

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

*In the matter of an application for Writs of
Mandamus, Certiorari and Prohibition under
and in terms of Article 140 of the Constitution of
the Democratic Socialist Republic of Sri Lanka.*

CA/WRIT/459/2021

P.S Rohana Premalal
No. 514/3C,
Maithreepala Senanayake Mawatha,
Anuradhapura.

Petitioner

Vs.

1. E.M.R.P.B. Ekanayake
Divisional Secretary,
Nuwaragam Palatha East,
Nuwaragam Palatha East Divisional
Secretariat,
Anuradhapura.
2. G.D. Keerthi Gamage
Land Commissioner General,
Land Commissioner General's
Department "Mihikatha Madura"
Land Secretariat,
1200/6, Rajamalwatte Road,
Battaramulla.
3. Sampath Dharmadasa
Provincial Land Commissioner,
Provincial Land Commissioner's
Department,
North Central Provincial Council
Complex,
Anuradhapura.
4. S.M. Chandrasena,
Minister of Lands,
Ministry of Lands,
"Mihikatha Medura",
1200/6, Rajamalwatte Road,

Battaramulla.

5. R.A.A.K. Ranawake,
Secretary,
Ministry of Lands,
“Mihikatha Medura”,
1200/6, Rajamalwatte Road,
Battaramulla.
6. N.H.M. Chithranandha
Secretary,
State Ministry of Home Affairs,
“Nila Medura”,
Elvitigala Mawatha,
Colombo 05.
7. A.P. Asilin Nona
No. 3171,
A 1,
Samanala,
Yasasiripura,
Anuradhapura.

Respondents

Before :Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel :Thishya Weragoda with Sanjaya Marambe and Thamila Perera for the
Petitioner.

Rajika Aluwihare, SC for the 1st to 6th Respondents.

Sapumal Bandara with S. Jayawardane for the 7th Respondent.

Supported on : 24.02.2022

Written submissions: 05.04.2022 (Petitioner)

05.04.2022 (1st to 6th Respondents)

19.04.2022 (7th Respondent)

Decided on : 25.05.2022

Sobhitha Rajakaruna J.

The Petitioner of this application pleads that he is the lawfully nominated holder of a lawful lease to an allotment of land described as Lot 514/3/C situated at Maithreepala Senanayake Mawatha in Anuradhapura and his right to enjoy the possession of a portion of the said land has been unlawfully and arbitrarily affected by one or more of the Respondents.

The Petitioner is seeking *inter alia* for a mandate in the nature of writs of Certiorari to quash the decisions of the 2nd Respondent contained in documents marked 'P24' & 'P28(c)' and also to quash the decision of the 6th Respondent contained in the letter marked 'P28(a)'. Additionally, the Petitioner seeks for a mandate in the nature of writs of Mandamus compelling the Respondents to take steps to amend the lease bearing No. 4/10/14925 marked 'P2(b)' and compelling the Respondents to take steps to formalize the Petitioner's lease permit bearing No. 11/9/2/3584 dated 12.01.1992.

It is to be noted that the Court has not heard the parties yet in respect of making an order on issuance of Notice of this application on the Respondents and also for an order for interim relief as prayed for in the prayer of the Petition. On the day the matter was fixed for support, the learned State Counsel ('SC') took up a preliminary objection based on the provisions of the Article 35 of the Constitution of the Republic and submitted that the subject long-term lease had been issued under the hand of His Excellency the President ('President') whose decisions could not be challenged in this Court. The other objection raised by the learned SC was that a writ should be sought only against a party who would be able to execute such writ. Accordingly, he sought to persuade the Court that none of the reliefs prayed for in the prayer of the Petition could be granted in favour of the Petitioner as the acts of the President performed qua President cannot be challenged in the Court of Appeal either directly or indirectly.

The learned Counsel for the Petitioner as opposed to the preliminary objections raised by the learned SC, submitted that the Petitioner is challenging only the vires of the delegated authority under the regulations made in terms of State Lands Ordinance. It seems that the Petitioner challenges the decision making process of the said authorities.

The impugned letter dated 16.03.2021 marked 'P24' and the report dated 06.09.2021 marked 'P28(c)' have been issued by the Commissioner General of Land. The other impugned letter marked 'P28(a)' has been issued by Senior Assistant Secretary

(Investigations) of the State Ministry of Home Affairs. Therefore, it is apparent that the Petitioner is not challenging any decision of the President by way of a writ of Certiorari.

Since this Court has not yet taken a decision on issuance of Notice of this case on the Respondents, I do not wish to comment at this stage whether the Notice could be issued on the Respondents based on the other reliefs sought by the Petitioner for writs of Mandamus and for a writ of Prohibition.

The lease bearing No. 4/10/14925 marked 'P2(b)' upon which an amendment is being sought by the Petitioner, has been issued in terms of the State Lands Ordinance. The 23 page report dated 06.09.2021 marked 'P28(c)' which is one of the impugned documents, elaborates very well that so many decisions of public officers are involved during the process of leasing out a State land. In terms of Section 2 of the State Lands Ordinance, the President has the sole authority to grant leases and other dispositions of State land. The said section 2 itself clearly stipulates that the President may enter in to an agreement for sale, lease or other disposition of the State lands **subjected to the provisions of the said Ordinance and to the Regulations made thereunder**. It is evident as per 'P28(c)' that the Divisional Secretary, Land Commissioner, Surveyor General and several other public officers contribute in their respective official capacities before taking a final decision to recommend to the President that a portion of State land be disposed by way of a lease.

I am very much mindful of the fact that a villager or a farmer in a remote area goes through hardships due to the tedious procedure in obtaining a land permit, a grant or a lease upon State land. They may not have the privilege of having direct contacts to the President. Further, this Court being a supervisory Court in this country cannot possibly overlook the fact that some public officers solicit or accept gratifications to perform or abstain from performing any official acts during such a long process. Generally, after following the procedure prescribed by the written law and its regulations, a final recommendation would be made to the President by the relevant officers after a long period of time. Also, the Court needs to take in to account the instances where under exceptional circumstances or under incomprehensible circumstances, the State lands are being disposed by way of permits, grants or by way of lease without following the due process. In this event, I am of the view, a citizen should have a right to challenge the decision making process up to the instant where the President exercises his powers under the law upon State land.

Though the learned SC asserts that this Court is suffering from patent and total want of jurisdiction in terms of the said Article 35 of the Constitution which confers Constitutional

immunity on the President from suit, it is obvious that the Petitioner is not challenging any decision of His Excellency the President and also that he has not made the President a party in the instant application. The Article 35 (which was in the 19th Amendment) of the Constitution has been repealed and a new Article 35 has been substituted by the 20th Amendment (certified on 29.10.2020). However, no change has been made to the proviso to Article 35(1) of the Constitution by which it emphasizes the right of any person to make an application under Article 126 against the Attorney General in respect of anything done or omitted to be done by the President in his official capacity. In that context, I need not examine at this stage whether the proper course of action for the Petitioner is to file a fundamental rights application in the Supreme Court against the Attorney General in respect of any infringement of his fundamental rights based on the issues raised by him in this Court.

Undoubtedly this Court has no jurisdiction to entertain any application against the President in respect of anything done or omitted to be done by the President either in his official or private capacity. However, such notion does not preclude this Court from examining the decision making process of the authorities who exercise delegated powers prior to the President disposing of a State land by way of a permit/grant/lease. The crucial question that this Court should take in to consideration is whether the final determination of this Court in the instant application would negate any act done or omitted to be done by the President. In an event if this Court decides that there is a procedural error in the decision making process of the authorities relevant to this application, it is up to the Head of the State to take such determination in to consideration or not. However, if the Supreme Court issues an order in an application filed under Article 126 of the Constitution based on the similar issues as such, the situation would have been different. The Petitioner for the reasons not known to Court has decided to recourse to the Court of Appeal in challenging the relevant decision making process and the Petitioner should be advised by himself as to what's the best forum available for him to get his grievances resolved.

In the light of the above reasons, I am not inclined to accept the proposition of the learned State Counsel and of the learned Counsel for the 7th Respondent that a writ of Certiorari should not be issued when the end result will be futile. The said Respondents in this regard rely on the judgment of *Ratnasiri and others vs. Ellawala and others (2004) 2 SLR 180*. I take the view that the final determination of this case cannot be futile as the relevant authorities or the Head of the State, as I have mentioned above, has the option of remedying any errors, if any, in future.

The learned SC argues that the above lease marked 'P2(b)' has been issued under the hands of the President as a result of exercising powers vested in him in terms of the State Lands Ordinance. Hence, his assertion is that if any person seeks to challenge the issuance of the said lease or the particulars of the lease, such person is eventually challenging the exercise of power by the President which is not permitted in terms of the said Article 35. In view of elaborating the provisions of the said Article 35, the learned SC cited the judgements in the following cases;

- i. Victor Ivan and Others vs. Hon. Sarath N. Silva and Others (2001) 1 SLR 309*
- ii. Center for Policy Alternative vs. D.M. Jayarathne and others SC FR 23/13 (decided on 24.03.2014)*
- iii. Jaliya Wickramasuriya vs. Hon. Thilak Marapana and others CA Writ 416/2017 (decided on 29.03.2018)*
- iv. Jaliya Wickramasuriya vs. Hon. Thilak Marapana and others SC Appeal 26/2021 (decided on 29.10.2021)*

In the above case of Victor Ivan, the respective Petitioners have alleged that their fundamental rights under Articles 12(1) and 17 of the Constitution have been infringed by reason of the appointment of the former Attorney General as the Chief Justice by the President. In the above 2nd case, the Center for Policy Alternatives challenged the act of appointing the former Attorney General (6th Respondent) as the 44th Chief Justice of Sri Lanka. The Court of Appeal judgement of the above 3rd case filed by Jaliya Wickramasuriya (who has served as an Ambassador of Sri Lanka in the United States of America-Washington) has been affirmed by the Supreme Court in the above 4th case bearing No. SC Appeal 26/2021. The said case deals with waiving of the immunity conferred on the Petitioner pursuant to the instructions of the President. In the above case CA/Writ/416/2017, His Lordship Justice Padman Surasena P/CA (as his Lordship was then) in view of the judgement in *Banadaranayake vs. Weeraratne and others (1981) 1 SLR 10 (at p.16)* referred to a general rule in the construction of Statutes which states that 'what a Court or person is prohibited from doing directly, it may not do indirectly or in a circuitous manner'.

All the above four cases deal with the immunity of the President under Article 35 of the Constitution. It is important to note that the Petitioners in the above cases have challenged an act of the President where the President has exercised his powers under the Constitution which is the Grundnorm and not the powers under the State Lands Ordinance or any

subordinate legislature. The appointment and removal of the judges of the Supreme Court and Court of Appeal is a power vested in the President under Article 107 of the Constitution. The President has power under Article 33 of the Constitution to receive and recognize and to appoint and accredit Ambassadors, High Commissioners, Plenipotentiaries and other diplomatic agents.

In a conceptus, the issue dealt in the above judgements, strongly relied on by the learned SC, revolves around the provisions of Article 35 of the Constitution which confers immunity of President from suit. In the light of my above findings, I see no relevance of any of those decisions to the instant case since what is challenged before this Court is the decision making process of the authorities who are empowered to act and take decisions under State Lands Ordinance and its regulations. Admittedly the Petitioner is not challenging any act of the President and the President is not a party to the instant application. The general rule referred to in the above case of Jaliya Wickramasuriya is also, in my view, not applicable in resolving the preliminary objections raised by the learned SC. The reason for my said finding is that the Petitioner (as I have explained before) has opted to recourse to the Court of Appeal irrespective of his entitlements, if any, under the proviso to the said Article 35(1).

In the circumstances, I proceed to dismiss the preliminary objections raised by the learned SC and allow the parties to make submissions enabling this Court to make an order on issuance of notice/interim relief.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal