

**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*. in
terms of Article 140 of the
Constitution of the Democratic
Socialist Republic of Sri Lanka.

C.A.(Writ)Application No. 324/2014

Aluthge Don Premarathna,
Janasawiya Road,
Pahalawelgama,
Bulathsinhala.

Petitioner

Vs.

01. Commissioner General of Land,
Land Commissioner General's
Department.
No.07, Gregory's Road,
Colombo 07.
02. Provincial Land
Commissioner,(Western Province)
Department of Provincial Land
Commissioner,
Maligawatte Secretariat,
3rd Floor,
Colombo 10.
03. S.K. Senadheera
Divisional Secretariat,
Bulathsinhala.
(Substituted 3rd Respondent)

04. District Secretary / Government Agent, Kaluthara, District Secretariat, Kaluthara.
05. Kamburuwala Kankanamge Bempi Singho Mapawila, Bulathsinhala.
06. Hon. Attorney General, Attorney General's Department Colombo 12.

Respondents

BEFORE : ACHALA WENGAPPULI, J.

COUNSEL : Pathum Wickramaratne for the Petitioner.
Vikum de Abrew S.D.S.G. for the 1st to 4th and 6th Respondents.
Manori Pathirana for the 5th Respondent.

WRITTEN SUBMISSIONS

TENDERED ON : 21.12.2018 (by the Petitioner)
10.01.2019 (by the 1st and 3rd Respondents
and the 5th Respondent)

DECIDED ON : 04.09.2020

ACHALA WENGAPPULLI, J.

The Petitioner, with his amended petition addressed to this Court, invokes its jurisdiction conferred under Article 140 of the Constitution, seeking primarily a Writ of Certiorari in order to quash a permit (P2) issued to 5th Respondent, in respect of an allotment of State land depicted as lot No. 34 in the preliminary plan No. 253 by the Surveyor General on 03.09.2013. He also seeks issuance of a Writ of Mandamus compelling the 1st to 4th Respondents to conduct an inquiry to consider his application for a permit in respect of lot Nos. 34, 35, 38, 39 and 40 of the said plan.

It is stated by the Petitioner that he is in possession of a “portion” of the said lot No. 34 since 1957, which is situated adjacent to his private property. Having improved the said portion of land by cultivating tea, rubber and coconut, the Petitioner claims that he has fulfilled the requirements to qualify himself for the issuance of a permit under the Land Development Ordinance, in relation to the said lot. However, the 5th Respondent was issued with a permit to the said lot by the 3rd Respondent (P2), who had thereupon erected a barbed wire fence, inclusive of the portion that had been developed by the Petitioner and his father.

A complaint was lodged with the Police by the Petitioner over this “illegal demarcation of boundaries” by the 5th Respondent. He also complained this incident to the *Grama Niladhari* of the area, who informed the 3rd Respondent that the Petitioner had requested for a permit for the developed portion of the said land since he had developed the said land. A formal application was then submitted to the *Grama Niladhari*, requesting the 2nd Respondent that the Petitioner be granted a permit. The 1st

Respondent had thereupon directed the 3rd Respondent to "take appropriate action" in respect of Petitioner's application, who later informed him that the said portion of land could not be given since it had already been given to the 5th Respondent.

His reporting of the erection of a boundary fence by the 5th Respondent had resulted in stalling the erection of a boundary fence and an inquiry was initiated as to who possessed the disputed portion of land, which is yet to reach a finality.

The 5th Respondent instituted action before the District Court seeking a deceleration of his entitlement to possess the said land and to eject the Petitioner therefrom and the matter is still pending before the said Court.

In these circumstances, the Petitioner alleges that the issuance of a permit to the 5th Respondent in respect of the said land is illegal, unreasonable and arbitrary.

The 5th Respondent resisted the Petitioner's application on the basis that he was issued a permit on 08.07.2013 (in addition to P2), by the 3rd Respondent in respect of lot No. 34 depicted in plan No. PP 253, with an endorsement by the 2nd Respondent, marked as 5R2.

Refuting the claim of the Petitioner that he was in possession of a portion of Lot No. 34, the 5th Respondent asserts that when the land was surveyed for the tracing No. ൩൪/൧൫൪/1/2011, on 30.01.2011 (5R1), the Surveyor had recorded that the said lot is occupied by the 5th Respondent. He further asserts that case No. 4029/L was instituted by him, before the

District Court of *Matugama*, in seeking a declaration of his title to the said land and to evict the Petitioner therefrom.

The 1st to 3rd Respondents, in their objections stated that the 5th Respondent made a written request for a permit in respect of Lot No. 34 on 22.05.2006. Upon recommendation of the 3rd Respondent, the 5th Respondent had granted a permit under Section 19(2) of the Land Development Ordinance, (marked as 3R4) in favour of the 5th Respondent on 08.07.2013, as directed by the 1st Respondent.

In their respective objections, the Respondents have collectively sought the dismissal of the petition of the Petitioner.

The Petitioner, in his counter affidavit, claims that the 5th Respondent was only shown boundaries in January 2011, referring to the plan 5R1 and reiterated his position as stated in the amended petition.

When the Petitioner's application was taken up for hearing, the parties invited this Court to pronounce its judgment on the written submissions they have already tendered.

The Petitioner, in his submissions contended that he was made aware of the issuance of the permit to the 5th Respondent (referring to P2), only when the boundaries were shown to him on 20. 01.2011, when in fact there was a direction by the 3rd Respondent to the *Grama Niladhari* not to proceed with the demarcation of boundaries on the said land, in view of the pending inquiry into the Petitioner's complaint. It is therefore stated that since it was the Petitioner who developed the land, he is entitled to the permit and not the 5th Respondent.

The 1st to 3rd Respondents contended that the Petitioner is not entitled to any relief in seeking a prerogative Writ, as the facts are at variance in relation to the claim of possession between the Petitioner and the 5th Respondent. They also contend that the application of the Petitioner is futile as a permit had already been granted to the 5th Respondent and he seeks to nullify a permit that had been issued earlier to the one marked as 5R2, on which the 5th Respondent claims his rights over the disputed land. It is also the submission of the 5th Respondent that the Petitioner never was in possession of the said portion of State land and the documentation clearly establish that the former was in possession long before the Petitioner first disputed his possession.

In view of the submissions of the 1st to 3rd Respondents, it is appropriate to consider their claim that the application of the Petitioner should be refused on the basis of futility.

The Petitioner, in his prayer to the amended petition, seeks the issuance of Writ of Certiorari to quash the permit marked P2. The permit marked as P2 had been issued in favour of the 5th Respondent by the 4th Respondent on behalf of the 2nd Respondent.

In paragraphs 32(d) and (e) of the petition, the Petitioner describes the said permit as a permit that had been issued under the Statute No.7 of 2002, is "*null and void and no force or effect in law*" since State lands had to alienated according to Article 33(d) of the Constitution and written law governing the matter.

Thus, the Petitioner's application to this Court seeking a Writ of Certiorari to quash the permit marked P2, that had been issued by the 4th Respondent.

The 5th Respondent, in his objections relied on a permit that had been issued under Section 19(2) of the Land Development Ordinance in respect of the disputed land, namely Lot No. 34 in support of his position. A copy of the said permit is annexed to the objections as 5R2. Said permit too had been issued by the 4th Respondent on 08.07.2013 upon approval of the 1st Respondent by his letter dated 10.02.2009.

Strangely, the Petitioner, in his counter affidavit did not make any reference to 5R2, although he responded to the plan marked by the 5th Respondent as 5R1, nor did claim any relief against it.

The contention of the 1st to 3rd Respondents is that the 5th Respondent was duly alienated with the rights over the disputed land (lot No. 34) upon the issuance of permit marked 5R2. They relied on a circular (3R3) issued by the 1st Respondent that if a permit had been issued under the Land Development Statute No.7 of 2002 of the Western Province, it should be endorsed as the approval granted under Section 20A of the Land Development Ordinance. In relation to 5R2 permit, this requirement had been fulfilled. Therefore, the 5th Respondent's rights in relation to Lot No. 34, originate from the said permit and, not from the permit P2, which had been challenged by the Petitioner and issued under a Statute.

This leaves the validity of permit 5R2 unchallenged by the Petitioner, who had restricted his challenge only to the validity of the permit P2. The resultant position is that even if this Court were to grant

relief to the Petitioner as he had prayed for, the 5th Respondent is still possessed of a valid permit (5R2) in respect of the said disputed land. There is no prayer in the petition seeking to quash the permit marked 5R2.

The identical factual situation arose for this Court to consider the question of futility in an application for a prerogative Writ. In the judgment of *Okanda Finance (Pvt) Ltd. v Director, Department of Supervision of Non-Bank Financial Institutions & Others* (2004) 3 Sri L.R. 60, this Court refused relief on the ground of futility, upon the basis that ;

"The only issue for this court is whether the notices dated 25th September 2002 (P14) and 27th September 2002 (P15) issued by the 1st respondent ought to be quashed on the basis that for the reasons urged by Okanda Finance the 1st respondent was not entitled to call for the information and documents set out in the third paragraph of the letter dated 12th September 2002 (P6) sent by the 1st respondent calling for certain documents and information. However, this would appear to be an exercise in futility as Okanda Finance cannot impugn P6 without a prayer for the quashing of the order contained in the letter marked P6."

Thus, as the 1st to 3rd Respondents contend, this Court is of the view that issuance of a Writ of Certiorari to quash the permit P2, in these circumstances, would be a futile exercise.

On the other hand, the illegality which tainted the validity of the permit P2 (as contended by the Petitioner), was cured subsequently with the issuance of permit 5R2, with the endorsement under Section 20A, which made it deemed that the said permit had been issued under Section 19(2) of the said Ordinance.

Even on the merits of the application, there are other reasons which made the Petitioner is not entitled to any relief. One such reason could be attributed to the availability of an equally effective alternative remedy. This is due to an admission the Petitioner had made in his letter P5, where it is stated that he had unwittingly cultivated the disputed portion of State land, situated adjacent to his private land. He requests the authorities to prevent the 5th Respondent from erecting a fence separating that portion of land.

It is noted from the number of letters written by the Petitioner, that he sought to regularize the encroachment only from May 2009. The 1st to 3rd Respondents have annexed the request of the 3rd Respondent addressed to the 2nd Respondent marked as 3R2. In this request dated 24.10.2007, it is stated by the 3rd Respondent that the Lot No. 34 is a vacant lot, remained unoccupied, even after a Land Kachcheri was held. The 3rd Respondent had recommended the 5th Respondent's application for a permit in respect of the said land on 05.06.1995, more than fourteen years before the Petitioner even raised his claim of any development activity on it.

Even if there is any development that had been made by the Petitioner, his interest over it is remedied by his own cross claim made to the *Matugama* District Court case No. L/4029 in seeking compensation for

improvement of the disputed portion of land, if the District Court holds with the 5th Respondent, who instituted the said action.

Therefore, this Court is of the view that the Petitioner failed to challenge the illegality or procedural impropriety in the issuance of the permit 5R2 by the 1st to 3rd Respondents and the issuance of a Writ of Certiorari to quash the permit 5R2 is a futile exercise..

The petition of the Petitioner is accordingly dismissed with costs, fixed at Rs. 25,000.00, payable to the 5th Respondent.

JUDGE OF THE COURT OF APPEAL