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 Writs of Certiorari and Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka of 1978.

CA Writ Application No.208/2013

Abeyasinghe Arachchige Asoka,

Diyapattugama,

Polgampola.

Petitioner

-Vs-

1. **R.P.R. Rajapaksha,**

   Commissioner General of Land,

   Land Commissioner's Department,

   No.1200/06,

   Rajamalwatte,

   Battaramulla.

2. **Ms. Githani Kannangara,**

   Assistant Divisional Secretary,

   Divisional Secretariat office,

   Agalawatte.

3. **Kamal Pushpakumara,**

   Divisional Secretary,

   Divisional Secretariat office,

   Agalawatte.

4. **Abeyasinghe Arachchige Piyadasa,**

   Diyapattugama,

   Polgampola.

5. **Hon. Attorney General,**

   Attorney General's Department,

   Colombo 12.

Respondents

BEFORE	:	**Vijith K. Malalgoda, PC J. (P/CA)** and **A.H.M.D. Nawaz, J.**
COUNSEL	:	Palitha Alagiyawanne with Nadeesha Agalawatte for Petitioner. Vikum de Abrew, DSG for 1st, 2nd, 3rd and 5th Respondents.
Argued on	:	26.01.2015
Written Submissions on :		26.05.2015 (For Petitioner) 04.06.2015 (For Respondents)
Decided on	:	02.09.2016

A.H.M.D. NAWAZ. J,

The Petitioner in this application for judicial review has sought the following remedies:-

(a) a mandate in the nature of a writ of certiorari to quash the decision of the 2nd and/or the 3rd Respondent as contained in the letter dated 4th March 2013 marked as **"P6"** which confers a joint ownership of a land called *"Iylakanda Mukalana"* on both the Petitioner and 4th Respondent;

(b) a mandate in the nature of a writ of mandamus directing the 1st to 3rd Respondents to take steps, under Section 87 of the Land Development Ordinance, to endorse the name of the Petitioner on a grant marked **"P3"** which has already been issued, or to issue a fresh grant in favour of the Petitioner.

Factual Template

The subject matter of the dispute–the land known as *"Iylakanda Mukalana"* is situated in Kurupita Grama Niladari Division, Eastern Pasdunkorale, Agalawatte, Kalutara District. The land had been allotted to the father of the Petitioner under the Land Development Ordinance namely one Abeysinghe Arachchige Charles Singho who was duly informed of the alienation of the State Land by the Government Agent in October 1973 -please *see* **P1**. As is apparent on the face of **P1**, the Petitioner has been named as the successor of her father to the said land in the event of his death. Even the land ledger which has been appended to the statement of objections as "**R1**" confirms that the Petitioner has been nominated as the successor of her father to the said land.

By a document marked "**P3**" which bears the date of 2nd June 1999, the land referred to above was alienated by the Government of Sri Lanka on a grant to the

Petitioner's father Abeysinghe Arachchige Charles Singho who subsequently passed away on 8th September 2002. With the demise of Abeysinghe Arachchige Charles Singho on 8th September 2002, it is the contention of the Petitioner that as the duly nominated successor, she became entitled to succeed to the rights of her father by virtue of the provisions of the Land Development Ordinance.

A rival claim to the land by the 4th Respondent

The Petitioner contends that whilst she has expended substantially along with her late father in developing the land over a period of 20 years and she claims the land as the successor of her father, there has emerged a rival claim of the 4th Respondent who has staked a claim to the land allegedly in concert with some officers of the Divisional Secretariat of Agalawatte.

Joint Ownership of the land conferred by P6

In fact by the impugned document **P6** dated 4th March 2013, both the Petitioner and 4th Respondent have been made joint/co-owners of the land which had been held on a grant by the said Abeysinghe Arachchige Charles Singho. It is apparent upon a scrutiny of **P6** that the 3rd Respondent to this application namely Divisional Secretary, Divisional Secretariat, Agalawatte has invoked Section 72 of the Land Development Ordinance to effect this co-ownership. It bears recalling that it is this document (**P6**) which is sought to be quashed by certiorari. At this stage it is pertinent to draw attention to the versions given by both the Petitioner and the 1st, 2nd, 3rd and 5th Respondents (hereinafter referred to as "the Respondents") to understand the genesis of **P6**.

Narrative of the Petitioner as to P6

The Petitioner alleges that she was told by an officer at the Divisional Secretariat of Agalawatte that the 4th Respondent was not staking any claim to the property in

question and a request was made of her to sign some papers for the purpose of being vested with a grant in her name. Having complied with the request, she was surprised to receive **P6** which bestowed the impugned joint ownership on her and the 4th Respondent who claimed to be a son of the deceased Abeysinghe Arachchige Charles Singho. The joint ownership has subsequently been registered in the land registry as borne out by the Register of Permit/Grant Registration which bears a marking **"P7"**. By **"P10",** the Petitioner states that she made a complaint to the Divisional Secretary of Kalutara. The Petitioner has also appended a complaint made to the Police against the 4th Respondent and Officers of the Divisional Secretariat of Agalawatte.

It is relevant to note the objections of the Petitioner to a document marked **"R3"** filed by the Respondents along with their statement of objections. The objections seriously impugn the contents of the said document **"R3"** in that the Petitioner alleges that the document has been filled in by somebody else after she had placed her signature thereon in the mistaken belief that it was going to be used for the purpose of securing a grant for her. She affirms in her affidavit that the document marked **"R3"** had not been filled in at the time she signed it. In other words the pith and substance of the allegation of the Petitioner is that there had been a making of a false document **"R3"** in order to secure a joint ownership in favor of the 4th Respondent who has no right whatsoever to the land in question. It is **"R3"** that has finally resulted in the document that created the joint ownership **"P6".**

Position taken by the 1st, 2nd, 3rd and 5th Respondents (the Respondents)

According to the Respondents, **"R3"** was a document wherein the Petitioner expressed willingness to co-own the property along with the 4th Respondent who had claimed the land as a son of the grant holder Abeysinghe Arachchige Charles Singho. It is the rival contention of the Respondents that it was consequent to this

consensual document **"R3"** given by the Petitioner that the 3rd Respondent informed the Land Registrar of Matugama by **"P6"** on 4th March 2013 that a joint-ownership had been created between the Petitioner and the 4th Respondent. It was as a result of **"P6"** that the land was duly registered in the relevant Register of Permits/Grants.

Thus the Respondents contend that they acted in conformity with the provisions of the Land Development Ordinance.

Disputed questions of facts – Applicability of Thajudeen v. Sri Lanka Tea Board

Undeniably these rival positions throw up disputed questions of fact. Whether the Petitioner was misled into signing an inchoate document which finally, by a stratagem of officers at the Divisional Secretariat as she alleges, converted itself into a document creating a joint-ownership or whether **"R3"** was given willingly and with a view to creating a joint-ownership are matters that would ordinarily require adjudication in a civil Court. It is incompetent for the Court of Appeal in its jurisdiction to issue writs, to investigate disputed questions of fact as its jurisdiction under Article 140 of the Constitution is to examine the question whether a statutory authority has acted within the four corners of its enabling legislation. It bears recalling that the Court of Appeal has refused the grant of prerogative remedies on several occasions in the exercise of its discretion as, in those precedents, facts, on the existence of which the power in question was derived, required oral evidence (tested by cross-examination) to be adduced. In such cases the more appropriate remedy would be a civil suit rather than an application for judicial review because the procedure in a civil suit permits oral evidence to be led whereas in an application for judicial review it is not usually allowed -*see* the oft-

quoted decision of ***Thajudeen v. Sri Lanka Tea Board***[1] and ***Namunukula Plantations Ltd. v. D.M. Jayaratne and Others.***[2]

Ranasinghe J, (as he then was) cited in ***Thajudeen,*** [3]CHOUDRI on the ***Law of Writs and Fundamental Rights***[4]

> "*Where facts are in dispute and in order to get at the truth it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining their witnesses and the Court would be better able to judge which version is correct, a writ will not issue.*"

See also for this proposition, ***Public Interest Law Foundation v. Central Environmental Authority***[5] which followed the English decisions of ***Chief Constable of North Wales Police v. Evans***[6] and ***Dowty Boulton Paul Ltd v. Wolverhampton Corporation.***[7]

In fact it has been contended on behalf of the Respondents that this application must be dismissed *in limine*, as the relevant facts have been disputed by the parties. But this submission would not hold good for the following reasons. The effect that flows from ***Thajudeen*** and the slew of cases cited above is crystal clear. If precedent facts require oral evidence to be led because parties are in conflict, then ***Thajudeen*** requires the conflicting facts to be best left for determination in a court of competent jurisdiction. Here in the instant case before us the Petitioner and the Respondents are in contention over the nature of the document **"R3".**

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[1] (1981) 2 Sri.LR 471.
[2] CA 836/2008 decided on 8.11.2013.
[3] *Supra*
[4] 2nd Edition at p 449
[5] (2001) 3 Sri.LR 330, 334-5
[6] (1982) 1 WLR 1155, 1173
[7] (1976) Ch 13.

Whilst the Petitioner states that this document was given for obtaining a grant in her name, the Respondents aver that it is her consent to co-own the property along with the 4th Respondent. Then the all important question comes into focus. Provided that Section 72 of the Land Development Ordinance applies to this case, is consent by the Petitioner a factual precondition to the exercise of discretion in Section 72 of the Land Development Ordinance that has been invoked to confer joint/co-ownership on the Petitioner and the 4th Respondent? If consent on the part of the Petitioner is not relevant in terms of Section 72, any conflict on consent between the Petitioner and the Respondents is totally irrelevant in considering the question whether the Respondent acted *intra vires* Section 72 of the Land Development Ordinance.

I hold the view that such a precondition of consent does not find itself in the provisions of the Land Development Ordinance and therefore the consent of the Petitioner would not be a relevant consideration in the exercise of the statutory discretion given in Section 72 of the Land Development Ordinance.

At this stage it is relevant to look at the statutory provisions that underpin devolution of title over state lands. That exercise will throw light on the question whether the statutory functionary has posed the right question in the case, or the statutory executive posed the wrong question, as Lord Reid so illustratively described the grounds occasioning nullity in the following terms,

> *".....Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. "*[8]

So "Can the Respondents create co-ownership over state lands on their own? If so, is consent of the Petitioner a factual precondition to the exercise of statutory

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[8] *See Anisminic Ltd v The Foreign Compensation Commission and Another* (1969) 2 A.C 147 at 171; (1969) 2 W.L.R 163 at 171: (1969) 1 All.E.R .208 at 214 (House of Lords).

power?" are questions that loom large in this application for judicial review. The question before this Court is whether these questions are the right questions to ask having regard to the statutory language. In order to appraise the decision made by the decision makers in the case, it is apposite to look at the scheme of the Ordinance in relation to alienation of State Land. That will indicate whether co-ownership can be created or not.

Section 72 of the Land Development Ordinance

The document that created the co-ownership -**"P6"** invokes Section 72 of the Land Development Ordinance. It is this document that has been challenged by the Petitioner. Section 72 of the Land Development Ordinance reads as follows:-

> *"If no successor has been nominated, or if the nominated successor fails to succeed, or if the nomination of a successor contravenes the provisions of this Ordinance, the title to the land alienated on a permit to a permit-holder who at the time of his or her death was paying an annual installment by virtue of the provisions of section 19 or to the holding of an owner shall, upon the death of such permit-holder or owner without leaving behind his or her spouse, or, where such permit-holder or owner died leaving behind his or her spouse, upon the failure of such spouse to succeed to that land or holding, or upon the death of such spouse, devolve as prescribed in rule 1 of the Third Schedule."*

Section 72 of the Land Development Ordinance regulates the devolution of title only when ***no successor has been nominated, or the nominated successor fails to succeed, or the nomination of a successor contravenes the provisions of the Ordinance***. There is no gainsaying the fact that the deceased father had nominated

the Petitioner-his daughter. Can then the 4th Respondent who claims to be a son of the deceased gain co-ownership in the land?

Section 48 of the Land Development Ordinance defines the word "successor" to mean;

> *"In this Chapter "successor", when used with reference to any land alienated on a permit or a holding, means a person who is entitled under this Chapter to succeed to that land or holding upon the death of the permit-holder or owner thereof, if that permit-holder or owner dies without leaving behind his or her spouse, or, if that permit-holder or owner died leaving behind his or her spouse, upon the failure of that spouse to succeed to that land or holding or upon the death of that spouse."*

It is evident upon the pleadings that as at the time when co-ownership was created by the Respondents on 4th March 2013 **(P6),** there was no surviving spouse of the deceased owner namely the grantee Abeysinghe Arachchige Charles Singho. Section 48 of the Ordinance makes it clear that the authorities vested with the regulation of succession to a state land have to pay attention to the question of who is entitled to succeed upon the death of the permit-holder or owner of the holding and if Section 72 has been relied upon in **P6** to create co-ownership, that administrative decision must be an act authorized by Section 72 of the Ordinance. If a power is claimed under Section 72 of the Land Development Ordinance to create co-ownership, the question before this Court is the legality of the act in accordance with the Ordinance and the resolution of that legality does not certainly require oral evidence to be led in a civil Court. The provisions cited above do not require consent of the petitioner to be proved as a factual precondition to the exercise of power and so any conflict on consent, as I stated before, is not determinative of the issues that are before this Court.

In administrative justice the statutory authority relies on the provisions of the Act for what it did in the exercise or purported exercise of its powers and this is not a situation where we have to refuse the relief *in limine* on the ground adumbrated in ***Thajudeen's*** case as that case does not apply to this case.

As the *vires* of the decision of the Respondents has been engaged, the question that arises is whether any of the Respondents is empowered by the enabling legislation to alienate state land on letters given by a party expressing willingness to share a property in co-ownership with another. Can alienation of state land be effected on such a letter? The answer would be in the negative for the reasons set out below.

Effect of a post-permit nomination after a grant is given

The Petitioner in this case claims to be a successor. Her nomination took place when her father was a permit-holder. After the father became the owner of the land by virtue of the grant given to him on 2nd June 1999, it is axiomatic that the nomination continued in effect *proprio vigore*.

In considering the effect of an original nomination, when a grant has supervened subsequently, His Lordship S.N. Silva C.J. stressed the importance of giving effect to the wish of the original allottee in ***Mallehe Widanaralalage Don Dayaratne v. Mallehe Widanaralalage Don Agosinno and four others*** [SC Appeal No.30/2004] decided on 23rd March 2005.

> *".....The fact that his interest is converted from that of a permit to a grant cannot make a variation in the wish that has been already indicated by him to the relevant authority. There is no provision in the Land Development Ordinance which has the effect of annulling the nomination that has been made by a holder of any lot. On an examination of the scheme of the*

sections, in particular, section 19(4) referred to in P7 itself, it is clear that the permit holder's right fructifies to a grant upon the satisfaction of certain conditions. The conversion of the character of the holdings cannot have the effect of annulling the nomination that has been validly made.

In these circumstances, we are of the view that the 1st respondent has made the order P7 on proper application of the relevant provisions and importantly, by giving effect to the wish of the deceased allottee....."

So there is no ambiguity in the law that a nomination made after a permit is given continues to be valid even after the permit holder has become the owner of the holding *post* a grant. Here is a Petitioner who sought an entitlement to the land after her father crossed the great divide. Section 51 of the Land Development Ordinance makes it clear that no person shall be nominated by the owner of a holding as his successor unless that person is the spouse of such owner or permit-holder, or belongs to one of the groups of relatives enumerated in rule 1 of the Third Schedule. The Petitioner who falls within the Third Schedule is not disabled from being nominated. Her rights as a nominee of her father have continued ever after the father became the owner of the land upon a grant.

But the Respondents proceeded to make her a co-owner of the land along with the 4th Respondent. Is this an act authorized by Section 72 of the Land Development Ordinance? On analysis we would answer the question in the negative. Section 72 of the Land Development Ordinance does not empower the Respondents to create co-ownership. The operation of Section 72 is contingent upon the absence of a nomination or failure of a nominated person to succeed or non-compliance of the nomination with the provisions of the Ordinance. Recourse to rule 1 in the Third Schedule to the Land Development Ordinance could be had only if one of the three conditions cited above exists. There was no warrant for the Respondents to bring in

a son to succeed when there is a nominated person who exists as large as life. In the circumstances the proper questions that must be posed by the Respondents would be, among other things -Is there a successor nominated? Is that nomination still valid? These are relevant considerations that have to be taken into account in giving effect to Section 72 of the Land Development Ordinance. Section 72 does not lead the statutory functionary to the task of creating co-ownership over state lands, even if the nominated person purports to assent by a letter, albeit unauthorized.

The rule of law on which our Constitution is founded, *inter alia*, would have been violated if, as a matter of law, the Respondents did not have the lawful authority to do what they did. While there may be room for debate about the outer boundaries of the rule of law, there is no doubt that both public bodies and private persons and bodies are subject to the rule of law and that, as far as those who exercise public powers are concerned, the rule of law 'requires that they act within the powers that have been conferred upon them' and that all of their decisions and acts must be authorized by law. Comparative jurisprudence makes for interesting forays into overseas jurisdictions. Within the context of administrative decision-making, this first principle of the rule of law is encapsulated in Section 6(2)(a)(i) of the Promotion of Administrative Justice Act 3 of 2000 **(PAJA-South Africa)** which provides that administrative action may be reviewed and set aside if the administrator who took the impugned action 'was not authorized to do so by the empowering provision'.

Our own Supreme Court has synonymously echoed:

> *"Sovereignty continues to be reposed in the People and organs of government are only custodians for the time being, that exercise the power of the People."*[9]

[9] Re Nineteenth Amendment to the Constitution – (2002)3 Sri LR 85-SC – at p.98.

This case further holds:

> *"The power, has to be seen and exercised in trust for the people – The basic premise of Public Law is that power is held in trust."*[10]

It is our view that Section 72 does not permit the creation of co-ownership and when confronted with the *vires* of the act, it was urged on behalf of the Respondents that what is not prohibited in the Act is permissible in law. This argument goes against the grain of the cardinal tenet of administrative law that legitimate State authority exists only within the confines of the law, as it is embodied in the Constitution that created it, and the purported exercise of such authority other than in accordance with the law is a nullity. Administrative justice has to be meted out in accordance with the law and a valid exercise of state authority otherwise than according to law is simply invalid. In other words what is permitted in administrative law must be authorized by law.

Ultra vires is the central principle of administrative law.

I see no reason to depart from the orthodox view that *ultra vires* is 'the central principle of administrative law' as Wade and Forsyth, Administrative Law, 11th ed., p.27 describes it. Lord Browne-Wilkson observed in ***R v. Hull University Visitor, Ex parte Page***.[11]

> *"The fundamental principle [for judicial review] is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all cases...this intervention...is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a*

[10] *Ibid* – p.99.
[11] [1993] A.C. 682, 701

Wednesbury sense...reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is Wednesbury unreasonable, he is acting ultra vires his powers and therefore unlawfully..."

What is not forbidden is permitted in law – Not applicable in administrative law

The above passages would suffice to dispose of the contention urged on behalf of the Respondents that what is not forbidden is permitted in law. This principle that what is not forbidden is permissible in law may hold good in procedural law.[12] But it may not hold water in administrative law which requires public authorities to keep within the bounds of statutory powers. A statutory authority endowed with statutory powers has no common law power at all; it can legally do only what the statute permits and what is not permitted is forbidden.

In ***R v. Somerset County Council, ex parte Fewings and others,***[13] Laws J made the point that while private persons are free to do anything that the law does not forbid, the opposite is true of public bodies: any action taken by a public body 'must be justified by positive law'. In my view, the same principle applies to creation of co-ownership in **P6** because there is no statutory authorization for Respondents to make the Petitioner a co-owner along with the 4th Respondent. No doubt there is an exception to the rule in administrative law that what is not permitted is forbidden. Wade and Forsyth articulate the exception in the following terms[14]:

"A statutory power will be construed as impliedly authorizing everything which can fairly be regarded as incidental or consequential to the power

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[12] *See* Gamini Amaratunga J in *David Kannangara v. Central Finance Ltd* (2004) 2 Sri LR 311
[13] [1995] 1 All ER 513 (QB)
[14] *See* Administrative Law, 11th ed., p.177

itself; and this doctrine is not applied narrowly.[15] *For example, a local authority may do its own printing and bookbinding even though it is not specifically empowered to do so.*[16] *Buses may be run a short distance beyond the end of the authorized route if there is no other practicable way of turning them round.*[17] *Housing authorities may charge differential rents according to their tenants' means,*[18] *may subsidise their tenants,*[19] *and may insure their effects.*[20]"

What the Respondents have in effect done in this case namely the creation of a co-ownership offends Section 72 of the Land Development Ordinance and as such it is as plain as a pikestaff that the Respondents have acted *ultra vires*. In the circumstances we proceed to grant a writ of certiorari quashing the decision of the 2nd and/or 3rd Respondents in **P6.** In addition this Court also grants a writ of mandamus on the 1st to 3rd Respondents to take steps to endow the Petitioner with the interest in the land by endorsing the name of the Petitioner on the said grant or by taking steps to have a fresh grant issued in respect of the subject matter of this application.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda, P.C. J. (P/CA)

I agree **PRESIDENT OF THE COURT OF APPEAL**

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[15] *AG v. Great Eastern Railway* (1880) 5 App Cas 473; *AG v. Smethwick Cpn* [1932] 1 Ch 563. Contrast the more restrictive approach taken in *Ward v. Metropolitan Police Commissioner* [2005] UKHL 32, [2005] 2 WLR 1114. 'It is not sufficient that such a power be sensible or desirable. The implication has to be necessary in order to make the statutory power effective to achieve its power'.

[16] *AG v. Smethwick Cpn* (above)

[17] *AG v. Leeds Cpn* [1929] 2 Ch 291.

[18] *Smith v. Cardiff Cpn (No 2)* [1955] Ch 159.

[19] *Evans v. Collins* [1965] 1 QB 580; and *see Luby v. Newcastle-under-Lyme Cpn* [1965] 1 QB 214.

[20] *AG v. Crayford Urban District Council* [1962] Ch 575.