

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

Kodituwakku Estates (Pvt.) Limited,  
No. 61/5, Galle Road,  
Dehiwela (South)

**PETITIONER**

C.A 827/2005 (Writ)

Vs.

1. Hon. Anura Priyadharshana Yapa  
Minister of Plantation Industries,  
Ministry of Plantation Industries,  
No. 55/75, Vauxhall Lane,  
Colombo 2.

**And 5 others**

**RESPONDENTS**

**BEFORE:** Anil Gooneratne J. &  
Deepali Wijesundera J.

**COUNSEL:** Manohara de Silva P.C., for the Petitioner  
Shavindra Fernando D.S.G. with Nerile Pille S.S.C. for the Respondents

**ARGUED ON:** 12.07.2013 & 31.07.2013

**DECIDED ON:** 05.12.2013

**GOONERATNE J.**

The Petitioner Company filed this Writ Application on or about May 2005 seeking the remedy of Mandamus/Certiorari and Prohibition pertaining to a proposed lease agreement marked P21. This court had also granted an interim order restraining the 1<sup>st</sup> to 3<sup>rd</sup> Respondent from taking any steps pursuant to the paper advertisement marked P27 (Journal Entry of 7.6.2005). The Journal Entry of 22.6.2005 also records the interim order for the reasons stated therein as follows “to restrain the 1<sup>st</sup> – 3<sup>rd</sup> Respondents from calling for tenders/proposals evaluating and disposing/leasing Midland Estate to a 3<sup>rd</sup> party till the next date. The several Journal Entries shows that the interim order had been extended at least till 12.7.2013. Thereafter the matter was heard and judgment reserved (vide J.E of 12.7.2013 & 31.7.2013).

Petitioner company has produced the certificate of incorporation marked P1 and state it owns and manage “Koladachchi Estate” in extent of 129 Acres; 1 Rood; 20 perches consisting of tea, pepper and cloves. The body of the petition refer to the management skill, experience and competence of the Petitioner Company as far as the agricultural aspects. However the Petitioner

Company for the reasons referred to in the body of the petition and in the submission of learned President's Counsel, was desirous of taking on lease another estate and had in fact, received information of 'Midland Estate' Rattota, was available on a lease. Petitioner commenced negotiating with the 2<sup>nd</sup> Respondent Corporation to obtain a lease. Position of the Petitioner Company and as urged by learned President's Counsel was that the above Midland Estate was offered to the Petitioner Company on a lease for a period of 50 years and demonstrated this fact by certain representation made by the authorities and with several documentation. It is the position of the Petitioner that in fact the lease agreement was prepared and ready for execution. Notwithstanding the above, advertisement marked P27 was published inviting prospective investors for privatization of several estates including Midland.

The midland estate was included in P27, despite the assurance given to the Petitioner Company to enter into a lease agreement, and had thereafter Respondent refused to enter into the proposed lease agreement, unless the Petitioner's project obtains the status of a BOI approved project. This court has been invited to peruse the several instances, steps taken in holding out to the Petitioner that the above Midland Estate would be leased to the Petitioner.

In the process of obtaining the necessary approvals, the Petitioner in order to establish same has annexed, several documents to the petition. P5, P5a being applications for site approval and investment. P6 is a request by Kodituwakku Estates (Pvt.) Limited to the Minister to grant approval. Documents P7, P8, P9, P10 are correspondence indicating the steps taken to obtain approval and by P8a & P10 the Minister and BOI express the view that, if the necessary approvals are obtained the estate in dispute could be released to the Petitioner Company, and BOI states that the Sri Lanka Plantation Corporation is informed that the land is available for the project, provided a proper valuation is done. It also call upon the Petitioner to furnish background information i.e investor, experience. Then documents P11, P11a, P12, P13a, P13b, P13c, P13d, P14a – c, P15 refer to valuation, details of the Petitioner Company, details of project proposal, bank details, status of Company etc. P16, P17 & P18 refer to the proposal being approved, preparation of lease agreement. P19 & P20 are survey plans and payment receipt to Attorney at Law Sudath Perera. P21 is the draft indenture of lease.

The above documents no doubt as far as the Petitioner is concerned seems to be a good attempt to demonstrate the initial steps taken by the Petitioner to make available to the Petitioner Company the above named Midland

Estate, by way of a lease, the several steps in the process that was needed to be carried out to plan, establish and the method in entering into the transaction with required details, followed by the assurance and the kind of hope given to the Petitioner regarding the intended formation of the lease agreement. Having collectively placed the above material Petitioner seek to establish that there is a legitimate expectation of a lease being executed in favour of the Petitioner. The question is whether it amounts to a legitimate expectation or a mere expectation?

In order to consider the case of Respondent, I have noted the contents of the objection of the Respondents. It is inter alia pleaded and some of the salient points are as follows:

- (a) Lease terms of State land for BOI investment projects to be recommended to the Cabinet by an Inter Ministerial Advisory Board (IMAB). A document titled "Guidelines for the alienation of State Counsel marked 2R1 is produced. The guidelines in 2R1 has not been satisfied. Letter marked 2R2 (14.5.2004) is also produced to refer to same.
- (b) Respondents complain that in the instant case the procedure has not been properly followed. i.e BOI inquires from the Sri Lanka State Plantation Corporation who would forward the requests to the Ministry of Plantation Industries. This procedure has not been followed.

- (c) Circular of 14.2 2002 regarding alienation of State Lands. No State lands to be alienated until a clear policy is set down.
- (d) Formalities contained in letter P16 not followed.

This court also refer and note the following important matters concerning State land. There being state policy pertaining to State land it is necessary to ascertain the following as gathered from the objections of the Respondents.

- (a) Consequent to the decision taken at the Cabinet Meeting, held on 6<sup>th</sup> October 2004, a Cabinet sub Committee consisting of Hon. Minister of Finance and Planning, Hon. Minister of Posts, Telecommunication and Upcountry Development was convened to look into the financial constraints faced by JEDB and SLSPC, by Hon. Anura Priyadharshana Yapa, the Hon. Minister of Plantation Industries on 2<sup>nd</sup> November 2004.
- (b) Pursuant to the said meeting and with the intention of reviving the estates of the SLSPC, the Hon. Minister of Plantation Industries presented a note to the Cabinet titled "Financial Crisis in JEDB, SLSPC, BCC (Lanka) Ltd.," No. 37/2004 at dated 17<sup>th</sup> November 2004.
- (c) A true copy of the Cabinet Memorandum, dated 17<sup>th</sup> November 2004 containing the recommendations made by the said sub-committee is annexed along with the Affidavit of the present Chairman of SLSPC.
- (d) On 9<sup>th</sup> December 2004, approval was granted by the Cabinet to implement the recommendations of the sub-committee as set out in the said Cabinet Memorandum, subject to 2 conditions.
- (e) Thereafter at the Cabinet meeting held on 15<sup>th</sup> December 2004, further amendments were made, and a true copy of the amended cabinet decision dated 20<sup>th</sup> December 2004.

- (f) In terms of the afore mentioned recommendations the task of identifying and leasing out the estates to private entrepreneurs on long term lease basis was a task to be performed by the Public Enterprise Reform Commission (hereinafter referred to as "PERC").
- (g) Accordingly Expressions of Interests (EOI's) are called and short listed by a Cabinet Appointed Negotiating Committee (CANC) and PERC invited Request for Proposals (RFP's) from the said short listed parties in order to select a party to enter into a long term lease (20 years lease), of a cluster of estates of Sri Lanka Plantations Corporation.
- (h) The Petitioner submitted Expressions of Interest (EOI) and a Request For Proposal (RFP) was issued to the Petitioner for which the Petitioner did not respond.
- (i) A true copy of the Request For proposal (RFP) issued by PERC is annexed hereto.
- (j) Midlands Estate has been omitted from the said RFP pursuant to an Interim stay order.
- (k) These Respondents further state that the approval of the President has not been obtained as required in terms of Section 33(d) of the Constitution;
- (l) It is clear that only the preliminaries involved had been attended to and nothing formal was finalized between parties. The Petitioner has come before Court before completing the necessary preliminaries and the other formalities involved.
- (m) These Respondents are committed to carry out all agricultural practices and make the estates viable by utilizing each and every resource on the estates and as such these Respondents state that SLSPC will not lease entire estates for joint ventures.
- (n) These Respondents further state that they are committed to adhere to Government Tender Procedure in order to maintain transparency.
- (o) In any event the policy of the incumbent Government has to complied with and at present it is the policy not to alienate State land in such instances.

The counter affidavit of the Petitioner filed in these proceedings also disclose some relevant material. Whilst reiterating the several matters pleaded in the petition, emphasis is on circular marked 'x' and a circular of 21.7.1995 issued

by the Presidential Secretariat pertaining to leasing and alienation of State land. It is also disclosed of a joint venture for Midland Estate (A, B, C, D, E, & G ). Then followed by discussion taken place between the parties for a joint venture for Midland Estate. It appears to this court that the idea of a lease seems to have gradually receded to the background and by 'A' & 'B' with discussions between parties a joint venture had surfaced which also does not seem to have materialized. But the question that need to be kept in mind is whether in view of change of circumstances from a lease to a joint venture, could the Petitioner have legally entertained an idea of legitimate expectation?

Learned President's Counsel on behalf of the Petitioner Company drew the attention of this court to the following forceful authorities on legitimate expectation. I will refer to same since it is of much persuasive value to ascertain the underlying principle.

As Clive Lewis states:

In the public law field, individuals may not have strictly enforceable rights but they may have legitimate expectations. Such expectations may stem either from a promise or a representation made by a public body, or from a previous practice of a public body.

Clive Lewis, *Judicial Remedies in Public Law*, 3<sup>rd</sup> Edition, page 157..



In the case of Multi National Property Development Ltd. Vs. Urban Development Authority (1996) 2 SLR , 51 Your Lordships' Court upheld the legitimate expectations of the Petitioner in circumstances similar to the present case before Your Lordships' Court. In that case, the UDA approved a project by the Petitioner to construct a complex car park on a land vested in the UDA and decided to allocate the land to the Petitioner for the project on a 99 year lease and the final lease agreement was ready. However after the change of government the UDA not to allocate the land to the Petitioner. The Court of Appeal citing with approval of the above passage of Clive Lewis, granted relief to the Petitioner and held:

Where a new policy is to be applied the individuals who have legitimate expectations based on promises made by public bodies that they will be granted certain benefits, have a right to be heard before those benefits are taken away from them on the ground that there had been a change of policy.

... In the public law field, individuals may not have strictly enforceable rights but they may have legitimate expectations. Decisions affecting such legitimate expectations are subject to judicial review.

Wickramaratne Vs. Jayaratne and Others 2001 (3) SLR 161 is a refreshing judgment which demonstrates the robust application of the principle of legitimate expectation. In this case, the Minister of Lands had acquired a land under the Land Acquisition Act. The Provincial Land Commissioner had recommended that a portion of the corpus be leased to the Petitioner in the said case. The Petitioner agreed to this and the District Secretary requested the Petitioner to hand over possession of the entire land, minus the area agreed to be retained by him. However thereafter, the District Secretary sought to take possession of the entire land. Thereupon, the Petitioner applied for a writ of certiorari and the Court of Appeal held that the State was bound to fulfill "an expectation generated by the conduct of or undertakings given ..... by officials who operate under the aegis so to say of the Ministry of Lands of the Central Government .... " (at pg. 167)

The above authorities no doubt clearly express the principle of legitimate expectation as to when it applies and the assurances given by the Government Department/Statutory bodies more or less inviting members of the public or private organizations to enter into transactions may be based on previous practice of the Government or public body. At least if the assurance cannot be fulfilled an opportunity need to be given to the affected party for a right of hearing or making further representations to enable the party to realize as to the need for change of policy.

However having all above in mind, I have to approach the case in hand differently due to certain basic facts which emerged from the material placed by either party.

The idea of a lease seems to have been invented and proposed by the Petitioner. The Government/Statutory body never invited the Petitioner to enter into any transaction concerning Midland Estate. No tenders were called from the public and unsolicited, nor a advertisement by the authorities concerned, other than the newspaper advertisement in P27. It is the Petitioner who initiated the process. Thereafter and since then, the statutory bodies seems, to have worked on the so called lease. As such the Petitioner never had a legal right at any given point of time. However in the process certain assurances crept

into the picture, in the form of representations. In any event the material placed before court also indicate that at a certain point (as in C, D & E) another idea of a joint venture was also being considered. (at or about the time the Petition was filed in this court). Further the objections of the Respondents and as pleaded in the counter affidavit of Petitioner it is apparent that the formality of approving the project by Inter Ministerial Advisory Board (IMAB) was pending. Whether it was a mere formality or otherwise, the Petitioner has not been able to complete and conclude the formalities in letter P16.

This court observes that just as much as certain safeguards are provided by the constitution to persons and citizens e.g right to choose ones residence, to engage in any lawful occupation, profession, trade, business or enterprise, when it comes to dealing with State lands the sole responsibility is cast on the Government to deal with State lands according to law, and the law only. The area of land law would always be important from a social, economic and a political point of view. One cannot also ignore the significance of the State's role at different times of our political history. There are statutes dealing with alienation of State lands, the acquisition of private lands for public and planning purposes, to acquire title for the state etc. As such all matters dealing with state land cannot be dealt with outside the available statute based/legal frame work.

As such variety of aspects dealing with State land are always subject to a regulatory role. In this background it would be rather confusing to claim a legitimate expectation to deal with State land except in terms of the law. Nor can a Minister give any undertaking or assurance in the absence of real or actual authority. A legitimate expectation in a contract can arise only where there is a concluded contract. Bar Association Law Journal 1999 Vol. III Pg. 38.

I do agree with the submissions of the Respondents that the Petitioner could not entertain a legitimate expectation as he did not participate in a transparent process open to the general public. To give recognition to legitimate expectation the Petitioner should have entered into an unsolicited transaction which require transparency, and participation or being open to the public. I am inclined to take the view that approval obtained subsequent to a non transparent, unsolicited transaction are not within the mandate of public authorities and is in breach of the Public Trust Doctrine vide *Nanayakkara Vs. Sunil Perera & others* S.C (F.R) 352/2007 (S.C minutes 8.10.2008)

I have also had the opportunity of perusing a more recent case vide *Vasana Vs. Incorporated Council of Legal Education and Others* Thus it is apparent that the Petitioner when claiming a legitimate expectation must necessarily establish a legal right. In other words it should not be a mere

expectation. It is apparent that the Petitioner could not entertain a legitimate expectation as he did not participate in a transparent process and therefore has failed to satisfy/establish the threshold requirement of a legal right

The learned Deputy Solicitor General who appeared for the Respondent along with Senior State Counsel emphasized another point i.e Petitioner has not come to court with clean hands and thereby lacks uberrima fides. I do not think it would be necessary for this court to grapple with that point as I am not inclined to hold with the Petitioner on the grounds of legitimate expectation. To entertain an expectation would be different to having a legitimate expectation.

This is an application filed on or about the year 2005. Since then over 9 years have lapsed and interim relief granted to Petitioner, also would have lapsed by 12<sup>th</sup> July 2013 since there was no application to renew the stay order on that date, or thereafter. As such the long lapse of time in finally disposing this case also would have caused some administrative inconvenience to the authorities concerned. As such it would be futile exercise to grant the writs prayed for at this point of time. Authorities concerned need to take some meaningful steps even at this late stage, may be to explore the possibility of a transparent procedure to alienate state controlled estates with the participation

of person and or organizations competent to deal with agricultural lands within the available legal frame work. In all the above circumstances I am reluctantly compelled to reject this application.

Application dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL