

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 Article 140 of the Constitution of the Republic of Sri Lanka.

Case No. CA (Writ) 141/2002

1. Binthi Huzaima Nizar
No. 74, Kokilapura, Wellawatte, Colombo 06.
2. Mariamma Perumal
No. 33B, Kokilapura, Vincent Lane,
Wellawatte, Colombo 06.
3. Sellamuttu Janaki
No. 33/1B, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
4. Sinthia Nadesan
No. 33/A, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
5. Heenatigala Madanayakege Anton Joy
No. 33/1, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
6. Velu Vijayaraman
No. 31/E, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
7. Heenatigala Madanayakege Kusumawathie
No. 33/1J, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
8. Weerakkodige Josalin Silva
No. 33/3, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.

9. Palan Thangarajah
No. 33/14, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
10. Muttu Saroja
No. 33/15, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
11. Samuel Madan
No. 33/18, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
12. Arumugam Madan
No. 33/18, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
13. Dasan Pushpawathie
No. 33/18, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
14. Philip Sodalai Joseph Rasiah
No. 39, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
15. Dasan Rajumma
No. 49, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
16. Kandan Rose Mary
No. 43, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
17. Madan Sandanam
No. 45, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.

18. Karupaiah Punandiran
No. 49/4, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
19. Muttiah Raju
No. 49/3, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
20. Cecilian Peiris
No. 49/5, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
21. Muniandhi Velu
No. 49/6, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
22. Umapathi Kandiah
No. 51, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
23. Nuwarapakshage Rueben
No. 36, Kokila Road, Kokilapura,
Wellawatte, Colombo 06.
24. Weligama Liyanage Malini
No. 41, Kokila Road, Kokilapura,
Wellawatte, Colombo 06.
25. Weligama Liyanage Jane Nona
No. 43, Kokila Road, Kokilapura,
Wellawatte, Colombo 06.
26. Ummu Khairia Hameed
No. 70, Kokila Road, Kokilapura,
Wellawatte, Colombo 06.

27. Mohammed Hamdoon Fathima Rizana
No. 96, Kokila Road, Kokilapura,
Wellawatte, Colombo 06.
28. Fathima Hanoon Fareed
No. 110, Kokila Road, Kokilapura,
Wellawatte, Colombo 06.
29. Siththy Naseera Kiyad
No. 112, Kokila Road, Kokilapura,
Wellawatte, Colombo 06.
30. G. B. Luci Hamy
No. 114, Kokila Road, Kokilapura,
Wellawatte, Colombo 06.
31. A. A. M. Ismail
No. 116, Kokila Road, Kokilapura,
Wellawatte, Colombo 06.
32. Nageshwary Rajaratnam
No. 118, Kokila Road, Kokilapura,
Wellawatte, Colombo 06.

Petitioners

Vs.

1. Minister of Lands
Ministry of Lands, Battaramulla.
2. Minister of Housing and Plantations and
Infrastructure
"Sethsiripaya", Battaramulla.
3. Minister of Housing and Development
"Sethsiripaya", Battaramulla.

4. The Chairman
National Housing Development Authority,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.
5. Deputy General Manager (Urban Housing)
National Housing Development Authority,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.
6. Land Manager
National Housing Development Authority,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.
7. Manager (Colombo City – Colombo South)
National Housing Development Authority,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.
8. Urban Development Authority
"Sethsiripaya", Battaramulla.
9. Divisional Secretary
Vajira Road, Colombo 04.

Respondents

10. W. D. Norman
No. 33/19, Vincent Lane, Kokilapura,
Wellawatte, Colombo 06.
11. Noor Zareena (Deceased)
No. 84, Kokila Road, Colombo 06.
- 11A. Mumtaz Fareena
No. 84, Kokila Road, Colombo 06.

Substituted Added Respondent

12. Mumtaz Fareena
No. 84, Kokila Road, Colombo 06.

Added Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Kamran Aziz with Ekshan Anaratnam for the Petitioners

Milinda Goonetilleke SDSG for 1st to 9th Respondents

Shaleem Wazeer for the 11A and 12A Substituted Respondents

Argued On: 11.06.2019

Written Submissions Filed On:

Petitioners on 02.08.2017 and 30.07.2019

1st to 9th Respondents on 11.09.2019

11A and 12A Substituted Respondents on 08.09.2017 and 02.09.2019

Decided On: 29.05.2020

Janak De Silva J.

In 1979 and 1985 the State consequent to orders made under and in terms of section 38(a) of the Land Acquisition Act as amended (Land Acquisition Act) (P1 and P2) acquired the lands forming the subject matter of this application for a the public purpose, namely setting up a housing scheme of 1,000,000 housing units for low income families in the Wellawatte area in Colombo.

The Petitioners claim that possession of these lands were taken over by the State and thereafter the National Housing Development Authority converted the public purpose from setting up of a housing scheme of 1,000,000 housing units for low income families to providing them with loan facilities to build their own houses on the said lands.

The 11th and 11A Added Respondents challenged the change of public purpose which was dismissed by this Court on the basis that the State was entitled to change the public purpose for which the land was originally acquired [*Noor Zareena and Another v. National Housing Development Authority and Others* (CA 346/1991, C.A.M. 01.04.1996)]. The special leave to appeal application was refused [*Noor Zareena and Another n. National Housing Development Authority and Others* (S.C. Spl. L.A. 225/96, 06.09.1996)].

Thereafter the Petitioners had come into possession of the lands in issue and taken loan facilities and made developments to their respective properties.

Subsequently orders had been made under and in terms of section 39A of the Land Acquisition Act divesting portions of the lands acquired by the State in terms of P1 and P2 (P5 and P6). The Petitioners are assailing these two orders on the basis that the requirements needed for divesting to be made in terms of section 39A of the Land Acquisition Act has not been fulfilled. It is further submitted that piece meal divesting is not possible [*Kingsley Fernando v. Dayaratne and Others* (1991) 2 Sri.L.R. 129; *Mendis v. Jayaratne, Minister of Agriculture, Lands and Forestry* (1997) 2 Sri.L.R. 215].

When this application was supported for notice, a stay order was issued in terms of prayer (c) to the petition which reads:

"staying the Respondents from taking any consequential steps in terms of order published under section 39A of the Act to divest the said lands"

During the pendency of this application admittedly the following orders had been made:

- (1) Gazette Notification No. 1327/14 dated 12/02/2004 marked X5 which cancelled the divesting order of the land described in Gazette No. 1185/14 (P5).

- (2) Gazette Notification No. 1752/9 dated 01/04/2012 marked as X6. This cancelled the acquisition made in terms of P1.

Thereafter, the status of the lands forming the subject matter of this application as at present is as follows:

A portion of the land acquired by P1(X1) was divested by P5(X3) which divesting order was cancelled by X5. Hence the land forming the subject matter of P5(X3) continues to vest in the State.

A portion of land acquired by P2(X2) was divested by P6(X4) and later the acquisition of the said land was cancelled by X6. Hence this land is not vested in the State.

In both these situations, the relief claimed by the Petitioners becomes futile. In the first instance there is nothing to quash as the land continues to vest in the State. In the second instance there is no question of quashing the divesting as the land is now not vested in the State.

During the course of the argument, Court gave anxious consideration to the orders X5 and X6 having being made during the pendency of the interim relief issued in this case and requested parties to address Court on the status of those two orders.

However, as the learned SD SG correctly submitted the order marked X5 which cancels the divesting order of the land described in Gazette No. 1185/14 (P5) is in favour of and associate with the relief prayed for by the Petitioners.

He further submitted that the order marked as X6 which cancels the acquisition made in terms of P1 falls outside the scope of the interim relief granted by Court. Having giving careful consideration to the scope of the interim relief granted by Court, we are inclined to agree with this submission.

However, the making of the order marked as X6 has effectively deprived the Petitioners from obtaining a determination from Court on the question of divesting for the land forming the subject matter of that order. Yet, it is a matter that the Petitioners were aware as far back as 04.06.2013 (in view of motion bearing the same date) but did not take any steps either by way of seeking to amend the petition and praying for relief against the order marked X6 or filing a fresh application to challenge it.

In this context, two principles must be borne in mind.

Firstly, in *Weerasooriya v. The Chairman, National Housing Development Authority and Others* [C.A. Application No. 866/98, C.A.M. 08.03.2004] Sripavan J. (as he was then) held that the Court will not set aside a document unless it is specifically pleaded and identified in express language in the prayer to the petition. The Petitioners have failed to pray for any relief against X6.

Secondly, in the absence of a quashing of X6 by a Court, it continues to be valid. Clive Lewis, *Judicial Remedies in Public Law*, 5th Ed., South Asia Edition (2017) in discussing the meaning of *null and void* in Administrative Law states (page 185):

“The primary concern here is the meaning of nullity or voidness solely in the context of the remedies granted by courts. The concept of nullity has been used to solve other problem arising in administrative law. For remedial purposes, the orthodox view is that an ultra vires act is regarded as void and a nullity. An act by a public authority which lacks legal authority is regarded as incapable of producing legal effects. **Once its illegality is established, and if the courts are prepared to grant a remedy**, the act will be regarded as void from its inception and retrospectively nullified in the sense that it will be regarded as ever incapable of ever producing legal effects.” (Emphasis added)

Thus, even where an act of a public authority is ultra vires and a nullity, for remedial purposes the illegality must be established before a court. As stated by Wade and Forsyth, *Administrative Law*, 9th Ed., Indian Edition, 281:

“...the court will treat an administrative act or order invalid only if the right remedy is sought by the right person in the right proceedings”

This approach is reflected in the statement of Lord Radcliffe in *Smith v. East Elloe Rural District Council* [(1956) A.C. 736, 769-770] where he held:

“An order, even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.”

Wade and Forsyth, *Administrative Law*, (supra) page 304, after restating the above statement of Lord Radcliffe sets out the correct position as follows:

“This must be equally true even where the ‘brand of invalidity’ is plainly visible for there also the order can effectively be resisted in law only by obtaining the decision of the court. **The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council, without distinction between patent and latent defects.** Lord Diplock spoke still more clearly [*F Hoffmann-La Roch and C AG v. Secretary for Trade and Industry* (1975) A.C. 295 at 366], saying that

It leads to confusion to use such terms as ‘voidable’, ‘voidable ab initio’, ‘void’ or ‘a nullity’ as descriptive of the status of subordinate legislation alleged to be ultra vires for patent or for latent defects, before its validity has been pronounced on by a court of competent jurisdiction.” (Emphasis added)

This approach is consistent with the 'presumption of validity' according to which administrative action is presumed to be valid unless or until it is set aside by a Court [*F Hoffmann-La Roche and Co. AG v. Secretary of State for Trade and Industry* (1975) A.C. 295]. However, this 'presumption of validity' exists pending a final decision by the Court [Lord Hoffmann in *R v. Wicks* (1998) A.C. 92 at 115, Lords Irvine LC and Steyn in *Boddington v. British Transport Police* (1999) 2 A.C. 143 at 156 and 161, and 173-4].

This presumption applies to subordinate legislation, such as X6, as well. It is in this context that Lord Irvine LC in *Boddington v. British Transport Police* [(1999) 2 A.C. 143] held:

"The *Anisminic* decision established, contrary to previous thinking that there might be error of law within jurisdiction, that there was a single category of errors of law, all of which rendered decision ultra vires. No distinction is to be drawn between a patent (or substantive) error of law or a latent (procedural) error of law. An ultra vires act or subordinate legislation is unlawful simpliciter and, if the presumption in favour of its legality is overcome by a litigant before a court of competent jurisdiction, is of no legal effect whatsoever."

For all the foregoing reasons, the application of the Petitioners is dismissed without costs.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal