

**SHUMS**  
v.  
**PEOPLE'S BANK AND OTHERS**

COURT OF APPEAL.

H. A. G. DE SILVA, J. AND T. D. G. DE ALWIS, J.

C. A. APPLICATION 1968/79.

SEPTEMBER 28 AND NOVEMBER 26, 1984.

*Writ of Certiorari—Determination to acquire and vesting order under Finance Act No. 11 of 1963 (s 71)—Preliminary objections of delay and invalidity of suit against official (not a juristic person) by official designation and not by name.*

To an application for a writ of certiorari to quash the determination and vesting order made under the Finance Act No. 11 of 1963 (for the purposes of redemption of land sold on a mortgage decree) two preliminary objections were taken :

(1) This application was made on 15th November 1979 whereas the determination had been made on 18.1.1977.

(2) The Minister of Finance who is not a juristic person had been made a party by official designation and not by name.

**Held —**

(1) The determination made on 18.1.1977 was communicated to the petitioner only on 2.8.1979. The vesting order was made on 11.7.1979. There has been undue delay by the 1st respondent in communicating his determination and in making the vesting order. In all the circumstances the objection of delay by the petitioner cannot succeed.

(2) In an application such as this in which writs of certiorari have been prayed for, the Minister of Finance could be cited as a respondent nomine officii. In an application for certiorari (unlike mandamus) it is the decision or order of a functionary or tribunal that is sought to be quashed. The functionary or tribunal is not ordered to do anything or refrain from doing anything.

**Cases referred to :**

- (1) *President of Malalgodapitiya Co-operative Society et al v. Arbitrator of Co-operative Societies, Galle et al* (1949) NLR 167.
- (2) *Dissanayake v. Fernando* (1968) 71 NLR 356.
- (3) *Gunasekera v. Weerakoon* (1970) 73 NLR 262.
- (4) *Ratnayake v. Jayasinghe* (1975) 78 NLR 35.
- (5) *The Land Commissioner v. Ladamuttu Pillei* (1960) 62 NLR 169.
- (6) *Leo v. Land Commissioner* (1955) 57 NLR 178.

- (7) *David v. Abdul Cader* (1963) 65 NLR 253.
- (8) *A. C. M. Haniffa v. Chairman, Urban Council, Nawalapitiya* (1963) 66 NLR 48.
- (9) *Rex v. Electricity Commissioners* [1924] 1KB 171.
- (10) *Rex v. Income Tax Commissioner* 21 QBD 313.
- (11) *White and Collins v. Minister of Health* [1939] 3All ER 548.
- (12) *Errington v. Minister of Health* [1953] 1KB 249.
- (13) *Franklin v. Minister of Town and Country Planning* [1948] AC 87.
- (14) *Singho Mahatmaya v. The Land Commission* (1964) 66 NLR 94.
- (15) *P. M. Walter Leo v. The Land Commissioner* (1959) 57 NLR 178.

APPLICATION for Writs of Certiorari.

*Nimal Senarayaka, P. C. with Miss S. M. Senaratne* for petitioner.

*Dr. J. A. L. Cooray with M. B. Peramuna* for 1st respondent.

*S. Phasena, State Counsel* for 2nd respondent.

*Cur. adv. vult.*

March 8, 1985.

**H. A. G. DE SILVA, J.**

This is an application for orders in the nature of writs of certiorari to quash (1) the determination made by the 1st respondent to acquire premises No. 353, Galle Road, Katukurunda, Kalutara South under the provisions of section 71 (4) of the Finance Act No. 11 of 1963, and (2) the Vesting Order No. 42 made by the 2nd respondent in respect of the said premises and published in Government Gazette Extraordinary No. 44/11 of 11th November 1979.

In this application which was filed on 13th November 1979, the petitioner averred that the said premises had been purchased by her father at a Court's sale, held in execution of a Mortgage Decree entered in D. C. Kalutara case No. 30585 and obtained a Fiscal's Conveyance in 1957; the petitioner became the owner of the said premises under a Deed of Gift No. 105 of 21st May 1968; the 3rd, 4th and 5th respondents had made an application under section 71 (1) of the said Finance Act to the 1st respondent for redemption of the said premises; inquiry into that application was held on 12th November 1975, 27th February 1976 and thereafter adjourned for 7th July 1976; on 7th July 1976 neither the petitioner nor her counsel were present and she had sent by registered post a medical certificate on 6th July 1976 (vide 'B'); in the petitioner's absence the

inquiry had been held *ex parte*, a fact which the petitioner was unaware of, nor had she been informed that her application for a postponement had been refused. •

The petitioner goes on to aver that she received from the Manager, Land Redemption Department of the 1st respondent with reference to the letter sent by the petitioner on 2nd July 1976, letter dated 14th October 1976 ('C') that if the petitioner objects to the redemption of the said property under the provisions of the Finance Act, the petitioner should submit her reasons in writing to reach the said Manager on or before 15th November 1976; her attention was invited to the earlier letter ('C') by ('D') of 8th November 1976; on 12th November 1976, the petitioner had submitted her objections to the proposed redemption in letter ('E') and no further communication had been received by her till she received a notice dated 18.1.79 ('I') of acquisition under section 71(4) of the said Act that the 1st respondent had determined that the said premises shall be acquired in terms of the provisions of Part VIII of the said Act; thereafter the petitioner received a notice ('J') dated 2nd August 1979 from the Manager of the 1st respondent's Land Redemption Department, that in terms of section 71 (4) of the said Act, the 2nd respondent had vested the said premises in the 1st respondent from 3rd July 1979 as set out in Gazette ('K') of 11th July 1979; on 2nd October 1979, the petitioner received a notice from the authorized officer of the 1st respondent that the premises will be taken over by the 1st respondent on 22nd November 1979 ('L').

The 1st respondent in his statement of objections avers that the medical certificate sent on 6th July 1976 was received by the 1st respondent at 1.30 p.m. on 7th July 1976 after the termination of the inquiry and hence for that reason the application for a postponement of the inquiry was refused; the objections of the petitioner to the proposed acquisition of the said property were duly considered by the 1st respondent before the determination was made to acquire the said property; the determination marked ('I') was made on 18th January 1977, by the 1st respondent after duly considering the memorandum of the Manager of its Land Redemption Department.

The 1st respondent further averred that the petitioner came into occupation of the premises after she was noticed by the 1st respondent to appear at the inquiry to be held on 12.11.75 with regard to the proposed acquisition.

The 3rd, 4th and 5th respondents have filed their statement of objections, but a consideration of their statement is not necessary for the matters that come for decision at this stage.

Learned Counsel for the respondents have taken up certain preliminary objections, the first of which is that this court will not exercise its discretion to grant the relief prayed for as there has been a delay in seeking such relief.

Learned Counsel for the respondents advert to the fact that according to the 1st respondent's statement of objections the determination under section 71 (3) of the Finance Act No. 11 of 1963 has been made on the 18th January 1977 while this application has been filed in this court only on 15th November 1979. i.e. after the lapse of a period of 2 years and 10 months. It is a well-known principle that a writ of Certiorari which is a discretionary remedy will not be granted where there has been undue delay in applying for the writ. In *President of Malalgodapitiya Co-operative Society et al v. Arbitrator of Co-operative Societies, Galle et al* (1) a period of nine months was held to constitute undue delay which prevented the petitioners from obtaining relief by way of a writ of certiorari. In *Dissanayake v. Fernando* (2), it was held that "where there has been a delay in seeking relief by way of certiorari, it is essential that the reasons for the delay should be set out in the papers filed in the Supreme Court". In this instance the delay was a period of one year and 3 months. *Gunasekera v. Weerakoon* (3) held that a delay of 7 months in applying for a writ of certiorari and mandamus was undue delay which disentitled the petitioner to the reliefs sought while in *Ratnayake v. Jayasinghe* (4), it was held that "the delay of one year and 3 months which had not been satisfactorily explained by the petitioner barred the remedy. The court has a discretion which it would exercise to refuse the application on the ground that there had been undue delay in bringing the proceedings".

The facts of the instant case show that an inquiry into the application to the 1st respondent for redemption was held on 12.11.75, 27.2.76 and 7.7.76. Thereafter on 14.10.76 and 8th November 1976 the objections to the redemption were called for to be submitted on or about 15th November 1976. It appears that the determination was made by the 1st respondent on 18th January 1977 but was communicated to the petitioner only on 18th January

1979. The vesting order which was gazetted on 11th July 1979 was communicated to the petitioner on 2nd August 1979, and on 2nd October 1979 the petitioner was informed that possession of the premises would be taken over by the 1st respondent on 22nd November, 1979.

This application is for writs of certiorari to quash both the determination of the 1st respondent as well as the vesting order made on 11th July 1979 by the 2nd respondent.

Section 71 (3) of the Finance Act No. 11 of 1973 empowers the 1st respondent to make a determination whether premises should be acquired or not for the purposes of the Act and sub-section 4 requires the 1st respondent, once it has so determined to notify such determination to the owner of such premises. Though the determination in the instant case has been done as far back as 18th January 1977, it has been communicated to the petitioner only two years later. There has been an undue delay on the part of the 1st respondent to comply with the provisions of the Act. In these circumstances a delay of 10 1/2 months in the petitioner applying for a writ to quash the said determination cannot be said to be unreasonable. Further even after such communication of the determination, it has taken a further six months for the 2nd respondent to make the vesting order and the petitioner has come into court in about four months of the date of vesting. I do not think this delay could be said to prevent the petitioner from obtaining her relief especially as the vesting order too was communicated to her on 2nd August 1979 and it was on 2nd October 1979 that she was informed of the taking over of possession on 22nd November 1979. In these circumstances I hold that this preliminary objection fails and I overrule it.

The second objection taken to the hearing of this application by learned Counsel for the 2nd respondent is that the 2nd respondent has been cited in this application by his official designation and not by name. It was his contention that since the Minister of Finance has not been cited by name, a necessary party was not before court and this being a fatal omission, the application should be dismissed in limine. He submitted that writs operated in personam.

The Minister of Finance was, according to learned State Counsel, not a juristic person. He was not a corporation sole and hence could not be cited *nomine officii*. In support of this proposition he relied on the case of *The Land Commissioner v. Ladamuttu Pillai*, (5) where it was *inter alia* held that the Land Commissioner was not a Corporation sole and that if the authority of a Land Commissioner to make a determination under section 3 of the Land Redemption Ordinance No. 61 of 1942 is challenged the appropriate procedure is by way of an application for *certiorari*.

This was an action instituted in the District Court against the Attorney General and the Land Commissioner claiming an injunction restraining the defendants jointly, or in the alternative from taking steps under the Land Redemption Ordinance to acquire the plaintiff's land.

Lord Morris, who delivered the judgment of the Privy Council, at page 182 states :

..... their Lordships consider that if the authority of a Land Commissioner to make a determination under section 3 of the Land Development Ordinance is challenged the appropriate procedure is by way of an application for *certiorari* (see *Leo v. Land Commissioner (supra)*). The Land Commissioner as the judicial tribunal the validity of whose action is being tested may then conveniently be brought before the higher court so that if necessary his decision or order may be brought up and quashed. If in some particular case it can be shown that a determination has not been within the competence of a Land Commissioner and if an application is made which results in an order to bring up and quash his determination then the difficulties which the present proceedings bring into relief are avoided. It was Mr. Amarasinghe who was the Land Commissioner in July, 1949, when these proceedings began and whose proxy was filed and on whose behalf an Answer was presented. If a declaration were now to be made—who would be bound? If an injunction were to be granted—who would be enjoined? It was sought to be said that the Land Commissioner is a Corporation Sole. Their Lordships do not find support for this view in the provisions of the Land Development Ordinance of 1935..... The Land Commissioner is not expressly created a Corporation Sole by any legislative enactment nor is it laid down that he may sue or be sued in a corporate name. Furthermore no

legislative enactment seems to reveal any intention to incorporate. . . . . If there had been a desire to incorporate the Land Commissioner there could have been express words of incorporation . . . . . All these considerations including the absence of any evident intent to incorporate, lead Their Lordships to reject the submission that the Land Commissioner can be regarded as a Corporation Sole".

A careful consideration of the principles set out in that case would show that Their Lordships while holding that the Land Commissioner was not a corporation sole and could not be joined as a party to that action *nomine officii* have given their reasons therefor when they said—

"If a declaration were now to be made—who would be bound? If an injunction were to be granted—who would be enjoined?" It appears that by the time that the action came to trial the holder of the office of Land Commissioner was not the same person as the holder at the relevant dates. Therefore one could see the procedural difficulties that could arise if the relief prayed for were granted against a "Land Commissioner". If the injunction was disobeyed or violated who would have been charged for contempt of Court? It is significant that Their Lordships stated "If in some particular case it can be shown that a determination has not been within the competence of a Land Commissioner and if an application is made which results in an order to bring up and quash his determination then the difficulties which the present proceedings bring into relief are avoided". "The application to bring up and quash" would be in a *Certiorari* proceeding in which event impliedly the "Land Commissioner" *nomine officii* could be made a party.

In *David v. Abdul Cader* (7) it was held that "Under the Urban Council Ordinance, the Chairman is himself the local authority in connection with granting of licences for cinema performances. The granting or withholding of such licences is his personal responsibility, and his acts are not those of the Council which is a Corporation, nor is he a Corporation for the purpose of the duties. It follows that, if the law does recognise a right of action against him in any circumstances arising out of a breach of these duties, whether or not a breach accompanied by bad faith or malice, the only way in which he can be sued is as an individual person, and there is no relevant distinction in his status as a party between his official capacity and his personal capacity . . . . . Accordingly, an action claiming damages for delict

is available against the Chairman, Urban Council in his personal capacity if he maliciously refuses, as a public authority, to exercise his statutory power . . . . .” This case does not in my view support the contention of the learned State Counsel as this was a case for damages for a delict and the Privy Council held that there was no relevant distinction in his status as a party, between his official capacity and his personal capacity and that though he acted as the Chairman of the Urban Council in refusing to grant a licence in bad faith or maliciously, he still could be sued in his own name.

The other cases relied on by learned State Counsel were all cases where writs of Mandamus had been applied for. In *A. C. M. Haniffa v. Chairman, Urban Council, Nawalapitiya* (8), it was held that “A Mandamus can only issue against a natural person who holds a public office. Accordingly in an application for a writ of Mandamus against the Chairman, Urban Council, the petitioner must name the individual person against whom the writ can issue”. The judgment in that case gives a reason why a Mandamus can only issue against a natural person, who holds a public office when it says that “If such a person fails to perform a duty after he has been ordered by Court, he can be punished for contempt of Court”. On the other hand in the case of a writ of Certiorari, what this court does is to bring up a decision or determination of a statutory Tribunal or a functionary and quash it. Once such a decision or determination is quashed, it ceases to exist and a fresh decision or determination would have to be made if the matter is again proceeded with. The tribunal or functionary is not enjoined to do anything or desist from doing anything, the question of non-compliance with such Orders resulting in contempt of court does not arise. Therefore it would be seen that the remedy by way of writ of Certiorari could not be equated to one of Mandamus as far as the effect on the parties is concerned.

Learned Counsel for the petitioner has cited a number of English cases such as *Rex v. Electricity Commissioners*, (9) ; *Rex v. Income Tax Commissioner*, (10) ; *White and Collins v. Minister of Health*, (11) ; *Errington v. Minister of Health* (12) ; *Franklin v. Minister of Town and Country Planning* (13) ; which were all cases of applications for Writs of Certiorari and the Statutory functionaries were cited *nomine officii*.



In *Singho Mahatmaya v. The Land Commissioner*, (14), it was held that "In an action instituted against the Land Commissioner for the purpose of obtaining from the court a declaration that a certain land was not liable to be acquired in terms of the Land Redemption Ordinance—(i) that the Land Commissioner cannot be regarded as a Corporation sole and, therefore, cannot be sued *nomine officii* and (ii) that the appropriate remedy of the plaintiff was by way of an application for *Certiorari*". In *P. M. Walter Leo v. The Land Commissioner* (15), it was held *inter alia* that "A writ of *Certiorari* is available against the Land Commissioner if purporting to act under the Land Redemption Ordinance, he orders the compulsory acquisition of property that is not "agricultural land" within the meaning of sections 3(1) and 8 of that Ordinance".

I am therefore of the view that in an application such as this in which writs of *Certiorari* have been prayed for, the Minister of Finance, whose vesting order is sought to be quashed could be cited as a respondent *nomine officii*. I hold therefore that this preliminary objection also fails with the result that the hearing of the application should be proceeded with.

**T. D. G. DE ALWIS, J. – I agree.**

*Preliminary objections overruled and case sent back for hearing.*

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