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

1. Muhandiramlage Balasooriya
   No.2/10, National Housing Scheme,
   Athwatewaththe, Diyasunnatha,
   Rambukkana.
2. Vidana Arachchillage Senevirathne
   No.10, Town House,
   Rambukkana.
3. Pinchage Priyadarshini Wimalasooriya
   Kaballawatte, H 191,
   Paththampitiya,
   Rambukkana.

Petitioners

Case No: CA(PHC) 212/2007

P.H.C Kegalle Case No: 2203/Writ

Vs.

1. The Principal
   Ke./Ma./Parakrama M.V, Rambukkana.
2. R.M Wijeratne-Principal
   Ke./Ma./Parakrama M.V, Rambukkana.
3. Divisional Educational Director
   Ke./Ma./Sujatha Vidyalaya,
   Divisional Office,
   Rambukkana.
4. Lionel Jayathilake
   Divisional Education Director,
   Ke./Ma./Sujatha Vidyalaya,
   Divisional Office,
   Rambukkana.

5. Divisional Educational Director,
   Ke./Ma./Sujatha Vidyalaya,
   Divisional Office,
   Rambukkana.
6. B.K.K.K Gunarathne
   Zonal Director's Office,
   Mawanella.
7. Provincial Educational Director
   Sabaragmuwa Provincial Education
   Ministry,
   Gatangama, Ratnapura.
8. Secretary, Sabaragmuwa Provincial
   Education Ministry,
   Gatangama, Ratnapura.
9. Chief Secretary, Sabaragamuwa
   Provincial Council,
   New Town, Ratnapura.
10. Father W.I.N Rowel
    Ke/ra/St.Aloysius Church,
    Rambukkana.

Respondents

AND NOW BETWEEN

1. Muhandiramlage Balasooriya
   No.2/10, National Housing Scheme,
   Athwatewaththe, Diyasunnatha,
   Rambukkana.

2. Vidana Arachchillage Senevirathne
   No.10, Town House,
   Rambukkana.
3. Pinchage Priyadarshini Wimalasooriya
   Kaballawatte, H 191,
   Paththampitiya,
   Rambukkana.

Petitioners-Petitioners

Vs.

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   Ke./Ma./Parakrama M.V, Rambukkana.
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   Divisional Education Director,
   Ke./Ma./Sujatha Vidyalaya,
   Divisional Office,
   Rambukkana.
5. Divisional Educational Director,
   Ke./Ma./Sujatha Vidyalaya,
   Divisional Office,
   Rambukkana.

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   Zonal Director's Office,
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   Sabaragmuwa Provincial Education
   Ministry,
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8. Secretary, Sabaragmuwa Provincial
   Education Ministry,
   Gatangama, Ratnapura.
9. Chief Secretary, Sabaragamuwa
   Provincial Council,
   New Town, Ratnapura.
10. Father W.I.N Rowel
    Keg/ra/St.Aloysius Church,
    Rambukkana.

Respondents-Respondents

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Hirosha Munsinghe for Petitioners-Petitioners

Ganga Wakishta Arachchi SSC for 1st to 9th Respondents-Respondents

Dr. Sunil Coorey with Sudarshani Coorey for the 10th Respondent-Respondent

Written Submissions filed on:

1st to 9th Respondents-Respondents on 08.11.2018

10th Respondent-Respondent on 03.10.2018

Argued on: 11.12.2018

Decided on: 22.02.2019

Janak De Silva J.

This is an appeal against the judgment of the learned High Court Judge of the Sabaragamuwa Province holden in Kegalle dated 11.12.2007.

KG/Rambukkana R.C. Mixed School, Rambukkana is a school which was vested in the State in terms of the Assisted Schools and Training Colleges (Supplementary Provisions) Act No. 08 of 1961 as amended (1961 Act) read with Vesting Order No. 1,124 published in Ceylon Gazette Extraordinary dated 28.03.1962(10වි1). This school is presently known as Ke/Ma/Parakrama Maha Vidyalaya, Rambukkana.

The Petitioners-Petitioners (Petitioners) claim that a portion of the school so vested in the State was sought to be given back to the Church contrary to law by a decision made on 13.05.1996 (අපි8ඇ) and sought a writ of certiorari quashing it. The learned High Court Judge was of the view that all administrative decisions taken in pursuance of the contract by which the portion of land was to be given back to the church is ultra vires and has no force in law. However, without dismissing the action for the reasons stated therein, he ordered the 1st to 9th Respondents-Respondents (1st to 9th Respondents) to regularize the contract according to law and report back to court within three months period from the date of the said order. Hence this appeal by the Petitioners.

1961 Act

The 1961 Act provided for the vesting in the State the property of assisted schools of which the Director of Education is or becomes the Manager under the Assisted Schools and Training Colleges (Special Provisions) Act No. 5 of 1960. The vesting was to take place in terms of an Order made by the Minister in terms of section 4(1) of the 1961 Act. It was recognized that the property so vested in the State may not be needed for a school at some later stage. Therefore section 10(1)(a) of the 1961 Act provided that the Minister, by subsequent Order published in the Gazette shall, if such property ceases to be used, or is not needed for the purpose of a school conducted and maintained by the Director for and on behalf of the Crown, revoke that Vesting Order in so far as it relates to such property with effect from the date on which such property so ceased to be used or was not so needed.

One of the conditions under which a divesting order can be made was discussed in *Methodist Trust Association vs. Minister of Hindu Resources and Others* [(2006) 3 Sri. L. R. 85] where Sriskandarajah J. held that Section 10(1)(a) states that "if such property ceased to be used or is not needed for the purpose of **a** school conducted and maintained by the Director for on behalf of the Crown..." (emphasis added) and that "a" is used in legislative drafting as the indefinite article, often it is used as part of the statement of the universal description, the word "the" is used in the definite article.

Clearly the divesting can take place only if the Minister makes a divesting order under section 10(1) of the 1961 Act. That too can be made only if the required conditions set out in the 1961 Act are met. There was no such divesting order in the instant case. Instead a decision had been arrived at to hand back the property in dispute to the church at a meeting held on 13.05.1996 between Father Christopher Perera, M. Milton, Principal of Ke/Ma/Parakrama Maha Vidyalaya, Rambukkana, H.W. Samanthilake, Deputy Director (Education) and P. Ranasinghe, Secretary to the Chief Mininster. Accordingly, the decisions contained in ඔප්පුව is ultra vires.

Scope of Judicial Review

The learned High Court Judge was exercising the power of judicial review conferred on the High Court and in that context the following statement of Seneviratne J. in *Nicholas v. Macan Markar Ltd.* [(1985) 1 Sri. L. R. 130 at 139] is instructive:

> "In this application the function of this Court is to make judicial review of the order made by the Rent Board of Review. There is a fine distinction between, "appeal" and "judicial review". When hearing an appeal, the court is concerned with the merits of the decision in appeal. The question before court is whether the decision subject matter of the appeal is right or wrong. ***In the case of judicial review, the question before court is whether the decision or order is lawful, that is according to law***. As such in this application for a writ, it is not the function of this court to decide whether the order of the Rent Board is right or wrong, or whether the order of the Rent Board of Review is right or wrong. ***The function of this court in this instance is to decide whether on the principles applicable to judicial review, the order of the Rent Board of Review should be allowed to stand or should be set aside***". (emphasis added)

Regrettably, the learned High Court Judge transgressed from this fundamental rule embedded in the process of judicial review and ventured into an area completely alien by ordering the 1st to 9th Respondents to regularize the contract according to law and report back to court within three months period from the date of the said order. The blame for this transgression cannot be placed squarely upon the learned High Court Judge as he appears to have been led in this direction by none other than the State itself as in the written submissions filed in the High Court the state counsel has submitted that "an order of court directing parties to regularize the transaction would be the best course of action to resolve the present dispute".

Accordingly, the judgment of the learned High Court Judge of the Sabaragamuwa Province holden in Kegalle dated 11.12.2007 is hereby set aside.

Relief to the Petitioners

The question then is whether the Petitioners are entitled to the writ of certiorari prayed for in the petition filed in the Provincial High Court which they have prayed for in their petition of appeal as well.

A petitioner who is seeking relief in an application for the issue of a writ of certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has a discretion to deny him relief having regard to his conduct, delay, laches, waiver, submission to jurisdiction - are all valid impediments which stand against the grant of relief. The impugned decision was made in 1996 while the application of the Petitioners was filed in 2004. However, the Petitioners contend that the decision was not known and became public only when it was sought to be implemented in 2004. In any event, in *Biso Menika v. Cyril De Alwis and others* [(1982) 1 Sri.LR. 368 at 379] Sharvananda J. (as he was then) held:

> "**When the Court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the Court would be loath to allow the mischief of the Order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection**. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically." (emphasis added)

The rationale is that the discretion to withhold the remedy against unlawful action for delay may make inroads upon the rule of law and must therefore be exercised with the greatest care. There is also a conflict between the interest of legal certainty in preserving decisions and the interest in ensuring that unlawful decisions should in general not be allowed to be acted upon. In the instant case there is a greater need to ensure that the unlawful decision in අපෙක්ෂ is quashed by a writ of certiorari as it impinges on a statutory vesting for the greater benefit of the public in particular school children.

In the written submissions filed on behalf of the 1st to 9th Respondents, it has been stated that there have been subsequent discussions pursuant to documents marked ඔපෘ and ඔපෘඅ to which the Petitioners had not been privy and that the 1st to 9th Respondents have, in view of the increasing number of students and being mindful of the lack of space to conduct classes, and especially considering the lack of buildings, decided to retain the school property and the buildings referred to in ඔපෘඅ as was vested in the State in 1962.

As explained above ඔපෘඅ is clearly ultra vires the provisions of the 1961 Act. Accordingly, we issue a writ of certiorari quashing the decisions contained in ඔපෘඅ.

In CA (Writ) Application No. 225/2017 parties thereto had agreed to a certain arrangement with regard to facilitating funeral processions to proceed from the Eastern boundary of the school land to the cemetery allowing at least 10 feet wide access. The order made in this case will not affect the said arrangement arrived between the parties thereto.

The appeal is allowed with costs.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal