

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

In the matter of an Application for
Prerogative Writs in the nature of Certiorari
and Prohibition under and in terms of
Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

All Ceylon General Ports Employees Union,
No. 198/19, Panchikawatte Road,
Colombo 10.

PETITIONER

CA (Writ) Application No. 623/2004

Vs.

1. Sri Lanka Ports Authority,
No. 19, Church Street,
Colombo 1.
2. Serendib Flour Mills (Private) Limited,
No. 48, 1st Floor,
Park Street, Colombo 2.
3. Prima Ceylon Limited,
No. 50, Jayawardenapura Mawatha,
Rajagiriya.

RESPONDENTS

Before: Arjuna Obeyesekere, J

Counsel: M.A.Sumanthiran, P.C with Nigel Barthelomeusz for the Petitioner

Sanjeeva Jayawardena, P.C., with Ms. Lakmini Warusevitane and Ms. Manisha Dissanayake for the 1st Respondent

Romesh De Silva, P.C., with S. Sivendran and Ms. Dushyanthi Jayasuriya for the 2nd Respondent

Written Submissions: Tendered on behalf of the Petitioner on 1st March 2019 and 13th August 2019.

Tendered on behalf of the 1st Respondent on 9th April 2019

Tendered on behalf of the 2nd Respondent on 28th March 2019

Decided on: 28th August 2019

Arjuna Obeyesekere, J

When this matter was taken up on 31st May 2019, the learned President's Counsel appearing for all parties moved that this Court pronounce its judgment on the written submissions that had already been tendered on behalf of the parties.

The Petitioner, who is a registered Trade Union under the Trade Unions Ordinance No. 14 of 1935, has filed this application, seeking *inter alia* a Writ of Certiorari to quash the 'alienation' of land made by the 1st Respondent, Sri

Lanka Ports Authority (SLPA) to the 2nd Respondent, Serendib Flour Mills (Private) Limited, by way of Deed of Lease No. 67, annexed to the petition marked 'P13'.

The facts of this matter very briefly are as follows.

The 1st Respondent has been incorporated in terms of the Sri Lanka Ports Authority Act No. 51 of 1979, as amended (the Act). Its objects and powers have been set out in Sections 6 and 7 of the Act, respectively. The Petitioner states that in early 1999, the Board of Investment (BOI) entered into an agreement with a company known as Galle Flour Mills (Private) Limited for the establishment of a flour mill at the Port of Galle. Subsequently, the said company had intimated to the Government of Sri Lanka that the viability of the said project would be contingent upon the factory being moved to Colombo. The Petitioner states further that a meeting was held on 11th May 2000 between the officials of the 1st Respondent and the investors of the proposed project to discuss the possibility of releasing land for the flour milling project from the Port of Colombo and that, as reflected by the minutes of the said meeting annexed to the petition marked 'P18', the Chairman of the 1st Respondent had informed the investors that due to shortage of land within the Port of Colombo, the 1st Respondent is unable to release the requested land. According to the Petitioner, there is a scarcity of land within the Port of Colombo for use by the 1st Respondent for Port related activity and the 1st Respondent had in fact identified the need to purchase as much as 40 acres of land in the vicinity of the Port of Colombo in order to efficiently perform its core operations.

It is in the above background that the 1st Respondent had entered into the aforementioned lease agreement marked 'P13' on 12th July 2001 with the 2nd Respondent. This Court has examined 'P13' and observes that the tenure of the lease is 30 years and that the annual lease rental is the Sri Lanka rupee equivalent of US Dollars 99,469.50. The Petitioner has pointed out that certain Clauses of 'P13' are not in the best interests of the 1st Respondent and can have a long term impact on the financial viability of the 1st Respondent. It is the position of the Petitioner that (a) the execution of the said lease agreement is not necessary for the exercise of the powers, and performance of the duties of the 1st Respondent, (b) is not within the statutory objects and duties of the 1st Respondent, and therefore is *ultra vires* the powers of the 1st Respondent.

It is the position of the 1st Respondent that the Government of Sri Lanka had decided in principle to permit the establishment of a flour milling project within the Port of Colombo and that in terms of the agreement that the 2nd Respondent had entered into with the BOI, the 2nd Respondent was eligible to receive a land within the Port of Colombo for the establishment of the said project. The 1st Respondent had stated further that 'P13' was executed only after due consideration of all matters and in keeping with Government policy. It has been submitted further that the 1st Respondent has leased out land within the Port of Colombo on previous occasions, a fact which has not been disclosed to this Court by the Petitioner.

The Respondents have taken up several objections with regard to the maintainability of this application. Of the said objections, there are two objections that this Court would like to consider at the outset, as this Court is of the view that the said objections go to the root of this case.

The first objection relates to the delay on the part of the Petitioner in invoking the jurisdiction of this Court. The Superior Courts of this country have consistently held that a petitioner seeking a discretionary remedy such as a Writ of Certiorari must do so without delay and that where a petitioner is guilty of delay, such delay must be explained to the satisfaction of Court. To put it differently, unexplained delay acts as a bar in obtaining relief in discretionary remedies, such as Writs of Certiorari and Prohibition.

In Biso Menika v. Cyril de Alwis¹ Sharvananda, J (as he then was) set out the rationale for the above proposition, in the following manner:

“A Writ of Certiorari is issued at the discretion of the Court. It cannot be held to be a Writ of right or one issued as a matter of course. But exercise of this discretion by Court is governed by certain well accepted principles. The Court is bound to issue a Writ at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, like submitting to jurisdiction, laches, undue delay or waiver..... The proposition that the application for Writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and the longer the injured person sleeps over his rights without any reasonable excuse the chances of his success in a Writ application dwindle and the Court may reject a Writ application on the ground of unexplained delay..... An application for a Writ of Certiorari

¹ 1981 1 Sri LR 358, at page 377 to 379. This case has been followed by the Supreme Court in Ceylon Petroleum Corporation v. K. Rajaratne and others (SC Appeal No. 43/2013 SC Minutes of 19th June 2019)

should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed."

In Jayaweera v. Assistant Commissioner of Agrarian Services Ratnapura and another² this Court held as follows:

"the 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."

In Seneviratne v. Tissa Dias Bandaranayake and another³, the Supreme Court, advertent to the question of long delay, held as follows:

"If a person were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance to enforce his rights; the law both to punish his neglect, *nam leges vigilantibus, non dormientibus subveniunt*,⁴ and for other reasons refuses to assist those who sleep over their rights and are not vigilant."

² 1994 (2) SLR 70 at page 73

³ 1994 (2) SLR 341 at 351

⁴ For the law to assist the vigilant (but not the slothful)

In Issadeen v. The Commissioner of National Housing and others⁵
Bandaranayake J, dealing with a belated application for a Writ of Certiorari
held as follows:

“It is however to be noted that delay could defeat equity. Although there is no statutory provision in this country restricting the time limits in filing an application for judicial review and the case law of this country is indicative of the inclination of the Court to be generous in finding ‘a good and valid reason’ for allowing late applications, I am of the view that there should be proper justification given in explaining the delay in filing such belated applications. In fact, regarding the writ of certiorari, a basic characteristic of the writ is that there should not be an unjustifiable delay in applying for the remedy”.

The above judgments clearly illustrate two very important matters. The first is that an application for a Writ must be filed without delay. The second is that where there is, on the face of the application, a delay, such delay must be explained to the satisfaction of Court.

As observed earlier, ‘P13’ was executed on 12th July 2001 whereas this application had been filed only on 10th March 2004. Thus, on the face of it, there is considerable delay in invoking the jurisdiction of this Court as this application has been filed almost three years after the document that is sought to be quashed has been executed.

⁵2001 2 SLR 10 at page 15

Very interestingly, in paragraph 8 of the petition, the Petitioner had stated as follows:

"The Petitioner states that in late 2001, several trade unions, which had a substantial number of members in the employee of the 1st Respondent, **including the Petitioner**, became aware that a portion of land within the Sri Lanka Ports Authority had been leased to the 2nd Respondent."

Thus, on its own admission, the Petitioner was aware by late 2001 of the fact that the 1st Respondent had leased a land within the Port of Colombo to the 2nd Respondent. The Petitioner has however offered an explanation for the delay in paragraph 9 of the petition, where the Petitioner states that the said lease agreement had been entered into discreetly and that details of the lease were not available to it. The Petitioner proceeds to state in paragraph 13 of the petition that, "if the facts behind the grant of the Deed of Lease No. 67 were made known to it, the Petitioner itself would have filed a similar Application."

Although the Petitioner states so, when this Court reads the rest of the petition, and more specifically the averments in paragraphs 14-51 of the petition, it becomes abundantly clear to this Court that the Petitioner had full knowledge of what was taking place with regard to the execution of the lease agreement 'P13', at or about the time that the said events took place. How else can one explain the knowledge on the part of the Petitioner of the details given in the petition, which facts have been affirmed to in the affidavit of the Secretary and Treasurer of the Petitioner who claims to have personal knowledge of the facts pleaded therein.

Furthermore, the Petitioner is a trade union consisting of employees of the 1st Respondent. It is therefore hard to accept that the Petitioner and its members were not aware of the details of the said project or the execution of 'P13' or that they had no means of obtaining the relevant details.

Assuming that the Petitioner did not have the details relating to 'P13', the most reasonable course of action to have been adopted would have been for the Petitioner to have requested the 1st Respondent for the details of 'P13'. This Court must observe at this stage that the Petitioner has not adduced any material to demonstrate that it requested the 1st Respondent to provide any details relating to 'P13' or that it took any other steps to obtain such material, nor has the Petitioner averred as to how or when it eventually obtained the details and materials that enabled it to file this application. This Court is therefore not satisfied with the explanation offered by the Petitioner.

The issue of delay has been raised by the 2nd Respondent in paragraph 4 of its statement of objections, while the 1st Respondent has raised the issue of laches in paragraph 3 (d) of its statement of objections. This Court has examined the counter affidavit filed on behalf of the Petitioner and observes that except for a bare denial, the Petitioner has not offered any other explanation in its counter affidavit as to why it did not invoke the jurisdiction of this Court soon after the execution of 'P13'.

There are two other developments that took place between the execution of 'P13' and the filing of this application, which contradicts the explanation offered by the Petitioner for the delay. The first is the admission by the Petitioner that the Jathika Sevaka Sangamaya, a trade union registered under

the Trade Union Ordinance had filed CA (Writ) Application No. 589/2002 in **March 2002** seeking to quash '**P13**'⁶. The Petitioner has admitted in paragraph 12 of the petition that the application filed by the Jathika Sevaka Sangamaya in March 2002 was given wide publicity in the media and that the Petitioner came to learn of the circumstances behind the granting of the Deed of Lease No. 67 by the 1st Respondent to the 2nd Respondent in circumstances that were far from the objects of the 1st Respondent. This demonstrates that the Petitioner could have obtained the relevant details as such details were now in the public domain. If this be so, why is it that the Petitioner did not invoke the jurisdiction of this Court soon thereafter? No explanation has been offered by the Petitioner in this regard.

Even if the explanation of the Petitioner that the execution of '**P13**' was done discreetly is accepted, the Petitioner's own admission that wide publicity was given to the filing of the application by the Jathika Sevaka Sangamaya demonstrates that the Petitioner had knowledge of '**P13**', including its terms and conditions by March 2002. This application has been filed in March 2004, which is after a period of almost two years.

This Court is therefore in agreement with the submission of the learned President's Counsel for the 1st Respondent that by its own admission, the Petitioner ought to have invoked the jurisdiction of this Court at least around March 2002.

The second development that took place between the execution of '**P13**' and the filing of this application, is the disclosure by the Petitioner that two veteran

⁶ The said application had been subsequently settled between the parties.

trade union leaders had filed CA (Writ) Application Nos. 937/2003 and 947/2003 against the 1st and 2nd Respondents to this application, seeking the identical relief.⁷ It is the submission of the learned President's Counsel for the 1st Respondent that filing of this application seeking relief which is identical to the relief sought in the said two applications is an abuse of process. While this Court is of the view that multiple suits in respect of the same matter are best avoided, without burdening the justice system, what is important is the fact that the Petitioner had knowledge of this issue even in 2003 but chose not to do anything until March 2004.

In these circumstances, this Court is of the view that the Petitioner is guilty of laches and that the explanation offered by the Petitioner cannot be accepted by this Court. The Petitioner must therefore bear full responsibility for the delay and the consequences thereof. This Court is therefore in agreement with the said submission of the learned President's Counsel for the 1st Respondent and upholds the said objection, with the necessary result being that this application ought to be dismissed in *limine*.

The next objection that this Court would like to consider is an objection raised by the learned President's Counsel for the 2nd Respondent that the Petitioner is guilty of suppression of material facts.

The suppression that the learned President's Counsel for the 2nd Respondent is referring to is the fact that in the past the 1st Respondent has given on lease several other lands situated within the Port of Colombo to other parties. The

⁷ Copies of the petitions in CA (Writ) Application Nos. 937/2003 and 947/2003 have been annexed to the petition, marked 'P25' and 'P26' respectively.

2nd Respondent has produced a series of such lease agreements, details of which are given below:

Document Number	Date	Extent	Lessee	Period	Lease Rental per annum
2R5	01.12.1987	3R 26.18P	Ceylon Grain Elevators Ltd	-	USD 22248
2R6	-	1A 1R	Ceylon Warehouse Complex Private Ltd	12 years	USD 49809
2R7	12.11.1997	1R 6.5P	Mahaweli Marine Cement Company Ltd	7 years	Rs. 480,000
2R8	01.10.1999	3R 32.3P	Samudra Cement Company Ltd.	30 years	Rs. 2.4 million

The Petitioner, while not disputing that it has not disclosed such fact, has submitted that the non-disclosure must relate to a material fact. This Court is in agreement that the non disclosure or the suppression must be of a material fact. What is material would however depend on the facts and circumstances of each case. When one considers the complaint of the Petitioner carefully, it is clear that apart from the *vires* of the transaction, the main allegation of the Petitioner is that the 1st Respondent does not have sufficient space within the Port of Colombo for its core activities and therefore leasing out land in a surreptitious manner causes a severe financial loss to the 1st Respondent. In this background, the fact that the 1st Respondent has entered into the said lease agreements in the past in respect of land within the Port of Colombo is a

material fact which the Petitioner ought to have disclosed to this Court. This Court is also of the view that the Petitioner ought to have explained to this Court, as part of its obligation to disclose all material facts fully and frankly, why it did not challenge the previous lease agreements.

It is the view of this Court that the objection relating to suppression too must be considered in the background of the Petitioner being a trade union of port employees. This Court has examined the above lease agreements and finds that the lands referred to therein have been given out for specific projects, which projects are apparent for everyone to see. An explanation, even if tendered, that it was not aware of such leases cannot thus be accepted.

Once the said objection was taken, the Petitioner had a duty to offer an explanation in its counter affidavit as to why it did not disclose the above lease agreements in its petition, which the Petitioner has not done. Even if an explanation was offered that the execution of several previous agreements does not make 'P13' legal, this Court is of the view that the Petitioner ought to have made such declaration, especially in view of the allegation made by the Respondents that this application has been filed for a collateral purpose and is a collusive action with the 3rd Respondent, who is a competitor of the 2nd Respondent with a flour milling complex within the Harbour of Trincomalee, and whose subsidiary, Ceylon Grain Elevators Ltd. has already been allocated land within the Port of Colombo.³

Our Courts have consistently held that a party invoking the Writ jurisdiction of this Court must come with clean hands and utmost good faith. In W.S.

³ Vide 1285

Alphonso Appuhamy vs Hettiarachchi and another⁹, the Supreme Court held 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 Purposes of the Income Tax Acts for the District of Kensington- Ex-parte Princess Edmond de Polignac*¹⁰. 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 the merits of the application, but will dismiss it without further examination."

The Supreme Court in Liyanage & another v Ratnasiri, Divisional Secretary, Gampaha & Others¹¹ citing the case of Jayasinghe v The National Institute of Fisheries and Nautical Engineering (NIFNE) and Others¹² has held as follows:

⁹ 77 L.R 131

¹⁰ (1917) 1 K.B. 486

¹¹ 2013 (1) Sri LR 6 at page 15

¹² 2002 (1) Sri LR 277

"The conduct of the petitioner in withholding these material facts from Court shows a lack of *uberrimae fides* on the part of the petitioner. When a litigant makes an application to this Court seeking relief, he enters into a contractual obligation with the Court. This contractual relationship requires the petitioner to disclose all material facts correctly and frankly. This is a duty cast on any litigant seeking relief from Court.

In Fernando, Conservator General of Forests and two others vs. Timberlake International Pvt. Ltd. and another¹³, the Supreme Court, having held that the conduct of an applicant seeking Writs of Certiorari and Mandamus is of great relevance because such Writs, being prerogative remedies, are not issued as of right, and are dependent on the discretion of court, stated as follows:

"It is trite law that any person invoking the discretionary jurisdiction of the Court of Appeal for obtaining prerogative relief, has a duty to show *uberrimae fides* or ultimate good faith, and disclose all material facts to this Court to enable it to arrive at a correct adjudication on the issues arising upon this application."

In the above circumstances, this Court is in agreement with the submission of the learned President's Counsel for the 2nd Respondent that the Petitioner is guilty of suppressing a material fact and is of the view that this application ought to be dismissed *in limine*.

For purposes of completeness however, this Court would like to consider the grievance of the Petitioner that the execution of 'P13' is *ultra vires* the powers

¹³ S.C. Appeal No. 06/2008. SC Minutes of 2nd March 2010

of the 1st Respondent. Before embarking on that task, this Court must observe that it is common knowledge that the establishment of industries within Port areas takes place not only in Sri Lanka but worldwide and that cement and flour industries have been in operation within the Ports of Colombo and Trincomalee for many years prior to 'P13'.¹⁴

While the objects of the 1st Respondent have been set out in Section 6 of the Act, its powers are set out in Section 7, with Section 7(1)(a) of the Act reading as follows:

"Subject to this Act, the Ports Authority may exercise all or any of the following powers: to acquire/hold, take on lease, to give on lease, hire, pledge and sell or otherwise dispose of any movable or immovable property."

Thus, it is clear to this Court that the 1st Respondent has the power to enter into lease agreements in respect of lands belonging to the 1st Respondent, and this Court is of the view that the decision of the 1st Respondent to execute 'P13' is not *ultra vires* its powers. The learned President's Counsel for the Petitioner has drawn the attention of this Court to the provisions of Sections 74 and 75 of the SLPA Act, the relevant portions of which reads as follows:

Section 74: "The Ports Authority may in accordance with such rules as may be made by the Authority enter into such contracts as are necessary for the discharge of its functions"

¹⁴ Vide '2R5', '2R7' and '2R8'

Section 75: "Any company or other body of persons may, notwithstanding anything to the contrary in any written law or instrument relating to its functions, enter into and perform all such contracts with the Ports Authority as may be necessary for the exercise of the powers and performance of the duties of the Authority."

This Court observes further that although Sections 74 and 75 of the Act empowers the SLPA to enter into contracts as may be necessary for the exercise of the powers and performance of the duties of the 1st Respondent, Section 7(1)(a) does not impose such a restriction with regard to the power of the 1st Respondent to give on lease lands belonging to it. It is not the function of this Court to insert such a requirement to Section 7(1)(a) and impose artificial fetters on the powers of the 1st Respondent not intended by the legislature. This Court therefore does not agree with the Petitioner that the insertion of the words, "subject to this Act" at the commencement of Section 7(1) means that the aforementioned wording in Sections 74 and 75 would apply and that a lease agreement can only be entered 'as may be necessary for the exercise of the powers and performance of the duties of the 1st Respondent'.

In the above circumstances, this Court does not see any legal basis to issue the Writs of Certiorari and Prohibition prayed for. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal