

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

Case No.CA/WRIT/297/2015

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

Nanayakkara Gamage Dona Yasawathie
12, Buthgamuwa Road
Kalapaluwawa
Rajagiriya

Petitioner

- Vs. -

1. Sri Lanka Land Reclamation and Development Corporation
P.O. Box 56
No.3, Sri Jayawardena Mawatha
Welikada
Rajagiriya
2. Kaduwela Municipal Council
Kaduwela
3. Road development Authority
1st, 3rd, 5th and 9th Floor
Sethsiripaya Stage I
Battaramulla.
4. Rajagiriya Motors and Services (Pvt) Ltd
21/8 Buthgamuwa Road
Kalapaluwawa
Rajagiriya
5. Athula jayasundera Bandara
No.58, Buthgamuwa Road
Kalapaluwawa
Rajagiriya
6. S.D. Sanjeewa
No.54, Buthgamuwa Road
Kalapaluwawa
Rajagiriya
- 7/ Ashoka Amerasinghe
No.57, Buthgamuwa Road
Kalapaluwawa
Rajagiriya

8. Jayalath Priyantha Ratnayake
No.12/3 Buthgamuwa Road
Kalapaluwawa
Rajagiriya.

Respondents

Before: Janak De Silva J.

&

N. Bandula Karunarathna J.

Counsel: Hejaaz Hizbullah with Muneer Thoufeek for the Petitioner
L.M.P.K. Bandula for 1st Respondent
N.A.T.B. Herath with Shashika de Silva for the 4th Respondent

Written Submissions: By the 4th Respondent filed on 19.09.2019
By the 1st Respondent filed on 20.09.2019
By the Petitioner on 20.09.2019

Argued on: 15/05/2019

Judgment on: 18/11/2020.

N. Bandula Karunarathna J.

The Petitioner has made this application *inter alia* seeking for the following relief:

- (a) a Writ of Certiorari quashing the decision and determination to construct a permanent drain through the Petitioner's land as reflected in the documents marked "P12", "P13" and "P13A";
- (b) a Writ of Prohibition restraining the 1st to 3rd Respondents from constructing a permanent drain through the Petitioner's land.

The factual setting to this instant case is as follows;

The Petitioner is the owner of the land and premises depicted as Lot 1 in Plan marked as P4. The Petitioner claims that the Petitioner's land is a Private Land and that there is no plan or deed showing the existence of any drain on the Petitioner's land. The 1st Respondent dug a drain through this land on March 21st 2015. Prior to the digging of the drain, the Petitioner claims that the 4th Respondent had released waste oil onto the Petitioner's land and proceedings were pending before the District Court of Plaintiff dated November 1st 2012 (marked P6) to the Plaintiff.

The Petitioner primarily claims that the 1st, 2nd, and 3rd Respondents have no authority to enter the Petitioner's land as such and they also do not have the authority to construct a permanent drain through the Petitioner's land.

The Petitioner states that the Respondents sought to justify their conduct on the basis of a utilitarian greater good argument that the drain was needed for storm water drainage and therefore the greater good of the many required the drain to be constructed on the private

land of the Petitioner despite her objections. However the Petitioner emphasizes that no material of such an actual greater good being served was not established. There may be a need for a storm water drain, however nothing to establish that it had to be where it was situated through the Petitioner's land. The Petitioner states that despite this total absence of any material supporting the actual existence of the greater good, the Respondents argued that private land and private rights ought to be sacrificed for the greater good.

The Petitioner states that if private land is needed, for some greater good, then the only way to obtain it and use it for a drain if need be so to acquire it through the Land Acquisition Ordinance. Once the Land Acquisition Ordinance comes into operation the Petitioner would have all the safeguards in the said Ordinance, which includes objecting to the acquisition on the ground that the drain is actually being dug for the ulterior objective of facilitating the waste disposal of the 4th Respondent.

The Petitioner states that however, without resorting to the Land Acquisition Ordinance, merely on evoking public sympathy, inconvenience and the pseudo claim of the greater good, the 1st Respondent has acted arbitrarily and walked into private land and caused harm. By doing so, they have acted completely ultra vires and acted arbitrarily and scant regard for the rights of the Petitioner.

Assuming without conceding that this land is necessary for storm water drainage, could the 1st Respondent enter into such land and permanently construct a drain. The answer is in the negative. The 1st Respondent is a creature of statute and relies on the statute for its powers. The statute does not provide for entry into a private land as proposed to be done under the facts of this case.

The Petitioner states that under section 2 (1) of the Sri Lanka Land Reclamation and development Corporation Act, No.15 of 1968 as amended the Minister may declare an area as an area to be a Reclamation and Development Area for the purposes of this Act. This declaration must be gazetted. In this case no such gazette was so produced. However, assuming without conceding that it is so gazetted, could the 1st Respondent enter and engage in work of constructing a drain without acquiring the land? The answer is again in the negative.

The Petitioner claims that the 'scheme of the Act' and the clear intention of Parliament was not to give the 1st Respondent an open warrant to enter into land even within the Area. The 1st Respondent must first obtain title to the same through recognized lawful means which is, that it must either vest or be acquired. Therefore, the Petitioner claims that this is the very essence of the Rule of Law, which the Court of Appeal through its Writ jurisdiction upholds.

The Petitioner further states that whilst State lands and lands vested in local authorities and other authorities may vest in the 1st Respondent, private lands must be acquired. Any land, if its private land, even if outside the area must be acquired.

This is evident upon reading section 19 of the Act which states that;

'Where any land (other than land referred to in section 4) or any interest in such land is required by the Corporation for any of its purposes, such land or interest may be acquired under the Land Acquisition Act by the Government for the Corporation, and the provisions of that Act shall apply for the purposes of the acquisition of that land or interest.'

Therefore, the Petitioner claims that the motion that the 1st Respondent can enter construct drain or private lands within the area, assuming that it is so, a fact that has not been established with any certainty before Court and no evidence to that effect produced, is misplaced. They can do so only after acquisition under the Land Acquisition Ordinance. Therefore, the actions of the 1st Respondent are per illegal and ultra vires.

The Petitioner also addresses a final point of whether this application is futile as the drain has been constructed. The Petitioner submits that only the preliminary work of digging the drain with a backhoe had been completed. Even if a Writ of Certiorari is not issued, a Writ of Prohibition would be sufficient to meet the ends of Justice.

The 4th Respondent in response to the aforementioned claims of the Petitioner states that;

- (a) the Petitioner has no specific legal rights for the reliefs sought for
- (b) the reliefs prayed for in the prayer (b) to the petition cannot be granted to the Petitioner in as much as the documents referred to in the said paragraph, marked P12, P13 and P13 (a) does not contain any decision arrived at by the 1st and 2nd Respondents in those documents to detriment the Petitioner's legal rights,
- (c) the Petitioner has no *locus standi* to apply the Writ of Certiorari in as much as contents of the documents marked P12 and P13 do not refer to any land owned by Petitioner with the determination to enter upon the Petitioner's land,
- (d) the Petitioner's failure to name the Attorney General as a party is a fatal irregularity of the Petitioner's application,
- (e) the Petitioner is entitled to obtain an injunction restraining the Respondents from interfering with her proprietyship of the land from the District Court and that the Petitioner is not entitled to seek a remedy in the nature of Writ of Certiorari,
- (f) the Petitioner has failed to establish any act of ultra vires or error on the face of the record relating to any decision arrived at by the 1st to 3rd Respondents,
- (g) the Petitioner has failed to show by his petition that the 1st to 3rd Respondents are acting of outside of their powers for the Petitioner to seek the relief of Writ of Certiorari and prohibition,
- (h) the Commissioner of Agrarian Development has not been made a party to this case and the Respondent is unaware of the document marked as "P4A" with the petition and state further that it is in any event irrelevant to the matter under consideration as the land falls within the purview of the 1st Authority whose express permission is required for the filling of the same,

The 4th Respondent also submits that the Petitioner has no right to seek any administrative relief from this Court as the Petitioner fill her land illegally using earth and debris although the land being a low line land falls within a declared area in terms of section 2 of Sri Lanka Land Reclamation and Development Corporation Act.

The 4th Respondent states *inter alia* that ;

- a. The Petitioner is not permitted to fill her land without proper approval of the 1st Respondent's Corporation,
- b. the reconstruction of the entire drainage system along the Buthgamuwa Road was suspended temporarily until the completion of the 1200mm underground pipe laying by the National Water Supply and Drainage Board which is part of a larger project commencing from Bandaranayakepura Road to Mahaniyara Junction;
- c. as such, the construction of the stretch of road pertaining to the matter would be completed in due course as part of the aforesaid project;
- d. in any event, the culvert and the adjoining canal that were obstructed due to the unauthorized filling of the Petitioner's land (Lot No.5) is different to the two culvert and ditch on Lot No.2 as referred to in paragraph 20 of the petition, and that the aforesaid culvert on Lot No.5 affected by the Petitioner's actions is indispensable for the purposes of drainage and channeling of storm water downstream

The 1st Respondent's arguments in a nutshell are contained hereinbelow;

At the outset the 1st Respondent submits that the documents marked "P13" and "13 (a)" do not contain any decision of the 1st Respondent to be quashed by the Court of Appeal.

The 1st Respondent claims that although the letter marked "P12" refers to a drainage plan dated 28.02.2013 prepared by the 1st Respondent the said plan has not been produced by the Petitioner. The plan marked "P13 (a)" is undated and it is only an annexure to the letter dated 06.07.2015 marked "P13". Therefore, even the letter marked "P12" does not contain any decision of the 1st Respondent to be quashed by the Court of Appeal at the instance of the Petitioner. The 1st Respondent further submitted that the Plan marked "P4" clearly shows that larger part of the allotments of land depicted there including the allotment of land marked Lot 1 claimed by the Petitioner is a Marsh. Even the letter issued by the Department of Agrarian Development marked "P4 (a)" clearly shows that the Petitioner's land had been a paddy field. It is pertinent to note that in the said letter marked "P4 (a))" the Department of Agrarian Development has imposed a condition that the Petitioner should not fill up her land.

It is the contention of the 1st Respondent that there is an existing drain along the Southern Boundary of Lot 5 in the said Plan marked "P4", which connects to the culvert on the Buthgamuwa Road opposite the said Lot 5 and goes through the Petitioner's land, and the said drain is obstructed as a result of the Petitioner filling up her land.

The 1st Respondent states that although, there is a problem of flooding and inundation in the area as a result of the Petitioner's illegal and unlawful action, the 1st Respondent has not taken any steps on its own to construct a permanent drain through the Petitioner's land, but has only submitted a drainage plan to the 2nd Respondent Kaduwela Municipal Council as shown by the letter marked "A12".

It is submitted that the Petitioner has failed to adduce evidence to establish her contention that the 1st Respondent intends to construct a permanent drain through her land and the said contention is nothing but a surmise.

In the circumstances, 1st Respondent argues that the Petitioner's application is misconceived in law. As per Section 9 (d) of the Sri Lanka Land Reclamation and Development Corporation Act, No.15 of 1968 as amended the 1st Respondent is empowered to cause the construction of works for the provision of public services including surface water drainage in declared areas in terms of section 2 of the said Act. In paragraph 6 of the Statement of Objections of the 1st Respondent it has been clearly pleaded that the Petitioner's land falls within such declared area. As per Section 22 of the said Act, the 1st Respondent has the power to enter upon any land or premises and do such acts as may be reasonably necessary for the purpose of carrying out any work.

It is pertinent to note that the Court issues a Writ of Certiorari to quash a decision which is ultra vires and Writ of Prohibition is issued to prohibit some act or decision which would be ultra vires. Therefore Writ of Certiorari looks to the past, Writ of Prohibition to future.

The documents marked P12,P13, P13 A does not contain any of the decision of past or to the future. Therefore there are no grounds to issue a Writ of Certiorari or a Writ of Prohibition as pleaded by the Petitioner.

I further note that the Petitioner has failed to prove any act of ultra vires or an error of the law on the face of the record committed by the 1st to 3rd Respondents and that the Petitioner is basically not entitled to the said reliefs prayed for in terms of the principles laid down for public law remedy. I also observe that in terms of section 32 of Sri Lanka Land Reclamation and Development Corporation Act permits the 1st Respondent's Corporation to enter upon any land and to discharge of any functions of the Corporation as stipulated in section 8 (d) to have the custody, management, improvement, maintenance and control of canals and the prevention of pollution of canals. Therefore the Petitioner is not entitled to restrain 1st Respondent discharging its powers and functions warranted by the provisions of statute in obtaining reliefs prayed for.

It is my view that the document submitted by Petitioner in his application is a dispute and the legal results of fact subject to controversy and that such matters shall be canvassed in a suit where the Court would be better able to judge the correct version after hearing of evidence.

In Thajudeen V Sri Lanka Tea Board and Another 1981 2 SLR 471 **it was stated** that,

"Where the major facts are in dispute and the legal result of the facts is subject to controversy and it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining the witnesses so that the Court would be better able to judge which version is correct, a Writ will not issue."

Public Law remedy is pre-eminently a discretionary remedy. It is an extraordinary, residuary and suppletory remedy to be granted only when there is no other means of obtaining justice. Even though all other requirements for securing the remedy have satisfied by the applicant,

the court will decline to exercise its discretion in her favor if a specific alternative remedy like a regular action equally convenient, beneficial and effective is available.

The Petitioner in this application has submitted the documents marked P6, the case instituted in the District Court of Colombo against the 4th Respondent and the Petitioner failed to obtain any of the relief prayed for in that case after an inspection done by the Court and the said case ended without any relief granted to the Plaintiff.

In the circumstances the Petitioner has failed to disclose very important relevant facts and makes an effort to restrain statutory activities of the public institution in terms of the present application.

Further the Section 97 of the the Sri Lanka Land Reclamation and Development Corporation Act states that the Government or the Councils have the power to make, alter or extent such public main or other drains, sewers and water causes as may appear to be necessary for the effectual draining of the Municipality, and, if necessary, the Government or the Councils have the power to carry them into, through or under any enclosed or other lands whatsoever, doing as little damage as may be and making full compensation for any damage done.

In Sugathadasa v jayasinghe, and The Minister of Local Government 59 NLR 457 at p.462 it has 59 been held as follows:

“That the adequate maintenance of these services in the city of Colombo is the responsibility of the Council is undeniable. The duties of the Council in that connection are clearly set out in section s 47,97 and 130, *inter alia*, of the Municipal Councils Ordinance”

Thus, it could be clearly seen that the 1st Respondent or the 2nd Respondent Kaduwela Municipal Council has a public duty to make, alter or extend a drain through the land claimed by the Petitioner for the effectual draining in the area and the only remedy that is available for the Petitioner is a claim for compensation for any damage done.

In Kathiravalu v. Urban District Council, Jaffna 27 NLR 468 where the Council, in exercise of the powers conferred upon it by Section 116 of the Local Government Ordinance, No.11 of 1920, which is similar to the Section 97 of the Municipal Council Ordinance, cut a channel through Plaintiffs' lands without having first acquired the necessary land, it has been held that the Plaintiffs were entitled to claim the value of the land taken up by the channel by way of compensation. At page 470 of the Judgment, his Lordship Branch, C.J. has held that “It is not necessary for a local authority on a case like the present, to purchase the land”.

Furthermore, the Petitioner is not legally entitled to file the instant Writ application as she is according to her own showing pursuing a civil matter on the same issue in the District Court of Colombo No. 000206/12. When there is an alternative remedy one cannot invoke writ jurisdiction. Furthermore the Petitioner's personal dispute with the 4th Respondent cannot be characterized as an issue which has statute coloration and in this backdrop the Petitioner's instant writ application should be dismissed.

It could be seen that the Petitioner has exercised effective alternative remedy provided by law. It is trite law that where a person has remedy provided by the law, first he has to recourse to such remedy. The Petitioner has exercised the remedy by filing an application in the District Court.

In the case of Hendrick Appuhamy V. John Appuhamy 69 NLR 29 where the Court of Appeal refused to intervene on the basis that the action was not maintainable since the Petitioner should have sought his remedy under the Paddy Lands Act and should have filed action in the District Court.

This has been followed in the case of Mahanayake v. Chairman Ceylon Petroleum Corporation and others [2005] 2 SLR at 193.

In the circumstances of this matter, it could be noted that even if the 1st Respondent or the 2nd Respondent construct a permanent drain through the land claimed by the Petitioner, without having first acquired the necessary land, such a construction would not be outside the powers conferred upon them by Section 97 of the Municipal Councils Ordinance.

Due to the aforementioned reasons, the application of the Petitioner, is hereby dismissed with cost.

Judge of the Court of Appeal

Janak De Silva , J

I agree.

Judge of the Court of Appeal