

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

In the matter of an Application in the nature of
Writ of Certiorari and Mandamus under and in
terms of Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

CA Writ Application No:

01/2019

Konara Mudiyansele Sudu Banda
Kesel Kotuwa,
Kalugahawadiya,
Nannapurawa

(through his power of attorney holder)

Konara Mudiyansele Gnanaratna
Kalugahawadiya,
Nannapurawa

Petitioner

Vs.

1. Simon Fernando Gamini Harischandra
Kendawinna
Kinnarabowa
Ranminigama
2. The Commissioner of Lands
Land Commissioner's Department
Colombo 07
3. K.N.G. Kapila Bandara
The Divisional Secretary
Medagama

4. The Hon. Attorney General
Attorney General's Department
Colombo 12

Respondents

Before: M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

Counsel:

Pradeep Fernando for the Petitioner

N.K. Ashokbharan instructed by Ms. Piyumi Samarasinghe for the 1st
Respondent

S. Wimalasena, SSC for the 2nd, 3rd and 4th Respondents

Argued on: 11.01.2022

Written submissions tendered on:

06.07.2020 by the Petitioner

29.05.2020 by the 1st Respondent

18.06.2020 by the 2nd, 3rd and 4th Respondents

Order delivered on: 10.03.2022

S.U.B. Karalliyadde, J.

When this writ Application came up before Court for support on 02.11.2021, on behalf of the Respondents two preliminary legal objections were raised about the maintainability of the Application. As recorded by the Court, those objections are based on the following facts;

1. In terms of Article 33(f) read with Article 35 of the Constitution, the Petitioner is not entitled to ask for the relief as prayed for in the prayer 2 of the amended Petition dated 26.07.2019.
2. There is no affidavit filed by the Petitioner under Article 3(1)(a) of the Supreme Court Rules.

By prayer 2 to the amended Petition, the Petitioner seeks for a mandate of the nature of writ of Certiorari to quash the Grant dated 23.04.1997 (marked as X 1) issued by the HE the President under sub-section 4 of section 19 of the Land Development Ordinance No. 10 of 1983 (as amended) (hereinafter referred to as the LDO) to the 1st Respondent. The position of the Petitioner is that, he has cultivated and developed the land mentioned in the Grant marked X 1 since the year 1970 as his own with the intention of mercifully praying for a Permit or a Grant from the State in the future. However, later, the Petitioner has come to know that the Grant marked X 1 has been issued on 23.07.1997 for that land to the 1st Respondent. The 1st Respondent had been brought up by the Petitioner from his childhood as his own child.

The position of the Respondents is that in terms of Article 33 (d) of the Constitution, the issuance of a Grant under the LDO is an executive function of the HE the President and that, in view of the immunity conferred under Article 35 of the Constitution on the President, the validity of the Grant cannot be challenged.

The relevant provisions apply to the case at hand in Article 33 of the Constitution are as follows;

33. *“In addition to the powers and functions expressly conferred on or assigned to him by the Constitution or by any written law, whether enacted before or after the commencement of the Constitution, the President shall have the power-*

(d)to make and execute under the public seal ... grants and dispositions of lands and immovable property vested in the Republic....”

Article 35 of the Constitution provides thus;

“35. (1) While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity:

Provided that nothing in this paragraph shall be read and construed as restricting the right of any person to make an application under Article 126 against the Attorney-General, in respect of anything done or omitted to be done by the President, in his official capacity:

Provided further that the Supreme Court shall have no jurisdiction to pronounce upon the exercise of the powers of the President under paragraph (g) of Article 33.

(2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating the period of time prescribed by that law.

(3) The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130 (a) relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament:

Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney-General.”

The argument of the learned Counsel for the Respondents is that without making the person who executed the Grant a party to the proceedings, the Grant cannot be challenged and since the land in dispute had been alienated by the HE the President he cannot be made a party in view of the provisions in Article 35 of the Constitution. To strengthen his position, the learned Counsel for the Respondents cited the case of *R.I.B Jayaratne Vs. The Commissioner of Land and Others*¹. In that case, despite the fact that a Permit had been issued to the land in dispute to the deceased father of the petitioner, a Grant has been issued subsequently for a portion of the same land to the 5th respondent after striking off the names of the parents of the petitioner in the land ledger maintained in the Divisional Secretariat. The petitioner sought a writ of Certiorari to nullify the Grant of the 5th respondent and a writ of Mandamus directing the Commissioner of Land and the Divisional Secretary to issue a Permit to the Petitioner. The Court has held that the Petitioner cannot challenge the Grant in favour of the 5th Respondent without making the HE the President who had issued the Grant a party to the proceedings as a necessary party and for the reason that as provided by Article 35 (1) of the Constitution the President could not be made a party to the proceedings, the Grant cannot be challenged. That decision had been affirmed by the Supreme Court in the special leave to appeal application No. 150/2009 on the ground that there is no basis to grant special leave on any substantial question of law.

In terms of Article 33 (d) of the Constitution, the HE the President has the power to make and execute Grants and dispositions of State land under the Public Seal. In the

¹ Writ Application No. 2390/2004.

instant Writ Application, the Petitioner is not challenging that power vested on the President by the Constitution. He challenges the administrative act and the decision of the Commissioner of Land and the Divisional Secretary.

Appendix II to the Constitution provides that, State land shall continue to vest in the Republic and may be disposed of in accordance with the Article 33 (d) of the Constitution and written law governing the matter. Therefore, it is clear that the HE the President has the power to dispose the State land in accordance with the provisions of Article 33 (d) and written law governing the matter. For instance, in the instant Application, the LDO. In terms of Chapter I of the LDO, steps to alienate the State land could be taken by the Government Agents and land officers under the supervision and control of the Land Commissioner. The Petitioner in the instant Application challenges the action and the decision of the Divisional Secretary of Medagama, the 3rd Respondent under the supervision and control of the Land Commissioner, the 2nd Respondent.

In the case of *Karunathilaka and another vs. Dayananda Dissanayake, Commissioner of Elections and others*² the Supreme Court has held thus;

“The immunity conferred by Article 35 is neither absolute nor perpetual. While Article 35 (1) appears to prohibit the institution or continuation of legal proceedings against the President, in respect of all acts and omissions (official and private), Article 35 (3) excludes immunity in respect of the acts therein described. It does so in two ways. First, it completely removes immunity in respect of one category of acts (by permitting the institution of proceedings against the President personally); and second, it partially removes Presidential immunity in respect of another category of acts, but requires that

² (1999) 1 SLR 157 at page 176.

proceedings be instituted against the Attorney General. What is prohibited is the institution (or continuation) of proceedings against the President. Article 35 does not purport to prohibit the institution of proceedings against any other person, where that is permissible under any other law.

... I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity: immunity is a shield for the doer, not for the act. Very different language is used when it is intended to exclude legal proceedings which seek to impugn the act. Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one which shall not be questioned in any Court. It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit; as, for instance, a defendant or a respondent who relies on an act done by the President, in order to justify his own conduct.”

In *R.I.B Jayaratne vs. The Commissioner of Land and Other* (supra), the Court of Appeal has not considered the provisions in the Appendix II to the Constitution and in the special leave to appeal application against that decision of the Court of Appeal, the Supreme Court has not considered and/or analysed the constitutional provisions regarding the matter. Nevertheless, in the case of *Karunathilaka and another vs. Dayananda Dissanayake, Commissioner of Elections and Others* (supra) the Supreme Court has considered and analysed the constitutional provisions. Therefore, this Court will follow the decision in *Karunathilaka's* case. Considering all the above stated facts and circumstances, I hold that Article 35 of the Constitution does not exclude judicial review of the impugned act and/decision of the Respondents who do not enjoy

immunity from suit but relies on an act done by the HE the President in order to justify their conduct. Accordingly, the Petitioner is entitled to seek for a writ of Certiorari to quash the Grant marked X 1 in favour of the 5th Respondent.

The learned Counsel for the Respondents also taken up the position that no affidavit has been filed by the Petitioner to support the Petition of the writ application and therefore, the Application is contrary to the provisions of rule 3 (1) (a) of the Supreme Court Rules. It is borne out by the case record that affidavit has been filed with the Petition. Therefore, there is no merit in that submission of the learned Counsel. Nevertheless, the validity and/or admissibility of the facts stated in that affidavit could be considered in the argument.

Under the above stated circumstances, I overrule the preliminary legal objections raised by the learned Counsel for the Respondents and fix the matter for support.

JUDGE OF THE COURT OF APPEAL

M.T. MOHAMMED LAFFAR, J.

I agree.

JUDGE OF THE COURT OF APPEAL