

**PERERA**

**v.**

**NATIONAL HOUSING DEVELOPMENT AUTHORITY**

COURT OF APPEAL

J.A.N. DE. SILVA, J. (P/CA)

C.A. 504/99

SEPTEMBER 18, 2000

OCTOBER 30, 2000

JANUARY 11, 2001

*Writ of Mandamus - To declare land as reservation - Locus standi - Public Right - Public Duty - Necessary parties not before Court - Writ is a discretionary remedy - Conduct of Party is relevant.*

The petitioner, a resident at the Raddolugama Housing Scheme sought a Writ of Mandamus compelling the Respondents to declare the land as reservation for the residents of zone 6 of the scheme.

The 1<sup>st</sup> Respondent denied the position taken up by the Petitioner and stated that the said scheme was not demarcated into zones, and the public utilities are provided for the entire scheme to use in common, and the lot in question was never given as a reservation for zone 6.

The 1<sup>st</sup> Respondent further contended that -

- (i) the petitioner does not have a legal right to obtain a writ of mandamus;
- (ii) Necessary parties are not before Court;
- (iii) suppression of facts;
- (iv) delay.

**Held :**

- (i) Foundation of Mandamus is the existence of a right. Mandamus is not intended to create a right but to restore a party who has been denied his right to the enjoyment of said rights.

The right to enforce must be a "Public Right" and the duty that must be enforced must be of a public nature.

In the instant case, there is no public duty cast upon the 1<sup>st</sup> Respondent to declare the land as a road Reservation, The Petitioner has no clear right to compel the 1<sup>st</sup> Respondent to do so.

- (ii) The affidavit of the 1<sup>st</sup> Respondent show that, the land was transferred to the UDA and then to a third party. When these matters were brought to the notice of the Petitioner, he should have moved court to add them as parties.
- (iii) The Petitioner has tendered a 'privilege' document which he is not entitled to have in his possession. He has not explained the circumstances under which he came to possess the document. Writ being a discretionary remedy the conduct of the applicant is also relevant.

**APPLICATION** for a Writ of Mandamus.

**Cases referred to :**

1. *Napler Ex Parte* - 1852 18 QB 692.
2. *R v. Metropolitan Police Commissioner* - 1953 2 All ER 717 at 719.
3. *Commissioner of Police v. Gordhandas* - 1952 SCR 135.
4. *Wijesiri v. Siriwardena* - 1982 1 SLR 17.
5. *R v. Garland* - 1870 5 QB 269.

*Hiran de Alwis* for Petitioner.

*Ms. M. Fernando, S. S. C.* for Respondents.

*Cur. adv. vult.*

April 3, 2001.

**J. A. N. DE SILVA, J. (P/CA)**

The petitioner in this application states that he is a resident at the Raddolugama Housing Scheme and claims to be a member of the Welfare Society of the residents of zone 6 of the said scheme. By this petition the petitioner has prayed for the following reliefs.

- (a) To issue a writ in the nature of writ of mandamus compelling the respondents to secure and/or declare the said land marked "lot 1288" as reservation for the residents of zone 6 of the Raddolugama Housing Scheme.
- (b) To prevent the respondents from transferring and/or selling, alienating that said land pending the hearing and final determination of this application.

(c) For costs and such other and further relief.

The petitioner in the petition sets out that the land, viz lot 1288, the subject matter of this application as owned by the National Housing Development Authority. The said authority constructed the Raddolugama Housing Scheme comprising 12 housing zones. Each housing zone is granted a reservation for recreational and welfare activities. The petitioner pleads that lot no 1288 was the reservation for zone 6 and the residents used the said reservation as belonging to zone 6. He also states that National Housing Development Authority at all times acted in the manner giving the impression that the residents are entitled to the said reservation and undertook not to transfer the said reservation to any outside authority or body.

The first respondent in his affidavit denied the position taken up by the petitioner and stated that the Raddoluwa Housing Scheme was not demarcated into zones and that although for easy administrative purposes it is referred to as zones, the public utilities namely playgrounds, community centers, libraries, bus stands, health centers etc. are provided for the entire scheme to use in common. The National Housing Development Authority never gave the impression or promised to the residents of zone 6 that the land in question would be given to them and no undertaking was given to them that this land would not be given to any outside body.

The Chairman of the National Housing Development Authority in his affidavit further states that Raddolugama Housing scheme comprised of 2022 houses and 144 shops in extent of 43, 122 hectares was established in a land acquired by State for the said purpose. At the rear end of the scheme lot 1288 which is the land in question is situated outside the premises of the scheme viz, on the other side of the road and therefore was not utilized for the purpose of the scheme and was lying idle.

In 1989 members belonging to a Catholic Association of Raddolugama requested they be permitted to purchase the said

land which is close to the church and the approval was granted by the Board of Directors of National Housing Development Authority for this purpose. As this association was not an incorporated body there had been certain legal impediments to transfer the property to that association and therefore a decision was taken to hand over the land to Arch Diocese of Colombo.

Explaining the above situation the Minister of Housing and Urban Development presented a memorandum to the Cabinet on 07. 01. 1999. On 03. 03. 1999 the cabinet decided to transfer the said land to Urban Development Authority (UDA) and the UDA to allocate same to the church of Our Lady of Lourdes Raddoluwa. In terms of the cabinet decision the land was handed over to UDA on 21. 05. 1999 by National Housing Development Authority and thereafter to the said church the same day.

The petitioner states that he is a resident in the above scheme and is personally affected by this decision and also states that he is acting on behalf of the others as the land in question was used by them for over 15 years and in the circumstances the petitioner is entitled to have and maintain this action.

At the hearing of this application the following objections were raised on behalf of the respondents.

- (i) That the petitioner does not have a legal right to obtain a writ of Mandamus.
- (ii) Necessary parties are not before Court.
- (iii) Suppression of facts.
- (iv) Delay.

On the question of legal right it is to be noted that the foundation of mandamus is the existence of the right. (*Napier Ex parte*<sup>(1)</sup>). Mandamus is not intended to create a right, but

to restore a party who has been denied his right to the enjoyment of such right. A "Mandamus" will lie to any person or authority who is under a duty (Imposed by Statute or under Common Law) to do a particular act, if that person or authority refrains from doing the act or refrains for wrong motives from exercising a power which is his duty to exercise the Court will issue a mandamus directing him to do what he should do. (*R v. Metropolitan Police Commissioner*<sup>(2)</sup> at 719.) (See also *Commissioner of Police v. Gordhandas*<sup>(3)</sup>).

The right to enforce must be a "Public Right" and the duty that must be enforced must be of a public nature.

In the instant case the petitioner has failed to establish that there is public duty cast upon the 1<sup>st</sup> respondent to declare that the land in issue as a reservation for zone 6 and that the petitioner has a clear right to compel the 1<sup>st</sup> respondent to do so.

The petitioner relied on the decision of *Wijesiri v. Stritwardena*<sup>(4)</sup> to establish the fact that to apply for a writ of mandamus it is not necessary to have a personal interest but it is sufficient if the applicant can show a genuine interest in the matter complained of and that he comes before Court as a public spirited person concerned to see that the law is objected in the interest of all.

It is to be noted that the petitioner in Wijesiri's case was a opposition member of Parliament who took up the cause of 53 candidates who were selected for appointment. The petitioner cannot be compared with a member of Parliament. There is nothing to show that the Welfare Society and the other members are even interested in this application. Even if one concedes jurisdiction of the Court and holds that the petitioner has "locus", he has not established that the 1<sup>st</sup> respondent has a public duty not to alienate the land in question.

It is observed that in certain instances, depending on the exigencies and on request, National Housing Development Authority has granted approval on temporary basis for certain

Welfare Societies to use unutilized land for a given object (e. g. to commence a montessori vide petitioners documents marked C1, C2 and C3) on the strict condition that the land should be handed back to the National Housing Development Authority on demand. This does not mean that there is a public duty cast upon the 1<sup>st</sup> respondent to secure and/or declare the land in question as a reservation for the residents of zone 6.

Another objection raised by the respondents was that necessary parties have not been brought before Court. The Chairman of the National Housing Development Authority in his affidavit had disclosed that what ever the action that was done was on a direction given by the cabinet. The land was 1<sup>st</sup> transferred to UDA and then to the Church Authorities by UDA. I am of the view that when these matters were disclosed the petitioner should have moved this Court to add the Cabinet of Ministers, UDA and the Church Authorities as parties to this application. This was not done. These are necessary parties to the effectual adjudication of the question in issue. I uphold this objection that necessary parties have not been made respondents.

It is also relevant to note that the petitioner has submitted to this Court a privilege document which he is not entitled to have in his possession. He has not explained the circumstances under which he came to possess this document. 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. (*R v. Garland*<sup>(5)</sup>)

For the above reasons I dismiss this application with costs.

*Application dismissed*

*Editors Note: The Supreme Court - in SC SPLA 107/2001 on 20.07.2001 refused special leave to the Supreme Court.*