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

In the matter of an Application for the issue of a Writ of Certiorari under Article 140 of the Constitution of the Republic.

Widana Ralalage Dona Wasana Thilini Ratnayake,

Of No: 55, Welikala Road, (Previously Sri Sumana Mawatha)

Pokunuwita.

Petitioner

C. A. Writ Application No. 308/2018

Vs.

Hon. Minister of Western Development and Megapolice,

16th Floor, "Suhurupaya",

Battaramulla.

1st Respondent

And two others

Before: Hon. D.N. Samarakoon J.,

Hon. Niel Iddawala J.,

Counsel: Amarasiri Panditharathne with Rumy Marsook for the Petitioner.

Mihiri de Alwis, S. C. for the 01st to 03rd Respondents.

Written Submissions on: 16.10.2020 by the Petitioner

21.03.2023 by the Respondents

Date: 12.07.2023

D.N. Samarakoon, J.

JUDGMENT

The position of the petitioner is that she is a co owner of an amalgamated "Arambewatta" and "Gamewatta" in extent of about 01 acre described in Deed of Gift No. 1545 dated 15.09.1996 marked "X.1". She claims through her father. She also claims that her mother Withthamperuma Arachchige Pushpa Nandani too is the owner of undivided 3/16th share and 23/64th share. In respect of possession of the land she states that her father was having a coconut plantation having obtained subsidies from the Coconut Plantation Board. She avers that she, her parents and grand parents have possessed the land for over 50 years.

The position of the 1st to 03rd respondents is that they are unaware of the above. The respondents also say that the petitioner has failed to identify the land claimed by her.

It is stated in paragraph 03(ix) that,

> "In the year 1984 a resident Bhikku of the Pokunuwita Rajamaha Viharaya namely Ekneligoda Indrasumana Thero made a claim to the said land as a result of which there was a dispute which was referred to the Horana Magistrate by the Horana police in terms of section 66 of the Primary Courts Procedure Act. However the said Thero admitted that the petitioner's father W. D. Gamini Ratnayake was in possession in the said

land and accordingly the Magistrate's Court made order granting possession of the said land to the petitioner's father".

The 1st to 3rd respondents are unaware of the above.

However, in the proceedings in case No. 62071 dated 03.09.1984 of Magistrate's Court of Horana, in respect of a land called "Arambewatte" between Ekneligoda Indrasumana Thero and Vidanaralalage Don Gamini Ratnayake the said Indrasumana Thero has admitted that the 2nd respondent is in possession and the 2nd respondent has been placed in possession. The said Don Gamini Ratnayake is the father of the petitioner. The Marriage certificate of Don Gamini Ratnayake and the mother of the petitioner Withthamperuma Arachchige Pushpa Nandani has been attached as "P.14".

The Deed of Gift No. 1545 is attached as "X.1". In that deed Don Gamini Ratnayake identifies Vidanaralalage Dona Wasana Thilini Ratnayake, the petitioner as his daughter.

Hence it is clear that the petitioner has shown sufficient relationship in respect of her standing in this case. It is clear that the petitioner and respondents claim the same land. There is no question or dispute in respect of identification. This is not a case by which petitioner claims title to the land. The question is about standing.

The petitioner points out that it is stated in Wada & Forsyth (10th Edition) at page 585,586 that,

> "The prerogative remedies, being of a "public" character as emphasized earlier, have always had more liberal rules about standing than the remedies of private law. Prerogative remedies are granted at the suit of the Crown; and the Crown always has standing to take action against public authorities, including its own ministers, who act or threaten to act unlawfully. As Delvin J., said "Orders of Certiorari and Prohibition are concerned principally with public order, it being a duty of the High Court

to see the inferior courts confine themselves to their own limited sphere". Consequently the court is prepared to act at the instance of a mere stranger, though it retains discretion to refuse to do so if it considers that no good would be done to the public. Every citizen has standing to invite the court prevent some abuse of power and doing so he may claim to be regarded not as meddle some busybody but as a public benefactor. Parker L. J., thus stated the law as to Certiorari,

> "Anybody can apply for it – a member of the public, who has been inconvenienced, or a particular party or person who has a particular grievance of his own. If the application is made by what for convenience one may call a stranger, the remedy is purely discretionary. **Where, however, it is made by a person who has a particular grievance of his own, whether as party or otherwise and then the remedy lies ex debitio justitio**". [Emphasis added in this judgment]

It is pertinent to consider paragraphs 04 to 07 of the petition, which reads, as follows,

> "04. In or about June 2018 Surveyors of the Surveyor General's Department surveyed the lands in the area for the "Bimsaviya" programme of the Government and the petitioner's mother Pushpa Nandani was informed by the Surveyors that the petitioner's land had been declared as Sacred area of the Pokunuwita Kithsiri Mewan Rajamaha Viharaya.
>
> 05. The petitioner and her mother immediately sought legal advice and they were required to obtain all necessary documents in order to resort to their legal remedy.
>
> 06. The petitioner and her mother immediately made inquiries and on 12.06.2018 they were able to obtain a certified copy of Surveyor General's

plan No. Mu. Pi. Ka4141 and the said plan and the report are annexed hereto marked Y.1.

07. The petitioner and her mother made further inquiries on 17.08.2018 they were able to obtain from the National Archives Department a certified copy of Gazette No. 1592/13 dated 13th March 2009 wherein the then Minister of Urban Development and Sacred Area Development had made order dated 13th March 2009 declaring the said land depicted in Plan "Y.1" had been declared as a Sacred area of the Pokunuwita Kithsirimewan Rajamaha Viharaya".

The respondents are unaware of averments in paragraphs 04 and 05.

There is no denial or acceptance of paragraphs 06 and 07.

It is stated in paragraph 05 of the Statement of Objections,

"Answering the averments in paragraph 11, the respondents deny the averments therein and state that

i. By the Extra Ordinary Gazette bearing No. 1592/13 of 13.03.2009, the Minister of Urban Development and Sacred Area Development, by the powers vested in him under sections 6(2)(b) and 21(2)(b) of the Town and Country Planning Ordinance, declared the scheduled area of land to be an urban development area;
ii. The said area of land in extent of 2.7622 hectares, comprising of Lot No.1 and Lot. No. 2 is depicted in the Surveyor General's Plan bearing No. KA/HRN/08/348 and dated 29.12.2008;
iii. The Order of Declaration of an Urban Development Area made under section 6(2)(b) of the Town and Country Planning Ordinance does not require any recommendation from the Coordinating Committee set up under section 4A;

iv. As the said declaration has been made under the powers vested by section 6(2)(b) and 21(2)(b) there is no legal requirement to follow the procedure in section 21(4)”.

What is section 6(2)(b) of Town and Country Planning Ordinance of 1946?

“PART II

DEVELOPMENT AREAS AND PLANNING AND EXECUTIVE AUTHORITIES

6.

Urban development areas.

(2) The Minister may, by Order published in the Gazette, declare-

(b) that any area, other than a Municipality or a town referred to in subsection (1) or paragraph (a) of this subsection, specified in the Order,

shall be an **urban development area** for the purposes of this Ordinance”.

Section 21(2)(b) reads,

“

Order for preparation of scheme.

21.

(2) Subject to the provisions of subsection (3), the Minister may, of his own motion or upon the recommendation of the Central Planning Commission, by Order published in the Gazette direct-

(b) **that an outline scheme shall be prepared for any urban development area** or for any land in any such area; or...”

Section 21(2) is subject to subsection (3). It reads,

"(3) **The Minister <u>shall not</u> make an Order directing the preparation of any outline scheme or detailed scheme for any area** or land which is situated in any regional development area **unless a regional scheme for that region has come into operation**, or where no such scheme has come into operation, unless the Regional Planning Committee for that area consents to the making of the Order".

Therefore under section 6(2)(b) the Minister can declare "Urban Development Areas".

Under section 21(2)(b) an "Outline Scheme" must be prepared.

It is not stated in Statement of Objections that provisions in section 21(3) has been followed.

To prepare an "Outline scheme" there should be "a regional scheme" for that "region".

It is stated neither in Statement of Objections or written submissions of the respondents that (1) a regional scheme for that region has come into operation or (2) if there is no such scheme that has come into operation the Regional Planning Committee for that area consented the making of the order.

The petitioner has submitted that the impugned order ("Y.2") of the Minister is devoid of legal validity in as much as the Minister has failed to follow the statutory scheme or procedure set out in section 21(3) of the said Ordinance, prior to making the impugned order.

It is further submitted, that, in the Statement of Objections, the 1st respondent (Minister) has not specifically stated as to whether a Regional Physical Plan for the region where the said land is situated is in operation or not and if such plan is in operation for the area, the 1st respondent should have submitted it to this Court. Subject to the term "Regional Physical Plan" be corrected as "a regional scheme" for that "region", this submission is right.

The process of declaring an "urban development area", according to the Ordinance, therefore, should be as follows,

A regional scheme or Consent of Regional Planning Committee

[Section 21(3)]

Outline Scheme [Section 21(2)(b)]

Urban Development Area [Section 6(2)(b)]

Section 85 defines "Regional Planning Scheme" as,

> ""regional planning scheme" means a planning scheme for any regional development area or for any land therein;..."

It appears that the term "regional scheme" has been interchangeably used with "regional planning scheme".

It defines "Outline Scheme" as,

> "
>
> "outline scheme " means an outline planning scheme for any urban development area or trunk road development area, or for any land in any such area;..."

Section 6(2)(b) comes under the Part II, "DEVELOPMENT AREAS AND PLANNING AND EXECUTIVE AUTHORITIES". Section 21 comes under Part III "PLANNING PROCEDURE". Part III begins from **section 18** which deals with, "Application for directions to prepare a **regional planning scheme**". **Section 19** is,

“Application for directions to prepare an **outline scheme**”. Section 20 is “Application for directions to prepare a detailed scheme”.

Section 20 subsections (1) and (2) lays down the following procedure,

“

(1) The planning authority for any urban development area or trunk road development area may, **at any time after an outline scheme for that area or any land therein has come into operation** in accordance with the provisions of this Part, make application to the Minister to direct the preparation of a detailed planning scheme for any land to which any provision of that outline scheme applies.

(2) Notwithstanding that an outline scheme has not come into operation for any urban development area or trunk road development area, the planning authority for that area may make application to the Minister to direct the preparation of a detailed planning scheme for any land in that area, if the authority is of opinion that the provisions proposed to be included in the detailed scheme are urgently necessary for the purpose of-

(a) the regulation of the development of such land; or

(b) the improvement of the locality in which the land is situated ; or

(c) the preservation of the amenities of the locality in which the land is situated”.

It is thereafter, that, section 21(2)(b) relied upon by the respondents come. But before that section the section 21(1) becomes material. It is as follows,

"

> (1) Subject to the provisions of subsection (3), the Minister may, on application made to him in that behalf under the preceding provisions of this Part, **by Order published in the Gazette** **direct that a regional planning scheme shall be prepared for any regional development area or that an outline scheme or a detailed scheme shall be prepared for the whole or any part of any urban development area** or trunk road development area, as the case may be".

Therefore before section 21(2)(b) there must be "regional planning scheme". This is the same as the limitation in section 21(3) if one looks at the above flowchart. This "regional planning scheme" according to section 21(1) must be embodied in an order published in the Gazette.

What does the Gazette Extra Ordinary bearing No. 1592/13 dated 13.03.2009 relied upon by the respondents and marked as "1R.1" say?

It says,

> "By virtue of the powers vested in me by section 6(2)(b) and section 21(2)(b) of the Town and Country Planning Ordinance (Chapter 269) I Dinesh Chandra Rupasinghe Gunawardena, Minister of Urban Development and Sacred Area Development, do by this order:-
>
> (a) Declare that the area of land specified in the Schedule hereto shall be an Urban Development Area for the purpose of the aforesaid Ordinance and shall be called the "Pokunuwita Kithsirimewan Rajamaha Vihara Sacre Area:; and
>
> (b) Direct that an out line scheme shall be prepared for the whole area declared to be the Pokunuwita Kithsirimewan Rajamaha Vihara Sacred Area".

Even if it is assumed for a moment, that, what is in (a) the declaration of an "Urban Development Area" is permitted under section 6(2)(b), the "outline scheme" in (b) above can only be declared under section 21(2)(b), which says,

> "21(2) Subject to the provisions of subsection (3), the Minister may, of his own motion or upon the recommendation of the Central Planning Commission, by Order published in the Gazette direct-
>
> (b)that an **outline scheme** shall be prepared for any urban development area or for any land in such area; or"

The document '1R.1" refers to section 21(2)(b) because of its reference in part (b) of the Gazette to an "outline scheme".

But this is subject to section 21(3). Section 21(3) says,

"

(3) The Minister shall not make an Order directing the preparation of any outline scheme or detailed scheme for any area or land which is situated in any regional development area **unless** a ***regional scheme*** for that region has come into operation, or where no such scheme has come into operation, unless the Regional Planning Committee for that area consents to the making of the Order".

The term "regional scheme" has been interchangeably used with "regional planning scheme" as section 85 also shows.

Under section 21(1) the "regional planning scheme" will come into operation when it is Gazetted.

Therefore, unless "1R.1" also declares a "regional planning scheme" or it has reference to a previous Gazette by which a "regional planning scheme" was declared, the Minister has no power to declare an "Urban Development Area" or an "outline scheme".

Section 21(3) specifically says,

> “The Minister shall not make an Order directing the preparation of any outline scheme or detailed scheme for any area or land which is situated in any regional development area **unless** a ***regional scheme*** for that region has come into operation…”

This is same as “regional planning scheme” as said above.

Hence without the declaration of a “regional scheme” or with the consent of the Regional Planning Committee, if there is such, for that area, the declaration in Gazette “1R.1” is ultra vires section 21(3) of Town and Country Planning Ordinance No. 13 of 1946.

The respondents who rely upon “1R.1” have not shown any reason why it should be otherwise.

In *Thirimavithana vs. Urban Development Authority 2010(2) SLR 262*, Sisira de Abrew J., said,

> “Even if the petitioners have not come to court on the basis that the UDA had failed to follow the procedure laid down in law, if it is brought to the notice of court that the respondents have taken decisions after violating the procedure so laid down and without following the mandatory requirements, can the court, exercising supervisory jurisdiction over the decisions made by the Public Bodies, turn a blind eye to such decisions? The answer is no. “If a local authority does not fulfill the requirements of law, this court will see that it does fulfill them.” [Vide Lord Dening MR in the case of Bradbury and Others vs. Enfield London Borough Council at 1324. What happens when the procedure laid down in law is not followed by Public Bodies? What is the duty of court when such violations are brought to the notice of Court? In this connection, I would like to cite the following passage from the judgment of Danckwerts LJ reported in Bradbury’s case (supra) at 1325. “It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statute in this respect are supposed to provide safeguards for Her

Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law; and it is essential that bureaucracy should be kept in its place."

Eventhough the respondents in a written submission dated 19.06.2019 has raised a "Preliminary Objection" on the basis of delay and presently too in their written submission has raised the point on laches, the petitioner has clearly stated that she and her mother came to know about the relevant Gazette when surveyors of the Surveyor's General Department surveyed the land in 2018, which could be accepted and also not denied (except for saying unaware of) by respondents. The petitioner has filed this application in 2018 itself and hence there is no laches.

Therefore, this Court issues a writ in the nature of Certiorari quashing the said order dated 13th March 2009 made by the then Minister of Urban Development and Sacred Areas Development published in Gazette "1R.1".

It must be also observed that the said Ordinance does not permit declaration of "sacred areas" but only "urban development areas". However according to the wording in "1R.1" one may argue that the words "sacred area" only came in the name given to the it, "Pokunuwita Kithsirimewan Rajamaha Vihara Sacred Area". This shows the part the 2nd respondent Rev. Waga Vimalarathana Thero, Vihara Adhikari, Kithsirimevan Rajamaha Viharaya Pokunuwita played in it. The petitioner has stated in paragraph 14 of the petition that, "To the best of the petitioner's knowledge and information there is no Minister at present in charge of the subject of Urban Development and Sacred Area Development…"The 01st respondent is Minister of Western Development and Megapolice as the present designation go on.

The application is hence allowed with costs.

Judge of the Court of Appeal

Neil Iddawala, J.

I agree.

Judge of the Court of Appeal