REV. MAUSSAGOLLE DHARMARAKKITHA THERO AND ANOTHER
vs
REGISTRAR OF LANDS AND OTHERS

COURT OF APPEAL.
SRIPAVAN, J AND.
SISIRA DE ABREW, J.
CA 1152/2004.
MARCH 17, 2005.

Writs of certiorari and mandamus –Registration of Documents Ordinance, sections 26(1) and 36(1)(a), 38 –Alienation of Sangika property – Refusal by Registrar to register deed –Alternative remedy not exercised – Maintainability of the application ? – Laches ? – Is it fatal ? Sangika property – Gihi Santhaka property - Distinction

One N donated the property in question to the 2nd petitioner – priest (P1) : the 2nd petitioner priest donated the said property to the 1st petitioner priest (P4) both deeds were attested by the 3rd respondent; when the 3rd Respondent presented the latter deed (PA) for registration the Registrar acting under section 36(a) of the Registration of Documents Ordinance refused to register the said deed.

The petitioner sought to quash the said decision of the 1st respondent, Registrar of Lands and further sought a writ of mandamus compelling the 1st respondent to register the said deed.

Held :

(1) When N gifted the property by P1 she gifted the property to the 2nd petitioner and the Maha Sanga as Sangika property as per the deed ; as the 2nd petitioner derived his title from deed P1 the respondent Registrar of Lands could refuse to register the said deed under section 36(1)(a). The 1st respondent had reasons to suspect that the person who presented P4 for registration was not a person who was authorized by the Ordinance.

(2) The petitioner had a right of appeal against the decision of the 1st respondent –section 38(1). The petitioners have not used the alternative remedy –it is fatal. The petitioners have slept over their rights for 8 1/2 years.

(3) Sangika dedication is not the only mode of acquisition of property of a temple. A temple could acquire property by the ordinary modes of acquistion without a ceremony conducted according to the Vinaya.

APPLICATION for a writ of certiorari/mandamus,

Cases referred to :

(1) *Gunasekera* vs. *Weerakoon* 73 NLR 262
(2) *Baldwin & Francis Ltd vs. Patent Appeal Tribunal and others* (1959) 2 ALL 433
(3) *Rodrigo* vs. *Municipal Coundil of Galle* 49 NLR 89
(4) *Obeysekera* vs. *Abeysekera and Others* 78-79 2 SLR 220
(5) *Jayaratne* vs. *Assistant Commissioner of Agrarian Services* 1996 2 Sri LR 70
(6) *Sarath Hulangamuwa* vs. *Siriwardane* –Principal, Vishaka Vidyalaya and another 1986 1 Sri LR 275
(7) *Biso Menika* vs. *Cyril Alwis* (1982) 1 Sri LR 368
(8) *Hopman and others* vs. *Minister of Lands and Land Development and others* 1994 2 Sri LR 240
(9) *Regina vs. Aston University Senate* (1969)2 Q·3538 at 555
(10) *Kampane Gunarate Thero vs Mawadawila Pannasena Thero* 1998 2 Sri LR 196
(11) *Ven. Omare Dharmapala Thero vs. Rajapaksage and others* 2004 1 Sri LR 1

Chandraratne for Petitioner,

M. N. Idroos, State Counsel for respondent.

Cur. adv. vult.

May 02, 2005
SISIRA DE ABREW J.

This is an application for writs of certiorari and mandamus. Facts of this case may be summarized as follows :

Baba Nona, by deed No. 3000 dated 15th March 1994 attested by the 3rd respondent marked P1, donated the property described in the said deed to the 2nd Petitioner who was a priest. The 2nd Petitioner by deed No. 3062 dated 01st February 1995 attested by the 3rd Respondent marked P4, donated the said property to the 1st Petitioner. When the 3rd Respondent, the Notary Public, presented P4 for registration the 1st respondent, the Registrar of Lands, Gampaha, acting under section 36(1)(a) of the Registration of Documents Ordnance hereinafter referred to as the ('said Ordinance') refused to register the deed P4. The 1st Respondent

communicated his decision to the 3rd Respondent by his letter dated 06.07.1995 (P8). The Petitioners are now seeking to quash the said decision of the 1st Respondent contained in P8 by way of a writ of certiorari. The petitioners are also seeking a writ of mandamus compelling the 1st Respondent to register the said deed P4 in the relevant registers of the Land Registry of Gampaha.

It is necessary to examine section 36 (1) (a) of the said Ordinance since the 1st Respondent has acted under this section. Section 36(1)(a) of the said Ordinance reads as follows :

"A registrar may, if he thinks fit, refuse to register an instrument,

(a) Where he has reason to suspect that the person presenting the Instrument for registration is not a person who is authorized by this Ordinance to present it for registration, until such person proves his right to present it for registration".

"A person who is authorized by the Ordinance" is described in section 26(1) of the said Ordinance. Section 26(1) of the said Ordinance reads as follows :

"An instrument may be presented for registration by

(a) any person executing the instrument :
(b) any person claiming any interest or benefits thereunder
(c) any person having any interest in or charge on any property affected thereby ; or
(d) the agent of any such person or an Attorney-at-Law or Notary, acting on behalf of any such person."

In the case before us the 2nd Petitioner is the donor and the 1st Petitioner is the donee of the property described in P4. Therefore Petitioners can be categorized as persons described in paragraphs (a), (b) and (c) of section 26(1) of the said Ordinance. When the 3rd Respondent, the Notary Public presented the deed for registration it is clear that he acted on behalf of the 1st and the 2nd Petitioners. This position is very clear when section 26 (1) of the said Ordinance is examined. It is now necessary to consider whether the 1st Respondent had reasons to suspect that the person, who presented the deed marked P4 for registration, was not a person who was authorized by the said Ordinance.

At the hearing of this application, learned Counsel for the Petitioners and the Respondents admitted that Sangika Property cannot be alienated which is the true position. When Baba Nona gifted the property by deed marked P1, she gifted the property to the 2nd Petitioner and Maha Sanga as Sangika Property. This conveyance is written in the deed marked P4. According to deed No. 3062 (P4) the registration of which was refused by the 1st Respondent, the 2nd Petitioner derived title to the property from deed marked P1. According to P1 Baba Nona gifted the property to the 2nd Petitioner and Maha Sanga. Considering these facts, when deed P4 was presented for registration, the 1st Respondent had reasons to believe that this property was Sangika property and as such he (the 1st Respondent) had reasons to suspect that the 3rd respondent who presented P4 for registration, was not a person authorized by this Ordinance.

When the 1st Respondent had reasons to suspect that the 3rd Respondent was not authorized to present P4 for registration ; specially after P8, the letter refusing registration, was sent to the 3rd Respondent, it becomes the duty of the 3rd Respondent who acted on behalf of the 1st and the 2nd Petitioners to prove his right to present deed P4 for registration. There in no evidence before this Court that the 3rd Respondent proved such right.

In view of the above facts, I hold that the refusal by the 1st Respondent to register deed P4 in the relevant registers of the Land Registry, which decision is contained in P8, is correct and the 1st Respondent has acted within the ambit of Law. Therefore the Petition of the Petitioners should fail on this ground alone.

The Petitioners had a right of appeal against the decision of the 1st Respondent contained in P8. This right has been given to them under section 38(1) of the said Ordinance. The learned Counsel for the Petitioners contended that the Petitioners were unaware of the decision made by the 1st Respondent refusing to register the deed P4. The Commissioner of Buddhist Affairs, by his letter dated 16.06.1995 marked P7, informed the 3rd Respondent a copy of which was sent to the 1st Petitioner that transfer of property by deed No. 3062 (P4) could not be approved since the property was Sangika property. The petitioners, in their petition have admitted this position. Therefore it is safe to conclude that the 1st petitioner was aware of the decision of the Commissioner of Buddhist Affairs who is the 2nd respondent. Then it was within the knowledge of the 1st Petitioner that the

1st Respondent was going to refuse the registration of deed P4. For these reasons, I am unable to agree with the above contention of the learned Counsel for the Petitioners.

In view of the above facts it is clear that the Petitioners have not used the right of appeal given to them under section 38 (1) of the said Ordinance. The Petitioners have, therefore, not used the alternative remedy available to them.

In the case of *Gunasekera Vs. Weerakoon*[1] the petitioner applied for writs of certiorari and mandamus to enhance the compensation awarded to him seven months after the impugned decision. Sirimanna J held that the application should be refused because (a) the petitioner was guilty of undue delay in making the application ; and (b) the petitioner had an alternative remedy.

In the House of Lords Case of *Baldwin & Francis Ltd. Vs. Patents Appeal Tribunal and Others*[2] Lord Denning remarked as follows :

> "I am prepared to assume that the appellants are aggrieved, but as they have another remedy open to them, the Court in its discretion, should refuse a certiorari".

In the case of *Rodrigo Vs. The Municipal Council Galle*[3] it was held that the writ of mandamus would not lie for the reason that the petitioner had an equally effective remedy by civil action.

In the case of *Obeysekera Vs. Abeysekera & others*[4] Soza J. stated that "certiorari is a discretionary remedy and will not normally be granted unless and until the plaintiff has exhausted other remedies reasonably available and equally appropriate".

Since the Petitioners have not made use of the alternative remedy available to them, I hold that the Petitioners are not entitled to the relief claimed.

The petition of the Petitioners was first filed in this Court on 20.05.2004. The petitioners, by this application, seek to quash a decision taken in July 1995 (P8). Thus the Petitioners have invoked the jurisdiction of this Court after a lapse of 8 1/2 years. Therefore it is necessary to consider whether

the Petitioners are guilty of undue delay. The 1st Petitioner alleges that the delay in filing this application was due to his studies. He completed his Post Graduate Diploma in 1998 ; and followed a masters degree during 1998 to 2000. From 2000 to 2003 he was engaged in Thripitaka Dharma and meditation. As pointed out earlier when Commissioner of Buddhist Affairs informed him by letter dated 16.06.1995 (P7) that the transfer of property by deed No. 3062 (P4) could not be approved ; it was within his knowledge that the 1st respondent was going to refuse the registration of the deed (P4).

In view of the above facts it is difficult to believe that he was unaware of the decision of the 1st Respondent. On receipt of P7, the 1st Petitioner would have made inquiries from the 3rd Respondent, for that matter I must state here that any ordinary person would have made inquiries from the Notary Public. There is no evidence before this Court that in the year of 1995 he was engaged in studies. Then the question arises why he did not move this Court to quash the decision of the 1st respondent during the latter part of the year 1995. I am unable to agree with the contention that the 1st Petitioner could not come to this Court due to his studies. In my view, the 1st Petitioner has slept over his rights for 8 1/2 years. No evidence whatsoever was placed before this Court to justify the delay on the part of the 2nd Petitioner. For the above reasons, I hold that the Petitioners are guilty of undue delay. In the case of *Jayaweera* Vs. *Assistant Commissioner of Agrarian Services*[5] Jayasuriya J. remarked, "A petitioner who is seeking relief of a writ of certiorari is not entitled to relief as a matter of course, as a matter right or as a matter of routine. Even if he is entitled to relief, still the Court has a discretion to deny him relief having regard to his conduct, delay laches, waiver, submission to jurisdiction–are still valid impediments which stand against the grant of relief". Jayasuriya J. refused the application for writ of certiorari as there was a delay of over 2 1/2 years since making the order challenged.

In the case of *Sarath Hulangamuwa vs. Siriwardena, Principal Visakha Vidyalaya & Others*[6] Petitioner made an application for writs of certiorari and mandamus seeking to quash orders refusing the application of the petitioner to admit his child to Visakha Vidyalaya and for an order directing the respondents to admit the child to the school. The application for writs of certiorari and mandamus was made 10 months after the refusal. Siva Selliah J. observed that there has been undue delay in the making of the application and the Court cannot possibly make an order which manifestly

cannot be carried out as the child will be over aged for the Kindergarten and has already been accommodated at Bishop's College.

In the case of *Gunawardena* Vs. *Weerakoon (supra)* one of the reasons to refuse the application for writ of certiorari and mandamus was the seven months delay. In *Biso Menika* Vs. *Cyril de Alwis*[7] Sharvananda J. held, that "writ of certiorari lies at the discretion of Court and will not be denied if the proceedings were a nullity ; even if there is delay especially where denial of the writ is likely to cause great injustice; it will be issued". It would therefore be seen that delay will not operate as a bar to the issue of writ of certiorari or mandamus if the impugned decision is a nullity. Kulatunga J. in the case of *Hopman and Others Vs. Minister of Lands and Land Development and Others*[8] did not follow the decision in Biso Menika's case *(supra)* and upheld the objection of undue delay since the impugned decision was not a nullity. In this judgment, I have, else where, held that the refusal by the 1st respondent to register the deed P4 (impugned decision) is correct and the 1st respondent had acted within the law. Therefore the decision in Biso Menika's case *(supra)* has no application here. Since the Petitioners are guilty of undue delay the application of the Petitioners should fail on this ground alone.

I have earlier pointed out that the petitioners have slept over their rights. In the case of *Regina vs. Aston University Senate*[9] at 555 Donaldson J (Lord Parker CJ and Blain J agreeing) held that "the prerogative remedies are exceptional in their nature and should not be made available to those who sleep upon their rights." Applying the aforementioned legal principle to the facts of the present case, I hold that the prerogative writs applied for are not available to the petitioners who have slept over their rights.

The learned Counsel for the Petitioners contended that the refusal to register the deed P4 by the 1st Respondent on the purported ground of Sangika property was wrong. He further contended when Baba Nona gifted the property to the 2nd Petitioner no formal ceremony was performed and as such property cannot be defined as Sangika property. It was the contention of the learned Counsel that even if the property was gifted to Maha Sanga if there was no formal ceremony, the property does not become Sangika Property. To strengthen his contention he cited the case of *Kampane Gunaratne Thero* Vs. *Mawadawila Pannasena Thero*[10] where Hon. Chief Justice G. P. S. de Silva held that, "As the deed of dedication had not been accompanied by a solemn ceremony in the presence of 4 or

more monks representing the 'Sarva Sanga' or entire priesthood' as prescribed in vinaya, the temple and it's property did not become Sangika property. The title to the property remains with the State. In other words property remains *Gihi Santhaka*". The above judgment was distinguished by Hon. Justice Bandaranayake in the case of *Ven. Omare Dharmapala Thero Vs. Rajapaksege Peiris and Others*[11] Bandaranayake J at 15 remarked that "offerings to a temple could include a rupee coin put into a till box or offerings such as bed sheets, plates, cups etc. for the use of priests. In each of these instances, the dedication may not be accompanied by a solemn ceremony in the presence of 4 or more priests who represents sarva sanga or entire priesthood with the ceremony of pouring water. Does this mean, purely because of the absence of such a ceremony, the dedication to the temple by a devotee would remain as *gihi santhaka* depriving him of his devotion and acquiring the merits of his benefaction? I do not think so. Such an interpretation would deprive the good intention of a devotee who has no intention of retaining the ownership of what he has already donated to the temple".

As pointed out earlier, Baba Nona by deed P1 donated the property to the 2nd petitioner who was a priest and to Maha Sanga. In the case before us, if the contention of the learned Counsel for the petitioner is to be accepted, we would be depriving Baba Nona from acquiring merits of her benefaction. Can we do it here at these proceedings without having the benefit of reading Baba Nona's evidence ? The answer is clearly 'No'.

In *Omare Dharmapala Thero* Vs *Rajapakshalage Peiris and Others (supra)* Bandaranayake J at 16 further stated that "when this case is examined in the light of aforementioned facts and circumstances, it is clear that there is no material to indicate that at the time the property was purchased on behalf of the temple, there was no such ceremony to dedicate the said property to the sarva sanga according to the vinaya. However sangika dedication is not the only mode of acquisition of property by a temple. A temple could acquire property by the ordinary civil modes of acquisition without a ceremony conducted according to the vinaya as happened in this case".

When the facts of the present case are considered with the aforementioned legal principles in *Omare Dharmapala Thero's Case (supra)*, the contention of the learned Counsel for the Petitioner that when the

property is gifted to Maha Sanga, without a formal ceremony being conducted that it does not become Sangika Property, is untenable.

For the above reasons, I dismiss the application of the petitioners. There will be no costs.

SRIPAVAN, J – I agree.

Application dismissed.