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

In the matter of an Application for Special Leave to Appeal under Article 128 of the Constitution of Sri Lanka.

J. S. Dominic
ID, Tower Building,
No. 25, Station Road,
Colombo 04.

PETITIONER-APPELLANT

S. C. Appeal No. 83/08
S. C. (SPL) L. A. No. 16/08
C. A. (WRIT) Application No. 918/05

-VS-

1. Hon. Jeevan Kumarathunga,
   Minister of Lands.

2. Secretary,
   Ministry of Lands.

   Both of Govijana Mandiraya,
   No. 80/5, Rajamalwatta Road,
   Battaramulla.

3. Hon. Dinesh Gunawardana,
   Minister of Urban Development Authority and Water Supply.

4. Urban Development Authority

   Both of 6th and 7th Floors,
   Sethsiripaya,
   Battaramulla.

5. Finco Limited,
   No. 49/16, Iceland Buildings,
   Galle Face,
   Colombo 3.

6. Hon. Attorney-General
   Attorney General's Department,
   Colombo 12.

RESPONDENT-RESPONDENT

BEFORE	:	N. G. Amaratunga, J., Saleem Marsoof, P.C., J., & C. Ekanayake, J.
COUNSEL	:	Mr. J. C. Weliamuna with Pulasthi Hewamanne for the Petitioner-Appellant. Mrs. Ganga Wakishtarachchi, S.C., for the 1st to 3rd and 6th Respondent-Respondents. Mr. S. L. Gunasekara, Mr. Ananda Dharmaratne with Ms. R. Senaratne for the 5th Respondent-Respondent.
ARGUED ON	:	7.10.2009
DECIDED ON	:	7.12.2010

SALEEM MARSOOF, J.

The only substantive question on which special leave to appeal has been granted in this case, is whether the Court of Appeal erred in upholding the preliminary objections taken up by the 4th Respondent-Respondent Urban Development Authority, and the 5th Respondent-Respondent Finco Limited, and dismissing the writ application filed by the Petitioner-Appellant (hereinafter referred to as the Appellant) in the Court of Appeal:-

> "in as much as the Court of Appeal rejected the Petitioner-Appellant's amended petition as well as his application to add ICC Housing (Pvt.) Ltd., National Housing Development Authority and Ocean View Development (Pvt.) Ltd., as party Respondents?"

Factual Matrix

This question arises in the context of the application filed by the Appellant in the Court of Appeal on 6th June 2005 praying for several relief including a mandate in the nature of *certiorari* to quash the order marked P28a, which was made by the 1st Respondent-Respondent Minister of Lands, purporting to release a condominium unit claimed by the Appellant from a divesting order previously made by the said Minister in terms of Section 39A(1) of the Land Acquisition Act No. 9 of 1950, as subsequently amended.

It was claimed by the Appellant in his application filed in the Court of Appeal, that by virtue of the Deed bearing No. 10795 dated 22nd March 1985 (P1), he owned, and was in occupation of, premises No. 49/5 of Kollupitiya Road, Colombo 3, which was a condominium unit situated on the property referred to in the impugned order marked P28a and the schedule to the Appellant's said application filed in the Court of Appeal. According to the Appellant, while he was so in occupation of the said premises, it was

acquired and vested in the State by virtue of an order dated 20th May 1987 made under Section 38 proviso (a) of the Land Acquisition Act and published in the Gazette Extraordinary dated 27th May 1987 (P2a) along with several other such premises which were in the vicinity.

In his application filed in the Court of Appeal, the Appellant has stated that he became aware of the said acquisition on or about 27th October 1987, and since the condominium property in question was earmarked for demolition, he was provided with alternative accommodation by the 4th Respondent-Respondent Urban Development Authority on a rent free basis in another condominium unit bearing No. 1D of the Tower Building situated at Station Road, Colombo 4, until such time as compensation for the property which was the subject matter of the Deed marked P1 is paid to him. He has further stated that as he had not been paid any compensation for the condominium unit he owned and possessed in Kollupitiya, the predecessor in office to the 1st Respondent-Respondent Minister of Lands made the divesting order dated 18th July 1991 which was published in the Gazette Extraordinary dated 23rd July 1991 (P6) and amended by the subsequent order dated 30th October 1991 published in the Gazette Extraordinary dated 4th November 1991 (P7), divesting the said premises along with certain other premises, in terms of Section 39A(1) of the Land Acquisition Act No. 9 of 1950, as subsequently amended.

The Appellant has stated in his application to the Court of Appeal, that since by the time the said divesting order was made, the condominium unit situated in Kollupitiya had been demolished, he was assured by the Urban Development Authority that the title of the condominium unit occupied by him at Tower Building, Colombo 4, would be transferred to him, subject to the condition that he shall pay the difference between the value of the said condominium unit and that of the value of the condominium unit at Kollupitiya previously owned by him. He has also stated that, notwithstanding his repeated oral and written representations, there was considerable delay in transferring title to the condominium unit in the Tower Building to him, and that, to his utter dismay, the said divesting order made in the year 1991 was sought to be varied thirteen years later by the impugned order dated 14th July 2004 published in the Gazette Extraordinary bearing No. 1349/17 dated 15th July 2004 (P28a). By the said order, the Minister of Lands purporting to remove premises bearing assessment Nos. 49/5 (claimed by the Appellant) and 49/4 of Kollupitiya Road from the divesting order P6 made in 1991, as amended by P7.

It is the position of the Appellant that the impugned order P28a has purportedly been made under Section 39A(1) of the Land Acquisition Act, depriving him of the benefit of the previous divesting order made in 1991, and that it has been made for a collateral and ulterior purpose to enable the 5th Respondent-Respondent Finco Limited to construct a new condominium or apartment complex on the land on which the Kollupitiya condominium was situated, and that the said order is *inter alia* ultra vires, illegal and in violation of his rights. The Appellant has in addition to an order in the nature of *certiorari* to quash P28a, sought an order directing the Respondents to hand over the possession of the said premises to the Appellant, and additionally, a writ of *mandamus* against all Respondents other than Finco Limited, to compel them to transfer to him the title in the condominium unit bearing No. 1D of Tower Building at Station Road, Colombo 4 on a valuation and / or on the basis of the terms already agreed.

The Preliminary Objections

The preliminary objections upheld by the Court of Appeal were raised by the 5th Respondent-Respondent Finco Limited and the 4th Respondent-Respondent Urban Development Authority, in their respective Statements of Objections dated 23rd September 2005 and 8th November 2005. The said objections, disclosed certain facts which were not set out in the writ petition filed by the Appellant. Based on these facts, the said Respondents simply took up the position that the failure of the Appellant to cite or add as respondents to his writ petition three necessary parties, namely, the National Housing Development Authority, Ocean View Development Company (Private) Ltd., and ICC Housing (Pvt.) Ltd., was fatal to the maintainability of the writ petition.

It was the position of the said Respondents that the premises claimed by the Appellant in Kollupitiya were "excess" housing property in terms of the Ceiling on Housing Property Law No. 1 of 1973, as subsequently amended, and had been vested in the Commissioner of National Housing in terms of the said Law, and had been subsequently transferred by the State to the Urban Development Authority, which demolished the entire condominium complex in or about November 1989 converting it into a bare land, prior to the making of the divesting order P6 and the amendment thereto P7 in 1991. According to the Respondents, it was this property that was purportedly released from the divesting by the impugned order marked P28a made in July 2004.

Finco has also averred as follows in paragraph 1(e) of its Statement of Objections dated 23rd September 2005:

> The land shown in Acquisition Order P2 (a) which is claimed by the Petitioner was handed over by the 4th Respondent (Urban Development Authority), after having obtained the approval of the 3rd Respondent, to ICC Housing (Pvt.) Ltd., a duly incorporated company under the laws of Sri Lanka, for development, and not to the 5th Respondent (Finco Limited). Hence, ICC Housing (Pvt.) Ltd. is a necessary party to this application. The Petitioner has failed and / or neglected to make the said ICC Housing (Pvt.) Ltd., a party respondent to this application. Therefore, the Petitioner is guilty of the non-joinder of a necessary party.

In paragraph 13 (d) of the said Statement of Objections, Finco Limited also disclosed that the Urban Development Authority had consequent to a decision of the Cabinet of Ministers on that behalf, handed over the Kollupitiya condominium land to ICC Housing (Pvt.) Ltd., for the construction of a new residential condominium consisting of 106 residential units using the said land as well as land adjacent thereto which was 126.77 perches in extent.

According to Finco, the said land had been conveyed on a 99 year lease (lease to be converted into free-hold only for residential units based on a Condominium Plan after completion of the said development) to the said ICC Housing (Pvt.) Ltd., on the payment in full of a sum of Rs. 33.6 million (Rs. 33,600,000/-) plus Value Added Tax (VAT). In paragraph 13 (e) of the said Statement of Objections, it is explained that ICC Housing (Pvt.) Ltd. was a fully owned subsidiary of International Construction Consortium Limited, which is an associate company of Finco Limited.

In paragraph 1 (ii) of its Statement of objection dated 8th November 2005, the 4th Respondent-Respondent Urban Development Authority took up a similar preliminary objection to the maintainability of the application filed by the Appellant in the following terms:-

> The Petitioner (now Appellant) is not entitled to the to the relief sought by prayer (c) of the Petition due to the reason that the Petitioner (Appellant) has failed to join two essential parties who should be heard in respect of the relief prayed for by the said prayer.

The relief sought by prayer (c) of the writ petition filed in the Court of Appeal was a writ in the nature of *mandamus* for compelling the 1st ,2nd, 3rd and 4th Respondent-Respondents, or any one or more of them, to transfer Condominium Unit 1D, Tower Building, Station Road, Colombo – 4 "on a valuation and or as per terms agreed". It was the position of the Urban Development Authority that, as set out in paragraph 17 of its Statement of Objections, after the Appellant vacated his premises in Kollupitiya, he was provided with alternate accommodation on a rent free basis by the said Authority until such time compensation in respect of the said property is paid, but when the property was divested by the divesting order P6 read with P7, the need to pay compensation ceased. The Authority had also stated in the said Statement of Objections that subsequently, consequent upon the impugned order P28a being made, the title in the property reverted to the State, which was vested with the National Housing Development Authority.

It was also the position of the Urban Development Authority that the condominium property at Tower Building in Bambalapitiya, which is the premises in which the Appellant was provided alternative accommodation, is managed by Ocean View Development Company (Private) Ltd., which is a joint venture company of which shares are equally held by the said Authority and the National Housing Development Authority, and that the land in which the said Tower Building was built was a land that was vested with the Urban Development Authority. The land on which this condominium complex was put up was leased to the said Ocean View Development Company (Pvt) Ltd., in terms of the Deed of Lease No. 298 dated 1st January 1996 attested by Mr. K. D. P. Jayaweera, Notary Public. Accordingly, it was the contention of the Urban Development Authority that the National Housing Development Authority as well as the said Ocean View Development Company (Pvt) Ltd., were necessary parties to this case, particularly in the context of the relief prayed for in prayer (c) to the writ petition.

The First Decision of the Court of Appeal

The Appellant initially responded to the aforesaid preliminary objections taken up in the Statements of Objections of Finco Limited and the Urban Development Authority, respectively dated 23rd September 2005 and 8th November 2005, with his motion dated 8th December 2005, in which the Appellant prayed that for the reasons set out therein, he be permitted to amend his writ petition to add ICC Housing (Pvt) Ltd., Ocean View Development Company (Pvt) Ltd., and the National Housing Development Authority as the 7th to 9th respondents thereto. The reliefs prayed for by the Appellant in the said motion were considered by the Court of Appeal on two separate occasions, and on both

occasions court decided not to grant the Appellant the primary relief prayed for by him, which was to permit him to add the aforesaid necessary parties disclosed by the Urban Development and Finco Limited in their objections as the 7th to 9th respondents to the writ petition.

Chronologically, the first of these decisions was embodied in the order of the Court of Appeal dated 12th December 2005, which for the first time dealt with the said motion dated 8th December 2005 filed by the Appellant. The said motion was an elaborate document, and it is significant that along with the said motion, the Appellant had also tendered to court a draft amended petition and sought the indulgence of court to admit the same, and issue notice on the aforesaid three entities which were sought to be added as the 7th to 9th Respondents to the application filed by the Appellant. The motion also set out, in a systematic manner, a summary of the amendments sought to be effected by the Amended Petition.

I quote below substantive paragraphs of the said motion in order to facilitate a fuller understanding of the nature of his application, which might be crucial to the decision of this appeal –

> "WHEREAS the present Application was supported on 24.06.2005 and notices having been issued on several (1st – 6th) Respondents the 4th and 5th Respondents filed their Statement of Objections on 11.11.2005. The Case is being mentioned on 12.12.2005 for the 1st and 2nd Respondents Statements of Objections and Notice Returnable on the 3rd Respondent.
>
> AND WHEREAS in view of the technical Objection of the 4th and 5th Respondents (Urban Development Authority and Finco Limited), and the Petitioner now reliably being aware of certain developments relating to the above case, respectfully *moves to file Amended Petition and respectfully moves that the same be accepted* and be filed of record
>
> ……...
>
> AND WHEREAS for fuller adjudication of matters *the Petitioner seeks Your Lordships' Court permission to add the 7th to 9th Respondents* to this Application as more fully stated in paragraph 18 and 19 of the Amended Petition *and respectfully moves that the 7th – 9th Respondents be added to this Application and Notices be issued on them.*
>
> AND WHEREAS the Petitioner seeks your Lordships indulgence *to be permitted to tender amended petition and affidavit only* as there is no change in the marked documents which have already being tendered with the original Petition and undertakes to provide additional copies if been necessary by Your Lordships Court." *(italics added)*

By its order dated 12th December 2005, the Court of Appeal refused to grant the Appellant any of the relief prayed for by him in his above quoted motion dated 8th December 2005. The said decision deprived the Appellant of the opportunity of adding the aforesaid necessary parties as respondents to his writ petition. The decision of the

Court of Appeal, which for convenience, will sometimes be referred to hereinafter as the "first decision", was embodied in the following order:–

> "12/12/05
>
> Same appearance as before.
>
> It would appear that the Petitioner has filed amended petition dated 08/12/05 and this has been objected by the learned Counsel for the 4th and 5th Respondents.
>
> Both Counsel indicate that the objections have been filed already to the original application filed by the Petitioner. Accordingly, *the application made by the Counsel for the Petitioner to accept the amended petition is refused.* SC appearing for the 1st and 2nd Respondents moves for further time to file objections.
>
> Objections to the original petition to be filed by the 1st and 2nd Respondents for 20/01/06.
>
> Mention on 20/01/06
>
> Sgd/." *(italics added)*

The Second Decision of the Court of Appeal

The second decision of the Court of Appeal which relates to the adding of necessary parties disclosed in the Statements of Objections of the Urban Development Authority and Finco Limited, is contained in the impugned judgement of that Court dated 3rd December 2007, against which the Appellant has been granted special leave to appeal by this Court, on the substantive question of law set out at the commencement of this judgement.

I shall at this stage attempt to outline the circumstance in which this "second decision" of the Court of Appeal came to be made. After the initial decision of the Court of Appeal dated 12th December 2005 not to permit the Appellant to amend his original writ petition dated 6th June 2005 by which amendment he had sought to add the parties disclosed as necessary parties in the objections filed by the Urban Development Authority and Finco Limited, the Court of Appeal permitted the 1st and 2nd Respondents-Respondents, respectively the Minister of Lands and the Secretary to the Ministry of Lands, to file their objections to the original writ petition. After obtaining several dates for filing these objections, learned State Counsel who appeared for the said Respondents, informed Court on 25th April 2006, that it was not intended to file any objections on behalf of the 1st and 2nd Respondent-Respondents as well as on behalf of the 3rd and 6th Respondent-Respondents, and thereafter the Appellant filed his Counter-Affidavit to the objections of the Urban Development Authority and Finco Limited on 24th May 2006.

When the case was mentioned on 30th October 2006, since pleadings were considered complete, the case was fixed for hearing on 30th May 2007. However, for certain technical reasons, the hearing was not taken up on that date, and the case was called thereafter on 14th June 2007 and re-fixed for hearing on 17th October 2007. Thus, the only additional

material available to Court at the time it heard the case on 17th October 2007, on which date learned Counsel for the Urban Development Authority and Finco Limited formulated their preliminary objections, was the said Counter-Affidavit filed by the Appellant in which he has specifically dealt with the preliminary objections raised by Urban Development Authority and Finco Limited.

In particular, it is relevant to note that in paragraph 4 of the said Counter-Affidavit, the Appellant has specifically pleaded that he was "unaware of any role played by Ocean View Development Company (Pvt) Ltd. and National Housing Development Authority" and that, on the contrary, he was led "to believe that the 4th Respondent (Urban Development Authority) had title and authority in relation to the condominium at Tower Building, Colombo 4." Similarly, in regard to the preliminary objection taken up by Finco Limited, the Appellant has in paragraph 6 c of his Counter-Affidavit specifically pleaded that he was "unaware of any role played by ICC Housing (Pvt) Limited.," and that the Appellant was led to believe that the Urban Development Authority had only granted permission to Finco Limited to deal with the "subject premises towards construction of a condominium complex".

On 17th October 2007, after hearing learned Counsel for the Urban Development Authority and Finco Limited as well as learned Counsel for the Appellant, on not only the preliminary objections raised by the former, but also in regard to the application made once again by learned Counsel for the Appellant that court be pleased to grant permission for the Appellant to add ICC Housing (Pvt.) Ltd., Ocean View Development Company (Pvt) Ltd., and the National Housing Development Authority respectively as 7th to 9th Respondents, the learned Judge of the Court of Appeal reserved judgement. However, at this point, it is also necessary to observe that the learned Judge of the Court of Appeal had in his order dated 17th October 2007 stated as follows :-

> "Court finds that the main relief sought is against the 1st Respondent (Minister of Lands) that is to quash the cancellation of the divesting order. But it appears that the 1st Respondent has not filed any objection in this application. *At this stage the learned State Counsel is permitted to file objection if any by the 1st Respondent*, and for that Counsel for the Petitioner and Counsel for the other Respondents have no objection.
>
> Objection to be filed on or before 20/11/2007.
>
> The date for the Counter Objection will be given after the order on the preliminary objection.
>
> Order on the preliminary objection on 03/12/2007…….." (Italics added.)

Through this order, *the Court of Appeal in effect re-opened the pleadings which, prior to that order, were considered closed by Court* upon learned State Counsel informing Court that no objections are intended to be filed on behalf of the 1st, 2nd, 3rd and 6th Respondent-Respondents, and the case was fixed for hearing on that basis. It is significant to note that the joint Statement of Objections of the 1st Respondent-Respondent Minister of Lands and the 2nd Respondent-Respondent Secretary to the Ministry of Lands dated 20th November 2007 were filed after Court reserved order on the preliminary objections but

prior to the impugned decision dated 3rd December 2007 was pronounced by the Court of Appeal.

By its impugned judgement dated 3rd December 2007, which for convenience may sometime hereinafter be referred to as the "second decision", the Court of Appeal refused to permit a further application made by learned Counsel for the Appellant to add the aforesaid parties, ICC Housing (Pvt) Ltd., Ocean View Development Company (Pvt) Ltd., and the National Housing Development Authority, as party respondents to the writ application on the ground that it "at this stage is a belated application", and decided to dismiss *in limine* and without costs, the substantive application of the Appellant for relief by way of writ. After quoting with approval the *dictum* of J.A.N de Silva, J. (as he then was) in *Perera v. National Housing Development Autithority* [2001] 3 Sri LR 50 at page 55 to the effect that the failure on the part of the petitioner in that case to move to add "necessary parties to the effectual adjudication of the question in issue" was fatal,
learned Judge of the Court of Appeal observed as follows:-

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

Should the Appellant Have Appealed Against the First Decision?

It is now convenient to consider the decision of the Court of Appeal dated 3rd December 2007 in the context of the question on which special leave has been granted by this Court, which is simply, whether the Court of Appeal erred in upholding the preliminary objections taken up by the Urban Development Authority and Finco Limited and dismissing the writ application filed by the Appellant in the Court of Appeal, inasmuch as it had rejected the Appellant's amended petition as well as his application to add ICC Housing (Pvt.) Ltd., National Housing Development Authority and Ocean View Development (Pvt.) Ltd., as party Respondents.

As already noted, applications made on behalf of the Appellant to add the aforesaid parties has been refused by the Court of Appeal on two occasions, firstly, more or less implicitly, by its order dated 12th December 2005, and later in the impugned judgement dated 3rd December 2007. The Appellant had not sought leave to appeal against the first of these decisions, and the question therefore arises as to whether the Appellant can canvass the decision of the Court of Appeal not to permit him to add the aforesaid parties and make consequential amendments to his writ petition in these appellate proceedings which are confined to the decision of the Court of Appeal dated 3rd December 2007.

Learned Counsel for the Urban Development Authority and Finco Limited have submitted that insofar as the Appellant has not appealed against the decision of the Court of Appeal dated 12th December 2005, they are not entitled to canvass in the course of this appeal, the said decision which refused to permit the Appellant to add the

aforesaid parties and make consequential amendment to the writ petition. Unfortunately, learned Counsel did not cite any authorities, in support of this submission during oral argument as well in written submissions filed thereafter.

Learned Counsel for the Appellant, has however, submitted that the fact that the Court of Appeal did not permit the adding of the relevant parties initially, did not prevent the Court of Appeal from permitting the addition of the said admittedly necessary parties, at the later point when the Urban Development Authority and Finco Limited took up the position that the writ application cannot be maintained without the said parties being added. He also submitted that the impugned decision of the Court of Appeal dated 3rd December 2007 was a "final order" dismissing the writ petition *in limine*, and that the Appellant was entitled to appeal against the said decision which stemmed from the error of law initially committed by the Court of Appeal in its earlier order dated 12th December, 2005. He further submitted that the Urban Development Authority and Finco Limited were precluded from taking up the said position having first objected to the addition of the said parties when the matter came up initially as "equity would prevent the Respondents from taking advantage of such an incongruity."He too did not cite any authorities in support of his submissions.

From a purely procedural point of view, it is plain that the submission made by learned Counsel for the Urban Development Authority and Finco Limited goes against sound and established principle enunciated by our courts, which as pointed out by Bertram, C.J. in *Fernando v. Fernando* (1919) 6 Ceylon Weekly Reporter 262 at page 265, "discourages appeals against incidental decisions when an appeal may effectively be taken against the order disposing of the matter under consideration at its final stage." It is trite law that leave to appeal will not generally be granted from every incidental order, for to do so, would be to open the floodgates to interminable litigation *(Balasubramaniam v. Valliappar Chettiar* (1938) 39 NLR 553 at page 560), but if the incidental order goes to the root of the matter and it is both convenient and in the interests of both parties that the correctness of the order be tested at the earliest possible stage, then leave to appeal will be granted *(Arumugam v. Thampu,* (1912) 15 NLR 253 at page 255; *Girantha v. Maria* (1948) 50 NLR 519 at page 521).

In the course of my judgement in *Francis Samarawickrema v. Dona Enatto Hilda Jayasinghe and another* [2000] BALJR 000, I quoted the following *dicta* of Vythialingam, J. in *K.A. Mudiyanse v. Punchi Banda Ranaweera* (1975) 77 NLR 501 at page 509-

> "A party so aggrieved, however, still has two courses of action: (1) to file an interlocutory appeal or, (2) to stay his hand and file his appeal at the end of the case even on the very same ground on which he could have filed his interlocutory appeal. If he adopts the latter course he cannot be shut out on the ground that his appeal being against the incidental order is out of time. It might well be that in spite of the incidental order against him he might have still succeeded in the action. . ."

This appears to me to be exactly what happened in the proceedings before the Court of Appeal in the instant case, as the Appellant, who was obviously aggrieved by the initial order of that court dated 12th December 2005, which order was made by that court in the face of the objections taken by the Urban Development Authority and Finco to the

addition of the other necessary parties disclosed in their very pleadings, probably decided not to appeal against the said decision in the hope that he could succeed in his substantive application with greater ease. In my considered opinion, the Appellant cannot be "shut out" from challenging the refusal of the Court of Appeal to permit the adding of the necessary parties at the stage of the final appeal simply because he had not rushed to the Supreme Court at the initial stage with an interlocutory appeal.

It is also significant that the second application to add the necessary parties was made by the Appellant in sheer desperation in the course of the hearing into the preliminary objections taken up by the Urban Development Authority and Finco Limited on 17th October 2007. Learned Counsel who appeared for the latter parties, who had objected to the adding of the necessary parties when application was made initially by the motion dated 8th December 2005, this time objected to the addition of the necessary parties on the ground that the application was belated. The Court of Appeal has by its order dated 12th December 2005 (first decision) and the impugned judgement dated 3rd December 2007 (second decision) disallowed the applications to add these necessary parties. In my opinion, these two decisions are intrinsically interrelated.

Was the Appellant's Motion Misconstrued?

The first question that has to be considered on this appeal is whether the Court of Appeal did err in its first decision in refusing permission to the Appellant to add the parties disclosed by the Statements of Objections filed by the Urban Development Authority and Finco Limited? It would appear from the order of the Court of Appeal dated 12th December 2005 that it had misconstrued the motion dated 8th December 2005 filed by the Appellant simply as a motion with which an amended petition has been tendered to court after the Urban Development Authority and Finco Limited had filed their objections. The Court of Appeal has failed to appreciate that the said motion was filed primarily for the purpose of seeking permission of Court *to add the parties disclosed in the Statement of Objections filed by the Urban Development Authority and Finco Limited* as the 7th to 9th Respondents to the petition dated 6th June 2005 filed by the Appellant in the Court of Appeal, and by the said motion an application was also made for permission to make consequential amendments to the original writ petition filed on 6th June 2005 possibly in order to save time.

It is manifest that the Appellant had acted with reasonable expedition and in good faith in making his application to add the parties sought to be added by him at the stage he made his application by the motion dated 8th December 2005. It is clear that the Appellant did not know, nor was he reasonably expected to know, that the parties sought to be added by him as party respondents by the said motion, had any interest in the matters raised in the writ petition at the time he originally sought to invoke the jurisdiction of the Court of Appeal. It is important to mention that learned Counsel for the Urban Development Authority and Finco Limited did not contest the position taken up by the Appellant in his said motion that the he was not aware of the interests ICC Housing (Pvt.) Ltd., Ocean View Development Company (Pvt) Ltd., and the National Housing Development Authority had in the properties which constitute the subject matter of his writ petition until he had notice of the Statements of Objections of the Urban Development Authority and Finco Limited little less than a month before the date of the said motion.

It is apparent from the letters dated 25th January 2005 (P29) sent by the Appellant himself and the subsequent letter dated 4th April 2005 (P30) sent on behalf of the Appellant by his lawyer to the Chairman of the Urban Development Authority, with copies to other relevant officials, that a few months before he filed his writ petition, he has been making more than reasonable endeavours to seek administrative relief for his long standing grievance. In order to give some idea of the efforts taken by the Appellant over a fairly long period of time, some extracts from this letter are quoted below:-

> "In lieu of the demolishing of my residential premises I made several representations and finally was assured that I would be compensated for same by transferring Tower Building apartment to my name.
>
> I have been periodically visiting and communicating with various Officers of the UDA as on most occasions they wrote to me as well as telephoned me and requested my presence towards concluding this matter. For instance I've had discussions with Mr. Wedamulla, Mr. Batuwangala, Mr. Dickson, Prof. Willie Mendis, Mr. Ivan Gunaratne and finally Mr. Dharmasiri.
>
> As these matters have been pending for a long time and repeated assurances had been given to transfer the apartment in my name and due to my persistent follow up I met Mr. Dharmasiri in December 2003 who assured me there would be no further delay and instructed Mr. Newton to expedite the transfer without further delay. However, not withstanding my several visits and communications the delay continued.
>
> Then all of a sudden like a bolt from the blues in or about October 2004 I was informed the divesting order relating to my land had been cancelled. This apart from being most surprising I consider irregular and unreasonable especially as I had no prior warning or knowledge of it. I made representations on this aspect as well and I was assured that the wrong cancellation of the divesting order would be looked into and relief granted to me.
>
> Since then I have made several representations and visits towards ensuring that the promises given to me would be fulfilled, but there is an unexplained delay. I have undergone immense mental and financial hardships for several years as you will no doubt agree. I therefore appeal to your good office to ensure that there be no further delays in fulfilling the promises and assurances given to me. I await your early action to alleviate my suffering.
>
> cc - Director General, UDA
Secretary, Ministry of Lands
>
> Yours faithfully
J. S. Dominic"

This was followed up by the letter dated 4th April 2005 (P30), which was also addressed to the Chairman of the Urban Development Authority, with copies to the then Minister of Lands, the Secretary to the Ministry of Lands, the then Minister of Urban Development and Water Supply and the Attorney General, by Ishara Gunawardena, Attorney-at-law, on instructions from the Appellant, seeking redress after outlining the basic facts to the extent that the Appellant was aware. There is no doubt in my mind that

had the Appellant been aware of the interests of ICC Housing (Pvt.) Ltd., Ocean View Development Company (Pvt) Ltd., and the National Housing Development Authority to the matters with respect to which he ultimately sought relief from the Court of Appeal, he would not have failed to copy the letters marked P29 and P30 to those parties as well. The fact that the Appellant moved court to add these parties as respondents soon after he became aware of their interest, shows that he had no intention of shutting out these parties from the writ proceedings, and would have cited them as party respondents to his writ petition had he been aware of their interests at the time he filed the same. I am therefore of the opinion that the Court of Appeal did err in its first decision in not permitting the addition of parties prayed for in the motion dated 8th December 2005 filed by the Appellant.

Did the Court of Appeal Err?

This brings me to the question whether the Court of Appeal erred in its impugned decision dated 3rd December 2007, which is for short referred to as the "second decision". The circumstances in which the Court of Appeal arrived at this decision has been explained earlier in this judgement, but it needs to be emphasized that the second decision was made in the context of the preliminary objections taken by the Urban Development Authority and Finco Limited in regard to the maintainability of writ application filed by the Appellant. It is also necessary to stress that although at the point of time when this case was taken up for final hearing on 17th October 2007, on which date the learned Counsel for the aforesaid two respondents formulated their preliminary objections and made submissions in support thereof, *pleadings were considered by Court to be complete*, as learned State Counsel who appeared for the 1st and 2nd Respondent-Respondents being the Minister of Lands and Secretary to the Ministry of Lands had informed Court on 25th April 2006 that it was not intended to file any objections on behalf of those respondents as well as on behalf of the 3rd and 6th Respondent-Respondents, and the Appellant had filed his Counter-Affidavit with respect to the objections of the Urban Development Authority and Finco Limited.

However, by a curious turn of events, at the same time when the Court of Appeal heard submissions of Counsel on the preliminary objections raised in the case on 17th October 2007, it took upon itself to make order, *ex mero motu* that since "the main relief sought is against the 1st Respondent, that is to quash the cancellation of the divesting order", learned State Counsel may file the objections of the Minister of Lands on or before 20th November 2007. *This in effect re-opened the pleadings that were considered closed by the Court of Appeal itself* at the time when the case was taken up for hearing on the very same day. It is therefore ironic, and in fact a grave travesty of justice, that the Court of Appeal by its judgement dated 12th December 2007 refused the Appellant permission to add the necessary parties disclosed by the Urban Dvelopment Authority and Finco Limited and went on to dismiss the substantive writ application filed by the Appellant on the ground that the very same necessary parties were not before court. It is unfortunate, to say the least, that in doing so the Court of Appeal was unmindful of the state of the law which has been lucidly and correctly explained in the following passage from Dr. S. F. A. Coorey's *Principles of Administrative Law in Sri Lanka* (2nd Edition) page 537, which had been quoted in the judgement of the Court of Appeal, with apparent approval:-

> "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* (1961) 65 NLR 359. Once the final hearing of the application by court commences, such an application made thereafter will be refused; *Goonetilleke v. Government Agent, Galle* (1946) 47 NLR 549; *Jamila Umma v. Mohamed* (1948) 50 NLR 15, 17; *Dharmaratne v. Commissioner of Elections* (1950) 52 NLR 429, 432." *(italics added)*

The impugned decision of the Court of Appeal dated 12th December 2007 is in my opinion not only self-contradictory and fundamentally flawed, but it is also extremely unreasonable. It is self-contradictory because at the time when the preliminary objections were taken up for hearing, the court had permitted the pleadings to be re-opened, and in fact the joint Statement of Objections of the 1st Respondent-Respondent Minister of Lands and the 2nd Respondent-Respondent Secretary to the Ministry of Lands were *filed with the permission of Court* only on 20th November 2007, that is after the Court reserved order on the preliminary objections but prior to the pronouncement of the impugned decision dated 3rd December 2007 by the Court of Appeal. In other words, at the time when submissions on the preliminary objections were heard and the judgement reserved, *the case was not ready for final disposal,* and in fact passed the test enunciated by Dr. Coorey in the passage quoted by the Court of Appeal itself in its impugned judgement as the applicable criterion to be considered eligible to make application to court to add any subsequently disclosed necessary party or parties.

In my view, the said decision is also fundamentally flawed, for another important reason. The court fell into error because it failed to realize that unlike in the generality of writ applications coming before our courts, the mandate in the nature of *mandamus* prayed for by the Appellant in prayer (c) was not dependant or conditional upon the grant of the writ of *certiorari* prayed for by him in prayer (a) and arose from two distinct transactions. The relief prayed for by the Appellant in his original writ petition related to two distinct premises both of which were condominium units, the first situated in Kollupitiya, and the second situated in the Tower Building, Bambalapitiya, and the writ of *certiorari* was sought by the Appellant by prayer (a) to his petition, to quash the order dated 14th July 2004 (P28a), which had been made for the purpose of releasing the Kollupitiya condominium unit claimed by the Appellant and another from the divesting order dated 18th July 1991 (P6 and amended by P7). The Appellant had also sought by prayer (c) to the petition, a mandate in the nature of *mandamus* to compel the 1st,2nd, 3rd and 4th Respondent-Respondents or any one or more of them and or their agents or servants, to transfer Condominium Unit 1D, Tower Building, Station Road, Colombo – 4 "on a valuation and or as per terms agreed". Thus, even if the Appellant did not succeed in regard to the relief prayed for by him in prayer (a), this by itself would not disentitle him to relief by way of *mandamus* as prayed for in prayer (c), and equally, the failure to succeed in the application for *mandamus* will not preclude the Appellant from relief by way of *certiorari* in terms of prayer (a).

An important fact worthy of note, which had apparently escaped the Court of Appeal, is that although Ocean View Development Company (Pvt) Ltd., which is said to be a joint venture company of which shares were at the relevant time equally held by the Urban

said Authority and the National Housing Development Authority, acquired its interests in the Bambalapitiya land upon the Indenture of Lease bearing No. 298 and dated 1st January 1996 (4R2) attested by K. D. P. Jayaweera, Notary Public, much prior to the filing of the writ petition by the Appellant, the interests of ICC Housing (Pvt) Ltd., in the Kollupitiya property had been acquired *after* the writ petition was filed.

It is apparent from the letter dated 10th June 2005 (5R3) by which the Urban Development Authority had informed the Chairman of ICC Housing (Pvt) Ltd., that the Authority has decided to allocate the Kollupitiya land to the said company, that even ICC Housing (Pvt) Ltd., became aware of its interests only approximately 4 days after the Appellant filed his writ petition dated 6th June 2005. It is apparent from the letter dated 16th June 2005 (5R4) that the payment of Rs. 38,640,000/- being the full premium for the 99 year lease with respect to the land was made by ICC Housing (Pvt) Ltd., by way of cheque 10 days after the writ petition was filed. Hence, there was no way in which the Appellant could have been aware of the interests of ICC Housing (Pvt) Ltd., at the time of filing his writ petition, and to deny the Appellant the opportunity of maintaining his application for *certiorari* on the ground that the said company, which has incurred such expenditure, had not been cited or added as a party respondent, was a grave travesty of justice.

In any event, the second decision of the Court of Appeal was extremely unreasonable because the court had treated the application made by the Appellant to add the necessary parties, ICC Housing (Pvt) Ltd., Ocean View Development Company (Pvt) Ltd., and the National Housing Development Authority, as party respondents as a "belated application" when it had been made within one month from the date on which the Appellant became aware of the interests of the said necessary parties in the properties which constituted the subject matter of the writ application filed by him. As already noted, when the application to add these parties was renewed on 17th October 2007, the Court of Appeal, having permitted pleadings to be re-opened for the Minister of Lands, refused the Appellant permission to add on the ground that the pleadings were closed, and the case was ready for final disposal by court. As this Court noted in *V. Ramasamy v. Ceylon State Mortgage Bank* (1976) 78 NLR 510, the validity of a plea of delay must be tried on principles which are substantially of an equitable nature, and the principles of laches must "be applied carefully and discriminatingly, and not automatically and as a mere mechanical device (*per* Wanasundera, J. at page 517). There is no doubt that in all the circumstances of this case, equity would very much favour the Appellant.

In this context, it is important to mention that writs in the nature of *certiorari* and *mandamus*, which are granted by our courts "according to law" as provided in Articles 140 and 154P (4)(b) of our Constitution, had their origins in English common law and were known as 'prerogative writs' as they were the means by which the Crown, acting through its courts, ensured that inferior courts or public authorities acted within their proper jurisdiction. The hallmark of such writs was that they were granted in the name of the Crown, as the title of every case indicated, but as the law developed, initially individual litigants were permitted to initiate proceedings in the name of the Sovereign, and in jurisdictions such as Sri Lanka, even without expressly referring to the Crown.

As H.W.R. Wade and C.F. Forsyth observe in *Administrative Law,* page 591 (Ninth Edition*),* "The Crown lent its legal lent its legal prerogatives to its subjects in order that

they might collaborate to ensure good and lawful government." The fact that our Constitution expressly refers to these writs by their ancient names shows that our Constitution makers intended to preserve the beneficial characteristics of these ancient remedies, which possess the inherent character and virility to be able to change to suit changing circumstances and needs. It is therefore unthinkable that a court of law will subvert the objectives of these beneficial remedies by non-suiting a party through a process of tying it down in unshakable knots, as the Court of Appeal has sought to do in the instant case.

Conclusions

Accordingly, for the reasons already set out in this judgement, I am of the opinion that the substantive question of law on which special leave to appeal has been granted by this Court, should be answered in the affirmative. I therefore hold that the Court of Appeal had erred in upholding the preliminary objections taken up by the 4th Respondent-Respondent Urban Development Authority, and the 5th Respondent-Respondent Finco Limited, and dismissing the writ application filed by the Petitioner-Appellant in the Court of Appeal, inasmuch as the Court of Appeal had rejected the Petitioner-Appellant's amended petition as well as his application to add ICC Housing (Pvt.) Ltd., National Housing Development Authority and Ocean View Development (Pvt.) Ltd., as party Respondents.

I make order allowing the appeal with costs fixed at Rs. 50,000/- payable jointly by the 4th and 5th Respondent-Respondent to the Appellant within a month from the date of this judgement. I set aside the judgement of the Court of Appeal dated 3rd December 2007 as well as the order of the Court of Appeal dated 12th December 2005 insofar as it rejected the amended petition filed with the motion dated 8th December 2005, and make order accepting the said amended petition. I direct that the original docket of the Court of Appeal be returned to that Court with a certified copy of this judgement, and further direct that this case be called in that court within six weeks of the date hereof, after notice to all the parties including ICC Housing (Pvt.) Ltd., National Housing Development Authority and Ocean View Development (Pvt.) Ltd., who are hereby added as 7th to 9th Respondents, and that after all respondents file their respective Statements Objections to the amended petition, and the Appellant files counter-objections, if any, the case be expeditiously taken up for hearing before a Bench to be specially nominated by the President of the Court of Appeal consisting of three judges of that court excluding any judge who might have previously heard this case.

JUDGE OF THE SUPREME COURT

N. G. AMARATUNGA, J.

I agree.

JUDGE OF THE SUPREME COURT

CHANDRA EKANAYAKE, J.

I agree.

JUDGE OF THE SUPREME COURT