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

In the matter of an application for a Mandate in the nature of a Writ of Certiorari under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

**COURT OF APPEAL**

**Application No: 717/2009**

D.M. Sudharma Hemamala Dissanayake
Pinnapolegama, Hulogedera,
Nikawertiya.

**PETITIONER**

Vs

1. N.P.M. Kariyawasam,
   Provincial Land Commissioner,
   (North Western Province)
   P.O Box 46,

Provincial Council Complex,

Kurunegala.

2. H.D.A.B. Boralessa,
   Commissioner of Lands,
   Land Commissioner's Department
   7, Gregory's Road, Colombo 7.
3. W.M.C.K.Wanninayake,
   Divisional Secretary,
   Divisional Secretary's Office,
   Nikaweratiya.

RESPONDENTS

**Before: Anil Gooneratne, J. &**

**H.N.J.Perera, J.**

**Counsel**: D.M.G.Dissnayake for the petitioner

Nayomi Kahawita S.C. for the respondents

**Argued on**: 06.03.2013

**Written submissions**: 30.04.2013

**Decided on**: 01.11.2013

**H.N.J.Perera, J.**

Two Petitioners filed Writ Applications bearing Nos: 708/2009 and the 717/2009 respectively seeking inter alia for writs of certiorari quashing the decisions respectively of the 3rd Respondent and the 1st Respondent reflected in the documents marked P10 and P13A.

When these two applications were taken up for argument on 06.03.2013, an application was made by the Counsel to the parties, since the material facts of both of these applications are similar to one another, argument may be taken up in relation to one writ application only, and that the order given by court in respect of that writ application could be made applicable to the other case. Accordingly case bearing 717/2009 was taken up for argument.

The Petitioner in this application seeks to quash the decision taken by the 3rd Respondent, on the order cancelling the permit issued to the petitioner by the document marked P10 dated 29.05. 2009 and the rejection of the appeal made by the petitioner to the 1st Respondent by the document marked as P13A.

By the decision on P10, the 3rd respondent has cancelled the permit issued to the petitioner marked P1 under the provisions of Section 19(2) of the Land Development Ordinance on 08.09.2004. The subject land is depicted as lot 2 in the plan no: 9248/2003-P2. The petitioner states that the entire land depicted on the plan P2, consisting of five allotments of land, was originally alienated to the petitioner's grand-mother named A.M.Menuhamy on 11.11.1980 (P15). And after the death of her grand-mother on 13.05.1998, the land alienated on P15 was divided into five distinct lots and alienated

on separate permits to the members of Menuhamy's family. Accordingly, lot 1 was alienated to the petitioner and lot 2 was alienated on a permit to the petitioner's sister who is the petitioner in Application No CA 717/2009.

The petitioner admits the fact that before the cancellation of P10, the form of notice to cancel permit on P8 was served on the petitioner by the 3rd respondent and further submits that on P8 it was stated that, the reason for the service of the said notice was that, the land coming under the purview of the permit P1 has not been developed by the petitioner, by cultivating the same. The petitioner states that she had taken steps to develop this land, however, the development activities had come to a stand- still as a result of a family dispute. The petitioner further states that a complaint in this regard was made to the 3rd respondent who summoned the petitioner and her other family members to an inquiry with regard to an allegation of preparing fraudulent deeds to the land. The petitioner further states that a letter has been sent by the 1st respondent addressed to the 3rd respondent with copy to her –P16 informing not to engage in any development activity on the land until the aforesaid dispute is resolved. The petitioner very clearly states that the 3rd respondent has directed the petitioner not to develop the land in issue in the year 2007.

It is submitted by the Counsel for the respondents that the subject land is given to the petitioner on a permit under Section 19(2) of the Land Development Ordinance. It was issued on or about 13.09.2004 by the 3rd respondent. Condition No 08 of the permit P1 stipulates that it shall be the responsibility of the permit holder to cultivate and effect other improvements to the land to the satisfaction of the Government Agent.

It is the position of respondents that the petitioner of the instant case, has not taken any steps to develop and cultivate this land given to her by the afore-mentioned permit and therefore the petitioner has acted in contravention of the terms and conditions of the said permit. It is further submitted on behalf of the respondents that the petitioner since 2004, has not taken any steps to develop and cultivate this land and in fact the petitioner herself had admitted this fact at the inquiry held before the 3rd respondent. The Respondents further states that the petitioner at the inquiry conducted by the 3rd respondent into the cancellation of the permit had in fact admitted the fact that she has not developed the land and had requested further time to develop and cultivate the said land.

The reason adduced by the petitioner for not being engaged in any development of the land was due to a letter of the 1st respondent sent in 2007 –P16.It is submitted on behalf of the respondents that P16 has no bearing whatsoever to the subject matter or subject land before this court. Upon a careful perusal of the document P16 it is apparent that copies of P16 had been sent to one B.M.Premadasa and T.B.M. Dissanayake who are not parties to this application. And although the petitioner states that a copy of P16 had been sent to her she is by no means a recipient of the letter. P16 had been dispatched in 2007.The petitioner was issued with the permit in September 2004. It is submitted by the respondents that the petitioner has no plausible explanation to be given as to why she did not develop or cultivate the land from 2004 to 2007.Further it is submitted on behalf of the respondents that the position taken by the petitioner that the land in this case together with other lands mentioned therein have been cultivated and consists of certain crops which are over 35 years of age and the development activities have been stopped because of the directive made by the 1st respondent

by P16 are been rebutted by the contents of the petitioner's own statement 3R17 given at the inquiry into the cancellation of the permit. It is submitted that in 3R17 the petitioner does not refer to P16 as the reason for not taking any steps to develop the land nor does she refer to any crops which are over 35 years of age being planted on the land. This court observes that in fact the petitioner by 3R17 admits the fact that she has failed to cultivate the land and requests for further time to engage in cultivation and development. Further this court observes that P4A is not a letter written and sent by the petitioner. P4A is not a letter sent by the petitioner, but is a letter addressed to the 1st respondent by one D.M.T.H.Dissanayake who is not a party to this application. P16 is also a letter sent by the acting Provincial Land Commissioner to the 3rd respondent with copies to one B.M.Premadasa and to T.B.M.Dissanayake, both not parties to this case.

It is contended on behalf of the respondent that the petitioner has wilfully and deliberately endeavoured to misrepresent the documents P4A and P16 as letters sent and received by her. It is very clearly seen that letters P4A and P16 are not letters sent or received by the petitioner. The petitioner had relied on these two documents to establish the fact that it was not due to her fault that the said land has not being developed. And in fact the petitioner states that the 3rd respondent directed her not to develop the land in 2007 by the document marked P16.

In W.S.Alphonso Appuhamy Vs L.Hettiarachchi (special commissioner, Chilaw) and another 77 NLR 131, it was held that when an application for a prerogative writ or an injunction is made, it is the duty of the petitioner to place before the court, before it issues notice in the first instance, a full and truthful disclosure of all the material facts; the petitioner must act with uberrima fides.

Further in the case of Namunukula Plantations Ltd Vs Minister of Lands and others (2012 B.L.R. Vol xix part 11 it was held that :

"A person who approaches the court for grant of discretionary relief to which category an application for certiorari would undoubtedly belong, has to come with clean hands, and should candidly disclose all the material facts which have any bearing on the adjudication of the issues raised in the case. In other words, he owes a duty utmost good faith to the court to make a full and complete disclosure of all material facts and refrain from concealing or suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence....if any party invoking the discretionary jurisdiction of a court of law is found wanting in the discharge of its duty to disclose all material facts, or is shown to have attempted to pollute the pure stream of justice, the court only has the right but a duty to deny relief to such a person..."

In the opinion of this court, this misrepresentation of facts alone is sufficient to refuse the application made by the petitioner to this court. Party concerned is bound to disclose fully all relevant and material facts.

Further it is the contention of the Counsel for the respondents that the petitioner's permit has been cancelled by the 3rd respondent by means of his decision in P10, taking into consideration the observations made by the officials of the 3rd respondent after a field visit to the petitioner's land and the cancellation of the permit had nothing to do with the inquiry held earlier with regard to the family dispute. It was at these field visits that the 3rd respondent and his officials came to know about the land parcels given to the petitioner and her sister. Thereafter a survey was done and the land parcels

belonging to the petitioner and her sister was identified as lots 233 and 234 and they were not subject to any development.

The petitioner admits the fact that notice to cancel the permit was served on her by the 3rd respondent. And further states that the said notice P8 stated that the land coming under the purview of the permit P1 has not been developed by the petitioner, by cultivating the same.

The procedure for cancellation of a permit under the Land Development Ordinance is set out in sections 106 to 110 of the said ordinance. It is not in dispute that an inquiry together with a field visit and inspection has been conducted on the premises of the petitioner's land. The petitioner had been a party to the said inquiry and also has made a statement 3R17.

It is further submitted on behalf of the respondents that a report was put up by the officers who conducted both inquiry and the field visit containing their observations-3R18, and based on the report a decision was made by the 3rd respondent to cancel the permit under section 110 of the Land Development Ordinance. The decision made by the 3rd respondent was accordingly communicated to the petitioner by P10. Thereafter, an appeal was preferred by the petitioner to the 1st and 2nd respondents and an inquiry into the said appeal P11 was conducted by the 1st respondent where once again the petitioner was given an opportunity for a hearing.

The 1st respondent by P13A had made his decision to reject the appeal and affirm the decision of the 3rd respondent since the petitioner had failed to show sufficient reason to justify her failure to develop the land given on a permit issued in 2004.

In Public Interest Law Foundation Vs Central Environmental Authority and another {2001] 3 Sri L.R. 330 it was held that judicial review is concerned not with the decision but with the decision making process.

In I.V.Fernando Vs W.D.L.Perera, Controller of Immigration and Emigration, B.A.S.L News 04/09/2000, C.A.Application No 1115/98, It was also held that when the court exercises writ jurisdiction it does not review the case on merits. It only looks for the legality of the decision.

In Best Footwear (Pvt) Ltd and Two Others V Aboosally, former Minister of Labour & Vocational Training and Others [1997] 2 Sri L.R. 137, F.N.D.Jayasuriya, J held:

"The remedy by way of certiorari cannot be made use of to correct errors or to substitute a correct order for a wrong order. Judicial review is radically different from appeals. When hearing an appeal the court is concerned with the merits of the decision under appeal. In judicial review the court is concerned with its legality. On appeal the question is right or wrong. On review, the question is lawful or unlawful. Instead of substituting its own decision for that of some other body as happens when an appeal is allowed, a court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not."

It is contended on behalf of the respondents that the decisions of the 3rd respondent reflected in P10 and the decision of the 1st respondent reflected in P13A are lawful and just and made with due conformity with the principles of natural justice and therefore, not amenable to be quashed by way of a writ of certiorari.

The fact that P8 notice was served on the petitioner, an inquiry was held, field inspection had been carried out, the fact that petitioner was a party to the said inquiry held by the 3rd respondent are not disputed by the petitioner in this case. The fact that the petitioner appealed from the decision of the 3rd respondent and the 1st respondent held another inquiry and the petitioner was a party to that inquiry too are also not in dispute in this case.

A perusal of the material facts and a careful consideration of the said facts and the submissions, clearly indicate that the respondents had clearly adhered to the procedure laid down in the Land Development Ordinance prior to the issue of the said orders marked P10 & P13A to the petitioner.

In P.S.Bus Co. Ltd Vs Members and Secretary of Ceylon Transport Board it was held that:

"A prerogative writ is not issued as a matter of course and it is in the discretion of court to refuse to grant it if the facts and circumstances are such as to warrant a refusal. Further it was held in Jayaweera Vs Asst. Commissioner of Agrarian Services Ratnapura and another [1996] 2 Sri L.R 70, that:

"A petitioner who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the court has discretion to deny him relief having regard to his conduct, delay, laches, waiver, submission to jurisdiction- are all valid impediments which stand against the grant of relief."

The petitioner in paragraph 22 of her petition has alleged that the cancellation of her permit by P10 has been done improperly and with an ulterior motive. But this court is of the view that the petitioner

has failed to establish that the respondents have acted in that manner and to substantiate the same by placing sufficient material before this court. Further the position taken on behalf of the petitioner that the development of the land by cultivating the same has been brought to a halt by the authorities on P16 cannot be accepted.

I hold that the petitioner has failed to establish that the respondents have acted in bad faith, unfairly or unreasonably, or that the respondents have failed to follow the proper procedure laid down in the Land Development Ordinance in the issuance of letters marked P10 & P13A to the petitioner in this case.

In the above circumstances the petitioner has not shown to the satisfaction of this court, any ground on which this court could issue a writ of certiorari to quash the above orders contained in P10 and P13A and hence this court dismisses this application without costs.

Application dismissed

JUDGE OF THE COURT OF APPEAL

Anil Gooneratne, J

I agree.

JUDGE OF THE COURT OF APPEAL