

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA.**

In the matter of an Application for
mandate in the nature of Writs of
Certiorari and Mandamus made in
terms of Article 140 of the
Constitution of the Democratic
Socialist Republic of Sri Lanka.

C.A.(Writ)Application No. 84/2015

Athugala Mudalige Wijekoon of
No. 2279, Habaraththawela,
Sevanagala

Petitioner

Vs.

01. Chandrasena Semarawickrama
Dahanayake,
Area Manager,
Sri Lanak Mahaweli Authoriry,
Kiri Ibban Ara.
02. Mahaweli Authority Sri Lanka,
No. 500,
T.B.Jayah Mawatha, Colombo.
03. Hewa Mithreege Piyasili Iranganie of
No.2282, Habaraththawela,
Sevenagala

Respondents

BEFORE : HON. ACHALA WENGAPPULI, J.

COUNSEL : Dr. Sunil F.A. Cooray for the Petitioner.
Manohara Jayasinghe S.S.C. for the 1st & 2nd
Respondents
Donner Nandasinghe for the 3rd
Respondent

WRITTEN SUBMISSIONS

TENDERED ON : 08th July, 2019 (by the Petitioner)
03rd October, 2019 (by the 3rd Respondent)

DECIDED ON : 19th February, 2020

HON. JUSTICE ACHALA WENGAPPULI,

The Petitioner had invoked the jurisdiction of this Court conferred by Article 140 of the Constitution in seeking Writs of *Certiorari* and thereby to quash a permit issued to 3rd Respondent by the 1st Respondent under Section 19(2) of the Land Development Ordinance ("P-09") and *Mandamus* in compelling the 1st and 2nd Respondents also to have an inquiry in relation to the said portion of land to grant a permit in respect of the portion of land possessed by him.

It is stated by the Petitioner that upon his long possession and development of a parcel of State land, he was subsequently granted a permit under Section 19(2) of the Land Development Ordinance ("P-02") and the said land is described therein as Lot No. 2279 depicted in the Final

Survey Plan No. 43, Sheet No. 21, prepared by Licensed Surveyor H.P.A. *Jayawickrama* dated 25.11.1986. The Petitioner claims that, he, in addition to the Lot No. 2279 described in "P-02", had also possessed a portion of the adjoining lot described as Lot No. 2282, situated along the western boundary of Lot No.2279, while one *Vimal Ranjith* possessed the balance portion. The Lot No. 2282 is of 0.194 Hectares in its total extent.

The Petitioner alleges that the 3rd Respondent came into possession of the balance portion of Lot No. 2282, occupied by said *Vimal Ranjith*, only in 2002. Since then there were several disputes that had erupted between the Petitioner and the 3rd Respondent over the possession of Lot No. 2282 and consequently *Sevenagala* Police instituted proceedings under Section 66 of the Primary Courts Procedure Act in the Primary Court of *Embilipitiya* in case No. 39790. On 17.11.2004, after an inquiry, the Petitioner was placed in possession of the disputed land by an order of Court.

The Petitioner then made several requests, after an initial written request, to the 1st and 2nd Respondents, requesting them to hold an inquiry and to regularise his possession over the said portion of land in Lot No. 2282 by alienation, but failed to evoke any response from them. It is asserted by the Petitioner that there was no regulatory inquiry held.

On or about 23.05.2013, the 1st Respondent had granted permit under Section 19(2) of the Land Development Ordinance ("P9") to the 3rd Respondent only to a part of Lot No. 2282, which consists only of 0.1 Hectare in extent from the total extent of 0.194 Hectares. Subsequent to the permit issued on the 3rd Respondent, she had instituted action in the

District Court of *Embilipitiya* in case No. 13439/L seeking the eviction of the Petitioner from the land described in the schedule to her plaint, which is in fact the parcel of State land identified as Lot No. 2282.

The Petitioner had subsequently tendered a surveyor plan (Plan No. 744 of 31.12.2014 of surveyor *Costa*) upon a commission issued by the Court as per the 3rd Respondent's request marked as "P12". In the said plan, the disputed portion of land, currently possessed by the Petitioner is shown as lot 3 and is in extent of 0.0279 Hectares / 11 perches.

In support of his application for a Writ of Certiorari, the Petitioner states that the grant of permit "P-09" by the 1st Respondent is "illegal, null and void and of no force or avail in law" as the 1st and 2nd Respondents have;

- a. failed to inquire into the dispute between the Petitioner and 3rd Respondent before alienating the land under a permit and failed to comply with Sections 19, 20, 22 and 23 of Land Development Ordinance and acted in violation of statutory provisions in alienating the said land, in addition to being in violation of Article 12(1) of the Constitution,
- b. issued the permit contrary to the objectives of the said Ordinance and had "collateral and extraneous reasons"
- c. failed to appreciate or totally ignored the fact that the Petitioner made a request that the portion he occupies be alienated to him after he was placed in possession by a Court,
- d. failed to consider that the said parcel of land had already been allocated to one *K.A. Ananda Kithsiri* in 1992 but the Petitioner

had been in its "long, peaceful and uninterrupted possession over 26 years" and, had acquired "prescriptive title" over it,
e. acted in breach of his legitimate expectation of the grant of a permit in his favour.

The 1st and 2nd Respondents and the 3rd Respondent have filed separate statement of objections to the Petitioner's application.

In their objections, the 1st and 2nd Respondents stated that the Petitioner has come into unlawful occupation of the land in Lot No. 2282 and since he was already issued with a permit in respect of Lot No. 2279, he cannot obtain a further permit to Lot No. 2282 as well. Whilst admitting that they have lawfully issued a permit in favour of the 3rd Respondent under Section 19(2) of the Land Development Ordinance, the 1st and 2nd Respondents claim that in doing so they have acted lawfully and fairly at all times and sought dismissal of the application.

In her objections, the 3rd Respondent stated that a Land Kachcheri was held on 16.12.1984 for alienation of the lands depicted in Plan No. 43 of 25.1.1986, made by surveyor *Jayawickrama* along with Sheet No. 21. The selected individuals by the said Land Kachcheri are listed in the document marked as "X1" and in the said document under serial No. 28, the name of *Kuruppusinghe Arachchige Ananda Kithsiri* is recorded. The said *Kuruppusinghe Arachchige Ananda Kithsiri* was eventually issued with a permit in relation to Lot No. 2282 on 23.05.2013 ("P9"). The 3rd Respondent claims the said *Kithsiri* is her husband and was in occupation of Lot No. 2282 even before the land was surveyed. But the Petitioner was not in

occupation of Lot No. 2279 at that point of time. Disputing the claim of "prescriptive" title, the 3rd Respondent stated that she and her son have cut down some branches from the trees on their property as these branches causing obstruction to their house. She further claims that it is this action resulted in the institution of proceedings for causing breach of peace.

The 3rd Respondent sought to provide an explanation to the difference in the extent to which the permit "P9" was issued. The said permit was issued in respect of a parcel of land in extent of Hectares 0.100 while Lot No. 2282 is in extent of Hectares 0.194. Placing heavy reliance upon this difference in the extent of the land in Lot No. 2282, the 3rd Respondent asserts that said balance extent of the land was alienated by the 1st Respondent with her husband's consent.

In seeking dismissal of the Petitioner's application, the 3rd Respondent stated that the Petitioner had failed to challenge the allocation of land after the Land Kachcheri held under Section 23A of the Land Development Ordinance as amended by Act No. 27 of 1981 and mislead this Court with the document marked "P11".

The Petitioner in his counter affidavit challenged the validity of document marked "X1" and reiterated his position as asserted in the Petition. He denied any knowledge in alienating a parcel of land in an extent of Hectares 0.094 and has tendered the Final Supplementary List marked as "X4".

It is stated in the Petition of the Petitioner that the 3rd Respondent and her husband came to possess Lot No. 2282 in 1993. The Petitioner also states that a permit was issued to the 3rd Respondent and annexed a copy

of it as "P9". This permit is dated 23.05.2013. The ground upon which the Petitioner seeks a prerogative Writ of Certiorari is that the 1st Respondent had failed to hold an inquiry to the "dispute" he had with the 3rd Respondent over a portion of Lot No. 2282, which he claimed to be in his possession, in addition to Lot No. 2279 under the permit "P2". The permit "P2" is dated 01.02.2000.

The Petitioner stated that after the Land Kachcheri that was held in 1992, he was allocated the said Lot No. 2279. The 3rd Respondent stated that only after a Land Kachcheri held on 16.12.1984, as per document marked "X2" (disputed by the Petitioner) lands, including Lot Nos. 2279 and 2282 as per the Final Plan No. 43 of Surveyor *Jayawickrama*, were alienated.

The Petitioner, in his petition did not reveal the date of notification as required by law after the Land Kachcheri that was held in 1992, which decided to issue a permit in respect of Lot No. 2279 in his favour. As already noted, the 3rd Respondent, had tendered a document marked "X2" in support of her claim that her husband was allocated Lot No. 2282 by a Land Kachcheri held on 16.12.1984, which had alienated State lands including Lot Nos. 2279 and 2282 as per the Final Plan No. 43 of Surveyor *Jayawickrama*. The date of the Final Plan lends support for the 3rd Respondent's claim.

It is clear from the proceedings before the Primary Court that the dispute between the Petitioner and the 3rd Respondent erupted in March 2004 over a common boundary and a complaint was made to Police. The Petitioner claimed that he was placed in possession over the disputed

portion of land and had already acquired prescriptive title over the said parcel of land. The failure to hold an inquiry by the 1st Respondent, as alleged by the Petitioner, is in relation to this dispute.

The Petitioner had been placed in possession of a certain portion of land only after the dispute resulted in a breach of peace, and upon an order made by the Primary Court of *Embilipitiya*, in Case No. 39790. The 3rd Respondent had subsequently instituted action under case No. 13439 before the District Court of *Embilipitiya* on 15.08.2014, seeking eviction of the Petitioner from the land described in her permit ("P9"). The Petitioner filed his answer on 23.10.2018, and took up the position that he had already challenged the validity of "P9" before the Court of Appeal, making reference to the instant application. The Petitioner had filed his Petition in the Registry of this Court on 24.02.2015, although it is dated 11.12.2014.

But the Land Kachcheri upon which the Final Plan No. 45 was drawn appeared to have been held on 16.12.1984 as the 3rd Respondent claims. This could be inferred from the date of the said plan, being 25.11.1986. The reference to the said plan in describing the boundaries to Lot No. 2279, the land alienated to the Petitioner in permit "P2" also supports that position. The Petitioners assertion of holding a Land Kachcheri in 1992 is not supported by the documents available. The 1st and 2nd Respondents have not provided any details of the Land Kachcheris.

There is a specific methodology for alienating State land that had been put in place by the relevant provisions contained in the Land Development Ordinance. These provisions also include the manner in which the selections are done regarding the prospective recipients of the

State lands that are to be alienated. That method is through Land Kachcheris. Sections 20 to 23B of the Land Development Ordinance contain explicit provisions setting out the procedural aspects involved in the process. Section 23A and 23B specify the course of action that should be taken by a person aggrieved by a decision taken after an inquiry held at the Land Kachcheri. As the 3rd Respondent submits, Section 23A and 23B provides that opportunity, subject to a time period of one year commencing from the date of notification of such a decision, could be varied by the Land Commissioner acting in revision.

The Petitioner did not state in his Petition, when the said notice was published. However, he had received a permit to Lot No. 2279 on 01.02.2000, more than 13 years before the 3rd Respondent did.

There is no explanation by the Petitioner as to why he did not challenge the decision of Land Kachcheri under Section 23A, when the predecessor of the 1st Respondent selected the 3rd Respondent's husband as a recipient under the provisions of Section 23A of the Land Development Ordinance. The Petitioner is similarly silent as to when he became aware that a permit had been issued to the 3rd Respondent in respect of Lot No. 2282.

It is noted that the instant application was filed by the Petitioner after 21 months from the issuance of the permit to the 3rd Respondent. However, he offers no explanation for this delay in seeking relief under public law. There is no statement that at least the point at which he came to know of the issuance of permit to the 3rd Respondent. In the absence of any explanation provided by the Petitioner as to the delay in challenging

the issuance of permit, this Court would consider the material placed before it to examine the conduct of the Petitioner.

Interestingly, an answer to this delay could be inferred from the examination of the chronology of events regarding the dispute between the Petitioner and the 3rd Respondent.

The *Sevanagala* Police reported facts to the Primary Court about a breach of peace on 11.03.2004 naming the Petitioner and the 3rd Respondent as parties. After an inquiry, the Court made its order on 29.10.2004, and thereby placing the Petitioner in possession of a strip of land towards the 3rd Respondent's house, which was the subject matter before that Court.

The 3rd Respondent had thereafter filed an action in the District Court of *Embilipityain* case No. 13439/Land, seeking to eject the Petitioner on 15.08.2014. Only then the Petitioner had filed the instant application, in challenging the validity of the issuance of "P9" and that too on 24.02.15. Thereafter the Petitioner filed his answer in the matter pending before the District Court of *Embilipitiya*, and took up the position that he had already challenged the validity of the issuance of the permit, on which the 3rd Respondent had claimed title, in order to seek eviction of the Petitioner.

Whether there was a Land Kachcheri in 1992 or not as alleged by the Petitioner, the Final Plan, which demarcated the State lands that are to be alienated, was prepared on 25.11.1986. It is thus presumed that the preparation of a Final Plan was made subsequent to the determination of the prospective recipients of permits under the Land Development Ordinance considering their un-regularised long possession of the respective parcels of State land and developmental activities such

occupiers have carried out on such lands. Upon examination of the scheme of Final Plan "X3", it could be seen that except for 7 Lots, all other lots are less than one Hectares in extent. Clearly the Government had limited the entitlement of land area to be alienated under that particular scheme to any individual in order to ensure a more equitable distribution of available State land among the prospective recipients.

In that scheme of land distribution, the Petitioner received Lot No. 2279, while the 3rd Respondent received Lot No. 2282. This scheme was setup in 1986. The "dispute" leading to the proceedings before the Primary Court between the Petitioner and the 3rd Respondent had erupted only in 2004, after the predecessors of the 1st Respondent and 2nd Respondent have decided the respective recipients in the said scheme.

The Supreme Court, in its judgement of *Gunatilleke v Attorney General and Another* (1979) 1 Sri L.R. 37, on an alleged violation of fundamental right of equality, observed that Government Agent of Nuwara Eliya having held a Land Kachcheri, placed the Petitioner in a wrong category after inquiry. Samarakoon CJ stated;

"What the petitioners complain of is of a wrong determination of facts, namely, that they owned land when they in fact did not own, possess or occupy land. As a result, they were placed in the wrong category. This is not a decision of law but a decision on disputed facts. The bona fides of the 2nd respondent in making the finding of fact is not in question. In the circumstances though the petitioners may have a grievance, I fail to see how a wrong decision bona

fide made on a question of fact could constitute a breach of the fundamental right of equality in the eye of the law. It is not even a breach of law and I cannot see how this Court can on application made under Article 126 of the Constitution give these petitioners protection against wrong decisions on facts due to an error of judgment.

When applying the reasoning of the apex Court to the instant application; even if the Petitioner's claim that, despite his informing the 1st Respondent of his "possession" over a portion of land in Lot No. 2282, the 3rd Respondent was issued with a permit without an inquiry, is an accurate statement of fact if at all, it clearly is a "wrong decision *bona fide* made on a question of a fact" and therefore is not tainted with any "breach of law" or of any illegality. There is no dispute that issuance of a permit over a State land for its alienation is well within the powers of the 1st Respondent. Hence there is no dispute over the *vires* of the 1st Respondent. It appears that the Petitioner sought a Writ of Certiorari on the basis of procedural impropriety in the failure to hold an inquiry. In view of the above considerations, this Court is unable to hold that there was procedural impropriety in the issuance of a permit to the 3rd Respondent since her husband's entitlement to a permit was already recognised by the predecessor of the 1st Respondent after holding a Land Kachcheri in 1984.

On the other hand, the Petitioner stated in his petition that he had cultivated and possessed "a larger extent of land despite the extent which he was allocated to" since "1989". Thus, it is clear that he had encroached upon the portion of land in Lot No. 2282, only after the Final Plan was drawn in 1986. The craving for larger land, as entertained by the Petitioner,

could be understood given the limited extent of land he had received under the scheme. But, once the scheme was finalised with blocking out State land with clear demarcations according to a Final Plan and the individuals who are to be issued with permits to possess them and develop, then possession of larger extent of land by an individual recipient, well beyond his due allocation could become an act of transgression of the individual rights of any other recipient, if that parcel of land had already been allocated to such other recipient.

The 3rd Respondent claimed that her husband was selected to receive a permit to Lot No. 2282, in a Land Kachcheri held in 1984. If the Petitioner had in fact acquired a "prescriptive title" over the land as he claimed over the said parcel of land, then he could vindicate his alleged acquired right before a competent Court.

The 3rd Respondent had already filed action against the Petitioner seeking his eviction and therefore the Petitioner is afforded an opportunity to vindicate his alleged acquisition of a "prescriptive title" over the disputed portion of Lot No. 2282 before that Court. Clearly the Petitioner therefore has an equally effective alternative remedy to the one he had chosen to pursue.

In *Jayaweera v Assistant Commissioner of Agrarian Services, Ratnapura and Another* (1996) 2 Sri L.R. 171, it was held that;

"...the Petitioner who is seeking a relief is an application for the issue of a Writ of Certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court had a discretion

to deny him of relief having regard to his conduct; delay, laches, waiver, submission to jurisdiction are all valid impediments which stand against the grant of relief."

Having regard to the facts and circumstances as revealed in the instant application, it is the considered view of this Court that the Petitioner is not entitled to any relief that he had prayed for. His application therefore is refused.

The Petition of the Petitioner is dismissed with costs fixed at Rs. 50,000.00.

JUDGE OF THE COURT OF APPEAL