

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

Sandanayake Pathiraja
Thyagaratne,
'Dharshana',
Gamunu Mawatha,
Duwa Temple Road,
Kalutara-South.
Respondent-Petitioner-Appellant

CA CASE NO: CA (PHC) 188/2013

HC KALUTARA CASE NO: 55/2011/REV

MC KALUTARA CASE NO: 84601

Vs.

Assistant Commissioner of
Agrarian Development,
4th Floor,
District Secretariat,
Kalutara.

1st Party Applicant-Respondent-
Respondent

Hon. Attorney General,
Attorney-General's Department,
Colombo 12.

2nd Party-Respondent-Respondent

Before: K.K. Wickramasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Shyamal A. Collure with A.P. Jayaweera for the
Appellant.
Sabrina Ahmed, S.C., for the Respondents.

Decided on: 05.08.2019

Mahinda Samayawardhena, J.

The Commissioner General of Agrarian Development (hereinafter “respondent”) instituted these proceedings against the respondent (hereinafter “appellant”) in the Magistrate’s Court of Kalutara under section 33(3) of the Agrarian Development Act, No. 46 of 2000, as amended, (hereinafter “Act”) praying for the issue of an order restraining the appellant from filling the paddy land by the name of *Madangahawatta Paula* in extent of 3 roods and 10 perches out of a larger land of 1 acre, which is morefully described in the schedule to the application. In terms of section 33(4) of the Act, a supporting affidavit of the Commissioner of Agrarian Development was tendered with the application.

Upon being satisfied with the complaint, the learned Magistrate has, in terms of section 33(5) of the Act, made an interim order *ex parte* restraining the appellant from continuing with the offensive act and issued summons on the appellant to show cause why he should not be restrained as prayed for in the application.

The appellant by way of an affidavit with supporting documents stated to Court that (a) the subject land is not a paddy land and

(b) he never filled the land, and therefore the application is misconceived in law.

The respondent filed a counter affidavit together with documents and stated that it is a paddy land.

Thereafter, the learned Magistrate, in terms of section 33(8) of the Act, has made the restraining order, which is also the final order, against the appellant.

Being dissatisfied with that order, the appellant has filed a revision application in the High Court. The High Court, by Judgment dated 31.10.2013, has affirmed the order of the Magistrate's Court and dismissed the application of the appellant. It is against this Judgment of the High Court, the appellant has come before this Court by way of final appeal.

Section 33(1) of the Act reads as follows:

No person shall fill any extent of paddy land or remove any soil from any extent of paddy land or erect any structure on any extent of paddy land except with the written permission of the Commissioner-General.

From the proceedings of the Magistrate's Court dated 29.04.2011, it is seen that the respondent has submitted to the Magistrate's Court that, in terms of sections 32(3) and 32 (5) of the Act, the respondent issued Notice on the appellant to abstain from filling the land and also complained to the police prior to the filing of the application.

These factual matters have not been challenged before the Magistrate's Court by the appellant. Hence the appellant cannot challenge them for the first time before this Court.

If the appellant has not filled or was not filling the land, and has no intention to do so, no prejudice would have caused to the appellant by making the restraining order.

If it is a paddy land, there is no dispute that the appellant cannot fill the land without the written permission of the Commissioner General of Agrarian Development.

The substantive issue raised or the defence taken by the appellant before the Magistrate's Court in his show cause affidavit tendered with supporting documents is that the subject land is not a paddy land.

The respondent with his counter affidavit by tendering *inter alia* P3, which is "*the Agricultural Land Register (Paddy Lands)*", has stated that this, i.e. *Madangahawatta Paula*, is a paddy land.

The respondent has also tendered P2, which is also "*the Agricultural Land Register (Paddy Lands)*", to show that *Dangaha Liyadda* is also a paddy land.

Underneath the document P2, it is written, as I understand, that P2 was amended in 1995 and thereafter it was revised in June 1995.

It is not clear whether P2 is the Original Register or the Amended Register or the Revised Register.

In any event, P2 does not refer to the subject paddy land, namely, *Madangahawatta Paula*, but to a different paddy land, namely, *Dangaha Liyadda*.

The matters contained in P2 and P3 are questions of fact and not of law, which cannot be raised for the first time in appeal.

P2 and P3 have not been challenged before the Magistrate's Court.

The pivotal argument of the learned counsel for the appellant before this Court is that both the learned Magistrate and the learned High Court Judge failed to appreciate that "*the Paddy Lands Register marked P2 very clearly indicates that the land called Madangahawatta Paula was no longer a paddy land by 1995.*" With respect, I cannot understand how the learned counsel makes such a bold assertion with confidence. For me, P2 does not indicate that *Madangahawatta Paula* was no longer a paddy land by 1995. Accordingly, in my view, the main argument of the appellant shall fail.

It is significant to note that the appellant in the Magistrate's Court, in his affidavit, through which he showed cause why the restraining order shall not be issued, has not taken up the position that the land has not been properly identified. If I may repeat, the only substantive matter which he has raised is that the subject land is not a paddy land.

Hence he cannot take up that question of fact for the first time in appeal.

The "*paddy land*" has been defined in section 101 of the Act as follows:

"paddy land" means land which is cultivated with paddy or is prepared for the cultivation of paddy or which, having at any time previously been cultivated with paddy, is suitable for the cultivation of paddy, and includes such other land adjoining or appertaining to it as may be used by the cultivator for a threshing floor or for constructing his

dwelling house, but does not include chena land or any land, which, with the permission of the Commissioner-General is used for any purpose other than cultivation in accordance with the provisions of this Act, or which is determined by the Commissioner-General not to be paddy land.

Who can decide whether a land is a paddy land or not? It is the Commissioner General of Agrarian Development. Section 28 of the Act reads as follows:

28(1) The Commissioner-General may decide whether an extent of land is a paddy land.

(2) The Commissioner-General may for the purpose of making a decision under subsection (1) call for and obtain the observations and information from the Agrarian Development Council within whose area of authority the extent of land is situate, and from the relevant government departments statutory boards and institutions. It shall be the duty of every such government department, statutory board and institution to furnish such observations and information as soon as practicable.

The learned counsel for the appellant states that “Section 28(1) of the Agrarian Development Act provides that the Commissioner General may decide whether an extent of land is a paddy land. However, it is trite law that discretion must be exercised fairly and reasonably. No such decision can be made *ex parte*, contrary to the rules of natural justice.” The learned counsel will understand that this is not a writ application challenging such

decision of the Commissioner General of Agrarian Development. Probably, he can do it in a properly constituted writ application.

Section 33(7) of the Act debars the Magistrate's Court to question the validity of the contents of the application. That section reads as follows:

Court shall not be competent to call for any evidence from the Commissioner-General, or Additional Commissioner-General or Commissioner or Deputy Commissioner or Assistant Commissioner in support of the application.

In the application filed before the Magistrate's Court, the Commissioner of Agrarian Development has *inter alia* stated that the land described in the schedule to the application is a paddy land.

The Magistrate's Court has no jurisdiction to call for evidence to substantiate the position of the Commissioner of Agrarian Development that the subject land is a paddy land. The Magistrate's Court has to accept the contents of the application at face value.

At the inquiry into the application what are the possible defences which one could take up? The answer is found in section 33(8) of the Act, which reads as follows:

If after the inquiry the Magistrate is not satisfied that the person showing cause has lawful authority to fill the extent of paddy land or remove any soil therefrom or erect a structure thereon, he shall confirm the interim order made under subsection (5) restraining such person and his

servants and agents from doing any act in contravention of this section.

According to that section, the only possible defence which could be taken up is to produce the lawful authority to fill the paddy land, which, according to section 33(1), is the written permission of the Commissioner General of Agrarian Development.

Obviously, the appellant does not have such an authority given by the Commissioner General of Agrarian Development.

For the aforesaid reasons, the Judgment of the High Court which affirmed the order of the Magistrate's Court is correct.

Appeal is dismissed. No costs.

Judge of the Court of Appeal

K.K. Wickremasinghe, J.

I agree.

Judge of the Court of Appeal