

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

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

CA (Writ) Application No: 403/2016

1. Palitha Kumara Sirimegha Bandara,
New Ellakkattu Road, Anuradhapura.
2. Jayalath Mudiyanseelage Wimal Jayalath,
New Ellakkattu Road,
Yakada Gettuwawatta, Anuradhapura.
3. Nanda Hettiarachchi,
No. 287/2, New Ellakkattu Road, Anuradhapura.
4. Bambarundage Don Rupasinghe,
No.24/293, New Ellakkattu Road, Anuradhapura.
5. Bambarundage Don Wijesinghe,
No.293/24, New Ellakkattu Road, Anuradhapura.
6. Gunasinghe Arachchilage Dharmatissa,
Tisawewakumbura,
Ellakkattu Road, Anuradhapura.

PETITIONERS

Vs.

1. Hon. Gayantha Karunathilake,
Hon. Minister of Lands.
2. Dr. W.H. Karunaratne,
Secretary, Ministry of Lands.

1st and 2nd Respondents at
Mihikatha Madura,
No. 1200/6, Rajamalwatta Road,
Sri Jayawardhanapura, Kotte.

3. Hon. P. Harrison,
Hon. Minister of Irrigation & Agriculture.
4. K.D.S. Ruwanchandra,
Secretary, Ministry of Irrigation & Agriculture,

3rd and 4th Respondents at
80/5, Govijana Mandiraya,
Rajamalwatta Road, Battaramulla.

5. Hon. Rauff Hakeem,
Hon. Minister of Higher Education.
6. Mr. M.M.P.K. Mayadunne,
Secretary, Ministry of Higher Education.

5th and 6th Respondents at,
No. 18, Ward Place, Colombo 7.

7. Dr. Jagath Munasinghe,
Director General,
National Physical Planning Department,
5th Floor, Sethsiripaya, Battaramulla.
8. The Bhiksu University of Sri Lanka.
9. Ven Prof. Kanattegoda Saddarathana Thero,
Acting Vice Chancellor,
The Bhiksu University of Sri Lanka.

8th and 9th Respodents at,
Bhiksu University Mawatha,
Puttalam Road, Anuradhapura.

10. Divisional Secretary,
Divisional Secretariat,
Nuwaragam Palatha-Central,
Pandulagama, Anuradhapura.

11. The Commissioner General,
Department of Agrarian Development,
No. 42, Sir Marcus Fernando Mawatha,
P.O. Box 537, Colombo 7.

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

RESPONDENTS

Before: Mahinda Samayawardhena, J
Arjuna Obeyesekere, J

Counsel: Ms. Raveendra Sumathipala for the Petitioners
Ms. Chaya Sri Nammuni, Senior State Counsel for the Respondents

Argued on: 11th September 2020

Written Submissions: Tendered on behalf of the Petitioners on 1st October 2019
Tendered on behalf of the Respondents on 15th September 2020

Decided on: 16th November 2020

Arjuna Obeyesekere, J

The Petitioners are residents of the village of Isurumuniya in Nuwaragam Palaatha in the North Central Province. They are farmers by profession, and claim that they cultivate paddy lands which are adjacent to a land in extent of approximately 13 acres that has been acquired for the establishment of residential facilities for the 8th Respondent, the Bhiksu University of Sri Lanka.

The Petitioners admit that the lands which are the subject matter of this application were acquired in 1992 under the proposed Anuradhapura Sacred City Development Plan. Although the Petitioners state that their paddy lands too were acquired in 2000, the Petitioners have not adduced any proof to support the position that the said lands belonged to them. The Respondents claim that compensation has been paid for all lands that were acquired. The Petitioners state that even though their lands were *acquired*, they have been in uninterrupted possession of the lands and continue to cultivate paddy on the said lands. In 2006, a decision had been taken to divest those lands that were not required.

The Petitioners claim that a feasibility study was undertaken in 2014 by the District Land Use Planning Office in Anuradhapura. The report prepared pursuant to the said study had recommended that several lands including the land that is the subject matter of this application be maintained as paddy lands. The Respondents have however disputed the authenticity of this report, and have claimed that this is a document prepared at the instance of Indrani Atapattu, who had been the tenant cultivator of the land in issue.

In 2016, possession of Lot No. 236 in Plan No. FVP 1400 containing an extent of 4.8044 Hectares (11A 2R 5P) had been handed over to the 8th Respondent for the purpose of expanding the said University and constructing *inter alia* a four storey hostel.¹ The 8th Respondent has submitted that the said land comprises of high lands as well as paddy lands, and that the said land has not been used for water retention, as claimed by the Petitioners. It is admitted that a four storey building to be used as residential facilities for the 8th Respondent has already been constructed on part of the land.

As noted earlier, the Petitioners state that their paddy lands are situated adjacent to the above land that has been handed over to the 8th Respondent. According to the Petitioners, during the rainy season, their paddy lands as well as the surrounding areas

¹ Vide letters dated 2nd March 2016 and 29th June 2016 marked '9R1' and '9R2', respectively, issued by the 10th Respondent, Divisional Secretary, Nuwaragam Palatha – Central.

where their paddy lands are situated are prone to flooding. The Petitioners state further that this is in addition to the over flowing of the Malwatu Oya situated close by during the rainy period. The Petitioners state that the land that has now been handed over to the 8th Respondent acts as a buffer zone during such periods, and as the said land absorbs the extra rain water, the effect on their paddy lands as a result of the flooding is minimised.

The complaint of the Petitioners is that if the development and filling of the said land by the 8th Respondent is permitted, their paddy lands will be inundated with water during the rainy season and that it would be difficult to cultivate their lands thereafter. It is in these circumstances that the Petitioners have filed this application seeking the following relief:

- (a) A Writ of Certiorari to quash the decision of the 5th, 6th, 8th and 9th Respondents to fill the said land with earth;
- (b) A Writ of Prohibition preventing the 5th, 6th, 8th and 9th Respondents from developing the said land.

In **Council of Civil Service Unions vs Minister for the Civil Service**,² Lord Diplock identified 'illegality', 'irrationality' and 'procedural impropriety' as the three grounds upon which administrative action is subject to control by judicial review. The Petitioners have not complained of any specific illegality on the part of the Respondents in carrying out the filling of the said land or that the Respondents have not followed due procedure. As observed earlier, their complaint is that filling of the said land would affect their cultivation rights, and their right to a livelihood. I must state that while development activity must take place, it must be done in accordance with the law, and in a manner that addresses to the maximum extent possible, the concerns of those who may be affected by such development.

² 1985 AC 374.

Section 33(1) of the Agrarian Development Act No. 46 of 2000, as amended provides that, “No person shall fill any extent of paddy land or remove any soil from any extent of paddy land or erect any structure on any extent of paddy land except with the written permission of the Commissioner-General.” Thus, it is noted that there is no absolute prohibition on the filling of paddy lands, and that filling can take place with the prior approval of the Commissioner General of Agrarian Development, the 11th Respondent in this application.

The 8th Respondent admits that development of part of the said land by filling of earth has taken place, but states that such development took place only after approval for the said filling was obtained. In his affidavit filed before this Court, the 11th Respondent has stated that the 9th Respondent, the Vice Chancellor of the 8th Respondent University had made an application to the Department of Agrarian Development to fill 135P of the said land. He states further that by letter dated 4th August 2016 marked ‘11R1’, approval was granted to fill and develop an extent of 135P of land for the purpose of residential halls for the 8th Respondent, subject to the conditions specified therein, including the following:

“1 අවසර දෙනු ලැබූ බිම් ප්‍රමාණය ඉහත සඳහන් කාර්යය සඳහා පමණක් යොදාගත යුතුය³

11 ඉඩම් කොටසේ කරනු ලබන සියලු සංවර්ධන කටයුතු ගොවිපන සංවර්ධන දිස්ත්‍රික් තාක්ෂණ නිලධාරියාගේ අධීක්ෂණය හා උපදෙස් මත සිදු කළ යුතුය

111 විෂයගත ඉඩමේ හෝ ඉඩමට මායිම්ව හෝ යම් වාරි පද්ධතියක් පවති නම් ගොවිපන සංවර්ධන දිස්ත්‍රික් තාක්ෂණික නිලධාරියාගේ උපදෙස් ප්‍රකාරව ඒ සඳහා අවශ්‍යය රක්ෂිතය තැබීම වාරි මාර්ග දෙපාර්තමේන්තුව යටතේ පාලනය වන වාරි ඇලවල් වලට කිසිදු හානියක් නොකිරීම කළ යුතු අතර එකී රක්ෂිතය තුල කිසිදු ඉදිකිරීමක් සිදු නොකළ යුතුය

1V අවසර දෙනු ලබන කාර්යය ඉටු කිරීමේදී යායේ අනෙකුත් කුඹුරුවල ප්‍රාප්තවන පද්ධතියට හෝ කුඹුරුවලට පලය සපයන වාරිමාර්ග වලට බාධාවක් නොවිය යුතු අතර වර්ෂා පලය බැස යාමට ඇති බස්නා ඇලවල් නියමිත පරිදි පලය බැස යන ලෙසට හා අධික වර්ෂා අවස්ථා වලදී බාධාවකින් තොරව පලය එක් රැස්වීමකින් තොරවද පලය බැස යන පරිදි නඩත්තු කිරීම හා යාවත්කාලීන කල යුතු අතර පරිසරයට හෝ යායේ අනෙක් කුඹුරුවලට හෝ පල මාර්ග වලට හානි වන පරිදි සංවර්ධන කටයුතු ඉදිකිරීම අපද්‍රව්‍ය බැහැර කිරීම නොකළ යුතුය”

³ Approval has been granted only for the construction of residential facilities.

It is therefore clear that the 11th Respondent has laid down the above stringent conditions in order to ensure that the filling of the said extent of 135P of land will not obstruct the free flow of water as well as ensure that there is no water retention or flooding as a result of the said development.

I must observe at this stage that the Petitioners have **not** complained that:

- a) The approval granted by '1R11' is irregular;
- b) The 11th Respondent has failed to take into consideration relevant factors when granting the said approval;
- c) The 8th Respondent has violated any of the above conditions specified in '1R11'.

For that matter, I must observe that the Petitioners have not even filed a counter affidavit contradicting the factual matters referred to in any of the affidavits filed by the Respondents.⁴

The 8th Respondent states that even though they obtained approval to fill 135P of the land, they have in fact developed only 84P out of that extent. As the Petitioners have disputed this claim, the Survey Department at the request of the Respondents had undertaken a survey of the said land which had revealed that only 88.3P out of the extent for which approval has been granted has been developed – vide letter dated 27th March 2018 issued by the Department of Agrarian Development marked '11R13'. Thus, the allegation of the Petitioners that the 8th Respondent has violated the approval granted to it is unfounded.

In these circumstances, I am satisfied that the 8th Respondent has obtained approval for the filling of 135P of land in terms of the law, and that there is no merit in the application of the Petitioners for a Writ of Certiorari to quash the said decision.

⁴ Vide journal entry of 8th October 2019, where this Court has been informed that a Counter Affidavit will not be filed.

That brings me to the Writ of Prohibition sought by the Petitioners to prevent the 8th and 9th Respondents from carrying out any further filling of the land. Such an application is premature in view of the position of the 8th and 11th Respondents that approval has only been sought and granted to fill 135P. In this regard too, I must state that as a paddy land can be filled with the approval of the Commissioner General of Agrarian Development, and in the absence of any material before this Court that the Commissioner General of Agrarian Development would be acting illegally by granting such approval, this Court cannot grant a Writ of Prohibition. However, I must say that it would be open for any person aggrieved by any future decision to grant approval, to seek legal redress from a court of competent jurisdiction at that stage.

Having said that, the 8th Respondent has made it clear that it intends to develop the entirety of the 13 acres of land handed over to it. However, in view of the concerns expressed by the Petitioners, the Respondents have engaged with the Petitioners after the filing of this application to ensure that the *concerns* of the Petitioners are addressed. I shall now consider the outcome of such engagement.

An inspection of the said land had taken place on 18th July 2017 with the participation of the Petitioners. The following observations made by the 11th Respondent in his letter dated 8th January 2018 marked '11R12' are relevant to any future development of the balance areas of the said land:

“VI. පල ගැලීම තත්ත්වයන්හිදී සාමාන්‍යයෙන් මෙම කුඹුරු ඉඩම සම්පූර්ණයෙන්ම පලයෙන් යටවන අතර විශාල පල ප්‍රමාණයක් කුඹුර හරහා ගලා යයි.

VII. දැනට ඉඩම වටා අඩි 06ක් පමණ උසින් යුතුව ඉදිකර ඇති තාප්පය හේතුවෙන් පල ගැලීම තත්ත්වයන්හිදී බැස යන පල කඳට බාධාවක් සිදුවන බවත්, එමගින් අවට කුඹුරු ඉඩම් වල එනම් ඉහල කුඹුරු අක්කර 50-75 ක පමණ වෙල් පහු වතුර ගලා බැස යාමට තිබූ එකම ඇළ මාර්ගය (කුණු ඇළ) හරස්වී ඇති බවත් නිරීක්ෂණය වේ. (පායාරූප ඇමුණුම - 5 ලෙස සලකුණු කර ඉදිරිපත් කරමි.) එම තත්ත්වයට පිළියමක් වශයෙන් පලය ගලා යාමට හැකි වන පරිදි තාප්පය පහල කොටස කවුලු (Openings) සහිතව සකස් කර ඇතත් එම කවුලු (Openings) බැස යන පල කඳට ප්‍රමාණවත් නොවන බව.

VIII. පල ගැලීම තත්ත්වයන් හිදී අවට කුඹුරු ඉඩම සම්පූර්ණයෙන්ම පලයෙන් යට වීමේ තත්ත්වයක් සාමාන්‍යයෙන් දැකිය හැකි අතර කුඹුරු ඉඩම වටා බැඳ ඇති මෙම තාප්පය

හේතුවෙන් පලය ගලා යාමට බාධා ඇතිවී අවට සියලුම ඉඩම පලයෙන් යටවීමේ අවධානමේ වර්ධනයක් සිදුවිය හැකිය.

IX. අක්කර 10 ක් වූ තිසාවැව කුඹුර නම් කුඹුරු ඉඩම සම්පූර්ණ වශයෙන්ම ශ්‍රී ලංකා හික්මු වගුව විද්‍යාලයේ ඉදිකිරීම් සඳහා යොදා ගැනීමට සැලසුම් කර ඇති අතර යම් කිසි හෙයකින් කුඹුරු ඉඩම සම්පූර්ණ වශයෙන් ම ගොඩ කළ හොත් අවට කුඹුරු ඉඩම පමණක් නොව අවට හේවාසික ඉඩම් මෙන්ම අනුරාධපුර නගරය ද පලයෙන් යටවීමේ අවධානමක් පවතී.

X. පලය බැස නොයාම හේතුවෙන් අවට කුඹුරු ඉඩම්වල අනවශ්‍ය පරිදි පලය රඳා පැවතීමේ තත්ත්වයක් ඇතිවිය හැකිය.”

It is an admitted fact that a five foot high wall had been constructed around the entire 13 acre land that has been handed over to the 8th Respondent. In its letter dated 27th March 2018 marked '11R13', the Department of Agrarian Development has reiterated its concern that the said wall may obstruct the free flow of water, and had therefore recommended that a grill fence be erected instead. The Department of Agrarian Development had also recommended in '11R13' that the recommendation of the Irrigation Department and the Central Environmental Authority be obtained for any future development of the balance part of the land.

The National Physical Planning Department had inspected the said land on 19th January 2018. By its report dated 15th February 2018 marked '9R8', it too had recommended the erection of a grill fence if it is not possible to expand the openings presently provided for in the said wall for the flow of water. The National Physical Planning Department had also recommended that all future construction be carried out on stilts without filling the land, thereby reducing the risk of flooding.

At the request of the 9th Respondent, Officers of the Irrigation Department too had inspected this land on 23rd March 2018. By his report dated 25th March 2018 marked '9R9', the Director of Irrigation had made the following recommendations:

- “i. වාන් පලය සහ වෙල් පහු පලය ගලා බැසීමට ඇති ස්වාභාවික ඇල මාර්ගය බාධක ඉවත් කොට අවශ්‍ය ඉඩකඩ සහිතව සංවර්ධනය කිරීමට යෝජනා කරන්නෙමු. එහිදී යාබද මාර්ගය හරහා දැනට දමා ඇති බෝක්කු විවර වල ප්‍රමාණයද ප්‍රමාණවත් නොවන බැවින් මාර්ගය

හරහා පලය ගලා බැස්සවීමට ප්‍රමාණවත් ඉඩකඩ සහිත නව නිර්මිතයක් ඉදිකිරීමටද යෝජනා කරන්නෙමු.

- ii. ඉහත කී ස්වාභාවික ඇල මාර්ගයේ කොටසක් නේවාසිකාගාර ඉඩම තුළින්ද ගමන් කරන අතර, එම ප්‍රදේශයට අදාළ ආරක්ෂිත තාප්පයේ දැනට යොදා ඇති කවුල වල ඉඩ කඩ ප්‍රමාණවත් නොවන බව නිරීක්ෂණය වූ බැවින්, එම ආරක්ෂිත තාප්පයේ කවුල ප්‍රමාණය වැඩි කර නැවත ඉදිකිරීමක් කළහැකි නම් ගංවතුර අවදානම අඩුකිරීම තවත් සාර්ථකව සිදුකරගත හැකි බවද යෝජනා කරන්නෙමු.”

By his letter dated 10th April 2018 marked ‘9R10’, the 9th Respondent has agreed to implement the recommendations in ‘9R9’ by expanding the openings kept in the perimeter wall, in addition to the construction of a 5m wide canal to carry the water from the North to the South of the said land, and a further 5m wide canal alongside Lot Nos. 170, 182 and 242 of the Plan marked ‘9R10a’, as depicted in the said Plan.

As the 8th Respondent was keen to proceed with further development of the said land, a meeting had been held on 21st June 2018 with the participation of the Officials of the Department of Irrigation, Department of Agrarian Development and the National Physical Planning Department. Pursuant to the said meeting, the Director of Irrigation, Anuradhapura by letter dated 12th September 2018, marked ‘9R16’ had *inter alia* recommended that canals situated within the land be cleared of all obstructions in order to reduce the risk of flooding.

The cumulative effect of the above material is twofold.

The first is that, whether any future development takes place or not, the 8th Respondent must put in place the safeguards that it has undertaken in ‘9R10’. I accordingly direct the 8th Respondent to implement within six months of today, items 1, 2 and 3 of the letter marked ‘9R10’. In addition, the 11th Respondent shall carry out periodic inspections of the land to ensure compliance by the 8th Respondent with the conditions set out in ‘11R1’.

The second is that due regard must be paid to the observations and views of the Department of Irrigation and the National Physical Planning Department. Therefore, if

an application is made by the 8th Respondent to develop the balance area of land handed over to the 8th Respondent (i.e. excluding the 135P of land for which approval has already been granted), the Commissioner General of Agrarian Development shall call for the views of the Department of Irrigation, the National Physical Planning Department and the Central Environmental Authority, prior to arriving at a decision in terms of Section 33(1) of the Agrarian Development Act.

Subject to the above, this application is dismissed. I make no order with regard to costs.

Judge of the Court of Appeal

Mahinda Samayawardhena, J

I agree

Judge of the Court of Appeal