

**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 and
in terms of Article 140 of the
Constitution of the Democratic
Socialist Republic of Sri Lanka.

CASE NO: CA/WRIT/81/13

Rohan Ajith Senanayake,
No. 96/5,
Kithulwatte Road,
Colombo 8.

PETITIONER

VS.

1. Raja Gunaratne,
Commissioner of National Housing,
Ministry of Construction,
Engineering Services, Housing and
Common Amenities,
2nd Floor, "Sethsiripaya",
Battaramulla.

1A. W.M. Karunadasa
Commissioner of National Housing,
Ministry of Housing and Samurdhi,
2nd Floor, "Sethsiripaya",
Battaramulla.

1B. Shyamal Amith Collure,
Commissioner of National Housing,
Ministry of Housing and Samurdhi,
2nd Floor, "Sethsiripaya",
Battaramulla.

1C. Sarath Athukorala,
Commissioner of National Housing,

Ministry of Housing and Samurdhi,
2nd Floor, “Sethsiripaya”,
Battaramulla.

2. Wimal Weerawansa,
Minister of Construction,
Engineering Services, Housing and
Common Amenities,
2nd Floor, “Sethsiripaya”,
Battaramulla.

2A. Sajith Premadasa,
Minister of Housing and Samurdhi,
Ministry of Housing and Samurdhi,
2nd Floor, “Sethsiripaya”,
Battaramulla.

2B. Mahinda Rajapaksha,
Minister of Urban Development and
Housing,
Ministry of Urban Development and
Housing,
“Sethsiripaya”,
Battaramulla.

3. Randolf Bernard Lakshman
Ediriweera Wijesooriya,
43, 2/2, Gregory’s Road,
Colombo 7.

4. Cartland (Private) Limited
Mo. 02, Deal Place,
Colombo 3.

RESPONDENTS

Before: **M. T. MOHAMMED LAFFAR, J. &
K. K. A. V. SWARNADHIPATHI, J.**

Counsel: Akiel Deen, instructed by M.M. Ziyard for the
Petitioner.

Suranga Wimalasena, SSC for the 1st and 2nd Respondents.

Champaka Ladduwahetty, instructed by the Nishanthi Mendis for the 3rd Respondent.

Meinusha Gamage, instructed by Thamila Perera for the 4th and 5th Respondents.

Written Submissions on: 21.02.2019 (by the Petitioners).

21.05.2020 (by the 1st and 2nd Respondents).

11.02.2019 (by the 3rd Respondent).

15.03.2019 (by the 4th Respondent).

Argued on: 27.04.2021.

Decided on: 09.11.2021

MOHAMMED LAFFAR, J.

The Petitioner in this application has invoked the supervisory jurisdiction of this Court under Article 140 of the Constitution seeking, *inter alia*, for the following relief:

- b) a mandate in the nature of a writ of *certiorari* quashing the transfer of the premises bearing Assessment No. 43, 2/2 Gregory's Road, Colombo-7, from the Commissioner of National Housing to the 3rd Respondent by way of deed of conveyance bearing No. 17547 dated 02.01.2012 and certified by Raja Gunaratna, Commissioner of National Housing, and
- c) a mandate in the nature of a writ of *mandamus* directing the 1st Respondent to forthwith divest the premises bearing No.

43, 2/2 Gregory's Road, Colombo-7, as per the application under section 17 (A) (2) dated 03.04.2012 marked A15 hereof, to the Petitioner.

When the matter was taken up for argument on 27.04.2021, the learned Counsel for the Petitioner informed Court that the Petitioner would not peruse the relief as prayed for in paragraph "c" of the prayers to the petition, namely the aforesaid mandate in the nature of a writ of *mandamus*.

In the circumstances, the only question to be determined in this application is confined to paragraph "b" of the prayers to the petition, namely a writ of *certiorari* quashing the transfer of the premises bearing assessment No. 43, 2/2 Gregory's Road, Colombo-7, from the Commissioner of National Housing to the 3rd Respondent by way of deed of conveyance bearing No. 17547 dated 02.01.2012.

Factual matrix

The Petitioner was the owner of the premises bearing Assessment No. 43, 2/2 Gregory's Road, Colombo-7 (hereinafter referred to as the "premises") and the 3rd Respondent was the tenant of the same when the said premises was vested with the Commissioner of National Housing on 13.01.1974, who is the 1st Respondent in this application, in terms of the provisions of the Ceiling on Housing Property Law No. 1 of 1973, as amended (hereinafter referred to as the "Ceiling on Housing Property Law").

Thereafter, the Petitioner made representation to the Commissioner for National Housing, and accordingly, on 05.08.1985 the premises were divested in favour of the Petitioner. Thereupon, the said divesting order was affirmed by the Ceiling on Housing Property Board of Review on 14.02.2001. The 3rd Respondent, by way of writ of *certiorari*, challenged the foregoing orders of the Commissioner and the Board of Review in the Court of Appeal (CA. Application No.

418/2001, CA Minutes dated 11.12.2002 - marked as A25). The Court of Appeal, in its order dated 11.12.2002, has quashed the said decision to divest the premises to the Petitioner. The Supreme Court, by order dated 29.01.2009, in case No. S.C. Appeal 52/2003 has affirmed the aforesaid order of the Court of Appeal. Accordingly, the 1st Respondent became the owner of the premises in suit.

Thereupon, the 1st Respondent, by a deed of conveyance bearing No. 17547 dated 02.01.2012 has transferred the premises in dispute to the 3rd Respondent. Subsequently, the 3rd Respondent filed an application in the Court of Appeal bearing No. CA. Writ. 92/2014, seeking to quash the decisions of the 1st Respondent and the Board of Review to not to allow the 3rd Respondent to sell and dispose the premises in question. The Court of Appeal, in its judgment dated 02.12.2016, allowed the said application of the 3rd Respondent and directed the 1st Respondent to allow the 3rd Respondent to sell and dispose the premises in suit in terms of section 17 (c) of the Ceiling on Housing Property Law. Accordingly, the 3rd Respondent, by deed bearing No. 24 dated 15.06.2017 attested by H.M.H.K. Deshapriya, Notary Public, conveyed his title to the 4th Respondent.

The dispute raised by the Petitioner

The contention of the Petitioner was that the 3rd Respondent has failed to insure the premises in question and neglected to pay the rates and taxes to the same, and thereby, violated the terms and conditions of the agreement to sell marked A2, entered into by and between the 1st Respondent and the 3rd Respondent. As such, he argued that the said deed of conveyance bearing No. 17547 is null and void in terms of the provisions of the Ceiling on Housing Property Law.

It is pertinent to be noted that there are contractual obligations between the 1st Respondent and the 3rd Respondent in accordance with the agreement to sell marked A2 whereas the Petitioner was not

a party to the same. Moreover, as per the determinations of the Court of Appeal and the Supreme Court (Supra) the Petitioner has no title to the premises in dispute. In such a situation, it is the considered view of this Court that, the Petitioner has no *locus standi* to question the contractual obligations of the party concerned of A2 and to challenge the validity of the deed of transfer bearing No. 17547.

Be that as it may, it is borne out from the letter dated 21.05.2010, issued by the Colombo Municipal Council marked 3R2 that there is no any rates due in respect of the premises in suit as at 31.03.2010. The 3rd Respondent in paragraph 13 of his statements of objection categorically denied the averments contained in paragraphs 17 and 18 of the Petition wherein it was alleged that the 3rd Respondent failed to insure the premises and did not pay the rates to the local authority.

Besides, this Court is mindful of the fact that the 3rd Respondent is not obliged to pay the rates to the Colombo Municipal Council from the year of 1985 in which the premises was divested with the Petitioner till the decision of the Supreme Court on 29.01.2009 in case No. S.C. Appeal 52/2003 by which the said order was quashed. The Supreme Court further observed that there is a valid agreement to sell between the 1st and 3rd Respondents and thereby the 3rd Respondent had *legitimate expectation* that the premises in suit be sold to him.

Furthermore, it is significant to note that the salient question raised by the Petitioner in this application has already been decided by the Court of Appeal and the Supreme Court.

The Court of Appeal in case No. CA/Writ/92/2014, CA Minutes dated 11.12.2015, observed as follows:

“The Court observes at this stage that the Petitioner-Respondent (the 3rd Respondent in this application) is the lawful

owner of the premises bearing No. 43 2/2 Gregory Road, Colombo 7 after the execution of the transfer deed by the 1st Respondent-Respondent on 02.07.2012...”

(Vide page 6 of the judgment)

Moreover, the Court of Appeal in the above case has allowed the 3rd Respondent to sell the premises to the 3rd party as well. In these circumstances, it is abundantly clear that the Court of has already recognized the fact that the 3rd Respondent was the owner of the premises in dispute.

In case No. CA. Application 418/2001 (supra), the Court of Appeal having quashed the order of the 1st Respondent divesting the premises in dispute to the Petitioner, observed the fact that the 3rd Respondent has complied with the terms and conditions of the Agreement to sell and paid the money to the 1st Respondent to purchase the premises, which reads thus,

“The sale of the premises is further clarified in document ‘A1’whereby he has requested to pay a sum of Rs. 440/- from 16/03/1977 until the Commissioner determines the price and this condition had been accepted by the Petitioner who had made payments from March 1977 for a period of 9 years until the Commissioner had purported to divest the house by A2 on 18/02/1986...”

(Vide page 6 of the judgment).

The Supreme Court in case No. SC. Appeal 52/2003 (Supra) observed that the 3rd Respondent has made the payments to the 1st Respondent towards the purchase of the premises in dispute without default as agreed upon the agreement marked A2, until the aforesaid divesting the premises. Further observed, that the 3rd Respondent had a *legitimate expectation* that the said premises will

be sold to him. The said observation of the Supreme Court is reproduced as follows:

“The Commissioner for National Housing in his affidavit dated 4th July 2001 has admitted the receipts marked A3 and A4 without expressly denying the claim that the said payments were regularly made during the period in question, and the Appellant in his affidavit dated 25th September 2001 has responded to the averments by admitting “the matter of record only”, whatever he intended to mean by that phraseology. In the absence, therefore, of any express denial from the Appellant or the Commissioner of the matters set out in paragraph 8 of the Respondent’s affidavit filed in the Court of Appeal, I am inclined to believe that the Respondent had in fact paid a substantial sum of money towards the purchase of the house in question. In these circumstances, it is my opinion that the Respondent had a legitimate expectation, at the very least, that the house in question will be sold to him.

In my considered opinion, the equities favor the Respondent rather than the minor child Pascal, in whose favor house bearing premises No. 43 2/1, Gregory’s Road, Colombo 7 had already been divested, although an attempt had been made to paint the picture that the said premises was divested in terms of Section 17(1) of the Ceiling on Housing Property Law to make out a case for another house to be divested on account of Pascal. It is unfortunate that the Commissioner for National Housing, and his Department, had wittingly or unwittingly helped the Appellant in this endeavor. To my mind, the “mistakes” made by the Commissioner for National Housing in this case are too many to be disregarded on the basis that they were made by sheer inadvertence.

I accordingly answer all the questions on which special leave has been granted by this Court in favor of the Respondent...”

(Vide page 15-16 of the judgment, SC Minutes of 29.01.2009)

Having considered the totality of the aforesaid judgments of the Court of Appeal and the Supreme Court it is abundantly clear that the fact in issue to be determined in this application has already been decided by the said apex Courts, and therefore, this Court has no jurisdiction to re-adjudicate the same once again.

It appears to this Court that the Petitioner though merely annexed the aforesaid judgments of the apex Courts to his petition, made no reference in the petition as to how these decisions would be relevant or have a bearing on the present application. Even though, some observations and determinations of the Court of Appeal and the Supreme Court in those cases are very material to the instant application, deliberately the petitioner failed to enunciate those aspects to this Court in his petition. It shows that the Petitioner has suppressed material facts in the application, and therefore, he is estopped from seeking discretionary remedies in the nature of writs from this Court.

In the case of **Alphonso Appuhamy v. Hettiarachchi** [1973] 77 NLR 131, it was held that,

*“When an application for a prerogative writ or an injunction is made, it is the duty of the petitioner to place before the Court, before it issues notice in the first instance, a full and truthful disclosure of all the material facts; the petitioner must act with *uberima fides*.”*

Furthermore, the petitioner in this case is seeking for an order to cancel the deed bearing No. 17547 on the basis that the 3rd Respondent has breached the agreement to sell entered into between

the 1st Respondent and the 3rd Respondent. It is trite law that the jurisdiction pertaining to the breach of contract and cancellation of deed is vested with the District Court.

Moreover, as Wade and Forsyth observe in their work *Administrative Law* (9th Edition, page 668), “contractual and commercial obligations are enforceable by ordinary action and not by judicial review”. This principle is illustrated by many judicial decisions such as ***University Council of Vidyodaya University v. Linus Silva*** [1964] 66 NLR 505 and ***Jayaweera v. Wijeratne*** [1985] 2 Sri LR at 413, which have had the effect of excluding contractual disputes from the pale of judicial review through prerogative remedies.

In these circumstances, I proceed to dismiss this application without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

K. K. A. V. SWARNADHIPATHI, J.

I Agree.

JUDGE OF THE COURT OF APPEAL