

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

*In the matter of an Application for Writs
of Certiorari and Mandamus in terms of
Article 140 of the constitution*

C A (Writ) Application No. 136 / 2013

Rajapaksage Dharmasiri Ranasinghe,

Ela 5,

Shrawasthipura,

Anuradhapura

PETITIONER

-Vs-

1. Commissioner General of Lands,
Department of Commissioner General of
Lands,
No. 7,
Gregory's Road,

Colombo 07

2. Divisional Secretary
Divisional Secretariat,
Nuwaragam Palatha Central,
Pandulagama,
Anuradhapura

3. Provincial Land Commissioner
Provincial Land Commissioner's
Department,
North Central Province,
Anuradhapura.

4. Rajapaksage Dushantha Anuradha
Karunarathne,
Rajapakse House,
Alankulama,
Anuradhapura

5. Hon. Attorney General
Attorney General's Department,
Colombo 12

RESPONDENTS

Before: Vijith K. Malalgoda PC J (P/CA)

P. Padman Surasena J

Counsel: Neville Abeyrathne with Kaushalya Abeyrathne Dias for the
Petitioner

Thilak Wijesinghe for the 4th Respondent

Suranga Wimalasena SSC for the 1st, 2nd, 3rd and 5th
Respondents

Argued on: 2016-06-01

Written submissions on behalf of the 4th Respondent filed on: 2016-06-15

Decided on: 2016-08-08

JUDGMENT

P Padman Surasena J

Document marked and produced by the Petitioner **P 1** in this proceeding is a permit issued in terms of section 19 (2) of the Land Development Ordinance (hereinafter sometimes referred to as the Ordinance) to Bisomanike Rajapaksha who is the mother of both the Petitioner and the

4th Respondent. Said Bisomanike Rajapaksha had nominated R P D Sarath Wijerathne who is one of her sons, as her successor.

After the demise of both the original permit holder Bisomanike Rajapaksha and the successor nominated by her in the permit namely, R P D Wijerathne, the Petitioner's name was entered on 2008-08-28 as the successor on the basis that he is entitled to succeed according to law, as he is the eldest surviving son.

The above facts pertaining to this case mentioned up to this point are not disputed by the parties. Hence, it is both appropriate and convenient to proceed in the rest of this judgment on the basis that the Petitioner is the current lawful permit holder of the permit marked **P 1**.

What is being contested, in this proceeding is an order marked **P 9** cancelling this permit by the 2nd Respondent and the decision dated 2013-03-05 marked **P 11** which is the decision of the 3rd Respondent pertaining to the consideration of the appeal (against **P 9**) lodged by the Petitioner.

Since what is being contested is an act of cancellation of a permit it would be necessary to examine the provisions dealing with this aspect in the Land Development Ordinance.

According to section 106 of the Ordinance, if it appears to the Government Agent that a permit holder has failed to observe a condition of the permit, he may issue a notice in the prescribed form intimating to such permit holder that his permit will be cancelled unless sufficient cause to the contrary is shown.

The procedure to be followed when such permit holder appears and offers to show cause is laid down in section 110 which is as follows.

section 110

(1) If on the date and at the time and place specified in a notice issued under section 106 or appointed by the Government Agent under section 109 (2) the permit-holder appears and offers to show cause why his permit should not be cancelled, the Government Agent may, if he is satisfied after inquiry that there has been a breach of any of the conditions of the permit, make order cancelling the permit.

(2) The Government Agent may adjourn any inquiry under this section from time to time and shall hear evidence before making his order.

All such evidence shall be given on oath or affirmation which the Government Agent is hereby authorized to administer for the purpose.

(3) Where an inquiry under this section is adjourned, notice in writing of the date and the time to which the inquiry is adjourned shall be given by the Government Agent to the permit-holder.

The 1st notice sent by the 2nd Respondent is the document marked **P 3**. According to that notice, the 2nd Respondent has alleged that the Petitioner has breached the conditions mentioned in the permit. It includes the following phrases :

"..... ඉහත සඳහන් අවසර පත්‍රයේ කොන්දේසි යුෂ්මතා විසින් මෙහි පහත දැක්වෙන අන්දමින් නොපිළිපැද තිබෙන බැව් පෙනී ගිය බැවින්....."

"..... කොන්දේසි පිළිපැදීම පිළිබඳ සටහන

01. පදිංචි නොවීම 02. සංවර්ධනය නොකිරීම 03. අත්සතු කිරීම"

The 2nd Respondent in the notice marked **P 3** has informed the Petitioner to appear before him and satisfy him as to why he should not cancel the Petitioner's permit. This notice is dated 2009-08-19.

Subsequent to the said notice, the 2nd Respondent by the letter dated 2009-11-18 (marked as **P 4**) has informed both the Petitioner and the 4th Respondent that he has decided to grant 2 permits to both of them for separate portions of the same land. The 2nd Respondent has further requested both the Petitioner and the 4th Respondent by that letter to come to an agreement and decide about the portions to be allotted to each of them.

It must be noted that the above inquiry was held to decide whether the permit should be cancelled or not, and the decision taken at the end, turns out to be a decision to subdivide the land.

Despite this decision, 2nd Respondent has again sent to the Petitioner, a 2nd notice dated 2012-09-26 (**P 7**) asking him to show cause as to why his

permit should not be cancelled. In that notice also, the wordings are exactly similar to the previous notice (**P 3**). It is as follows.

"..... ඉහත සඳහන් අවසර පත්‍රයේ කොන්දේසි යුෂ්මතා විසින් මෙහි පහත දැක්වෙන අන්දමින් නොපිළිපැද තිබෙන බැව් පෙනී යන බැවින්....."

"..... කොන්දේසි නොපිළිපැදීම පිළිබඳ සටහන

01. පදිංචි නොවීම 02. සංවර්ධනය නොකිරීම 03. අන්සතු කිරීම"

It is to be noted that the wordings of both the above letters (**P 3 & P 4**) are the same except the underlined word.

The Petitioner was asked to be present for the inquiry referred to in the letter **P 4** before the 2nd Respondent on 2012-11-14. It is the contention of the Petitioner that he submitted his reasons against cancellation of the permit by the document marked **P 8**.

The following causes namely,

- i. that he had to keep away from the land due to the threats from the 4th Respondent
- ii. that he has lodged a complaint in this regard at the Police station, Anuradhapura on 2009-11-26

- iii. that he has instituted a case in the District court of Anuradhapura bearing number L 23439 to have the trespasser (4th Respondent) evicted.
- iv. that the allegation that the land has not been developed is factually wrong as he has not only made constructions in the land but also has cultivated and that he had properly entrenched the land with fences.
- v. that he has at no stage alienated this property to the person who is said to occupy the land at present but he is a person who had resided even at the time he was named as the successor to this permit.

Subsequent to this inquiry the 2nd Respondent has by the document marked **P 9** ordered the cancellation of the said permit. The said order contains *inter alia* the following phrases:

"..... ඉහත සඳහන් අවසර පත්‍රයේ කොන්දේසියක් යුෂ්මතා විසින් පහත සඳහන් අන්දමින් නොපිළිපැද තිබුණ බැව් පෙනී ගිය බැවින්ද,

2012-11-14 (දින) පෙ.ව 10.00 (වෙලාව) ට මධ්‍යම නුවරගම් පළාත ප්‍රාදේශීය ලේකම් කාර්යාලයේ (ස්ථානයේ) දී යුෂ්මතා මා ඉදිරිපිටට පැමිණ තම නිදහසට සෑහෙන පරිදි කරුණු පෙන්වුම් කර නොසිටියොත් අවසර පත්‍රය අවලංගු කරන බව යුෂ්මතාට දන්වා දැන්වීමක් නිකුත් කළ බැවින්ද,

දැන්වීමෙහි සඳහන් වූ දිනදීත්, වෙලාවේදී හා ස්ථානයේදීත්, යුෂ්මතා තමාම පෙනී සිට අවසර පත්‍රය අවලංගු නොකළ යුතු බවට කරුණු පෙන්වුම් කිරීමට

කැමති බව දන්වා සිටි බැවින්ද, විභාගයෙන් පසු ඉහත සඳහන් කළ කොන්දේසිය කඩ කර තිබෙන බව මට ඒත්තු ගිය බැවින්ද, අවසර පත්‍රය අවලංගු කිරීමට මම මෙයින් නියම කරමි.

"..... කොන්දේසි නොපිළිපැදීම පිළිබඳ සටහන

01. පදිංචි නොවීම 02. සංවර්ධනය නොකිරීම 03. අන්සතු කිරීම"

It must be again noted that even here the wordings appearing at the bottom of the document are same as before.

First of the main contentions relied upon by the learned counsel for the Petitioner is that the 2nd Respondent has failed to hold a proper inquiry as envisaged by section 110 of the Ordinance before he decided to cancel the permit.

The position taken up by the 2nd Respondent, is as follows.

- i. an inquiry under section 106 of the Land Development Ordinance for which the parties were notified by the document marked **P 3** was not held.
- ii. the inquiry which was conducted on 2009-11-18 was not an inquiry under the Section 106 of the Land Development Ordinance and it was just an informal "office inquiry" conducted by the 2nd Respondent;

- iii. the decision of the said inquiry was issued on the same date as a kind of settlement, which is marked as **P 4**, and is not a decision or notice under section 109 of the Land Development Ordinance;
- iv. the said document itself shows that, to execute the said decision, the consent of the Petitioner and the 4th Respondent was required by the 2nd Respondent;
- v. the said decision did not come into force since the parties did not respond to the said document **P 4**.

It is relevant to note that the 2nd Respondent's position is that he gave the impugned decision (**P 9**) based on the material made available to him by Grama Niladhari, land Officer and the Petitioner (Paragraph 15 (Vii) of his affidavit). The 2nd Respondent has admitted receiving the document marked (**P 8**). It contains the reasons adduced by the Petitioner addressed to the 2nd Respondent urging him not to cancel the Petitioner's permit. The said document **P 8** is dated 2012-11-14. Thus at its least, those reasons adduced by the Petitioner through **P 8** should have been considered by the 2nd Respondent, in the inquiry which is said to have been held. However not a word, at least indicative of the fact that such reasons were considered, is to be found in his decision **P 9**. As shown before his decision is not more than a repetition of the same paragraph that appeared in the notice (**P 7**) summoning the Petitioner for the inquiry.

By virtue of section 110 of the Ordinance it becomes incumbent upon the 2nd Respondent to consider intently the material that would be adduced by those who are concerned in the matter. A specific procedure in that regard

has been set out in the Ordinance. There is no material or basis for this Court to conclude that the 2nd Respondent has complied with that procedure. Thus the contention of the Petitioner that the 2nd Respondent has failed to conduct an inquiry in terms of section 110, has to be upheld.

The Petitioner being aggrieved with the said cancellation order has preferred an appeal to the 3rd Respondent. The appeal he has lodged is marked and produced as **P 10**.

The decision of the 3rd Respondent with regard to the said appeal is the document marked **P 11**.

The second of the two main contentions relied upon by the learned counsel for the Petitioner is that the 3rd Respondent has failed to observe the rules of natural justice when he decided the appeal preferred by the Petitioner, against the 2nd Respondent's decision.

In terms of section 113 of the Ordinance a permit-holder aggrieved by an order made by the Government Agent under section 110 may appeal therefrom to the Land Commissioner. Section 114 of the Ordinance sets out a time limit of forty-two days for lodging such an appeal.

Section 115 of the Ordinance sets out the Powers that could be exercised by the Land Commissioner in such an appeal.

According to that section, the Land Commissioner may in appeal

- a) direct further inquiry to be made or information to be furnished or evidence to be given; or

- b) allow the appeal and set aside the order of the Government Agent; or
- c) modify the order of the Government Agent; or
- d) affirm the order of the Government Agent; or
- e) make such other order as he may consider just.

The 3rd Respondent, in his affidavit filed before this Court has admitted

- I. that the Petitioner has lodged the appeal (**P 3**)
- II. that he gave the decision (**P 11**) after perusing the available documents pertaining to the case.

He however does not deny the complaint against him, made by the Petitioner that he had not afforded an opportunity for the Petitioner to be heard before he decided this appeal. What section 113 of the Ordinance has given to an aggrieved party is a right to appeal.

Section 115 of the Ordinance has specifically given wide powers to the Land Commissioner which he is empowered to exercise to correct any injustice that could be caused at the hands of the Government Agent. This Court has concluded that the 2nd Respondent has failed to follow the procedure set out in law, when he arrived at his decision to cancel the permit of the Petitioner. Even at the hands of the appellate authority the Petitioner has not been afforded an opportunity to explain the injustice that was caused to him. Thus the second contention of the Petitioner is also entitled to succeed.

In these circumstances and for the foregoing reasons, we issue

- 1) a writ of Certiorari to quash the decision by the 2nd Respondent (marked **P 9**) cancelling this permit and
- 2) the decision dated 2013-03-05 marked **P 11** which is the decision of the 3rd Respondent pertaining to the consideration of the appeal (against **P 9**) lodged by the Petitioner.

No cost is ordered.

Application is allowed.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda PC J

I agree,

PRESIDENT OF THE COURT OF APPEAL