

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

In the matter of an application under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka for mandates in the nature of Writs of Certiorari, Mandamus and Prohibition.

C.A (Writ) Application No. 281/2018

1. Nimal Wijethilaka,
No. 45, Kekirawa Road,
Galenbindunuwewa.
2. M.H.M. Mohideen,
Lanka Filling Station,
Galenbindunuwewa.

Petitioners

Vs.

1. Ceylon Petroleum Corporation,
No. 609, Danister de Silva
Mawatha, Colombo 9.
2. Dhammika Ranathunga,
Chairman.
3. N.R.R. Jayasekara,
Director.
4. Athula B. Herath,
Director,

5. K.A. Vimalenthiraja,
Director,
6. R.A. Nimal Jayasundara,
Director,
7. Sashi Danathunga
Director,
8. W.S. Perera,
Director,

All C/o Ceylon Petroleum Corporation,
No. 609, Danister de Silva
Mawatha, Colombo 09.

9. Chinthana K.K. Seneviratne,
No. 145D, Kekirawa Road,
Galenbindunuwewa.
10. W.M.M.B. Weerasekara,
Commissioner General of Agrarian
Development,
Department of Agrarian Development,
No. 42, Sir Marcus Fernando
Mawatha, Colombo 07.
11. Ananda Atapattu,
Land Officer,
Divisional Secretariat,
Galenbindunuwewa.
12. Margaret Kumburage,
Divisional Secretary,
Divisional Secretariat,
Galenbindunuwewa.

13. Central Environment Authority,
Parisara Piyasa,
No. 104, Denzil Kobbekaduwa
Mawatha, Battaramulla.
14. Chandraratne Pallegama,
Chairman,
Central Environment Authority,
Parisara Piyasa,
No. 104, Denzil Kobbekaduwa
Mawatha, Battaramulla.
15. Assistant Director,
Central Environmental Authority,
North Central Province Office,
338/40, Harischandra Mawatha,
Anuradhapura.
16. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before: P. Padman Surasena, J / President of the Court of Appeal
Arjuna Obeyesekere, J

Counsel: Manohara De Silva, P.C for the Petitioners

Vikum De Abrew, Senior Deputy Solicitor General with Ms. Chaya Sri Nammuni, Senior State Counsel for the 1st – 8th and 10th – 16th Respondents

J.C.Weliamuna, P.C with Keerthi Gunawardena and Pulasthi Hewamanne for the 9th Respondent

Supported on: 09th October 2018

Written Submissions of the Petitioners tendered on: 02nd November 2018

Written Submissions of the 1st – 8th and 10th – 16th Respondents tendered on: 13th November 2018

Written Submissions of the 9th Respondent tendered on: 31st October 2018

Decided on: 16th November 2018

Arjuna Obeyesekere, J

The Petitioners have filed this application, seeking *inter alia* the following relief:

- a) A Writ of Certiorari to quash the decision of the 13th – 15th Respondents to grant an environmental protection clearance to the 9th Respondent to operate a filling station in Galenbindunuwewa;
- b) A Writ of Certiorari to quash the decision of the 1st – 8th Respondents to grant approval to the 9th Respondent to operate a filling station in Galenbindunuwewa.

The facts of this matter very briefly are as follows.

The 1st Petitioner is a resident of Galenbindunuwewa. In addition to cultivating a paddy land which he claims is owned by his brother-in-law, the Petitioner is

engaged in business and is the proprietor of Nimalsiri Motor Enterprises. The 2nd Petitioner is operating a filling station owned by the 1st Respondent Ceylon Petroleum Corporation situated in the Galenbindunuwewa town, since 1994. The family of the 2nd Petitioner had been operating the said filling station prior to that for several years.

The Petitioners state that in May 2018, the 9th Respondent had commenced filling a land situated in Galenbindunuwewa¹ and had commenced construction on the said land. The Petitioners had made inquiries and found that part of the said land² had been sold by its owner Priyantha Fernando to the 9th Respondent³. The Petitioners state that in July 2018, underground tanks had been installed on the said land and the Petitioners had found out that the 1st Respondent had granted approval to the 9th Respondent to commence a filling station.

The Petitioners have two grievances with regard to the construction of the said filling station on the said land. The Petitioners' first grievance is the violation of a decision that the Petitioners claim the 1st Respondent had taken that new filling stations will not be approved within a distance of 1km from an existing station. This Court is of the view that any such decision would have been taken by the 1st Respondent for commercial reasons and that the 1st Respondent has the right to vary such commercial decisions from time to time depending on the circumstances prevailing at such time. The 2nd Petitioner has not stated in his petition that he adjusted his business affairs based on the said commercial

¹ The said land is depicted as Lot No. 453 in Plan No. FVP1420, produced with the petition marked 'P1A'. The Tenement List annexed to the petition marked 'P1B' describes the property as a 'garden containing coconut trees and a permanent house.'

² The total extent of Lot No. 453 is 2A 0R 1P. The extent of land sold to the 9th Respondent is 1R 22P and is depicted as Lot No. 2 on Plan No. 1427 produced by the 9th Respondent marked '9R1'.

³ By Deed of Transfer No. 560A dated 18th February 2018, produced with the petition marked 'P2B'.

decision of the 1st Respondent. This could not be the case in any event as the said decision is said to have been taken in 2012 whereas the 2nd Petitioner has been operating his filling station since 1994. This Court is of the view that the said decision is not justiciable through the jurisdiction conferred on this Court by Article 140 of the Constitution. For these reasons, this Court does not see any merit in the Petitioners first complaint.

The second grievance of the Petitioners is that the said land is surrounded by paddy lands, streams and water ways and the construction of the filling station would cause environmental damage to the surrounding paddy lands and water resources. The Respondents, whilst denying that there is environmental damage caused by the construction of a filling station, state that the Petitioners have not come to Court with clean hands and that this application has been filed by the Petitioners for a collateral purpose. This Court would consider this submission of the Respondents as a preliminary issue as it goes to the root of this application and would determine if this Court should consider the purported grievance of the Petitioners.

The 1st Petitioner claims he is affected by the construction of the filling station as the land he is cultivating is situated in front of the land on which the filling station is being constructed and the discharge of waste water and affluent by the filling station would pollute the water ways from which water is obtained for cultivation.

The 1st Petitioner however admits that he too had wanted to purchase part of this land in 2015 for the identical purpose of starting a filling station and that he had in fact paid an advance to the owner of the property. The 1st Petitioner

claims that the transaction did not go through as he was informed by the authorities that approval cannot be granted as the said land is situated close to a large paddy field. This Court observes that proof of such refusal has not been submitted with the petition. Therefore, the fact that the authorities did not grant approval for the 1st Petitioner to go ahead with the setting up of a filling station on this land as the land was situated close to a large paddy field is a fact that the Petitioners have failed to prove.

Be that as it may, the question that arises is how a land which was suitable for the 1st Petitioner to commence a filling station in 2015, has become unsuitable for the 9th Respondent to start a filling station in 2018? The same considerations of polluting the same water ways would have applied irrespective of who is constructing and operating the filling station.

It is admitted by all parties that the 2nd Petitioner is operating the only filling station presently available at Galenbidunuwewa and that the closest filling station is presently situated 18km away. The 2nd Petitioner, by a letter dated 21st February 2018 annexed to the petition marked 'P11' has complained to the 1st Respondent that his business would be severely affected if approval is granted for another filling station. Thus, it is clear to this Court that the filing of this application by the 2nd Petitioner is to unfairly protect his business interests and ensure that there is no competition as opposed to being concerned with damage being caused to the environment.

This conduct of the Petitioners gives credence to the claim of the Respondents that this action has been filed for a collateral purpose, namely to prevent another filling station being established in close proximity to the filling station

operated by the 2nd Petitioner, and not because of any potential damage being caused to the environment. In these circumstances, this Court is in agreement with the objection taken by the Respondents that this action has been filed for a collateral purpose and that the Petitioners have not come to Court with clean hands.

The Respondents have submitted that there are several averments in the petition which are clearly untrue or false. The first is the 1st Petitioner's claim that the land cultivated by him belongs to his brother in law. This has been rebutted by the 9th Respondent who claims that the owner of the said land, Wasantha Jayalath is not the brother in law of the 1st Petitioner. This is corroborated by the affidavit of Wasantha Jayalath, marked '9R6'. Thus, the 1st Petitioner has uttered a falsehood to this Court, for which no explanation has been offered. Furthermore, although the 1st Petitioner states that it is he who is cultivating the said land, the 9th Respondent has submitted that it is not the 1st Petitioner who is cultivating the said land but the wife of the 1st Petitioner, a fact which has not been denied by the 1st Petitioner. In any event, Wasantha Jayalath has stated that 4 acres out of his 5 acre land is being cultivated by him and that he has no objection to the construction of the filling station by the 9th Respondent.

The Petitioners state that they made inquiries and became aware only in May 2018 that the 9th Respondent had submitted an application to establish a filling station. This is clearly wrong when one considers that by letter dated 21st February 2018 annexed to the petition marked 'P11', the 2nd Petitioner informed the 1st Respondent as follows:

'මැතකඳි මාගේ ඉන්ධන පිරවුම්හල අසල සිට මීටර් 25 ක පමණ සමීප දුරකින් නව ඉන්ධනහලක් පිහිටුවීමට කටයුතු කරගෙන යන බව තහවුරුවී තිබේ.'

This clearly establishes that the 2nd Petitioner was aware of the construction of the filling station as far back as February 2018 but has chosen to state that they became aware only in May 2018. Quite apart from attempting to mislead Court on this matter, 'P11' is proof that the Petitioners did not invoke the jurisdiction of this Court for more than 6 months and are guilty of laches.

The next misrepresentation of facts by the Petitioners is their statement that the application of the 1st Petitioner to operate a filling station was refused by government officials on the basis that the said land is situated in close proximity to a large paddy field and would have an adverse impact on the environment. However, according to the 1st Respondent, the application submitted by the 1st Petitioner⁴ to operate a filling station in 2016 had been rejected on the basis that the 1st Petitioner did not have the financial capability to run a filling station, a fact which is established by the documents submitted to this Court by the 1st Respondent marked '1R5' and '1R6'.

Our Courts have consistently held that a party invoking the Writ jurisdiction of this Court must come with clean hands and utmost good faith. The Supreme Court in Liyanage & another v Ratnasiri, Divisional Secretary, Gampaha & Others⁵ citing the case of Jayasinghe v National Institute of Fisheries and Nautical Engineering and Others⁶ has held as follows:

⁴ A copy of the said application along with the annexures have been submitted to this Court by the 1st Respondent marked '1R5'.

⁵ 2013 (1) Sri LR 6 at page 15.

⁶ 2002 (1) Sri LR 277 at page 286.

“The conduct of the Petitioner in withholding these material facts from Court shows a lack of *uberrima fides* on the part of the Petitioner. When a litigant makes an application to this Court seeking relief, he enters into a contractual obligation with the Court. This contractual relationship requires the Petitioner to disclose all material facts correctly and frankly. This is a duty cast on any litigant seeking relief from Court.

In the case of **Blanca Diamonds (Pvt) Limited v. Wilfred Van Els and Two Others**⁷, the Court highlighted this contractual obligation which a party enters into with the Court, requiring the need to disclose *uberrima fides* and disclose all material facts fully and frankly to Court. Any party who misleads Court, misrepresents facts to Court or utters falsehood in Court will not be entitled to obtain redress from Court. It is a well-established proposition of law, since Courts expect a party seeking relief to be frank and open with the Court. This principle has been applied even in an application that has been made to challenge a decision made without jurisdiction. Further, Court will not go into the merits of the case in such situations.”

In **Timberlake International (Pvt) Ltd. Vs. The Conservator General of Forests**⁸, the Supreme Court, having held that the conduct of an applicant seeking Writs of Certiorari and Mandamus is of great relevance because such Writs, being prerogative remedies, are not issued as of right, and are dependent on the discretion of court, stated as follows:

⁷ 1997 (1) Sri LR 360.

⁸ S.C. Appeal No: 06/2008 SC Minutes of 2nd March 2010.

“It is trite law that any person invoking the discretionary jurisdiction of the Court of Appeal for obtaining prerogative relief, has a duty to show *uberrimae fides* or (utmost) good faith, and disclose all material facts to this Court to enable it to arrive at a correct adjudication on the issues arising upon this application.”

In these circumstances, this Court is of the view that the lack of good faith on the part of the Petitioners, the filing of this application to achieve collateral purposes and the aforementioned suppression and misrepresentation is sufficient for this Court to reject this application of the Petitioners.

This Court would like to advert to one other matter. The Petitioners have complained to this Court that there is a possibility of water ways, streams and paddy fields being polluted and damage being caused to the environment by the construction of the said filling station by the 9th Respondent. This Court observes that obtaining the approval of the 13th Respondent Central Environmental Authority is one of the criteria laid down by the 1st Respondent⁹ for the selection of new dealers. This Court further observes that at the request of the 12th Respondent Divisional Secretary¹⁰, the 13th Respondent has conducted a site inspection prior to the construction of the filling station and, by its letter dated 6th April 2016 produced by the 9th Respondent marked ‘9R9b’, granted environmental clearance for the construction of the filling station subject to the conditions set out therein. This demonstrates that due consideration has been given to the provisions of the National Environment Act at the time construction of the filling station commenced. Clause 18.1 of ‘9R9b’ states further as follows:

⁹ The criteria for selection has been produced with the Counter Affidavit, marked ‘A9’.

¹⁰ The request of the 12th Respondent has been produced by the 9th Respondent, marked ‘9R9a’.

“මෙම ඉන්ධන පිරවුම්කලේ සේවා කටයුතු ආරම්භ කිරීමට මසකට පෙර ඒ සඳහා 2000 අංක 53 හා 1988 අංක 56 දරන පනත් වලින් සංශෝධිත 1980 අංක 47 දරන ජාතික පාරිසරික පනත අනුව පාරිසරික ආරක්ෂණ බලපත්‍රය ලබා ගැනීමට අදාළ පළාත් පාලන ආයතනයට ඉල්ලුම් කළ යුතුය.”

This clearly establishes that the 9th Respondent must obtain an Environmental Protection License for the operation of the filling station from the 13th Respondent. In these circumstances, this Court does not see any legal basis to quash the environmental clearance granted by '9R9b'.

For the reasons set out in this Order, this Court does not see any legal basis to issue notices on the Respondents. This application is accordingly dismissed, with costs fixed at Rs. 100,000 payable by the Petitioners to the 9th Respondent.

Judge of the Court of Appeal

P. Padman Surasena, J/ President of the Court of Appeal

I agree.

President of the Court of Appeal