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

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

CA (Writ) Application No: 81/2018

1. M.M.Herath Banda.

2. M.M. Sarath Wijebandara

   LB 04, Hingurakdamana, Hingurakgoda.

PETITIONERS

Vs.

1. R.M.C.M. Herath,
   Commissioner General of Lands,
   Land Commissioner's Department,
   1200/6, Rajamalwatte Road,
   Sri Jayawardenapura, Kotte.

2. Provincial Commissioner General of Lands,
   Provincial Department of Lands,
   Polonnaruwa.

3. Dr. I.H.K.Mahanama.

3A. W.H.Karunaratne,
   Secretary,
   Ministry of Lands and Parliamentary Reforms,
   1200/6, Rajamalwatte Road,
   Sri Jayawardenapura, Kotte.

4. Pushpakumari,
   Divisional Secretary,
   Hingurakgoda.

5. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

6. A.R.M. Anulawathie,
   6th Mile Post,
   Hingurakdamana, Hingurakgoda.

RESPONDENTS

Before: **Arjuna Obeyesekere, J**

Counsel: K.G.Jinasena with Ms. R.A. Nelum Pradeepa, D.K.Vikum Jayanath and Ms. Mihiri Kolombage for the Petitioners

Ms. Avanti Weerakoon, State Counsel for the 1st – 5th Respondents

W.Dayaratne, P.C., with Ranjika Jayawardena for the 6th Respondent

Written Submissions: Tendered on behalf of the Petitioners on 2nd July 2019 and 17th January 2020

Tendered on behalf of the 1st – 5th Respondents on 20th September 2019 and 7th February 2020

Tendered on behalf of the 6th Respondent on 29th July 2019 and 7th February 2020

Decided on: 16th June 2020

Arjuna Obeyesekere, J

When this matter was taken up for argument, the learned Counsel for all parties moved that this Court pronounce its judgment on the written submissions tendered on behalf of the parties. This Court thereafter directed the parties to clarify certain matters that had arisen from the pleadings, which was duly complied by way of further written submissions.

The Petitioners' complaint to this Court is that the recommendation of the 1st – 4th Respondents to issue to the husband of the 6th Respondent a Grant in terms of the Land Development Ordinance is contrary to the provisions of such Ordinance, and is *ultra vires* the powers conferred on the 1st – 4th Respondents by the said Ordinance.

The facts of this matter very briefly are as follows.

The State had issued Annual Permit No. 373 dated 14th March 1946 to W.M.Kapilaratne. Although a copy of the permit has not been produced, it appears that the said permit was in respect of a paddy land in extent of 1A 2R, which formed part of Plan No. 516. It is not in dispute that this land is the subject matter of this application.

By a notice issued by the Assistant Commissioner of Lands, Polonnaruwa under Section 106(1) of the Land Development Ordinance[1], annexed to the petition marked '**P3**', Kapilaratne had been informed as follows: "**ඔබ සතු** 1A 2R **මඩ ඉඩම සංවර්ධනය නොකිරීම සහ අතහැරයාම පරීක්ෂණ වලදී හෙලිවී තිබෙන හෙයින් ඉඩම්**

[1] Section 106 of the Ordinance has been repealed and replaced by Section 7 of the Land Development (Amendment) Act No. 22 of 1993.

සංවර්ධන ආඥාපනතේ 106(1) වගන්තිය යටතේ රු. 100 දඩ මුදලක් 1982.08.28 දිනට කලින් මා වෙත ගෙවන මෙන් දන්වා සිටිමි."

It appears that Kapilaratne had not complied with the above notice and that an inquiry in terms of Section 110(1)[2] of the Ordinance had been scheduled for 12th October 1982. However, as Kapilaratne had not presented himself at the inquiry, the Assistant Commissioner of Lands, Polonnaruwa had cancelled the aforementioned Permit No. 373, by his directive dated 10th November 1982 issued under Section 109(1) of the Ordinance. The said directive has been annexed to the petition marked '**P2**'.

The 1st Petitioner states that he was issued an Annual Permit No. 716/36 in respect of the above land on 31st December 1982. A copy of the said permit has been annexed to the petition marked '**P1**'. Although '**P1**' does not have a lot number, it is not in dispute that this land is now identified as Lot No. 53, and is the subject matter of this application.

The 1st Respondent has produced together with the written submissions dated 7th February 2020 filed in response to the clarifications sought by this Court, a letter dated 5th October 1983 marked '**R1**', which explains the steps that had been taken after Permit No. 373 was cancelled in November 1982.

The said letter reads as follows:

[2] Section 110(1) reads as follows: "If on the date and at the time and place specified in a notice issued under section 106 or appointed by the Government Agent under section 109 (2) the permit-holder appears and offers to show cause why his permit should not be cancelled, the Government Agent may, if he is satisfied after inquiry that there has been a breach of any of the conditions of the permit, make order cancelling the permit."

"<u>516 ඉඩම් කැබැල්ල – හිගුරක තුලාන</u>

මින්නේරිය සංවර්ධන ව්‍යාපාරයේ පලවන පියවරට අයත් හිගුරක තුලානේ අංක 516 දරන බිම් කැබැල්ල ප්‍රමාණයෙන් අක්කර 16 පමණ වේ. හිගුරක් දමන ඉඩම් ලැබුවන් ගෙන් කිප දෙනෙකුට ඔවුන් ලැබූ ඉඩම් වලට අමතරව 1949 වර්ෂයේදී පමන මෙම බිම් කැබැල්ලෙන්ද ඉඩම් දී තිබින. එහෙත් ඔවුන් එම ඉඩම වලට කිසි කලෙක පැමින නැති අතර කිසිම වගාවක් නොකර වල් බිහි වී තිබුන බැවින් ඔවුන්ට දී තිබුන බලපත්‍ර අවලංගු කර ඇත.

02.එමෙන්ම මෙම බිම් කැබැල්ල අවුරුදු 20 පමන කාලයක් සිට වගාකරමින් සිට පහත සඳහන් අයට ඒ සඳහා අනවසර ඉඩම් නියමානුකූල කිරීම යටතේ බලපත්‍ර නිකුත් කර ඇති හෙයින් ඔවුන්ට හැර ඉහත කී බිම් කැබැල්ල සඳහා වෙනත් කිසිවෙකුට අයිතිවාසිකම් කිමට හැකියාවක් නොමැති බවද කරුණාවෙන් සැලකුව මැනවි."

According to '**R1**', the beneficiaries that are referred to in '**R1**' include (a) the 1st Petitioner, (b) the father of the Petitioners, i.e. M.M.Wijeratne, and (c) R.M.Padmawathie, who is the mother of the Petitioners. Accordingly, in addition to the permit issued to the 1st Petitioner, the State had issued M.M.Wijeratne a permit bearing No. 716/37 in respect of a land which is said to be in extent of 2 acres. When one considers the fact that the western boundary of Lot No. 53 is the land occupied by Wijeratne, it becomes clear that the said land given to the 1st Petitioner and the land given to his father are contiguous lots.

The Petitioners have brought to the attention of this Court that Kapilaratne had filed Case No. 2699 in the District Court of Polonaruwa in November 1983, seeking to eject Wijeratne from the land that is the subject matter of this application. This Court has examined the plaint[3] and observes that Kapilaratne has admitted that he permitted Wijeratne to occupy and cultivate the said land

[3] A copy of the plaint has been annexed to the petition marked 'P8'.

in 1976, but that Wijeratne had refused to hand over the property, culminating in the District Court action. While the filing of the District Court action confirms that Kapilaratne was not in occupation of the said land, the factual matters set out in the aforementioned letter marked '**R1**' are thus confirmed by the averments in the plaint filed by Kapilaratne.

The 1st Petitioner states that he paid the annual tax in respect of the land given to him by '**P1**', and that the annual permit has been extended. The Petitioners have produced receipts marked '**P9E**', '**P9G**' and '**P9X**' to support their position that the annual permit issued to the 1st Petitioner has been extended. The 1st Respondent has however denied this position, and has stated that the annual permit issued to the 1st Petitioner has not been extended, since being issued in 1982. The position of the 1st Respondent appears to be correct, for the reason that the receipts relied upon by the Petitioners, namely '**P9E**', '**P9G**' and '**P9X**' are in respect of Permit No. 716/37, which is the number of the permit issued to M.M. Wijeratne.

The Petitioners have produced together with their written submissions dated 17th January 2020, filed in response to the clarifications sought by this Court, a letter dated 16th December 2019 marked '**Y1**' written by the 2nd Petitioner to the 4th Respondent, Divisional Secretary, Hingurakgoda, where he confirms the following:

> "බලපත්‍ර අංක 716/36 ඉඩම සම්බන්ධව
>
> ඉහත නම් සඳහන් බලපත්‍රය දරන ඉඩම හිඟුරක බන්ඩාරගම ග්‍රාම නිලධාරී වසමේ වර්තමානයේ 516 යැයි නම් කර ඇති ඉඩම් කොටසෙහි කට්ට අංක 53 දරන ඉඩම අක්කර 2ක් පමන වේ. මෙය හේරත් බන්ඩා යන අයට බලපත්‍රයෙන් ප්‍රධානය කර ඇති අතර ඔහු මැදිරිගිරිය ප්‍රදේශයට පදිංචිව ගිය පසු ඔහුගේ කැමැත්තෙන් ඔහුගේ

සහෝදරයකු වන එම් එම් සරත් විජේබන්ඩාර යන අයට භුක්ති විඳීමට 1990 වසරේ සිට ලබා දී ඇත."

Thus, the averment in paragraph 1 of the petition that the *1st Petitioner is the occupier of the paddy land under the Annual Permit P1* is factually incorrect. The correct position thus appears to be that the land given to the 1st Petitioner under Permit No. 716/36 is currently being cultivated by the 2nd Petitioner, namely M.M.Sarath Wijebandara. This is in addition to cultivating the adjoining land given to M.M.Wijeratne, the father of the Petitioners under Permit No. 716/37.

The Petitioners state that while they were cultivating the said land, and unknown to them, His Excellency the President had issued W.M.Kapilaratne, who is the son of the holder of Permit No. 373, a Grant dated 12th January 1994 in terms of Section 19(4) of the Ordinance, read together with Section 19(6) thereof. A copy of the said grant has been annexed to the petition marked '**P4**'. It is an admitted fact that even though '**P4**' describes the said land as a high land, the grant has been issued in respect of Lot No. 53, which is the paddy land that had been given to the 1st Petitioner by '**P1**'. Upon the death of the grantee, his wife, the 6th Respondent has succeeded to the said land, as confirmed by letter dated 23rd August 2013 issued by the 4th Respondent.

Aggrieved by the decision of the State to issue '**P4**' while the land is occupied and cultivated by the Petitioners on a permit issued by the State, the Petitioners filed this application, seeking *inter alia* the following relief:

a) A Writ of Certiorari to quash the recommendation made by the 1st – 4th Respondents to HE the President to issue '**P4**';

b) A Writ of Mandamus to direct the Hon. Attorney General to conduct necessary inquiries and make a suitable recommendation to quash '**P4**'.

This Court must observe that this application has been filed 24 years after the Grant '**P4**' had been issued, and that the 6th Respondent has taken up the position that the Petitioners are guilty of *laches*. The position of the Petitioners is that they have been in occupation of the said land since 1982, and was not aware of the Grant, until the 6th Respondent instituted Case No. 158/L in 2017 in the District Court of Hingurakgoda, seeking a declaration of title in respect of the said land and to eject the father of the Petitioners from the said land. This explanation is plausible, especially since the 6th Respondent has not placed any material before this Court that the existence of the Grant was divulged to the Petitioners any time prior to 2017.

In **Ramasamy vs Ceylon State Mortgage Bank**,[4] the Supreme Court, having considered the issue of laches, held that, "*The principles of laches must, in my view, be applied carefully and discriminatingly and not automatically and as a mere mechanical device*."

In **Biso Menika v. Cyril de Alwis and others**,[5] Sharvananda, J (as he then was) having set out the rationale for the proposition that the application for a Writ must be sought as soon as injury is caused, went on to consider if an application for a writ should be dismissed on account of delay where the act complained of is an illegality, and held as follows:

[4] 78 NLR 510; Wanasundera, J with Tennekoon C.J and Thamotheram, J agreeing.
[5] [1982] 1 Sri LR 368; at page 379. This case has been followed by the Supreme Court in Ceylon Petroleum Corporation v. Kaluarachchi and Others [SC Appeal No. 43/2013; SC Minutes of 19th June 2019].

"*When the Court has examined the record and is satisfied the Order complained of is* ***manifestly erroneous*** *or* ***without jurisdiction*** *the Court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay,* ***unless there are very extraordinary reasons to justify such rejection****. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically*." (emphasis added)

The Supreme Court, in **Ramasamy** as well as in **Biso Menika's** case, referred to the following passage from **Lindsey Petroleum Co., Vs. Hurd**[6]:

"*Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as related to the remedy*."

Thus, when determining whether an application should be dismissed on account of delay on the part of a petitioner, Court can consider if the act complained of is manifestly illegal, and the nature of the acts that have taken place during the time period between the impugned decision or act and the filing of the application.

This Court, having carefully considered the above factual material, is satisfied that the permit issued in 1946 to Kapilaratne has been cancelled in November

[6] (1874) L.R., 5 P.C 221 at 239, as referred to in Biso Menika's case (supra) at page 378.

1982, and that the State had soon thereafter issued an annual permit to the 1st Petitioner in respect of the land that was the subject matter of Permit No. 373. Even if this Court accepts the position of the 1st Respondent that the said annual permit has not been extended, the fact of the matter is that the said land had been occupied by the 1st and/or 2nd Petitioners since 1982, the Petitioners have cultivated and developed the said land, and that even as at now, the 2nd Petitioner is in occupation of the said land. It is also not in dispute that even though the Grant '**P4**' had been issued, Kapilaratne or his wife has not been in possession of the said land – hence the necessity to file the aforementioned actions in the District Court.

Section 19(1) of the Ordinance specifies that, "*Alienation of State land to any person under the provisions of this Ordinance shall be effected in the manner hereinafter provided.*" In terms of Section 19(2) of the Ordinance, every such person shall, in the first instance receive a permit authorizing him to occupy the land. In terms of Section 19(4) of the Ordinance, a permit holder shall be issued a Grant in respect of the land of which he is in occupation where he satisfies the State *inter alia* that he has been in occupation of, and where the land is irrigated land, has fully developed such land for a period of three years.

The evidence that is available to this Court – i.e. '**P2**' - is that Permit No. 373 was cancelled not only due to the failure on the part of the permit holder to develop the said land but also because the permit holder had abandoned the land. Thus, there was no valid permit in favour of Kapilaratne at the time the Grant was issued, which is a pre-condition in terms of Section 19(4) of the Ordinance for the issuance of a Grant. Furthermore, there is no evidence before this Court (a) that Kapilaratne, his son or the 6th Respondent entered

the land after the permit was cancelled, or (b) that Kapilaratne developed the said land, or (c) that the cancellation of the permit was subsequently revoked. The evidence in fact is to the contrary. Thus, it is clear that the 1st – 4th Respondents could not have recommended the issuance of a Grant to Kapilaratne, and therefore it is the view of this Court that the issuing of the Grant '**P4**' is contrary to the provisions of the Ordinance.

In response to the clarifications called for by this Court, the learned State Counsel has submitted that:

(a) the Grant '**P4**' has been issued on submission of erroneous information;

(b) there is no legal basis to issue a Grant on the strength of the permit issued to Kapilaratne; and

(c) the Grant '**P4**' is not legally valid.

The learned State Counsel has therefore quite correctly submitted that the issuing of '**P4**' is contrary to law.

The plea of *laches* raised by the learned President's Counsel for the 6th Respondent cannot therefore be applied in this case in view of the illegal and *ultra vires* actions of the 1st – 4th Respondents. Furthermore, no prejudice has been caused to the 6th Respondent by the delay as the 6th Respondent or her husband have not been in possession of the disputed land, and/or developed the said land.

This Court must state that for a Writ of Certiorari to issue, the impugned decision must be before Court. In this case, that would be the recommendation made by the 1st – 4th Respondents that Kapilaratne be issued a Grant. The above submission of the learned State Counsel that the Grant '**P4**' had been issued based on incorrect information confirms the existence of a recommendation. Furthermore, even though the said recommendation is not before this Court, there is no dispute that HE the President would not have issued the Grant '**P4**' in the absence of the recommendations of the 1st – 4th Respondents. This Court is therefore satisfied that there in fact exists such a recommendation.

In the above circumstances, this Court issues a Writ of Certiorari to quash the recommendation that was made by the 1st – 4th Respondents to issue the Grant '**P4**'. The 1st Respondent shall bring to the attention of HE the President, the findings of this Court to enable appropriate action to be taken in respect of '**P4**'.

This Court makes no order with regard to costs.

Judge of the Court of Appeal