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

In the matter of an application for Writ of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Thilakaratne Bandara Ranatunge
"Chandrika", Ranawana Road, Katugastota.

Petitioner

Case No. C. A. (Writ) 180/2017

Vs.

1. Commissioner General of Agrarian Development
   Department of Agrarian Development,
   No. 62, Sir Marcus Fernando Mawatha,
   Colombo 02.

2. T. A. Ranasinghe
   Deputy Commissioner of Agrarian Development
   Department of Agrarian Development,
   Kandy District Office,
   Gatambe, Peradeniya.

Respondents

Before: Janak De Silva J.

Counsel:

Dulindra Weerasuriya P.C. with Kanishka Gunawardena for the Petitioner

Himali Senanayake SC for the Respondents

Written Submissions tendered on:

Petitioner on 21.05.2019

Respondents on 11.03.2019 and 10.06.2019

Argued on: 14.03.2019

Decided on: 17.07.2019

Janak De Silva J.

The Petitioner is the owner of the land forming the subject matter of this application (P1/P3). He claims that although the said land was identified as paddy land it was in fact a marsh together with the adjoining lands to the north, south and the east. As his land could not be cultivated as a paddy land the Petitioner applied to the 1st Respondent to permit him to fill it and develop (P7).

The 1st Respondent after calling for reports from relevant officers decided in terms of section 28 of the Agrarian Development Act No. 46 of 2000 (Act) that the said land was not a paddy land (P8). This decision is dated 31.10.2016 whereas as far back as 08.01.2013 the Deputy Commissioner of Agrarian Services, Kandy had recommended to the 1st Respondent that it be declared that the said land is not a paddy land (P6).

Thereafter on 04.04.2017 (P9) the Acting Commissioner General of Agrarian Services had informed the Petitioner that he is cancelling P8 as the Petitioner violated the second condition therein. The Petitioner claims that the said decision had been taken after the 2nd Respondent had written to the 1st Respondent on a mistaken belief that P8 had been issued under section 34 of the Act (P10). Thereafter, the Deputy/Assistant Commissioner of Agrarian Services Kandy had on 19.04.2017 (P11) informed the Petitioner that steps will be taken in terms of sections 32 and 33 of the Act.

The Petitioner has inter alia sought the following relief:

(a) Quash the conditions imposed by the 1st Respondent by his letter dated 31.10.2016 marked P8 with this application, when declaring the land in issue is not a paddy land, by way of writ of certiorari,

(b) Quash the findings/decisions of the 2nd Respondent mentioned in the 2nd Respondents letter dated 23.02.2017 marked P10 with this application by way of a writ of certiorari,

(c) Quash the determination of the 1st Respondent stated in his letter dated 04.04.2017 marked P9 with this application to cancel the decision of the 1st Respondent in his letter dated 31.10.2016 marked P8 with this application, by way of writ of certiorari,

(d) Quash the decision of the 2nd Respondent reflected in his letter dated 19.04.2017 marked P11 with this application, to take steps under sections 32 and 33 of the Act, against the Petitioner by way of writ of certiorari.

The learned State Counsel raised two preliminary matters to the maintainability of the application.

Firstly, it was submitted that the Petitioner was guilty of lashes in that P8 was issued on 31.10.2016 whereas he accepted P8 and came to court after 10 months of its issue. The question of delay depends on the facts and circumstances of each case. As more fully explained below, the imposition of the four conditions in P8 is ultra vires the powers of the 1st Respondent. Hence there is a patent lack of jurisdiction on the part of the 1st Respondent to impose the four conditions in P8 and as such acquiescence on the part of the Petitioner does not confer jurisdiction on the 1st Respondent [*Beatrice Perera v. Commissioner of National Housing* (77 N.L.R. 361)].

Secondly, it was submitted that the Petitioner is guilty of suppression/misrepresentation of material facts. The material fact alleged to have been suppressed/misrepresented is the purported statement by the counsel for the Petitioner on 25.01.2019 that the Petitioner has filled the entire portion of land belonging to the Petitioner. This in my view is not a material fact.

Quashing of Conditions in P8

The Respondents contend that P8 is a forged document [paragraph 10 of the statement of objections] and rely on documents R6 and R6A to establish it. However, R6 is a letter written by the 1st Respondent to the Director of the Criminal Investigation Department requesting him to initiate an investigation into certain irregularities that have occurred in the issue of letters authorising paddy land to be utilised for other purposes and determinations that certain lands are not paddy lands. It is general in nature and has no specific application to P8. R6A is a letter written by the 1st Respondent to the 2nd Respondent indicating that P8 has not been issued

following the correct procedure. Nowhere is it stated therein that P8 is a forgery. Therefore, I hold that the evidence before this Court is not sufficient to establish that P8 is a forged document.

Then question then is whether the 1st Respondent can impose the three conditions set out therein. These three conditions have been included to be applicable if the said land is to be used for a non-agricultural purpose.

Section 28 of the Act vests the 1st Respondent with the power to decide whether an extent of land is a paddy land. In *Liyanage and Others v. Gampaha Urban Council and Others* [(1991) 1 Sri.L.R. 1] S.N. Silva J. (as he was then) held as follows:

> "In construing instruments that confer power what is not permitted should be taken as forbidden. This strict doctrine of ultra vires ought to be reasonably and not unreasonably understood and applied. Whatever may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires. Acts of statutory authorities that go beyond the strict letter of this enabling provision can be reasonably considered as being incidental to or consequential upon that which is permitted been done with a view to promoting the general legislative purpose in the conferment of power to such authorities. This is in keeping with the purposive approach to statutory interpretation. Anything that is contrary to or inconsistent with such general legislative purpose should not be held as valid by courts in an exercise of statutory interpretation."

Applying the above rules of interpretation with which I am in respectful agreement, I hold that the 1st Respondent is not empowered to impose any conditions under section 28 of the Act after he decides that any land is not paddy land. His power under that section is limited to deciding whether the land is paddy land or not. Once he determines that the land is not paddy land, he cannot impose conditions under which the land can be used for non-agricultural purposes as he has done in P8.

The learned State Counsel contended that a writ of certiorari can be issued only to quash P8 completely and not parts of it as has been prayed for by the Petitioner.

This submission is misconceived in law. In *Thames Water Authority v. Elmbridge Borough Council* [(1983) 1 Q.B. 570] it was held that where a local authority had acted in excess of their powers, the court is entitled to look not only at the document but at the factual situation and, where the excess of the power was easily identifiable from the valid exercise of power, to give effect to the document in so far as the exercise of the power had been intra vires. In *Regina v. Secretary of State for Transport ex parte Greater London Council* [(1985) 3 W.L.R. 574] it was held that in an appropriate case, certiorari will go to quash an unlawful part of an administrative decision having effect in public law while leaving the remainder valid.

However, such severance of the ultra vires part from the intra vires part is subject to qualifications. If the bad can be cleanly severed from the good, the court will quash the bad part only and leave the good standing [*Agricultural, Horticultural and Forestry Industry Training Board v. Ayelsbury Mushrooms Ltd.* (1972) W.L.R. 190]. In *R. v. North Hertfordshire District Council ex parte Cobbold* [(1985) 3 All.E.R. 486] it was held that where a specific part of a licence could be identified as being offensive and therefore unlawful, it could only be severed from the licence so far as to leave the remainder untainted if the severance would not alter the essential character or substance of that which remained. It follows that severance would not be permitted where the words which is sought to sever were fundamental to the purpose of the whole licence.

The 1st Respondent did have the power to decide whether the land forming the subject matter of this application is paddy land or not. That part of his order in P8 is valid and severable from the four conditions imposed after concluding that the land is paddy land. The 1st Respondent did not have the power to do so as explained above. Accordingly, I issue a writ of certiorari quashing the conditions imposed by the 1st Respondent by his letter dated 31.10.2016 marked P8 with this application, when declaring the land in issue is not a paddy land.

Quashing of findings/decisions in P10

In *J.B. Textiles Industries Ltd. v. Minister of Finance and Planning* [(1981) 2 Sri.L.R. 238] this court held that where a statute empowers a Minister to make orders which interfere with the rights of property enjoyed by a citizen, the Minister is, in the absence of clear and express provision to the contrary set out in the statute concerned, ordinarily under a duty to observe the principles of natural justice and/or to act fairly before he exercises such powers, even though the said statute itself is silent in regard to adoption of such a procedure.

The 2nd Respondent by P10 requested the 1st Respondent to take steps to cancel P8 as it is found on the report of the Agrarian Services Officer that the Petitioner has breached condition two in P8. There is no evidence of the Petitioner being given a hearing before P10 was sent. The Petitioner acquired a vested right upon P8 as the owner of the land in dispute. A recommendation, which in this case Such a vested right cannot be cancelled without giving the Petitioner a fair hearing. As that was not done, I issue a writ of certiorari quashing the decision of the 2nd Respondent mentioned in the 2nd Respondents letter dated 23.02.2017 marked P10 with this application.

Quashing of P9

The 1st Respondent by P9, acting presumably on P10, cancelled P8. The reason given was the breach of condition two therein by the Petitioner. Here again the Petitioner was not given a hearing before the cancellation and for the reasons set out above, I issue a writ of certiorari quashing the determination of the 1st Respondent stated in his letter dated 04.04.2017 marked P9 with this application to cancel the decision of the 1st Respondent in his letter dated 31.10.2016 marked P8 with this application.

Quashing of P11

P11 is a letter sent by the 2nd Respondent to the Petitioner stating that action will be taken against him in terms of sections 32 and 33 of the Act. This is on the basis of the cancellation of P8 which is ultra vires for the reasons set out above. Accordingly, I issue a writ of certiorari quashing the

decision of the 2nd Respondent reflected in his letter dated 19.04.2017 marked P11 with this application, to take steps under sections 32 and 33 of the Act, against the Petitioner.

To summarise, for all the reasons set out above, I issue writs of certiorari quashing

(a) the conditions imposed by the 1st Respondent by his letter dated 31.10.2016 marked P8 with this application, when declaring the land in issue is not a paddy land,

(b) the decision of the 2nd Respondent mentioned in the 2nd Respondents letter dated 23.02.2017 marked P10 with this application,

(c) the determination of the 1st Respondent stated in his letter dated 04.04.2017 marked P9 with this application to cancel the decision of the 1st Respondent in his letter dated 31.10.2016 marked P8 with this application,

(d) the decision of the 2nd Respondent reflected in his letter dated 19.04.2017 marked P11 with this application, to take steps under sections 32 and 33 of the Act, against the Petitioner.

The Respondents submitted that P8 is a forged document. R6A takes a different position and states that P8 has not been issued following the correct procedure.

For the avoidance of any doubt, I hold that the orders made by this court will not prevent the 1st Respondent from conducting any inquiry to ascertain whether P8 is a forgery or to ascertain whether it has been issued without following the correct procedure for an ultra vires representation cannot form the basis of a legitimate expectation [*Bandara v. The Director, Land Reform Commission and Others* (CA (Writ) 233/2017, C.A.M. 17.06.2019)]. An essential step of such an inquiry is to give the Petitioner a fair hearing.

The application is allowed with costs.

Judge of the Court of Appeal