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

Court of Appeal (Writ)
Application No: 490/2015

In the matter of an application for a writ of Mandamus under and in term of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hagalan Mudiyanselage Chandana Bandara Kahawatta,
Bowatenna Yaya,
Pubbogama.

Petitioner

-Vs-

1. Resident Project Manager,
   Mahaweli Authority of Sri Lanka,
   Project Office,
   Huruluwewa Zone,
   Welwehera,
   Dambulla.

2. Sri Lanka Mahaweli Authority,
   No. 500,
   T.B. Jayah Mawatha,
   Colombo 10.

3. Rathupunchi Dewayalage
   Wimalasuriya,
   Konpolayagama,
   Pubbogama.

4. Wanasinghe Mudiyanselage
   Muthubanda,
   Mahameegas Wewa,
   Namal Pura,
   Galenbindunu Wewa.

Respondents

Before: C.P. Kirtisinghe – J.
Mayadunne Corea – J.

Counsel: Dr.Sunil Coorey with Tony Mutalip and D. Panditharathne for the Petitioner.
Shantha Jayawardena with Hiranya Damunupola for the 1st and 2nd Respondents.

Argued on: 05.10.2022 and 11.10.2022

Decided On: 10.11.2022

C. P. Kirtisinghe – J.

The Petitioner is seeking for a mandate in the nature of a writ of mandamus directing the 1st and 2nd Respondents to issue a permit to the corpus in this case under the Land Development Ordinance.

The facts of the case can be summarized as follows:

The 4th Respondent was the original permit holder for the block of land no. 426 which is the corpus of this application and he had been cultivating the land. After the 4th Respondent was seriously injured on his leg by a gunshot injury and became disabled, he had handed over the land for cultivation to the Petitioner's father who cultivated it thereafter.

After some time, the Petitioner's father had handed over the land for cultivation to the Petitioner due to his old age, with the consent of the 4th Respondent. It appears from the available material that the permit issued to the 4th Respondent was cancelled subsequently and the Petitioner had been cultivating the land. Thereafter, in 1993 an inquiry for regularizing unauthorized persons (අනවසර නියමානුකූල කිරීමේ පරීක්ෂණය) was carried out in a Land Kachcheri and the Petitioner had submitted his name as an Applicant with the consent of the 4th Respondent. No one else applied. According to the Petitioner, he was selected for recommendation at the inquiry. The Petitioner states that the document marked X1 is the list of the selectees which was given to him by the Block Manager after the inquiry. According to the Petitioner, without cancelling the aforementioned Selectees' List, the applications were called once again in 1995 for another Land Kachcheri for regularizing unauthorized persons and the Petitioner had submitted an application for that inquiry as well. The 3rd Respondent also had submitted an application for the same land at the second

inquiry. Therefore, no decision was made with regard to the selection to the land. Thereafter, the 1st Respondent had prohibited the cultivation of the land and the 3rd Respondent had tried several times to cultivate the land disregarding the order of the 1st Respondent preventing the cultivation of the land and the Petitioner had complained to the Authorized Officers against the conduct of the 3rd Respondent and prevented the aforesaid actions of the 3rd Respondent. The Petitioner states that the 1st and 2nd Respondents were unlawfully, illegally and wrongfully delaying the issuance of a permit to the Petitioner with regard to the said land. The Petitioner states that he legitimately expected to be granted a permit for the said land since the previous permit holder, the 4th Respondent had entrusted the cultivation of the land to the Petitioner and the Petitioner had been cultivating the land since 1988 and even at the time the inquiry was held in 1993. While this writ application was pending in this court, the Mahaweli Authority had issued a permit to the 3rd Respondent.

The 3rd Respondent in his Statement of Objections had stated that the document marked X1 has no reference to the subject matter of this application and the Petitioner has failed to identify the subject matter of this case. He states that while pending this application, the 1st and 2nd Respondents have issued a permit for the 3rd Respondent and the Plaintiff has failed to prove that the land which he claims is the property given to the 3rd Respondent in terms of the aforesaid permit.

The 1st and the 2nd Respondents in their joint Statement of Objections state that the Petitioner challenges the lawfulness of an administrative step that has been taken by the officials of the 2nd Respondent 20 years ago with an inordinate and huge delay. They state that the document marked X1 is just a recommendation for a field inspection and not a list of selectees as described by the Petitioner. They state that the discretion and decision of alienating state lands is with the state and the relevant authorities and the unauthorized occupants cannot claim a permit as of right based on the fact that they are in unauthorized occupation. The Petitioner cannot claim for any entitlement for a permit to a state land as a legal right.

The 3rd Respondent is challenging the identity of the land. According to the Petition, the subject matter of this writ application is the allotment of land no. 426 which is described in the schedule to the Petition. According to the documents marked X3, X4, X5, X7 and X8 the inquiry had been held in respect of lot no. 426 and that was the land which had been given to the 4th Respondent

earlier. The dispute had arisen in respect of that land and it is the land in which the Unit Manager of the Mahaweli Authority had prohibited the cultivation. According to the permit tendered by the 3rd Respondent marked Y1, it is to that land that a permit was issued to the 3rd Respondent subsequently. Therefore, no difficulty arises in identifying the land and the subject matter of this case is the allotment of land bearing no. 426 which has been described in the schedule to the Petition and to which a permit has been issued to the 3rd Respondent pending this action.

Although the 1st and 2nd Respondents state that the document marked X1 is merely a recommendation for a field inspection and not a list of selectees as described by the Petitioner from the contents of the document it appears that it is something more than a recommendation for a field inspection and the 3rd Respondent who has a competing claim against the Petitioner has not taken up that position. In his Answer to the averments contained in paragraphs 6 and 7 of the Petition, the 3rd Respondent has not denied the fact that X1 is a list of selectees. The heading to that document reads as follows:

"ගල්කිරියාගම කොට්ඨාශයේ අනවසරයෙන් භුක්ති විඳින ගොඩ/මඩ ඉඩම් සඳහා 1993 දෙසැම්බර් මස 05, 06, 23, 34, 30 දිනවල පැවති අනවසර පරීක්ෂණ වාර්තාව (ක්ෂේත්‍ර පරික්ෂාව)."

In the document marked X3, a letter addressed to the Unit Manager of the Mahaweli Authority by the Area Manager of the Mahaweli Authority in the area, this inquiry had been referred to as අනවසර නියමානුකූල කිරීමේ පරීක්ෂණය. Therefore, it is apparent that it was an inquiry which was held for the purpose of regularizing the unauthorized persons who were in occupation of state land coming under the supervision of the Mahaweli Authority. The document marked X1 has various subheadings as follows:

1. 67 යටතේ නිර්දේශිත
2. නිර්දේශිත
3. වාර්ෂික බදු යටතේ නිර්දේශිත
4. කට්ටි කඩා නැති නිර්දේශිත

The Petitioner's name is listed under the category of **'67 යටතේ නිර්දේශිත'**. 67 is the number of a Circular issued by the Mahaweli authority in respect of regularizing the unauthorized occupants of Mahaweli land and the learned Counsel for the Respondents has furnished us a copy of it. From the document

marked X1, it is apparent that in 1993 when the first inquiry was held the Petitioner had been in occupation of the subject matter of this case and he alone was cultivating it. No one else had cultivated the land at that time. The fact that his name was listed under the subheading **'67 යටතේ නිර්දේශිත'** shows that the Petitioner was recommended for the issuance of a permit to the subject matter of this case under the provisions of the Land Development Ordinance. The purpose of the inquiry was to find out the persons who had been in unlawful occupation of state land and regularize their possession by issuing permits. At the inquiry, no one else other than the Petitioner had claimed for this land on the basis that he was cultivating the land. Therefore, one can come to the conclusion that the Petitioner was selected for recommendation for the issuance of a permit at this inquiry. The word **'67 යටතේ නිර්දේශිත'** in the document marked X1 indicates that the Petitioner's name was recommended for a permit. Once the Petitioner was selected for recommendation, it is the duty of the Mahaweli Authority to issue a permit in the name of the Petitioner unless he is disqualified for a permit on other grounds. The 1st and 2nd Respondents had not stated in their Statement of Objections and the Affidavit that the Petitioner was disqualified for a permit on other grounds. Although the Petitioner is an unauthorized occupier of state land and he does not have a right to demand for a permit on the mere ground that he was in occupation of the land, the main purpose of holding a Land Kachcheri and an inquiry to regularize unlawful occupation of the occupants is to issue permits to those who are in unlawful occupation unless they are disqualified for a permit on any other ground. Therefore, the officers of the Mahaweli Authority have no right to refuse the granting of a permit to an unlawful occupier merely on the ground that he has no right to ask for a permit to a land in which he is in unlawful occupation. The Mahaweli Authority has no right to refuse the granting of a permit merely on the ground that the discretion and decision of alienation of state lands is with the state and relevant authorities. That discretion must be exercised fairly and reasonably.

The most significant development in the use of reasonableness as ground for review is the case of **Secretary of State for Education Vs. Tameside Metropolitan Borough Council [1977] A.C. 1014 at 1064 (C.A.).** In that case, the secretary of state was given a statutory power to overrule an elected local Council if he was "satisfied…that any local education authority…have acted or are proposing to act unreasonably". A secretary of state, who was a member of the Labour party, used this section to block the implementation of the policies

of a Conservative Local Authority. There was then a conflict of discretion – the discretion of the secretary of state in deciding when "he is satisfied" and the discretion of the Local Council to make policy, which should be overturned only for unreasonableness. There was an explicit finding of good faith on the minister's part. Furthermore, there was no conclusive evidence that the minister misdirected himself or considered irrelevant matters. Nevertheless, the minister's decision was reviewed and quashed. The explanation must be that the secretary of state made a decision so manifestly unreasonable about the reasonableness of the Local Council's policies that the court was entitled to quash it even without an explicit error or misdirection on the minister's part. All that is necessary is that the discretionary decision be such that no reasonable person could make it.

The question arises whether the "duty to be fair" is always a part of the duty to act reasonably. S.A. De Smith in his Judicial Review of Administrative Action (3rd Edition London 1973) suggests that **"fairness"** has a substantive side and applies in some form to most questions of discretion. J. H. Grey in an article titled "Discretion in Administrative Law" in Osgoode Hall Law Journal Volume 17 No. 1 (April 1979) says thus,

"It is thus very likely that the doctrine of "fairness" will apply, to some extent, to all use of discretion, although the extent will vary greatly from discretion to discretion"

Therefore, the Petitioner has a right to ask for a mandate in the nature of a writ of mandamus against the 1st and 2nd Respondents and the Petitioner has a *locus standi* to make this application. The Petitioner also has a legitimate expectation for a permit granted in his favour. The Petitioner had been selected for recommendation for a permit as far back as 1993. The Petitioner had made this application to this court in 2015. That delay cannot be treated as laches on the part of the Petitioner as he was attempting to get a permit for himself during this period and the 1st and the 2nd Respondents were delaying the issuance of a permit without making a decision on the application of the Petitioner. Even in 2015 at the time of the institution of this application, the 1st and 2nd Respondents had not made any decision regarding the application of the Petitioner. That conduct of the 1st and 2nd Respondents amounts to an implied refusal of the application of the Petitioner. The fact that a permit was issued to the 3rd Respondent pending this application strengthens this position. That is clearly a refusal of the Petitioner's application.

The learned Counsel for the 1st and 2nd Respondents submitted that the Mahaweli Authority is willing to cancel the permit that had been issued to the 3rd Respondent while this case was pending. The 3rd Respondent had informed to court that a permit had been issued to him in his Statement of Objections on 10th October 2016. But so far, no step had been taken by the Mahaweli Authority to cancel that permit. The 2nd Respondent Mahaweli Authority is responsible for the acts committed by its officers. The learned Counsel for the 1st and 2nd Respondents submitted that the person who issued the permit to the 3rd Respondent was unaware of the pending writ application. The 1st Respondent in this application is the Resident Project Manager of the Mahaweli Authority. Therefore, one cannot say that there was lack of communication between the officers and the person who issued the permit was unaware of this case. The act of issuing a permit to the 3rd Respondent while the pendency of this writ application clearly demonstrates that the 1st and the 2nd Respondents and their subordinates were acting maliciously against the Petitioner. After preventing the Petitioner, who had been cultivating this land for a long period of time, from cultivating the land a permit had been granted to the 3rd Respondent who was never in possession in 1993 when the inquiry was held. That shows that the 1st and 2nd Respondents and their subordinates had acted maliciously, unfairly and unreasonably.

For the aforementioned reasons, we issue a mandate in the nature of a writ of mandamus directing the 1st and 2nd Respondents to issue a permit to the Petitioner for the subject matter of this case. It necessarily implies that the 1st and 2nd Respondents will have to cancel the permit that has been already issued to the 3rd Respondent as agreed upon by the learned Counsel for the 1st and 2nd Respondents.

Judge of Court of Appeal

Mayadunne Corea – J.

I Agree

Judge of Court of Appeal