

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALISTIC REPUBLIC OF
SRI LANKA.

In the matter of an appeal having
granted Special Leave under and in terms of
the provisions of the Constitution.

SC Application No. SC/SPL/LA 230/2012

CA Writ Application No.1097/2006

SC Appeal 161/2013

Hassen Lebbe Mohamed Nizam
89/2, Lady Gordon's Road, Kandy.

Petitioner

~Vs~

1. Dr. M.S. Jaideen

2, R. W. M.S.B. Rajapakse

3. Dilshan Jayasooriya

All members of the Ceiling on Housing
Property Board of Review

No. G- 10, Vipulasena Mawatha Housing
Scheme Sri Vipulasena Mawatha, Colombo 10.

4. The Commissioner for National Housing

Department of National Housing,
Sethsiripaya, Battaramulla.

5. Gnoi Bintan Moomin

No. 504/6 Peradeniya Road, Kandy.

6. K. Engonona Wickramasinghe

504/1, Peradeniya Road, Kandy.

7. Mulin Medawatte Gedara,
504/1, Peradeniya Road, Kandy.

8. M.C. De La Motte,
No. 36, Windsor Place, Dehiwala.

9. W.M.H.L. Mohamed Farrok
504, Peradeniya Road, Kandy.

Respondents

AND NOW BETWEEN

Hassen Lebbe Mohamed Nizam
89/2, Lady Gordon's Road, Kandy.

Petitioner-Petitioner

-Vs-

1. Dr. M.S. Jaldeen.

2. R. W. M.S.B. Rajapakse

3. Dilshan Jayasooriya

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No. G 10, Vipulasena Mawatha Housing
Scheme, Sri Vipulasena Mawatha, Colombo
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No. 36, Windsor Place, Dehiwala

9. W.M.H.L. Mohamed Farrok
504, Peradeniya Road, Kandy.

Respondents- Respondents

BEFORE: Eva Wanasundera P.C.J
Buwaneka Aluwihare P.C.J
Sisira J De Abrew J

COUNSEL : M U..M Ali Sabri PC with Lasantha Thiranagama for
the Petitioner- Petitioner-Appellant
Vikum De Abrew Deputy Solicitor General for the 4th
Respondent- Respondent
J.C Boange for the 5th and 7th Respodent Respondent

Argued on: 26- 05-2014

Decided on : 15-02-2016

Aluwihare P.C.J

The Petitioner-Petitioner-Appellant, and the 9th Respondent became joint owners of the premises bearing assessment numbers 504/1, 504/2, 504/3, 504/5, and 504/6, Peradeniya Road Kandy, originally owned by one George E De La Motte, by virtue of George De Lamotte's last will. His son Hans Cecil De La Motte became the owner of the premises in issue as at 1973, the year in which the Ceiling on Housing Property Law came into operation. Hans Cecil De La Motte died intestate in 1979. Prior to the death of Hans Cecil De La Motte, the Petitioner-Petitioner-Appellant (hereinafter the Appellant) and his brother, the 9th Respondent had entered into an agreement with Hans Cecil De La Motte to purchase tenements bearing assessment numbers 504/1 to 504/6 and premises bearing assessment numbers 504, 504/1A. The Appellant and the 9th Respondent subsequently purchased the premises 504/1 to 504/6 with the permission of the court from the administratrix of the estate of said Hans Cecil De La Motte, appointed by the District Court of Kandy case number 2820/T. Deed Nos. 8707 and 8708 dated 15 September 1981 had been executed for this purpose.

Subsequent to the transactions referred to above, Applications were made by some of the tenants of the premises referred to above to the 4th Respondent, the Commissioner of Housing to have the tenements transferred to them on the basis that the De La Motte family had houses in excess of the permitted number. After an inquiry, the 4th Respondent, held that Hans Cecil De La Motte was an excess house owner. Aggrieved by this decision of the 4th Respondent, the Appellant and the 9th Respondent appealed against the said order of the Housing Commissioner to the Board of Review established in terms of section 17 of the Ceiling of Housing Property Law (hereinafter the Law). The Board of Review affirmed the findings of the Commissioner of Housing by its order dated 3rd May 2006.

As a sequel to this order, the Appellant sought a writ of certiorari from the Court of Appeal to quash the order dated 3 May 2006 made by the Board of Review.

The gravamen of the Appellant's complaint before the Court of Appeal was that the Board of Review failed to consider the contents of three highly relevant documents (X1, X 2 and X3) which the Appelleant asserted, provided vital evidence to arrive at the determination as to whether George De La Motte was or was not an excess house owner for the purpose of the Law. The three documents were;

(a) Last Will of George De La Motte -X1

(b) Inventory- X2

(c) Probate in respect of the estate of said George De La Motte -X3

The above documents, X1 to X3 were marked and produced before the Court of Appeal as P 15, P 16 and P17, in that order.

Although it does not seem necessary to delve into the facts in relation to this matter in detail, I wish to refer to them to the extent necessary to bring some clarity to the issues before this court.

The documents X1 to X3 aforesaid were produced as annexures to the Petition before the Board of Review. On behalf of the Appellant and the 9th Respondent it was pleaded that the said documents had not been available to them at the time and hence they could not be produced at the inquiry before the 4th Respondent. The Appellant and the 9th Respondent had taken up the position that the heirs of De La Motte were neither made parties nor noticed at the said inquiry and the particulars relating to several premises owned by Hans Cecil De La Motte were matters within the knowledge of his heirs and that the Appellant and the 9th Respondent had to embark on a voyage of discovery to trace the documents X1 to X3, the contents of which would have shed light on the issue before the Board of Review.

The Respondents, however had objected to the production of the said document on the grounds that they were new documents produced for the first time and there was no provision to admit new evidence before the Board of Review. It was urged on behalf of the Appellant, that Section 32 of the Ceiling on Housing Property law confers power on the Board of Review to record additional evidence and compel production of documents.

It was the contention of the Appellant that such powers are conferred on the Board of Review to enable it , to come to the correct findings, in this instance as to the propriety rights of the parties before it. The document X1, which is the last Will of the father of Hans Cecil De La Motte appears to be a significant document in determining as to whether Hans Cecil De La Motte was an excess house owner or not.

It was urged before the Board of Review by the Appellant that the 4th Respondent, Commissioner, was made to believe that Hans Cecil De La Motte is the only heir of George De La Motte, and the Commissioner made an order on the premise that all the properties of George De La Motte devolved on Hans Cecil De La Motte. The Board of Review had neither considered the documents X1 to X3 nor had adduced any reasons for rejecting the said documents. The Board of Review in upholding the decision of the 4th Respondent, Commissioner, had gone on to state that the Commissioner is justified in arriving at the determination on the basis of the evidence both oral and documentary, produced by the Respondents.

The Court of Appeal dismissed the application of the Appellant based on the (now has become known as) “Ladd principles” which have laid down the basis for reception of fresh evidence. The Court of Appeal relied on the following passage of Lord Denning in the case of Ladd vs. Marshall (1954 3 AER 745)

“In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled; first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second,

the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible”.

As far as the three requisites referred to in the case of Ladd vs. Marshall are concerned, the documents sought to be produced not only have significant influence on the result of the issue that had to be decided but also appear to be credible in that they consist of a last Will which has been proved, an inventory filed in a testamentary case and the probate in respect of the estate of George De La Motte.

The only issue that has to be considered is whether Appellants could have obtained the documents when the matter came up for inquiry before the 4th Respondent Commissioner, if reasonable diligence had been exercised. Although the Court of Appeal had been of that view, with all due deference, the Court of Appeal had not given any reasons for such a conclusion. The test as to the application of the requisites was considered by the Court of Appeal of England in the case of R vs. Seaga UK Ltd (2015) EWCA Civ 113. It was held the standard required is reasonable diligence and not higher.

By enacting Section 32 of the Law, the legislature in its wisdom would have been mindful of the significance of safeguarding proprietary rights of the citizenry and had thought it fit to vest power with the Board of review, to consider fresh material that had not been placed before the Commissioner.

Section 32 (1) of the Law reads thus.-

“The Chairman or the Vice-Chairman of the Board and, if the Chairman or the Vice-Chairman is not presiding at any meeting of the Board, the Chairman of that meeting shall, for the purpose of the consideration and determination of any reference, have all the powers of a District Court-

- (a) to summon and compel the attendance of witness;
- (b) to compel the production of documents;
- (c) to administer any oath or affirmation to witness.

The main issue that came up in the Court of Appeal was whether the 5th Respondent had uttered a deliberate falsehood at the inquiry before the 4th Respondent (Commissioner of Housing) to the effect that George the La Motte had only one child, namely Hans Cecil De La Motte on whom the ownership of 22 houses had devolved. The assertion on the part of the 5th Respondent in this respect, in all probability would have influenced 4th Respondent, to come to the findings that were challenged before the Board of Review. It was, to establish that the position taken up by the 5th Respondent was incorrect; that the Appellant sought to produce the documents X1 to X3 referred to earlier, before the Board of Review, invoking Section 32 of the Ceiling on Housing Property law.

The gravamen of the complaint is that the Board of Review did not admit or consider the contents of the documents, X1 to X3 which were very material to determine the issues before the Board of Review. It was the contention of the Appellant that, had these documents been considered, the Board of Review would have arrived at a different determination. By virtue of section 39 (2) of the Law, section 32 is applicable to the hearing and determination of any appeal before the Board of Review. Thus, section 32 vests the power with the Board of Review to summon and compel attendance of witnesses and to compel the production of documents.

Hence there is no ambiguity that fresh material that may not have been produced at an inquiry before the Commissioner of Housing by a party, could be placed before the Board of Review.

The Court of Appeal went on to state that “it is an admitted fact that by the documents X1, X2 and X3 the Petitioner attempted to establish the fact that George De La Motte had six children and therefore is not an excess house owner” The Court of Appeal observed that X1, X2 and X3 could have been obtained by the Petitioner if he had exercised reasonable diligence. The Court of Appeal however had not attributed any reason to form such a view.

Upon analysis of Lord Denning's decision in Ladd Vs. Marshall, I wish to focus on the second and third principles laid down in the case with regard to admission of fresh evidence vis a vis the facts of this case: I am of the view that the document sought to be marked would satisfy the second and third of the Ladd principles. What is left to be decided is whether the Appellant has exercised reasonable diligence to trace the impugned documents.

At this point I wish to refer to the reasoning of Lord Denning (in deciding the issue of permitting fresh evidence to be led) At page 748 of the judgment wherein his Lordship expressed the view *“if it were proved that the witness had been bribed or coerced into telling a lie at the trial and was now anxious to tell the truth, that would I think be a ground to for a new trial, again if it were proved that the witness made a mistake on a most important matter and wished to correct it and the circumstances were so well explained, that his fresh evidence was presmbly to be believed, then again there would be ground for a new trial”*.

In the present case, it is apparent that either the 5th Respondent had uttered a falsehood or made a mistake on a most important matter, when he testified before the 4th Respondent to the effect that Hans Cecil De La Motte was the only child of George De La Motte, whereas documents X1, X2, and X3 amply demonstrate that was not the case.

When an application is made to have fresh evidence adduced before any forum which is empowered to receive such evidence, such an application must be determined by applying the priciples referred to. In the instant case the Board of Review failed in its duty to do so. The Court of Appeal does not appear to have applied them either.

In this context I am of the view that the decision of Court of Appeal cannot stand and accordingly I set aside the order of the Court of Appeal dated 13-09-2012 for the reasons aforesaid. I also make order quashing the order of the Board of Review dated 03-05-2006 and direct the Board of Review to hold a fresh inquiry.

In the event an application is made to have documents X1 X2and X3 admitted as evidence in terms of Section 32 (1) of the Law, the Board of review is further directed to reconsider the application applying the principles referred to, in this judgement.

The appeal is allowed. I make no order as to costs

JUDGE OF THE SPREME COURT

Eva Wanasundera P.C J.

I agree

JUDGE OF THE SPREME COURT

Sisira J De Abrew J.

I agree

JUDGE OF THE SPREME COURT