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DIGEST

vacating office belonged, to nominate within a period to be specified by the returning officer, a person Eligible under this ordinance for election as a member of that local authority, to fill such vacancy and . . . . On the other hand if such secretary or group leader fails to make a nomination within the prescribed period, the returning officer shall declare elected as member from nomination paper submitted by that party or group, the candidate who has secured the highest number of preferences at the election of members to that local authority. . . . ."

Section 65A (2) comprise two limbs. First is nomination by the secretary when called upon by the returning officer and the second requiring nomination by the returning officer upon default by the secretary. The first limb empowers the nomination of a person eligible under the Act for election (whom the returning officer shall then declare elected) and the second limb requires the returning officer, upon default by the secretary, to declare elected from the nomination paper submitted, the candidate who has secured the highest number of preferences at the election.

It is the first limb that is germane in this respect. The secretary of the party is given the right to nominate a person Eligible under the ordinance. Much depends on the eligibility criterion. Therefore the secretary has to be first satisfied that a person is eligible. Unlike the returning officer, the secretary of a party is in a better position to find out whether a person to be nominated is eligible or not. It is because the secretary has access to information from the organizers, party officials and grass root level party supporters on the question of eligibility of a prospective nominee. One who is qualified at the time of nominations may be disqualified from being nominated by the time the vacancy occurs. Therefore it is the

duty of the secretary of the party to ascertain whether the person to be nominated is infact eligible or not. Hence a duty is cast upon the secretary of the party not to nominate any one other than a person who is eligible.

In the instant case the petitioner as well as the 3rd respondent is eligible to be nominated. The secretary of the party has nominated the 3rd respondent on the basis of youth representation. But youth representation is a criterion that should be considered at the time of nominations only. No where in the act is there reference to mandatory youth representation in the final composition of a local authority. Youth representation is a thing that should be filled according to democratic ideals, i.e. in the instant case the vacancy should have been filled by the person who secured the highest number of votes and not on the basis of youth representation. If the person who has secured the highest number of preferential votes fits the criterion of youth representation, so be it. No doubt it would greatly enhance the composition of the local authority. But all these considerations take second seat to the right of the people to choose their representatives.

The fourth respondent, secretary of the alliance, misdirected himself by nominating the 3rd respondent, who was able to secure only 1875 preferential votes, whereas the petitioner got 1897, i.e. 22 votes more. Though the margin is negligible one cannot overlook the fact that the petitioner was able to secure more preferential votes than the 3rd respondent. That was the aspiration of the people. 3rd and 4th respondents in their joint objections stated that the above nomination was done in order to strengthen the representation of youths and to fulfill the aspirations of the voters. But

as I have already observed youth representation is a factor that should only be considered at the time of nominations. Once nominations are over, criterion of youth representation recedes to the background and the wishes of the electorate must take precedence. Therefore the 4th respondent has erred in nominating the 3rd respondent.

I therefore issue a writ of certiorari quashing the decision (P3) contained in the extraordinary gazette of 13th August 2007 and issue a writ of mandamus directing the 2nd respondent to appoint the petitioner as a member of Harispattuwa Pradeshiya Sabah as prayed for in prayer (c). The above writs are issued with costs fixed at Rs. 25,000/= payable by the 4th respondent to the petitioner.

SRI SKANDARAJAH, J. – I agree.

Application allowed.

BUDDADASA VS.
COMMISSIONER OF LOCAL GOVERNMENT AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
LECAMWASAM, J.
CA 963/2007
AUGUST 27, 2009

Writ of Certiorari – Pradeshiya Saba Act Section 8 (2), Section 8 (2), Section 8 (4) – Delegation of power by the Chairman who is out of the Island? To whom? – When? Can a public officer or body delegate the entirely of the powers possessed by him? Distinction between Section (2), Section 8 (3) and Section 8 (4)

The petitioner Chairman of the Predeshiya Sabawa (Kaduwela) delegated his powers to the Secretary of the Pradeshiya Sabawa – as he had to go abroad for a conference. In an earlier occasion, he delegated his powers to the same Secretary, when he went abroad for medical treatment. On a complaint lodged with the Human Rights Commission (HRC), the Human Right Commission came to the conclusion that, there is a violation of the rights of the Vice Chairman and recommended that in future in the absence of the Chairman his duties should be entrusted to the Vice Chairman.

The Commissioner of Local Government – 1st respondent – in the second instance – invited the Chairman to comply with the directions of the H.R.C.

The petitioner sought to quash this direction issued by the 1st respondent.

Held

(1) A careful scrutiny of Section 83 ( ) of the Act will illustrate that the power so delegated is envisaged not to be a general power, but be for a specific purpose. Chairman cannot delegate all the power which he possess but only some of the powers.

Per Lecamwasam, J.

> "General principles of law enumerates certain confines within which delegation could be effected which delegation is sometimes

essential for administrative convenience, such delegation has to be either expressly or impliedly authorized by statute. A public officer or body cannot delegate the entirely of the powers possessed by him or it. Delegation should be for a particular function or purpose, including a power to revoke such delegation where desired".

(2) Section 8 (4) deals with a situation where the Chairman is absent due to the illness or other unavoidable cause as in the instant case. When the Chairman is overseas it is obvious he cannot attend to routine work of the Pradeshiya Saba. Therefore somebody must act for the Chairman during the period when the Chairman is away from Sri Lanka.

(3) There is a clear distinction between Section 8 (4) as opposed to Section 8 (2) and Section 8(3). Section 8 (2) and 8 (3) deal with delegation, but when the Chairman is away from Sri Lanka provisions of Section 8 (2) and Section 8 (3) do not apply. The only applicable Section is Section 8 (4). Under Section 8 (4) he has no legal authority to delegate his powers to the Secretary. The Vice Chairman is the sole person of authority who could exercise the powers and perform duties of the Chairman when the Chairman is away from Sri Lanka.

Per Lacamwasam, J.

"Chairman has acted in an arbitrary and illegal manner delegating his powers to the Secretary for the second time even after the directions of the H.R.C. – it is a lamentable indication of his disrespect for the law of the country."

APPLICATION for a Writ of Certiorari.

Manohara de Silva PC with *Nimal Hippola* and *Anusha Perusinghe* for petitioner

Janak de Silva SSC for 1 – 9th respondents.

Rashika Dissanayake for 10th respondent.

Rohan Sahabandu for 11th respondent.

November 4th, 2009
D. S. C. LECAMWASAM, J.

The petitioner is the chairman of Pradeshiya Sabha, Kaduwela. Due to ill health he had to be away in Malaysia

for medical treatment during the period spanning from 31.01.2007 to 05.02.2007. Prior to leaving the chairman delegated his powers to the secretary of the Pradeshiya Sabha instead of the vice chairman for which governor has given his approval. Being dissatisfied with the above delegation of power, the vice chairman of the Pradeshiya Sabha, i.e. the 10th respondent, made an application to the Human Rights Commission alleging that the above delegation has violated his human rights.

In pursuance to the above application, the Human Rights Commission held an inquiry and had come to the conclusion that by said delegation the chairman of the pradeshiya Sabha (that is the petitioner in this application) has infact violated the rights of the vice chairman and recommended that in future in the absence of the chairman his duties should be entrusted to the vice chairman and the Commissioner of Local Government should act in a more responsible manner by giving proper directions to the Pradeshiya Sabha. The above decision and directive of the HRC are reflected in P9 and P 9A dated 24/09/2007.

In spite of the above observations of the HRC, when the petitioner chairman had to go to South Korea for a conference from 28/10/2007 to 01/11/2007 he again delegated his powers to the same secretary. Because of this second delegation the 1st respondent, Commissioner of the Local Government (Western Province) had issued P 15 and P 16 inviting the attention of the chairman and the secretary of the Pradeshiya Sabha to the findings of the HRC and directed both officials to comply with the directions/observations of the HRC contained in P9 and P9A.

Instant application of the petitioner is to quash P 9, P 9A, P 15 and P 16.

Sections 8(2), 8(3) and 8(4) of Pradeshiya Sabhas Act No. 15 of 1987 are relevant to the instant application.

Section 8(2) reads as follows;

"The chairman may by order in writing delegate to the vice chairman or the secretary or any other officer of the Pradeshiya Sabah any of the powers, duties or functions conferred or imposed upon or vested in the chairman by this act or any other written law."

8(3) states

"The exercise, discharge or performance by the vice chairman or the secretary or any other officer of Pradeshiya Sabha of any power, duty or function delegated to him by order of the chairman, shall be subject to such conditions and restrictions and limited to such purpose or purposes as may be specified in the order and any such delegation may at any time be varied or cancelled by order of the chairman."

Careful scrutiny of section 8 (3) will illustrate that the power so delegated, is envisaged not to be a general power, but be for a specific purpose. There can be restrictions or conditions attached to such delegation. Chairman cannot delegate all the powers which he possesses but only some of the powers. Also the chairman may vary or cancel such delegation by order.

Lawful exercise of power entails that such power is to be exercised by the authority upon which it is conferred. The only exception being when there is express provision to the effect or reasonable inference that such power was to be delegable.

Delegation is conferment of power by a distinct act, upon a person or body of persons previously not competent to exercise such power.

General principles of law enumerate certain confines within which delegation could be effected. While delegation is sometimes essential for administrative convenience, such delegation has to be either expressly or impliedly authorized by statute. A public officer or body cannot delegate the entirety of the powers possessed by him or it. Delegation should be for a particular function or purpose, including a power to revoke such delegation when desired.

Section 8(2) and 8(3) in my opinion are therefore precisely meant to address the issue of delegation of power subject to the limitations hitherto mentioned.

But in the absence of the chairman from the island, there cannot be a delegation of powers. One who is performing the functions or the duties of the chairman in such a situation cannot act under delegated power because of its restrictive nature. Such a person has to perform all the functions of the chairman in the absence of the chairman. If it is delegated power one cannot to beyond the powers conferred on him through delegation. Section 8(4) attests to this fact.

Section 8(4) states – *"During the period of absence of the chairman on account of illness or other unavoidable cause, the vice chairman may exercise the same powers and perform the same duties as the chairman."*

Section 8(4) deals with a situation where the chairman is absent due to illness or other unavoidable cause as in the instant case. When the chairman is overseas it is obvious he cannot attend to routine work of the Predeshiya Sabha. Therefore somebody must 'act' for the chairman during the period when the chairman is away from Sri Lanka.

Hence there is a clear distinction between Section 8(4) as opposed to Section 8(2) and (3). Sections 8(2) and 8(3)

deal with delegation. But when the chairman is away from Sri Lanka Provisions of 8(2), 8(3) do not apply. The only applicable Section is section 8(4). Under section 8(4) during the absence of the chairman due to unavoidable causes as in this case, he has no legal authority to delegate his powers to the secretary. The vice chairman is the sole person of authority who can exercise the powers and perform duties of the chairman when the chairman is away from Sri Lanka.

Chairman has acted in an arbitrary and illegal manner in delegating his powers to the secretary for the second time even after the issuance of P 9A. It is a lamentable indication of his disrespect for the law of the country.

Therefore I do not see any reason to interfere with P 9, P 9A, P 15 and P16 and hence the application of the petitioner must fail under these circumstances. Therefore I dismiss the application for a writ of Certiorari without costs.

SRI SKADARAJAH, J. – I agree.

Application dismissed.

WIJAYANANDA VS. POST MASTER GENERAL AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
LECAMWSAM, J.
CA 284/2007
MAY 14, 2009

Writ of Certiorari/Mandamus – to act according to Circular to prepare a seniority list and recommend – Quash decision to appoint – Postal Service – Constitution – 17th Amendment – Article 55 (5), 61A – 126, 146, 155 (c) – Preclusive clause – applicability? Constitutional ouster – Public Service Commission (P. S. C.)

The petitioner sought to quash the decision of the Post Master General to appoint 3 – 138 respondents to the Unified Postal Service on temporary basis subject to the covering approving of the P. S. C. and further sought a Mandamus against the respondents to act according to Circular to prepare the seniority list.

The respondent contended that the Court of Appeal does not have jurisdiction in view of Article 61A of the Constitution.

Held

(1) The Constitutional ouster contained in Article 61A excludes judicial review. Ouster clauses contained in the Constitution would bar jurisdiction that has been granted within the Constitution – it would be a bar to entertain a writ application by the Court of Appeal.

APPLICATION for Writs of Certiorari/Mandamus.

Cases referred to:-

1. *Credit Information Bureau of Sri Lanka vs. Messrs Jafferjee & Jafferjee (Pvt.) Ltd.* – 2005 – 1 Sri LR 59
2. *Kumara vs. The Mayor, Ratnapura Municipal Council and others* – 2003 – 1 Sri LR 38
3. *Ratnasiri vs. Ellawala and others* – 2004 – 2 Sri LR 180 at 190
4. *Migultenne vs. AG* – 1996 – 1 Sri LR 408

5. *Katugampola vs. Commissioner General of Excise and others* – 2003 – 3 Sri LR 207.

Chula Bandara for petitioner.
Yuresha de Silva SC for Attorney General.

Cur.adv.vult.

November 3rd, 2009
SRISKANDARAJAH, J.

The Petitioners are presently serving as officers in Group B of Grade II of the Unified Postal Service of the Department of Post and are presently attached to the Accounts Division of the Head Office, Colombo 10. The 3rd to the 138th Respondents are the officers in the Group B Grade II of the Unified Postal Service who were promoted by the 1st Respondent to the Group B Grade I of the same service with effect from 02.02.2007, on a temporary basis subject to the covering approval of the Public Service Commission.

Under Public Service restructuring project a committee was appointed to make recommendation to restructure the Department of Post. The said committee submitted their report and proposed the establishment of a unified postal Service by amalgamating the existing Postal Clerical Service, Postmasters and Signallers Service and all the other services in the Department of Posts. This proposal was approved by the Cabinet of Ministers on 15.05.1991. Subsequently the 1st Respondent issued a circular bearing No. 256 dated 01.05.1992 establishing a Unified Postal Service and all officers were absorbed into this service.

Thereafter 151 officers were promoted subject to the covering approval of the Public Service Commission and were confirmed by the Public Service Commission with effect from

16.01.2003. The Respondents contended that 3rd to 138th Respondents were only appointed to cover up duties in respect of the post of Group B Class I A of the unified postal service with effect from 02.02.2007 subject to the approval of the Public Service Commission. In the mean time all necessary steps are being taken for the purpose of preparing a common seniority list as per Administrative Circular No. 256 dated 08.04.1992.

The Petitioners have submitted that they are more senior than both groups of officers promoted with effect from 16.01.2003 and 02.02.2007. They had a legitimate expectation of being promoted to the group B Class I of the Unified Postal Service if a correct seniority list is prepared in terms of Circular 256. Therefore the Petitioners submitter that the decision of the 1st and 2nd Respondents to temporarily promote the 3rd to 138th Respondents to group B Class I of the Unified Postal Service is irregular, unreasonable, arbitrary, and in violation of the provisions of the circular 256. In these circumstances the Petitioners seek a writ of certiorari to quash the decision made by the 1st Respondent to appoint the 3rd to 138th Respondents on a temporary basis with effect from 02.02.2007.

The Respondents in this application has raised two preliminary objections namely that the Court of Appeal does not have jurisdiction in view of Article 61A of the Constitution and necessary parties are not been named in this application.

The Petitioners contended that the prayer of mandamus against the Respondents to act according to Circular No. 256 to prepare a seniority list is within the purview of the 1st and 2nd Respondent and as such Article 61A of the Constitution which relates to the Public service commission is inapplicable in this instant.

The Petitioners in prayer (c) has sought a writ of Mandamus, to act according to the Circular 256 to prepare the seniority list of officers who were absorbed into Class B Group II category. Prayer (d) is for a mandamus to recommend according to the said seniority list. This is a consequential relief to prayer (c). The Respondents have explained the delay in preparing the seniority list. The 1st Respondent stated that necessary steps were taken on numerous occasions to prepare a common seniority list. However, in view of the objections that were expressed by various quarters/trade unions regarding the common seniority lists and in view of the Fundamental Rights Application filed challenging the said common list it was not possible to finalise or prepare a list that was acceptable to all relevant parties. But the Respondent categorically submitted in the objections filed in this application that all necessary steps are being taken for the purpose of preparing a common seniority list as per Administrative Circular No. 256 dated 08.04.1992. In view of the above explanation and the undertaking the Petitioner cannot claim a writ of mandamus. To seek a writ of mandamus the Petitioner should have made a request and that should have been denied; *Credit Information Bureau of Sri Lanka v. Messrs Jaggerjee & Jafferjee (pvt) Ltd* (1). The court dismissed an application for a writ of mandamus against the Mayor of the Ratnapura Municipal Council (the Mayor) for an order to allocate shop No. 41 in a new shopping complex constructed by the Municipal Council, on the ground that the Mayor had given an undertaking that the petitioner would be allocated a shop which undertaking the Mayor was willing to honour. This order was based on the principle that failure to perform duty is a precondition for issue of writ: *Kumara v. The Mayor, Ratnapura Municipal Council and Others* (2). In the Present case the Petitioners neither had made a request not had it been refused.

The Petitioner has sought a writ of certiorari to quash the decision of the 1st Respondent to appoint the 3rd to 138th Respondents on a temporary basis. This decision is subject to the approval of the Public Service Commission.

Article 155(C) introduced by the 17th Amendment to the Constitution provides:

"Subject to the jurisdiction conferred on the Supreme Court under paragraph (1) of Article 126, no court or tribunal shall have the power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the commission, in pursuance of any power or duty, conferred or imposed on such commission or committee under this chapter or under any other law."

"Commission" in Article 155 (c) includes Public Service Commission Article 61A deals with Public Service Commission. In *Ratnasiri v. Ellawala and Others*(3) at 190 the Court held:

> "In view of the elaborate scheme put in place by the Seventeeth Amendment to the Constitution to resolve all matters relating to the public service, this court would be extremely reluctant to exercise any supervisory jurisdiction in the sphere of the public service. I have no difficulty in agreeing with the submission made by the learned State Counsel that this court has to apply the preclusive clause contained in Article 61A of the Constitution in such a manner to ensure that the elaborate scheme formulated by the Seventeenth Amendment is given effect to the fullest extent."

Marsoof J (P/CA as he then was) further held in the above case:

> "I am inclined to the view that since this court exercises a supervisory jurisdiction in terms of Article 140 of the

Constitution which commence with the words "Subject to the provisions of the Constitution", the constitutional ouster contained in Article 61A excludes judicial review even in the situations contemplated by the proviso to section 22 of the interpretation Ordinance as Mark Fernando J observed in *Migultenne v. Attorney General*[4] at 491 in connection with sections 106 and 107 of the Republican Constitution of 1972."

In relation to the above constitutional provisions Tilakawardena J observed in *Katugampola v. Commissioner General of Excise & others*[5] that the ouster clauses contained in the Constitution would bar jurisdiction that has been granted within the constitution and would therefore such ouster clause adverted to above would be a bar to entertain a writ application by the Court of Appeal.

Tilakwardena J further held:

"Therefore whether to consider the application of Article 55(5) or Article 61A nevertheless the decisions by the PSC have been precluded and the jurisdiction was vested even prior to the amendment of the Constitution in the Supreme Court which has jurisdiction to inquire into the validity of the decision of the PSC in terms of Article 126 of the Constitution, that is in the exercise of the fundamental rights jurisdiction."

For the above reasons this court dismisses this application without costs.

D. S. C. LECAMWASAM, J. – I agree.

Application dismissed

MAHINDAPALA AND OTHERS VS. MINISTER OF LANDS AND LAND DEVELOPMENT AND OTHERS

COURT OF APPEL
SRISKANDARAJAH, J.
LECAMWASAM, J.
CA 807/2007
SEPTEMBER 10, 2009

Writ of Certiorari – Land Acquisition Act – Section 2 – Section 38 (a) Urgency – material to justify inquiry? – procedure flawed – Order of Minister invalid? Natural Justice – fair hearing

The petitioners sought a writ of certiorari to quash the decision to acquire the land in question and a writ of mandamus directing the respondents to divest the lands to the petitioners.

The petitioners' position was that, the Minister had published a vesting order in terms of Section 38 (a) of the Land Acquisition Act. The petitioners contended that, they were never informed of the impeding vesting and neither were they served notice under Section 2. The petitioners further contended that, there had been a proposal since early 1990 for the Weressa river/Bolgoda lake project and in such circumstances, there cannot be an urgency.

Held

Per Lecamwasam, J.

> "Though the acquisition proceedings in respect of the 11 blocks were initiated in 2006/2007, these proceedings are only a part of a long chain of acquisitions. This project is not a project commenced in 2006. I am convinced that, the said project was in existence at least since the year 2000 – therefore there is no urgency per se compelling the Minister to act under Section 38 (a).

(1) As there was no urgency, the Authorities should have followed the proper procedure envisaged in the Act. Had they followed the proper procedure petitioners would have got an opportunity to air their grievances. One pillar of the doctrine of natural justice is the right to a fair hearing before an administrative authority acts or makes decisions affecting the right of parties.

(2) Failure to observe the procedure laid down in the relevant legislature as in the present situation violates the decision made by the public authority. The Minister's order which was not pursuant to following proper procedure in the absence of urgency is invalid.

APPLICATION for a writ of certiorari.

Case referred to:-

Volnet vs Barret 1885 55 LJQB 39 at 41

J. C. Weliamuna for petitioner.

Nuwan Peiris SC for 1st, 2nd and 3rd respondents.

November 18rd, 2009

D. S. C. LECAMWASAM, J.

The petitioners by their petition dated 21st September 2007 inter alia prayed for writs in the nature of certiorari to quash the decision contain in p13, P12 a-c and P12, in the nature of mandamus directing the respondents to divest the lands of the petitioners, and in the nature of prohibition, prohibiting the respondents from acquiring the petitioners land.

The petitioners are the owners of three contiguous allotments of land situated at Boralesgamuwa, facing Piliyandala-Colombo main road. According to the petitioners there are buildings on these three contiguous allotments. The petitioners allege that the 1st respondent, the Minister of Lands acting in terms of section 38 Proviso (a) of the Land Acquisition Act published in Gazette No. 1510/15 dated 14th August 2007 a vesting order in respect of eleven allotments of land including the above mentioned three contiguous lands of the petitioners and in consequence to the above gazette notification the 3rd respondent Divisional Secretary of Kesbewa sent a letter (p12) dated 2007/09/05 addressed to the 1st petitioner stating that the above allotments are vested with the state for the development of Weressa river/ Bolgoda lake

project by virtue of section 38(a) of the Land Acquisition Act and possession of the above lands would be taken over on 17th September 2007.

The petitioners categorically state that they were never informed of the impending vesting of their lands under section 38 (a) and neither were they served notice under section 2 of the Land Acquisition Act. According to the petitioners there had been a proposal for the above Weressa river/Bolgoda lake project since early 1990s' and therefore the petitioners state there cannot be an 'urgency' to acquire their lands under section 38(a) of the act. This background has led the petitioners to seek relief before this court.

1-3 respondents in their objections deny most of the averments of the petitions. As the alleged acquisition is under section 38(a) of the Land Acquisition Act it is common ground that the respondents have acted on the basis of 'urgency'. Despite acting under section 38(a) of the act, in paragraph 7 of their objections 1-3 respondents state that the 3rd respondent has given section 2 notice and they have filed 'R1' as proof of that. R1 is a document which is not worth subjecting to a careful scrutiny.

Mere glance at R1 is suffice to expose its palpable falsehood. It is the Grama Sewaka of the area who is said to have exhibited the relevant notice. According to R1 paragraph 6 under the heading 'whether immediate possession can be taken? Grama Sewaka has reported to the effect that there are no houses on the land and there is only a temporary hut. Whereas according to the documents of the petitioners such as P3, P5, P6(a), P8, P9, P10, P11, P16 a-d, P17(b) and P18 (a) it is crystal clear that the 1st petitioner has been residing on the land since 1991, 2nd and 4th Petitioners at least from June 2006 and the 3rd petitioner with her

spouse Sunil at least from 1997. Whilst two of these petitioners i.e. 2nd and 3rd were engaged in their business activities the 1st petitioner was engaged in business whilst been resident on the disputed land since 1991. Grama Sewaka whilst saying that there is only a temporary hut and no business premises on the land, says in the same breath in Paragraph b(6) under 'any other facts', 'the present occupants of the land are informed about the acquisition proceedings' i.e. in other words Grama Sewaka himself admits that there are occupants on the disputed land which would have impeded upon immediate possession. Therefore report filed by Grama Sewaka is deceptively misleading and should not have been acted upon.

Having perused the petition and the objections by the respondents there cannot be any doubt that the Werassa river/Bolgoda lake project is a project which had been initiated long before 2006. Although the state wanted to acquire the eleven allotments of land including the three disputed blocks in August 2007 by way of p13, according to R2 and R3 it can be safely inferred that a Section 2 notice had been issued way back in year 2000. Paragraph 2 of R2 refers to a section 2 notice being issued under 12/2000/UDA/376 dated 02nd July 2001. Therefore though the acquisition proceeding in respect of these eleven blocks were initiated in 2006/2007, these proceedings are only part of a long chain of acquisitions. Weressa river/Bolgoda lake project is not a project commenced in year 2006. According to the limited documents before me, I am convinced that the said project was in existence at least since year 2000. Therefore there is no 'urgency' per se compelling the 1st respondent minister to act under section 38 proviso (a).

As there was no 'urgency' the authorities should have followed the proper procedure envisaged in the Land Acquisition Act. Had they followed the proper procedure,

petitioners would have got an opportunity to air their grievances. Failure on the part of the authorities to follow the procedure deprived the petitioners of that opportunity. One pillar of the doctrine of Natural Justice is the right to a fair hearing before an administrative authority acts or makes decisions affecting the rights of subjects. As stated in Administrative Law (Ninth Edition) by Wade & Forsyth "in its broadest sense natural justice means simply 'the natural sense of what is right and wrong' and even in its technical sense equated with 'fairness'" *Voinet v. Barrett*[1] at 41. The lack of urgency in the acquisition proceedings warrants a granting of a hearing. Natural justice is concerned also with the observance of fair procedure in the context of public decision making. Failure to observe the procedure laid down in the relevant legislation, as is the case in the present situation vitiates the decision made by the public authority. Therefore the minister's order which was not pursuant to following proper procedure, in the absence of urgency, is invalid.

For the aforesaid reasons I would hold that this court would be justified in exercising its discretionary powers to grant a writ in the nature of certiorari on the basis that the procedure was flawed and no material has been placed before this court to justify urgency.

Accordingly this court issues a writ of certiorari quashing P 13, P 13a, P 13b, P 13c and p 12 and also issues writs of mandamus as prayed for in prayers (g) and (h) in so far as it relates to the allotments of the three petitioners. This order will not preclude any future acquisition pursuant to following the correct procedure. I make no order as to costs.

SRI SKANDARAJAH – I agree.

Application allowed.

PUSHPAKANTHI VS. AMARATUNGA AND OTHERS

COURT OF APPEAL
SATHYA HETTIGE PC J (P/CA)
GOONERATNE, J.
CA 849/2002
DC KURUNEGALA 3228/P
JULY 15, 2009

Partition Law – Section 18 (2) – 18 (3), when could Court act? Action in respect of one land converted into an action in respect of another land by amendment of pleadings – Permissibility? Exceptional circumstances – Delay – Revision.

The 2nd defendant-petitioner sought to revise the order made by the trial judge requiring parties to take steps under Section 18 (2) or Section 18 (3).

Held

(1) Procedure under Section 18 (3) is available if only field notes and the plan pertaining to the preliminary survey have to be verified or to be certified as correct. The Court did not in the instant case act on its own motion, it was set in motion by the plaintiff-respondent by an application to have a different corpus shown.

(2) An action in respect of one land cannot be converted into an action in respect of another land by an amendment of pleadings.

Per Anil Gooneratne, J.

> "The prejudice caused to the 2nd defendant-petitioner by the order of the trial Judge if given effect to, far outweighs the prejudice caused to the plaintiff-respondent who only loses time in instituting another case in case the order is set aside. He only has to blame himself for his folly in his conduct. . . ."

(3) The order of the trial Judge has carefully considered the options available to a party to proceed with the case.

(4) The delay and absence of exceptional circumstances would be sufficient to reject the petitioner's application.

APPLICATION in Revision from an order of the District Court of Kurunegala.

Cases referred to:-

(1) *Ulberis et al vs. M. W. Jayasekera* 62 NLR 217

(2) *Rashid Ali vs. Mohamed Ali* – 1980 – 1 Sri LR 262

(3) *Hotel Galaxy (Pvt.) Ltd. vs. Mercantile Hotels Management Ltd* – 1987 – 1 Sri LR 5

(4) *Ganegoda Appuhamilage Don Laxmen Seneviratne vs. Sri Jayawardenepura Kotte Municipal Council and others* – CA 212/2003 – CAM 12.11.2003.

Upali de Almeda for 2nd Defendant Petitioner.

Jacob Joseph for Plaintiff - Respondent

S. N. Vijithsinghe for 1st Defendant Respondent.

September 24th, 2009

ANIL GOONERATNE, J.

The 2nd Defendant-Petitioner has filed this revision application to set aside the order marked P12 dated 24.09.2001 in a partition suit. The gist of the order at P12 by the learned District Judge require the parties to take steps according to the Proviso of Section 18(2) or Section 18(3) of the Partition Law. The said Section 18(3) require that Survey General be issued a Commission. The last paragraph of the learned District Judge's Order is reproduced and reads thus:

> "ඒ අනුව මෙම නඩුවේ මූලික පිඹුර වන 133 සී. දෝෂ සහිත නම් එය නිවැරදි කර ගැනීමට, එක්කෝ බෙදුම් පනත 18(2) අතුරු විධානය යටතේ කටයුතු කල යුතු බවත්, එසේ නොමැති නම්, බෙදුම් පනතේ 18(3) යටතේ වගන්තිය මිනුම්පති මගින් නිවරදාතාවය තහවුරු කර ගැනීමට හෝ නව මැනුමකට කටයුතු කල යුතු බවටත් නියම කරමි. දැනටමත් නව නඩු විභාගයට නියම කරන තුරු ප්‍රමාණවත් මූලික පිඹුර සඳහා (133 සී. දෝෂ සහිත බව පැමිණිලිකරුම පවසන විට) පැමිණිලිකරු කටයුතු

කර නොමැතිව සිට ඇත. ඒ අනුව මෙම නියෝගය අනුව කටයුතු කිරීමට ඔහු කිසි උද්යෝගය දැන්විය යුතු බවටද නියම කරමි.

This case has a history since as far back as 28.01.1999, the Court of Appeal by it's Order at (P8) set aside the Judgment dated 10.10.1995, the interlocutory decree and the final decree and directed Trial de Novo be held and also made order for the Petitioner to intervene if so advised.

The Plaintiff in the above partition case in the objection filed in this court has raised the following preliminary objections.

(a) That the 2nd defendant –petitioner (hereinafter referred to as the Petitioner) has failed to make an application for Leave to Appeal against the order dated 24.09.2001.

(b) That this application for Revision has been made after long and unreasonable delay.

(c) The Petitioner is guilty of lashes and/or acquiescence

(d) The petitioner has failed to comply with Rules 3(1) of the Court of Appeal (Appellate Rules) of 1990.

It is further pleaded in the said objections inter alia as follows:

1. That the learned District Judge by his order dated 24.09.2001 has acted in terms of the provisions of the Partition Law No. 21 of 1977 as amended, and has issued a commission to the Licensed Surveyor P. B. Dissanayake on 04.06.2002 and the commission is returnable on 23.10.2002. Copy of the Journal entries of the said case is annexed hereto market 1R1.

2. C. A. 109/98 is Res-Judicata between the plaintiff and the petitioner and this application for Revision is misconceived in Law.

3. The petitioner has not explained the long and unreasonable delay and he is guilty of lashes and acquiescence.

4. That the petitioner is abusing the process of Court and is not entitled to relief prayed for by this application as these are no special circumstances to invoke the Extraordinary Jurisdiction.

The Petitioner to this revision application contest the learned District Judge's Order P12 mainly on the following grounds.

(a) The said order has the effect of converting an action in respect of one land into an action in respect of another land in relation to identity;

(b) The effect of the said order is to deprive this Defendant-Petitioner of the plea of prescription in as much as rights of parties are determined as at the date of action and any amendment of the plaint after the survey is carried out pursuant to the order marked P12 will date back to the date of the original plaint and will work to the prejudice of this Defendant –Petitioner;

(c) The said order has the effect of ignoring the provisions of the Civil Procedure Code in relation to amendment of pleadings and the provisions of the Partition Act re lis pendens.

In the Written Submissions filed in this court the Petitioner inter alia urge the following points in support of the revision application, though belatedly filed.

The order sought to be impugned in these proceedings is canvassed on the basis that although the learned District Judge seeks to invoke Section 18(3) (a) of the Partition Act, in the instance case, such relief is in not available.

Section 18(3) (a) reads thus:-

"Notwithstanding anything in subsection (2) of this section, the court, either of its own motion or on the application of a party to the action, may, before using the copy of the Surveyor's field notes and the plan, cause them to be verified and to be certified as correct or, where such field notes and plan are incorrect, cause fresh field notes and a fresh plan to be made by the Surveyor-General or by any office of his department authorized by him in that behalf, and may for that purpose issue a commission to the Surveyor-General."

This procedure is available if only field notes and the plan pertaining to the Preliminary Survey have to be verified or to be certified as correct. It is true that the Original Court could act ex mero motu. But in this instance, the Court did not act on its own motion. Instead, it was set in motion by the Plaintiff-Respondent by an application to have a different corpus shown as Lot 3 in P5 treated as the corpus. In the instant case, a problem arose not relating to the verification of the Preliminary Plan but on account of his conduct mid stream to change the corpus. If the Surveyor-General on being referred to, makes a Plan in accordance with Lot 3 of Plan P5, then the 2nd Defendant-Petitioner loses the normally available defence of prescription.

It is appropriate to quote a passage from Basnayake J. in the case of *Uberis et al vs. M. W. Jayasekara*(1) an action in respect of one land cannot be converted into an action in respect of another land by an amendment of pleadings. Although not on all fours, the attempt by the Plaintiff-Respondent is also on the same lines. What was hitherto made the subject of a partition action accomplished by tom tom beating prior to 1991, is now changed to another land lying to its east.

The Plaintiff-Respondent's conduct has been wanting in transparency and has caused a denial of justice to the 2nd Defendant-Petitioner.

The prejudice caused to the 2nd Defendant-Petitioner by the order of the learned District Judge if given effect to, far outweighs the prejudice caused to the Plaintiff-Respondent who only loses time in instituting another case in case the order is set aside. He only has to blame himself for his folly in his conduct which the Court of appeal set aside the earlier final decree – a step which is granted in exceptional circumstances.

The delay in filing the revision application in hand is apparent. Further exceptional circumstances which need to support a revision application has not been specifically and properly pleaded in the application before court. Instead Petitioner only anticipate certain matters which may prejudice the case of the Petitioner. The Original Court need to proceed with the trial since long delays have already occurred in this case and the Petitioner is not without a remedy at the conclusion of the partition suit, if her property rights are denied. The learned District Judge in his order at P12 suggest 3 options to proceed with the trial in the best interest of justice, to encourage the Plaintiff and others to proceed with the trial. As stated above the 3 options are:

(i) To take steps as in the proviso to Section 18(2) of the Partition Law

(ii) To take steps as in Section 18(3) of the Partition Law for verification by Surveyor General.

(iii) Move for a fresh commission.

The Plaintiff-Respondent has annexed Journal Entry 1R1 with the objections. Commission issued to a Licensed Surveyor on 04.06.2002.

On receipt of the fresh commission as in 1R1, parties could decide the best course of action and take steps.

The Order of the learned District Judge at P12 has carefully considered the options available to a party to proceed with the case as the learned District Judge has been very mindful of the judgment delivered by the Court of Appeal previously at P8 of 28.01.1999. As such we see no reason to interfere with the learned District Judge's order at this stage, and the parties should proceed to trial and whatever points of contest necessary for the final adjudication of the partition case could be raised and tried in the Original Court. On receipt of the commission as at 1R1 parties could decide to take steps according to the Partition Law and proceed to trial and leave it to the Trial Judge to examine title of all parties before court.

The delay and absence of exceptional circumstances would be sufficient to reject the Petitioner's application. In this regard the following authorities are noted.

> In *Rashid Ali v. Mohamed Ali*[2] 1980 (1) SLR 262 it has been held that "Ordinarily the Court will not interfere by way of Revision, particularly when the law has expressly given an aggrieved party an alternate remedy such as the right to file a separate action except when non interference will cause a denial of justice or irremediable harm."
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> In *Hotel Galaxy (pvt) Ltd. v. Mercantile Hotels Management Ltd,*[3] it has been held that "it is settled law that the exercise of the revisionary power of the appellate court is confined to cases in which exceptional circumstances exists warranting its intervention."
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> In the case of *Ganegoda Appuhamilage Don Laxman Seneviratne v. Sri Jayawardenapura Kotte Municipal Council and Others* [4], it has been held that "the Petitioner had

the right of Appeal and therefore the remedy of revision is not available unless there are exceptional circumstances."

In all the above circumstances I am of the view that this is not a fit case to exercise revisionary powers of the Court of Appeal. Delays and absence of exceptional circumstances would disentitle the Petitioner for the relief sought in this court. In any event the learned District Judge's order cannot be faulted. As such Petitioner's application for revision is refused and dismissed accordingly.

SATHYA HETTIGE, PC. J. (P/CA) – I agree.

Application dismissed.