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

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition under Article 140 of the Constitution.

Court of Appeal No : 304/2015(Writ)

M.C. Nikawaratiya case No : 25188/Misc

Galle Naotunne Wijerathne,
Hiriwewa, Kobeigane.

PETITIONER

Vs

1. B.A.S.S Perera,
   Director, District Irrigation,
   Department of Irrigation,
   Kurunegala.

2. Learned Magistrate,
   Magistrate Court of Nikavaratiya.

3. Honourable Attorney General
   Attorney General's Department,
   Colombo 12.

RESPONDENTS

Before : L.T.B. Dehideniya J. (P/CA)

Counsel : Chula Bandara with M. Jinendra for the Petitioner.

: Manohara Jayasinghe SC for the Respondent.

Argued on : 20.07.2017

Written submissions filed on : 15.09.2017

Decided on : 17.10.2017

L.T.B. Dehideniya J. (P/CA)

This is an application filed by the Petitioner seeking for a mandate in the nature of writ of Certiorari to quash the 1st Respondent's decision contained in P7(a) which directed the petitioner to vacate his house and Land, and also to issue a mandate in the nature of writ of prohibition prohibiting the 1st and the 2n respondent from proceeding with action No.25188/misc instituted before the Magistrate Court of Nikaveratiya and issue a stay order until a final determination of this application restraining 1st and 2n respondent from proceeding with the said Magistrate Court action until the determination of this application.

The Petitioner states that he is a motor Vehicle painter by profession originally resided at Kiribath Kumbura, Kandy and in 1985 he and his family moved to Kobeigane to stay with a friend of his. In the latter part of 1985 he moved to a land in Hiriwewa, Kobeigane, approximately one and half acres (in extent) where he currently resides. At the time he entered the premises it was an abandoned land, covered with trees and shrubs. Having cleared the land the petitioner built a small house there on and now it is a single storied building with 3 bed rooms and a kitchen.

Since 1985, he occupied the land as of his own. After some time the Petitioner became aware that the block of land he is residing belongs to the State and it is depicted as Lot 27G in the plan no. F.V.P. 1621 prepared by the Survey General marked P 2 and the tenement list marked as P2 (a).

He has obtained electricity supply to the said house in 1992 in his name at his cost

On 01.08.2014 petitioner received a letter bearing reference No. වාරි/නික/ආ/පොදු/29 from the Divisional Engineer (Irrigation), Mr. Y.A.C.R.K Yapa Arachchi directing the Petitioner to vacate the said house and the

premises before 15th of October 2014. Marked P5

The Petitioner thereafter had received another letter (P6) dated 17.11.2014 bearing reference No. DIKUR/E/GQ/සිය from the administrative officer, on behalf of the Director Irrigation, Kurunegala Division along with a quit notice marked P6(a) issued by the by the Director Irrigation, Kurunegala Division made in terms of section 3 of Government Quarters (Recovery of Possession) Act No 7 of 1969 amended by the act 40 of 1974 and in terms of Section 6:15 of the Chapter XIX of the Establishment Code, directing the petitioner to vacate the said premises within two months starting from 1st December 2014.

Thereafter the Petitioner had received another letter marked P7 dated 12.16. 2014 bearing reference No. DIKUR/E/GQ/සිය from the administrative officer, Kurunegala Division along with a quit notice marked P7(a) issued by the by the Director Irrigation, Kurunegala Division in terms of section 3 of Government Quarters (Recovery of Possession) Act (as amended) and in terms of Section 6:15 of the Chapter XIX of the Establishment Code, directing the petitioner to vacate the said premises within two months starting from 01.01.2015.

The petitioner, through his Attorney-at-Law, by a letter dated 20.03.2015 informed the 1st Respondent that the house situated in Hiriwewa, Kobeigane is depicted as lot 27G in plan marked P2. According to P2 (a) schedule, the said Land is only a Chena land and it does not show any Government Quarters standing on this block of land belonging to the Department of Irrigation as stated in P7 and P7(a) and that the house therein was built by him at his cost.

The Petitioner marked an unsigned and unauthenticated document as P9 as the inventory maintained by the Divisional office of Government Quarters (Irrigation) where it does not contain the said quarters bearing no IDB-36.

The Petitioner's case briefly is that the land where he is residing is a State land but it does not belong to the Irrigation Department and the 1st Respondent has failed to establish that the land or the house where the Petitioner is residing belongs to them. His case is that the house was built by him with his money. Therefore the 1st Respondent cannot issue a quit notice under the Government Quarters (Recovery of Possession) Act. Further he states that he was not in the Government Service at any time and therefore the Establishment Code has no application to him.

Thereafter the 1st and 3rd respondents filed the statement of objections dated 04th March 2016 by which they stated that;

The subject premises in where the petitioner is allegedly residing is a state land and a premises, which belonged to the Irrigation Department, and that the Petitioner and his family, after the Petitioner's retirement from the service of the Irrigation Department, had been in unlawful and unauthorized occupation of the said government premises.

The subject land in where the petitioner and his family are occupying has always been a state land and that the Petitioner, in law, cannot claim prescriptive title to land which belongs to the State.

The Final Village Plan bearing No. 1621 marked as P2 and the relevant tenement list marked as P2 (a). The land in question is the lot no. 27G in the said plan. According to the information received from the Survey Department by its letter dated 07-07-2015 and the Divisional Secretary of Kobeigane by its letter dated 14-07-2015, it is a state land or land settled in favour of the state.

The first quit notice marked as P6(a) inadvertently did not contain a date thereof, a fresh quit notice, P7(a) inserting the date was issued to the petitioner by the 1st respondent who was the designated competent authority on behalf of the irrigation department to take steps under the Government Quarters (Recovery of Possession) Act and it was based on the quit notice

marked as P7(a) that an application for ejectment was instituted in the Magistrate Court of Nikaweratiya which is still pending for determination.

Further the Respondents deny the authenticity of the inventory marked P9 and stated that it is a document manufactured by the Petitioner.

The Respondents had further stated that the premises under reference IDB - 36, at all time material to this action, is a state premises belonging to the Irrigation Department. The petitioner was at one point of time was in the service with the Irrigation Department and these premises were given for his occupation as Government Quarters during that period. The Petitioner however, even subsequent to his as cessation of employment with the Irrigation Department, continued unlawfully to occupy the said premises.

The Petitioner in his counter objections stated that the petitioner was never attached to the Department of Irrigation as an employee and therefore the provisions of the Establishment Code as stated in the quit notice did not apply to the petitioner and therefore the quit notices P7 and P7(a) are bad in law. The quit notice marked as P6, P6(a), P7 and P7(a) refers to a premises No. IDE 36. However in terms of R4 there is no premises referred to as IDB 36 instead there is IDB 36/1 and 36/2 and thus the said notice is bad in law. The premise is a state land but not belonging to the Department of Irrigation and hence the 1st Respondent had no authority to take action in terms of Section 3 of Government Quarters (Recovery of Possession) Act

The Petitioner does not challenge that the 1st Respondent is a Competent Authority. Further he admits that the land in question is a State land but does not admit that the land or the house standing thereon belongs to the Irrigation Department and further denies that he was ever served in the Irrigation Department.

Under the Government Quarters (Recovery of Possession) Act a quit notice can be issued only in relation to a Government Quarters. The section 3(1) of the said Act reads as follows;

A competent authority may, at any time, serve or cause to be served on the occupier of any Government quarters a notice stating the reasons for the issue of such notice and requiring such occupier

(a) to vacate such quarters together with his dependants, if any; and

(b)to deliver vacant possession of such quarters to such authority, or any other such competent authority or authorized person as may be specified in the notice, before the expiry of such period as shall be specified in the notice, being a period commencing on such date as shall be so specified. The specified period shall not in any instance be less than two months from the date of its commencement.

As per the Section 9 of the Act,

Government Quarters *"means any building or room or other accommodation occupied for the use of residence which is provided by or on behalf of the Government or any public corporation to any person and includes any land or premises in which such building or room or other accommodation is situated, but does not include any house provided by the Commissioner for National Housing to which Part V of the National Housing Act applies;"*

In terms of Section 3(1) the Competent Authority while serving the Quit Notice is obliged to state the reason for the issue of such notice on the occupier of any Government Quarters. The reason given in P7 (a) for the issue of such notice has been stated as *"the officer who allocates houses in terms of paragraph 6:15 of Chapter XIX of the Establishment Code decide."*

It was a common ground that the block of land in issue belongs to the State. The Respondents in their objections admitted F.V.P. 1621 and the tenement list. As per the documentation of the Respondents, they do not deny that the land where the Petitioner is residing is lot 27G. The lot G27 is

described as a Chena land in the tenement list.

The Irrigation Department or the Director Irrigation for that matter, is not empowered to issue a quit notice under the Government Quarters (Recovery of Possession) Act on any State land, it is the Secretary to the Ministry of Public Administration has that authority but he can delegate that power to any other public officer under section 9 of the Act. Section 9 describes the Competent Authority as,

> *(a) in relation to Government quarters the Secretary to the Ministry of the Minister in charge of the subject of Public Administration* ***or any public officer authorized by such Secretary to be a competent authority*** *for the purposes of this Act;(emphasis added)*
>
> *(b) in relation to quarters belonging to a public corporation*
>
> > *(i) the Chairman of such public corporation or any officer authorized by such Chairman to be a competent authority for the purposes of this Act or*
> >
> > *(ii) where such public corporation has no Chairman the Secretary to the Ministry of the Minister in charge of such public corporation or any officer authorized by such Secretary to be a competent authority for the purposes of this Act;*

The 1st Respondent was authorized to act as the Competent Authority by the Secretary to the Ministry in charge of Public Administration and Home Affairs by letter marked R3 *"to recover the possession of the Government buildings* ***belonging to the Irrigation Department*** *situated in Kurunegala District."(Emphasis added)* This authorization is subject to two conditions.

1. The building should belong to the Irrigation Department.
2. It should situate within the Kurunegala District.

The second limb i.e. that the land is situated within Kurunegala District is fulfilled because Kobeigane comes within Kurunegala District,

but the first limb whether the land belongs to the Irrigation Department is a matter that has to be considered. Unless it is established that this building belongs to the Irrigation Department, the 1st Respondent has no authority under the powers delegated to him by the Secretary under section 9 to issue quit notice. Then the issuance quit notice marked P7(a) becomes ultra vires.

Sunil Coorey in his book on Pricilpes of Administrative law 3rd Edition Vol 1 at page 549 says that;

> *Therefore, when the enabling statute enumerates several facts in describing the subject-matter or state of facts in which the power conferred is to be exercised, two types of fact so enumerated must be distinguished: firstly, those facts which go to determine the subject-matter/state of facts", so that the absence of any of these facts will result in the exercise of power being invalid, and secondly, those facts which do not go to determine the "subject-matter/state of facts" in respect of which such power is conferred. The distinction perhaps corresponds to the distinction between jurisdictional facts on the one hand and merits on the other, drawn between facts on which the enabling statute requires findings to be made in the process of exercising power.*
>
> *Sometimes the statute itself indicates whether a particular factual aspect of the subject-matter over which or the state of facts in respect of of which power is to be exercised, is jurisdictional or not. Violation of the rules relating to its territorial jurisdiction by a criminal court, appears to be of no consequence, for it is provided that," Any sentence or order of any criminal court in the trial of an offence shall not be liable to be set aside merely on the ground that the inquiry into the commission of the offence to which the sentence or order relates was made by a Magistrate's Court not empowered*

under this Chapter so to do.

At page 551 he says that;

Wrong Person Exercising Power

"If an authority is not competent to pass an order which can be only posses by a superior authority, then the order passed by him will amount to a nullity and is void.(Gnanaprakasam v. Sabaratnam (1943) 44NLR 159) "An order or decision by an official who had no legal authority to make that order /decision in law a nullty and is and is non-existent in the eye of of the law; such an order/decision is inoperative and void and it is open to a Court to declare that it is a nullity."190(Abeywickremav. Pathirana (1986) 1 SLR 120,156)

The Respondents admit P2. It describes the land as a Chena land settled in favour of the State by Gazette dated 29th August 1919, it does not say that it belongs to the Irrigation Department. Once it is admitted, the burden shifts to the Respondents to establish that the land/building belongs to them.

In the book of Administrative Law Ninth Edition by Wade and Forsyth at page 292 it says about the burden of proof as follows.

The burden of proof

Where the validity of an administrative act or order is attacked, the incidence of the burden of proof may vary with the circumstances. The burden of proof naturally lies in the first instance upon the plaintiff or complainant. Whether he can transfer it to the defendant public authority depends upon the nature of the fact.

If the act is one which in the absence of statutory power would be a trespass or other wrongful injury, the plaintiff has only to prove the facts which would constitute the wrong and the burden of proof then passes to the public authority, which has to show justification.

Thus a government official seizing a man's goods bears the onus of proof that he had power to do so. A highway authority which removes a supposed obstruction can be put to proof of its power, and if it cannot show this it will be liable in damages for trespass. A local authority empowered to eject a tenant for housing purposes must give some evidence that it is acting for those purposes. An immigrant detained on the ground that he landed unlawfully within the previous twenty-four hours is entitled to release by habeas corpus if there is no proof either way of the time at which he landed. Lord Atkin once said:

> *In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive.*

This was in a case where a Nigerian chief had been deported to another area but the power to do so depended on a number of conditions. The Privy Council held that it was for the executive to show that these conditions existed and they remitted the case to the court in Nigeria.

Where, on the other hand, the administrative act is some decision or order which in itself inflicts no legal wrong, the complainant's task will be to raise prima facie case of irregularity, and the burden of proof lies upon him. This is equally so where there is an invasion of his liberty or property but he alleges not that the statutory conditions are not satisfied but that there is some ulterior defect, for example bad faith. It has often been laid down that the onus of proof rests upon the party alleging invalidity. In other words, there

is a presumption that the decision or order is properly and validly made, a presumption sometimes expressed in the maxim omnia praesumuntur rite esse acta. In a war-time case

Where it was unsuccessfully contended that the minister had no adequate grounds connected with national defence for making an order taking control of a colliery business, Lord Greene MR said,

It is a settled principle, in dealing with documents of this kind, that the rule of omnia rite esse acta is to be applied and, therefore, when it is stated by the Ministry in the proper way that it appears to the Minister of Fuel and Power that certain things are so, it is to be taken that that is an accurate statement unless and until the contrary is proved. '

Sunil Cooray in his book on Principles of Administrative Law 3rd Edition Vol.1 at page 569 says;

(2)Burden of Proof

The party who would lose a contest if a particular fact is not proved is said to carry the burden of proof of that fact. The level to which the official or tribunal before whom that contest takes place, should be convinced by evidence of the existence of a fact, is referred to as the standard of proof of that fact. Except in proving the elements of a criminal offence, the standard of proof is usually "on a balance of probability", namely, that official or tribunal is convinced that on the evidence adduced the existence of the fact is more probable than not.

The burden of proof of substantive error depends, to an extent, depends on what the type alleged substantive error is. In the context of the burden of substantive error, there are three different types of situations

"(l)Where a power cannot be exercised unless certain physical facts exist. In such a case if the validity of the exercise of power is disputed, then the executive must prove that the requisite facts actually existed.

(2) Where a power may be exercised by some authority if he is satisfied of the existence of certain facts. In such a case a Court can inquire into the circumstances, in order to ascertain whether it was reasonable for the authority to be satisfied of the existence of the facts.

(3)Where... the power can be exercised merely because of an opinion that it is necessary to exercise it. In such a case the mere production of the instrument whereby the power is exercised concludes the matter, unless good faith is negatived."

The Respondents have failed to tender any document to establish that the block of land was handed over to the Irrigation Department. They have tendered only an affidavit of a retired Grama Niladhari in this regard. Official handing over of a state land to a Department cannot be established by such a document.

The Respondent's stand taken in the objection is that the Petitioner was an employee of the Irrigation department and the building was given to him as his quarters but failed to hand it back after the retirement. The Petitioner denies that he was in the Government service at any time. The Respondents could have established very easily that the Petitioner was in their employment by tendering his service record. They have failed or neglected to tender those documents. Therefore the only conclusion that the Court can come in to is that the Petitioner was not in the Government service and this building was not allocated to him as quarters for his employment.

In these circumstances I hold that the 1st Respondent by issuing P7(a)

had acted illegally, without authority and contrary to the provisions of the Government Quarters (Recovery of Possession) Act. I issue a writ of certiorari to quash the quit notice marked P7(a) issued by the 1st Respondent. Further I hold that the subsequent steps taken under P7(a) is bad in law and I issue a writ of prohibition prohibiting the 1st Respondent from proceeding with the action No. 25188/miss instituted before the learned Magistrate of Nikaweratiya.

Application allowed. I order no costs.

President Court of Appeal