IN THE CONSTITUTIONAL COURT OF SEYCHELLES

[Corum: D.Karunakaran,J (Presiding),B. Renaud, J and G. Dodin, J]

CP 04/2012

[2013] SCCC 128

ROBERT NELSON POOLE
Petitioner

versus

GOVERNMENT OF SEYCHELLES & HONOURABLE ATTORNEY GENERAL
Respondent

Heard:	15 January 2013
Counsel:	Mr. Boulle for petitioner
	Mr. Chinasamy for respondent
Delivered:	26 November 2013

RULING OF THE COURT

Karunakaran J

[1] This is an application filed under Article 130(1) of the Constitution, wherein the petitioner alleges that the State has contravened its Constitutional obligations contained in paragraph 14(1) of Part III Schedule 7 thereof, by failing to return his land Parcel No. T627 compulsorily acquired on 18th October 1983,and to pay compensation in addition to

the compensation already paid under the Land Acquisition Act, 1977in terms of a judgment given by the Supreme Court in Civil Side Case No. 139 of 1985. The petitioner in the present Constitutional petition seeks this Court for a judgment in his favour:

[2] Ordering the 1stRespondent to return and transfer to the Petitioner, the parcels of land now registered as Title Nos. T3161 T3160, T3159, T2102, T3095, T3107, T1855, T1052, T2839, which collectively formed part of the original parent parcel, T627.

[3] Ordering the 1st Respondent to pay compensation to the Petitioner in the sum of sixty four million fifty six thousand two hundred and fifty rupees (Rs 64,056,250) for land sold to third parties extracting from the parent parcel; and

Granting such other remedy under the Schedule as this Court deems fit with interest and costs.

The respondents raised preliminary objections to the petition and hence this Ruling. The objections in essence, based on the following two grounds:

[4] **The petition is time-barred**: The Constitutional Court (Application, Contravention, Enforcement and Interpretation of the Constitution) Rules 1994; particularly Rule 4 (2) stipulates that any petition alleging a violation of a constitutional right must be filed within 90 days of such violation. However, according to the Respondents, the petitioner has filed the instant petition out of time i.e. after a delay of about 17 years from the alleged violation of his constitutional right. It is also the case of the respondents that the petitioner herein did file a similar petition in 1996 nearly 17 years ago, before the Constitutional Court in Constitutional Case No. 4 of 1996, alleging the same grievance and seeking a similar constitutional remedy. The Constitutional Court in that petition held that even as on 1996, it was time-barred, and accordingly dismissed the

petition. Therefore, Mr. Chinnasamy, Learned Counsel for the respondents contended that the instant petition *a fortiori* now in 2012,again on the same cause, seeking the same remedy, is obviously time-barred and hence not maintainable in law.

[5] **The petition is barred by *res judicata***: It is the contention of the respondents that the principle of *res judicata* applies squarely to the present petition since the cause, parties and subject matter between the previous Constitutional Case No: 4 of 1996 (the first case) and the present one (the second case) are totally identical. The petitioner is therefore, stopped from re-petitioning now and reopening the same issue between the same parties on the same cause, which has already been determined by the competent court in the first case. Furthermore, the petitioner abandoned his right of appeal to the Court of Appeal against the judgment in the first case, which judgment therefore, has given finality to the litigation and binds the parties on this issue. Having lost his claim in the first case, the petitioner again attempted to renegotiate on the same issue that had already been judicially determined by the judgment in the first case. This second attempt by the petitioner to renegotiate with the respondents after the said judgment was not made in good faith. Such repeated attempts by the petitioner to re-litigate the same issue defeats the principle of finality to litigation and leads to a vexing multiplicity of litigation. The instant petition is therefore, bad for *res judicata* being barred by previous judgment in the first case, and not maintainable in law. It is also the contention of the respondents that no new cause of action has arisen since the judgment of the first case, and no change of circumstances have taken place giving rise to any new cause of action which could justify the present petition. According to the respondents, the finality of the judgment in the first case and in Civil

Side No: 139 of 1984 (for compensation under the Land Acquisition Act, 1977) are binding on the parties by virtue of Article 1351 of the Civil Code, which reads thus:

[6] *"The authority of a final judgment shall only be binding in respect of the subject matter of the judgment. It is necessary that the demand relate to the same subject matter, that it relate to the same class, that it be between the same parties and that it be brought by them or against them in the same capacities."*

[7] Besides, it is the contention of the respondents that previous compensation payments made by the State to the petitioner under the Land Acquisition Act, 1977debars the petitioner from applying for a return of his land or further compensation. Therefore, the petitioner is now debarred from re-petitioning the Court for further remedies in respect of the same grievance.

[8] In view of all the above, learned counsel for the respondents submitted that the instant petition is not tenable in law and hence liable to be dismissed *in limine*.

[9] On the other side however, Mr. Boullé, learned counsel for the petitioner, opposed the preliminary objections of the respondents and submitted that the instant petition is tenable in law, for the following reasons:

[10] On the first issue as to the time-limit of 90 daysstipulated under the Constitutional Court Rule 4(2), Mr. Boullé submitted that there is no such time-limit to apply for a Constitutional remedy, set out in paragraph 14(1) of Part III Schedule 7 of the Constitution for any person whose land had been compulsorily acquired under the Land Acquisition Act, 1977. The only time-limit stipulated therein in respect of lands

compulsorily acquired is that a claimant should have filed his application for consideration by the State, within the period of 12 months from the date of coming into force of the Constitution. The petitioner in this matter did make his application within the said period of 12 months. In fact, Paragraph 14(1) therein reads thus:

[11] *"The State undertakes to continue to consider all applications made during the period of twelve months from the date of coming into force of this Constitution by a person whose land was compulsorily acquired under the Land Acquisition Act, 1977 during the period starting June, 1977 and ending on the date of the coming into force of this Constitution and to negotiate in good faith..."*

[12] According to Mr. Boullé, since the State has undertaken to continue to consider all applications made during that period of 12 months, there is no time-limit set by the Constitution for obtaining a remedy - in his own words - even if it takes a hundred years for him to obtain his constitutional remedy. This alleged "perpetual right", if I may call it so, which Mr. Boullé is attempting to formulate, in his view, is embedded in the Constitution. This right cannot be abrogated or limited by any judgment of any court, which according to his definition, is nothing but a document or writing that has the force of law, whereas the Constitution being the supreme law of the land, it cannot be overridden by any judgment or procedural rules of the Court. Therefore, it is the contention of Mr. Boullé that the time-limit based on the90-day rule, or the finding of the Constitutional Court in the first case against the petitioner on the issue of time-limit, cannot debar the instant petitioner from coming again before this Court for his constitutional remedy. Therefore, according to counsel, the petition is not time-barred and therefore tenable in law.

[13] On the second issue as to *res judicata*, Mr. Boullé submitted that there is no identity of subject matter between the first and second case.

According to counsel, in the petition of the first case, the petitioner sought a writ of *certiorari* to quash the decision of the respondents and a writ of *mandamus* ordering the respondents to review the application. However, in the petition of the present, second case, the petitioner seeks(i) an order directing the 1st Respondent to return and transfer to the Petitioner, the parcels of land now registered as Title Nos. T3161 T3160, T3159, T2102, T3095, T3107, T1855, T1052, T2839, which collectively formed part of the original parent parcel, T627 (ii) ordering the 1st Respondent to pay compensation to the Petitioner in the sum of sixty four million fifty six thousand two hundred and fifty rupees (Rs 64,056,250/-) for land sold to third parties; and (iii) granting such other remedy under the Schedule as this Court deems fit with interest and costs. Thus, the subject matter in the first-case is different from that of the present, second case. Mr. Boullé also cited an authority in support of his contention in this respect, namely, the case of *James Pouponneau and ors v. Otto Janich [1979] SLR,* wherein the Court held that for the plea of *res judicata* to be upheld, there must be three-fold identity of (i) subject matter, (ii) cause and (iii) parties between the 1st and 2nd cases. Indeed, in the case of *Pouponneau*, on the facts of the case, the Court (A. Sauzier, J.) found that there was no identity of subject matter since, in the first case the relief was for a declaration of title to the house and ejectment there from, and in the second case the relief was for an order to vacate the land and remove a house there from. Hence, the Court dismissed the plea of *res judicata* raised in that particular case. Therefore, according to counsel, the rule of *res judicata* has no application in this matter. Moreover, on the petitioner's alleged failure to appeal to the Court of Appeal against the judgment of the first case, Mr. Boullé submitted that since the petitioner had won that case, there was no need for him to appeal against it. In support thereof, he quoted selective excerpts from the operative part the minority judgment of

Justice Amerasing he, who finally ordered the issuance of both writs sought by the petitioner therein. According to counsel, the writs were the subject matter in the first petition. It is the submission of Mr. Boullé that since the petitioner in the first case had obtained the relief, he did not appeal against the judgment of the first case, and that therefore, the allegation of abandoning the right of appeal is irrelevant to the case. In the circumstances, Mr. Boullé submitted that the preliminary objections raised by the respondents in this matter are not tenable in law and sought a dismissal of those objections.

[14] We diligently analyzed the submissions made by counsel on both sides, perused the pleadings and the relevant provisions of law, and gave a careful thought to the back ground facts of the case. We also considered the judgments delivered in the previous two cases namely:

[15] The Supreme Court Case in Civil Side No. 139 of 1985 dealt with under the Land Acquisition Act, 1977, during the reign of the Constitution of the Second Republic.

[16] The Constitutional Court Case No: 4 of 1996 (the first case) dealt with after coming into force of the Constitution of the Third Republic.

[17] In our view, the issues joined herein, in substance, give rise to only two fundamental questions that require determination in this matter. They are:

Is the instant petition time-barred under Rule 4(1) (a) of the Constitutional Court Rules, 1994? and

Is the instant petition barred by the application of *res judicata*?

[18] It seems to us, before finding answers to these questions, that one should first have a proper perspective of the entire factual circumstances surrounding the instant case, and the first case. It is not in dispute that

the Petitioner was, prior to the 1st October 1983, the lawful owner of the parcel of land registered as Title T627 of the extent of 415,219 square meters situated at Anse Gaulettes, Mahé. The said land was compulsorily acquired by the 1stRespondent on 1st October 1983 under the Land Acquisition Act, 1977.

[19] Following the said acquisition, the Government of Seychelles paid compensation in the sum of SR 450,845/- to the petitioner for the acquired land in Title T627. The quantum of compensation was indeed determined by the Supreme Court in Civil Side No. 139 of 1985 under the Land Acquisition Act, 1977, during the reign of the Constitution of the Second Republic.

[20] Soon after the coming into force of the Constitution of the Third Republic, on the 1stOctober 1993, the Petitioner submitted an application to the Seychelles Government, in accordance with Part Ill Schedule 7 of the Constitution, (hereinafter referred to as the "Schedule") for the remedies guaranteed there under for past land acquisitions made under the Land Acquisition Act, 1977.Incidentally, paragraph 14(1) under the Schedule reads thus:

[21] *"(1) The State undertakes to continue to consider all applications made during the period of twelve months from the date of coming into force of this Constitution by a person whose land was compulsorily acquired under the Lands Acquisition Act, 1977 during the period starting June, 1977 and ending on the date of coming into force of this Constitution and to negotiate in good faith with the person with a view to -*

where on the date of the receipt of the application the land has not been developed or there is no Government plan to develop it, transferring back the land to the persons;

where there is a Government plan to develop the land and the persons from whom the land was acquired satisfies the Government that the person will implement the plan or a similar plan, transferring the land back to the person;

where the land cannot be transferred back under sub-subparagraph (a) or sub-subparagraph (b)

as full compensation for the land acquired, transferring to the person another parcel of land of corresponding value to the land acquired;

paying the person full monetary compensation for the land acquired; or

as full compensation for the land acquired, devising a scheme of compensation combining items (i) and (ii) up to the value of the land acquired.

[22] *(2) For the purposes of subparagraph (1), the value of the land acquired shall be the market value of the land at the time of coming into force of this Constitution or such other value as may be agreed to between the Government and the person whose land has been acquired.*

[23] *(3) No interest on compensation paid under this paragraph shall be due in respect of the land acquired but Government may, in special circumstances, pay such interest as it thinks just in the circumstances.*

[24] *(4) Where the person eligible to make an application or to receive compensation under this paragraph is dead, the application may be made or the compensation may be paid to the legal representative of that person."*

[25] In response to the said application submitted by the petitioner, the Principal Secretary of the Ministry of Community Development, by a letter dated 12thOctober 1993, informed the Petitioner that his application was receiving attention and that he would be informed of the outcome in due course. After the said letter, the negotiations in terms of the Schedule, commenced with a meeting with the Lands Director of the Ministry of Community Development on 8thApril 1994, and according to the petitioner, due to the reluctance of the 1st Respondent to return the land, in compliance with the Schedule, the petitioner proceeded to negotiate monetary compensation, and the negotiations thereafter continued by correspondence. By a letter dated 18th April 1994, the Petitioner pursued negotiations for the remedy of monetary compensation and the Principal Secretary in the Ministry of Community Development by a letter dated the 9th May 1994 informed the Petitioner that the issue was being looked into and a decision would be communicated in due course.

[26] As the Ministry did not communicate with the Petitioner by the end of 1994, the Petitioner attempted to proceed with negotiations with the President and wrote a letter to the President on 7thJanuary 1995, wherein he requested a meeting to resolve the issue amicably and arrive at a mutually agreeable conclusion. The President did not entertain the request for a meeting with the Petitioner and referred the matter of negotiations back to the Ministry for further action, and by a letter dated 16thFebruary 1995, Mr J.A. Nourrice as Principal Secretary of the said Ministry informed the Petitioner that he could not take negotiations any further as monetary compensation had been determined by the court.

[27] According to the Petitioner, the position adopted by the 1st Respondent in its negotiation for monetary compensation was not constitutionally sound and requested the 1st Respondent by a letter dated 13th March 1995, to reconsider its obligations in accordance with the relevant provisions of the Constitution. On 9th January 1996, the Petitioner wrote another letter to the Principal Secretary expressing his disappointment at the 1st Respondent's failure to respond to his previous correspondence. The Principal Secretary of the Ministry of Community Development informed the Petitioner by a letter dated 18th January 1996, that the Government was unable to review the monetary compensation as payment for the compensation had already been determined by the Supreme Court prior to the coming into force of the Constitution.

[28] Following the said letter dated 18th January 1996, which maintained the stance of the Government that it was unable to review the monetary compensation since payment for the compensation had already been determined by the Supreme Court prior to the coming into force of the Constitution, and having been aggrieved by the repeated refusal of the Government to review the compensation, the petitioner filed a petition, the first case, before the Constitutional Court on 22nd February 1996, seeking a writ of *certiorari* and a writ of *mandamus* directing the 1st Respondent to review the application of the Petitioner under the Schedule in terms of his right to the remedy under Clause 14 (1), and the payment of monetary compensation under Clause 14 (2) of the Schedule.

[29] In the first case, the respondents therein raised the same preliminary objection to the petition based on the same issues, before the Constitutional Court, contending that the petition was then, time barred

under Rule 4(1) (a) of the Constitutional Court Rules 1994. The Court in its Ruling dated the 22nd of September 1998, upheld their contention and dismissed the first case as it found that the petition was then, time barred under Rule 4(1)(a) of the Constitutional Court Rules, 1994. It is pertinent to quote what the Court (Perera, J) (majority judgment) had to say in the operative part of its Ruling on this issue, which runs thus:

[30] *"In the instant case, however, the letter dated 16thFebruary 1995 contains a clear and an unambiguous decision of the Government. Unlike in the Wholly Pillay v. Government of Seychelles Constitutional Case No. 7 of 1994, there were no further negotiations ending with a 'careful consideration.' The final letter of 18thJanuary 1996 did not add to or subtract from the decision conveyed by the letter dated 16thFebruary 1995. Hence the mere continuance of correspondence after a clear and unambiguous decision had been made, in the hope that the State would revoke or vary that decision is a meaningless exercise as the Constitutional remedies commence as soon as there is a contravention or a likely Contravention. Such contravention cannot be made a continuing one by seeking to review the decision. The 30-day* [now amended to 90 days (mine)] *limitation period should therefore have commenced on 16thFebruary 1995 and not on 18thJanuary 1996.Accordingly, I hold that the petition is time-barred under Rule 4(1)(a) of the Constitutional Court Rules, 1994, and is therefore dismissed with costs."*

[31] Obviously, the petitioner has now filed the instant petition after a delay of about 17 years from the alleged violation of his constitutional right. It is evident that Rule 4(1) of the Constitutional Court Rules,1994 provides that in the case of an alleged contravention or a likely contravention, a petition shall be filed within 90 days of such contravention, or the act or omission which would allegedly cause a likely contravention. Sub-rule (4)

of the Constitutional Court Rules, 1994 provides that the Constitutional Court may, "for sufficient reason", extend the time for filing the petition. In the case of *Hydra III Maritime Co vs. The Republic of Seychelles (Constitutional Case No 8 of 1994)* this Court held that the time limit in Rule 4(1) is mandatory. In that case the petitioner did not furnish any reasons for the delay. The court stated thus: –

[32] *"This court has on several occasions held that the stipulation of the time limit of '30 days* [now amended to 90 days (mine)]*of the occurrence of the event' was mandatory. In exercising the discretion under Rule 4(4), the court has to be conscious that Rule 4(2) is not merely a rule of procedure but more basically a statutory bar designed to prevent frivolous and vexatious applications of persons so that the legislative process of the government is not unnecessarily hampered".*

[33] In passing, it is pertinent to mention that in exceptional cases, on the application of the principle *lex non cogitadimposibilia,* this court has jurisdiction to entertain a petition filed out of time if "sufficient reasons" have been adduced by the petitioner to purge the default. Rule 4(1) provides a mandatory time limit, but where the petitioner became aware of the alleged act or omission which constitutes the contravention of the Constitution only on a later date, the 90-dayperiod would commence from that date. Hence, if a preliminary objection based on a filing of petition out of time is to be successfully maintained, the court should initially be furnished with some form of proof such as a registered postal receipt or a certificate of proof of posting by reference to a postal dispatch register, or such other document. Thereupon the burden of proving the contrary on a balance of probabilities, would fall on the person noticed. It is then that the court can decide whether the petitioner's reasons for

leave are sufficient or not, since a person's right to a Constitutional remedy cannot be deprived on mere speculative or inconclusive grounds.

[34] In the present case, the respondents have undisputedly, come before this Court on 22nd February 1996, with a Constitutional petition, alleging the very same grievance of contravention of Clause 14(1) and have sought remedy under Clause 14(2) of the Schedule. The writs of *certiorari* and of *mandamus* sought in the first case, were simply consequential reliefs that follow the main remedy of declaratory relief directing the 1st Respondent to review the application of the Petitioner under the Schedule.

[35] In any event, the petitioner has not adduced sufficient reasons if any, for the delay of 17 years. In the circumstances, we hold that the instant petition is time-barred under Rule 4(1)(a) of the Constitutional Court Rules, 1994. Thus, we find the first question answered in the affirmative.

[36] We now proceed to examine the second issue as to *res judicata*. For *res judicata* to apply, it is trite to say that there must be three fold identities of subject matter, cause and parties in the first and the subsequent case. This was ably explained by Sir Georges Souyave, CJ, in *Hoareau v Hemrick [1973] SLR 272* at 273.

[37] "For the plea of res judicata to be applicable, there must be between the first case and the second case the threefold identity of "objet", "cause" and "personnes". The "objet" is what is claimed. "La cause" is the fact, or the act, whence the right springs. It might be shortly described as the right which has been violated … "

[38] Firstly, on the identity of "personnes" or parties, there is no dispute that the parties in the first and second case, are one and the same. Secondly, on the identity of "la cause" or the fact or act from which the cause of action arose, in our view, there is again no dispute since in both cases, the cause that gave rise to the right to the petitioner to come before this court, is the alleged contravention by the State of its Constitutional obligations contained in paragraph 14(1) of Part III Schedule 7.

[39] Thirdly, the "objet" or remedies sought by the petitioner in both cases, in our view, are also the same. In fact, the petitioner in the first case sought the writs of *certiorari* and *mandamus* which are nothing but consequential reliefs hinged on the main constitutional remedy of declaratory relief as to the violation of the constitutional obligation by the State and provide remedy therefor, under Clause 14(2) of the Schedule, directing the 1st Respondent to review the Petitioner's application for compensation. In the present, second case the relief of an order for the return of the land and compensation which has been sought by the petitioner, cannot be granted without first granting a declaratory relief on the alleged unconstitutionality in the refusal of the Government to review the Petitioner's application for compensation, and the resultant order for such review which may determine the matter in its own merit. In the circumstance, we find the "objet" or remedies sought, in both cases, are one and the same.

[40] Having said that, we note that in the case of *Pouponneau* cited by the Petitioner, the "objet" was different and the court rightly found that there was no identity of subject matter. However, in the instant case, there is an identity of "objet" or the remedies sought. Hence the case of *Pouponneau* can be distinguished from the instant case, and so we find.

[41] Before we conclude we must add that in the first case, the court has given a final judgment with competent jurisdiction and no appeal has been preferred against the judgment. Therefore, we hold, as rightly submitted by the Respondent counsel that the principle of *res judicata*s quarely applies to the present case. Thus, we find answer to the

second question also in the affirmative and that the present petition is barred by *res judicata*.

We accordingly uphold the preliminary objections raised by the Respondents in this matter. The petition is therefore dismissed and we make no orders as to costs

Signed, dated and delivered at Ile du Port on 26 November 2013

D Karunakaran
Judge

B Renaud
Judge

D Dodin
Judge