

GNANASAMBANTHAN
v.
REAR ADMIRAL PERERA AND
OTHERS

SUPREME COURT
AMERASINGHE, J.,
GUNAWARDANA, J.,
GUNASEKERA, J.
S.C. APPEAL NO. 49/96
COURT OF APPEAL
APPLICATION NO. 1369/85
OCTOBER 12, 1998.

Certiorari and Mandamus – Necessary parties – Failure to implead necessary party – Emergency (Rehabilitation of Affected Property, Business or Industries) Regulations – Rehabilitation of Property and Industries Authority (REPIA).

It is both the law and practice in Sri Lanka to cite necessary parties to applications for Writs of Certiorari and Mandamus. In an application for a Writ of Certiorari to quash the divesting order and for a Writ of Mandamus directing the first respondent to make order divesting the property to the petitioner, REPIA the authority that made the divesting order sought to be quashed by Certiorari was a necessary party. Failure to implead REPIA was a fatal irregularity.

Cases referred to:

1. *Shums v. People's Bank and others* (1985) 1 Sri LR 197.
2. *Faquir Chand Anant Ram v. Gopi Chand* AIR (1962) Punjab 117.
3. *Karunaratne v. Commissioner of Co-operative Development* (1978) 79 Sri LR (2) 103.
4. *Ramasamy v. Ceylon State Mortgage Bank* (1976) 78 NLR 510.
5. *Dissanayake v. Siyane Adikari Co-operative Stores Union* (1958) 60 NLR 140.
6. *Amritsar Improvement Trust v. Custodian* EP AIR (1964) Punjab 110.

APPEAL from judgment of the Court of Appeal.

S. Sivarasa P.C with *A. R. Surendran* and *Arul Selvaratnam* for appellant.
Ikram Mohamed, P.C with *Ian Fernando* and *A. M. Faiz* for 3rd respondent.

Cur. adv. vult.

October 29, 1998

AMERASINGHE, J.

The petitioner had been carrying on business at No. 2, Main Street, Avissawella, from 1956 as a tenant of the second and third respondents.

In 1982, the second and third respondents transferred the rear portion of the premises to the petitioner's son. At the same time, the front portion was transferred to the petitioner on condition that the second and third respondents were entitled to a retransfer of the premises on payment by them of a stipulated sum of money within five years. However in 1983 the premises were damaged in the ethnic disturbances of that time.

Any immovable property damaged or destroyed on or after July 24, 1983, by riot or civil commotion was declared as "affected property" by section 19 of the Emergency (Rehabilitation of Affected Property, Business or Industries) Regulations made under section 5 of the Public Security Ordinance (Cap. 40).

By its letter dated 27 August, 1983, (3R2) the Rehabilitation of Property and Industries Authority (REPIA), in the exercise of its powers under the regulations referred to above, divested the property to the second and third respondents. The letter was signed by the first respondent who was the Chairman of REPIA.

The petitioner applied to the Court of Appeal for a Writ of Certiorari to quash the divesting order and for a Writ of Mandamus directing the first respondent to make order divesting the property to the petitioner.

The Court of Appeal upheld a preliminary objection raised by the first respondent that since REPIA was the authority concerned with the making of divesting orders, the failure to make REPIA a party should lead to the dismissal of the petition. The Court of Appeal upheld the objection.

The regulations state that "REPIA shall consist of five Directors . . . one of whom shall be named as Chairman of REPIA". There are certain things the Chairman was empowered to do. For instance, in terms of regulation 11 (3) he could give notice of the repudiation of liabilities. However, there are other things, including the divesting of affected property which he cannot do. Regulation 14 makes it clear that it is REPIA that was empowered to make a divesting order. If the order made on the 27th of August, 1983, was invalid, REPIA, and not the Chairman, should have been made a respondent. What is sought to be quashed is the order of REPIA and not that of its Chairman.

Learned counsel⁶ for the appellant submitted that in an application for a Writ of Certiorari it is the decision of a functionary or tribunal that is sought to be quashed. The functionary or tribunal is not ordered to do anything or refrain from doing anything. He cited *Shums v. People's Bank and Others*⁽¹⁾. In that case the Minister of Finance, who was not a juristic person, had been made a party by official designation and not by name. It was held that the Minister could be cited as a respondent *nomine officii*.

That case related to an application for a Writ of Certiorari. In the matter before us the petitioner seeks both a Writ of Certiorari and a Writ of Mandamus. In any event the question before us is not whether the Chairman of REPIA could be cited *nomine officii*, which perhaps was possible in respect of the application for Certiorari but not in respect of the application of Mandamus, but whether REPIA should have been cited as a necessary party, since the decision was one which only REPIA was empowered to make.

Learned counsel for the petitioner submitted that a court should not refuse to grant relief to a citizen merely on the ground of omission to implead the authorities concerned if otherwise on the merits the justice of the case demands or warrants interference. Reliance was placed on *Faquir Chand Anant Ram v. Gopi Chand*⁽²⁾. In that case, the court was considering the practice of the Indian courts in matters relating to Article 227 of the Indian Constitution. Moreover, the court

was of the view that the petition failed on the merits. Attractive as it seems, superficially I am of the view that the *obiter dictum* of the learned judge in that case is stated in terms that are too wide to be accurate. In my view it is both the law and practice in Sri Lanka to cite necessary parties to applications for Writs of Certiorari and Mandamus. For the reasons already explained, REPIA was a necessary party and in my view the failure to implead REPIA was a fatal irregularity. Eg : see *Karunaratne v. Commissioner of Co-operative Development*⁽³⁾; *Ramasamy v. Ceylon State Mortgage Bank*⁽⁴⁾; *Dissanayake v. Siyane Adikari Co-operative Stores Union*⁽⁵⁾.

Learned counsel for the petitioner submitted that the failure to make the party who made an impugned order would not justify the rejection of the petition without reference to the merits of the case. He referred to *Amritsar Improvement Trust v. Custodian*⁽⁶⁾ in support of his contention. In that case the Authority (the "Competent Officer") whose order was assailed was a party. It was the appellate authority who confirmed that order who was not cited and in these circumstances it was held that the rejection of the petition without reference to the merits of the case would not be justified. In the matter before me, it is the authority whose order is being assailed who has not been impleaded. In any event, how does one go into the merits of a case without hearing the necessary parties.

For the reasons set out in my judgment, I affirm the decision of the Court of Appeal and dismiss the appeal with costs.

GUNAWARDANA, J. – I agree.

GUNASEKERA, J. – I agree.

Appeal dismissed.