IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

SC Appeal No. 177/2015
SC (Spl) No. 213/14
CA (Writ) Application No. 403/2008

In the matter of an Application for Special Leave to Appeal under and in terms of the provisions of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka from the Judgment of the Court of Appeal dated 30th September 2014.

Rajeswari Nadaraja,
6/1, Frankfurt Place,
Colombo 4.

Petitioner-Petitioner

-Vs-

1 (a) Hon. M. Najeeb Abdul Majeed

1 (b) Hon. Johnston Fernando

1c) Hon. Bandula Gunawardena

1(d)Hon.Gamini Jayawickrema Perera

1 (e) Hon. Rishard Badurdeen
Minister of Industry and Commerce and Co-operatives Development,
No. 73/1, Galle Road,
Colombo 03.

2. Hon. Mahipala Herath
Provincial Chief Minister,
Provincial Minister of Law & Peace, Finance & Planning, Local Government, Education & Technology, Estate Welfare, Public Transport Co-Operative Development, Housing, Sports, Electricity, Cultural and Youth Affairs
Sabaragamuwa Provincial Council,
Secretaries Complex,
New Town,
Ratnapura.

3 (a) Mr. A.P.G. Kitsiri

3 (b) Mr. D.D. Upul Shantha de Alwis

3 (c) Mr. Dhammika Rajapaksa

Present Commissioner Substituted 03rd Respondent

3 (d) Mr. D. Jeewanadan
Commissioner of Cooperative Development/ Registrar of Cooperative Societies
No. 330, Union Place,
Colombo 02.

4. Mr. Kapila Perera

Present Commissioner Substituted 04th Respondent

4 (a) Palitha Nanayakkara
Commissioner of Cooperative Development/Registrar of Cooperative Societies of Sabaragamuwa Province
New Town,
Ratnapura.

5.Yatiyanthota Multipurpose
Cooperative Societies Limited,
Main street,
Yatiyanthota.

Before: Priyasath Dep PC. CJ
Buwaneka Aluwihare PC. J
Sisira J. de Abrew J

Counsel: Palitha Kumarasinghe PC with Chinthaka Mendis for the Petitioner-Petitioner instructed by Palitha Mathew & Co.

Yuresha de Silva SSC for the 1st to 4th Respondents-Respondents

M. Kumarasinghe for the 5th Respondent-Respondent

Argued on: 24. 11. 2016

Decided on: 31. 08.2018

Aluwihare PC, J.

This Court granted Special Leave to Appeal on the following questions of law:

1) Did the Court of Appeal err in law in refusing an Application of the Petitioner for a Writ of Mandamus for a 'Derequisition order' derequisitioning the property which was requisitioned for the temporary use of the 5th Respondent by Requisitioning Order No. 101 dated 24th April 1974 made under Section 10 (1) of the Co-operative Societies (Special Provisions) Act No. 35 of 1970 published in Government Gazette No. 108/9 of 26th April 1974 and occupied by the 5th Respondent for over 35 years?

2) Did the Court of Appeal err in law in holding that a contract of tenancy exists between the Petitioner and the 5th Respondent who entered into the property under and by virtue of the Requisition Order No. 101 dated 24th April 1974 made under section 10 (1) of the Co-Operative Societies (Special Provisions) Act No. 35 of 1970, published in Government Gazette No. 108/9 of 26th April 1974, marked "P2"?

3) Did the Court of Appeal err in law in holding that the Petitioner is guilty of laches, in the circumstances of this matter?

4) Did the Court of Appeal err in law in holding failing to appreciate that the single judge bench of the Court of Appeal that delivered the impugned Judgment is bound by the judgment of the Two judge bench of the Court of Appeal in Case No. C.A. (PHC) 75/2008 Bandarawela Multi-Purpose Co-operative Society v Periannen Nadaraja and Others (decided on 9th September 2010) and the Application for Special Leave to Appeal against which judgment has been refused by the Supreme Court in Application No. SC. (SPL) L.A. 198/2010 decided on 8th September 2011?

5) Did the Court of Appeal err in law holding that the Petitioner has failed to show that a legal duty is owed to herself by the Respondents, in the circumstances of this matter?

A brief narration of the facts is as follows.

The Petitioner-Appellants's (hereinafter "the Petitioner") predecessor in title Kanther Sivagurunathan Nadarajah constructed the "Nathan Building" which is the premises in suit. Before the said Kanther Sivagurunathan Nadarajah could occupy the said building, the 5th Respondent, Yatiyanthota Multipurpose Cooperative Societies Limited (hereinafter the Cooperative Society) by a requisitioning order No. 101 dated 24th April 1974 made for "temporary use" under section 10 (1) of the Co-Operative Societies Act No. 35 of 1970 published in Government Gazette No. 108/9 of 26. 04. 1974, came in to occupation of the property in question. Subsequently, the 5th Respondent Cooperative Society through the letter marked "AP5" informed the Petitioner's predecessor in title that the Department of Cooperative Development had forwarded the necessary documents to the Chief Valuer in order to assess the monthly compensation for the requisitioning of the Nathan Building. The letter further informed that the Petitioner will be paid Rs. 350/= per month as an advance payment of rent. This amount was later increased to Rs. 400/= per month following the Chief Valuer's assessment.

After a reasonable period of 'temporary use' by the 5th Respondent, the Petitioner's predecessor in title on several occasions requested the 5th Respondent Cooperative Society to hand over the premises in suit. On 1st August 1992, the Petitioner's predecessor in title through a letter (AP 8) requested the 5th Respondent to derequisition the premises in order to house his business since the family business

establishment which up to that point had been conducted in a rented place elsewhere was burnt down during the riots of 1983 and the owners of those rented premises had refused to rent out the said premises, once again.

The 5th Respondent Cooperative Society, by writing, dated 8th November 1992, (AP9), informed the Petitioner's predecessor in title that the 5th Respondent is in the process of constructing a new building and that his request would be considered upon the completion of the said new building. Once the buildings were constructed, the Petitioner's predecessor in title again requested the 5th Respondent to issue a derequisition order pointing out that the said new building had been completed and that the 5th Respondent Cooperative Society was earning an income of 8000/= rupees per month by renting out a portion of the Nathan Building to a third party while paying only 400/=per month to the Petitioner's predecessor in title. [AP 10]

Instead, however, of handing over the vacant possession of the premises, the 5th Respondent Cooperative Society then moved to have the Nathan Building acquired under the Land Acquisition Act by notice dated 4th January 2001. Thereupon the Petitioner's predecessor in title filed CA writ Application bearing No. 324/2001 against the proposed acquisition by Petition marked "AP12". The Court of Appeal by judgment dated 19th August 2002 issued a writ of certiorari quashing the said notice and also issued a writ of prohibition prohibiting the authorities concerned from taking over the premises under the provisions of the Land Acquisition Act.

Pursuant to the said judgement, the Petitioner's predecessor in title proceeded to institute legal action to have the property returned to him. However, prior to any further action being taken, the Petitioner's predecessor in title passed away.

Once the title to the property in suit had vested in her, the Petitioner by writing marked "AP22" to "AP26" demanded the 1st to the 5th Respondents to release the

property in suit to the Petitioner. The 4th Respondent and the secretary of the 5th Respondent Cooperative Society by writing (AP27) and (AP28) sought 2 further weeks to respond to the said letter of the Petitioner. Regrettably, they never replied. Thereafter the petitioner filed an application for a writ of *mandamus* in the Court of Appeal to compel the 1st and 2nd Respondents to derequisition the property on the basis that the 5th Respondent's continued occupation of the property requisitioned for temporary use in 1974 was *ultra vires* and grossly unreasonable and illegal *viz a viz* the provisions of the Cooperative Societies (Special Provisions) Act no. 35 of 1970.

The Respondents took up the position that the Petitioner's predecessor in title had entered into a tenancy agreement with the 5th Respondent Cooperative Society and that they had a legal right to remain in possession of the Nathan building in their capacity as a tenant. It was further pointed out that the 5th Respondent was in any event a tenant protected under the Rent Act and that the Cooperative Societies (Special Provisions) Act No. 35 of 1970 has been repealed or fallen into disuse. The Respondents also pointed out that the petitioner's application was time barred. It was further contended that the Petitioner was not entitled to seek a writ of mandamus as the Cooperative Societies Act vests the discretion in the minister, the 1(e) Respondent, to derequisition the property.

The Court of Appeal by a bench of a single judge in the judgment dated 30th September 2014 refused to issue a writ of mandamus and held that;

> *There is a valid tenancy agreement between the 5th Respondent and the Petitioner's predecessor in title, marked by the Respondents as "R6." The petitioner has failed to mention that there has been contract between the parties for the very reasons that if he did so a writ cannot lie.*

That the petitioner was guilty of laches in as much as she has moved only after 34 years to have the property derequisitioned. A writ of mandamus is a discretionary remedy and cannot be granted even when there is no other remedy available. And that the petitioner has failed to show that there is a legal duty owed to the petitioner by the respondents.

It is against the judgement of the Court of Appeal that the Petitioner has come before this court.

Of the 5 legal questions before us, it is pertinent to proceed to address the 2nd issue; first, whether there is a separate tenancy agreement between the parties. In my opinion, if this question is answered in favour of the Respondent, there would be no necessity to inquire into the other legal issues raised before us.

As mentioned above, the 5th Respondent came to occupy the Nathan Building following a requisitioning order No. 101 dated 24th April 1974 made under section 10 (1) of the Co-Operative Societies Act No. 35 of 1970 published in Government Gazette No. 108/9 of 26. 04. 1974. Section 10 reads; "*the Minister may by order (in this Act referred to as a requisitioning order) published in the Gazette, requisition, with effect from such date as shall be specified in the order, any immovable property that it may be temporarily used by a principal society for the purposes of any business of such society*". According to the document marked "P2" the then Minister requisitioned the Nathan Building with effect from 8th May 1974 to be used by the Yatiyanthota Multi-Purpose Co-operative Society Limited.

It is the contention of the 5th Respondent Cooperative Society, however, that they possess the Nathan Building not only by virtue of the said Requisitioning Order but also by virtue of a Tenancy Agreement marked "R6" which the 5th Respondent and the Petitioner's predecessor in title had entered into in 1976. The 5th Respondent

strenuously argued that "R6" is a tenancy agreement, as it decisively uses the word "කුලිය (rent)" whereas under the Co-Operative Societies (Special Provisions) Act No. 35 of 1970 there is no monthly 'rent' payable but only "compensation" in terms of sections 13 to 19 of the Act.

In response, the Petitioner pointed out that the words "rent" and "compensation" had been used interchangeably and that the word 'rent' is in fact a reference to 'compensation.' The question that needs to be determined now is whether "R6" is a Tenancy Agreement that exists independently of the Requisitioning Order issued on 26. 04. 1974.

On the face of it, it is apparent that "R6" is not a tenancy agreement. Unlike in a normal tenancy agreement, there is no identification of the *corpus*, or any clauses pertaining to handing over the possession of the premises, determining the rights and liabilities of the parties in relation to the tenancy or the duration for which tenancy agreement is signed. The document only stipulates that "නාදන් ගොඩනැගිල්ලේ ගෙවල් කුළිය සම්බන්දයෙන් එකඟත්වයට පැමිණ 1976-12-15 දින යටියන්තොටදී අත්සන් තබන ලද ගිවිසුම් පත්‍රය" In terms of "R6", the 5th Respondent had undertaken to pay a sum of 400/= to the Petitioner's predecessor in title on a monthly basis till the Chief Valuer's Assessment was communicated to them. Furthermore, "R6" stipulates that any difference in the value that would be revealed pursuant to the said assessment would be reimbursed by the respective party. Plainly, "R6" is an agreement that regulates the payment of a sum of money and a condition pertaining to reimbursement. It cannot by any stretch of the imagination be construed being anything more than that. If "R6" is deliberately limited to the payment of rent for the Nathan Building, logically there ought to be another document which explains the genesis of this arrangement. At this point, it is helpful to peruse the document "AP 5" which is a letter sent by the 5th Respondent Cooperative Society to the Petitioner's predecessor in title. The letter

informed that the documents necessary for the calculation of the monthly sum for the requisitioned property 'Nathan Building' had already been sent to the Chief Valuer and that as there had been some delay in the assessment of the sum, the 5th Respondent co-operative society had decided to pay Rupees Rs. 350/= to the Petitioner's Predecessor in title on a monthly basis. It further stated that;

"එසේ අත්තිකාරම් මුදල් ගෙවීමේදී තක්සේරු කරන ලද මාසික කුළිය ගෙවනු ලබන රුපියල් 350/= ට වැඩ වැඩිවුවහොත් එම හිඟ මුදල සමිතියෙන් ගෙවීමත්, තක්සේරු කරන ලද මාසික කුළිය රුපියල් 350/=ට වැඩ අඩු වුවහොත් එම මුදල සමිතියට ගෙවන බවට පොරොන්දු පත්‍රයකට අත්සන් කිරීමෙන් පසුව එම ගෙවල් කුලී අත්තිකාරම් මුදල ලබා දිය හැකි බැවින් [...]"

This letter sent in September 1975 in my opinion forms the basis of the agreement "R6" signed and entered into on 15-12-1976. "R6" therefore was neither a tenancy agreement nor an agreement that determined the 'rent.' It was the aforementioned "පොරොන්දු පත්‍රය" whereby both parties expressly undertook to reimburse each other where there was a difference in the amount paid and the actual amount due for the value of the property.

It is also pertinent to note that "මාසික කුළිය" referred to in "R6" was not a sum which the parties had agreed mutually. It explicitly states that:

"දැනට ඉහත සඳහන් ගොඩනැගිල්ලේ, මාසික කුළිය තක්සේරුකරවා ගැනීම සඳහා අවශ්‍ය ලියකියවිලි, කෑගල්ල සමූපකාර සංවර්ධන උප කොමසාරිස් තුමා මඟින් තක්සේරු දෙපාර්තමේන්තුව වෙත ඉදිරිපත් කර ඇති බැවින් එකී ගොඩනැගිල්ල සඳහා මාසික කුළිය තක්සේරුකර එවන තුරු, පළමුවන පක්ෂයෙන් දෙවන පක්ෂයටත් ගොඩනැගිල්ලේ කුළිය වශයෙන් මසකට රුපියල් 400 ක් පහත සඳහන් කොන්දේසි මත පවරාගත් දින සිට (1974-06-24 දින සිට) ගෙවීමට කටයුතු කරනු ලැබේ."

According to the document itself the 'rent' or its semantic variations had been determined with the intervention of the Chief Valuer. This was also the position maintained in "AP5". In my opinion, these references reinforce the Petitioner's position that "R6" is not a tenancy agreement to pay a 'rent' but is in fact an agreement to pay 'compensation'. This is plainly understood by referring to the statutory provisions relating to 'compensation' for property requisitioned under the Co-Operative Societies (Special Provisions) Act No. 35 of 1970.

Determination of compensation.

Section 17.

(1) The Registrar shall refer to the Chief Valuer the determination of the compensation payable in respect of any property, and such Valuer shall submit his determination to the Registrar.

(2) The Chief Valuer shall, before making his determination of the compensation payable in respect of any property, give the person from whom that property was requisitioned for a principal society, as well as the Registrar, an opportunity to adduce before such Valuer, by himself or by a representative authorized by him in that behalf, evidence with regard to the value of that property.

(3) The Registrar shall communicate in writing to the person from whom any property was requisitioned for the principal society the determination of the compensation payable in respect of that property made by the Chief Valuer.

(4) The Registrar shall cause a notice to be published in the Gazette and in at least one Sinhala, one Tamil and one English newspaper, specifying the compensation that it proposes to pay in respect of any property, being the compensation determined by the Chief Valuer, and inviting any person who had any interest in that property, immediately before that property was requisitioned for the principal society and who claims any compensation in respect of that property, to communicate to such Registrar his claim in writing, stating the nature and the basis thereof, before such date as shall be specified in the notice.

According to these several provisions, where a property is requisitioned under the Special Provisions Act, determining the compensation for such property falls within the province of the Chief Valuer. Therefore, the reference to the chief valuer in agreement marked "R6" could only be deemed a deliberate insertion to highlight the statutory flavor of the agreement. Additionally, the words "මසකට රුපියල් 400 ක් පහත සඳහන් කොන්දේසි මත පවරාගත් දින සිට (1974-06-24 දින සිට) ගෙවීමට කටයුතු කරනු ලැබේ" is a cross reference to section 15 of the Act, which reads "*The compensation payable in respect of any property shall be considered as accruing due from the date on which that property was requisitioned for the principal society.*" Apart from this, the Petitioner has presented two Gazette notifications issued under the Co-operative Societies (special provisions) Act where the words "මාසික කුළිය" and "වන්දි" had been used interchangeably to refer to compensation. In light of these clear references, I am unable to agree with the contention that "R6" is a stand-alone tenancy agreement.

More fundamentally, "R6" comes into existence as a direct result of the Requisition Order issued by the Minister. This plainly rules out the possibility of construing "R6" as a 'contract' or an 'agreement' to let the premises. The predecessor to the property in question had no intention, at any point of time, of renting out his

building to the co-operative society. He, however had no choice but to comply with the Requisition order under section 10 (1). This negates the fundamental element of a contract—the element of voluntary meeting of minds. In terms of section 29 (2) of the Rent Act No. 7 of 1972, a tenancy agreement could only arise when the parties, in their private capacities, agree to let and occupy the premises on mutually agreed terms.

"*[…] it shall be lawful, with effect from the date of commencement of this Act, for the landlord of any residential premises and the person seeking to be the tenant thereof to enter into a written agreement whereby such premises are let to such person for a period specified therein […]*"

The statutory language bears no ambiguity that a situation of tenancy arises when the landlord and the tenant *agree* to let the premises. This view is also shared by C. J. Rustomjee in ***The Rent Act No. 7 of 1972*** at page 7;

"*A contract of tenancy is an agreement whereby one party agrees to give the use of immovable property on a rent to another for successive period until it is terminated by a notice given by either party*"

The Law of Rent and Ejectment *by* Dr. Wijedasa Rajapakshe, PC [2005] J.B.J.L., Vol. 1, 219-223 further confirms that a tenancy agreement is firstly and primarily a private agreement which arises outside the manacle of law. The intention of the parties, the enforceability of the agreement, the identification of corpus and other relevant terms are ascertained based on contractual principles.

The Rent Act only governs a tenancy agreement-it by no means creates one. Rather, it presupposes that an agreement is already in place. Thus, the Respondents cannot seek refuge in the Rent Act to colour themselves as tenants without firstly

establishing, based on contractual principles, that the predecessor in title to the property *intended* to let the premises. The evidence before us speaks of, no such agreement. In contrast, both parties agree that the 5th Respondent Cooperative Society came into occupation pursuant to the aforementioned order by the Minister.

The statutory nature of the payment is further amplified when one considers the language of Section 13 of the Act which says: *"In respect of any property requisitioned for a principal society, such society shall* **pay compensation** *equal to the amount which might reasonably expected to be payable for the temporary use of such property".*

In these circumstances, I observe that the Court of Appeal erred in holding that "R6" is a tenancy agreement that stands independent of the requisition order. "R6" is not a tenancy agreement. It is an ancillary agreement made for the purpose of paying and reimbursing the excess/shortfall of the compensation in respect of the "Nathan Building." As such, it cannot transform the 5th Respondent's position to that of a 'tenant'.

Since there is no private agreement that ousts the writ jurisdiction, this Court will proceed to consider the remaining legal issues in the chronological order. Firstly, it is pertinent to examine whether the Petitioner has failed to demonstrate that there is a legal duty owed to her by the Respondents.

The 5th Respondent urged that it is only when there is a duty owed to the Petitioner can a writ of mandamus be issued to compel the performance. Since in the present application, the Petitioner has failed to assert any such legal right, they contend, that a writ of mandamus should be refused. Citing **Perera v National Housing Development Authority 2001 3 SLR 50**, they argue that "*Mandamus is not*

intended to create a right, but to restore a party who has been denied his right to the enjoyment of said right".

The requirement of a legal right becomes necessary in the writ jurisdiction for the purpose of determining the *locus standi* of a Petitioner. While in the early days a writ of mandamus was available only to those asserting a legal right, Courts in Sri Lanka gradually moved away from taking this narrow approach. In **Dilan Perera v Rajitha Senarathna 2002 2 SLR 79** the court held that the "*in mandamus the petitioner must show that he is a person aggrieved of*". It has also been held, although in a different context, that "*on any view, the performance of that which is an essential ancillary to the performance of one's duty itself the performance of one's duty. To hold otherwise would be to give the word 'duty' an unduly restricted meaning as to defeat rather than promote the general principles of the ordinance*" **(Jayanetti v Mitrasena 71 NLR 385, 397)** Furthermore, in **Wickremaratne v Jayaratne 2001 3 SLR 161** *locus standi* for the writ jurisdiction was expanded to include legitimate expectations. U. De. Z. Gunawardena J. observed that "*the doctrine of inconsistency or of legitimate expectation prohibits decisions being taken which confounds or disappoints an expectation which an official or other authority or person has engendered in some individual except perhaps where some countervailing facet of the public interest so requires-this being judged in the light of harm being done to the applicant*".

In the present application, the Petitioner's premises in suit was requisitioned by the Minister in 1974 for 'temporary use'. The petitioner was entitled to legitimately expect that the property would be returned once the premises had been used for a particular period. In particular, once the 5th Respondent Cooperative Society moved to have a new building constructed, there was indeed no justification for refusing to issue an order derequisitioning the Nathan Building. The sketch marked "AP19" demonstrates that the 5th Respondent owns or occupies several other

buildings in Yatiyanthota Town which could be used for the purposes of the Co-operative society. In these circumstances, the Petitioner and the Petitioner's predecessor in title are justified in expecting that the property will be returned to them after a 'temporary period'. To that extent there was a duty cast on the 1st Respondent to order a derequisition of the property.

In any event, I am unable to see how the present application is different from the authorities relied on by the Respondents. [Perera v National Housing Development Authority 2001 3 SLR 50]. Undoubtedly, the Petitioner is the legal owner of the property., which fact had been not contested by any of the Respondents. She is thus fully entitled to all the benefits that accrue by virtue of her ownership. Nevertheless, she has been continuously deprived of enjoying the benefits of her ownership due to the excessively long period of possession by the 5th Respondent. She only seeks that the property-which is rightfully hers- be returned to her because the purpose for which it had requisitioned had been fulfilled. By the Respondent's own admission, this is a grievance captured by the writ jurisdiction as a writ of mandamus could '*restore a party who has been denied his right to the enjoyment of the said right*'. As such, I see no reason to reject the application on the basis that the petitioner lacks the locus *standi*.

Having considered Petitioner's *locus standi*, the Court must examine whether the circumstances alleged by the Petitioner fall within the jurisdiction of a Writ of Mandamus.

The Petitioner is pleading by a Writ of Mandamus for a 'Derequisition order' derequisitioning the property which was requisitioned under Section 10 (1) of the Co-operative Societies (Special Provisions) Act No. 35 of 1970 published in Government Gazette No. 108/9 of 26th April 1974 for the temporary use of the 5th Respondent in 1974.

In an application for a writ of mandamus, the first matter to be settled is whether or not the officer or authority in question has in law and in fact the power which he or she refused to exercise. As a question of law, it is one of interpreting the empowering statutory provisions. As a question of fact, it must be shown that the factual situation envisaged by the empowering statute in reality exists.

Under section 10 (1) of the Co-Operative Societies (special provisions) Act No. 35 of 1970 the Minister has the power to requisition any immovable property by publishing an order to that effect in the Gazette. The purpose of such requisition is to allow the property to be '***temporarily used by a principal society for the purposes of any business of such society***' Furthermore, section 10 (4) of the same Act also empowers the Minister to derequisition any such property by following the same procedure. The section reads as; "*Where any property is requisitioned by a requisitioning order, the Minister may, by Order (hereinafter in this Act referred to as derequisitioning order) published in the Gazette, derequisition such property with effect from such date as shall be specified in the derequisitioning Order.*"

Thus, there could be no question with regard to the Minister's competence to issue a derequisitioning order. What needs to be determined is whether the Minister's power is amenable to the writ jurisdiction of this Court. by Both sections 10 (1) and section 10 (4) the Minister '*may*' issue a requisitioning and derequisitioning order. The text of the Act does not contain any express guidelines regulating the exercise of the discretion. The issuance of the order therefore is a matter that has been left to the discretion of the Minister.

Where power is conferred by law to exercise it in a given factual situation, it may either be a duty or a privilege. Generally, it is only if there is a duty that the repository can be compelled to act by a writ of mandamus. If there is only a discretion (privilege) to act, the writ cannot compel the person to act. It was

pointed by the Counsel for the 1st to the 4th Respondent that "*the word 'may' ordinarily connotes a situation where the exercise of a power is permissive or discretionary as opposed to its exercise being obligatory or mandatory. Ordinarily the word 'may' connotes a discretionary power and the word 'shall' connotes that which is mandatory or in the nature of a duty the discharge of which is obligatory. […] And to use the words of Wade and Forsyth 'mandamus has nothing to do with the exercise of such discretionary power*".

However, it is a cardinal principle in Administrative law that no discretion is unfettered and absolute in the public sphere. In fact, **Wade** himself confirms that; "*Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose, everything depends upon the true intent and meaning of the empowering Act.*" **(5th Ed., page 353)**

G.P.S de Silva CJ in his much-quoted dictum in **Premachandra v Major Montegue Jaywaickrema 1994 2 SLR 90, 105** held that "*There are no absolute or unfettered discretions in public law; discretions are conferred on public functionaries in trust for the public, to be used for the public good, and the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted.*" This is also the position maintained by **Dr. Cooray** in **Principles of Administrative Law**; "*every discretion conferred by law is a public trust, to be exercised for the purposes for which it has been conferred by statute, and the proved factual situation in a given case may be such that, in keeping with the*

purpose for which such discretion has been conferred by the statute, the law discerns a duty to exercise that discretion in a particular manner and that duty will be enforceable by mandamus." (Volume II, 3rd edn, page 847).

Thus, even if the empowering statute does not expressly require any jurisdictional fact to be present for exercise of power, it will be held invalid if the public authority has acted in total disregard for the purpose for which such discretion/power was vested in him.

The object and the purpose of the Co-operative Societies (Special Provisions) Act No. 35 of 1970 as gleaned from its long title is;

"To make special provisions for the implementation of a scheme of reorganizing the cooperative movement, in particular for the dissolution of societies and the amalgamation of societies and for the matters connected therewith or incidental thereto"

The Special Provisions Act was a legislative response to the economic policy that was in place in the 1970s. This economic policy gave primacy to the co-operative system and orders requisitioning private property were introduced solely to ***"reorganize the co-operative movement"*** and for ***"the dissolution of societies and the amalgamation of societies."*** However, as the Act itself makes clear, the requisitioning was to be made temporarily and catered to 'the purposes of any businesses of the principal society'. It was never meant to permanently dispossess legal owners of their property. This is confirmed by subsection (7) which states that a derequisitioning order has the effect of "*reviving any lease subsisting on the date on which the property was requisitioned.*" Unless the requisitioning of property was intended for a short period, section 10 (7) would have no meaning.

In the present case, the 5th Respondent Co-operative society has remained in possession of the property for a period of 35 years. Furthermore, they have sublet one floor of the Petitioner's building to the National Apprentice and Industrial Training Authority for computer training. It could not have been the intention of the legislature to permit permanent use of requisitioned property. Neither can it be said that this legislative enactment which gives primacy to '*reorganize the co-operative movement, in particular for the dissolution of societies and the amalgamation of societies'* would allow using the requisitioned property for financial ventures extraneous to the principal functions of the co-operative society. Particularly in the present case, the sketch marked "AP19" amply demonstrates that the 5th Respondent Cooperative Society owns or occupies several other buildings in Yatiyanthota Town which could be made use both for the purposes of the Co-operative society and for the aforementioned computer training facility.

Both the Petitioner and Petitioner's predecessor in title repeatedly brought these matters to the attention of the Respondents when they requested an order derequisitioning the property ["AP 22-AP26 and "AP8" "AP9"]. The Petitioner's predecessor in title implored as far back in 1992 to have the property derequisitioned as all his other property in the area was destroyed by the communal riots. However, there was a persistent failure on the part of the authorities to take cognizance of these grievances. When the petitioner again moved for a derequisitioning order, the secretaries to the 4th and 5th Respondents requested 2 weeks to respond but they never did so. To this day, there has been no response from the authorities. The factual situation in the present case is such that, in keeping with the purpose of the Act, an order derequisitioning the property should have been made a long time ago. The discretion vested in the Minister in this regard does not mean that he is empowered to withhold issuing the order as he pleases. Where circumstances warrant, in particular where the premises have been used for a period far exceeding the time frame contemplated in the

enactment , the law imposes a duty to exercise that discretion in a particular manner- which in the present case is a derequisitioning order. Where there is a failure in this regard, that duty would be made enforceable by a mandamus.

However, even if the circumstances qualify for the issuance of a writ of mandamus, the Court could refuse to issue the same in the event the Petitioner is guilty of laches.

The Court of Appeal in the judgment has held that "*the petitioner's premises were requisitioned in 1974 and only after 34 years the petitioner moved to de-requisition the premises. Even after the Court of Appeal judgment in the acquisition case which was given in favour of the Petitioner she did not move to get the premises derequisitioned. Only four years after the judgment the Petitioner has filed the instant application. The petitioner has not given a proper acceptable explanation for the very long delay. The only conclusion, this court can come to is that there has been a contract of tenancy between the parties. A writ of mandamus is a discretionary remedy which can be granted when there is no other remedy available*"

As rightly observed by the learned judge in the Court of Appeal, a writ of mandamus is an equitable discretionary remedy which could be denied if the Petitioner is guilty of inexplicable delays.

The traditional approach is that delay by itself is fatal to the application. However, courts generally do not apply the principle of laches mechanically, but take in to account the facts and the circumstances of the case. There is no criteria to determine what constitutes delay. Whether there has been undue delay and whether the explanation offered by the petitioner sufficiently excuses the delay is to be decided by the Court.

Sharvananda J. as he then was, in **Biso Menika v Cyril de Alwis [1982] 1 SLR 368, 380** observed as follows; "*if the delay can be reasonably explained, the court will not decline to interfere. The delay which a court can excuse is one which is caused by the application pursuing a legal remedy and not a remedy which is extra -legal. One satisfactory way to explain the delay is for the petitioner to show that he has been seeking relief elsewhere in a manner provided by law*" These words were later cited with approval by Sripavan J. as he then was, in **Samaraweera v Minister of Public Administration [2000] 3 SLR 64, 66-67.** His Lordship further observed that "*Further, the predisposition of parties to explore other lawful avenues which hold out reasonable expectation of obtaining relief without incurring the expense of coming into Court cannot be overlooked or censored and any delay caused thereby cannot be characterized unjustifiable*"

In **Biso Menike v Cyril de Alwis**, Sharvananda J. Held that the delay caused by the Petitioner unsuccessfully making representation to a committee of inquiry appointed by the Minister to look into injustices caused to the parties by the past operation of the Ceiling Housing Property Law, No. 01 of 1973, under S. 17A (1) under which Law the Commissioner of National Housing had the power, with the approval of the Minister, to divest himself of the ownership of houses vested in him under the law, was justified.

As correctly observed by the court of Appeal, the Petitioner in the present application has invoked the writ jurisdiction of the Court to have the property derequisitioned after 34 years from the date of requisition. However, attempts to have the property derequisitioned commenced as far back as in 1992 by the Petitioner's predecessor in title making representation to the Respondents.

The initial attempt was made in 1992, wherein the petitioner's predecessor in title was promised that the request would be considered once the construction of a new building was completed ["AP8"] In 2000 the Petitioner's predecessor in title again made representation to relevant authorities to derequisition property ["AP10"] On the second occasion he drew attention to the completion of the new building and claimed that there could be no further use for his property. In addition to these representations, the Petitioner's predecessor in title also took prompt action to quash an order made by the Minister to acquire the building under the Land Acquisition Act. ["AP13"] Once the title was vested in the Petitioner, she too made representation to the Minister to issue an order of derequisition. Documents marked "AP22" to "AP26" demonstrate these efforts. It was only after failing in all these attempts that the Petitioner resorted legal action to have the property derequisitioned. As such, it is clear that neither the Petitioner nor the Petitioner's predecessor in title has slept on their rights for 34 years. They had continued, albeit unsuccessfully, to pursue their claims using other lawful avenues. In those circumstances, the Petitioner cannot be held guilty of laches as she has provided a justifiable explanation for delaying to invoke the writ jurisdiction.

The final question of law for determination is whether the single judge in the court of appeal was bound by the decision given by the court of appeal sitting by a bench of two judges.

The Petitioner has drawn our attention to a decision made by two judges of the Court of Appeal in C.A. (PHC) 75/2008 **Bandarawela Multi-Purpose Co-operative Society v Periannen Nadaraja and Others** (decided on 9th September 2010). The Petitioners in the said application prayed for a writ of mandamus directing the Minister to issue an order derequisitioning the property requisitioned under the Co-operative Societies (Special Provisions) Act. The Court of Appeal in a

unanimous judgment which dealt with an identical situation and identical statutory provisions held that:-

"*Minister under section 10 of the Act No. 35 of 1970 can requisition a building only for temporary use by a co-operative society. Such co-operative society cannot use it permanently. The order of requisition was made in 1975 and the action in the High Court was instituted in 2005. Then it is clear that the building has been used for well over a period of 30 years. Thus, it is clear that the use of the building by the co-operative society is not a temporary one. The co-operative society, the Petitioner in this case, has used the building almost permanently. The co-operative society has used the building beyond the purpose set out in the Act No. 35 of 1970. I therefore hold that the learned High Court Judge was right when he issued a writ of mandamus and certiorari prayed for by the Respondent*".

The present petitioner drew attention to this case when this application was first instituted in the Court of Appeal. However, she claims that the Court of Appeal failed to take cognizance of the judgment. A perusal of the Court of Appeal judgment marked "L" confirms this assertion.

It is settled law in Sri Lanka that a bench numerically inferior regards itself bound by a decision of a bench numerically superior. Basanayake CJ in **Bandahamy v Senanayake 62 NLR 313** elucidated;

"*We have in this country over the years developed a cursus curia of our own which may be summarised thus-*

(a) One Judge sitting alone as a rule follows a decision of another sitting alone. Where a Judge sitting alone finds himself unable to follow the decision of another judge sitting alone the practice is to reserve the matter for the decision of more than one Judge (88.38 & 48).

(b) A Judge sitting alone regards himself as bound by the decision of two or more Judges.

(c) Two Judges sitting together also as a rule follow the decisions of two Judges. Where two Judges sitting together find themselves unable to follow a decision of two Judges, the practice in such cases is also to reserve the case for the decision of a fuller bench, although the Courts Ordinance does not make express provision in that behalf as in case of a single Judge."

This was later followed by a bench of 5 judges in **Walker Sons & Co. Ltd v Gunatilaka & Others, 1978-79-80 1 SLR 231.**

In those circumstances, Her Ladyship in the Court of Appeal erred when she failed to give due regard to the unanimous judgement by a bench of two judges in C.A. (PHC) 75/2008 **Bandarawela Multi-Purpose Co-operative Society v Periannen Nadaraja and Others** (decided on 9th September 2010).

Having considered the questions of law referred to this Court and having answered them in the affirmative, I hold that the Petitioner in the present application is entitled to have her property derequisitioned under section 10 (4) of the Co-operative Societies (Special Provisions) Act No. 35 of 1970.

Having considered the questions of law referred to this Court and having answered them in the affirmative, I hold that the judgment of the Court of Appeal is erroneous and set aside the same.

The court observes that the requisition had been made for "temporary use" of the 5th Respondent Cooperative Society and even after 43 years (1974 to 2017) the building still remains as requisitioned property. In these circumstances, I issue a *writ of mandamus* directing the 1 (e) Respondent forthwith to derequisition the land together with the buildings thereon, requisitioned by order 101 published in the gazette of the Republic of Sri Lanka dated 26th April 1974 bearing number 108/9 and the 5th Respondent to hand over vacant possession of the premises to the Petitioner.

Appeal Allowed with cost of Rs.75, 000/=

JUDGE OF THE SUPREME COURT

JUSTICE PRIYASATH DEP P.C
I AGREE

CHIEF JUSTICE

JUSTICE SISIRA J. DE ABREW
I AGREE

JUDGE OF THE SUPREME COURT