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

Case No.CA/WRIT/310/2013

In the matter of an application for Writs of Mandamus and Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S. M Sunil Abeybandara Seneviratne,
'Senevipaya', Henepola,
Poholiyadda,
Galagedara.

Petitioner

Vs.

1. Land Commissioner General
   Land Commissioner General's Department,
   "Mihikatha Madura"
   1200/6, Rajamalwatte Road,
   Battaramulla.

2. Mahaweli Authority of Sri Lanka,
   No.500, T B Jayah Mawatha,
   Colombo 10.

3. Divisional Manager,
   Mahaweli Authority of Sri Lanka,
   Mahaweli Economic Agency,
   Divisional Manager's Officer,
   Madatugama.

4. Wasantha Kumara Seneviratne,
   Near Pallehingura Dewalaya,
   Mahaelagamuwa,
   Kekirawa.

Respondents

Before: **Janak De Silva J.**

&

N. Bandula Karunarathna J.

Counsel:	Thishya Weragoda with S Marawila for the Petitioner D. Nandasinghe for the 4th Respondent N. Kahawita SC for the State
Written Submissions:	By the Petitioner filed on 10.03.2017 By the 2nd & 3rd Respondents filed on 06.07.2017
Argued on:	11/06/2019
Judgment on:	**18/11/2020.**

N. Bandula Karunarathna J.

The Petitioner instituted this application before this Court seeking inter alia;

a) A Writ of Certiorari to quash the decision of the 3rd Respondent to cancel the permit marked as P1 by virtue of the cancellation directive marked as P2.

b) A Writ of Certiorari to quash the decision of the 3rd Respondent to issue the permit marked as P3 in favor of the 4th Respondent.

c) A Writ of Mandamus compelling the 1st, 2nd and 3rd Respondent to re-issue a permit in the name of the Petitioner in respect of the land connected to this application.

The Petitioner stated in his Petition that the permit marked as P1 was issued to one Senevirathne Mudiyanselage Thewahamige Herathhamy by the 2nd Respondent. Said Herathhamy had originally appointed Thamara Malkanthi Senevirathne as his successor to the land and later appointed 4th Respondent. Finally the Petitioner was appointed as the successor of Herathhamy.

The Petitioner stated that, as there was a dispute between said Herathhamy and the 4th Respondent and his father, said original permit holder Herathhamy, filed the action bearing No. L/19149 before the District Court of Anuradhapura seeking ejectment of the 4th Respondent and his father from the subject matter of said action.

The 3rd Respondent had cancelled the permit marked P1 by his letter marked P2 dated 08/09/2003 whilst the said action was pending before the District Court and later had issued a fresh permit marked as P3 in the name of the 4th Respondent on the 14th of July 2005.

The Petitioner challenged the decisions of cancelling the permit issued to Herathhamy and the permit issued to the 4th Respondent by this application on the basis of that he was the nominated successor of said permit issued to Herathhamy.

it is the position of the petitioner that the purported cancellation of permit is tainted with procedural impropriety. the Petitioner submits that in terms of the Land Development Ordinance, notice must be given to the Permit holder informing him that there has been a breach of conditions of the permit. This notice is mandatory. The Petitioner states that as per Section 106 of the Land Development Ordinance, 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 Government Agent on a date and place specified in such notice.

The Petitioner says that the aforesaid notice under Section 106 contains a note that the aforesaid notice has been returned undelivered on or about 11th November 2002. The Petitioner submits that, section 108 of the said Act further mandates that notice must be duly served on the Permit Holder.

The Petitioner further says that, Section 109(2) has no application to the present matter before Court. Section 109(2) of the Act refers to situations where the Permit Holder fails to appear before the Government Agent upon being served with notice. In the matter before Court, the Permit Holder has not been served with notice, and therefore, showing cause as to why the permit should not be cancelled is of no consequence.

The Petitioner argued that, notice as required by the law not being served on Herathhamy, renders the entire process null and void *ab initio.* As such, the 2nd and 3rd Respondents failing to duly serve notice as mandated by the Land Development Ordinance, the entire proceedings are a nullity and procedural impropriety has occurred.

The Petitioner submits that, assuming that notice was duly served and the Permit Holder failed to appear, even so, the decision marked P2 has been made without any valid and legal basis or without any evidence rendering the said decision communicated by P2 null and void. The purported notice marked 2R4 indicates that, the said Notice is issued on the basis that the Permit Holder has breached conditions 8 and 13 of the Permit marked P1.The Petitioner further states that the document 2R5, does not disclose an iota of evidence to substantiate how the 2nd Respondent satisfied itself as required in Section 109 (1) of the Act that there had been a breach of any condition contained in the Permit marked P1.

It is the position of the 2nd and 3rd respondent that in the absence of any court order or even an intimation by the parties that the title and the possession of the said land was under judicial consideration and to refrain from taking any action with regard to the land, the 2nd and 3rd Respondents cannot be held liable for discharging their responsibilities under the provisions of the Land Development Ordinance.

The Respondents' argument is that the 2nd and 3rd Respondents have a statutory duty to take action against any person who violate any condition set out in the permit. Non possession of the land in issue is a fundamental round for cancellation of a permit under the Land Development Ordinance. After cancellation of the permit issued to Herathhamy, it is a duty of the said Respondents to regularize the land in favor of the person who is in possession since 1994 and developed the land in dispute.

The Petitioner did not take steps to inform the said Respondents of his interest in the land or that he was not allowed to take the possession by the 4th Respondent or any other person.

The said Respondents embark on the fact that the original permit holder Herathhamy, violated the conditions of the permit. He disposed of the land and did not cultivate. The Petitioner did not occupy the land. The Petitioner has no locus-standi in this matter. His rights flow from a valid permit from Herathhamy. By the time the Petitioner was substituted in the DC and he filed this present case, the permit from which he may have derived rights has been cancelled. Therefore, the Respondents state that the Petitioner has no locus-standi in this matter.

The Respondents further submit that they were never made parties to the DC case. They were never informed of any issue. Thus, they did not go against a DC order and did not know of this action to halt their inquiries. The Respondents also reiterate that the Petitioner had slept over their rights since they did not challenge the decision to cancel the permit. Thus, they are precluded from seeking the discretionary remedies.

It is important to note that section 113 of the Land Development Ordinance which provides that a permit holder aggrieved by an order of cancellation of the permit may prefer an appeal to the Land Commissioner against the decision of cancellation.

The original permit holder who had the knowledge of the cancellation of his permit had every opportunity to invoke the appellate Jurisdiction vested with the Commissioner of Lands. He had neither filed any appeal against the cancellation nor had he challenged the aforesaid decision before any other forum. He had not even sent a letter to the any of the authorities questioning the validity of the cancellation of his permit.

The Petitioner could have exercised effective alternative remedy provided by law. It is trite law that where a person has remedy provided by law, first he has to recourse to such remedy. The Petitioner has not exercised the remedy by filing an appeal in the Higher Court.

In the case of Hendrick Appuhamy V. John Appuhamy 69 NLR 29 where the Court of Appeal refused to intervene on the basis that the action was not maintainable since the Petitioner should have sought his remedy under the Paddy Lands Act and should have filed action in the District Court.

This has been followed in the case of Mahanayake v. Chairman Ceylon Petroleum Corporation and others I2005J 2 SLR at 193.

The 4th Respondent filed his statement of objections on the 25th of March 2014 and took up the following preliminary objections amongst other objections stated therein.

a) The Petitioner has no locus- standi to invoke the writ Jurisdiction of this Court and seek relief as prayed for in his Petition.

b) The Petitioner is guilty of laches which had not been explained and therefore in any event is not entitled for any relief.

c) The Petitioner has misrepresented material facts and therefore guilty of lack of uberima fides necessary to seek prerogative writs.

The 4th Respondent stated further that in any event the Petitioner is not entitled for a writ of mandamus in his favor as he does not belong to any of the categories referred in rule 1 of the 3rd schedule of Land Development Ordinance. The 2nd and 3rd Respondents have legally cancelled the permit issued to Herathhamy during the lifetime of the original permit holder and he had not challenged the aforesaid decision for a period of 7 years (2003 to 2010) until his death on the 4th of June 2010. As the original permit holder had not challenged the cancellation of his permit in any manner whatsoever for such a long period it can reasonably be decided that he had accepted the decision of cancellation made by the 3rd Respondent.

The 4th Respondent states that as Herathhamy, being the original permit holder had not challenged the cancellation of his permit the purported nominated successor has no rights to challenge it after the death of Herathhamy as his nomination had also been automatically wiped out with the cancellation of the permit.

On the contrary, the 2nd and 3rd Respondents stated in their statements of objections that they have followed the due process for cancellation of the permit issued to the original permit holder and later granting a fresh permit in the name of the 4th Respondent after 2 years of said cancellation.

Subsequent to a thorough analysis of the facts of the case, it is my position that the Petitioner has no locus- standi to seek prerogative writs from Court. The Petitioner had filed this writ application on the basis of that he was the duly nominated successor to the original permit marked as P1. He challenges the decision of cancellation of the permit issued to Herathhamy and further challenges the issue of the fresh permit marked P3 to the 4th Respondent on the basis of that the issue of fresh permit is invalid as the original permit was not properly cancelled.

It could be seen that the letter of cancellation of the original permit (marked as P2) had been issued on the 8th of September 2003 by the 3rd Respondent during the lifetime of the original permit holder.

The Petitioner says that, though the said letter is having a date in 2003 the original permit holder had no knowledge of cancellation of his permit, as P2 was never received by him and further that it was the reason for failure to challenge aforesaid decision by Herathhamy. The 4th Respondent introduces the document marked as 2R4 by which the 3rd respondent had summoned the original permit holder for an inquiry in respect of cancellation of his permit. Though the document 2R4 is having a note that said letter posted in a registered cover was returned, the original permit holder had stated giving evidence at the trial before the District Court of Anuradhapura that he was called for an inquiry in respect of cancellation of his permit.

The letter of cancellation of the original permit was marked and produced as P9 before the District Court at the trial on the 29th of June 2006 through a witness from Mahaweli Authority. Said witness was called by the Plaintiff in said action. The original permit holder Herathhamy said that document was marked as one of the documents of the Plaintiff (Herathhamy). (at page 104 and 105 of the certified copy of the case record) The fresh permit issued in the name of the 4th Respondent was also marked at the trial before the District Court as P14 on the 28th of September 2006 by the Plaintiff of the said action namely Herathhamy (vide page 108 of the certified copy of the case record)

Therefore I believe that the original permit holder Herathhamy was having knowledge of cancellation of his permit and issue of a fresh permit in year 2006 as both those documents were marked on his behalf at the trial before the District Court.

It is also pertinent to note that though the original permit holder had the knowledge of cancellation he had not taken any step to challenge said cancellation until his death in 2010. The section 113 of the Land Development Ordinance which provides that a permit holder aggrieved by an order of cancellation of the permit may prefer an appeal to the Land Commissioner against the decision of cancellation. The original permit holder who had the knowledge of the cancellation of his permit had every opportunity to invoke the appellate Jurisdiction vested with the Commissioner of Lands. He had neither filed any appeal against the cancellation nor had he challenged the aforesaid decision before any other forum. He had not even sent a letter to any of the authorities questioning the validity of the cancellation of his permit. For the reasons aforementioned, it can reasonably be decided that the original permit holder had accepted the decision of cancellation by choosing not to canvas its validity until his death.

The purported succession of the Petitioner also wipes out with the cancellation of the permit. The successor is having no right to be appointed in the room of the deceased original permit holder when there was no valid permit as at the date of his death. Since the original permit holder had accepted the decision of cancellation of his permit in the aforesaid manner the question of nomination to the permit does not arise. Therefore the Petitioner cannot be treated as the nominated successor of the original permit from the date of cancellation of said permit.

The Petitioner had tendered this application as the nominated successor. Since he had also his position of nominated successor in 2003 by cancellation of the permit and said cancellation had been accepted by the original permit holder without challenging said decision, the Petitioner is having no locus standi to maintain this application as he was not the nominated successor anymore.

The Petitioner is guilty of laches which had not been explained and therefore in any event he is not entitled for any relief. The cancellation of the permit issued to the original permit holder had taken place in the year of 2002. The fresh permit marked as P3 had issued in the name of the 4th Respondent in year 2005. Both the original permit holder and the Petitioner were well aware of aforesaid cancellation and the issue of fresh permit at least from the middle part of the Year 2006 in the manner as I explained above. As per the proceedings dated 28th September 2006 the Plaintiff in said action, Herathhamy had been present in Court in person when the fresh permit was marked as P14 through the evidence of the witness called by him from the 2nd Respondent Authority.

Neither the original permit holder nor the Petitioner had taken any step to challenge the aforesaid decisions until the Petitioner filed this application on the 04th of October 2013. The delay of 7 years (at the least) for challenging the aforesaid decisions of the 2nd and 3rd Respondents had not been explained in the pleadings filed by the Petitioner. Though the laches had been taken as a specific objection in the statement of objections of 2nd and 3rd Respondents and also by the 4th Respondent, the Petitioner had not explained the long delay even in his counter affidavit.

In any event the Petitioner is not entitled for the Writ of Mandamus prayed in his Petition.The Petitioner by prayer (d) of his petition had moved for a Writ of Mandamus compelling the 1st to 3rd Respondents to re-issue a permit in the name of the Petitioner under and in terms of the Land Development Ordinance in respect of the land related to this application.

I further note that the question of re-issue of a permit to the Petitioner does not arise in this application as no permit was issued to him at any point of time. The succession to the aforesaid permit has to be decided by the relevant authorities (2nd and 3rd Respondents) at an inquiry to be held in terms of the provisions in Land Development Ordinance as the original permit holder Herathhamy is now deceased.

In order to succeed to the permit issued to Herathhamy as the purported nominated successor, the Petitioner has to establish that he is belonging to one of the categories in rule 1 of the 3rd Schedule of the Land Development Ordinance as section 51 of said Ordinance had enacted a specific restriction for nomination of any person other than the spouse of the permit holder and a person belongs to one of the group of relatives enumerated in said rule.

The Petitioner had not tendered any proof in any manner to establish that he was having a relationship to the original permit holder in order to appoint himself as the nominated successor of said permit.

For the reasons aforementioned, the application of the Petitioner is hereby dismissed, with cost.

Judge of the Court of Appeal

Janak De Silva , J

I agree.

Judge of the Court of Appeal