

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

C A. PHC 166/09

HC Galle 04/08 Writ

Dr. Ananda Raj Kumar

Wachana Liyanage

'Hema Sri', Main Street,

Balapitiya.

PETITIONER-APPELLANT

Vs

Chairman,

Balapitiya Pradeshiya Sabhawa,

Balapitiya.

Balapitiya Pradeshiya Sabhawa,

Balapitiya.

S. Sudath De Silva

Wellabada Temple Road,

Balapitiya.

RESPONDENT-RESPONDENT

BEFORE: A.W.A.SALAM, J & Sunil Rajapakse, J.

COUNSEL: J C Weliamuna for the petitioner-appellant
& Chula Bandara for the respondents.

ARGUED ON : 04.03.2014

DECIDED ON: 26.08.2014

A W A Salam, J

This appeal concerns the legality of a decision made by the learned High Court judge in the exercise of his original jurisdiction, when he was invited to exercise his prerogative powers to issue a writ of certiorari to quash a decision taken by the 1st respondent-respondent. The decision impugned in this appeal is dated 27 August 2009. By the said decision, the learned High Court Judge refused the application made by the petitioner-appellant to have the direction issued by P10 quashed.

The facts relevant to the application made by the petitioner-appellant for writ of certiorari in the High Court centres upon the document marked as P 2 and P 10. The Chairman of the Balapitiya Pradeshiya Sabhawa namely the 1st respondent-respondent by P2 purporting to exercise his powers under Section 107 of the Pradeshiya Sabha Act called upon the petitioner-appellant to tie a king coconut tree, pluck the king coconut regularly and remove the branches of a rukattana tree and certain banana trees. In issuing P2 the 1st respondent-respondent had purportedly acted under Section 107 of the Pradeshiya Sabha Act which reads as follows.

(1) Where in any Pradeshiya Sabha area any tree or any branch, trunk, fruit or other part of a tree is causing or is likely to cause damage to any building, or is in a condition dangerous to the occupants if any building, or to the safety of passers-by along any public thoroughfare, the Chairman of the Pradeshiya Sabha of such area may, by a notice in writing served on the owner or occupier of the land on which such tree stands require such owner or occupier to tie up and make secure, or to cut down and remove such tree or the branch, trunk, fruit or other part of such tree within such time as may be specified in the notice.

According to the averments in the petition the 1st respondent-respondent has issued P2 calling upon the petitioner-appellant to tie up a certain tree, pluck the king coconut regularly, remove the branches of the rukattana tree and the leaves of the banana trees. Having issued P2 the 1st respondent-respondent has admittedly issued yet another order marked as P10. The 1st respondent-respondent has decided to cut and remove the rukattana tree and to tie up the thambili tree to ensure the safety of the adjoining land owner.

The learned Counsel for the petitioner-appellant has submitted that the 1st respondent-respondent has amended P2 and issued P10 acting on the advice of the Assistant Commissioner of Local Government of Southern Province. The said advice of the Assistant Commissioner of Local Government given to the 1st respondent-respondent has been marked in the proceedings before the High Court as 1D2. According to 1D2 the 1st respondent-respondent has been directed by the Assistant Commissioner of Local Government to order the petitioner-appellant to cut and remove the rukattana tree instead of his being directed to cut and remove the branches of the said tree. In terms of Section 107 (1) of the Pradeshiya Saba Act, the Chairman of the Pradeshiya Saba is empowered to issue a notice in writing served on the owner or occupier of a land on which any tree or branch, trunk, fruit or other part of the tree is causing or likely to cause damage to any building or is in a condition dangerous to the occupants of the building or to the safety of the passers-by along any thoroughfare. According to Section 107 (1) the decision as to whether such a tree or any branch or trunk or fruit or other part of a tree is causing or likely to cause damage to any building etc has to be decided by the Chairman of the respective Pradeshiya Sabhawa. The complaint of the petitioner-appellant is that instead

of deciding as to the dangerousness of the tree or any branch or trunk or fruit or other part of the tree the 1st respondent-respondent has acted under the dictation of a person who did not have the authority to direct him to do so. In other words the petitioner-appellant contends that the 1st respondent-respondent has surrendered his statutory right to issue a notice under Section 107 of the relevant Act to the Assistant Commissioner of Local Government.

In this respect the learned Counsel for the petitioner-appellant has adverted us to the legal proposition that an action of repository of power becomes null and void if he acts on the external dictation that amounts to bad faith or abusive power. In this respect the learned Counsel has cited the treatise on administrative Law by H W R Wade C. F Forsyth (7th edition) pages 358 2 359.

As has been contended by the learned Counsel for the petitioner-appellant, the several objectives in enacting Section 107 of the Pradeshiya Sabha Act is to ensure that the people living in the Pradeshiya Sabha areas do not face any dangers by means of a tree or any branch, trunk, fruit or other part of it. Therefore, the Provisions of the Law which enables the Chairman of the Local Authority to take such action to remove the danger, is

significantly a unique power conferred on him in his capacity as an elected member of the Local Authority. This power, as it involves the deprivation of property rights of one person and elimination of dangers with regard to the living condition of another person should be exercised with the utmost care and on clear material. P2 is drawn up in a careless manner requiring the petitioner-appellant to remove the banana leaves (කෙසල් ගස්වල නිවස පැත්තට තිබෙන අතු) endangering the house of the neighbour.

The learned Counsel for the petitioner-appellant states that this is demonstrative of the malafides of the 1st respondent respondent. On this question I am totally in agreement with the learned Counsel for the petitioner-appellant. P2 has been issued in such a manner without taking into consideration as to whether in fact such leaves of the banana trees are endangering the buildings belonging to the neighbour.

In the circumstances, it appears that the learned High Court Judge has not considered the question of vires and the allegation of malice. Above all, the court has failed to consider the question that the 1st respondent-respondent has depended to a great extent on the dictation of the Assistant Commissioner of Local

Government to issue P10. Further, before the issuance of P10 the 1st respondent-respondent has failed to withdraw P2.

Hence, it is my view that the learned High Court Judge should have issued the writ of certiorari to quash P10. Therefore, I set aside the judgment of the learned High Court Judge and issue a writ of certiorari quashing the decision contained in P10.

Subject to the above the appeal preferred by the petitioner-appellant is allowed subject to costs.

President/Court of Appeal

Sunil Rajapaksha, J

I agree

Judge of the Court of Appeal

KRL/-