

**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 Writs of
Certiorari and Mandamus under Article 140
of the Constitution of the Democratic
Socialist Republic of Sri Lanka.

CA (Writ) Application No. 416/2013

1. Mohamed Rafeek Mohamed Anees,
Katukeliyawa, Pubbogama.
2. Hasange Nisara Umma,
Pongollamada,
Rathukohadeegala, Akurana.

PETITIONERS

Vs.

1. Sri Lanka Mahaweli Authority,
No. 500, T.B. Jayah Mawatha,
Colombo 10.
2. The Resident Project Manager,
Mahaweli Authority of Sri Lanka,
Palwehera, Dambulla.
3. K. M. Sawnadasa,
Block Manager,
Mahaweli Authority of Sri Lanka,
Office of the Block Manager, Galkiriyagama.
4. T.M.N.B. Tennakoon,
Divisional Manager,
Mahaweli Authority of Sri Lanka,
Office of the Divisional Manager,
Tambuttegama.

5. Gamini Sisira Kumara,
Land Officer,
Office of the Resident Project
Manager,
Mahaweli Authority, Embilipitiya.
6. Seyadu Mohamed Ummu Naleesha.
7. Hamsa Lebbe Gibriya Umma.
8. H.M. Hamsa Lebbe.
9. Jebardeenge Mohamed Ibrahim.

RESPONDENTS

Before: Arjuna Obeyesekere, J

Counsel: Dr. Sunil Cooray for the Petitioners

Ms. Maithri Amarasinghe Jayathilake, State Counsel
for the 1st – 5th Respondents

Shafraz Hamza for the 6th – 9th Respondents

Written Submissions: Tendered on behalf of the Petitioner on 10th
December 2018

Tendered on behalf of the 1st – 5th Respondents on
30th April 2019

Tendered on behalf of the 6th – 9th Respondents on
18th January 2019

Decided on: 28th June 2019

Arjuna Obeyesekere, J

When this matter was taken up for argument on 22nd October 2018, the learned Counsel for all parties moved that this Court pronounce its judgment on the written submissions that would be tendered by the parties.

This application has been filed by the Petitioners seeking *inter alia* a Writ of Mandamus on the 1st Respondent, the Mahaweli Authority of Sri Lanka to issue a permit to the 1st Petitioner in respect of a land owned by the 1st Respondent.

The facts of this matter briefly are as follows.

The 1st Respondent had issued Mohamed Anver Mohamed Rafeek an annual permit on 8th August 1985, under the provisions of the State Lands Ordinance No. 8 of 1947, as amended, in respect of a land in extent of 5P described in the said permit as Lot No. 367 of F.V.P. No. 191. A copy of the said permit has been annexed marked '1R1' to the document annexed to the petition marked 'P15'.¹ The said land is situated in the New Town, Thibbogama.

This Court has examined the said permit and observes that the following two conditions are important in determining this application:

Condition No. 5, which specifies that the said permit is personal to Rafeek -

මෙම අවසර පත්‍රය දරන්නාට පුද්ගලික වූවක් වේ

¹ The Petitioners state that they had filed a previous application in respect of this matter which had been subsequently withdrawn reserving their right to file a fresh application. The Statement of Objections filed by the 1st Respondent in that application has been annexed to the petition in this application marked 'P15' and consists of annexures marked as '1R1' – '1R11'.

Condition No.6 which specifies as follows:

“අවතර පත්‍ර දරන්නා විසින් ඉඩම හෝ ඉඩමේ කිසියම් කොටසක් පිළිබඳ තමාගේ අයිතිය අතුරු බදු දීමක්, පැවරීමක් උකස් කිරීමක් හෝ වෙන හුමයකින් බැහැර කිරීමක් හෝ ගනු දෙනු කිරීමක් නොකළ යුතුය.”

While the 1st Petitioner is the son of Rafeek, the 2nd Petitioner is the widow of Rafeek. The Petitioners state that although Rafeek erected a building on the said land, due to ill health, Rafeek was unable to commence business in the said premises. The Petitioners admit that due to this reason, Rafeek gave the said building on rent to the 9th Respondent in 1986. This Court observes that even though the Petitioners do not specify a date on which the said building was given on rent, the 6th – 9th Respondents have produced marked '6R2', a document dated 19th February 1986 by which Rafeek is said to have sold the said premises to the 9th Respondent for a sum of Rs. 15,000. This Court must observe that it is immaterial whether it was a lease or an outright sale, as any transaction falling within Condition No. 6 in '1R1' was a breach of the terms of '1R1'.

The Petitioners state that Rafeek passed away in February 1990, while the 9th Respondent was still using the said building and paying rent to Rafeek. The Petitioners state that after the death of Rafeek, the Petitioners have been paying all taxes in respect of the said land to the 1st Respondent, in the name of Rafeek. The Petitioners have annexed to the petition as proof of payment of taxes and rent in respect of the said land, four receipts marked 'P5', 'P6', 'P7' and 'P8'. This Court has examined the said receipts and observe that 'P5', 'P6' and 'P7' have been issued in 2001, 2002 and 2005 respectively in the name of

Rafeek while 'P8' issued in 2006 acknowledges for the first time the fact that Rafeek had passed away. It appears from a letter dated 10th February 2009, annexed to the petition marked 'P10', that the Petitioners have not made any payments after 2006 and that the 1st Respondent too had been reluctant to accept any monies due to the fact that the permit holder had passed away. This Court must observe that the Petitioners ought to have informed the 1st Respondent of the death of the permit holder in view of the provisions of Condition No. 5 of '1R1'.

The Petitioners state that in 2006, the 9th Respondent had informed that he is unable to carry on the business and at the request of the 9th Respondent, the Petitioners had granted temporary permission to the 8th Respondent to occupy the said building on the condition that the 8th Respondent hands over possession of the land after two years. Thus, it is clear that the Petitioners continued to be in violation of Condition No. 5 as well as No. 6.

The Petitioners state that it made several requests to the 1st Respondent to transfer the permit issued to Rafeek in the name of the 1st Petitioner but that other than 'P4', which is a letter issued in 2004 by the Land Officer, Embilipitiya of the 1st Respondent recommending that life interest over the said land be granted to the 1st Petitioner, there was no positive response from the 1st Respondent.

Be that as it may, this Court observes that by letter dated 3rd December 2009, annexed to the petition marked 'P11', the 3rd Respondent had requested the 1st Petitioner and 6th Respondent to attend an inquiry on 9th December 2009 at

10 am, in order to inquire into the request of the 1st Petitioner. The 1st- 5th Respondents claim that the 1st Petitioner never attended the said inquiry.

The Petitioners state that they subsequently became aware that the 8th Respondent is attempting to have a permit issued in his favour in respect of the said land. In response to a letter sent by the 1st Petitioner addressed to the 3rd Respondent, Block Manager of the Mahaweli Authority dated 30th July 2010, the 3rd Respondent had informed the following to the 1st Petitioner by letter dated 7th September 2010, annexed to the petition marked 'P14'.

“අ.ප.පි 191/367 දරණ වාණිජ ඉඩම 1985 එම්.ඒ.යූ රැස් මහතාට බාරදී ඇතත් ඔහු 1986.02.19 දින රු. 15000/- කට ජේ.එම් ඉඩුතිම් නැමැත්තෙකුට විකුණා ඇත. ඒ අනුව මුල් අයිතිය අවලංගු කර ඇති බව කාරුණිකව දන්වමි.”

Aggrieved by the decision in 'P14', the Petitioners have filed this application seeking *inter alia* the following relief from this Court:

1. A Writ of Certiorari to quash the document marked 'P14';
2. A Writ of Mandamus directing the 1st – 3rd Respondents to issue a permit in favour of the 1st Petitioner under Section 19(2) of the Land Development Ordinance;
3. In the alternative, a Writ of Mandamus directing the 1st -3rd Respondents to declare that the 1st Petitioner is the successor to the said land in question.

The Petitioners are seeking to quash 'P14' on two grounds. The first is that the reason assigned for the cancellation of the permit '1R1' is wrong because the land has not been transferred to the 9th Respondent in contravention of the conditions in the permit '1R1'. The second ground urged on behalf of the Petitioners is that they were not afforded a hearing and an inquiry was not held prior to cancelling the said permit. Thus, the Petitioners state that the correct procedure was not adopted in concluding that the conditions of the permit issued to Rafeek have been violated.

In addressing this issue, this Court is mindful that when exercising its Writ jurisdiction, it should refrain from making factual determinations where facts are in dispute. This Court will only consider factual issues in so far as they are relevant to a determination of the issues that have been raised by the Petitioners.

The position of the Petitioners is that Rafeek constructed a building on the said premises and gave the said premises on rent to the 9th Respondent due to his inability to continue the business owing to a serious medical condition. The Petitioners state that the 9th Respondent acknowledged his tenancy by the continuous payment of rent to the 1st Petitioner's father and then to the Petitioners after the death of Rafeek.

Contrary to the above, the 6th - 9th Respondents state that the said land in question was in fact transferred by the original permit holder Rafeek to the 9th Respondent for a consideration of Rs. 15,000 on 19th February 1986. The 1st Respondent states that it was made aware of the said transaction only when the 9th Respondent made a request to the 1st Respondent that he be issued a

permit in his name to the land in dispute. Along with the said request marked '1R4(a)' the 9th Respondent had submitted documents marked '1R2' and '1R3' as proof that the said land had been transferred to him by the original permit holder in contravention of the conditions contained in his permit '1R1'.

The Petitioners in their counter affidavit have stated that they were never confronted with the said documents prior to these proceedings and that the said documents have been prepared fraudulently to support the position of the Respondents, and that the signature of Rafeek has been forged.

This Court cannot make any determination as to the authenticity of the said documents '1R2' and '1R3' as it is beyond the scope of its Writ jurisdiction. However, as observed earlier, it is admitted that Rafeek had acted in contravention of Condition No. 6 and that the Petitioners continued with the said contravention. This Court is of the view that on this ground alone, the permit '1R1' is liable to be cancelled and for that reason, this Court does not see any merit in the first ground urged on behalf of the Petitioners.

The 1st Respondent states that after the receipt of the documents '1R2' and '1R3' which demonstrated that conditions in the permit prohibiting a transfer or a sale had been violated, they initiated proceedings under Section 106 of the Land Development Ordinance in order to cancel the said permit due to the alleged violation of the conditions of the said permit.

Section 17 of the State Lands Ordinance relates to the cancellation of permits issued under the said Ordinance, and reads as follows:

“(1) Where a Government Agent is of opinion that the grantee of any permit or license has failed to observe any condition attached to any such permit or license, he may cancel such permit or license and eject the grantee in accordance with the procedure prescribed in sections 106 to 128 of the Land Development Ordinance which shall apply accordingly as though the grantee of a permit or license under this Ordinance were a permit-holder under that Ordinance and as though the land which is the subject-matter of a permit or license under this Ordinance were land alienated by a permit issued under that Ordinance:

Provided that any matter or form required by the Land Development Ordinance to be prescribed in connection with the cancellation of a permit under that Ordinance shall, for the purpose of the application of that Ordinance to the cancellation of a permit or license under this Ordinance, be prescribed under this Ordinance.

(2) Where a permit or license is cancelled under subsection (1), all rights of the grantee under such permit or license shall cease and be finally determined.”

Section 106 of the Land Development Ordinance, referred to in Section 17 of the State Lands Ordinance reads as follows:

“If it appears to the Government Agent that a permit-holder has failed to observe a condition of the permit, the Government Agent may issue a notice in the prescribed form, intimating to such permit-holder that his

permit will be cancelled unless sufficient cause to the contrary is shown to the Government Agent on a date and place specified in such notice."

Thus, the provisions relating to the cancellation of a permit stipulates that notice should be issued to the permit holder that such permit will be cancelled. The permit holder should thereafter be afforded a hearing on a date and time specified in order to show sufficient cause to the contrary.

This Court observes that the key word in this provision is "permit holder". Where the "permit holder" is deceased, would this provision be equally applicable to the heirs, successors, potential heirs or potential successors of the "permit holder"?

Before proceeding to evaluate the said provision of the Land Development Ordinance relating to the cancellation of permits and whether the 1st Respondent complied with such provisions, this Court will examine what the usual course of action is when a permit holder under the State Lands Ordinance dies without breaching any of the conditions of the said procedure.

Section 16 of the State Lands Ordinance is relevant in this regard and is reproduced below:

"(1) Where it is provided in any permit or license that such permit or license is personal to the grantee thereof, all rights under such permit or license shall be finally determined by the death of such grantee;

(2) Where it is provided in any permit or license that such permit or license shall be personal to the grantee thereof, the land in respect of which such permit or license was issued and all improvements effected thereon shall, on the death of the grantee, be the property of the State; and no person claiming through, from or under the grantee shall have any interest in such land or be entitled to any compensation for any such improvements."

The fact that the permit in question is one issued under the State Lands Ordinance is not disputed by any party. It is also not disputed that the original permit holder was Rafeek and that the said permit holder died on 28th February 1990, as per the death certificate marked 'P3'. This Court, having examined the permit '1R1' has already observed that Condition No. 5 of the said permit states that the permit is personal to the permit holder. Thus, according to Section 16 of the State Lands Ordinance, on the death of Rafeek, the land becomes the property of the State and "no person claiming through, from or under the grantee shall have any interest in such land or be entitled to any compensation for any such improvements." The provisions relating to succession contained in the Land Development Ordinance do not apply, and the Petitioners have no right in terms of the law to succeed to Rafeek.

The identical Condition No. 5 was considered in the case of HAP Wimaladasa vs. KA Mary Nona² where the Supreme Court held as follows:

"According to condition No.5 of the permit, the permit is personal to the permit holder. The Plaintiff-Respondent, in her evidence, admits that at

² SC Appeal 39A/2010; SC Minutes of 11th February 2015; judgment by Sisira De Abrew, J.

the time she filed the case her husband was dead. When I consider Section 16 of the State Land Ordinance and the conditions of the permit, it appears that the rights of the Plaintiff-Respondent under the permit have come to an end with the death of her husband and the Plaintiff-Respondent has no title to the land. Therefore, the case of the Plaintiff-Respondent should fail.”

In the above circumstances, this Court is of the view that it would be futile to make a determination on the legality of ‘P14’ as the Petitioners have no standing to have and maintain this application nor any claim to the said land after the death of Rafeek. The provisions relating to cancellation of the permit would have only been applicable if the original permit holder was alive.

The 1st Respondent has submitted that prior to issuing ‘P14’, its Officers followed the procedure set out in under Section 106 of the Land Development Ordinance. The 1st Respondent has produced documents marked ‘1R5(a)’,³ ‘1R5(b)’,⁴ ‘1R6(a)’⁵ and ‘1R6(b)’⁶ in support of this position. The document marked ‘1R5(a)’ dated 28th September 2007, is evidence of the fact that the said Rafeek or anyone claiming any right through him had been summoned to attend an inquiry on 31st October 2009 at 10am. The document marked ‘1R5(b)’ which appears to be the proceedings of the said inquiry, show that no one attended the said inquiry, and that a recommendation had been made that the permit issued to Rafeek be cancelled.

³ ‘1R5a’ is a notice dated 20th September 2007 issued under Section 106 of the Land Development Ordinance requesting Rafeek or any person claiming under him to appear on 31st October 2007 and show cause as to why the permit should not be cancelled due to the violation of Condition No. 6 of the permit.

⁴ 1R5b’ are the notes of the inquiry held on 31st October 2007.

⁵ ‘1R6a’ is a notice dated 25th June 2008 issued under Section 106 of the Land Development Ordinance requesting Rafeek to appear on 6th August 2008 and show cause as to why the permit should not be cancelled due to the violation of Condition Nos. 2 and 6 of the permit.

⁶ ‘1R6b’ appears to be the notes of the inquiry held on 6th August 2008.

Both documents marked '1R6(a)' dated 25th June 2008 and '1R6(b)' dated 6th August 2008, together with the aforementioned documents '1R5(a)' and '1R5(b)' demonstrate that the procedure under Section 106 of the Land Development Ordinance has been duly adhered to. Therefore, this Court is of the view that there has been no procedural impropriety in issuing 'P14' and thus, the second ground urged on behalf of the Petitioners must fail.

The 1st Respondent has stated that by '1R11', the Resident Project Manager was informed by the Director (Lands) of the 1st Respondent to take steps to compute the rentals and regularise the issuance of the permits to the chosen permit holders. The 1st Respondent has stated further state that the current position is that the said Lot 367 of F.V.P of 191 has been divided into two and two permits have been issued to the 7th and 9th Respondents, marked 'X1' and 'X2'.

This Court observes that no relief has been sought to quash the said permits 'X1' and 'X2'. Thus, no useful purpose will be achieved by this Court quashing 'P14' and/or ordering that a fresh inquiry be held as the 1st Respondent has already issued permits in respect of the said land. Thus, in any case, granting the relief prayed for would be futile.

In the above circumstances, this Court is of the view that the Petitioners are not entitled to the relief prayed for. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal