis Appuhamy was married to one Dimiyage Elpi Nona and all together they had four children, Petitioner being the third in the family while the 5th Respondent being the fourth. Themis Appuhamy after constructing a house in the land in dispute lived there with his family until his death in 1956.

Subsequent to marriage in 1961, the Petitioner had left her parental home situated in the land in subject. By the time the Petitioner was leaving her parental home, her two elder sisters had left their parental home previously to take up residence with their spouses while the 5th Respondent who was the youngest continued to be in occupation of the land and premises in dispute with her widowed mother. In 1978, the 5th Respondent had left the parental home and thereafter in 1981, the Petitioner had come into possession of her parental house which is situated within the subject land supposedly to look after her old-aged mother. Meanwhile, the grant dated 03.06.1986 was issued in respect of the corpus, in favour of the 5th Respondent. However, it appears that the 5th Respondent had not been in possession of the land at the time of the issuance of the grant and had never returned thereafter. The said Elpi Nona the Petitioner's mother had passed away in 2005.

In spite of such facts, on 27.02.2006, the 5th Respondent had instituted the action bearing no. 141/L before the District Court of Kaduwela, seeking a declaration of title and an order of ejectment against the Petitioner. The said District Court case has been decided in favour of the 5th Respondent and the Petitioner being aggrieved by said order, lodged an Appeal before the High Court of the Civil Appellate, Homagama, bearing Appeal No. WP/HCCA/HO/146/18F and the same was later withdrawn by the Petitioner.

The Petitioner claims that the said Themis Appuhamy, father of her, had never nominated a successor to the land in issue and that the 5th Respondent never had been in occupation of the land in issue after 1978. Despite such facts, the Petitioner claims that the 5th Respondent had discreetly moved the authorities to

issue a grant with regard to the land in question, in her favour. The Petitioner further claims that, she came to know of the above referred actions of the 5th Respondent only in the said District Court matter. Therefore, the Petitioner's contention is that the 1st to 4th Respondents have issued the aforesaid grant in favour of 5th Respondent without holding a proper inquiry or without even making a proper visit to the land in dispute.

The fact the said Themis Appuhamy had been issued a permit to occupy the subject land and also the fact that he passed away in 1956 are not in dispute. Furthermore, the fact that the wife of said Themis Appuhamy was in occupation of the corpus until her death in 2005 is also not a matter in dispute. However, the nomination of the 5th Respondent as a successor by said Themis Appuhamy and the issuance of the above-referred grant in favour of the 5th Respondent, is disputed by the Petitioner.

The learned counsel for the Petitioner in his submissions drew the attention of this court to Section 19(4)(c) of the LDO by which it is provided that a permit holder shall be issued a grant in respect of a land, only in the event where such permit-holder is in occupation of such land. Section 19 (4)(c) of the LDO reads:-

> *4.A permit -holder shall be issued a grant in respect of land of which he is in occupation -*
>
> *(c) where he has been in occupation of, and fully developed, to the satisfaction of the Government Agent ..*

Petitioner's argument is that the 5th Respondent was not in occupation of the land in dispute after 1978, and therefore the issuance of the grant to the 5th Respondent in terms of the said Section 19(4)(c) was bad in law. However, the said Themis Appuhamy the original permit-holder has passed away in 1956, prior to obtaining a grant in favour of himself while leaving his spouse said Elpi Nona. Therefore it is observed that the succession to the land alienated has to be considered in terms of Section 48A of the LDO and not in terms of the Section 19(4) (c) of the LDO. In terms of the Section 48A (1) of the LDO, the spouse of a permit-holder who at the time of his or her death was required to pay any annual instalments and accordingly he will be entitled to succeed to a land alienated to such permit-holder on a permit, upon the death of such permit-holder. Section 48A (1) of the LDO is as follows,

> *"48A (1). Upon the death of a permit-holder who at the time of his or her death was required to pay any annual instalments by virtue of the provisions of subsection (2) of section 19, notwithstanding default in the payment of such*

*instalments, the spouse of that permit-holder, whether he or she has or has not been nominated as successor by that permit-holder, shall be entitled to succeed to the land alienated to that permit-holder on the permit and the terms and conditions of that permit shall be applicable to that spouse."*

Accordingly, it appears that the fact as to whether such spouse was nominated by the permit-holder to be his/her successor or not, is immaterial in issuing a permit in favour of a spouse of the deceased permit-holder. Hence, a necessity to consider the validity of the nomination of 5th Respondent (1R1) as the successor to the alienated corpus by the permit-holder does not arise at this juncture. Thus, in application of the said Section 48A (1) to the given scenario, it appears that said Elpi Nona, the widow of the permit-holder (Themis Appuhamy) shall be entitled to succeed to the corpus upon a permit issued subsequent to the demise of said Themis Appuhamy. The Section further elaborates on the procedure that needs to be followed up by the authorities in issuing a grant to such widowed spouse. In terms of the Section 48A (2) of the LDO, a spouse who succeeds to a land on permit under said Section 48 A (1) of the LDO, shall also be entitled to a grant of such land provided the requirements laid down in the provision are fulfilled. The said Section 48A (2) of the LDO reads:-

*"48A (2). If, during the lifetime of the spouse of a deceased permit-holder who has succeeded under subsection (1) to the land alienated on the permit, the terms and conditions of the permit are complied with by such spouse, such spouse shall be entitled to a grant of that land subject to the following conditions-*

*(a) Such spouse shall have no power to dispose of the land alienated by the grant;*

*(b) Such spouse shall have no power to nominate a successor to that land;*

*(c) Upon the death of such spouse, or upon his or her marriage, the person, who was nominated as successor by the deceased permit-holder or who would have been entitled to succeed as his successor, shall succeed to that land:*

Therefore, in the event the authorities arrive at a decision to issue a grant in respect of a corpus, such authorities are required to act in accordance with the provisions of Section 48A (2) of the LDO. If so, the correct procedure would have been for the 1st to 4th Respondents to issue such a grant in favour the said Elpi Nona, the spouse of the said deceased permit-holder.

However, it is observed that due to the failure or inability on the part of the 1st to 4th Respondents to follow up the due process of law 1st to 4th Respondents have wrongly issued the grant in dispute to the 5th Respondent, while said Elpi Nona was still alive. Had the 1st to 4th Respondents accurately applied the relevant provisions of law, then the impugned grant would've never been issued in favour of the 5th Respondent. 1st and 2nd Respondents had a duty to act judicially. The duty to act judicially is the duty to follow up the due procedure in determining in questions affecting right of parties. It was held in Ceylon Transport Board v. Gunasinghe (1968) 72 NLR 76,81 by Weeramantry J. that:

> *"It is manifest that the duty to act judicially is not exclusively confined to those who hold judicial office. This is a view which this court has expressed on more than one occasion. Judicial power and power in exercise of which there is a duty to act judicially are two different things.''*

In view of the reasons mentioned above, I am of the view that the 1st and 2nd Respondents have failed to act judicially. Further, the 1st and 2nd Respondents have acted in violation of the principles of natural justice where, a certiorari is necessarily available. Therefore, the decision of the 1st to 4th Respondents to issue the grant in favour of the 5th Respondent as well as the grant on the face of is void ab initio. Accordingly, the said decision to issue the impugned grant in favour of the 5th Respondent must be declared "no decision". It was held by *Lord Wright in General* Medical Council Vs. Spackman *(1943)A.C627 at 644*

> *''If the principles of natural justice are violated in respect any decision it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the essential principles of justice. The decision must be declared to be no decision.''*

The learned Counsel for the 5th Respondent has brought to the attention of this court the proceedings before District Court case No.141/L. The learned trial Judge in the District Court of Kaduwela, has gone into the facts involved in that case and has held that the 5th Respondent was the legitimate owner of the land. The above-referred decision of the District Court of Kaduwela remains unchallenged. The Petitioner's contention is that, since the said judgement of the District Court remains unchallenged, the principle of *res judicata* operates against the Petitioner of the instant case. The term *res judicata* in Latin stands for "matter decided". The doctrine of *res judicata* prevents re-litigation upon the same cause of action once decided on its merits in a second suit between the same parties. However, 1st to 4th Respondents of the case at hand were not

parties to said District Court matter referred above. The said District Court case was a *rei vindicatio* action. Moreover, the validity of the impugned grant 1R1 which is the subject matter of this case has not been challenged before the District Court upon the grounds of ultra vires. The District Court lacks the jurisdiction to hear and determine the legality of an administrative decision of the 1st to 4th Respondents who are public authorities. The Judicial review and action for *rei vindicatio* are not comparable. Thus, issues raised before this court could be distinguished from the issues that were raised before the District Court. Therefore, I hold that the judgement of the District Court could not operate as *res judicata* among the parties in the case at hand.

The case of T.I.G. Suriyaarachchi and Others vs, L.C. Liyanage alias Gunewardena and Others (C.A. Case No. 272/1997(F) decided on 08.06.2018) clearly illustrates how the decision of the Court of Appeal in a writ application shall not operate as *res judicata* against the proceedings before the District Court concerning the same corpus.

> *"So in light of the above principles I would hold that the application for a writ of certiorari could not have operated as res judicata. As it would have, the writ application bearing No. CA 918/85 never went into tide and it must be borne in mind that an application for judicial review investigates process rights such as failure to afford a hearing and traditionally it would never go into the merit of a decision. This is the traditional view of judicial review. English Courts have gone into the distinction between merits of a decision and procedural defects that preceded the making of a decision. … In the writ application bearing No. 918/85, S.N. Silva, PICA (as His Lordship then was) never went into the title of the Plaintiffs vis~a~vis that of the People's Bank. There was only the decision making process before the vesting order that was challenged before the then President of the Court of Appeal. The challenge was based on an absence of the right to a hearing and the learned President of the Court of Appeal (as His Lordship then was) concluded that as the ground for judicial review was not established, he would dismiss the application for a writ of certiorari. But the later action filed by the Plaintiffs in the District Court of Colombo that has led to this appeal was a rei vindicatio action. Metaphorically the apples were not the same. Judicial review and an action rei vindicatio are not comparable. Therefore, the learned Additional District Judge of Colombo was quite incorrect when she held that res judicata applied in this case."*

The Petitioner in his Petition seeks for a mandate in a nature of a writ of certiorari to quash the impugned grant dated 03.06.1986. In response to the Petitioner's claim the 1st to 4th Respondents argue that the Petitioner's application is barred by laches. However, the Petitioner states that he came to know about the grant only at the proceedings of Kaduwela District Court Case No.141/L. The said action had been instituted on 27.02.2006 and judgement there to was delivered on 24.05.2017. Proceedings of this court commenced on 16.01.2019. Accordingly, it clearly appears that there had been a delay on the part of the Petitioner in invoking the jurisdiction of this Court.

However, in the case of Pathirana vs. Victor Perera (DIG Personal Training Police) (2006) 2SLR281,291 it was held as follows;

> *"an application for a writ of certiorari will not be refused on the ground of delay is not attributable to the petitioner. Laches could be excused if the order is nullity. As the circular is a nullity there are no laches."*

Further, Wanasundera J. in the case of Ramasamy v. Ceylon State Mortgage Bank (1976) 78 NLR 510, held that

> "*the principles of laches must ... be applied carefully and discriminately and not automatically and as a mere mechanical device.*''

In the circumstances I hold that the decision of the 1st to 4th Respondents to issue the impugned grant and the impugned grant on the face of it is void *ab initio*. As the said decision of the 1st to 4th Respondents is a nullity, the laches on the part of the Petitioner could be excused.

It was held In Biso Menika Vs. Cyril de Alwis (1982) 1 SLR 368,379 that,

> *"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 law. ……. Where the authority concern has been acting altogether without basic jurisdiction, the court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically*."

The Judgement in the Kaduwela District Court case 141/L was delivered on 24.05.2017. Once the matter was decided in favour of the 5th Respondent, the Petitioner of this case had lodged an appeal against the said judgement dated 24.05.2017 before the Civil Appellate High Court of Homagama. The Petitioner

has only lodged this Writ Application, pending the proceedings before the Civil Appellate High Court of Homagama. The Petitioner has sought relief elsewhere in a manner provided by law and therefore, I am of the view that the delay on the part of Petitioner in filing the Petition at hand is justified.

In the light of the reasons given above, I hold that the writ of certiorari as prayed for by the Petitioner should be granted quashing the order of the 1st to 4th Respondents to issue a grant in favour of the 5th Respondent. However, I am of the view that the Petitioner had failed to satisfy this Court of his entitlement for a grant. Therefore, the relief for a writ of mandamus prayed for by the Petitioner by which the Petition moves this court to issue an order directing the 1st to 4th Respondents requiring them to hold a proper inquiry and issue the grant to the Petitioner, cannot allowed. However, this judgment shall not prevent the 1st to 4th Respondents from holding a proper inquiry into the matter and making an appropriate order with regard to the rightful entitlement to the grant in issue. In view of the above circumstances I direct the issue of a mandate in the nature of a writ of certiorari to quash the order to issue the grant in favour of the 5th Respondent.

Judge of the Court of Appeal

Sobhitha Rajakaruna, J

I agree.

Judge of the Court of Appeal