

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

In the matter of an appeal under Article 154P  
(6) read with Article 138 of the Constitution  
of the Democratic Socialist Republic of Sri  
Lanka

Hitihamilage Udeni Sumith Senarathna

**Case No: CA (PHC) 174/2009**

Kehelowitagama,Uda Kiriella.

**HCCA-Rathnapura Case No.WA/75/2008**

**Petitioner-Appellant**

**Vs.**

01. R.H.S.Dissanayake

Divisional Secretary,Alapatha.

02. H.Thushara Sudath Senavirathna

03. Shriyani Manel

Both of Dedenama,Kehelowitagama,

Uda Niriella.

**Respondents-Respondents**

**Before:** K.K. Wickremasinghe J.

Janak De Silva J.

**Counsel:**

Harith De Mel with Dilan Wijeratne for the Petitioner-Appellant

Udeshi Senasinghe S.C. for 1<sup>st</sup> Respondent-Respondent

Pradeep Gamage for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents-Respondents

**Written Submissions tendered on:**

Petitioner-Appellant on 12.07.2018

1<sup>st</sup> Respondent-Respondent on 02.10.2018

**Argued on:** 10.05.2018

**Decided on:** 19.10.2018

**Janak De Silva J.**

This is an appeal against the judgment of the learned High Court Judge of the Civil Appeal High Court of Ratnapura dated 28.10.2009.

The Petitioner-Appellant (Appellant) was issued a permit in terms of section 19(2) of the Land Development Ordinance (Ordinance) for state land 1 Acre in extent. However, the said land was not surveyed and handed over to the Appellant although his grandfather and predecessors possessed the said land from 1930. The Appellant requested that the land forming the subject matter of the permit issued to him be surveyed and demarcated. However, according to the Appellant steps were then taken to demarcate part of the said land to be given to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents-Respondents (2<sup>nd</sup> and 3<sup>rd</sup> Respondents) resulting in the land forming the subject matter of the permit issued to him decreasing to about ½ an Acre.

In the circumstances, the Appellant filed the above styled action in the Provincial High Court of the Sabaragamuwa Province holden in Ratnapura and sought the following relief:

- (a) A writ of certiorari quashing the decision ෧෧.5 of the 1<sup>st</sup> Respondent-Respondent (1<sup>st</sup> Respondent) to grant a portion of land to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents without first giving clear title to the land of an extent of 1 Acre possessed by the Appellant by virtue of permit ෧෧.1 numbered 51/625;
- (b) A writ of mandamus compelling the 1<sup>st</sup> Respondent to clear the land of 1 Acre already given to the Appellant by virtue of permit ෧෧.1 numbered 51/625.

The position of the 1<sup>st</sup> Respondent-Respondent (1<sup>st</sup> Respondent) is that initially it was the mother of the Appellant who was in unauthorized possession of the said state land and that once her children, the Appellant and his brother Asela Sugath Senaratne the 2<sup>nd</sup> Respondent-Respondent (2<sup>nd</sup> Respondent), became majors both of them were allowed to enter the land kachcheri. Afterwards, the Appellant was issued the permit ෧෧.1 while the brother was not given a permit as he was a public officer.

According to the 1<sup>st</sup> Respondent later the Appellant lost part of the said state land due to his failure to develop it. At a survey conducted on 31.05.1992 it was found that both the Appellant and his brother Asela Sugath Senaratne were in occupation of the said state land. Later the Provincial Land Commissioner by letter dated 21.08.2007 (ඒ.3) informed the 1<sup>st</sup> Respondent to take steps to issue a permit to the Appellant and a long-term lease of agricultural land to the 2<sup>nd</sup> Respondent based on their present possession of the said state land. This decision of the Provincial Land Commissioner was informed to the Appellant by the 1<sup>st</sup> Respondent by letter dated 15.10.2007 (ඒ.4).

The learned High Court Judge after due inquiry dismissed the application of the Appellant and hence this appeal.

### ***Writ of Certiorari***

The learned High Court Judge held that ෧෧.5 does not contain any decision but is only a letter sent by the 1<sup>st</sup> Respondent to the Appellant's lawyer in response to a letter. It does refer to the decision of the Provincial Land Commissioner by letter dated 21.08.2007 (ඒ.3) which according to the Appellant is only an advisory letter. I am unable to accept this proposition. ෧෧.5 is not a decision but only a letter sent to the Appellant's lawyer informing of the decision of the Provincial Land Commissioner. It is trite law that a writ of certiorari will only issue to quash a decision where the decision maker has determined questions affecting the rights of subjects. [*De Mel v. De Silva* (51 N.L.R. 105), *Dias v. Abeywardena* (68 N.L.R. 409), *Fernando v. Jayaratne* (78 N.L.R. 123), *G.P.A. Silva and others v. Sadique and others* (1978-79) 1 Sri.L.R. 166, *Dayaratne v. Senaratne, Minister of Lands and others* (2006) 1 Sri.L.R. 7]. ෧෧. 5 is not such a decision and as such the learned High Court Judge was correct in concluding that it cannot be quashed by a writ of certiorari.

The first rule regarding the necessary parties to an application for a writ of certiorari is that the person or authority whose decision or exercise of power is sought to be quashed should be made a respondent to the application and the failure to do so is fatal and provides in itself a ground for the dismissal of the application in limine [*Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thero and four others* (2011) 2 Sri.L.R. 258]. The learned High Court Judge correctly held that the Provincial Land Commissioner was a necessary party as he was the person who had taken the decision to divide the land between the Appellant and the 2<sup>nd</sup> Respondent and the application must be dismissed as necessary parties were not before court.

### ***Writ of Mandamus***

The learned High Court Judge held that the 1<sup>st</sup> Respondent does not owe a public duty imposed by law towards the Appellant to give him an undisturbed possession of a clearly demarcated one-acre land in terms of the permit 03.1. I will now examine the validity of this statement of law.

Section 19(3) of the Ordinance read with Transfer of Powers (Divisional Secretaries) Act No. 58 of 1992 states that the Divisional Secretary shall cause the land alienated on a permit to be surveyed by the Surveyor General, and the extent and description (by reference to metes and bounds) of the land so surveyed shall be inserted in such permit. While this clearly imposes a statutory duty on the 1<sup>st</sup> Respondent to set out the extent and description (by reference to metes and bounds) of the land surveyed in the permit, it is not clear whether that duty extends to give a permit holder undisturbed possession of a clearly demarcated area falling within the permit issued in terms of section 19(2) of the Ordinance when the permit is issued to the permit holder.

The preamble of a Statute may legitimately be consulted when interpreting any section of the Act whose meaning is not clear [*Pasangna v. The Registrar General and another* (67 N.L.R. 33)]. The preamble to the Ordinance states that it is to provide for the systematic development and alienation of state land. There certainly cannot be a systematic development of state land where permits are issued to permit holders without giving them undisturbed possession of a clearly demarcated area falling within the permit. In fact, there have been many disputes raised before courts due to such actions on the part of public officials. Therefore, I disagree with the learned High Court Judge and hold that that the Divisional Secretary is under a statutory duty in terms of

section 19(3) of the Ordinance read with the preamble to give a permit holder undisturbed possession of a clearly demarcated area falling within the permit issued in terms of section 19(2) of the Ordinance when the permit is issued to the permit holder.

Although the position of the 1<sup>st</sup> Respondent is that the Appellant lost part of the state land described in the permit ๑๒.1 due to his failure to develop it, no documentation has been produced to support this assertion. However, a writ of mandamus cannot be issued in this instant as Appellant has failed to seek a quashing of the decision taken by the Provincial Land Commissioner by letter dated 21.08.2007 (๒.3). In the circumstances, there is no question of issuing a writ of mandamus compelling the 1<sup>st</sup> Respondent to clear the land of 1 Acre already given to the Appellant by virtue of permit ๑๒.1 numbered 51/625.

There is also a further matter which stands in the way of any relief been granted to the Appellant. The reliefs claimed by the Appellant are for a writ of certiorari quashing the decision ๑๒.5 of the 1<sup>st</sup> Respondent-Respondent (1<sup>st</sup> Respondent) to grant a portion of land to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents without first giving clear title to the land of an extent of 1 Acre possessed by the Appellant by virtue of permit ๑๒.1 numbered 51/625 and a writ of mandamus compelling the 1<sup>st</sup> Respondent to clear the land of 1 Acre already given to the Appellant by virtue of permit ๑๒.1 numbered 51/625.

In *The Superintendent, Stafford Estate and two others v. Solaimuthu Rasu* [(2013) 1 Sri.L.R. 25] the Supreme Court held that the Provincial High Court did not have jurisdiction to hear cases where dispossession or encroachment or alienation of State Lands is/are in issue. That being the situation in the instant case, the High Court in any event did not have jurisdiction to entertain the application of the Appellant in any case. This is a patent lack of jurisdiction and the fact that it was not raised in the High Court does not vest it with jurisdiction. Court directed the parties to address this issue in the written submissions which has been done. I have considered the submissions made by the learned counsel for the Appellant on this issue. Nothing therein moves me to change my views expressed above.

For the forgoing reasons and subject to the statutory duty I have adverted to above, I see no reason to interfere with the judgment of the learned High Court Judge of the Civil Appeal High Court of Ratnapura dated 28.10.2009.

Before concluding, I am compelled to observe that there have been many instances where disputes pertaining to state land have occurred due to the failure on the part of the Divisional Secretary to give a permit holder undisturbed possession of a clearly demarcated area falling within the permit issued in terms of section 19(2) of the Ordinance when the permit is issued to the permit holder. Therefore, Court requests the Hon. Attorney General to inform the relevant authorities that the Divisional Secretary is under a statutory duty in terms of section 19(3) of the Ordinance read with the preamble to give a permit holder undisturbed possession of a clearly demarcated area falling within the permit issued in terms of section 19(2) of the Ordinance when the permit is issued to the permit holder. The Registrar is directed to send a certified copy of the judgment to the Hon. Attorney General.

Subject to above, the appeal is dismissed with costs.

Judge of the Court of Appeal

**K.K. Wickremasinghe J.**

I agree.

Judge of the Court of Appeal