

## RAJAKARUNA

v.

## R. J. DE MEL, MINISTER OF FINANCE AND OTHERS

COURT OF APPEAL.

G. P. S. DE SILVA, J. AND JAYALATH, J.

C. A. APPLICATION No. 2045/80.

FEBRUARY 11, 1985.

*Writ of Certiorari – Determination to acquire and vesting order under s. 72 of Finance Act No. 11 of 1963 as amended by Law No. 16 of 1973 – S. 71 of Finance Act – Statutory income – Delay.*

Under s. 71 (2) (c) of the Finance Act No. 11 of 1963 as amended by Law No. 16 of 1973 the People's Bank can make a determination to acquire land only if the Bank is satisfied that the statutory income under the written law relating to income tax of the

applicant and of the other members of the family of which he is the head does not exceed Rs. 10,000 for the three years immediately preceding the date of the application. The second respondent-bank acted on the document issued by an assessor of the Department of Inland Revenue wherein the assessable income and taxable income of the 3rd respondent for the years of assessment 1975/76, 1974/75 and 1973/74 were less than Rs. 10,000.

**Held -**

(1) 'Statutory income' is a concept which is different from 'assessable income' and 'taxable income'. The 2nd respondent-bank failed to consider the relevant matter, namely, the statutory income which the statute directed it to take into account. Therefore the determination is a nullity. The error goes to the jurisdiction of the tribunal (Bank).

(2) The date of communication of the determination is not available but the vesting order was published in the Gazette of 11.7.79. The application to Court was made on 29.9.1980. Delay will not result in the automatic refusal of certiorari. The orders here were manifestly erroneous and without jurisdiction. The plea of delay was not taken in the objections filed and no material showing prejudice has been placed before Court. There is nothing to show that it would be inequitable to issue a writ of certiorari. Hence the objection of delay is not entitled to succeed.

**Cases referred to :**

- (1) *President of Malalgodapitiya Co-operative Society v. Arbitrator of Co-operative Societies, Galle* (1949) 51 NLR 167.
- (2) *Dissanayake v. Fernando* (1968) 71 NLR 356.
- (3) *Gunasekera v. Weerakoon* (1970) 73 NLR 262.
- (4) *Ramasamy v. The Ceylon State Mortgage Bank* (1976) 78 NLR 510.
- (5) *Lindsay Petroleum Company v. Hurd* (1974) L.R.P.C. 221, 229.
- (6) *Biso Menike v. de Alwis and Others* S.C. 59/81 - C. A. Appln. 1123/8 - S.C. Minutes of 12th May 1982.

**APPLICATION for a Writ of Certiorari.**

*Ben Eliyathamby* for petitioner.

*Douglas Premaratne, Deputy Solicitor-General* for 1st respondent.

*Dr. J. A. L. Cooray* with *M. B. Peramuna* for 2nd respondent.

*A. A. de Silva* with *Lalin de Silva*, for 3rd respondent.

*Cur. adv. vult.*

April 3, 1985.

**G. P. S. DE SILVA, J.**

This is an application for a Writ of Certiorari to quash a vesting Order made by the 1st respondent (Minister of Finance) under the provisions of section 72 of the Finance Act No. 11 of 1963 as amended. The father of the 3rd respondent, one Arnolis Appuhamy, transferred to

the petitioner the paddy field described in the Schedule to the petition subject to the condition that the petitioner would re-transfer the field to Arnolis Appuhamy on payment of a specified amount within a period of 10 years. Arnolis Appuhamy was unable to purchase the field within the period of 10 years and died in or about 1972 leaving the 3rd respondent as his sole heir. Thereafter the 3rd respondent made an application to the 2nd respondent (The People's Bank) in terms of section 71 of the said Finance Act as amended by Law No. 16 of 1973 for the acquisition of the field. Admittedly, an inquiry was held by the 2nd respondent in respect of the application made by the 3rd respondent.

At that inquiry, both the petitioner and the 3rd respondent were present. The petitioner was represented by counsel. The notes of inquiry have been produced marked "A". One of the objections to the acquisition taken on behalf of the petitioner at the inquiry was that the 3rd respondent's 'statutory income' exceeded Rs. 10,000. This objection was disposed of by the officer of the 2nd respondent-bank who conducted the inquiry by stating that, "according to a certificate filed by the Inland Revenue Department submitted by the applicant her average statutory income does not exceed Rs. 10,000". The objections having been overruled, the 2nd respondent-bank made a 'determination' on a 25.3.77 to 'acquire' the field and notified the 1st respondent of its 'determination'. Thereupon the 1st respondent made the 'vesting order' which was published in the gazette on 11.7.79.

Counsel for the petitioner attacked the 'determination' made by the 2nd respondent-bank on the ground that a condition precedent to the making of the 'determination', namely the requirement stipulated in section 71(2) (c) of the Finance Act No. 11 of 1963 as amended by Law No. 16 of 1973, has not been satisfied. This section reads thus :

"No premises shall be acquired under sub-section (1) unless the Bank is satisfied that the average *statutory income* of the person making the application and of the other members of the family of which he is the head, computed under the provisions of the written law relating to the imposition of income tax, for the three years of assessment immediately preceding the date on which such application was made by him, does not exceed a sum of ten thousand rupees".

At the hearing before us, the document upon which the 2nd respondent-bank was 'satisfied' that the applicant's statutory income did not exceed a sum of ten thousand was produced. This was a document dated 21.12.77 issued by the Assessor of the Department of Inland Revenue, Regional Office, Kurunegala. This document sets out the 'assessable income' and the 'taxable income' of the 3rd respondent for the years of assessment 1975/76, 74/75 and 73/74. There is not one word in that document to indicate what the 'statutory income' of the 3rd respondent was for the relevant years of assessment. 'Statutory income' is a concept which is different from 'assessable income' and 'taxable income' in terms of the scheme of the Inland Revenue Act No. 4 of 1963 as amended. Chapter III of that Act deals with the ascertainment of statutory income while Chapter IV is concerned with the ascertainment of 'assessable income' and 'taxable income'. Having regard to this document, both Dr. Cooray, counsel for the 2nd respondent-bank and Mr. Premaratne, Deputy Solicitor-General, counsel for the 1st respondent, very properly conceded that the 2nd respondent-bank had, while taking into account an irrelevant matter, namely the 'assessable income' or the 'taxable income' had failed altogether to consider the relevant matter, namely 'the statutory income' of the 3rd respondent. In other words, the 2nd respondent-bank had failed to consider a matter which the statute itself directed it to take into account and the result is that the purported determination of the 2nd respondent-bank is a nullity. There is little doubt that the error is one which goes to the jurisdiction of the tribunal (Bank).

However, both Dr. Cooray and Mr. Premaratne strongly urged that the Writ of Certiorari being a discretionary remedy, should not issue in the circumstances of this case, since the petitioner was guilty of undue delay in making his application to this court. The determination of the 2nd respondent-bank was made in March 1977 while the application to this court was filed in September 1980. It was submitted that there was a delay of 3 1/2 years which the petitioner has not explained in the papers filed before us. Dr. Cooray cited the cases of *President of Malalgodapitiya Co-operative Society v. Arbitrator of Co-operative Societies, Galle* (1), *Dissanayake v. Fernando*, (2) and *Gunasekera v. Weerakoon*, (3) in support of his argument on the question of undue delay. It is correct that the period of delay in the above cases was less than in the present case.

However, it is very relevant to note that none of the respondents has pleaded delay in the papers filed before us as a ground for the refusal of the writ. Moreover, in none of the cases relied on by Dr. Cooray has the court given its mind to the question whether delay per se is a valid ground for the refusal of the writ where the purported decision is a nullity, nor has the court considered the true basis of the principle of laches. The relevant aspects were discussed at length by Wanasundera, J. in *Ramasamy v. The Ceylon State Mortgage Bank*, (4). The learned Judge observed "the principles of laches have not been applied automatically or arbitrarily or in a technical manner by Courts of Equity themselves (at page 514) . . . . . The argument that there should be certainty about official acts is a statement that a court readily understands, but such a principle cannot be applied indiscriminately, but should be done carefully and only in appropriate cases. The acts involved here do not have that public character generally associated with official acts. The present transaction relates to the redemption of a land for the benefit of an individual, namely the original mortgagor. Finally, it is my view that where we are dealing with a matter concerning the extent of the powers and jurisdiction, which is reposed in us to be exercised for the public good, we should hesitate to fetter ourselves with arbitrary rules, unless such a course of action is absolutely necessary. The principles of laches must, in my view, be applied carefully and discriminatingly and not automatically and as a mere mechanical device (page 517)". One relevant circumstance would be "the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy" - vide *Lindsay Petroleum Company v. Hurd*, (5) cited by Wanasundera, J. In the instant case no material was placed before us, nor was any submission made to indicate that the land which is the subject matter of these proceedings has undergone a change since March 1977 which might make it inequitable to make an order in favour of the petitioner.

Sharvananda, J. had occasion to consider the principle of laches in *Biso Menike v. de Alwis and Others*, (6). In the course of his judgment the learned Judge stated :

"When the court has examined the record and is satisfied that the order complained of is manifestly erroneous or without jurisdiction the court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay, unless there

are very extraordinary reasons to justify such rejection . . . . . Unlike in English law, in our law there is no statutory time limit within which a petition for the issue of a writ must be filed. But a rule of practice has grown which insists upon such petition being made without undue delay. When no time limit is specified for seeking such remedy, the court has ample power to condone delays, where denial of writ to the petitioner is likely to cause great injustice".

In support of this view, Sharvananda, J. cites the following passage from de Smith, *Judicial Review*, 4th Edition, page 426, "Recent practice clearly indicates that where the proceedings were a nullity an award of Certiorari will not readily be denied".

In the present case there is no material to show when the determination of the 2nd respondent-bank was communicated to the petitioner. The 'Vesting Order' however was published in the gazette on 11.7.79. The application to this court was made on 29th September 1980. As stated earlier, none of the respondents has taken up the plea of undue delay in their objections. No material has been placed before us to show that the respondents have been prejudiced by the delay of the petitioner in coming into court. There is nothing to indicate that the respondents have taken any steps consequent upon 'the determination' made by the 2nd respondent-bank and the 'Vesting Order' made by the 1st respondent. In short, there is no material to show that the issue of the Writ of Certiorari would be inequitable in view of the delay now complained of. I accordingly hold that the objection based on 'delay' is not entitled to succeed in the facts and circumstances of this case.

The 'Vesting Order' made by the 1st respondent is based on the determination of the 2nd respondent-bank. Since the purported determination made on 25.3.77 is a nullity it follows that the 'Vesting Order' too is destitute of any legal effect. In the result, I direct the issue of a writ of Certiorari quashing the aforesaid 'determination' of the 2nd respondent-bank and the 'Vesting Order' published in gazette No. 44/11 dated 11.7.79. In all the circumstances, I make no order as to costs.

JAYALATH, J.— I agree.

*Writ of Certiorari issued quashing determination and vesting order.*