

DOMINIC VS. MINISTER OF LANDS AND OTHERS

COURT OF APPEAL
SRI SKANDARAJAH, J.
CA 918/2005
OCTOBER 17, 2007

Writ of Certiorari - Who are necessary parties? Failure - Is it fatal? At what point of time could an application to add a party be made? Proper party - Necessary Party - Difference?

Held

- (1) Where an order would affect adversely a party who is not before Court, that party must be deemed to be a necessary party and consequently the failure to make the necessary party a respondent must be regarded fatal to the application.
- (2) A necessary party is one without whom no order can be effectively made. A proper party is one in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the proceedings.
- (3) An application for addition will be allowed only if the application is not yet ready for disposal by Court.

APPLICATION for a writ of certiorari - on a preliminary objection raised.

Cases referred to:

- (1) *Perera vs. National Housing Authority* - 2001 - 3 Sri LR 50
- (2) *Abayadura and 162 others vs. Dr. Stanley Wijesundara - Vice Chancellor, University of Colombo and another* - 1983 2 Sri LR 268.
- (3) *In Re vs. John Neil keerthi* - 3 SCC 12.
- (4) *Carron vs. Government Agent, Western Province* - 46 NLR 237
- (5) *Goonetilaka vs. Government Agent, Galle* - 47 NLR 190
- (6) *James Perera vs. Godwin Perera* - 48 NLR 190
- (7) *Rawaya Publisher and other vs. Wijedasa Rajapakse, Chairman, Sri Lanka Press Council and others* - 2001- 3 Sri LR 213

- (8) *Udit Nanayan Singh vs. Board of Revenue* - AIR 1963 - SC 768
- (9) *Prabodh Derma vs. State of Uttara Pradesh* - AIR 1985 - SC 167
- (10) *Vinna Sithamby vs. Joseph* - 1961 65 NLR 359
- (11) *Jamila Umma vs. Mohamed* - 50 NLR 15, 17
- (12) *Dharmaratne vs. Commissioner of Elections* - 1950 - 52 NLR 429, 432
- (13) *Ramasamy vs. Ceylon State Mortgage Bank* (1967) 78 NLR at 516.

Geoffrey Alagaratnam with *M. Sithambaram* for petitioner.

Ms. G. Wakista Arachchi SC for 1- 3 respondents.

Nimal Jayawardene with *M. A. P. Bandara* for 4th respondents.

S. L. Gunasekera with *Rukshini Senaratne* and *Anuraddha Dharmaratne* for 5th Respondent.

Cur.adv.vult

December 03rd 2007

SRISKANDARAJAH, J.

The Petitioner in this application has sought a writ of certiorari to quash the cancellation of the divesting order as set out in government Gazette No. 1349/17 of 15.07.2004 marked P28(a) and a writ of mandamus against the 1st and / or 2nd and/or 3rd and /or 4th Respondents and/or their agents and/or servants for transfer of condominium Unit 1 D, Tower Building, Station Road, Colombo 4 on a valuation and/or as per terms agreed.

The 5th Respondent raised a preliminary objection and submitted that the I.C.C. Housing Private Limited has put up a building in the said land spending over one billion rupees and it is nearly in completion and out of the apartments some of the apartments are sold to private parties. Therefore the 5th Respondent submitted that the I.C.C. Housing Private Limited is a necessary party to this application. He further submitted that if the above prayers are granted to the Petitioner the rights of the I.C.C. Housing Private Limited will be adversely affected.

The 4th Respondent also raises a similar preliminary objection that the necessary parties namely: National Housing Development Authority and Ocean View Development Company Private Limited who are the owners of the building in relation to which the Petitioner is seeking a mandamus are not made parties. They are necessary parties to the effectual adjudication of the question in issue.

The Petitioner submitted that he was the owner of a condominium unit on the subject premises. This premises was acquired under the Land Acquisition Act under Proviso (a) of section 38 and the relevant Section 5 and Section 7 notices were also published in the Government Gazette. The Petitioner submitted that he was called upon to vacate his condominium unit on the subject premises and to reside at the condominium unit in the Tower Building of Colombo 4. The residential condominium unit on the subject premises was demolished. The Petitioner was not paid his compensation. A divesting order of the said property was made on 23.07.1991 under Section 39A of the Land Acquisition Act. In view of the divesting of the said land and the demolition of the residential condominium which stood on the said land, the Petitioner together with another person became co-owner of the bare land. However on 15th July 2004 the said divesting was cancelled by a Government Gazette notification published in Gazette No. 1349/17 of 15.07.2004. The Petitioner challenges the said cancellation of the divesting order on the basis that it is ultra vires, in breach of natural justice, for an ulterior purpose and mala fide.

The quashing of the said cancellation of the divesting order would have a bearing on the co-owner of the Petitioner as well but the Petitioner has not made him a party to this application.

If a writ of certiorari is issued to quash the cancellation of the divesting order the persons who have constructed the

building on the said land as submitted by the 5th Respondent will be adversely affected. The co-owner of the said land is also a necessary party for the proper adjudication of the question in issue.

In relation to the prayer of mandamus the Petitioner is seeking an order to transfer the Tower Building condominium unit to him. If the said unit has to be transferred to the Petitioner only the owner of the said building could do so. As disclosed by the 4th Respondent the owner of the said building is the Ocean View Development Company (Pvt) Ltd which was not made party to this application.

In Perera v. National Housing Authority⁽¹⁾ the court held:

“Another objection raised by the respondents was that necessary parties have not been brought before Court. The Chairman of the National Housing Development Authority in his affidavit had disclosed that what ever the action that was done was on a direction given by the cabinet. The land was 1st transferred to UDA and then to the Church Authorities by UDA. I am of view that when these matters were disclosed the petitioner should have moved this Court to add the Cabinet of Ministers UDA and the Church Authorities as parties to this application. This was not done. These are necessary parties to the effectual adjudication of the question in issue. I uphold this objection that necessary parties have not been made respondents.”

In the instant application also the Respondents namely the 4th and the 5th Respondents in their objections had disclosed that the 4th Respondent after having obtained the approval of the 3rd Respondent handed over the said land to ICC Housing Private Limited a duly incorporated company for development. The said company has constructed over 70

residential apartments in the said land with a project cost of approximately Rs. 1,205,000,000.00.

The 4th Respondent in his objection disclosed that the said Tower Building is being managed by Ocean View Development Company (Private) Ltd which is a joint venture company between the 4th Respondent Authority and the National Housing Development Authority.

The Petitioner would have come to know that the ICC Housing Private Limited, Ocean View Development Company (Private) Ltd and the National Housing Development Authority are necessary parties to this application at least after the Respondent filed their objection but the Petitioner has not taken any steps to add them as parties other than the Petitioners attempt to amend the Petition and it was refused by this court.

The law regarding necessary parties and the consequence; if parties who ought to be joined, are not made parties to an application is dealt with extensively in *Abayadeera and 162 Others v. Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo and Another* ⁽²⁾ the Court observed:

In the matter of the application of *John Neil Keith*⁽³⁾ for a Writ Mandamus on the *Government Agent, Western Province* the applicant applied for the issue of a Mandamus on the Government Agent, Western Province, requiring him to recognise the due election of Mr. Leechman as Councilor for the Slave Island Ward of the Colombo Municipality, and to permit him to exercise the said office. Neither Mr. Leechman nor the rival candidates were made parties to the writ proceedings. Caylay, C.J. said -

“Now, before considering the nature and object of the mandamus applied for, it appears to us that there is at the

outset a fatal objection to granting it. In effect we are asked to pronounce an opinion upon a disputed election, and to compel the Government Agent to espouse the said of a particular candidate, without either of the candidates themselves being parties to the proceedings or having had any notice of them. This we cannot do. Even if we granted the mandamus, neither of the candidates would be bound in any way by these proceedings or prevented from hereafter taking such steps, as may be lawful, either for the ratification of his election or the annulment of the election of his rival.”

In *Carron v. Government Agent, Western Province*⁽⁴⁾ Mr. Carron, the unsuccessful candidate, applied for a Writ of Mandamus to set aside the election of the successful candidate alleging irregularities committed by the Returning Officer with regard to the nomination of candidates and to the permission granted to one candidate to withdraw from the election. It was admitted that Mr. Jayasinghe had accepted and acted in the office of a member of the Urban Council. He was not made a party to the proceedings. Wijeyewardene, J. said (p. 239) -

“Even if a Writ of Mandamus could issue in the present case there is a serious objection to the present application. The petitioner wants to have the election declared void but has failed to make Mr. Jayasinghe a party respondent. The petitioner’s Counsel did not at any stage move to have him added as a party. The application must fail on that ground also.”

In *Goonetilleke v. Government Agent, Galle*⁽⁵⁾ a writ of Certiorari of Mandamus was applied for to set aside an election, in connection with a Village Committee, and for holding of a fresh election in respect of the Ward. The successful candidate was not made a party. Keuneman, S.P. J. Said (p.550) -

“The objection has been taken in the first instance that no order such as is claimed by the petitioner can be made when the successful candidate has not been made a party. This was held in the case of *Carron v. Government Agent, W. P. (supra)*, I think the objection on the part of the Government Agent is a good one.”

In *James Perera v. Godwin Perera*⁽⁶⁾, the petitioner applied for a Writ of Mandamus on the Chairman of a Village Committee for the issue of a bakery licence in his favour. The petitioner stated in his petition that the Chairman issued the licence to one Jayasinghe and has failed to issue it to him. The respondent’s Counsel submitted that the issue of the Writ would affect prejudicially the rights of Jayasinghe who is not before the Court. Nagalingam, A.J. said (pgs. 191, 192) -

“I find that in two earlier cases a similar objection was sustained. In the case of *Carron v. The Government Agent, Western Province, (supra)* Wijeyewardene, J. expressed himself as follows:- “The petitioner wants to have the election declared void but has failed to make Mr. Jayasinghe a party respondent. The petitioner’s counsel did not at any stage move to have him added as a party. The application must fail on that ground also”. In the case of *Goonetilleke v. The Government Agent, Galle (supra)*, Keuneman J. followed this authority in like circumstances.

Counsel for the petitioner contends that principle should be limited to election cases and should not be extended to cases where an application is made to compel the issue of a trade licence by a local authority. If the principle underlying election cases is that where an order would affect adversely a party who is not before the Court that party must be deemed to be a necessary party and consequently the failure to make the necessary party a respondent to the proceedings must be regarded fatal to the application, it must apply equally even

in regard to an application for a licence as applied for in these present proceedings. It would manifestly be unsatisfactory to have two persons licensed to run the business of a baker at one and the same place of business where the two parties are at arm's length. The issue of a licence to the petitioner must necessarily involve the cancelation of the licence issued in favour of Jayasinghe. I am therefore of the view that the objection is sound and that the failure to make Jayasinghe a party respondent must be held to be fatal irregularity."

The Court held in *Abayadeera and 162 Others v. Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo and Another: (supra)*

"It appears to us that the principle to be discerned from these cases is what was stated by Nagalingam, A. J. where an order would affect adversely a party who is not before Court, that party must be deemed to be a necessary party and consequently the failure to make the necessary party a respondent to the proceedings must be regarded fatal to the application."

In *Rawaya Publishers And Other v. Wijedasa Rajapakshe, Chairman Sri Lanka Press Counsel & Others*⁽⁷⁾ the court made the following observation when dismissing an application as the necessary parties are not made parties:

"In the context of writ applications, a necessary party is one without whom no order can be effectively made. A proper party is one in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the proceedings. In the case of *Udit Narayan Singh v. Board of Revenue*⁽⁸⁾ It has been held that where a writ application is filed in respect of an order of the Board of Revenue not only the Board itself is a necessary party but also the parties in whose favour the Board has pronounced the impugned decision because without them no effective decision can be made. If they are

not made parties then the petition can be dismissed in limine. It has also been held that persons vitally affected by the writ petition are all necessary parties. If their number is very large, some of them could be made respondents in a representative 'capacity (vide *Prabodh Derma v. State of Uttara Pradesh*⁽⁹⁾ also see Encyclopedia of Writ Law By P. M. Bakshi)"

In view of the above authorities it is clear that the failure to name the necessary parties namely: the ICC Housing Private Limited, The co-owner of the said land, Ocean View Development Company (Private) Ltd and the National Housing Development Authority as parties in this application is fatal.

The Petitioner moved at the stage of argument to add these respondents as parties. S. F. A. Coorey; 'Principles of Administrative Law in Sri Lanka' 2nd Edition at page 537 under the subheading: Subsequent addition of a Respondent observed:

"The failure to make a necessary party a respondent is fatal. If the omission is discovered during the pendency of the application for the writ the Petitioner is well advised to apply to court to add such party as a respondent. Such an application for addition will be allowed only if the application is not yet ready for final disposal by court; *Vinnasithamby v. Joseph*⁽¹⁰⁾. Once the final hearing of the application by court commences, such an application made thereafter will be refused; *Goonetilleke v. Government Agent, Galle (supra)*; *Jamila Umma v. Mohamed*⁽¹¹⁾ *Dharmaratne v. Commissioner of Elections.*⁽¹²⁾"

In any event the application to add the necessary parties at this stage is a belated application; *Ramasamy v. Ceylon State Mortgage Bank*⁽¹³⁾ at 516. Therefore I refuse the application and uphold the objection that necessary parties have not been made respondents and for this reason I dismiss this application without costs.

application dismissed.