

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

In the matter of an application under
Article 140 of the Constitution for
mandates in the Nature of Writ of
Mandamus.

1. Muthukumaru Kathiravelu,
Hospital Road,
Chankanai.

PETITIONERS

Vs.

C.A.(Writ) Application No. 674/2010

1. Emelda Sukumar,
Government Agent,
District Secretariat,
Jaffna.
2. The Divisional Secretary,
Valigamam West,
Chankanai.
3. K. Lalithambal,
Grama Niladhari,
Chankanai Centre -J 181,
Chankanai.
4. Geological Survey & Mines
Bureau,
Senanayake Building,
No.04, Galle Road, Dehiwala.

5. Thambithurai Rajeev,
Project Coordinator,
Maheswary Foundation,
No.110, 4th Cross Street,
Jaffna.

RESPONDENT

BEFORE : P.W.D.C. JAYATHILAKE, J

COUNSEL : M. A. Sumanthiran with Jannita
Arulananthan for the Petitioner.
Abdul Najeem for the 5th Respondent.

Argued On : 17.01.2013

Decided On : 28.03.2013

P. W. D. C. Jayathilake J.

The petitioner Muthukumaru Kathiravelu was in need of 3 tractor loads of sand for the purpose of repairing his wall and well area. On his making an application (P1) to the 3rd Respondent K. Lalithambal, Grama Niladhari, the recommendation was obtained for the purchase and

removal of sand and also obtained the recommendation of the 2nd Respondent Divisional Secretary for the said purpose. On submitting the said application to the Divisional Secretariat Valigamam West Chankanai, Petitioner was given 18th October 2010 as the date on which he should call over, after making payments to an organization called Maheswary Foundation. He came to know that the said Foundation has been collecting money from those in need of sand and that the 1st Respondent Emeldar Sukumar, Government Agent of Jaffna and the 2nd and 3rd Respondents do not issue permits unless the applicants make the said payments and produce receipts. The petitioner found out that one has to pay Rs : 13,500.00 for 3 tractor loads of sand to the 5th Respondent Thambithurai Rajeev, the Project Coordinator of Maheswary Foundation, and that the royalty cost due to the 4th Respondent is only Rs : 286.20 .

The petitioner states that every application under the Mines and Minerals Act No.33 of 1992 (as amended) shall be made to the Geological Survey and Mines Bureau (the 4th Respondent) in relevant form and it shall contain required particulars and shall be accompanied by documents as described with the prescribed fee. Petitioner complains that he has been compelled to make an illegal payment to the 5th Respondent's Foundation who acts as brokers in the transaction of obtaining of the licence to transport sand. The petitioner's contention is that the conduct of the Respondents in this regard is a violation of the provisions of the Mines and Minerals act and thereby unauthorized, illegal and Ultra Varies. Therefore petitioner seeks the mandate in the Nature of Writ of Mandamus to

compel the 1st ,2nd and 3rd Respondents to adopt the procedure established by Law in issuing licence to transport sand and a mandate in the Nature of a writ of prohibition restraining Respondents from, compelling applicants needing sand transport permits to make payments to the 5th Respondent.

4th and 5th Respondents have filed objections against the petitioners application.

While stating the powers vested to the 4th Respondent by the Mines and Minerals Act it has taken the position that it has acted in good faith and in compliance with the relevant provisions stipulated in the Mines and Minerals Act and the Regulations made there under.

According to the objections filed by the 5th Respondent the Maheswary Foundation has obtained licence from the 4th Respondent to engage in mining and selling of sand to the public in Jaffna with a view to providing job opportunities to a large number of unemployed people and also to ease the difficulties of those engaged in construction activities finding uninterrupted and regular supply of sand at a reasonable price. Further emphasizes that in the past public faced numerous difficulties in obtaining sand for construction activities due to various reasons including paying ransom to the LTTE. In the statements of it's objections 5th Respondent has explained the way that Maheswary Foundation supply sand to the public.

Petitioner's complaint is that the Respondents have deprived petitioner's of the right of collecting sand on payment of royalty which is entitled under the normal Law. The compulsion of the practice adopted to supply sand through the 5th Respondent is a violation of Law and thereby illegal. The 5th Respondent while admits the fact that his organization is engaged in mining and trading of sand under the licence issued by the 4th Respondent which was marked as 4R2 stating that the petitioner is not entitled in Law to seek the writ of Mandamus against the 5th Respondent since the 5th Respondent is not performing any public duty.

Petitioner has prayed for a mandate in the Nature of a Writ of prohibition restraining the Respondents from compelling the applicants for transport permits for sand to make payments to the 5th Respondent and/or the Maheswary Foundation. It has been submitted on behalf of the petitioner that there is no legal requirements whatsoever under the Mines and Minerals Act or regulations requiring any other payment to be made to any other party for the purchase and removal of sand. It has been argued that the exercise of non-existing power is a nullity, by citing **Gnanaprakasam V. Sabaratnam** 1943 44 NLR 159. The 5th Respondent has admitted that the Maheswary Foundation was engaged in mining, trading and transporting sand. But as stated in the objections of the 4th Respondent an industrial mining licence has been issued to the 5th Respondent for a period of 1 year but said licence has not been renewed thereafter. This fact has not been denied by the 5th Respondent. As it is obviously the fact revealed before this court is that the public in Jaffna has

faced the same situation in another form which they had faced in the past, as mentioned in the objection file by the 5th Respondent. There is no wrong of 5th Respondent's organization in engaging in mining and selling of sand to the public in Jaffna with a view to providing job opportunities to unemployed people. But it has no legal right to intervene with the public duties. Therefore the fact that compelling the public by the 1st, 2nd and 3rd Respondents to make payments to the 5th Respondent in order to obtain licence to collect sand which has not been denied by said Respondents, cannot be justified by the purpose stated by the 5th Respondent.

The main relief that has been asked by the petitioner is a writ of mandamus to compel the 1st, 2nd and 3rd Respondents to adopt the procedure established by Law in issuing licences to transport sand. If the 1st, 2nd and 3rd Respondents follow the procedure according to Law, it automatically stops them from compelling the public to make payments to any other organization which is not entitled to accept such payments. Therefore the need of issuing a writ of prohibition in that regard does not arise. Even though the payments made by the public to 5th Respondent's organization have been done on the direction of the 2nd Respondent, as those payments appear as voluntary payments on records and the 5th Respondent's organization is not a public body, this court agrees with the submissions made by the learned counsel for the 5th Respondent, that the petitioner is not entitled in Law to seek the relief sought against the 5th Respondent's organization. Therefore this court issues a writ of mandamus

to compel the 1st , 2nd and 3rd Respondents to adopt the procedure established by Law in issuing licences to transport sand.

JUDGE OF THE COURT OF APPEAL