

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

H.V.A. Farms (Pvt) Limited,
No. 39A, Linton Road,
Kandana.
Petitioner

CASE NO: CA/WRIT/469/2015

Vs.

1. Mr. M.G.C. Sooriyabandara,
Director General,
Department of Wildlife,
No. 111/A,
Jayanthipura Road,
Battaramulla.
2. V.K. Manoj Widyaratne,
Park Warden,
Wilpattu National Park,
Hunuwilagama Pahala,
Maragahawewa.
3. Sanjeewa Herath,
Divisional Secretary,
District Secretariat,
Puttlam.
4. N.H.M. Chithrananda,
District Secretary,
District Secretariat,
Puttlam.

5. Commissioner of Lands,
North Western Province,
Provincial Land Commissioner's
Office,
Kurunegala.
6. R.P.R. Rajapakse,
Commissioner General of Lands,
Land Commissioner General's
Department,
No.7,
Gregory's Avenue,
Colombo 7.
7. John Amaratunga,
Minister of Lands,
Ministry of Lands,
Rajamalwatta Road,
Battaramulla.
8. Gamini Jayawickrama Perera,
Minister of Wildlife Conservation,
Ministry of Wildlife Conservation,
Rajamalwatta Road,
Battaramulla.
9. Board of Investment of Sri Lanka,
P.O. Box 1768,
West Tower,
World Trade Centre,
Echelon Square,
Colombo 1.

Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Nigel Hatch, P.C., with Shantha Jayawardena
for the Petitioner.
Chaya Sri Nammuni, S.S.C., for the 1st-8th
Respondents.
J.C. Weliamuna, P.C., with Pulasthi
Hewamanna for the 9th Respondent.

Decided on: 02.07.2019

Mahinda Samayawardhena, J.

The petitioner is a limited liability private company whose primary object is to carry on the business of cultivating fruits and vegetables for export market.¹ The petitioner says that its holding company, at the invitation of a local politician of the Puttalam District made a request to the Divisional Secretary of Wanathawilluwa to release 25 Acres of State Land to commence an eco-friendly organic fruit cultivation project as a pilot project. According to the petitioner, the petitioner was handed over possession of 25 Acres of State Land in Ralmaduwa Grama Niladhari Division within the Wanathawilluwa Divisionsl Secretariat area in early January 1998² by the Divisional Secretary of Wanathawilluwa³ on the understanding that the said land would be given to the petitioner on a long Lease. The petitioner is said to have started the project on or about

¹ P1B.

² Paragraph 7 of the amended petition.

³ Paragraph 5 of the amended petition.

06.01.1998⁴, and invested approximately Rs. 30 million on the project.

There is no documentary proof to the satisfaction of the Court to ascertain who handed over to the petitioner the possession of 25 Acres of State Land, and when it was done, and how the land of 25 Acres was identified. The drawing marked P12 depicting a land of 250 Acres is dated 07.10.1998, and the Plan marked P15A is dated 17.01.2002.

The petitioner then says that immediately thereafter the petitioner requested the Provincial Commissioner of Lands of the North Western Province to release 250 Acres inclusive of the aforesaid 25 Acres to the same project.⁵ It is not clear, when (according to the petitioner) 25 Acres have already been handed over to the petitioner by the Divisional Secretary, why the petitioner wanted that 25 Acre land also to be handed over by the Provincial Commissioner of Lands.

The Provincial Commissioner of Lands of the North Western Province has acted swiftly and directed the Divisional Secretary of Wanathawilluwa by letter marked P5 dated 27.01.1998 to prepare a Plan, and instructed the holding company of the petitioner to obtain necessary approvals from Provincial Environment Authority, Irrigation, Forest Conservation and other relevant State Departments.

Whilst these approvals were pending (and some obtained), the District Forest Officer of Puttalam by letter marked P17 dated

⁴ Paragraph 10 of the amended petition.

⁵ Paragraph 10 of the amended petition.

07.02.2002 has informed the petitioner not to clear the Reserved Forest expanding the 25 Acre land.

In the meantime, a larger land in extent of 2193.309 Hectares including the aforesaid 25 Acres alleged to have been released to the petitioner to later grant on a Lease, has been declared as Thabbowa Sanctuary by virtue of an order made by the Minister of Environment under the Fauna and Flora Protection Ordinance, published in the Gazette dated 19.07.2002.⁶

Thereafter the Divisional Secretary of Wanathawilluwa by P22 dated 02.03.2005 has informed the petitioner to vacate the 25 Acre land as the District Land Committee unanimously decided that it cannot be released to the petitioner (on a long Lease or a Permit) *inter alia* because it is rich in fauna and flora, and has a significant archeological value, and falls within Thabbowa Sanctuary.

Then the petitioner has requested the Board of Investment to intervene in this matter and the latter has sought an opinion from the Attorney General about the matter. P24 is the opinion of the Attorney General. It is this opinion which has largely led to this interminable litigation. I will later refer to this opinion.

Upon receipt of this opinion, the Board of Investment, with a copy of the opinion attached, has, by letter dated 06.10.2005, written to all the stakeholders including Director Provincial Environmental Authority, Provincial Land Commissioner, Director Irrigation Department, Divisional Secretary Wanathavilluwa, Director Agricultural Department, Director

⁶ P19.

Department of Archeology, District Land Utilization Officer, Director Department of Wild Life Conservation, Director Natural Resources of the Ministry of Environment, Conservator General of Forest to inform that *“The Hon. Attorney General is in the opinion that there would be no legal impediment with regard to agricultural cultivation being permitted on the land in issue, which has been declared as part of the Thabbowa Sanctuary, in terms of section 2(2) of the Fauna & Flora Protection Ordinance, provided the proposed cultivation of the land in issue with the said sanctuary, is not in contravention of the regulations contemplated under section 7(1) of the Fauna & Flora Protection Ordinance.”* Hence the Board of Investment has notified the concerned officers to permit the petitioner company to implement the project without further delay.⁷

Thereafter the Divisional Secretary of Wanathavilluwa has by P26 dated 08.11.2006 withdrawn P22 whereby the petitioner was asked to vacate the land.

In the meantime, an organization by the name of Environmental Foundation Limited, has filed a writ application No.1044/2006 in the Court of Appeal based on P22 seeking to compel the relevant public officers to remove the petitioner’s project from the said location. The Court of Appeal has issued an interim order preventing the petitioner from carrying on any project activities within the Thabbowa Sanctuary and Weerakkodicholi-

⁷ This letter is found in the documents compendiously marked P25A with the amended petition.

Eluwankulama proposed Forest Reserve, and the application to vacate the said interim order has been refused.⁸

The petitioner by way of Special Leave to Appeal Application No. 45A/2007 (later SC Appeal No.35/2007), has gone before the Supreme Court against this order, and the Supreme Court has, as seen from the proceedings, tried to settle the matter, and thereafter, given directions to the authorities how to put an end to the matter. At last, proceedings of the Supreme Court together with those of the Court of Appeal have been terminated on 16.03.2009 upon a mutual settlement.⁹

Thereafter, according to the petitioner, on 22.08.2012, the Divisional Secretary of Wanathawilluwa handed over to the petitioner 168 Acres of land¹⁰, and the draft Indenture of Lease¹¹ was prepared, but the said Lease has not been formally executed up to date by His Excellency the President being the authorized signatory for State Land alienation.¹²

By looking at P57 filed with the counter affidavit of the petitioner, it appears to me that, it is unlikely that His Excellency the President would agree to such long Lease being granted on the reasons stated therein. In P57, the incumbent President as the then Minister of Environment has *inter alia* stated that the said land earmarked for leasing falls within the Weerakkodichole Reserved Forest from 28.10.2013.

⁸ P30.

⁹ P41.

¹⁰ P43.

¹¹ P46.

¹² Vide paragraph 55 of the amended petition and paragraph 1.18 of the written submissions of the petitioner.

Thereafter, in July 2015, criminal proceedings have been instituted in the Magistrate's Court of Puttalam in Case Nos.16005/15 and 16006/15 by the Department of Wildlife Conservation against the employees of the petitioner upon violation of several provisions of the Fauna and Flora Protection Ordinance.¹³ The petitioner says that this conduct of the officials of the Department of Wildlife Conservation is arbitrary and malicious.

In that backdrop, the petitioner has filed the present application seeking the following main reliefs:

- a) To compel the 3rd-9th respondents by writ of mandamus to grant a Lease to the petitioner (on the Regulations promulgated under the State Lands Ordinance or otherwise) or regularize the petitioner's possession, in respect of 25 Acre State Land shown as Lot 1 in Plan marked P15A (admittedly falling within the Thabbowa Sanctuary);
- b) To quash by writ of certiorari the criminal proceedings pending in the Puttalam Magistrate's Court referred to earlier; and
- c) To prohibit the 1st and 2nd respondents by writ of prohibition instituting criminal proceedings against the employees and owners of the petitioner under the Fauna and Flora Protection Ordinance.

¹³ P49 and P50.

It must be made clear that the petitioner has filed this application only in relation to 25 Acre State Land, which, admittedly, in the Thabbowa Sanctuary; and not in respect of 225 Acre State Land (which was reduced to 168 Acre State Land), and as seen from P57, now apparently falling within Weerakkodichole Reserved Forest.

The learned President's Counsel for the petitioner, as seen from the written submissions, rests the case of the petitioner on two main grounds.

The first one is on Legitimate Expectation. The learned President's Counsel submits that, from 1998, the respondent public officials and government authorities held out and promised to the petitioner in writing and by conduct that 25 Acre land would be granted to the petitioner by way of a Lease for the fruit cultivation project, and by the time Thabbowa Sanctuary was later declared, the petitioner had invested about Rs. 30 million to develop the land expecting that the land would be given to the petitioner on a long Lease.

I am unable to accept this argument based on Legitimate Expectation after the area was declared as a Sanctuary under the Fauna and Flora Protection Ordinance. According to this argument, notwithstanding a larger area including the said 25 Acres was declared as a Sanctuary, the petitioner private company shall be allowed to continue with the project, which is its business, uninterruptedly, and the Government shall be forced to regularize its possession by executing an Indenture of Long-Term Lease. No Court, in my view, in such circumstances,

can force the Government or rather the Head of the State to give the State Land which is in the middle of the Thabbowa Sanctuary on a long Lease on the ground of Legitimate Expectation of the petitioner. I unreservedly reject that argument.

The next argument of the learned President's Counsel for the petitioner is that, in terms of section 7 of the Fauna and Flora Protection Ordinance, cultivation is a permitted activity within a Sanctuary, which has not been restricted by way of Regulations made by the Minister.¹⁴

This argument may be based on the opinion given by the Attorney General in P24.

Let me make the following general observation before I refer to the said opinion. When an opinion is sought from the Attorney General, the opinion given shall be clear and precise. It shall not be open for various interpretations. An opinion is sought from the Attorney General when a matter is already open for various interpretations.

The opinion sought by the Board of Investment from the Attorney General was "*whether the utilization of the subject land for an organic fruit and vegetable cultivation project could be permitted under the relevant prevailing laws.*"¹⁵

A Senior State Counsel for the Attorney General has given the following opinion.

¹⁴ Paragraphs 1.11, 4.15 of the written submissions of the petitioner.

¹⁵ Vide letter of the BOI dated 6.10.2005 found in documents compendiously marked P25A.

I have considered the material made available to me and observe that section 7(1)(c)(ii) of the Fauna & Flora Protection Ordinance provides that no person shall, except in accordance with regulations, in any state land within any sanctuary clear or break up any land for cultivation, mining or for any other purpose.

In the circumstances, I am of the opinion that there would be no legal impediment with regard to agricultural cultivation being permitted on the land in issue, which has been declared as part of the Thabbowa Sanctuary, in terms of section 2(2) of the Fauna & Flora Protection Ordinance, provided the proposed cultivation of the land in issue with the said sanctuary, is not in contravention of the regulations contemplated under section 7(1) of the Fauna & Flora Protection Ordinance.

As I have already stated, upon receipt of this opinion, the Board of Investment, with a copy of the opinion attached, has informed all the stakeholders to permit the petitioner company to implement the project without further delay.

It is regrettable that this opinion of the Attorney General is either wrong or misleading.

Section 7(1)(c)(ii) of the Fauna and Flora Protection Ordinance reads as follows:

No person shall, except in accordance with regulations, on any State Land within any Sanctuary, clear or break up any land for cultivation, mining or for any other purpose.

According to this section, in my view, cultivation within a Sanctuary is prohibited, unless it is done in accordance with the Regulations made by the Subject Minister. It is common ground that no Regulations have so far been made by the Minister. If no Regulations have been made, prohibition continues.

The argument of the learned President's Counsel for the petitioner that in terms of section 7(1) of the Fauna and Flora Protection Ordinance, cultivation is a permitted activity within a Sanctuary, which has not been restricted by section 7(2) by way of Regulations made by the Minister is unacceptable.

I have already quoted section 7(1) to state that cultivation is not a permitted activity within a Sanctuary (unless it is done in accordance with Regulations, which are yet to be made).

Section 7(2), introduced by Act No. 22 of 2009, reads as follows:

The Minister may for the purpose of this section, make regulations restricting the carrying out of any specified activity or activities in any Sanctuary or in any prescribed Sanctuary where he deems such restriction is necessary or essential taking into consideration the prevailing circumstances.

Section 7(2) cannot be (mis)interpreted to say that cultivation in a Sanctuary is a "specified activity", or "permitted activity", which has not been restricted by way of Regulations, and therefore, there is no impediment in law for the petitioner to carry out cultivation within Thabbowa Sanctuary.

When the opinion was sought by the Board of Investment from the Attorney General “*whether the utilization of the subject land for an organic fruit and vegetable cultivation project could be permitted under the relevant prevailing laws*” the Senior State Counsel on behalf of the Attorney General, in my view, could have simply stated “No” because the question was whether it was permissible under the “prevailing laws”. Prevailing Laws (without Regulations) prohibit cultivation within a Sanctuary.

This interpretation of section 7 seems to have been acknowledged by the petitioner company itself in paragraph 73 of the amended petition which states that: “*The petitioner states that it is unreasonable, irrational and illegal to penalize the petitioner for the failure on the part of the Minister to perform a mandatory statutory obligation/duty. The petitioner’s rights are adversely affected and prejudiced by the Minister’s failure to make such regulations.*”

Further, by paragraph (i) of the prayer to the amended petition, the petitioner prays: “*Without prejudice to the other reliefs prayed for in this application, grant and issue an order in the nature of writ of mandamus, directing the 9th respondent to make regulations under section 7(2) of the Fauna and Flora Protection Ordinance, in respect of cultivation activities within sanctuaries or Thabbowa Sanctuary.*”

If there is no prohibition as there are no Regulations restricting cultivation in a Sanctuary, there was no necessity for the petitioner to say that the petitioner was gravely prejudiced by the failure on the part of the Minister to make Regulations, and

to seek to compel the Minister by mandamus to make Regulations.

I reject the second argument.

Hence I hold that this Court cannot compel the respondents by writ of mandamus to convey by way of Long Lease the 25 Acre State Land admittedly falling within the Thabbowa Sanctuary shown as Lot 1 in Plan marked P15A to the petitioner.

This Court also cannot in the circumstances stop present and future criminal proceedings—initiated and to be initiated—against the petitioner on violation of Fauna and Flora Protection Ordinance.

What I have stated so far is adequate to conclude the matter. Nevertheless, let me now advert to another point which is relevant to the matter under consideration. That relates to the Supreme Court proceedings referred to above. It is the submission of the learned Senior State Counsel for the respondents that the petitioner agreed before the Supreme Court to exclude the area of the 25 acre land that falls within the Thabbowa Sanctuary.

As I have already stated, the petitioner by way of Special Leave to Appeal went before the Supreme Court to get the interim order issued by the Court of Appeal vacated. That interim order basically prevented the petitioner from carrying out any project activity within the Thabbowa Sanctuary until final determination of the case.

The Supreme Court on 16.03.2009 terminated the proceedings in the following manner.¹⁶

This is an appeal from the order dated 17.7.2006 of the Court of Appeal granting an interim order restraining the appellants from and his employees continuing with or carrying on with any project activities within the Thabbowa Sanctuary and the Weerakkodicholi, Eluwankulama proposed Forest Reserve.

This matter was adjourned on several days to enable the appellants to secure alternative land for the organic agricultural project being the subject matter of the application. It is now agreed that the alternative land has been identified at Eluwankulama which is outside the Thabbowa Sanctuary. An extent of 225 acres has been identified and the alienation thereof to the appellant is now being processed. It is submitted that the appellant has done an Environment Impact Assessment (EIA) in respect of the project which has been published. The public objections are to close on 26.3.2009.

Mr. Senanayake, Director Provincial Environmental Authority, North Western Province is present in Court and submits that he has already appointed a Technical Evaluation Committee to proceed with the matter and the composition of the Committee is specified in the letter dated 16.3.2009 which is now filed of record.

¹⁶ P41.

In these circumstances, President's Counsel for the petitioner submits that the petitioner would co-operate with the Director General of Wild Life in excluding the area that comes within the Thabbowa Sanctuary. The project of the Appellant will continue only in the other area.

We consider that this is a suitable arrangement and terminate these proceedings and proceedings with the Court of Appeal.

If the petitioner or the Provincial Environmental Authority require a further order from Court in this matter, a motion will be filed with notice to the other parties.

It is the submission of the learned President's Counsel for the petitioner (who was not the President's Counsel appeared in the Supreme Court Case) that the said proceedings only relate to the new allocation of 225 Acres and not to the 25 Acre pilot project already commenced within the Thabbowa Sanctuary. He submits that the said proceedings have to be understood in conjunction with the earlier proceedings.

I find difficult to accept that position. The Court of Appeal proceedings, according to the petitioner¹⁷, were initiated on P22, by which the petitioner was asked to vacate the 25 Acre land in Thabbowa Sanctuary. The Supreme Court appeal originated from the interim order issued by the Court of Appeal. In that backdrop, it is unthinkable that the Supreme Court disregarded the main issue in relation to 25 Acre land within the Sanctuary, and gave directions to the authorities to release an additional

¹⁷ Vide paragraph 32 of the amended petition.

land of 225 Acres to the petitioner. If I may repeat, what has been recorded is *“In these circumstances, President’s Counsel for the petitioner submits that the petitioner would co-operate with the Director General of Wild Life in excluding the area that comes within the Thabbowa Sanctuary. The project of the Appellant will continue only in the other area. We consider that this is a suitable arrangement and terminate these proceedings and proceedings with the Court of Appeal.”*

Learned President’s Counsel for the petitioner heavily relies on the first sentence in the proceedings of the Supreme Court dated 26.11.2007 wherein it is stated that: *“President’s Counsel for the appellant (who was not the same President’s Counsel who appears for the petitioner in this application) submits that the appellant is agreeable not to expand the present pilot project of 25 acres which is admittedly located within the Thabbowa Sanctuary”* to say that 25 Acre land within the Thabbowa Sanctuary is therefore unaffected. It appears to me that the said undertaking may be referable to P17 whereby there was an allegation that the petitioner was expanding 25 Acre land into the Reserve Forest.

Proceedings dated 31.03.2008 reveal that the alternative land has been identified and a sketch plan has been prepared. It says that: *“A representative of the appellant is present in Court and submits that the sketch plan correctly identifies the land that is to be developed by the appellant as an alternative to the land that is in question.”*

In any event, the Supreme Court has not directed the public officials to give the area of the 25 acre land that falls within the Thabbowa Sanctuary on a long term Lease to the petitioner or expressly allowed the petitioner to continue to stay there until regularization of the process or until alternative land is given.

I cannot accept that the Supreme Court even tacitly gave the permission to the petitioner to carry out a profit-making business of cultivation in the Thabbowa Sanctuary, which is prohibited in law under Fauna and Flora Protection Ordinance.

Taking all the circumstances into account, I accept the argument of the learned Senior State Counsel for the respondents that the petitioner agreed before the Supreme Court to exclude the area of the 25 acre land that falls within the Thabbowa Sanctuary.

I must make it clear that, the case is not decided on this last point. This point was dealt with only to fortify the conclusion already reached that the petitioner cannot be granted the reliefs sought for.

For the aforesaid reasons, I refuse to grant reliefs to the petitioner as prayed for in the prayer to the amended petition.

Application of the petitioner is dismissed with costs.

Judge of the Court of Appeal