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

In the matter of an Application for mandate in the nature of a Writ of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Case No:

CA-Writ-0385-19

01. Kurukulasuriya Patabendige
Gerhard Irukshantha De Silva
Adityadeva

02. Iroshanie Erangika De Silva
Nee Amarasuriya

Both of,
No. 22,
"Ganga Siri",
Oruwella Road,
Panadura.

Petitioners

Vs.

01. Ishanthi Buddhinie Gunasekera
Divisional Secretary,
Divisional Secretariat,
Panadura.

02. Hon Attorney General
Attorney General's Department,
Hulftsdrop,
Colombo 12.

Respondents

Before:

M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

Counsel:

Uditha Malalasekara, instructed by Ms. Saumya Jayasena for the Petitioners

Suranga Wimalasena Deputy Solicitor General for the Respondents

Written submissions tendered on:

On 29.11.2022 by the Petitioners

On 22.12.2022 by the Respondents

Argued by way of written submissions

Decided on: 29.05.2023

S.U.B. Karalliyadde, J.

The Petitioners to this Writ Application are seeking to issue a Writ of Certiorari to quash the Quit Notice marked as P-13. In the Petition to this Application, the Petitioners have averred that they are entitled to the land to which the Quit Notice relates, on possession for more than a hundred years by their predecessors in title and by them and on a chain of title deeds. The land is shown in the survey plan No. 1041 dated 17.09.2006 of Mr. Ranjith Ananda Licensed Surveyor marked as P-8. In the year 2013, the Urban Council of Panadura (the Urban Council) showed interest in the land and, for the first time after nearly 100 years, the Urban Council claimed the land as State land. Thereafter, the Petitioners were summoned for an inquiry before the Chairman of the

Urban Council. Since the Urban Council failed to substantiate at the inquiry that the land in issue is State land, the Urban Council referred the matter to the Divisional Secretary of Panadura (the 1st Respondent) to make a decision on whether it's State land. For the reason that the 1st Respondent was unable to make a decision, she referred the matter to her Senior Officer, the District Secretary of Kalutara. The District Secretary held an inquiry and for the purpose of the inquiry, the land in dispute was surveyed by the Government Surveyor Mr. D. P. Wijesuriya. He prepared the plan bearing No. Ka/PND/2013/092 dated 29.04.2013 marked as P-10 and report annexed thereto marked as P-10(a). On that plan, he superimposed the survey plan marked as P-8 which shows the land claimed by the Petitioners. According to the Government Surveyor's plan marked as P-10, the land in dispute is private land and it has been claimed before the Surveyor by the 2nd Petitioner.

According to the Respondents, since the 1st Respondent still had a doubt whether the land in dispute is State land, at a District Coordinating Committee meeting held on 03.10.2016, a decision was taken to request from the District Secretary of Kalutara to conduct a fresh inquiry to ascertain as to whether the decision made by him earlier on the plan of the Government Survey marked as P-10 is correct. The proceedings of the relevant District Coordinating Committee meeting and the decision taken therein have been tendered to Court marked as R-1 and R-2 respectively. Thereafter, the District Secretary decided to prepare another survey plan through the Surveyor General and accordingly, the Surveyor General prepared the survey plan bearing No. KA/PND/16/660 dated 28.12.2016 marked as P-12. On that plan, it was found that the land in dispute is State land. It has been stated in the Report marked as P-11 attached to the survey plan marked P-12, that P-12 has been prepared superimposing all the relevant old plans and though in the plan and the report marked as P-10 and P-10(a)

respectively, the Surveyor General has reported that the land in dispute is private land, after superimposing the old plans it was found that it is State land. Along with the statement of objections, the Respondents have tendered to Court an affidavit of the Surveyor General marked as R-3A. The Surveyor General, in that affidavit, has affirmed that when preparing the Surveyor General's plan marked as P-10, the plan used to superimpose was Field Sheet L 16/56 G Supplementary prepared in 1914 marked as SG1 and the subsequent plan marked as P-12 was prepared using the Field Sheet No. 16/56 in the year 1900 marked as SG2 for superimposition. It has been further stated in the affidavit marked R-3A that when assessing the Field Sheet prepared in 1900 marked SG2, it is clear that the disputed land falls within the land to which lot numbers have not been allotted on the eastern boundary of that Filed Sheet, which is the sea and foreshore and the line drawn from the said foreshore downwards towards the southern boundary has been marked "waterline surveyed in March 1876". It has been further affirmed by the Surveyor General that the Tenement List in Town Survey Sheet No. 16/55 4 East prepared in 1930 marked as SG3, includes the land in dispute within Lot $158^{1/2}$ which belongs to the foreshore and the sea, based on a superimposition of the relevant plans. The Respondents have tendered to Court a consolidated Tracing marked SG4 including all the above-stated data.

By a letter dated 03.12.2018 marked as P-14, the 1st Respondent informed the Petitioners that the land in issue is State land and demanded to hand over the vacant possession of it. Thereafter, in terms of section 3 of the State Lands (Recovery of Possession) Act No. 7 of 1979 (as amended) (the Act) the 1st Respondent, as the competent authority served on the 1st Petitioner the Notice to Quit dated 01.09.2019 marked as P-13.

The learned Counsel for the Petitioners argued that when the ownership of the land is in doubt, the competent authority could not form an opinion that the land is State land and therefore, is not entitled to take steps under the Act to evict the person in possession or occupation of the land. The learned State Counsel for the Respondents submitted to Court that section 3(1) of the Act requires the competent authority to form an opinion on the material available to him and if his opinion is that the land is State land, to serve or exhibit a Quit Notice on the person in possession or occupation. The learned State Counsel submitted that in the instant action, since the 1st Respondent formed her opinion based on the survey plan marked P-12 and the Report marked P-11, her decision was based on the material available to her and therefore, she has correctly formed an opinion and served the Quit notice which is in compliance with the provisions of the Act. It is the contention of the learned Counsel appearing for the Petitioner that, since plans marked as P-10 and P-12 were prepared by the Surveyor General, in terms of section 83 of the Evidence Ordinance and section 4 of the Surveyor Act No. 17 of 2002 it should presume that both plans were accurate and subsequent plan marked as P-12 could not supersede the first plan marked as P-10 and that due to the anomaly created by the two plans, the opinion of the 1st Respondent, that the land in question, is State land, is arbitrary, irrational, capricious, ultra vires, illegal and violates the rules of natural justice.

Section 3(1) of the Act provides that where a competent authority is of the opinion that any person is in unauthorized possession or occupation of any State land, the competent authority could serve a notice on such person in possession or occupation thereof. The 1st Respondent has formed her opinion on the plan and report marked as P-12 and P-11 that the land in dispute is State land. Since both plans marked P-10 and P-12 were prepared by the Surveyor General, both plans could be considered in terms of section

83 of the Evidence Ordinance as accurate and therefore, the view of this Court is that the 1st Respondent could form her opinion whether the land in dispute is State land on either P-10 or P-12. Therefore, the opinion formed by the 1st Respondent on P-12 could not be considered as against the provisions of section 3 of the Act and arbitrary, irrational, capricious, ultra vires, illegal as well as violates the rules of natural justice as argued by the learned Counsel for the Petitioners.

The learned Counsel for the Petitioners also argued that the failures of the 1st Respondent and the District Secretary to offer opportunities to the Petitioners to make their representations respectively, at the inquiry held before the decision mentioned in the R-2 was made and before the decision was made by the District Secretary to resurvey the land, violates the rules of natural justice. The Act does not provide for the competent authority, to give a hearing to the person who is in possession or occupation of the land before taking steps under the Act. The only defence available to such a person when the competent authority makes the application in terms of section 9 of the Act before the magistrate is to 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. Under the said circumstances, the Court cannot agree with the above-stated submissions of the learned Counsel appearing for the Petitioners.

In the case of *Farook Vs. Gunewardena, Government Agent, Ampara*[1] 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*

[1] (1980) 2 Sri L.R. 243.

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 the case of *M.I. Fernando Vs. J.M.C. Priyadharshani, Authorized Officer/Competent Authority and others*[2] Arjuna Obeyesekere, J. has held that;

"*Section 3 of the Act is made up of several components. Firstly, prior to initiating the process described under Section 3, the Competent Authority must form an opinion that the land in question is State land, and that the person against whom the quit notice is being issued is in unauthorized possession or occupation of such land.* ***In forming that opinion, the Competent Authority is not required to afford anyone a hearing or conduct an inquiry***" (Emphasis added).

Furthermore, in the case of *Udagedara Waththe Anusha Kumari Nikaathagoda Vs. Jayasinghe Mudiyanselage Chamila Indika Jayasinghe, Divisional Secretary, and Others*[3], it was held by Justice Arjuna Obeyesekara that;

"*This Court wishes to emphasize,* ***for the avoidance of any doubt the Competent Authority is not required in terms of the Act to carry out an inquiry*** *of the title of the person who is in unauthorized possession of such land"* (at page 16). His Lordship further held that "*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*

[2] CA (Writ) Application No: 484/2011 decided on 10.06.2021 at page 7.
[3] CA (Writ) Application No: 293/2017 decide on 18.11.2019.

reasonableness. Thus, a Competent Authority would be acting reasonably if he were acting on the basis of a Surveyor General's plan, even if the occupant is claiming prescription. The Competent Authority is not expected to and indeed is precluded from, carrying out an inquiry" (at page 17).

The aforementioned authorities endorse the proposition that there is no statutory requirement to hold an inquiry by the competent authority on whether the land in dispute is State land before making an opinion under and in terms of section 3 of the Act. Therefore, the Court can conclude that the 1st Respondent has acted according to the provisions of the Act following the proper procedure without abusing or violating any Law.

In the instant application, the Petitioners rely on the plan marked as P-10 and claim that the land shown on that plan is private land which belongs to them. On the other hand, relying upon the plan marked as P-12 the Respondents claim that it is State land. In the survey plan marked as P-10 it has been stated that the land called "Dombagahawatta" in the extent of 0.4458 ha. which is shown on that plan as lot A is private land and the 2nd Petitioner is possessing it. In the subsequent survey plan marked as P-12, it has been mentioned that two lots of land shown on that plan as lots A and B a total extent of 0.4457 ha. is State land. In both plans the same land which is in dispute is shown. Therefore, it is clear that in the instant writ application, mainly the identity and the ownership of the land are in dispute. When the main matters as such are in dispute, the Court cannot come to its conclusions only on the affidavit evidence of the parties. **A.S. Choudri** in his book on the "***Law of Writs and Fundamental Rights****"* (2nd edition, Vol.2, at page 449) states thus:

"*Where facts are in dispute and in order to get at the truth, it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining their witnesses and the Court would be better able to judge which version is correct, a writ will not issue*."

Referring to the above-stated quoting, in the case of *Thajudeen V. Sri Lanka Tea Board and Another*[4], Ranasinghe J with Seneviratne J agreeing held:

"*That the remedy by way of an application for a Writ is not a proper substitute for a remedy by way of a suit, especially where facts are in dispute and in order to get at the truth, it is necessary that the questions should be canvassed in a suit where the parties would have ample opportunity examining their witnesses and the Court would be better able to judge which version is correct".* (at page 474).

Section 12 of the Act provides that, *"Nothing in this Act contained shall preclude any person who has been ejected from a land under the provisions of this Act or any person claiming to be the owner thereof from instituting an action against the State for the vindication of his title thereto within six months from the date of the order of ejectment."* Therefore, a person who is dispossessed from a land on the premise that it's State land, in terms of the Act has an alternative remedy. Since the writ jurisdiction of this Court is discretionary, when there is an adequate alternative remedy, the Court will not exercise its writ jurisdiction.

H.W.R. Wade and C.F. Forsyth in their book titled, *Administrative Law* (11th Edition, Oxford University Press 2009) state as follows;

[4] (1981) 2 Sri LR 471.

"*… In principle, there ought to be no categorical rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in court as soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal in order to see whether the action will in the end be taken or not. An administrative appeal on the merits of the case is something quite different from a judicial determination of the legality of the whole matter. This is merely to restate the essential difference between review and appeal, which has already been emphasized. The only qualification is that there may occasionally be special reasons which induce the court to withhold discretionary remedies where the more suitable procedure is an appeal, for example, whereas an appeal is already in progress,' or the object is to raise a test case on a point of law…* (at page 600).

… In the past three decades, case law has produced a crop of judicial statements which conflict with the principle just explained. It has been said that, where there is some right of appeal, judicial review will not be granted 'save in the most exceptional circumstances'; and that the normal rule is that the applicant' should first exhaust whatever other rights he has by way of an appeal'. A decision of the Court of Appeal goes further and suggests that, in the absence of a point of law, the existence of alternative dispute mechanisms or statutory complaint procedures is sufficient to preclude judicial review. These propositions have been prompted by the rapid growth of applications for judicial review and a judicial desire to limit them. The Law Commission also supports them and favours a general rule requiring the exhaustion of alternative remedies before judicial review is allowed…" (at page 602)

In *Linus Silva Vs. the University Council of the Vidyodaya University*[5] it was observed that; "*The remedy by way of certiorari is not available where an alternative remedy is open to the petitioner is subject to the limitation that the alternative remedy must be an adequate remedy.*"

The Court of Appeal in *Tennakoon Vs. The Director-General of Customs*[6] held that; "*The petitioner has an alternate remedy, as the Customs Ordinance itself provides for such a course of action under section 154. In the circumstances, the petitioner is not entitled to invoke writ jurisdiction*."

The learned Counsel for the Petitioners submitted that the Act has been designed to evict persons who are under obligation to vacate State land which has been given to them on a contractual footing and argued that since the land in issue in the instant application was owned and possessed by the Petitioners and their predecessors in title for more than a century and it's private land, the competent authority could not take steps to recover the possession of it under the provisions of the Act. Furthermore, the learned Counsel for the Petitioners has drawn the attention of the Court to the fact that the Petitioners are neither the licensor nor the tenants of the State, hence they do not owe an obligation to vacate and give up possession. In support of this proposition, the judgment of the Supreme Court in *Senanayake vs. Damunupala*[7] was cited in which Victor Perera J, stated follows;

"*A purposive examination and interpretation of this Law show that it was enacted to get back possession of State land which had been given to a person on a contractual footing and where there was an obligation to vacate and give up possession or*

[5] (64) NLR 104.
[6] (2004) 1 SLR 53.
[7] (1982) 2 SLR 621.

occupation on the happening of some event as a necessary consequence... It was not meant to obtain possession of a land which the State has lost possession of by encroachment or ouster for a considerable period of time by ejecting a person in such possession."

Section 3 of the Act, before the Amendment No.29 of 1983 was brought in was as follows;

"Where a competent authority is of the opinion that any person is in unauthorized possession or occupation of ***any State land*** *the competent authority may serve a notice on such person in possession or occupation thereof, ... requiring such person to vacate such land ... 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.*" (emphasis added). After the decision of *Senanayake vs. Damunupola* (supra), by the Amendment, section 3 of the main Act was repealed as follows;

"***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, ... requiring such person to vacate such land ... and to deliver vacant possession of such land to the such competent authority or other authorized person as may be specified in the notice on or before a specified date". (emphasis added).

Therefore, it is clear that after the Amendment, if the opinion of the competent authority is that the land in question is State land the competent authority could take steps to recover the possession of the land in terms of the Act. Therefore, the Court refuse to accept the said argument of the learned Counsel appearing for the Petitioners.

After considering the above-stated facts and circumstances, the Court decided that the Petitioners are not entitled to a Writ of Certiorari as prayed for in the Petition. Therefore, we dismiss the Application without costs.

JUDGE OF THE COURT OF APPEAL

M.T. MOHAMMED LAFFAR, J.

I agree.

JUDGE OF THE COURT OF APPEAL