

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

CA/Writ/No.778/09

In the matter of an application for a Mandate in the nature of Writs of Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Perumbda Pejjalage Jayantha
No.151
Hipawwa
Dalpotha
Kumbukwewa.

Petitioner

- Vs. -

1. Commissioner General of Agrarian Development.
2. Deputy Commissioner of Agrarian Development.
3. Agrarian Development Officer,
Agrarian Development Centre
Kumbukgete
Kurunegala.
4. P.P. Kularatne, Mudunpita
Hipawwa
Kumbukwewa.

Respondent

Before: **N. Bandula Karunaratna J.**

&

R. Gurusinghe J.

Counsel: E.M. Lakmini K. Edirisinghe for the Substituted 4A Respondent.
N. Kahawita SSC for the Hon.AG

Written Submissions: By the Petitioner filed on 08.03.2019

Argued on: 25/07/2019 and 22/02/2021

Judgment on: 17-03-2021

N. Bandula Karunarathna J.

In this application the Petitioner is seeking to have quashed an order made by the 1st Respondent embodied in the document marked "P5" annexed to the Petition, purportedly exercising powers vested in the 1st Respondent by Section 77 of the Agrarian Development Act No. 46 of 2000 (the decision of the 1st Respondent is marked as "P6" in the said document marked "P5").

It is submitted by the Petitioner that the Petitioner's name was entered in the Agricultural Land register as the tenant cultivator, in relation to the paddy land of which the 4th Respondent is the owner, in place of the father of the Petitioner, after an inquiry held by a subcommittee of agrarian services committee of Kumbukgete. The said inquiry was held in to an application made by the father of the Petitioner for transfer of his tenant cultivation rights to the Petitioner in terms of Section 11 (1) of the Agrarian Services Act No. 58 of 1979.

The Petitioner states that the 4th Respondent has filed a copy of the proceeding and the decision of the said inquiry with the consent of the Petitioner in this application by way of a motion dated 11/11/2011. According to the said document marked "P5" after an inquiry and investigation purportedly held by the 1st Respondent the said decision marked "P6" had been made. By the said purported order of the 1st Respondent, it has been decided that the decision made on 25/05/1998 to enter the name of the Petitioner in the Agricultural Land Register is against the provisions of law and the principals of Natural Justice and that decision is erroneous. Further, the 1st Respondent has annulled the said decision and ordered that the name of the Petitioner be struck off from the Agricultural Land Register.

The said decision has been made purportedly exercising powers vested in the 1st Respondent by Section 77 of the Agrarian Development Act No. 46 of 2000 (hereinafter referred to as the Act).

It was argued by the Petitioner that the 1st Respondent did not have power, in terms of Section 77 (1) of the Act, to make a decision of that nature. The first Respondent has powers in terms of Section 77 (1) to prevent the continuation of powers conferred on any organization, council or federation referred to therein being misused. In a situation where such powers have been misused, there is no continuation of such organization, council or federation.

Furthermore, the Petitioner states that there was no inquiry held with granting an opportunity for the Petitioner to represent her case before the said decision was made by the 1st Respondent and the Respondent have failed to place any material to show that there was such inquiry held before the said decision. Accordingly, it was argued that the said decision of the 1st Respondent is ultra vires and has been made in violation of principals of Natural Justice.

The Petitioner says that in terms of Section 53 (5) of the Act, if the 1st Respondent is satisfied that certain information should be entered in the agricultural lands register, 1st Respondent shall enter such particulars after hearing any parties affected. Accordingly, it was stated that in terms of Section 53(5) read along with 53(1) the 1st Respondent should have held an inquiry availing an opportunity for the Petitioner to make representation prior to the making of the said decision marked "P6". The said decision of the 1st Respondent is arbitrary, in breach of principals of natural justice and tainted by error of law on face of record.

The Petitioner argued that the 4th Respondent has taken up the position that he could have made an Appeal if he had been communicated the decision to insert the name of the Petitioner in the register as the tenant cultivator. It is evident from paragraph 5 (vi) of the document marked "P4" that the 4th Respondent has made an Appeal against the order of said-committee and that he was fully aware of the said decision and could have challenged the same without delay.

The Petitioner states that the Respondents have taken up the position that the Ombudsman is a necessary party and the failure to make the Ombudsman as a Respondent to this application is fatal. It was argued by the Petitioner that the Ombudsman is not a necessary party because his recommendations are not challenged and they are not amenable to Writ of Certiorari. In the circumstances, the Petitioner prays for this court to quash the said decision marked "P6" embodied in the letter marked "P5" by issuing a Writ of Certiorari and granting the reliefs as prayed for in the prayer to the Petition.

As opposed to the aforesaid Application of the Petitioner, the 4 A Respondent states that it is relevant to consider whether the order of the 1st Respondent to re-insert Petitioner's father's name as the tenant cultivator falls within purview of Section 77(1) of the Agrarian Development Act No. 46 of 2000.

Section 77(l) of the Agrarian Development Act states as follows;

Where the Commissioner-General is of the opinion that any power conferred on any Farmers' Organization or Agrarian Development Council or Farmers' Organizations District Federation or any farmers Organization Provincial Federation or the Sri Lanka Farmers' Organizations National Federation by this Act. Or by any regulations made there under has been misused, he shall forthwith take steps to prevent the continuation of such misuse.

The 4A Respondent says that at the inquiry held by the Agrarian Services Committee, Kumbukgete dated 25-05-2008 to transfer the tenant cultivator's rights to the Petitioner, the 4A Respondent being the owner of the said paddy land had objected to the said transfer. However, steps had been taken by the sub- Committee to enter the Petitioner's name as the tenant cultivator of the said paddy land without the knowledge of the 4A Respondent. It is further stated that Sasira was the person who gave the share to the 4A Respondent till his death in 2004. Thereafter the 4A Respondent had come to know that the Petitioner's name had been illegally entered by the sub- committee of Agrarian Service Committee, Kumbukgete as the tenant cultivator.

Therefore, the 4A Respondent submits that as the sub- committee of Agrarian Service Committee, Kumbukgete failed to inform the 4A Respondent regarding the amendment they made to the land register. The 4A Respondent didn't have an opportunity to appeal against the said decision of the sub- committee of Agrarian Service Committee, Kumbukgete, earlier. The said misuse of power by the sub- committee of Agrarian Service Committee, Kumbukgete had been recognized by the Ombudsman as shown in documents marked P3 and P4 and had made the recommendation to the 1st Respondent to take necessary steps to prevent the misuse of authority by the said sub- committee.

The 4A Respondent states that in the said document marked P3 it is clearly stated that under the provisions of Section II (I) of the Agrarian Services Act No. 58 of 1979 a tenant cultivator can transfer his tenant rights to his surviving spouse and where such spouse fails, his eldest child being preferred. It was argued that where such transfer had taken place in violation of said provisions it is null and void under provisions of Section 11(3) of the same Act.

Further the 4A Respondent states that in P3 and P4 even though the landlord, 4A Respondent had objected to the said transfer, the sub- committee of Agrarian Services Committee, Kumbukgete had entered the Petitioner's name as the tenant cultivator by violating the legal provisions of the Act. Therefore, the 4A Respondent stated that the said transfer of tenancy rights to the Petitioner is null and void in limine and it amounts to a continuation of misuse of power vested upon the sub- committee of Agrarian Services Committee, Kumbukgete.

The 4A Respondent further states that the 1st Respondent after observing decision of the sub- committee of Agrarian Services Committee, Kumbukgete to amend the register of lands upon the inquiry held on 25-05-1998 had taken steps in terms of Section 77(1) of the Agrarian Development Act No. 46 of 2000 prevent the continuation of said misuse by his decision in P6 to remove the Petitioner's name as the tenant cultivator from the Register of Lands.

It was argued that the 1st Respondent had acted within the powers vested upon him in terms of Section 77(1) of the Agrarian Development Act No. 46 of 2000 to prevent the continuation of misuse of power by the sub- committee of Agrarian Services Committee, Kumbukgete by entering Petitioner's name as the tenant cultivator.

The 4A Respondent states that in terms of Section 77 of the Agrarian Development Act No. 46 of 2000 there is no requirement to hold an inquiry by the 1st Respondent before he acts in terms of the provisions stated in the said Section 77. The 4A Respondent further submits that under the said Section 77 no opportunity will be granted to any person to place any materials before the 1st Respondent as the said section only deals with the prevention of the continuation of misuse of power by the officials who come within the purview of the Commissioner under the Act.

The 4A Respondent argues that there is no necessity to call neither the Petitioner nor the 4A Respondent for an inquiry by the 1st Respondent before taking steps to prevent the continuation of misuse of power by the officials. Thus, the 4A Respondent submits that the 1st Respondent's decision in P6 is intra vires and legal as the said Section itself does not require the 1st Respondent

to hold an inquiry before preventing any continuation of misuse of power by organizations stated in the said Section. This section provides to review the official acts of Administrative Officer by going through necessary files and relevant documents.

Further the 4A Respondent states that the 1st Respondent upon the recommendation made to him by the Ombudsman, he himself called for the necessary materials available with his officials and had reviewed the act of misuse of power by the sub- Committee. Accordingly, it was argued that, the 1st Respondent correctly made his decision P6 in terms of the Section 77 (l) of the Agrarian Development Act No. 46 of 2000. It is also necessary to consider whether by not applying the provisions of the Section 53 of the Agrarian Development Act No. 46 of 2000 the 1st Respondent availed the opportunity of the Petitioner to make her representation.

Section 53(1) of the Agrarian Development Act No 46 of 2000 states as follows:

Every Agrarian Development Council shall prepare, amend and maintain a register of the agricultural lands within its area of authority:

Provided that, the register relating to agricultural lands within the area of authority of the Council shall be prepared and certified by the Commissioner- General.

Section 53(5) of the Agrarian Development Act No. 46 of 2000 states as follows;

When the Commissioner-General is satisfied that certain information in respect of an agricultural land has not been entered in the Agricultural Lands Register maintained in the area where the land is situated, the Commissioner- General shall, after hearing any parties affected, have the power to enter the particulars relating to that agricultural land in the Agricultural Lands Register.

The 4A Respondent says that the Section 53(1) deals with the preparation, amendments and maintenance of the register of the Agricultural Lands and Section 53(5) deals with the insertion of certain information in the Register.

Section 53(5) vividly refers to insertion certain information which has not been entered to the Register of Agricultural Lands and not regarding any amendments to it. Therefore, the 4A Respondent argues submits that the 1st Respondent's decision P6 is an act under Section 77(l) of the said Act and it does not fall within the purview of Section 53(5) as it is not an insertion done but an act taken to prevent the continuation of misuse of power by the sub- committee of the Agrarian Service Committee, Kumbukgete.

Thus, the 4A Respondent says that the 1st Respondent's decision in P6 does not fall within Section 53(5) of the said Act and therefore there was no necessity to hold an inquiry before issuing the decision P6. It is further argued that the Petitioner's name had been entered to the Agricultural land register without following the required procedure to do so and such decision had not been communicated to the 4A Respondent precluding him from making an Appeal against it. Therefore the Petitioner's rights had not been affected by the 1st Respondent's decision in P6 as

the entry of the Petitioners name as the tenant cultivator in the agricultural land register was null and void from the beginning.

The 4A Respondent further states that it is also necessary to consider whether the 4A Respondent has made an appeal against the decision in 1998 of the sub- committee of the Agrarian Service Committee, Kumbukgete according to paragraph 5 (VI) of document marked P4. P4 is the letter date 25-08-2008 issued by the Ombudsman to the 1st Respondent recommending to act under Section 77(l) of the Agrarian Development Act No. 46 of 2000 to prevent the misuse of power done by the sub- committee of the Agrarian Service Committee, Kumbukgete by entering the Petitioner's name as the tenant cultivator of the said paddy land.

The 4A Respondent states that in the said paragraph 5(VI) of P4 it is stated as follows;

කෙසේ හෝ පැමිණිලිකරු අනුකමිටුවේ තීරණයට විරුද්ධව ගොවිකාරක සභාවට අභියාචනයක් ඉදිරිපත් කර ඇතත් ඒ සම්බන්ධයෙන් කිසියම් පියවරක් ගොවිකාරක සභාව පිළිනොගත් බව ඔහු ප්‍රකාශ කරන ලදී.

The 4A Respondent says that till the death of Petitioner 's father, Sasira in 2004 he was the person who paid the ande share to the 4A Respondent and the 4A Respondent became aware of the insertion of the Petitioner's name as the tenant Cultivator of the said paddy land after the death of Sasira in 2004. Thereafter, the 4A Respondent made an application to District Office of Agrarian Development, Kurunegala seeking an order to recover possession of the said paddy land. In document marked P2 it clearly indicates that the 4A Respondent had made an application seeking an order to recover possession of the said paddy land. The said application of the 4A Respondent had been dismissed by the 2nd Respondent stating that the said application had not been made within the stipulated time frame.

It is argued by the 4A Respondent that the Agrarian Services Committee, Kumbukgete failed to communicate the decision to insert Petitioner's name as the tenant cultivator at any instance and therefore, the 4A Respondent did not have an opportunity to appeal against the said decision. The said application of the 4A Respondent to recover possession of the said paddy land is a separate application made after the death of Petitioner's father, Sasira and not an Appeal.

The 1st Respondents decision in P6 which was made under the powers vested upon him in terms of Section 77(1) of the Agrarian Development Act No. 46 of 2000 to prevent the misuse of powers by the sub- committee of the Agrarian Services Committee, Kumbukgete and does not fall within the purview of the Section 53(1) or 53(5) of the said Act.

The 4A Respondent further submitted that, by document marked (P6) Sasira the father of the Petitioner had been made the tenant cultivator. But the original tenant cultivator is no more since 2004. Sasira's death has created a vacancy to be filed early. Accordingly, an application could be considered for this purpose. The failure to make such application since 2004 has created a situation to that as if the recognized heirs have abandoned the tenancy rights.

Therefore, the 4A Respondent says that though there is an available Alternative Remedy for the Petitioner to acquire the tenancy right of the said paddy land the Petitioner had not availed of the alternative remedy. Thus, the 4A Respondent argues that the said decisions embodied in P6 and P9 to remove the Petitioner's name as the tenant cultivator of the said paddy land are *intra vires* and legal and therefore, the said decisions P6 and P9 should not be interfered with.

It is pertinent to note that the section 11 (1) (b) of the Agrarian Services Act No. 58 of 1979 (Old Act) which deals with transfer of rights of tenant cultivator states as follows;

If he does not cultivate such extent either jointly or in rotation with any other tenant cultivator or cultivators, transfer his rights in respect of such extent to his spouse and failing such spouse to only one of his children the eldest being preferred to the others when there are more children than one.

The sub section 3 of the said Section 11 further states as follows

Any transfer by the tenant cultivator in violation of the provisions of subsection (1) or (2) shall be null and void and shall render the person in occupation of such extent to be evicted in accordance with the provisions of section 6 and on such eviction the provisions of subsection (5) of section 4 shall apply.

Thus, under the said section when a tenant cultivator transfers his tenant rights to another person, he should first consider his spouse and when the spouse is no longer surviving tenant cultivator can transfer his tenant rights preferably to his eldest child. It could be noted that under sub section 3 of section 11 it is well depicted that in an occasion where the tenant cultivator fails to do as stipulated in said section 1(1) any other transfer will render null and void.

At the inquiry held by the Agrarian Services Committee of Kumbukgete the father of the Petitioner, Sasira who was the tenant cultivator of the said paddy land had never mentioned that whether his wife was living with him or the Petitioner is his eldest child nor lead evidence to that effect and therefore, the decision to transfer the tenant cultivation rights of Sasira to the Petitioner is null and void.

It is pertinent to note that the Petitioner is not the eldest child of Sasira but the sixth child of him and therefore under section 11(1) (b) of Act No.57 of 1979 of which Sasira transferred his tenancy right to the Petitioner, the Petitioner is not entitled to the tenancy rights of her father, Sasira.

The Section 45(2) (b) of the Agrarian Services Act No. 58 of 1979 further states as follows;

Any application to the Committee for the amendment of the register of agricultural lands by the inclusion of the name of a new tenant cultivator in respect of any extent of paddy land shall be in writing and shall be accompanied by a letter from the landlord consenting to the registration of the applicant as the tenant cultivator of such extend.

Accordingly, under the said Section 45(2) (b) the written consent of the landlord must be given in order to include a name of a new tenant cultivator in the Agricultural Lands Register. Although

the Petitioner's name was included as the new tenant cultivator in the Agricultural Lands Register the 4th Respondent didn't give his consent for such inclusion verbally or in writing and in fact the 4th Respondent had objected to such inclusion. Therefore, the Agrarian Services Committee, Kumbukgete had no power to include Petitioner's name as the new tenant cultivator of the said paddy land.

The 4A Respondent made a complaint to the Ombudsman on 26-02-2007 regarding the inclusion of the Petitioner's name as the tenant cultivator in the Agrarian Land Register. The Section 15 (2) of the Parliamentary Commissioner for Administration Act No. 17 of 1981 states as follows;

Every investigation by the Ombudsman under this Act shall be conducted in private and no person shall be entitled as of right to be present at such investigation.

Further, sub section 3 of the said section 15 of the said Act states as follow;

The Ombudsman shall make all such inquiries as he considers necessary, but shall not be obliged to hold any hearing. He may hear the evidence of or obtain information or entertain representations from. such persons as he thinks fit. Subject to the provisions of subsection (4), no person shall be entitled as of right to give evidence or to make representations to the Ombudsman.

The Petitioner in her Petition claimed that she was not summoned for an inquiry by the Ombudsman; although in terms of Section 15(3) of the Parliamentary Commissioner for Administration Act No. 17 of 1981 it is not mandatory for the Ombudsman to call persons to appear before him for any investigation. In view of these legal provisions the said complaint of the Petitioner does not hold water as there is no legal compulsion to do so.

The Ombudsman by his letters marked P3 and P4 with the Petition had given recommendations to the 1st Respondent to investigate the matter under Section 77(1) of the Agrarian Development Act No. 46 of 2000 (New Act).

Section 77(1) of the Agrarian Development Act No. 46 of 2000 which relates to the powers of the Commissioner of Agrarian Development states as follows;

Where the Commissioner-General is of opinion Powers that any power conferred on any Farmers' Organization or Agrarian Development Council or Farmers' Organizations District Federation or any Farmers' Organization Provincial Federation or the Sri Lanka Farmers' Organizations National Federation by this Act, or by any regulations made thereunder has been misused, he shall forthwith take steps to prevent the continuation of such misuse.

Thus, under Section 77 of the Agrarian Development Act No. 46 of 2000 (New Act) the Commissioner of Agrarian Development is vested with wider powers to take necessary steps to prevent any power misused by any organization stipulated in section 77 of the said Act. Under the provisions of the said section there is no legal compulsion made that the commissioner

should conduct an inquiry or an investigation before taking any necessary steps to prevent any misuse caused.

In paragraph 2 of the document marked as P5 with the Petition clearly indicates that the 1st Respondent after conducting a proper investigation about the amendment done to the Agricultural Land Register dated 25-05-1998 by the Agrarian Services Committee had correctly taken the decision to remove the name of the Petitioner from the Agricultural Land Register.

As the Petitioner had stated in her petition, her father Sasira died in 2004 and the inclusion of Sasira's name as the tenant cultivator was done by the 3rd Respondent in September 2009. Under Section ID (I) of the new Agrarian Development Act No. 46 of 2000 where the tenant cultivator is dead his tenant rights are devolved on his surviving spouse and in the event the spouse is no longer surviving then the rights are devolved on one of his children.

The said section ID (I) of the new Agrarian Development Act NO. 46 of 2000 states as follows;

The rights of a tenant cultivator under the principal enactment in respect of an extent of paddy land shall in the event of the death or permanent disability of such tenant cultivator, devolve on the surviving spouse of such tenant cultivator and failing such spouse, on only one of the children of such tenant cultivator.

Provided further, if there is more than one child, whose sole means of living is cultivation, the oldest from amongst such children shall be preferred to the others.

Therefore, without having made an application under Section ID (I) of the Agrarian Development Act No. 46 of 2000 requesting to include the Petitioner's name as the tenant cultivator, the Petitioner straight away had come before this Court. After Sasira's name was included as the tenant cultivator again in the Agrarian land register in 2009 and as the Petitioner had not make any application under Section 1D (I) of the Agrarian Development Act No. 46 of 2000 the 4th Respondent had transferred the said paddy land to 4A Respondent and his other four daughters in 2009.

It could be noted that since 2009 the 4A Respondent cultivates the paddy land to date with the consent of the other four co-owners of the paddy land who are her sisters. And therefore the 4A Respondent had been substituted in the room of the deceased 4th Respondent.

It is also pertinent to note that there are three grounds of review of an administrative decision of a public officer or public body as recognized in the case of DESMOND PERERA AND OTHERS

v KARUNARATNE, COMMISSIONER OF NATIONAL HOUSING AND OTHERS [1994] 3 SLR 316 as follows;

- I. Illegality
- II. irrationality
- III. Procedural impropriety

I do not believe that the Petitioner could prove that the Petitioner comes under above mentioned three grounds for review and a writ cannot be issued accordingly.

The 1st Respondent acting within the powers vested upon him under Section 77(1) of the Agrarian Development Act No. 46 of 2000 had conducted an investigation and very correctly directed the 2nd Respondent to remove the Petitioner's name from the Agrarian Land Register. Under the directions of the 1st Respondent, the 2nd Respondent by issuing P5 and P6 had taken necessary steps to remove the Petitioner's name from the said Agrarian Land Register.

The 1st, 2nd and 3rd Respondent had acted within the power vested upon them under Agrarian Development Act No. 46 of 2000 and very correctly made the decision to remove the Petitioner's name as the tenant cultivator of the said paddy land and therefore, the decisions embodied in P6 of the 2nd Respondent and P9 of the 3rd Respondent should not be interfered with.

Therefore, I hereby dismiss the application of the Petitioner, with cost.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal