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

Herath Mudiyanselage Dingiri Banda
"Sirisevana"
Kiwulegama, Nebadewa,
Nikaweratiya.

PETITIONER

C.A 293/2007 (Writ)

Vs.

1. The Land Commissioner General,
   Land Commissioner General's Department
   No. 7, Gregory's Avenue, Colombo 7.

2. The Divisional Secretary of Kotawehera,
   Divisional Secretariat,
   Kotawehera.

3. Provincial Land Commissioner
   (North-Western Province),
   Provincial Land Commissioner's Office
   (N.W.P.), Kurunegala.

4. Ven. Mahamithawa Ayupala
   The Viharadhipathi,
   Sri Shailatharamaya,
   Meewellewa.

5. Ven. E. Vijithapala
   C/o. Sri Shailatharamaya
   Meewellewa.

RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: Nilshantha Sirimanna for the Petitioner

Janaka de Silva D.S.G., for Respondents

ARGUED ON: 05.10.2012

DECIDED ON; 28.11.2012

GOONERATNE J.

The Petitioner to this Writ application claim to be the lawful permit holder (P1) to a permit issued on or about December 1992 in terms of the Land Development Ordinance. A mandate in the nature of writ of certiorari and prohibition are sought to quash the order made by the 2nd Respondent. Divisional Secretary, Kotawehera who had by document P20 (letter of 10.1.2007) cancelled the above permit issued to the Petitioner and also to quash document P17 being a notice alleged to be issued in terms of Section 106(2) of the Land Development Ordinance by the 2nd Respondent dated 29.9.2006. Petitioner has also sought certain other relief in the nature of writ of certiorari/prohibition, inter alia against the 1st to 3rd Respondent as prayed for in the petition filed of record.

The Petitioner's learned counsel submitted to this court that Petitioner's father one Punchirala was the original permit holder. Counsel on either side argued that by the time permit P1 was issued the Petitioner's father was dead. It was the position of the learned Deputy Solicitor General that there is no valid permit issued on P1. Petitioner's counsel maintained that the permit is valid as there is an endorsement on P1 dated 2.2.1994 where Petitioner's father's name had been scored off and Petitioner's name inserted. This was not denied by learned D.S.G. P19A – P19C are other permits issued to Petitioners siblings. The situation of the property in dispute is shown in plan 2R1. Land pertaining to P1 is included in part of lot 'A' in 2R1. The adjoining lot 'B' is occupied by the 4th & 5th Respondents being temple land. The grounds for the issue of writ as argued and submitted by learned counsel for the Appellant is based on

(a) Bias
(b) Procedural ultra vires.
(c) Breach of the rules of Natural Justice

It is the Petitioner's case that he had been helping his father the original permit holder in cultivation for a long period of time. His father had cultivated inter alia paddy and other crops until 1992 and with Petitioner's help built an artificial reservoir. The initial allegation seems to be against the 4th Respondent who had attempted to destroy the artificial reservoir in October 1980 and by document P3a Petitioner relying on same indicates to court that the authorities had

warned the 4th Respondent to desist from damaging the reservoir. This may be an attempt to show 4th Respondent's male fides against the Petitioner. Apart from document P3a the Petitioner has listed at least 6 other occasions or instances of directly or indirectly, the attempts of the 4th Respondent to illegally acquire Petitioner's entitlement to the property in dispute. i.e blocking of access road (P3d) in September 83, use of land for a car park, (P5 & P6), fencing the land in June 2006, (P12b/P13), inciting violence against Petitioner's family, P14, (July 2006), attempting to influence officers of Provincial Ministry of Lands 2R4 & 2R5 (August 2006), incite violence in August 2007.

The learned counsel for Petitioner stressed at the hearing facts to establish bias by predetermination. In this regard I have noted the following points.

(1) Permit cancelled (P2V) by 10.1.2007. Petitioner argues that by 10.12.2006 by plan 2R1 Petitioner's land identified as land to be given to the temple (4th Respondent chief incumbent and 5th Respondent his deputy).
(2) Notice issued under Section 106 of the Land Development Ordinance to Petitioner (P17). This process to cancel initiated by or as a result of orders by Secretary of Ministry of Wayamba Provincial Council by letter of 16.8.2006. 2R4 & 2R5 support Petitioner's position (paragraphs 4/5 of 2R4 sent by 2nd Respondent three months before the said order to cancel. Instructions issued to 2nd Respondent before the notice under Section 106 was issued to petitioner on 29.9.2006. Bias predetermined by 2R4 (paragraph 4). 2nd Respondent acted in pursuance of predetermined objectives.
(3) The basis of cancellation as shown in paragraph 4 of 2R4 is predetermined.
(4) Petitioner contends that cancellation of permits predetermined which was made well before the order for cancellation by P20.
(5) Out come of the show cause inquiry predetermined as above.

(6) The 2nd Respondent is the sole authority to issue permits and to take other procedural step, under the Land Development Ordinance.

Notice to issue under Section 106 to conduct show cause inquiries and to make cancellation orders are all acts to be performed by the 2nd Respondent who is empowered by law to do so. Petitioner stress that the 2nd Respondent was clearly acting in pursuance of a predetermined objective.

Another line of argument was also pursued by the Petitioner. i.e Abdication/or dictations and failure to give reasons in document P20. The learned counsel for Petitioner argues that

(7) By reference paragraphs 4/5 and 2R4 and the contents of 2R5 it is evident that the process to cancel the Petitioner's said permit was due to orders/instructions of Secretary of the Ministry of Wayamba Provincial Council. As stated above the lawfully empowered authority to issue notices under Section 106 and to cancel permits is vested with the 2nd Respondent. The Secretary of the Ministry of Wayamba Provincial Council has no right/authority to instruct or dictate the 2nd Respondent to cancel permits.

(8) Document P20 does not contain reasons and argues that natural justice entitled a party to a reasoned consideration of his case and not merely hearing evidence as submissions. Vide Karunadasa Vs. Unique Gemstones Ltd. and others 1997 (1) SLR 257 at 263.

P20 does not contain reasons for canceling the said permit other than merely restating the same grounds in P17. Order P20 merely restates and reproduces the grounds in p17 in one line. P20 is an inadequately and or improperly reasoned decision.

The position of the 1st – 3rd Respondents is that the Petitioner has no right to the permit P1. The said permit was issued to the Petitioner's father and he was dead by the time it was issued, and as such it has no validity. The amendment on P1 on 2.2.1994 is of no force? I have to pose the question that the Respondent have not explained the circumstances under which the amendment was done. Who was responsible for such amendment? Having done so can the authorities state otherwise? Can the authorities concerned approbate and reprobate. A man cannot both affirm and disaffirm the same transaction. Show it's true nature for his own relief and insist upon its apparent character to prejudice his adversary. 20 NLR 124. On the other hand if P1 remains invalid, what was the basis and purpose of issuance of P17. Authorities inquired into a question of non-development of the land in dispute. The entire exercise to inquire would be meaningless if it was the position that Petitioner had no valid permit or it was a nullity? If that be so the next best course of action would be to evict all unauthorized persons by resorting to correct law.

However Respondent's contention that no mala fides have been pleaded against the 2nd Respondent cannot be denied. If mala fides is alleged against the repository of a power, it must be expressly pleaded and particularized. 1994(2) SLR 182.

It is also the submission on behalf of the above Respondents that the Divisional Secretary's statement that after inquiry he will take a decision to either cancel or not to cancel the permit, has to be viewed very cautiously. The two documents submitted by the Respondents marked '2R4' & '2R5' would in fact demonstrate the correct position. It leads to a situation to be reviewed, whether the decision maker was Bias? The principle which emerge from 'bias' is not concerned with the fact that the decision maker was biased, but with the possibility that he or she might have been biased.

The title in document 2R4 refer to obstruction to lands subject to permits.... භුක්තියට බධාකිරීම. The 2nd paragraph of 2R4 gives details of permit holders and paragraph 3 gradually open the subject of discussion, and refer to the alleged role of the 4th & 5th Respondents pertaining to the land in dispute and the attempts of disturbances or obstructions caused therein, which resulted in the dispute and by certain welfare committees requesting land to be allotted for public purposes. Paragraph 4 of 2R4 raise much controversy as follows:

(a) Secretary to Ministry of Agriculture & Irrigation & Animal Production of the North-Western Provincial Council has by it's letter of 16.8.2006 ordered the cancellation of permits and convey that a field/site inspection was carried out and on the basis of non-development of the land, directions given to cancel permits.

(b) According to above instructions Land Commissioner of the said Provincial Council has also notified by letter of 30.8.2006 to take steps accordingly (cancellation).

(c) As a preliminary step notice of 29.9.2006 under Section 106 of the Land Development Ordinance had been issued (P17)

(d) In subsequent inquiries decision would be taken to cancel or not to cancel permits.

This letter as reflected above goes against very basic norms in public law.

Letter '2R5' confirms bias on the part of the 2nd Respondent by pre determination and support the contents of 2R4. It is noted that 2R4 & 2R5 had been sent by 2nd Respondent, 3 months before the said purported order for cancellation was made by P20 and the show cause inquiry conducted by 2nd Respondent who was the sole authority under the above statute. It no doubt create the impression that decision to cancel is more or less definite and the steps to follow are merely the process. The real likelihood of bias cannot be ruled out, in this instance.

In this regard the following authorities suggest and endorse the judicial approach to bias by pre-determination, and from which this court was able to fortify the version of bias by pre-determination.

Wade & Forsyth – Administrative Law 8 ed. at pg. 450...

"where there has been previous involvement in the case by a person who should be unbiased then the appearance of bias may be created or the decision may be pre-determined. The kent Police authority erred, when proceeding to retire a chief inspector compulsorily on the ground of mental health, by informing him that they would refer to the doctor who had examined him the previous year and reported adversely. The Court of Appeal held that the doctor had the duty to act fairly and heed the rules of natural justice; and he could not do so if he had committed himself to an

opinion on the case in advance of the inquiry. The rule against bias can apply at any stage of a statutory proceeding, e.g to the making of a report as a preliminary step before making the final order. This is bias by predetermination."

Neidra Fernando v. Ceylon Tourist Board and Others (2002) 2 SLR 169..

"The rule against bias is a doctrine which requires that no man should be the judge in his own cause. The petitioner had a right to a fair hearing. The inquiring officer must appear to be free from bias which is a concomitant of that right. It is true that the Chairman had not personally decided the matter, but he had appointed the inquiring officer who did make the decision or the recommendation. Bias being insidious one rarely has to or is bale to prove actual bias. I think appearances are everything, just must be seen to be done."

Samarasinghe Vs. Samarasinghe 1991 (1) SLR 259 at 262..

The test of bias should be to ascertain whether there exists a 'real likelihood of bias'.

The aforesaid test adopted by our Courts in relation to bias accords with the most recent affirmation of the test of bias under English Law, as set out in Pinochet (No. 2) (2000) 1A.C 119 and in Porter v. Magill (2001) UKHL 67, wherein the House of Lords held that the test of bias should be whether "the fair minded and informed observer, having considered the facts, would conclude that there was real possibility of bias".

Text Book on Administrative Law, peter Leyland & Terry woods.

Forming a Concluding View in Advance

If it is evident that the decision-making body has made up its mind in advance of the hearing, this will give rise to serious doubts about the validity of the hearing process since any such procedure would be considered to be unfair. It is all too easy for adjudicators to form a view on the basis of a multitude of factors, such as indiscreet comments made to them by one party in the absence of the other, involvement with an earlier stage in the process or access to press reports

containing adverse references to one or other of the parties. (Perhaps we need to make it clear that it may be immediately apparent that a case is flawed for a whole host of other reasons, for example, that it falls outside the jurisdiction, etc., which have nothing to do with bias. It is for the adjudicator to decide fairly the merits of that case.)

This point is well illustrate in R v. Kent Police Authority, ex parte Godden (1971) 3 All ER 20. The applicant in this case had served in the Kent police as a Chief Inspector, but in 1969 he was transferred to administrative duties. He then made certain allegations about unjust treatment by his superiors. These were investigated by an inquiry set up by the Chief Constable but the inquiry considered that the allegations were unfounded. In July 1970, a search of the applicant's desk unearthed erotic material but he denied all knowledge of these items. Subsequently, an appointment was arranged with the chief Medical Officer, who was supplied in advance with a copy of the report and the erotic material. He concluded that the applicant was suffering from a mental disorder and certified that he was unfit for duty. The applicant went to see his own doctor who found him to be completely normal. The authority then proceeded to terminate the applicant's employment by selecting the same Chief Medical Officer to determine whether the applicant was permanently disabled. Lord Denning held that decisions leading to compulsory retirement were of a judicial character and that there was a duty to act fairly. There was no doubt that the Chief Medical Officer was disqualified from certifying the applicant's condition, as he had already formed a view and thus he could not bring an impartial judgment to bear on the matter.

I would also refer to the question of appearance of bias through the formula adopted and refer to rule against bias by, Peter Cane 2nd Ed – An Introduction to Administrative Law pg. 177/178..

If a person can show that a decision has actually been affected by bias on the part of the decision-maker that person is, of course, entitled to have the decision quashed. But if the applicant relies on an appearance of bias, what must be shown? The cases contain two different formulae; that there must be a 'reasonable suspicion of bias, and that there must be 'real likelihood' of bias. There has been much discussion as to whether there is any significant

difference between these two tests. Two points only need to be made. First, both tests are objective in the sense that the relevant question is how the outside observer would view the situation, given knowledge of the facts bearing on the question of bias. Secondly, the test of reasonable suspicion sounds easier to satisfy than the test of real likelihood, but neither test gives by itself any indication of how easy or difficult it is to satisfy. The outcome depends on a judgment by the court on the facts of the particular case. If the court feels the decision ought to be quashed for bias, it will choose terminology which enables it to reach that result; similarly if it thinks the opposite.

Another allegation leveled against the 2nd Respondent is that cancellation of document P20 does not contain reasons as contemplated by law. Perusal of P20 the only reason given at the bottom of 2nd pg. of same is non development of the land and non occupation. The same is found in P17. Both P17 & P20 are prescribed forms. It is more or less filling the blanks. Perusal of the reason given therein is certainly <u>not adequate</u>. Inquiry proceedings 2R7 held on 2 days also fail to provide reasons as required by law. Merely reproducing the grounds contained in P17 would not suffice. The idea in providing reasons are very clearly dealt in the following authorities and decided cases and in considering same it is apparent the reason given in just one line would not be adequate especially when a permit had been issued, long years ago from the time of Petitioner's father and in instances already discussed in this judgment . The 2nd Respondent should have been extra careful and given adequate reasons.

In De Smith's 'Judicial Review' (6th edition), the standards of reasoning were explained, inter alia, in the following manner (at pages 423 to 426):

"It is clear that the reasons given must be intelligible and must adequately meet the substance of the arguments advanced. It will not suffice to merely recite a general formula or restate a statutorily prescribed conclusion. It is also preferable if reasons demonstrate a systematic analysis has been undertaken by the decision maker.

In Emerging Trends in Public Law – Mario Gomez pg. 188

In an older case, the former Court of Appeal, which at that time was the highest court of appeal, observed.

> Even in the absence of a legal requirement, we think it desirable that any tribunal against whose decision an appeal is available should, as a general rule, state the reasons for its decision, a course of action which has the merit of being both fair to the practitioner and complainant concerned and helpful to the appellate authority – Wijeratne Vs. Paul

76 NLR 241 at 245.

The same court took a similar view in Brooke Bond v Tea, Rubber, Coconut and General Produce Workers' Union 77 NLR 6. The court observed that where an appeal lay form an order of a tribunal to a higher court findings on all questions of fact, including reasons must be set down. Reasons and findings on fact were essential for the appellate court to discharge its function effectively. This approach was confirmed in Ratnayake v Fernando where the Supreme Court observed that where a right of appeal is given, a duty to record findings and state reasons is implied form such a right of appeal. (S.C Minutes 20.5.1991)

The present Court of Appeal took a marginally different position in Perera V Ebert (C.A minutes 2.4.1993). Justice H W Senanayake after citing de Smith and Wade, held that where there is a right of appeal it is incumbent on the administrative authority to give reasons. He noted that public confidence in the decision making process is enhanced by the knowledge that supportable reasons have to be given by those who exercise administrative power and that reasons are essential when there is a right of appeal. He went on to observe that it was a healthy discipline for all who exercise power over others to give reasons, even though the statute does not specifically impose this obligation.

Another point suggested by the Respondents is the question of alternate remedy. In an appeal the court has to consider the appeal on the basis of the decision being the subject matter of the appeal is right or wrong. In a writ application court has to be primarily concerned with the grounds of review i.e breach of rules of natural justices, bias, error of law or the face of the record etc. In the case in hand I cannot conclude that the appeal is more convenient and that this court lacks the power to deal with the issues. The statutory right of appeal differs and is distinct from an application for judicial review. In Nicholas Vs. Macon Marker Ltd. 1985 (1) SLR 13 at 139..

"In this application, the function of this Court is to make a judicial review of the order made by the Rent Board of Review. There is fine distinction between, 'appeal' and 'judicial review'. When hearing an appeal is the court is concerned with the merits of the decision in appeal. The question before the court is whether the decision subject matter of the appeal is right or wrong. In the case of judicial review the question before the court is whether the decision or order is lawful, that is according to law. As such, in this application for a writ, it is not the function of this court to decide whether the order of the Rent Board is right or wrong. The function of this

court in this instance is to decide whether on the principles applicable to judicial review, the order of the Rent Board of Review should be allowed to stand or should be set aside."

Somasunderam Vanniasingham V. Forbes and Another 1993 (2) SLR 362

"...there is no rule requiring alternative administrative remedies to be exhausted first without which access to review is denied. A court is expected to satisfy itself that any administrative relies provided for by statute is a satisfactory substitute to review before withholding relief by way of review."

The permit that was issued had been issued in favour of Petitioner's father, some years ago. On the demise of Petitioner's father the Petitioner became entitled to be issued a permit in terms of the Land Development Ordinance. At various stages or period of time Petitioner had to face certain obstructions and disturbances and protest for the use and occupation of this land. A series of incidents took place for which the adjoining land occupiers or owners, the 4th & 5th Respondents were responsible. The acts of the 4th & 5th Respondents were no doubt malicious with ulterior motives to displace the Petitioner from the land in dispute. To consider one such incident as to oust the Petitioner by forcibly having a car park on the Petitioner's land at a certain point of time would demonstrate the extent of danger to the Petitioner's use and occupation of the property. There is an apparent gradual participation in the above events, by the authorities concerned, who seems to have tacitly or otherwise for improper purposes, ulterior motives and extraneous considerations got involved in the ouster of the Petitioner from the land

in dispute. A classic example is borne out from document 2R4 & 2R5. I cannot come to the conclusion that the 2nd Respondent and all other Respondents except 4th & 5th Respondents acted with malice. But the 2nd Respondent had been bias which is a component of breach of natural justice and which is part of judicial vocabulary. I would draw a distinction in 'malice' and 'bias', though a marginally a thin layer separate each other.

The doctrines of malice and bias stand on different footing (state bank of India Vs. Ram Dias 2003(120 SCC 474: Two expressions are not interchangeable. E.g. A Judicial Officer or Administrative Officer may have a pecuniary interest in the subject matter of a case before him. If he or she holds shares in the Plaintiff Company, litigant in the case. In which event he would be disqualified from deciding the case on the ground of bias and not because of mala fides – law of Bias & Mala Fides. 4th ed. A. S. Misra's Law (revised by Dr. Prakash).

A Predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. Bias may be defined as a preconceived opinion or a predisposition or predetermination to decide a case or an issue in a particular manner, so much so that such predisposition does not leave the mind open to conviction. It is, in fact, a condition of mind, which sways judgments

and renders the judge unable to exercise impartiality in a particular case. Pg. 10 A. S. Misra's Law of Bias & Mala Fides – 4th Ed.

In all the above circumstances I have come to the conclusion that Bias by predetermination is established and is apparent. It is also my view that document P20 contains inadequate statements as far as reasons are concerned. As such I hold that the Petitioner's rights are breached i.e breach of the rules of natural justice. As such I allow this application, in terms of sub paragraph ('b') and ('c') of the prayer to the petition with costs.

Application allowed.

JUDGE OF THE COURT OF APPEAL