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

In the matter of an Application for a mandate in the nature of a Writ of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. (Writ) Application No. 61/2017

Mohammed Mohideen Mohammed Rizvi,
No. 30, Ampara Road,
Sammanthurai.

Petitioner

VS

1. Land Commissioner,
   Land Commission,
   7, Gregory's Avenue, Colombo 7.

2. D.D.Anura Dharamadasa,
   Provincial Land Commissioner,
   Department of Land Administration,
   Trincomalee.

3. A. Mansoor,
   Divisional Secretary,
   Divisional Secretariat, Sammanthurai.

3A. S.L.Mohammed Haniffa,
   Divisional Secretary,
   Divisional Secretariat, Sammanthurai.

Respondents

Before: **P. Padman Surasena, J/ President of the Court of Appeal**
Arjuna Obeyesekere, J

Counsel: Faiz Mustapha, P.C, with Ms. Faiszar Markar for the Petitioner

Nirmalan Wigneswaran, Senior State Counsel for the Respondents

Supported on: 03rd September 2018

Decided on: 19th October 2018

Arjuna Obeyesekere, J

The Petitioner has filed this application seeking a Writ of Certiorari to quash a quit notice[1] issued in terms of Section 3 of the State Lands (Recovery of Possession) Act No. 7 of 1979, as amended (the Act).

The Petitioner states that in January 1968, the State had issued the Petitioner's father, M.A.M.Mohideen with an annual permit in respect of a land situated in the Grama NIladhari division of Villinayadi, in Sammanthurai. An illegible copy of the said permit has been annexed to the petition, marked '**P2**'. Although the Petitioner has not submitted any proof to demonstrate that the said annual permit had been extended beyond 1971, there does not appear to be any dispute between the parties that the said permit has in fact been extended.

It is admitted between the parties that the land referred to in the said permit is Lot No. 11 of Plan No. 'PP ඇමි 839', a copy of which has been submitted to this Court by the Respondents, by way of a motion dated 4th August 2017[2]. This

[1] The Quit Notice has been annexed to the petition, marked 'P16'.
[2] This Plan had been annexed to the Statement of Objections filed in CA(Writ) Application No. 235/2008

plan has been prepared by the Surveyor General in 1989. The Tenement List attached to the said Plan confirms that the lands referred to therein are State Land and that Lot No. 11 is cultivated under a permit issued under the Land Development Ordinance by the Petitioner's father, M.A.M.Mohideen. According to the said Tenement List, the only Lot that has not been given under the Land Development Ordinance is Lot No. 10[3] which is adjacent to the lot allotted to the Petitioner's father. According to the said Tenement List, there is a masonry well constructed by the Rural Development Society of Villinayadi on Lot No. 10.

The Petitioner claims that he, his father and grandfather have been in occupation of a land containing 36.7 perches from 1964 and that he and his father have built a residential house on the said land and effected improvements including the sinking of a well. The Petitioner has annexed to the petition, marked '**P1**', a copy of Plan No.3537 dated 18th February 2008 depicting the said land of 36.7 perches. According to '**P1**', the said land occupied by the Petitioner "falls in Lot Nos. 10 and 11 and a part of Lot 12 in PP ඇමි 839". The Petitioner has also submitted Plan No. 3538 dated 18th February 2008, marked as '**P1a**', super imposing the boundaries of Lots 10, 11 and 12 of Plan No. 'PP ඇමි 839'. According to '**P1a**', the land referred to therein 'falls in entire Lot No. 10 and 11 and a part of Lot No. 12 in Plan No. 'PP ඇමි 839'.

It is therefore clear that the Petitioner's father was and now the Petitioner is occupying the entirety of Lot Nos. 10 & 11 and part of Lot No. 12 of Plan No. 'PP ඇමි 839', although the State has only issued the Petitioner's father a permit

[3] Case No. 37296/04 had been filed in the Magistrate's Court of Kalmunai under Section 66 of the Primary Court's Ordinance where it was alleged that the Petitioner's father had dispossessed the Villinayadi Rural Development Society from Lot No. 10. It appears from the Order of the said case, annexed to the petition marked 'P8a', that Lot No. 10 had been granted by the State to the said Rural Development Society.

in respect of Lot No. 11 of the said Plan. The Petitioner has not produced any documentary proof to establish that he has been issued with a valid permit or other written authority of the State granted in accordance with any written law, in respect of Lot Nos. 10 and 12. It is in these circumstances that the 3rd Respondent Divisional Secretary of Sammanthurai has issued the quit notice, annexed to the petition marked '**P16**, seeking to eject the Petitioner from the land identified as Lot No. 10 of Plan No. 'PP ඇමි 839'.

This Court observes that several previous attempts by the State to eject the Petitioner's father from the said land under the provisions of the Act have been unsuccessful. The first application[4], filed in August 1982 had been withdrawn. The second application[5] made in 2003 had been dismissed by the learned Magistrate as the application had been filed in the wrong court. A third application[6] made in 2004 had been allowed by the learned Magistrate. However, the High Court of the Eastern Province holden in Ampara had set aside the order on the basis that there had been no proper affidavit before the learned Magistrate. A further quit notice issued in June 2007 had been stayed by this Court in CA (Writ) Application No. 235/2008. The said application had abated in 2012 due to the death of the Petitioner's father.

In terms of Section 3 of the Act, where the Competent Authority is of the opinion that any land is State land and that any person is in unauthorised possession or occupation of such land, he may issue a quit notice to the person in possession of the property identified in the said notice, requiring such person to vacate the said land with his dependants, if any, and deliver vacant

[4] Magistrate's Court of Kalmunai Case No. 86278.
[5] Magistrate's Court of Kalmunai Case No. 29303/PC/03.
[6] Magistrate's Court of Kalmunai Case No. 37118/S/04

possession of such land, on a date not less than thirty days from the date of the issue of the said quit notice. In terms of Section 3(1A) of the Act, 'no person shall be entitled to any hearing or to make any representation in respect of a notice under subsection (1)'. In the event the person in possession fails to vacate such land and deliver vacant possession, the Competent Authority shall be entitled in terms of Section 5 of the Act to file an application for ejectment in the Magistrate's Court. The learned Magistrate is thereafter required to issue summons in terms of Section 6 of the Act to the person named in the said application to appear and to show cause as to why he should not be ejected from the land as prayed for in the application for ejectment. The scope of the Inquiry that has to be held by the learned Magistrate and the defences that could be taken up by a person against whom an application has been filed for ejectment have been set out in Section 9 of the Act, which reads as follows:

> "At such inquiry the person on whom summons under section 6 has been served shall not be entitled to contest any of the matters stated in the application under section 5 except that such person may establish that he is in possession or occupation of the land upon a valid permit or other written authority of the State granted in accordance with any written law and that such permit or authority is in force and not revoked or otherwise rendered invalid."

A very strict regime has therefore been put in place by the legislature as 'the clear object of the State Lands (Recovery of Possession) Act is to secure

possession of such land by an expeditious machinery without recourse to an ordinary civil action'.[7]

The learned President's Counsel for the Petitioner submitted that he is challenging the said quit notice '**P16**' on two grounds. The first is that the 3rd Respondent had no reasonable basis to come to the conclusion that the land referred to in the quit notice, was State land. The Respondents deny this position and have submitted Plan No. 'PP 839', prepared by the Surveyor General in 1989 to establish that the lands referred to in the said Plan are State land. This is clearly stated in the Tenement List annexed to the said Plan.

This Court is mindful that the function of this Court when considering an application for a writ is to look at the legality of the decision and not whether it is right or wrong. As Lord Brightman stated in the House of Lords in **Chief Constable of North Wales Police v Evans**[8], applications for judicial review are often misconceived: "Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power..... Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."

This Court observes that the Divisional Secretary had the clearest evidence in the form of a Surveyor General's plan that the said land was State land. In these circumstances, this Court is of the view that the opinion formed by the Divisional Secretary that the said land is State land, is not only a reasonable

[7] Ihalapathirana vs Bulankulame 1988 (1) Sri LR 416 at 420
[8] [1982] 1 WLR 1155 at 1174

decision but it is the only decision the Divisional Secretary could have made. Hence, this Court does not see any merit in the first ground urged by the Petitioner.

The second ground urged on behalf of the Petitioner is that he and his family have been in undisturbed and uninterrupted possession of the said land for over 50 years. During the course of his submissions, the learned President's Counsel for the Petitioner advanced this argument and submitted that the Petitioner has prescribed to the said land. The Supreme Court in **Senanayaka v. Damunupola**[9] set out the position that the State Lands (Recovery of Possession) Act "was not meant to obtain possession of land which the State had lost possession of by encroachment or ouster for a considerable period of time by ejecting a person in such possession."[10] That position as articulated in **Senanayaka v. Damunupola** has since been changed by the amendment brought to Section 18 of the Act by the State Lands (Recovery of Possession) (Amendment) Act No. 29 of 1983[11], which introduced the following definition of 'unauthorised possession or occupation':

> "Unauthorised possession or occupation means every form of possession or occupation except possession or occupation upon a valid permit or other written authority of the State granted in accordance with any

[9] 1982 (2) Sri LR 621

[10] Ibid page 628

[11] See the judgment of Janak De Silva, J in Namunukula Plantations PLC v. Nimal Punchihewa [CA(PHC)APN No. 29/2016; CA Minutes of 9th July 2018] where he held as follows: "The Hon. Minister of Land, Land Development and Mahaweli Development during the second reading of the State Lands (Recovery of Possession) (Amendment) Bill [Parliamentary Debates, Volume 24 at pages 1504-5], which was subsequently passed as State Lands (Recovery of Possession) Act No. 29 of 1983, specifically stated that the amendment is being moved due to the decision of the Supreme Court in Senanayake v. Damunupola which made it difficult to recover land belonging to the State and that recourse to existing law to recover possession of state land was time consuming."

written law and includes possession or occupation by encroachment upon State land."

Therefore the *ratio decidendi* in **Senanayake v. Damunupola** is no longer valid and steps can be taken under the Act to eject any person who is in unauthorised possession or occupation of State land.

This position has been upheld in the recent judgment of this Court in **Namunukula Plantations PLC v. Nimal Punchihewa**[12], where this Court held as follows:

"A competent authority can have recourse to the [State Lands (Recovery of Possession)] Act to evict any person who is in unauthorized possession or occupation of state land including possession or occupation by encroachment upon state land. Any possession or occupation without "a valid permit or other written authority of the State granted in accordance with any written law" is unauthorized possession".

This Court is further of the view that prescription cannot be determined by a Competent Authority, who is only required to form an opinion that the impugned land is State land and that the possession is unauthorised. The Competent Authority is not required in terms of the Act to carry out an inquiry on the title, as long as he has cogent material to form an opinion that the land is state land.

[12] ibid

This position has been clearly laid down in **Farook v. Gunewardene Government Agent, Ampara**[13] where it was held as follows:

> "Where the structure of the entire Act is to preclude investigations and inquiries and where it is expressly provided (a) the only defence that can be put forward at any stage of the proceedings under this Act can be based only upon a valid permit or written authority of the State and (b) special provisions have been made for aggrieved parties to obtain relief, I am of the opinion that the Act expressly precludes the need for an inquiry by the competent authority before he forms the opinion that any land is State land."

The question of prescriptive title cannot be adjudicated by a Writ Court, as it involves disputed questions of fact, which could only be resolved by oral testimony of witnesses. The power of this Court to issue Writs when the facts are in dispute was considered in the case of **Thajudeen v. Sri Lanka Tea Board and Another**.[14] In this case, it was held that where the major facts are in dispute, it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining the witnesses so that Court would be better able to judge which version is correct, and that a writ will not issue in such circumstances.

The question of the Petitioner's prescriptive title is a matter for the Petitioner to establish in a civil court. This position is fortified by Section 12 of the Act, which provides for title to a land to be vindicated by any person who has been ejected. As the Petitioner's claim is on the basis of a prescriptive title, this

[13] 1980 2 Sri LR 243
[14] 1981 2 Sri LR 471

Court is of the view that Section 12 will be the most appropriate remedy. In fact, in addition to vindicating title, in terms of Section 13 of the Act, a person could also obtain compensation for any damages sustained by being compelled to deliver up possession. The availability of an alternative remedy will always be a consideration when considering an application for judicial review. In this case, the alternate remedy is in fact the most suitable and effective remedy.

The learned President's Counsel relied on the judgment of the full bench of the Supreme Court in the case of **Weerakoon v. Ranhamy**[15]. The applicability of this judgment to an application under the Act has been considered and rejected by this Court in **Ihalapathirana's** case[16]. This Court is in agreement with the said reasoning in **Ihalapathirana's** case.

For the above reasons, this Court does not see any merit in the second ground urged on behalf of the Petitioner.

The learned Senior State Counsel submitted that Plan No. 'PP ඇමි 839' was available to the Petitioner but that the Petitioner had wilfully suppressed the said document from this Court. It is trite law that a petitioner invoking the writ jurisdiction of this Court must come with clean hands and divulge the complete story, without suppressing material facts. The submission of the learned Senior State Counsel has much merit but the necessity to consider whether the said Plan was deliberately suppressed by the Petitioner does not arise, as this Court is in agreement with the submission of the Respondents that the Petitioner has not made out a prima facie case, to issue notice.

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[15] 35 CLW 43
[16] supra

In the above circumstances, this Court does not see any legal basis to issue notices on the Respondents and accordingly dismisses this application, without costs.

Judge of the Court of Appeal

P. Padman Surasena, J/ President of the Court of Appeal

I agree.

President of the Court of Appeal