

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

Gurugodage Dinusha Chanaka
Perera,

No.15, Meetotamulla Road,
Kolonnawa.

Appearing by his duly appointed
Attorney Wedage Rajindra
Fonseka,

No.15, Meetotamulla Road,
Kolonnawa.

Petitioner

CASE NO: CA/WRIT/439/2015

Vs.

1. A.A. Thilakeratne,
Additional Secretary (Housing
and Development),
Ministry of Housing and
Samurdhi,
Commissioner of National
Housing,
2nd Floor, Sethsiripaya,
Sri Jayawardenapura Kotte,
Battaramulla.

- 1A. Nimal Kotawalagedera,
Additional Secretary (Housing
and Development),
Commissioner of National
Housing (Acting),
Ministry of National Housing and
Development,
2nd Floor, Sethsiripaya,
Battaramulla.
- 1B. Shamal Amith Collure,
Commissioner of National
Housing,
Ministry of National Housing and
Development,
2nd Floor, Sethsiripaya,
Battaramulla.
- 1C. Sarath Athukorale,
Commissioner of National
Housing,
Ministry of Urban Development,
Water Supply and Housing,
2nd Floor, Sethsiripaya,
Battaramulla.
2. P.W.A. Don Koranelis,
10/2, Meetotamulla Road,
Wellampitiya.
3. Pagoda Wijesinghe Arachchige
Don Mayura Sanjeewa,
10/2, Meetotamulla Road,
Wellampitiya,
Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Ranjan Suwandarathna, P.C., with Inoka
Hendawitharana and Lahiru Abhayaratne for
the Petitioner.
Anusha Fernando, D.S.G., for the 1C
Respondent.
C.E. de Silva for the 2nd and 3rd Respondents.

Argued on: 17.07.2020

Decided on: 02.09.2020

Mahinda Samayawardhena, J.

The premises in suit, No.10/2, Meetotamulla Road, Wellampitiya, vested in the 1st Respondent, the Commissioner of National Housing, upon a declaration made by the original owner of the property, Marshal Fonseka, as a surplus house under the Ceiling on Housing Property Law, No.1 of 1973. By the time the said declaration was made, Marshal Fonseka is said to have gifted the property to his daughter, Srimathie Fonseka, by Deed No.7182 marked A2. Upon the death of Marshal Fonseka, his widow requested the Commissioner of National Housing to invalidate the vesting on the basis that her deceased husband had been mentally unsound when he made the said declaration. The Commissioner of National Housing by letter marked A3 informed Marshal Fonseka's widow to file an action before a competent Court seeking redress. She filed case No.2053/SPL in the District Court of Colombo against the Commissioner of National Housing, seeking a declaration of title

to the premises, a permanent injunction preventing the Commissioner of National Housing from alienating the premises, and damages. The Commissioner of National Housing was represented in the District Court by State Counsel Ameer Ismail (who later adorned the Bench of the Supreme Court). The Court entered a *inter partes* decree dated 14.10.1982 that the premises had never vested in the Commissioner of National Housing – *vide* A6. No appeal was filed against the said Judgment.

Srimathie Fonseka alienated the premises by way of the Deeds marked X4 and X5 to the Petitioner in this application. Prior to this, the said premises were given on lease to the 2nd Respondent by the widow of Marshal Fonseka together with Srimathie Fonseka by the Lease Agreement dated 08.08.1973 marked X3. The 2nd and 3rd Respondents in paragraph 3 of the statement of objections accept this. By X7, it is clear the 2nd Respondent had recognised Srimathie Fonseka as his landlady by depositing rent in her name in the Kolonnawa Urban Council in the years 1993-1997.

Due to the 2nd and 3rd Respondents making structural changes to the said premises, the Petitioner filed case No.DLM/155/13 on or around 30.08.2013 in the District Court of Colombo against the 2nd and 3rd Respondents as Defendants, seeking a declaration of title to the premises, ejectment of the Defendants therefrom, and damages. The 2nd and 3rd Respondents filed the answer on or around 04.06.2014. In the answer, the said Respondents did not say they are the owners of the premises. However, by an additional list of documents dated 03.07.2015, the said Respondents disclosed for the first time a transfer of the property by the Commissioner of National Housing to the 2nd

Respondent by an Indenture of Transfer dated 17.06.2015, which has now been marked X20. The Petitioner says he was completely unaware of the execution of X20 until it was disclosed in the said case by the 2nd and 3rd Respondants.

The Petitioner has filed this application before this Court seeking to quash the decision of the Commissioner of National Housing to transfer the premises to the 2nd Respondent marked X18 and the subsequent Deed of Transfer in favour of the 2nd Respondent marked X20 by a writ of certiorari.

The Petitioner says when case No.DLM/155/13 was pending in the District Court, he became aware the 2nd and 3rd Respondents were attempting to obtain the premises through the Commissioner of National Housing, on the purported basis the said premises vested in the Commissioner of National Housing by operation of law. Therefore, the Petitioner by X15 dated 03.03.2015, conveyed through his lawyer, informed the Commissioner of National Housing that the premises did not vest in the Commissioner of National Housing. Together with X15, the Petitioner tendered *inter alia* a copy of the decree in case No.2053/SPL, whereby the District Court held the premises never vested in the Commissioner of National Housing. The Petitioner also tendered a copy of the plaint filed in the pending case No.DLM/155/2013, whereby the Petitioner asserts he is the lawful owner of the premises. The Commissioner of National Housing by X16 acknowledged receipt of X15 and requested the Attorney-at-Law of the Petitioner to be present at his office on 06.04.2015 “*in order to come to a final solution regarding the ownership of the premises.*” In X16, below his signature, the Commissioner of National Housing has identified himself as

“*Commissioner of National Housing (Attorney at Law of the Supreme Court)*”. As an Attorney-at-Law, the Commissioner ought to have known no further intervention by him was required in light of the decision of the District Court in case No.2053/SPL, delivered in October 1982, that the premises never vested in the Commissioner of National Housing. The Commissioner of National Housing had no right whatsoever to hold another inquiry to decide the owner of the premises. The Commissioner of National Housing manifestly acted *ultra vires*.

The Petitioner further says no proper inquiry with both parties attending together was held by the Commissioner of National Housing and no decision was served on him after the inquiry.

Be that as it may, X18 dated 25.05.2015 is the decision of the Commissioner of National Housing, made pursuant to the purported inquiry. By X18, the Commissioner of National Housing says the Petitioner did not establish his title to the property to the satisfaction of the Commissioner but the other party (i.e. the 2nd Respondent lessee) “*perfectly*” did through written submissions and decided cases, and therefore, the Commissioner decided to transfer the title of the property to the 3rd Respondent who is the son of the 2nd Respondent. I totally reject this line of reasoning. When a competent Court has already decided in a case wherein the Commissioner of National Housing was the Defendant that the property never vested in the Commissioner of National Housing, how can the Commissioner of National Housing thereafter purport to transfer the said property to another? The written submission referred to by the Commissioner of National Housing in his Order has been marked X23. In this written submission, many Judgments are

cited but, regrettably, not the most important and most relevant one, i.e. the *inter partes* Judgment and decree entered in case No.2053/SPL. Nor has the Commissioner of National Housing taken the said decree into consideration in arriving at the impugned decision, despite the fact that he was given a copy of it by the Petitioner's Attorney-at-Law.

Learned Deputy Solicitor General appearing for the incumbent Commissioner of National Housing candidly admits X18 and X20 cannot be defended in the eyes of the law.

The 2nd and 3rd Respondents in paragraph 2(g) of the statement of objections state for the first time that the decree entered in case No.2053/SPL is *per incuriam*. They say this, in my view, in passing. They do not pray for such a relief in the prayer to their statement of objections. Although the 2nd and 3rd Respondents, who were not parties to the said case state the said decree is *per incuriam*, the parties to the action do not state so. There is no allegation of collusion. In any event, a Judgment handed down by a competent Court cannot be attacked collaterally, whether by a party to the action or a third party. The 2nd Respondent is admittedly the lessee of the premises under the predecessor in title of the Petitioner (until perhaps X20 was wrongfully executed). How can such a person challenge the Judgment entered in case No.2053/SPL on the basis the decision is *per incuriam*?

The gravamen of the submission of learned Counsel for the 2nd and 3rd Respondents is, once the property vests in the Commissioner of National Housing, the Commissioner of National Housing can alter this status not by cancelling the vesting by way of a letter, such as the one dated 05.06.1984

marked D, but by way of a divesting order published in the Gazette, which has not been done in this case. This submission is misconceived. The letter dated 05.06.1984 has no significance. Although it is not necessary to do so, let me explain.

After the declaration by Marshal Fonseka that the property was a surplus house, the property vested in the Commissioner of National Housing by operation of law. Thereafter, the Commissioner of National Housing by R2 dated 20.03.1974 informed the 2nd Respondent that the property vested in the Commissioner of National Housing effective from 13.01.1974, and therefore rent should be paid to the Commissioner of National Housing. The decree in the District Court case No.2053/SPL that the premises never vested in the Commissioner of National Housing (on the basis that at the time the declaration was made, the declarant was not in a proper frame of mind to make such a declaration)¹ was entered on 14.10.1982. It is in this context the Commissioner of National Housing sent the letter marked D to Srimathie Fonseka with a copy to the 2nd Respondent (with reference to the letter dated 20.03.1974). The Petitioner's case does not depend on this letter at all. This letter is redundant. In accordance with the District Court decision that the premises never vested in the Commissioner of National Housing, there is no necessity for the Commissioner of National Housing to subsequently cancel the vesting. There is nothing to cancel.

The Commissioner of National Housing acted *ultra vires* in conducting a purported inquiry and making the decision marked

¹ *Vide* the proceedings dated 14.10.1982 in the said case, appearing at page 51 of X2.

X18. The Deed executed in pursuance of this wrongful decision has no force or avail in law.

I unhesitatingly quash X18 and X20 by a writ of certiorari.

The 1st Respondent shall pay a sum of Rs. 100,000 as costs to the Petitioner.

The application of the Petitioner is allowed with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.

I agree.

Judge of the Court of Appeal