DAYANANDA
v.
THALWATTE

COURT OF APPEAL.
JAYASINGHE, J.
JAYAWICKREMA, J.
MC NUWARAELIYA : 9616/97
CA 912/97
2nd DECEMBER, 1999.
1st FEBRUARY, 2000.
24TH MAY, 2000.

Primary Court Procedure Act - S. 66 - Petitioner declared entitled to possession - Steps under State Lands Recovery of Possession Act, 7 of 1979 - Prerogative writs - Failure to specify - Declaration that Magistrate had no jurisdiction - Can an application for Writ be combined with an application for Revision - Constitution Articles 133 and 140.

The Petitioner instituted proceedings under S. 66 Primary Courts Procedure Act alleging that, the Superintendent of the Estate attempted to interfere with the possession of the petitioner. The Primary Court made order that he was entitled to possession of the said land. Thereafter the Superintendent of the Estate instituted proceedings in the Magistrates Court in terms of Act 7 of 1979.

The Petitioner sought a declaration that the Magistrate's Court had no jurisdiction to hear and determine the matter and sought by way of certiorari and quo warranto to quash the decision of the 1st Respondent to evict the Petitioner and also to declare null and void the steps taken by the 1st Respondent. The application made to the High Court by the Petitioner was withdrawn, and an Application was made to the Court of Appeal to quash the decision by the 1st Respondent to institute proceedings in terms of Act 7 of 1979 and to declare that the quit Notice is of no avail or force, and for an order declaring that the Magistrates Court of Nuwara Eliya has no jurisdiction to hear the case.

Held :

(i) Application for Revision in terms of Article 138 and an application for writ of Quo Warranto, Certiorari and Prohibition under Article 140 cannot be combined as they are two distinct remedies.

(ii) Even though the Petitioner has set out in the caption that 'In the matter of an Application..... for Writs of Quo warranto and Prohibition' there is no supporting averment specifying the writ and there is no prayer as regards the writ that is being prayed for. The failure to specify the writ renders the Application bad in law.

(iii) The institution of proceedings in the Magistrates Court in terms of quit notice is not a determination affecting legal rights "warranting the issuance of a Writ of Certiorari.

It was open for the Petitioner to seek to quash the quit notice by way of certiorari when the determination was made by the 1st Respondent, or to move in Revision at the conclusion of the Magistrates findings.

APPLICATION for Revision and Writs of Quo Warranto, Certiorari and Prohibition under Article 140 of the Constitution.

Cases referred to :

1. *K. M. Karunarathne vs Ratnayake* - 1986 1 CALR 478
2. *Fernando vs University of Ceylon* - 58 NLR 285
3. *Wijesinghe vs Tharmaratnam* - Vol. IV - Sri Kantha Law Reports 47

I. S. de Silva with *Siddhi Daluwatte* for Petitioner.
Faiz Musthapha PC., with *Dr. Jayampathy Wickremaratne* for 1st Respondent.
Ms Murdu Fernando SSC for 2nd Respondent.

Cur. adv. vult.

September 29, 2000.
JAYASINGHE, J.

The Petitioner instituted proceedings in the Primary Court of Nuwara-Eliya under Section 66 of the Primary Courts Procedure Act; and alleged that the Superintendent of the Court Lodge Estate attempted to interfere with the possession of the Petitioner of the land morefully described in the schedule to this application, handed over to him for cultivation on a

profit sharing basis in June 1994. The learned Primary Court Judge made order that the Petitioner was entitled to possession of the said land and restrained the Udapussellawa Plantations Limited, the lessee its agents from interfering with the possession of the Petitioner. The Petitioner alleged that the 1st respondent wrongfully and unlawfully with a view of negating the order made by the learned Primary Court Judge instituted proceedings in the Magistrate's Court of Nuwara-Eliya seeking to eject the Petitioner in terms of the State Lands Recovery of Possession Act No. 7 of 1979 as amended. The petitioner thereafter instituted proceedings in the High Court of Kandy seeking a declaration that the Magistrate's Court had no jurisdiction to hear and determine the said action and sought by way of Writ of Certiorari and Quo Warranto an order to quash the decision of the 1st Respondent to evict the Petitioner and also to declare null and void the steps hither to taken by the 1st Respondent. The 1st Respondent filed objections to the said application: and contended that the High Court of Kandy did not have jurisdiction to hear and determine the said application: that the subject matter of the said application was outside the Provincial Council list in terms of Article 154(P) (4) (b) of the Constitution. Thereafter the Petitioner moved to with-draw the said application before the High Court of Kandy which was allowed. The present application is to quash the decision of the 1st Respondent to institute proceedings in terms of the State Lands Recovery of Possession Act No. 7 of 1979 as amended to eject the Petitioner and, to declare that the quit notice of 08.04.1997 is of no avail or force in law; for an order declaring that the Magistrate Court of Nuwara-Eliya has no jurisdiction to hear and determine this action; for an order staying proceedings pending before the Magistrate's Court of Nuwara-Eliya until the final determination of this application.

When this matter came up for argument on 02.12.1999 Mr. Musthapha, PC. raised a number of preliminary objections regarding the maintainability of this application. He contended that -

(i). an application for revision cannot be combined with an application for writ as they are two distinct remedies available to a party aggrieved.

(ii). that the Petitioner has failed to identify the writ he has sought from this Court.

(iii). that the prayer sought

a). to quash the decision of the 1st Respondent to institute proceedings in terms of State Lands Recovery of Possession Act and

b). to declare that the quit notice dated 08.04.1997 . . . is of no force or avail

are misconceived and unknown to the law and therefore neither relief could be granted.

Mr. I. S. de Silva for the Petitioner submitted that the contention of the 1st Respondent that to quash the decision to institute proceedings, one has to wait till the proceedings are instituted and that as in this instance only a decision to institute proceedings has been made and therefore writ does not lie is an argument that is not maintainable for the reason that an action has already been instituted in the Magistrate's Court of Nuwara-Eliya to eject the Petitioner and that the said action is pending. He submitted that it was during the pendency of this action that these proceedings were instituted to quash the decision of the 1st Respondent and to declare the said quit notice of no avail or force in law. He submitted that a party need not wait until legal proceedings are instituted to preserve his lawful rights. In *K. M. Karunaratne Vs. Ratnayake*[1] the Court of Appeal having held that there was a contract of tenancy, proceeded by way of writ of certiorari and quashed the quit notice on the ground that the said quit notice was not valid in law. In this case the Assistant General Manager of National Savings Bank a Competent Authority for the purpose of Government Quarters Recovery of Possession Act No. 7 of 1969 as amended gave notice to the Petitioner to vacate certain

premises occupied by him. The Petitioner in the said case challenged the quit notice on the ground that there was a tenancy agreement between the parties which was not covered by the said Act No. 7 of 1969. He submitted that in the present case the Respondent not only issued quit notice but also instituted action and the Petitioner has sought both to quash the proceedings that has already been instituted in the Magistrate's Court of Nuwara-Eliya and that can only be done by way of a writ of certiorari; that the Petitioner has also sought a declaration that the Magistrate's Court of Nuwara-Eliya has no jurisdiction. Mr. de Silva then submitted that even though it was contended that in the prayer of the Petition the word certiorari had not been specified and thus there is no basis for application of writ, an examination of the Petition would show both from the caption and the body of the Petition that the Petitioner has sought by way of writs of certiorari and quo warranto to quash the decision of the 1st Respondent to eject the Petitioner and to avoid all consequential steps taken by the 1st Respondent. Mr. de Silva while conceding that the words writ of certiorari does not appear in the petition submitted that there is clear proof of the fact that the Petitioner has sought to invoke the writ jurisdiction particularly by way of certiorari. He also submitted that Courts of England have from time to time held that an applicant might seek any of the five remedies of mandamus, certiorari, prohibition, declaration or injunction and that in *Fernando Vs. University of Ceylon*[2] Supreme Court has held that where a remedy by way of certiorari may not be available, Courts may intervene by way of a declaration or injunction notwithstanding the absence of a right of appeal.

Mr. Musthapha, PC. submitted in support of his argument that Revision and Writ Jurisdiction cannot be combined in that Writ Jurisdiction is original jurisdiction while Revisionary Jurisdiction is review jurisdiction. In *Wijesinghe Vs. Tharmaratnam*[3] the caption was as follows:-

"In the matter of an application for leave to appeal under Section 156(2) of the Civil Procedure Code and/or for the

exercise of the revisionary powers under Section 753 of the said Code." Paragraph 18 of the petition of the above case stated that "in the circumstances aforementioned it is respectfully urged that Your Honours Court be pleased to grant relief to the Defendant-Petitioner by exercising the revisionary powers vested in Your Honours Court in the event that Your Honours Court is pleased to maintain that the Defendant-Petitioner is not able to maintain an application for leave to appeal in this matter." A preliminary objection was raised in appeal that an application for leave to appeal cannot be joined together with an application for revision. It was also urged that stamps furnished have been only for the leave to appeal application and none for the application for revision. The Court did not proceed to make a determination on the objections taken namely, as to misjoinder and the consequent understamping. Jameel, J. expressed the view that "these two objections are not devoid of merit but they could await a fuller argument in an appropriate case. Mr. Musthapha, P. C. relying on the above case submitted that the two applications cannot be joined for the reason that different criteria applies for stamping. Mr. Musthapha then submitted that since Mr. De Silva conceded that writ jurisdiction cannot be combined with revisionary jurisdiction the present application could be dismissed on this ground alone.

Mr. Musthapha then submitted that the Petitioner has failed to specify the writ he was seeking even though in the caption he has referred to quo warranto, certiorari and prohibition, there is no reference made to any of these writs either in the body of the application or in the prayer. He submitted that in England due to the confusion resulting from the need to identify a specific writ an important reform was made in 1997 with the introduction of a new form of procedure known as The Application for Judicial Review. In the Administrative Justice Report of the Committee of the Justice - all Souls Review of Administrative Law in the UK laid down the procedural innovation vide order 53 of the Rules of the Supreme Court -

"An important reform was made in 1977 with the introduction of the new form of procedure known as 'the application for judicial review'. The change had been proposed in 1976 by the Law Commission of England and Wales in Remedies in Administrative Law (Law Com. No. 73 Cmnd. 6407). Earlier Commonwealth precedents were Ontario's Judicial Review Procedure Act, 1971 (now Revised Statutes of Ontario 1980 c. 224), and New Zealand's Judicature Amendment Act, 1972 as subsequently amended. The Australian Parliament in 1977 enacted the Administrative Decisions (Judicial Review) Act, though not proclaimed until 1 October 1980."

The learned President's Counsel referred to A. A. De Smith in **Judicial Review of Administrative Action 4th Edition at Page 568** "On an application for judicial review made under order 53 of the Supreme Court Rules it is now possible for a Court to award in a single proceeding any one or more of the prerogative orders of certiorari, prohibition or mandamus, declaration or an injunction. This was a reform enacted in England by an amendment to the rules by which a specific remedy known as an Application for Judicial Review stated above was introduced to avoid having to specify a writ. However in the absence of such a procedure in Sri Lanka the omission to specify the writ is a fatal irregularity and Mr. Musthapha submits that a bald prayer to quash the decision of the 1st Respondent to institute proceedings in terms of State Lands Recovery of Possession Act is misconceived and cannot be granted. Similarly the prayer to declare the quit notice dated 08.04.1997 as of no force or avail is also misconceived as a fatal error for the same reason.

Mr. Musthapha also submitted that in order to obtain certiorari there must be a determination affecting legal rights. The institution of proceedings in the Magistrate's Court in terms of a quit notice is not a determination affecting legal rights.

I have very carefully considered the submissions of the learned President's Counsel and Mr. I. S. de Silva. I hold that the application for revision in terms of Article 138 and on application for Writs of Quo Warranto, Certiorari and Prohibition under Article 140 of the Constitutions cannot be combined as they are two distinct remedies available to an aggrieved party and for that reason the Petition is fatally flawed. The Petitioner has failed to aver the basis for his entitlement why he is invoking the writ jurisdiction of this Court. Nor has the Petitioner averred in his Petition that he is seeking to invoke the Revisionary Jurisdiction of this Court. The Petitioner in paragraph 13 of his Petition has only stated that the " . . . aforesaid matters constitute exceptional circumstances and grounds warranting the invocation of the jurisdiction of Your Lordships Court." This averment is vague indistinct, ambigious and without a legal basis and therefore cannot be maintained. Mr. I. S. de Silva did concede that revisionary jurisdiction cannot be combined with writ jurisdiction.

An aggrieved person who is seeking to set aside an unfavourable decision made against him by a public authority could apply for a prerogative writ of certiorari and if the application is to compel an authority to perform a duty he would ask for a writ of mandamus and similarly if an authority is to be prevented from exceeding its jurisdiction the remedy of prohibition was available. Therefore it is necessary for the Petitioner to specify the writ he is seeking supported by specific averments why such relief is sought. Even though the Petitioner has set out in the caption that "In the matter of an application . . . for writ of quo warranto and prohibition" there is no supporting averment specifying the writ and there is no prayer as regards the writ that is being prayed for. The failure to specify the writ therefore renders the application bad in law.

The learned President's Counsel's objection that the institution of proceedings in the Magistrate's Court in terms of the quit notice is not "a determination affecting legal rights"

warranting the issuance of a writ or certiorari is well founded. It was open for the Petitioner to seek to quash the quit notice by way of ceriorari when the determination was made by the 1st Respondent or to move in Revision at the conclusion of the Magistrate's finding.

The preliminary objections of the learned President's Counsel is sustained. I am unable to grant the relief prayed for by the Petition.

Application is dismissed with costs fixed at Rs. 5000/-.

JAYAWICKRAMA, J. - I agree.

Application dismissed