

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

An Application for Writ of Certiorari and
Prohibition under Article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka

CA (Writ) Application No.185/2012

1. Walter Perera,
No. 145, Siridhamma Mawatha,
Colombo 10.
2. Greenfield Development (Pvt.)
Limited,
No. 145, Siridhamma Mawatha,
Colombo 10.

PETITIONERS

Vs.

1. K.P. Rangana Fernando
Divisional Secretary,
Kalpitiya.
2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: Arjuna Obeyesekere, J

Counsel: Sunil Abeyratne for the Petitioners

Suranga Wimalasena, Senior State Counsel for the Respondents

Written Submissions: Tendered on behalf of the Petitioners on 25th February 2019

Tendered on behalf of the Respondents on 28th June 2019

Decided on: 17th September 2019

Arjuna Obeyesekere, J

When this matter was taken up for argument on 6th December 2018, the learned Counsel for the parties moved that this Court pronounce its judgment on the written submissions that would be tendered on behalf of the parties.

The Petitioners state that the 2nd Petitioner is the present owner of a land known as '*Thattaweli Tharawakany*' in extent of approximately 20 acres situated in Kalpitiya. According to the Petitioners, the 2nd Petitioner purchased the said land as several lots on a staggered basis and have produced the relevant deeds pertaining to such purchases, marked 'P14' – 'P25'. The Petitioners state further that their predecessors in title have owned these lands for over 72 years and that the said lands are privately owned lands. The Petitioners have also annexed to the petition marked 'P40' – 'P42', affidavits

by persons who claim to have been employed as watchers of the said lands, by the Petitioners as well as by their predecessors in title.

The Petitioners state that the 1st Respondent, the Divisional Secretary, Kalpitiya had issued the 2nd Petitioner a quit notice dated 23rd March 2012, annexed to the petition marked 'P35', issued in terms of Section 3 of the State Lands (Recovery of Possession) Act No. 7 of 1979, as amended, directing the 2nd Petitioner and all those claiming under the 2nd Petitioner to hand over vacant possession of Lots A, B and C of Plan No. Pu/2012/026 in extent of 9.052 Hectares, on or before 10th May 2012.

The 1st Respondent had thereafter filed an application for ejectment in the Magistrate's Court of Puttalam in terms of the State Lands (Recovery of Possession) Act seeking to eject the 2nd Petitioner from the land referred to in the quit notice 'P35'. The said application for ejectment has been annexed to the petition, marked 'P45'.

Aggrieved by the said actions of the 1st Respondent, the Petitioners filed this application, seeking *inter alia* the following relief:

- (a) A Writ of Certiorari to quash the quit notice 'P35';
- (b) A Writ of Prohibition restraining the 1st Respondent from taking any steps under the quit notice 'P35'.

The position of the Petitioners is that the said land is private land and that the 1st Respondent does not have any legal basis to form an opinion that the said

lands are State land, and therefore the said decision of the 1st Respondent to issue the quit notice 'P35' and to institute action under the provisions of the State Lands (Recovery of Possession) Act is arbitrary, irrational and illegal.

The State Lands (Recovery of Possession) Act was introduced in 1979 to provide for an expeditious mode of recovery of State land from persons who were in unauthorised possession or occupation of such state lands.¹ The purpose of the Act has been discussed in the case of Namunukula Plantations PLC v. Nimal Punchihewa², where this Court has held as follows:

"A competent authority can have recourse to the [State Lands (Recovery of Possession)] Act to evict any person who is in unauthorized possession or occupation of state land including possession or occupation by encroachment upon state land. Any possession or occupation without 'a valid permit or other written authority of the State granted in accordance with any written law' is unauthorized possession".

Prior to considering the legality of 'P35', it would be appropriate at this stage for this Court to lay down the structure of the Act. In terms of Section 3 of the Act, where the Competent Authority is of the opinion that any land is State land and that any person is in unauthorised possession or occupation of such land, he may issue a quit notice to the person in possession of the property identified in the said notice, requiring such person to vacate the said land with his dependents, if any, and deliver vacant possession of such land, on a date not less than thirty days from the date of the issue of the said quit notice. In

¹Ihalapathirana vs Bulankulame, Director-General U.D.A [1988 (1) Sri LR 416 at 420] – "The clear object of the State Lands (Recovery of Possession) Act is to secure possession of such land by an expeditious machinery without recourse to an ordinary civil action".

² CA (PHC) APN 29/2016; CA Minutes of 9th July 2018.

terms of Section 3(1A) of the Act, 'no person shall be entitled to any hearing or to make any representation in respect of a notice under subsection (1)'. In the event the person in possession fails to vacate such land and deliver vacant possession, the Competent Authority shall be entitled in terms of Section 5 of the Act to file an application for ejectment in the Magistrate's Court. The learned Magistrate is thereafter required to issue summons in terms of Section 6 of the Act to the person named in the said application to appear and to show cause as to why he should not be ejected from the land as prayed for in the application for ejectment. The scope of the Inquiry that has to be held by the learned Magistrate and the defenses that could be taken up by a person against whom an application has been filed for ejectment have been set out in Section 9 of the Act.³

It is therefore clear that a very strict regime has been put in place by the legislature to achieve the object of the State Lands (Recovery of Possession) Act, namely to secure possession of such land by an expeditious machinery without recourse to an ordinary civil action.⁴

As observed earlier, the primary contention of the Petitioners is that the land in question is a private land and therefore, the issuance of the quit notice 'P35' is bad in law. It is the position of the Respondents that the said land is State land. The Respondents have produced marked 'R1' Plan No. Pu/~~no~~/2012/026

³ Section 9 reads as follows:

"(1) At such inquiry the person on whom summons under section 6 has been served shall not be entitled to contest any of the matters stated in the application under section 5 except that such person may establish that he is in possession or occupation of the land upon a valid permit or other written authority of the State granted in accordance with any written law and that such permit or authority is in force and not revoked or otherwise rendered invalid.

(2) It shall not be competent to the Magistrate's Court to call for any evidence from the competent authority in support of the application under section 5."

⁴ Ihalapathirana vs Bulankulame, Director-General, U.D.A. 1988 (1) Sri LR 416 at 420.

prepared by the Surveyor General. The tenement list annexed thereto marked 'R1A' describes the State as being the claimant to the said land and specifies further that the said land is part of Lots F27 – K27 of Plan No. 165, which has been produced marked 'R3'. The Respondents have also submitted Preliminary Plan No. 1381 prepared in 1955 marked 'R2' which describes the lands referred to in the said plan as being waste land, the State as being the claimant to the said lands and that the said land is part of Lot Nos. G27 – I27 of Plan No. 165.

This Court must observe at this stage that in terms of Section 21 of the Survey Act No. 17 of 2002, *"Any cadastral map, plan, or any other plan or map prepared in accordance with the provisions of this Act or any written law, purported to be signed by the Surveyor General or officer acting on his behalf and offered in evidence in any suit shall be received in evidence, and shall be taken to be prima facie proof of the facts stated therein."*

This Court is of the view that the 1st Respondent had cogent material, in the form of a Surveyor General's plan that the said land was State land. In these circumstances, this Court is of the view that the opinion formed by the Divisional Secretary that the said land is State land is reasonable and is a decision that a reasonable man would have arrived at, on the strength of the Surveyor General's plan. Hence, this Court does not see any merit in the argument of the Petitioners.

This Court is further of the view that the Competent Authority is only required to form an opinion that the impugned land is State land and that the possession is unauthorised. The Competent Authority is not required in terms

of the Act to carry out an inquiry on the title, as long as he has cogent material to form an opinion that the land is State land.

This position has been clearly laid down in Farook v. Gunewardena, Government Agent, Ampara⁵ where it was held as follows:

“Where the structure of the entire Act is to preclude investigations and inquiries and where it is expressly provided (a) the only defence that can be put forward at any stage of the proceedings under this Act can be based only upon a valid permit or written authority of the State and (b) special provisions have been made for aggrieved parties to obtain relief, I am of the opinion that the Act expressly precludes the need for an inquiry by the competent authority before he forms the opinion that any land is State land.”

In any event, the question of title cannot be adjudicated by a Writ Court, as it involves disputed questions of fact, which could only be resolved by oral testimony of witnesses. The power of this Court to issue Writs when the facts are in dispute was considered in the case of Thajudeen v. Sri Lanka Tea Board and Another.⁶ In this case, it was held that where the major facts are in dispute, it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining the witnesses so that Court would be better able to judge which version is correct, and that a writ will not issue in such circumstances.

⁵ 1980 2 Sri L.R. 243.

⁶ 1981 2 Sri L.R. 471. See the judgments in Dr. Puvanendran and another v. Premasiri and two others [(2009) 2 Sri.L.R. 107]; Rajapaksha Pathiranage Namal Kumara vs Attanayake, Divisional Secretary of Mulatiyana [CA (Writ) Application No. 240/2017; CA Minutes of 4th April 2019]; Public Interest Law Foundation vs Central Environmental Authority [(2001) 3 Sri LR 330].

While following the judgment in Thajudeen's case, this Court, in Office Equipment Limited vs Urban Development Authority⁷ has referred to the following passage from Regina vs Jenner:⁸

"the process of judicial review, which rarely allows of the reception of oral evidence, is not suited to resolving the issues of fact involved in deciding whether activity said to be prohibited by it is caught by Section 90. These issues could not possibly be decided upon the contents of affidavits, which is the form of evidence usually received by the Divisional Court."

This Court is of the view that the question of the 2nd Petitioner's title is a matter for the Petitioners to establish in a civil court. As submitted by the learned Senior State Counsel, this position is fortified by Section 12 of the Act, which provides for title to a land to be vindicated by any person who has been ejected. In fact, in addition to vindicating title, in terms of Section 13 of the Act, a person could also obtain compensation for any damages sustained by being compelled to deliver up possession. The availability of an alternative remedy will always be a valid consideration when considering an application for judicial review. It is the view of this Court that as the 2nd Petitioner's claim is on the basis of several deeds of transfer, the remedy provided in Section 12 will be the most appropriate, suitable and effective remedy for the 2nd Petitioner.

⁷ CA (Writ) Application No. 1062/2000; CA Minutes of 5th September 2003.

⁸ 1983 1 WLR 873 at 877.

By the time this application was filed in July 2012, the 1st Respondent had already instituted proceedings in the Magistrate's Court, Puttalam under the provisions of the State Lands (Recovery of Possession) Act to eject the 2nd Petitioner from the land referred to in the quit notice. The learned Senior State Counsel has brought to the attention of this Court that the learned Magistrate of Puttalam had allowed the said application to eject the 2nd Petitioner by his Order dated 16th October 2012, and that the revision application filed by the 2nd Petitioner in the High Court, Puttalam has also been dismissed.⁹ In these circumstances, the learned Senior State Counsel submitted that the granting of the relief prayed for would be futile.

In Ratnasiri vs Ellawala¹⁰ what was sought to be quashed was the decision said to have been made by the Transfer Board, to whom the power of transfer has been delegated by the Public Service Commission. However, the Public Service Commission had approved and adopted the decision of the Transfer Board and no relief has been sought against that decision. Marsoof J P/CA (as he then was) held that it would be futile to grant the reliefs prayed for since it would still leave intact the decision of the Transfer Board.

The position is no different in this application as Judicial orders have already been made pursuant to the said quit notice. The Writ of Certiorari being a discretionary remedy, this Court would not exercise its discretion to quash 'P35' where it would be futile to do so or where it would be an exercise in vain.

⁹ HC Revision Application No. 15/2012; Order dated 11th February 2014.

¹⁰ 2004 (2) Sri LR 180 at 208.

In the said circumstances, this Court is of the view that the decision of the 1st Respondent to issue the quit notice is neither illegal nor irrational and therefore is of the view that the Petitioners are not entitled to a Writ of Certiorari to quash 'P35', or to the Writ of Prohibition prayed for. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal