

**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 Mandamus and Prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**CA (Writ) Application No: 373/2015**

M. S. Shah Jahan,  
43/1, Galle Face Terrace,  
Colombo 3.

**PETITIONER**

1. K.A.Thilakaratne,  
Additional Secretary,  
Ministry of Housing and Construction.
  
2. W.K.K.Atukorale,  
Additional Secretary,  
Ministry of Housing and Construction.
  
3. Nimal Kotawelagedara,  
Commissioner of National Housing.
  
- 3A. S.A.Kollure,  
Commissioner of National Housing.

All Respondents at 'Sethsiripaya',  
Sri Jayawardenapura,  
Kotte, Battaramulla.

**RESPONDENTS**

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

**Counsel:** Ghazzali Hussain with Thushara Werapitiya for the  
Petitioner

Parinda Ranasinghe, P.C., Additional Solicitor General  
with Ms. Sabrina Ahamed, State Counsel for the  
Respondents

**Argued on:** 24<sup>th</sup> June 2020

**Written Submissions:** Tendered on behalf of the Petitioner on 8<sup>th</sup> July 2020

Tendered on behalf of the Respondents on 10<sup>th</sup> June  
2020 and 27<sup>th</sup> July 2020

**Decided on:** 24<sup>th</sup> August 2020

**Arjuna Obeyesekere, J**

By an amended petition dated 18<sup>th</sup> August 2016, the Petitioner has sought a Writ of Mandamus directing the Respondents to permit the Petitioner to pay the purchase consideration in respect of premises bearing assessment No. 43 1/1, Galle Face Terrace, Colombo 3, and a Writ of Prohibition preventing the Respondents from alienating the said premises to a third party.

This application has a long history, and it would be important to lay down the relevant facts at the outset, which I would endeavour to do, as briefly as possible.

By virtue of Deed of Transfer No. 1676 dated 1<sup>st</sup> July 1965, Edmund De Silva Guneratne had become the owner of premises No. 43, Galle Face Terrace, Colombo 3, on which a condominium property consisting of four units, bearing

assessment Nos. 43, 43/1, 43 1/1 and 43 2/1 had been constructed. With the introduction of the Ceiling on Housing Property Law No. 1 of 1973 (the CHP Law), any person who owned houses in excess of the permitted number of houses was required to declare *inter alia* the number of houses owned by such person, and the ownership of the houses that such person does not propose to retain. The said Edmund De Silva Guneratne is said to have declared to the 3<sup>rd</sup> Respondent, the Commissioner of National Housing, premises bearing assessment No. 43 1/1 (**the said premises**) as an excess house. At the time the said declaration was made in 1973, the tenant of the said premises had been Stephen Perera.

The Respondents state that as the information provided by the said Edmund De Silva Guneratne in the said declaration was inadequate, the Commissioner of National Housing had requested that a proper declaration be submitted. However, Edmund De Silva Guneratne had passed away on 9<sup>th</sup> December 1974, and it was left to his widow, Anna Louise Guneratne to submit the declaration with the relevant details.<sup>1</sup> By this time, the tenant of the said premises was N. Thiyagaraja.

Thiyagaraja is said to have executed a Power of Attorney in favour of the Petitioner permitting him to occupy the said premises, prior to leaving for India in 1983. By Deed of Transfer No. 409 dated 19<sup>th</sup> September 1986, Anna Louise Guneratne had sold premises bearing Assessment Nos. 43, 43/1 and 43 2/1 to the wife of the Petitioner, Mariam Beevi. Thus, by the latter part of 1986, the Petitioner and/or his wife was in occupation of the entire property.

It appears that the Petitioner has not handed over the said premises to Thiyagaraja on his return to Sri Lanka, resulting in Thiyagaraja instituting Case No. 16024L in the District Court of Colombo in 1992, seeking to eject the

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<sup>1</sup> Vide 'R2' – dated 9<sup>th</sup> May 1983.

Petitioner from the said premises. The said action had however been withdrawn in 1996 due to the plaint not containing a schedule of the land. In May 1998, the wife of the Petitioner is said to have rented out the said premises to Nihal Bogahalanda, with the rent being paid to the Petitioner.

There is no dispute among the parties that the said premises, i.e. 43 1/1, vested in the Commissioner of National Housing with effect from 13<sup>th</sup> January, 1974. By a notice marked 'R1' published in Gazette No. 1035 dated 3<sup>rd</sup> July 1998, in terms of Section 20(1) of the CHP Law,<sup>2</sup> the Commissioner of National Housing had called for claims in respect of the said premises. This Court has however not been apprised of the response received to 'R1'.

In terms of Section 12(2) of the CHP Law:

*“Any house vested in the Commissioner under this Law shall, if the Commissioner proposes to sell such house, be offered for sale, in the first instance, to the tenant, if any, of such house, and where the tenant does not accept such offer, the Commissioner may sell such house to any other person. Where any house vested in the Commissioner is at the time of vesting not let to a tenant, the Commissioner may sell such house to any person.”*

The Petitioner had made an application under Section 12(2) to purchase the said premises.<sup>3</sup> Pursuant to an inquiry held by the Commissioner of National

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<sup>2</sup> Section 20(1) reads as follows: “Where any house is vested in the Commissioner, the Commissioner shall, by notice published in the Gazette and in such other manner as may be determined by him, direct every person who was interested in such house immediately before the date on which such house was so vested to make, within a period of one month reckoned from the date specified in the notice, a written claim to the whole or any part of the price payable under this Law in respect of such house, and to specify in the claim-

- (a) his name and address,
- (b) the nature of his interest in such house,
- (c) the particulars of his claim, and
- (d) how much of such price is claimed by him.”

<sup>3</sup> Vide page 4 of 'R6'.

Housing, the Petitioner and the said Thiyagaraja had been informed by a letter dated 31<sup>st</sup> July 2002 marked 'R4' that a decision had been taken by the Commissioner of National Housing in terms of Section 12(2) to sell the said premises to Thiyagaraja. In other words, the Commissioner of National Housing had recognized that Thiyagaraja was the tenant of the said premises.

The Petitioner had challenged the said decision before the Board of Review, which had dismissed the said appeal having held that the tenant, Thiyagaraja had a better claim to the said premises than the Petitioner – vide 'R5'. The Petitioner had thereafter filed CA (Writ) Application No. 891/2005 seeking a Writ of Certiorari to quash 'R4' and 'R5'. By its judgment delivered on 19<sup>th</sup> November 2007, marked 'R6', this Court had upheld the decisions 'R4' and 'R5'. Even though the Petitioner had sought Special Leave to Appeal against 'R6', proceedings had been terminated before the Supreme Court subject to the following:

*“The order dated 31<sup>st</sup> July 2002 of the (Commissioner of National Housing) in favour of (Thiyagaraja) which was challenged in the Court of Appeal is not operative in view of the death of (Thiyagaraja). Hence, these proceedings are terminated without prejudice to any steps that may be taken for succession to the tenancy as referred above.”<sup>4</sup>*

The reference to '*referred to above*' is to the following sentence in the said Order – *“The question whether the daughter is entitled to succeed to the rights of tenancy, if any, of (Thiyagaraja) should be decided in terms of the applicable law being the Rent Act ...”*

Having conducted an inquiry in 2010 to determine the entitlement of the daughter of Thiyagaraja to succeed to the tenancy, the Commissioner of

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<sup>4</sup> Vide 'R7' - SC (Spl) L/A Application No. 369/2007; SC Minutes of 27<sup>th</sup> January 2009.

National Housing had rejected her claim on the basis that she had failed to establish her claim.<sup>5</sup>

By a letter dated 2<sup>nd</sup> September 2009,<sup>6</sup> Nihal Bogahalande had informed the Commissioner of National Housing of the fact that he had rented out the said premises from the wife of the Petitioner and conveyed his interest to purchase the said premises. The Commissioner of National Housing, probably realising that the Petitioner had no right to collect rent for the said premises as he was neither the owner nor the tenant of the said premises, had informed the said Nihal Bogahalanda to cease the payment of rent to the Petitioner, as the premises have been vested in the Commissioner of National Housing, and to deposit the said sum of money with the National Building Fund.<sup>7</sup>

The issue that has given rise to this application commenced in 2015, with the Commissioner of National Housing informing (a) the Petitioner, (b) Nihal Bogahalanda, and (c) the daughter of Thiyagaraja that they may submit offers by 15<sup>th</sup> June 2015 to purchase the said property.<sup>8</sup> I must reiterate at this stage that Section 12(2) of the CHP Law permits the sale of the vested premises to a third party only where the tenant does not accept the offer made by the Commissioner to purchase the property, or where there was no tenant at the time of vesting. None of the parties, namely the Petitioner, Nihal Bogahalanda, and the daughter of Thiyagaraja had objected to the decision of the Commissioner to call for bids to sell the property. The right of the Commissioner to sell the said property in the aforementioned manner has not been assailed before this Court.

It is not in dispute that while the Petitioner submitted an offer in a sum of Rs. 9,800,000, the offer of Nihal Bogahalanda had been for a sum of Rs. 9,500,000.

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<sup>5</sup> Vide letter dated 3<sup>rd</sup> June 2015, marked 'R15'.

<sup>6</sup> Vide 'R10.

<sup>7</sup> Vide letter dated 18<sup>th</sup> March 2011, marked 'R12'.

<sup>8</sup> Vide 'R15' – supra.

The Petitioner claims that the Commissioner of National Housing, by a letter dated 22<sup>nd</sup> June 2015 marked 'P6' informed him as follows:

*“your bid for the above premises has been accepted by me since it was the highest offer. With the acceptance of your bid you now enter into a legal contract with the Commissioner of National Housing leaving no room for litigation unless you violate the terms of settlement of the payment.*

*In terms of Government Financial Regulations, you are expected to make an initial deposit of Rs. One Million immediately and the balance sum may be paid within six months duration in favour of the Housing Development Authority.*

*Once you produce the receipt of initial payment to this Office, I do undertake to make the final order to vest this property either in your name or your spouse name, subject to the condition that the payment of balance sum of Rs. Seventy Eight Hundred Thousand (7.8 million) should be deposited within the stipulated period.”*

The complaint of the Petitioner in this application is that even though he received 'P6', and even though he was willing to make the payment, the Respondents refused to accept payment. It is in these circumstances that the Petitioner has filed this application, seeking the aforementioned Writ of Mandamus directing the Respondents to permit the Petitioner to pay the purchase consideration for the said premises.

I must observe that although 'P6' has been written on a letter head of the Ministry of Housing and Samurdhi, and contains a signature said to be that of the then Commissioner, who incidentally was due to resign as Commissioner

the next day,<sup>9</sup> 'P6' does not contain the designation of the writer, or the seal of the writer. The Respondents have stated that there has been a serious violation of the bidding process, in that the Petitioner has been given access to the bid of Nihal Bogahalanda, thereby enabling the Petitioner to decide the price that the Petitioner should offer, and violating the level playing field that must exist in a competitive tender. This is evident by the fact that the Petitioner has left the value of his bid blank on his offer letter marked 'R18'. The Respondents have alleged that the bids were opened only in the presence of the Petitioner and that the value has been filled subsequently by hand.

The Respondents have stated further that by 'P6', the Petitioner has in fact been asked to pay only Rs. 8.8m, whereas his bid, assuming that there is no irregularity, was Rs. 9.8m. All these irregularities have culminated in a complaint being made to the Commission to investigate allegations of Bribery and Corruption against the then Commissioner. It is on this factual basis that the Respondents resisted this application. I must also note that the offer of Nihal Bogahalanda is conditional, in that he had sought to set off from his offer price, *inter alia* the rent paid by him since 1998, to a party other than the Commissioner of National Housing.

I shall now consider the conditions that must be satisfied for a Writ of Mandamus to issue. The Supreme Court in Ratnayake and Others vs C.D.Perera and others<sup>10</sup> has held as follows:

*"The general rule of Mandamus is that its function is to compel a public authority to do its duty. The essence of Mandamus is that it is a command issued by the superior Court for the performance of public legal duty. Where officials have a public duty to perform and have refused to perform, Mandamus will lie to secure the performance of the public duty,*

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<sup>9</sup> Vide letter marked 'R20'.

<sup>10</sup> [1982] 2 Sri LR 451.



*in the performance of which the applicant has sufficient legal interest. It is only granted to compel the performance of duties of a public nature, and not merely of private character that is to say for the enforcement of a mere private right, stemming from a contract of the parties.”*

The above position has been reiterated in **Jayawardena vs. People’s Bank**<sup>11</sup> where it was held as follows:

*“Courts will always be ready and willing to apply the constitutional remedy of mandamus in the appropriate case. The appropriate case must necessarily be a situation where there is a public duty. In the absence of a public duty an intrusion by this Court by way of mandamus into an area where remedial measures are available in private law would be to redefine the availability of a prerogative writ.”*

The first issue that I must consider is whether the Respondents have a public duty to perform. The power of the Commissioner to sell any premises vested in him in terms of the CHP Law has been conferred by Section 12(2) of the CHP Law. Even though he has the power, there is no obligation on the part of the Commissioner to sell a house vested in him. However, where he decides to sell such a house, he is under a legal duty in the first instance to offer the said house to the tenant. As noted earlier, the Petitioner’s claim to have the said premises offered to him on the basis that he is the tenant of the said premises had been rejected by the Commissioner of National Housing. Therefore the Commissioner was not under a legal duty to offer the said premises to the Petitioner.

The tenant of the said premises at the time the declaration was made in 1983 was Thiyagaraja, and the Commissioner did in fact make an order in favour of

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<sup>11</sup> [2002] 3 Sri LR 17.

Thiyagaraja, which order was challenged in CA (Writ) Application No. 891/2005. However, after the death of Thiyagaraja, his successors have not been recognised as tenants, and therefore, the question of offering for sale the said house to *the tenant* does not arise.

The right of the Commissioner to sell the said premises to *any other person* arises only if the tenant does not accept the offer, or where at the time of vesting, the house was not let to a tenant. None of the said situations would apply in this instance, and therefore the Commissioner is not under a legal duty to sell the said premises to the Petitioner. In the absence of a legal duty, this Court cannot compel the Commissioner of National Housing by a Writ of Mandamus to sell the said premises to the Petitioner.

The situation that has arisen being outside the above two situations provided for in Section 12(2), the Commissioner, when he called for offers for the sale of the said premises has acted in the course of his general powers conferred by Section 12(2). Thus, while the source of his power was statutory, what followed thereafter was contractual. As held by the Supreme Court of India in **Air India vs Cochin International Airport Ltd**<sup>12</sup>, the “*award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction.*”

In **Court of Appeal (Writ Application) No. 866/2006**,<sup>13</sup> Sripavan J (as he then was) (with Sisira De Abrew J agreeing) has held as follows:

*“The next question that arises for consideration is whether a writ of mandamus would lie to compel the second to seventh respondents to evaluate the tenders in compliance with the tender condition. The general rule of mandamus is that its function is to compel a public authority to do*

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<sup>12</sup>Case No. Appeal (Civil) 3641 of 1998 - delivered on 31<sup>st</sup> January 2000

<sup>13</sup> CA Minutes of 14<sup>th</sup> June 2006

*its duty. The essence of mandamus is that it is a command issued by court for the performance of a public legal duty. It is granted to compel the performance of duties of a public nature and not merely of a private character, namely, for the enforcement of a private right stemming from the terms and conditions of the tender. The terms and conditions of the tender do not have the status of "law" and non-compliance with them could not be enforced by mandamus."*

I therefore take the view that the Petitioner cannot seek a public law remedy to enforce a purported right of a private character. In any event, given the aforementioned conduct of the Petitioner relating to the manipulation of the tender process, I am of the view that in any event, this is not a fit matter where the discretion of this Court should be exercised in favour of the Petitioner.

Taking into consideration the totality of the material placed before this Court, I see no legal basis to grant the Writs of Mandamus, and Prohibition prayed for in the petition. The application of the Petitioner is accordingly dismissed, without costs.

**Judge of the Court of Appeal**

**Mahinda Samayawardhena, J**

I agree

**Judge of the Court of Appeal**