

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

**In the matter of an Application for mandates in the
nature of Writ of *Mandamus* under and in terms of
Article 140 of the Constitution of The Democratic
Socialist Republic of Sri Lanka**

Kalinga Mudalige Derick Mervin Perera,
"Lihini"
Kurunegala Road,
Nikaweratiya.

Petitioner

CA/ WRIT/87/2014

Vs,

1. J.M.R.P. Jayasinghe,
Provincial Land Commissioner
(North Western Province)
PO Box 46,
Provincial Council Complex,
Kurunegala.
2. P.P.R. Rajapakshe,
Commissioner of Lands,
Land Commissioner' Department,
1200/6, Rajamalwatte Road,
Battaramulla.
3. P. Susanth Jayathilake,
Divisional Secretary,
Divisional Secretary's Office,
Nikaweratiya.

Respondents

Before

**: Vijith K. Malalgoda PC J (P/CA) &
S. Devika de L. Tennakoon J**

Counsel : D.M.G.Dissanayake, K.K.Farook and L.M.C.D. Bandara for the Petitioner,
P.Nawana, DSG for the Respondents

Argued On: 11.12.2015

Written Submissions On: 24.02.2016

Order On: 08.07.2016

Order

Vijith K. Malalgoda PC J (P/CA)

Petitioner to the present application Kalinga Mudalige Derick Mervin Perera has come before this court seeking inter alia,

“a mandate in the nature of a *Writ of Mandamus* on the 3rd Respondent to comply with the directions given to him by P-3, P-5 to P-9 by the 1st and the 2nd Respondents and to issue a permit in the name of the Petitioner under the provisions of section 19 (5) of the Land Development Ordinance.”

Petitioner's father namely, Kalinga Mudalige George Hubert Perera was issued with an annual permit bearing No. Nika/Ni/7296 dated 10.06.1981 for an allotment of land bearing 236A depicted in plan bearing No.1191 within the town limits of Nikaweratiya in the extent of 3 Roads and 32 Perches.

As revealed during the arguments before this court, the original permit holder had permitted one Lakshman Abeygunawardena who was running a rice mill in a neighboring land to occupy a portion of the said land to use as a shed to collect paddy dust.

According to the Petitioner, during the life time of his father, the said portion of land to the extent of 1 Rood 30 Perches was given to the said Lakshman Abeygunawardena by the predecessor of the 3rd Respondent by an annual permit bearing No. Nika/Wa/Ba/520.

The original permit holder had died during this period and according to the Petitioner the original permit holder had objected to the said alienation prior to his death and an inquiry was held to resolve the dispute between the parties.

It is further revealed that after the said inquiry held in the year 1996 between the two parties, a decision had taken to regularize the portions occupied by each party by alienating the said portions to the respective parties.

Petitioner had submitted before this court certain correspondence between the 1st, 2nd and 3rd Respondents and the Petitioner during the period 2001-2012 and complains that the 3rd Respondent had failed to implement the orders given by the 1st and 2nd Respondents by issuing a permit to the portion of land occupied by the Petitioner under the Land Development Ordinance.

In support of his contention the Petitioner had relied on the documents produced marked P-3, P-5 to P-9 and complains that the 3rd Respondents had failed to carry out the instructions given in the said letters by the 1st and the 2nd Respondents.

Out of the said letters the Petitioner had relied upon, P-3 is only a letter addressed to co-ordinating secretary to the Prime Minister by the Provincial Land Commissioner (1R) giving details of the events took place with regard to the land in question. Out of the other letters relied by the Petitioner before us, except for P-5 and P-6 other documents are reminders sent either by the 1st and/or the 2nd

Respondents to the 3rd Respondent and therefore the documents needed to be looked into by this court are limited to P-5 and P-6.

As observed by this court the document produced marked P-5 by the Petitioner is a letter dated 04.12.2008 written by the Provincial Land Commissioner (1R) to the 3rd Respondent.

In the said letter he had referred to a letter dated 24.11.2008 by the Commissioner General of Land where the said Commissioner General had advised to grant the portion of land identified in the said letter under special circumstances identified in order 70, in the Land Orders and requested the 3rd Respondent to submit the relevant documentation for approval.

The document P-6 referred to a letter by the Commissioner General of Land (2R) dated 09.05.2012 addressed to the same 3rd Respondent requesting him to issue a permit in the name of the Petitioner with regard to the land identified in the letter, since he has already informed the Provincial Land Commissioner to alienate the said land under the provisions of the Land Development Ordinance **without considering it as a precedent.**(emphasis added)

When going through the said letters, specially the letter marked P-6 which gives a specific direction to the 3rd Respondent, it is clear that the said directive is given against the accepted rule of alienating the land, otherwise there is no necessity for the writer of the said letter to inform the 3rd Respondent that the said alienation should not be considered as a precedent.

According to the version given by the Petitioner before this court, the original permit holder to the land in question, is his father Kalinga Mudalige George Hubert Perera. In the pleadings before this Court, the Petitioner had submitted that his father had died when the inquiry with regard to the dispute between his father and Lakshman Abeygunawardena was pending. The petitioner has failed to produce before this court any proof of the death of his father. The copy of permit, the Petitioner has produced before this court marked P-1 is only a copy of an annual permit issued in the name of K.G.H. Perera.

However according to the annual permit produced marked 1R2 by the Respondents, the name of the permit holder had been amended to one K.M.E. Quintus Perera (son). The Respondents have further submitted before this court that a complaint dated 24th June 1992 by the said Eric Quintus Perera was made with regard to a dispute between him and one Lakshman Abeygunwardena with regard to the land in question and an inquiry was conducted and a settlement was reached between the parties in the year 1996.

Even though the Petitioner refers to the said inquiry in his pleadings before this court, he had refrained from referring to the involvement of his brother to the said inquiry. Petitioner has further refrained from submitting before this court the fact that K.M. Eric Quintus Perera becoming the annual permit holder after the death of the original permit holder. The Petitioner has further failed to produce before this court a copy of the latest annual permit issued in respect of the land in question.

In P-5, there is reference to another letter said to have send by the Commissioner General of Lands on 24.11.2008 but the said letter is not before this court. According to the Respondents the said letter dated 24.11.2008 was sent by the 1st Respondent in consequent to a letter sent by the 3rd Respondent informing his difficulty in issuing a permit under the provisions of the Land Development Ordinance and the said letter sent by the 3rd Respondent is produced before this court by the Respondents marked 1R3.

In the said letter the 3rd Respondent had given reasons as to why he cannot issue a permit under the provisions of the Land Development Ordinance as follows;

“ඉඩම් නියෝග 70 (අ) හි සඳහන් ලෙසට නගර හෝ මහ නගරසභා ප්‍රදේශ හෝ කාර්මික වාණිජ වශයෙන් සංවර්ධිත ප්‍රදේශ තුළ පිහිටා ඇති ඉඩම් සඳහා ඉඩම් සංවර්ධන ආඥා පනත යටතේ බලපත්‍ර ලබාදීමේ හැකියාවක් නොමැත. ඒ අනුව අදාළ ඉඩම පිහිටා ඇත්තේ නිකවැරටිය නාගරික බල ප්‍රදේශයට අයත්වන අතර ඉඩමේදැනට අනවසරකරු

විසින් ගොරායක් හා වෙළඳසැලක් පවත්වාගෙන යනු ලබන අතර ගොරාය සඳහා බදුදීමක්ද සිදුකර ඇති බැව් පෙනීයයි.

මෙම ඉඩම ප්‍රධාන වශයෙන් භාවිතකරනුයේ ව්‍යාපාරික කාර්යයන් සඳහා වන බැවින් අදාළ ඉඩම සඳහා රජයේ ඉඩම් ආඥා පනත යටතේ දීර්ඝ කාලීන බදු ලබාදිය හැකි බවට නිර්දේශකර ඉදිරිපත්කරමි.”

However in contrary to the view the 3rd Respondent had taken the 1st Respondent by letter dated 09.05.2012 informed the 3rd Respondent to issue a permit in the name of K.M.D. Mervin Perera under the provisions of the Land Development Ordinance but it should not be considered as a precedent. In the absence of the letter dated 24.11.20008 before this court, this court is not in a position to make any comment about the said letter but from the letter dated 09.05.2012 it is clear that the said letter had been issued by the 1st Respondent, without having any legal basis for him to support his contention.

When considering the material placed before this court by the Petitioner, it is clear that the Petitioner had suppressed material with regard to the exact dates with regard to the death of his father, the subsequent amendment to the annual permit issued to his brother and the fact that the inquiry conducted by the 1st Respondent was a result of a complaint made by his brother. It appears that the above suppressions are deliberate suppressions for the reasons best known to the petitioner.

In the case of *Alponso Appuhamy V. L. Hettiarachchi and Another 77 NLR 135* Pathirana J whilst concluding that, when an application for a prerogative writ or injunction is made it is the duty of the petitioner to place before the court, before it issues notice in the first instance, a full and truthful disclosure of all the material facts; the petitioner must act with *uberrima fides*, observed as follows;

“The necessity of a full and fair disclosure of all the material facts to be placed before the court when an application for a writ or injunction is made and the process of the court is invoked is laid down in the case of *The King V. The General Commissioners for the purpose of the Income Tax Acts for the*

District of Kensington -Ex-parte Princes Edmond de Poignac -(1917) Kings Bench Division 486. Although this case deals with a writ of prohibition the principles enunciated are applicable to all cases of writs or injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a *Writ of Prohibition* without going into the merits of the case. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the court would not go into merits of the application, but will dismiss it without further examination.”

As observed by us, when the Petitioner came before this court he was well aware of the fact that the annual permit which was issued in the name of his late father had been amended in the name of his brother and it is his brother who initiated the inquiry against Lakshman Abeygunawardena. The Petitioner has deliberately suppressed the above fact from this court and therefore, this court is of the view that the said deliberate suppression will constitute suppression of material facts as identified in the case of Alponso Appuhamy.

The petitioner has come before this court seeking a mandate in the nature of *Writ of Mandamus* compelling the 3rd Respondent to issue a permit under the Land Development Ordinance in the name of the Petitioner as directed by the 1st and 2nd Respondents in their letters produced marked P-3, P-5 and P-9.

This court has already gone into the contents of the said letters relied by the Petitioner and observed that the direction came from the 1st and /or the 2nd Respondents to the 3rd Respondent to issue a permit under the Land Development Ordinance, has come with a limitation, “that the said directive should not be considered as a precedent”, after the 3rd Respondent by his letter dated 29.02.2008 clearly informed

the 2nd Respondent, that the material available does not permit him to issue a permit under the Land Development Ordinance.

As observed by this court, the said letter is not a refusal to issue a permit to the said land but it was only a refusal to issue a permit under the provisions of the Land Development Ordinance for the reasons set out there in. The 3rd Respondent had recommended issuing a long term lease under State Land Ordinance but we observe from the material placed before this court that the petitioner had insisted using his influence through different channels to obtain a permit under the Land Development Ordinance.

As observed in Administration Law by H.W.R. Wade and C.F. Forsyth "The essence of a mandatory order is that it is a royal command issued in the name of the crown from the Court of King's Bench ordering the performance of a **Public Legal Duty**. (emphasis added) *H.W.R.Wade and C.F.Forsyth Administrative law 10th Edition page 521*.

In this regard the court is mindful of the decisions in *Perera V. Municipal Council of Colombo (1947) 48 NLR 66* where the court held, that the duty to be performed must be of a public in nature and *The Bank of Chettinad V. Tea Export Controller (1935) 37 NLR 190* and *Sumanagala Mahanayake Thero V. Registrar General (1941) 42 NLR 251* where the court held that the applicant for a *Writ of Mandamus* must have a legal right amounting to sufficient personal interest in the performance of his duty.

As observed by this court there was a legal right and a corresponding legal duty on the public authority to the issuance of a permit under the Land Development Ordinance but the said issuance of the permit will certainly become a precedent. If the writer of P-6 informed that the permit issued in the case in hand should not be considered as a precedent, it is our view that what is contemplated by P-6 was not within the law and therefore there is no Public Legal Duty cast upon the 3rd Respondent to grant a permit under the Land Development Ordinance.

For the reasons set out about we see no merit in the application before this court and therefore we refuse the application with cost fixed at Five Thousand Rupees.

PRESIDENT OF THE COURT OF APPEAL

S. Devika de L. Tennakoon J

I agree,

JUDGE OF THE COURT OF APPEAL