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

In the matter of an application for the grant of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution.

CA(WRIT) Application
No. WRT 181/20

Ahamathu Lebbe Katheeja Umma
No. 54,
Ashraff Nagar,
Oluvil-01

Petitioner

Vs.

1. W.A.C. Weragoda,
   Conservator General of Forests,
   Forest Department of Sri Lanka,
   82, Rajamalwatta Road, Battaramulla.

2. S.M. Chandrasena,
   Hon. Minister of Land and Land Development,
   Ministry of Land and Land Development,
   "Mihikatha Madura", Land Secretariat,
   No. 1200/6 Rajamalwatta Road,
   Battaramulla.

3. Lieutenant General Shavendra Silva,
   Commander of the Sri Lanka Army,
   Sri Lanka Army Headquarters,

Sri Jayewardenepura.

RESPONDENTS

1A. Dr. K.M.A. Bandara,
Conservator General of Forests,
Forest Department of Sri Lanka,
82, Rajamalwatta Road,
Battaramulla.

2A Harin Fernando,
Hon. Minister of Tourism and Lands,
Ministry of Tourism and Lands,
"Mihikatha Madura",
Land Secretariat,
No.1200/6
Rajamalwatta Road, Battaramulla.

3A. Major General Vikum Liyanage
Commander of the Sri Lanka Army,
Sri Lanka Army Headquarters,
Sri Jayewardenepura.

ADDED RESPONDENTS

Before: **D.N. Samarakoon, J.**
B. Sasi Mahendran, J.

Counsel: Pulasthi Hewamanna with Fadhila Fairoze and Githmi Wijenarayana instructed by Tharmaja Tharmarajah for the Petitioner
Vikum de Abrew, ASG, PC with Shamanthi Dunuwille SC for the Respondents

Written Submissions: On 24.11.2022(by the Petitioner) 25.11.2022(by the Respondents)

Argued On : 14.10.2022 and 22.11.2022

Decided On : 30.11.2022

B. Sasi Mahendran, J.

The Petitioner, by Petition dated 21st July 2020, applied to this Court in terms of Article 140 of the Constitution seeking a Writ of Certiorari to quash the decision of the 1st Respondent (The Conservator General of Forests acting as the "competent authority") to issue the Quit Notice ("P3a") under Section 3 of the State Lands (Recovery of Possession) Act No. 7 of 1979, as amended; a Writ of Prohibition preventing any one or more of the Respondents from proceeding with the said Quit Notice; an award of compensation.

The crux of the Petitioner's grievance is that the competent authority's decision to evict her from the land described in the Schedule of the Notice is unreasonable or irrational and arbitrary because she continues to occupy the land with her family in the capacity of a permit holder. The Permit issued to her under Section 19(2) of the Land Development Ordinance No. 19 of 1935, as amended, is marked "P1a". She states that the impugned 'Quit Notice' ("P3a") had been served on her husband. The said Notice dated 3rd March 2020, was received on 24th June 2020, under registered cover. They were ordered to vacate the land by 25th July 2020.

The Respondents, on the contrary, contend that the Petitioner is an illegal occupier of land situated in a State forest falling within the purview of the Department of Forests. It should be noted that, as per the Respondents' Statement of Objections, this land, situated in the Pallekadu forest, was under the control of the Divisional Secretary of Ampara, and in 2007 the control of the land had been handed over to the Forest Department. Nonetheless, the Respondents have failed to submit any material, including the Gazette under which such lands were handed over to the Forests Department, to substantiate this point. This is important to stress because it was only after such purported handing over, that permits had been issued to the Petitioner and many others (sixty-eight others, as per the Petitioner's Fundamental Rights Application "P2a") by the

Divisional Secretary for such land under the Land Development Ordinance in the year 2011. At this point, a question that arises is if the lands were under the purview of the Forests Department, how could the Divisional Secretary have issued permits, especially since the Divisional Secretary must first ascertain the situation of the land prior to making the selection of who is entitled to it at the Kachcheri. Even if such Kachcheri is not undertaken, Section 20(a) of the Land Development Ordinance provides that the Land Commissioner can immediately alienate the land if it is desirable in the interests of the applicant "**and that there are no other interests in the land in question which are likely to be prejudiced**". The interests of the Forest Department would indeed be prejudiced by an alienation of the land which is alleged to be under the control of the Forest Department.

In addition, it is contended, that the Petitioner does not have locus standi to file this application as the Quit Notice was served on her husband.

At the outset, it must be stated that we do not see any merit in the locus standi argument. The Petitioner's husband occupies the land in the capacity of a dependent of the permit holder. If the permit holder is permitted to occupy the land, the purpose that would be served if the spouse of the permit holder is asked to vacate the land is perplexing. The logic in serving a Quit Notice on the spouse of a permit holder, puzzling as it is, has the effect of rendering the permit nugatory. It is also a disruption of the family life of a lawful occupant. It need not be reminded that **the State shall recognize and protect the family as the basic unit of society** in terms of the Directive Principles of State Policy (vide Article 27(12) of the Constitution).

The State Lands (Recovery of Possession) Act No. 7 of 1979, as amended provides for an expeditious method of recovery of "state lands" without the State being forced to go through a very cumbersome process of a protracted civil action and consequent appeals (Vide L.H.M.B.B. Herath v. Morgan Engineering [2013] 1 SLR 222). According to Section 3(1) of the Act, where a **competent authority** forms an opinion that any land is State land and that a person is in unauthorised possession or occupation of that land, the competent authority may serve a notice (referred to as a "Quit Notice") on such person requiring such person to vacate that land and to deliver vacant possession of that land. This Section reads:

> Where a competent authority is of the opinion
>
> (a) that any land is State land; and

(b) that any person is in unauthorized possession or occupation of such land, the competent authority may serve a notice on such person in possession or occupation thereof, or where the competent authority considers such service impracticable or inexpedient, exhibit such notice in a conspicuous place in or upon that land requiring such person to vacate such land with his dependants, if any, and to deliver vacant possession of such land to such competent authority or other authorized person as may be specified in the notice on or before a specified date. The date to be specified in such notice shall be a date not less than thirty days from the date of the issue or the exhibition of such notice.

Section 18 of the Act defines "unauthorized possession or occupation" thus:

except possession or occupation upon a valid permit or other written authority of the State granted in accordance with any written law, and includes possession or occupation by encroachment upon state land.

Therefore, this statutory scheme is set in motion once the competent authority has formed an opinion that the land is State land (first limb) and that the person is in unauthorized possession or occupation of that land (second limb). That is a condition precedent to issuing a Quit Notice.

It is well-settled that, as adverted to above, the objective of this Act is to create, to use the words of his Lordship S.N. Silva J. (as he then was) in Ihalapathirana v. Bulankulame [1988] 1 SLR 416, "an expeditious machinery for the recovery of state lands from persons in unauthorised possession or occupation" as "urgency appears to be the hallmark of the Act" (per his Lordship Abdul Cader J. in Farook v. Gunewardene [1980] 2 SLR 243).

Notwithstanding that objective, it is also settled law that this Court in the exercise of its supervisory jurisdiction, conferred by virtue of Article 140 of the Constitution, unless this extraordinary Writ jurisdiction has been ousted by the Constitution itself, must test the lawfulness of the opinion of the competent authority on the basis of the well-established grounds of judicial review. In Dayananda v. Thalwatte [2001] 2 SLR 73 his Lordship Jayasinghe J. opined that it was open for the Petitioner to seek to quash the Quit Notice by way of certiorari when the determination was made by the 1st Respondent. Citing this judgment, in Amarasiri Gunarathna v. Senarath Bandara CA PHC 212/2006 decided on 24.07.2018, his Lordship Janak De Silva J., observed that the competent authority's ultra vires action in commencing proceedings contrary to Section 14(2) of the Act, "is an issue to be tested in appropriate proceedings where administrative law principles apply". More recently, his Lordship Sobhitha Rajakaruna J. in Padmanadon v.

General Manager, Department of Railway CA/MC/REV/28/2016 decided on 20.11.2020, observed, "Also, a writ proceeding does lie to the Court of Appeal if the alleged unauthorized occupant could show that the Competent Authority's action is ultra vires."

We are mindful that Section 3(1A) of the Act takes away the right to a hearing of the person to whom the Quit Notice has been served. There is no opportunity to make representations to the competent authority either. By this provision, that person is forbidden from canvassing her grievance before the competent authority. This also illustrates why the competent authority must exercise care and caution when forming that opinion. This Section was introduced by the State Lands (Recovery of Possession) (Amendment) Act No. 29 of 1983, following the judgment of Senanayake v. Damunupola [1982] 2 SLR 621.

Accordingly, although a competent authority need not grant a hearing, the "vires" of the competent authority's opinion, is not immune from judicial review on the grounds of illegality and irrationality. The observation of his Lordship Arjuna Obeyesekere J. in Udagedara Waththe Anusha Kumari v. Jayasinghe Mudiyanselage Chamila Indika Jayasinghe, CA (Writ) Application No. 293/2017 decided on 18.11. 2019, is most apposite:

"The principle then is that while no inquiry is needed to form an opinion, there should be a rational basis to form the opinion that the State is lawfully entitled to the land. The rational basis should satisfy the Wednesbury test of reasonableness."

In the case of Udagedara Waththe Anusha Kumari (supra) his Lordship Arjuna Obeyesekere J. reviewed the reasonableness of the opinion formed by the competent authority (the Divisional Secretary) with regard to the first limb i.e. whether the land is state land. The question for determination, in that case, was whether "...the Respondent act[ed] illegally or unreasonably or irrationally when he formed his opinion that the land which is the subject matter of the said quit notice is State land." It was held:

"The strict regime for the expeditious recovery of State land stipulated in the Act only provides a person served with a quit notice, the limited remedies under Section 9, and a person against whom an Order of ejectment has been issued, an opportunity to vindicate her title under Section 12 of the Act. **It is the view of this Court that the legislature could not have intended for the Competent Authority's opinion, which can have far reaching consequences on one' s proprietary rights, to be baseless. The Competent Authority's opinion must thus be formed on a rational basis. What constitutes a rational basis must be ascertained case by case**." [emphasis added]

We entirely agree with this proposition of law and would adopt the following dicta of his Lordship as well:

"This Court wishes to reiterate that merely because a person who is ejected or against whom an order for ejectment has been made, has a remedy by way of Section 12 does not absolve the Competent Authority from his obligation to act reasonably and legally, when forming the all important opinion in terms of Section 3."

In the instant case, there is no dispute that the land concerned is State land. The dispute surrounds the second limb i.e. whether the Petitioner and her family are in unauthorized possession or occupation of the land concerned (the second limb).

After the arguments concluded, the Respondents, by way of a motion dated 15th November 2022, produced an Affidavit ("X1") and a supporting document ("X2)", and informed us that the Petitioner's permit had been cancelled. The Affidavit ("X1") of the incumbent Divisional Secretary of Addalaichenai affirms that the Provincial Land Commissioner of the Eastern Province had revised the decision of the former Divisional Secretary to issue the permit to the Petitioner. This revision had been done under Section 23A of the Land Development Ordinance. Section 23A reads thus:

Where by reason of a decision of a Government Agent made at a Land Kachcheri or otherwise a person is notified of his selection for the alienation of land or a person is in occupation of any land as a permit-holder, the Commissioner-General of Lands [formerly Land Commissioner] may, within one year after the date on which such selection was notified or such person has been in occupation of such land, vary by way of revision the decision of the Government Agent, if in the opinion of the Commissioner-General of Lands [formerly Land Commissioner] the selection has not been made in accordance with the provisions of this Ordinance.

It is evident, on a careful reading of this Section, that this Section can be relied on by the Commissioner General of Lands only to vary or revise the "selection" of the Divisional Secretary. As spelled out in Section 23, it is the Divisional Secretary at a Land Kachcheri that selects the applicants to whom state land is to be alienated to. Section 23A enables the Commissioner General to act as a "check" on the selection done by the Divisional Secretary. There is nothing to say that the selection of the Petitioner to the land concerned was erroneous. Even in the letter ("X2") issued under the hand of the Provincial Land Commissioner of the Eastern Province to the previous Divisional Secretary of Addalaichenai, there is nothing to show that the nine persons to whom permits have been granted (including the Petitioner, as mentioned in that letter) were wrongly selected. This Section cannot be used to cancel or revoke permits by an artificial

interpretation of the word "selection" to mean, the selection of lands to be alienated. Even if one sets aside logic and common sense to read the word "selection" to mean the selection of the land to be alienated, "X2" does not state that the land alienated has been wrongly selected either.

The Provincial Land Commissioner appears to have misapplied or misconstrued Section 23A to cancel the permits. This is ultra vires, and we cannot permit this decision to stand. We are mindful that this letter was issued in 2012 and that it cancels the permits of eight other persons as well. Those permits must be cancelled or revoked only by law and not by caprice disguised as law. Therefore, the Respondents are urged to act in terms of the law when cancelling the permits. If the permits are lawfully cancelled then that would disentitle the Petitioner and others concerned from challenging the Quit Notice since they no longer occupy the land on a lawful permit.

At the argument stage, the learned State Counsel for the Respondents indicated to Court that if there is a valid permit the Petitioner can defend herself in the Magistrate's Court under Section 9 of the Act. However, as mentioned above, there is no bar to a person to whom the Quit Notice has been served to challenge the "vires" of the opinion which forms the basis of the decision to issue the Quit Notice. If that route is not availed of, it is then that Petitioner can raise the fact that she has a valid permit before the Magistrate's Court.

Further, reliance was placed on Section 53A of the Forest Ordinance (as amended) during the course of arguments to justify cancellation of permits. This Section is inapplicable to the facts of the case as the Petitioner has not been convicted of unlawfully clearing or encroaching forest land.

In the light of ultra vires cancellation of the permit, an issue that arises then is whether the Competent Authority had considered the fact that the land was the subject matter of a valid permit when it formed an opinion under Section 3 of the Act. This is because as **the Preamble of this Act sets out, it was enacted to recover the possession of State lands from persons in unauthorized possession or occupation. A person to whom a valid permit has been granted therefore cannot fall within the definition of "unauthorized possession or occupation"**. The competent authority cannot act unless the condition precedent as aforesaid is satisfied.

The fact that the competent authority has not properly formulated that opinion is evident when considering that the Quit Notice issued to the 2nd Petitioner in the related

application (CA Writ Application No. 182-20) was undertaken to be withdrawn. This undertaking was made on the 22nd of November, when this matter was taken up to support the Respondents' motion dated 15th November. Further, it must be noted that, the Respondents in their written submissions, while raising an objection as to the absence of the Divisional Secretary of Addalaichenai as a necessary party, have stated that "the supporting documents **were not in custody of the 1st Respondent**. The 1st Respondent as the competent authority had issued the Quit Notice on the 1st Petitioner on the premise that the permit issued to the 1st Petitioner was not a valid permit as it had been cancelled by the Provincial Commissioner of Land." This then creates doubt about whether the opinion had been correctly formulated and whether all the relevant documents were considered when forming that opinion, since at the argument stage, or even in their Statement of Objections before the argument stage, there was no mention that the 1st Respondent based his opinion on such letter. The letter, if not in his custody initially, could have been submitted to this Court, with our permission, even later. However, there was no mention that the opinion was formulated on that letter.

Having said that, we will address whether the failure to include the Divisional Secretary of Addalaichenai as a party to this application is fatal. The Supreme Court in Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thero [2011] 2 SLR 258 set out two rules in this regard. The relevant excerpt of the judgment of his Lordship Amaratunga J. reads:

"The first rule regarding the necessary parties to an application for a writ of certiorari is that the person or authority whose decision or exercise of power is sought to be quashed should be made a respondent to the application. If it is a body of persons whose decision or exercise of power is sought to be quashed each of the persons constituting such body who took part in taking the impugned decision or the exercise of power should be made respondent……

If the act sought to be impugned had been done by one party on a direction given by another party who has power granted by law to give such direction, the party who had given the direction is also a necessary party and the failure to make such party a respondent is fatal to the validity of the application.

The second rule is that those who would be affected by the outcome of the writ application should be made respondents to the application…."

In the instant application, the decisions sought to be impugned were made by the 1st Respondent in his capacity as the competent authority. The issue before us is whether

he correctly formed an opinion that the land was state land and that the occupants were not in lawful occupation. It is this action of the competent authority and not the Divisional Secretary that is sought to be impugned. The issue does not concern the cancellation of permits. This objection cannot be maintained.

If there is a valid permit then, it is manifest that the 1st Respondent has acted illegally. It is tantamount to an abuse of power. There is only one right answer in this case to remedy the malady caused at the hands of the Respondent and that is to quash the Quit Notice.

In passing, one observation must be made on the formation of an opinion of whether a land is a State land (the first limb). If the land in question has been alienated by a permit under the Land Development Ordinance, as in the present case, the competent authority would not have to formulate whether the land is State land, as if it is not State land, it could not have been alienated under a permit in the first place. If a competent authority opines that the land alienated is not a State land, that would only mean that the land in question could not have been alienated under a permit in the first place. If, however, there is no permit issued, then there would be a necessity to form an opinion that the land is State land.

This judgment does not in any way prevent a Quit Notice from being served on the Petitioner afresh if the due process of law is followed. If the land concerned is forest land and one which should be preserved, then it is for the Respondents to act in accordance with the due process of law by taking steps to revoke the permit. This raises the question of how the land was alienated on a permit in the first place if it is land that ought to be preserved and protected. The enormous responsibility with which the authorities must perform the functions expected of them, especially when dealing with State lands, and the care and diligence that they must exercise, and that which is expected of them, is unequivocal. It is ultimately the impoverished who are left helpless when authorities do not act in accordance with the law, especially those who do not have the means to battle it out in Court.

We observed that in the journal entries of the Fundamental Rights Application (SC FR No. 192/2012) lodged by the Petitioner (annexed to the Petition as "P-2(b)"), which is pending before that Court, there appears to be an indication of a settlement to be effected by allocating suitable alternate land to the Petitioner. If by due process of law the permits are cancelled, when such cancellation is owing to no fault of the permit holder,

such as breaching the conditions of the permit, we urge that such an amicable settlement be reached in the interests of justice to protect the land concerned and also the interests of the Petitioner.

For these reasons, the Quit Notice ("P3a") is quashed. We make no order for costs.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL