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

Elpitiya Plantations PLC,
Level 9, Aitken Spence Tower 01,
No.305, Vauxhall Street,
Colombo 02.
Petitioner

CASE NO: CA/WRIT/315/2016

Vs.

1. Land Reform Commission,
   P.O. Box: 1526,
   No.C82, Hector Kobbekaduwa Mawatha,
   Colombo 07.
2. Sumanatissa Thambugala,
   Chairman,
   Land Reform Commission,
   P.O. Box: 1526,
   No.C82, Hector Kobbekaduwa Mawatha,
   Colombo 07.

2A. Sampath Subersinghe Arachchi,
Chairman,
Land Reform Commission,
No.475, Kaduwela Road,
Battaramulla.

2A(i). Sirimewan Dias,
Chairman,
Land Reform Commission,
No.475, Kaduwela Road,
Battaramulla.

2A(ii). Nalintha Wijesinghe,
Chairman,
Land Reform Commission,
No.475, Kaduwela Road,
Battaramulla.

3. Sri Lanka State Plantations
Corporation,
No.11, Duke Street,
Colombo 01.

4. Ravindra Hewavitharana,
Secretary,
Ministry of Public Enterprise and
Development,
36th Floor, World Trade Centre,
Echelon Square,
Colombo 01.

4A. Monty Ranatunga,
Ministry of Small and Medium
Business Enterprise and
Development,
36th Floor, World Trade Centre,
Echelon Square,
Colombo 01.

5. I. H. K. Mahanama,
Secretary,
Ministry of Lands,
“Mihikatha Medura”,
No.1200/6,
Rajamalwatta Road,
Battaramulla.

5A. R. A. K. K. Ranawaka,
Secretary,
Ministry of Lands,
“Mihikatha Medura”,
No.1200/6,
Rajamalwatta Road,
Battaramulla.

6. John Ameratunga,
Minister of Lands,
Ministry of Lands,
“Mihikatha Medura”,
No.1200/6,
Rajamalwatta Road,
Battaramulla.

6A. Gayantha Karunathileke,
Minister of Lands,
Ministry of Lands,
“Mihikatha Medura”,
No.1200/6,
Rajamalwatta Road,
Battaramulla.

6A(i). S. M. Chandrasena,
Minister of Lands,
Ministry of Lands,
"Mihikatha Medura",
No.1200/6, Rajamalwatta Road,
Battaramulla.

7. A. N. D. Liyanage,
No.25/1, Anagarika Dharmapala
Mawatha,
Galle.

8. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Kushan D'Alwis, P.C., with Hiran Jayasuriya for the Petitioner.
Dr. Sunil Coorey with Sudarshini Coorey for the 1st and 2nd Respondents.
Suranga Wimalasena, S.S.C., for the 4th-6th and 8th Respondents.
Chandrasiri Wanigapura for the 7th Respondent.

Argued on: 06.07.2020

Decided on: 04.08.2020

Mahinda Samayawardhena, J.

This case has a chequered history.

J.D. Liyanage made a statutory declaration marked 1R1 under section 18 of the Land Reform Law, No.1 of 1972, as amended (LRC Law). The Land Reform Commission (LRC) made a statutory determination dated 28.02.1974 marked 1R2 under section 19(1)(a) of the LRC Law, specifying the portion of land the Petitioner was permitted to retain, i.e. fifty acres of the estate including the tea factory situated thereon. Thereafter, the statutory determination was gazetted on 30.09.1976 in the gazette marked 1R3(a), but notably excluding the tea factory.

Predominantly due to the exclusion of the tea factory in the land he was permitted to retain, J.D. Liyanage filed a writ application seeking to quash by certiorari the gazette 1R3(a) and to compel the LRC by mandamus to deliver possession of the land including the tea factory to him. This Court, by Judgment dated 04.09.1981 marked P8, decided that the first statutory determination dated 28.02.1974 is "*the lawful statutory determination*" made under section 19(1)(a) of the LRC Law, and quashed the purported second statutory determination gazetted in 1R3(a) but refused mandamus. Let me quote the relevant portion of the Judgment of Justice Atukorale (with Justice Colin-Thome agreeing) for convenience.

> *There remains for consideration application No.217/80. One relief sought is for a writ of certiorari quashing the statutory determination published in Government Gazette of 30.9.1976 – P3. On a perusal of the affidavits and the*

counter-affidavits, the documents filed and also the file maintained by the Commission which was made available to us at the hearing, it seems clear that the Commission has on 28.2.1974, in terms of S.19(1)(a) of the Land Reform Law, made a statutory determination specifying the portion of land that the petitioner should be permitted to retain. According to this determination he has been allowed to retain 50 acres of the estate including the tea factory. Subsequently at the instance of the Member of Parliament for Baddegama at that time and the then Minister, the Chairman of the Commission appears to have varied this determination. This varied determination is set out in the letter P2 and has been published in the Gazette P3. It deprives the Petitioner of the portion that he was originally allowed to retain by the Commission. S.19(1)(a) of the Land Reform Law enacts that the Commission shall as soon as practicable make a determination (called the statutory determination) specifying the portion which the statutory lessee (in this case, the petitioner) shall be allowed to retain. In making this determination the Commission is obliged to take into consideration the preferences expressed by the declarant in his declaration. In his declaration the petitioner stated his preference to retain the portion where the tea factory was situated. <u>There is no doubt that the determination made by the Commission on 28.2.1974 was the lawful statutory determination under S.19(1)(a). The law contemplates only one statutory determination. This determination cannot in my view be varied by the Chairman of the Commission. I am therefore of the opinion that the</u>

> *determination published in the Government Gazette P3 is ultra vires and is of no legal force, and must be quashed.* (emphasis added)

Thereafter, the LRC, instead of gazetting the aforesaid lawful statutory determination, which the LRC is bound in law to do under section 19(1)(b) of the LRC Law, vested the land including the tea factory in the 3rd Respondent, the Sri Lanka State Plantations Corporation, by the gazette marked P3. The LRC did so within six months of the Court of Appeal Judgment. In my view, this is an affront, if not a challenge, to the authority of the Court. The said actions of the LRC are unlawful. From the abovementioned Judgment it appears political and ministerial interference in the function of the LRC is the reason for this outrageous conduct.

The 3rd Respondent, in turn, leased out the land together with the tea factory to the Petitioner by the Lease Agreement marked P4.

In my view, when this Court held that the statutory determination dated 28.02.1974 is the lawful statutory determination made by the LRC under section 19(1)(a) of the LRC Law, the LRC should have published the said statutory determination in the gazette. There is no discretion in this regard; it is a mandatory requirement. Section 19(1) of the LRC Law enacts:

> *19(1) The following provisions shall apply on the receipt by the Commission of a statutory declaration made under section 18:*

(a) *The Commission shall, as soon as practicable, make a determination, in this Law referred to as a "statutory determination", specifying the portion or portions of the agricultural land owned by the statutory lessee which he shall be allowed to retain. In making such determination the Commission shall take into consideration the preference or preferences, if any, expressed by such lessee in the declaration as to the portion or portions of such land that he may be allowed to retain.*

(b) ***The Commission shall publish the statutory determination in the Gazette*** *and shall also send a copy thereof to such lessee by registered letter through the post. Such determination shall be final and conclusive, and shall not be called in question in any court, whether by way of writ or otherwise*. (emphasis added)

It appears, even up to now, the LRC has not gazetted the statutory determination. In other words, there is no statutory determination in the eyes of the law in respect of the statutory declaration made by J.D. Liyanage many moons ago!

In more recent years however, wiser counsel has prevailed, and the LRC has had several correspondence with the 3rd Respondent and the Petitioner requesting them to hand over the tea factory to the LRC in order for it to be returned to J.D. Liyanage and his heirs, but to no avail.

In the meantime, J.D. Liyanage and his heirs had unsuccessfully engaged in several lawsuits to regain possession of the tea factory.

However, upon the death of J.D. Liyanage, in a testamentary case filed in the District Court of Galle, a settlement was reached between the LRC and the heirs of J.D. Liyanage to hand over possession of the land in dispute including the tea factory to the latter. A Plan was also prepared in the testamentary case to identify the area in question.

It is noteworthy that the 3rd Respondent, in whom the land including the tea factory was purportedly vested by the LRC, does not object to the re-vesting of the land along with the tea factory. If I may repeat, the Petitioner is the lessee of the 3rd Respondent, not of the LRC.

It is in this context the then President of the Republic, by the gazette dated 06.06.2014 marked P7, partly revoked the P3 gazette in order to return the portion of land inclusive of the tea factory to the heirs of J.D. Liyanage.

The Petitioner, who is the lessee of the 3rd Respondent, has filed this application against the LRC and the Minister of Lands seeking to quash by certiorari the P7 gazette, more than two years and three months after its publication, on the basis it is null and void because the reason stated in P7 for revocation is non-existent and incoherent. The said reason in the P7 gazette is "*non-compliance with such terms and conditions relating to consideration for the vesting in such Corporation*" whereas the P3

gazette says "*No terms or conditions are laid down as regards consideration.*" This is a valid argument by the Petitioner.

Nevertheless, as I have already stated, prior to the P7 gazette, the P3 gazette was published in violation of the mandatory provisions of the LRC Law. Therefore, the P3 gazette, insofar as it relates to the tea factory and the adjacent land thereto, is null and void.

Lord Denning in *Macfoy v. United Africa Co. Ltd. [1961] 3 ALL ER 1169* at 1172 states:

> *If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.*

This passage was referred to with approval by G.P.S. de Silva J. (later C.J.) in *Rajakulendran v. Wijesundera [1982] 1 Sri Kantha LR 164* at 168-169, Sharvananda J. (later C.J.) in *Sirisena v. Kobbekaduwa, Minister of Agriculture and Lands (1978) 80 NLR 1* at 182, and Sripavan J. (later C.J.) in *Leelawathie v. Commissioner of National Housing [2004] 3 Sri LR 175* at 178.

Sharvananda J. in *Sirisena v. Kobbekaduwa, Minister of Agriculture and Lands* (*supra*) at 182 quotes the following portion of Hailsham (4th Edition) Vol. I, paragraph 27:

> *No legally recognised rights found on the assumption of its validity should accrue to any person even before the act is declared to be invalid or set aside in a Court of Law.*

If the P3 gazette, insofar as it relates to the tea factory and the adjacent land, is a nullity, then there is no necessity to quash the subsequent P7 Gazette. All that flows from a nullity is automatically null and void.

It is hackneyed that writ is a discretionary remedy. A party cannot invoke the writ jurisdiction of this Court as of right. Even if a party is entitled in law to the relief sought, the Court can, taking all the circumstances into account, refuse relief. This principle is eminently befitting to the instant case.

Wade in *Administrative Law* (11th Edition) at pages 249-250 states:

> *the act may be clearly void but the court may be unwilling (and in some cases not empowered) to grant the necessary legal remedies…The court may hold that the act or order is invalid, but may refuse relief to the applicant because of his lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason…Similarly with remedies withheld in discretion: the court may hold that an attack on the validity of some act or order succeeds, but that no remedy should be granted. The court then says, in effect, that the act is void but must be accepted as valid.*

De Smith's Judicial Review (8th Edition) at page 1006 states:

> *The general approach ought to be that a claimant who succeeds in establishing the unlawfulness of administrative action is entitled to be granted a remedial order. The court does, however, have discretion—in the sense of assessing "what is fair and just to do in the particular case"—to withhold a remedy altogether or to grant a declaration (rather than a more coercive quashing, prohibiting or mandatory order or injunction which may have been sought by the claimant) or to grant relief in respect of one aspect of the impugned decision, but not others.*

In the unique facts and circumstances of this case, I refuse to grant the relief sought by the Petitioner.

The application of the Petitioner is dismissed but without costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.
I agree.

Judge of the Court of Appeal