

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

In the matter of an Application under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka for a Writ of Certiorari.

CA (Writ) Application No. 49/2013

Kathirgamu Sivalogeswaran,
Kokkuththoduwai, Mullathivu.

Petitioner

Vs.

1. N. Vedanayagam,
Government Agent/
District Secretary,
Mullaitivu.
2. S.B. Divaratne
Secretary, Presidential Task Force for
Resettlement, Development and
Security in the Northern Province,
World Trade Centre, Colombo 1.
3. Basil Rajapakse
Chairman, Presidential Task Force for
Resettlement, Development and
Security in the Northern Province,
Colombo 1.
4. Mr. P. Thayanathan,
Land Commissioner,
Northern Province,
295, Kandy Road, Ariyalai, Jaffna.

Respondents

Before: Arjuna Obeyesekere, J

Counsel: B. N. Thamboo for the Petitioner

Indula Ratnayake, State Counsel for the Respondents

Written Submissions: Tendered by the Petitioner on 13th December 2018

Tendered by the Respondents on 16th November 2018

Decided on: 1st March 2019

Arjuna Obeyesekere, J

The Petitioner has filed this application seeking *inter alia* a Writ of Certiorari to quash the contents of the letters annexed to the petition marked 'P1'¹ and 'P2'².

The facts of this case very briefly are as follows.

The Petitioner claims that his parents were natives of 'Manal Aru' in the district of Mullathivu and that he is a permanent resident of the District of Mullathivu. He claims that during the conflict, while the Petitioner was still an infant, his parents were forcibly removed from their property and moved to Kokkuthoduwai. The Petitioner claims further that during the conflict he was injured in an artillery attack where he sustained an injury to his right leg. This Court observes that the Petitioner has not substantiated any of the said claims with any documentary proof nor has he established how he would be affected

¹ 'P1' is a letter dated 22nd November 2012 sent by the 2nd Respondent to the 1st Respondent.

² 'P2' is a letter dated 23rd November 2012 sent by the 2nd Respondent to the 1st Respondent, seeking to amend certain portions of 'P1'.

by the implementation of the recommendations contained in the said two letters 'P1' and 'P2'.

In the exercise of the powers vested in terms of Article 33(f) of the Constitution, the President had issued a Presidential Directive dated 7th May 2009, produced by the Respondents marked '1R1' appointing the persons mentioned therein as members of the "Presidential Task Force for the Resettlement, Development and Security of the Northern Province". It is set out in '1R1' that the said Presidential Task Force (PTF) is being established in order to "launch an urgent, co-ordinated and sustained effort to resettle the internally displaced persons (and) rehabilitate and develop the economic and social infrastructure of the Northern Province of Sri Lanka." The primary task entrusted to the PTF was to prepare strategic plans, programmes and projects to carry out the said tasks and primarily to re-settle the internally displaced persons.

In July 2012, the PTF had appointed a Committee comprising of representatives of various Government institutions to study and make recommendations relating to the resettlement of a large number of Muslim families who were displaced from the Northern Province in 1990.³ The report of the said Committee containing their recommendations had been presented to the PTF in October 2012⁴. The PTF, while agreeing with the said recommendations, had recommended that the lands referred to in the Report

³ The necessity for the appointment of the said Committee has been set out in the letter dated 16th July 2012 produced by the Respondents marked '2R2'.

⁴ A copy of the said Report has been produced by the Respondents marked '3R3'.

'3R3' be released depending on the necessities of the people and, very importantly in terms of the existing procedure.⁵

By 'P1', the 2nd Respondent Secretary to the PTF informed the 1st Respondent District Secretary, Mullativu of the recommendations of the Committee. The letter 'P1' titled 'Release of Forest Lands for Resettlement of Muslim Families' sets out the several recommendations of the aforementioned Committee with regard to selection of persons for the allocation of lands coming within Mannar as well as Mullathivu and the criteria that should be applied when selecting persons.⁶ The penultimate paragraph of 'P1' reads as follows:

"Please consult the Land Commissioner and instruct Divisional Secretaries to hold the Land Kachcheries on the basis of the recommendations of the Committee. Once the actual number of landless families is identified, please submit a request to the Forest Department for release of land at the above places."

By 'P2' the 2nd Respondent had amended the criteria set out in 'P1' for the identification of families who require land for resettlement.

It is in the above factual background that the Petitioner is seeking a Writ of Certiorari to quash the recommendations set out in 'P1' and 'P2'.

⁵ Letter dated 22nd November 2012 sent by the 2nd Respondent to the Secretary, Ministry of Environment, produced by the Respondents marked 'SR5'.

⁶ In respect of Mannar, the Committee had identified the categories of persons who are eligible to receive lands and the criteria that should be applied in selecting these persons. The Committee had however recommended that the selection of the families be done through a Land Kachcheri.

The first complaint of the Petitioner to this Court is that there is no Constitutional or Statutory provision to establish the PTF and therefore the purported exercise of power by the PTF is illegal. This Court observes that the PTF was established in May 2009 and that this application has been filed only in February 2013, which is almost 4 years after the establishment of the PTF. The Petitioner has not explained the delay in invoking the jurisdiction of this Court. It has been consistently held by our Courts that a petitioner must invoke the jurisdiction of this Court without delay and that any delay must be explained. The Petitioner has done neither and on this ground alone, the first complaint of the Petitioner is liable to be rejected.

The directive '1R1'⁷ has been issued by the President in terms of the powers conferred under Article 33(f) of the Constitution⁸, which reads as follows:

“In addition to the powers, duties and functions expressly conferred or imposed on, or assigned to him (the President) by the Constitution or by any other written law, whether enacted before or after the commencement of the Constitution, the President shall have the power to do all such acts and things, not being inconsistent with the provisions of the Constitution or written law, as by international law, custom or usage he (the President) is required or authorized to do.”

This Court observes that '1R1' was issued just before the end of the conflict in order to co-ordinate the social and economic issues that the Government

⁷ '1R1' provides for the “appointment of a task force to take necessary steps for the implementation of the powers vested in His Excellency the President of the Democratic Socialist Republic of Sri Lanka, by Article 33(f) of the Constitution of Sri Lanka.”

⁸ Pursuant to the 19th Amendment to the Constitution, similar provision is found in Article 33(2)(h).

would be faced with, after the end of the conflict. The Petitioner has not referred this Court to the existence of any other agency that has been entrusted with the said task. Nor has the Petitioner has not referred this Court to any provision of the Constitution or any written law which has been violated as a result of the issuance of the directive '1R1'. In these circumstances, this Court does not see any illegality with the establishment of the PTF.

The second complaint of the Petitioner is that the PTF does not have the power to issue directions to public servants who exercise powers in terms of legislative provisions and that the direction in 'P1' to hold a land kachcheri to identify the recipients is in violation of Section 3 of the Land Development Ordinance (the Ordinance).

According to Section 3(1)(b) of the Ordinance, it is the Land Commissioner General who is responsible for the general supervision and control of all Government Agents and land officers in the administration of State Land. In terms of Section 20 of the Ordinance, the selection of persons to whom State land shall be alienated under the Ordinance shall be made at a Land Kachcheri. This Court observes that the abovementioned powers of the Land Commissioner General and the procedure set out for the selection of recipients of State land have not been violated in any manner by the said instruction provided in 'P1'. On the contrary, 'P1' recognizes and reconfirms the role of the Land Commissioner General as it requests the 2nd Respondent to "consult the Land Commissioner and instruct the Divisional Secretaries to hold Land Kachcheries." Thus, this Court finds no merit in the second complaint of the Petitioner.

The next complaint of the Petitioner is that the purported exercise of power by the PTF is in respect of devolved powers, and is therefore unlawful. Appendix II of List I to the Ninth Schedule to the Constitution reads as follows:

“State land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) and written law governing this matter.

Subject as aforesaid, land shall be Provincial Council Subject, subject to the following special provisions –

1. State Land

1:1 State land required for the purposes of the Government in a Province, in respect of a reserved or concurrent subject may be utilised by the Government in accordance with the laws governing the matter. The Government shall consult the relevant Provincial Council with regard to the utilisation of such land in respect of such subject.

1:2 Government shall make available to every Provincial Council State land within the Province required by such Council for a Provincial Council subject. The Provincial Council shall administer, control and utilise such State land, in accordance with the laws and statutes governing the matter.

1:3 Alienation or disposition of the State land within a Province to any citizen or to any organisation shall be by the President, on the advice of

the relevant Provincial Council, in accordance with the laws governing the matter.

It is the position of the Petitioner that the PTF is exercising authority in respect of devolved powers which is contrary to the above provisions of the 13th Amendment to the Constitution.

This issue has been addressed by the Supreme Court in **Solaimuthu Rasu vs. Superintendent, Stafford Estate and others**⁹ where the Supreme Court held as follows:

“Appendix II begins with an unequivocal opener – ‘State Land shall continue to vest in the Republic and may be disposed of, in accordance with Article 33 (d) and written laws governing the matter.’ This peremptory declaration is a pointer to the fact that State Land belongs to the Republic and not to a Province.

The notion of disposition of State Land in accordance with Article 33 (d) and written laws governing the matter establishes beyond doubt that dominium over all “State Land” lies with the Republic and not with the Provincial Councils.”

The Supreme Court has held further that ‘it cannot be construed that the advice tendered by the Provincial Council’ in terms of paragraph 1:3 of Appendix II binds the President, and that the power of the President to alienate or dispose of State Land in terms of Article 33 (d) of the Constitution

⁹ SC Appeal No. 21/13; SC Minutes of 26th September 2013.

and other written laws remains unfettered, subject to such disposal being in compliance with the laws enacted by Parliament.

Sripavan J (as he then was), in his judgment in Solaimuthu Rasu has cited the following paragraph from the determination of the Supreme Court in the Bill titled "Land Ownership"¹⁰ with regard to paragraph 1:3 of Appendix II:

"By such provision the authority for alienation or disposition of the State land within a province to any citizen or to any organisation was yet vested with the President"

In these circumstances, this Court does not see any merit in this argument of the Petitioner.

The Petitioner's final complaint is that the exercise of power by the PTF in recommending that Land Kachcheris be held for the purpose of resettling individuals in a particular community is discriminatory. Thus, his complaint is that he has been discriminated on the basis of his ethnicity, and thereby his fundamental rights enshrined in Articles 12(1) and (2) of the Constitution has been violated.

As per Article 126(1)¹¹ read with Article 17¹² of the Constitution, the Supreme Court of Sri Lanka shall have the sole and exclusive jurisdiction to hear and

¹⁰ Special Determination Nos. 26/2003 – 36/2003; Determination dated 17th December 2003 by Shirani A. Bandaranayake J (as she then was).

¹¹ Article 126(1) reads as follows - The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.

determine any matters relating to fundamental rights violations and every person shall be entitled to apply to the Supreme Court in respect of such infringement or imminent infringement. This Court is of the view that the Petitioner ought to have invoked the fundamental rights jurisdiction of the Supreme Court if he was of the view that his fundamental rights protected by Articles 12(1) and (2) have been violated. The Petitioner has not disclosed whether he has done so nor has he disclosed the reasons for not doing so.

Be that as it may, this Court would now consider whether the Petitioner has made out a prima facie case of discrimination on the basis of his ethnicity.¹³ The PTF was established almost at the tail end of the conflict in order to address the issues that the Government would be faced with in respect of internally displaced persons, once the conflict ended. It is for this reason that the PTF was entrusted with the primary task of preparing strategic plans, programmes and projects to resettle the internally displaced persons. Although the role of the PTF extended to the settlement of all internally displaced persons living within the Northern Province, the necessity for the PTF to consider the plight of the Muslim community and that too, three years after the end of the conflict, is borne out by the following paragraph of '2R2':

¹² Article 17 reads as follows - Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter.

¹³ Article 126 (3) reads as follows - Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of *habeas corpus*, *certiorari*, *prohibition*, *procedendo*, *mandamus* or *quo warranto*, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.

“a large number of Muslim families who have returned to their villages after nearly 20 years of displacement are finding it difficult to resettle as most of them are landless.

One of the major reasons for a considerable number of families not to take up permanent residence is landlessness.”

It is therefore clear that the non-availability of land to settle the internally displaced persons was a pressing issue for the Government and that the PTF, in keeping with its mandate, was attempting to resolve the said issue. In the above background, this Court cannot come to the conclusion that the decision of the PTF to address the issues of the Muslim community is unreasonable or illegal.

This is more so when one considers the fact that the Petitioner has not alleged that the members of the Tamil community were faced with a similar issue. Nor has the Petitioner complained that the PTF refused to address the issues faced by the members of the Tamil community who were faced with a similar issue as the Muslim community. In fact, the Petitioner has not even stated that he falls within the same category of persons whose grievances were sought to be addressed through the recommendations of the said committee. The Petitioner has not produced any documentary proof to establish to the satisfaction of this Court that he or his father owned land within the Northern Province or that they were displaced from such lands or even the fact that the Petitioner has been prevented from returning to his land. In other words, the Petitioner has not proved to the satisfaction of this Court that he has the *locus standi* to have and maintain this application.

This Court must observe that the Land Commissioner General has issued Circular No. 2013/01 titled, 'Accelerated Programme on solving post conflict State lands issues in the Northern and Eastern Provinces' to all Divisional Secretaries in the Northern and Eastern Provinces in January 2013. This Circular, annexed to the petition marked 'P3A' sets out clearly the steps that must be taken by the Divisional Secretaries to resolve the outstanding issues of the people living in the said Provinces with regard to State lands, irrespective of ethnicity. Thus, a mechanism to address the grievances of all citizens relating to State land was in place by the time this application was filed.

The fact that the Petitioner is a member of the Seruvila Pradeshiya Sabha amply demonstrates that the Petitioner has not faced any difficulty in returning to the Northern Province and carrying on with his life, which was the same facility the PTF was trying to extend to members of other communities.

This Court is of the view that the Petitioner has failed to demonstrate that he is similarly circumstanced as the people whose issues were sought to be addressed by the PTF or that he was discriminated on the basis of his ethnicity. In the above circumstances, this Court does not see any merit in the final complaint of the Petitioner.

The learned State Counsel has submitted that what is contained in 'P1' and 'P2' are mere recommendations, which are not liable to be quashed by way of a Writ of Certiorari. This is in fact borne out by the penultimate paragraph of 'P1' which required the 1st Respondent to "consult the Land Commissioner and instruct Divisional Secretaries to hold the Land Kachcheries on the basis of the

recommendations of the Committee.” Although there is much merit in the said submission of the learned State Counsel, the necessity for this Court to consider it does not arise in view of the finding of this Court with regard to ‘P1’ and ‘P2’.

In the above circumstances, this Court does not see any legal basis to issue the Writ of Certiorari prayed for. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal