O. S. PERERA

v.

ATTORNEY-GENERAL

COURT OF APPEAL.
BANDARANAYAKE, J. AND DHEERARATNE, J.
C.A. 159/75 F.
D.C. EMBILIPITIYA 822/M.
JANUARY 27, 28, 30 AND FEBRUARY 3 AND 6, 1987.

Negligence – Damages for failure to issue permits – Forest Ordinance, s. 26 – People's Committees Act No. 16 of 1971 – People's (Janatha) Committee.

The plaintiff having obtained a non-notarial lease of 100 acres of private land for felling trees was found to have felled trees in an adjoining forest reserve of the State, on information given by the People's (Janatha) Committee operating under the People's Committees Act No. 16 of 1971, investigations were set afoot and the plaintiff's offence was compounded on a payment and the State timber confiscated. But the Government Agent, having earlier before the Janatha Committee's complaint issued a permit, later refused to issue permits for the transport of the balance logs until the plaintiff proved that the balance logs had been felled from the private land by matching

the logs with the stumps on the private land. The plaintiff was also asked to define the boundary of the private land (s 26 of the Forest Ordinance). The Government Agent wanted to satisfy himself that these logs had not been extracted from yet unidentified areas of the Forest Reserve. Further as the Land Reform Law had by then come into operation the Government Agent wanted clearance from the Land Reform Commission in whom the private land was by then vested.

Held–

(1) In enacting the Forest Ordinance conservation of timber was one intention of the Legislature but at the same time its need as an essential commodity in the lives of the people was also recognised. This recognition creates a legitimate interest in the nature of a right in the people to be allowed to transport timber for their legitimate needs. Once such a legitimate interest is recognized the law must also recognize a corresponding duty on the authorities to avoid causing wrongful injury to the people. There is thus a duty to exercise the discretionary power bona fide and properly, of issuing or refusing to issue a permit to transport timber. The people have a right to a permit in appropriate circumstances. The breach of such statutory duty would give rise to a 'fault' and in the event of loss a claim in damages in an Aquilian action as the loss suffered may have been prevented by diligence and the exercise of reasonable care.

(2) The trees being already felled the Land Reform Commission had no stake in the felled logs. The condition of matching the logs with the stumps of the trees on the private land was unreasonable as it stipulated what was almost a physical impossibility. By unreasonably withholding the permits the Government Agent caused loss to the plaintiff as he could not fulfil his obligations to supply timber to the Plywoods Corporation and State Timber Corporation and had to disband his workforce etc. There has been a breach of the statutory duty of care by the public authorities concerned by refusing or refraining from issuing a permit to transport timber and the plaintiff is therefore entitled to his claim in damages.

APPEAL from judgment of the District Court of Embilipitiya.

Dr. H. W. Jayewardene, Q.C. with *N. R. M. Daluwatte, P.C.* and *H. M. P. Herath* for plaintiff-appellant.

D. N. Karunaratne, S.C. for defendant-respondent.

Cur. adv. vult

February 12, 1987.

BANDARANAYAKE, J.

This concerns an action in damages brought by the plaintiff-appellant against the Attorney-General as representing the Republic of Sri Lanka.

By a writing dated 4.6.72 (P5) the plaintiff undertook to take on lease a land called Galwetawatte in extent 100 acres out of a private land of 300 acres situated at Rakwana from the owner, one G. P. D. Jinadasa. By writing (P6) Jinadasa agreed to the terms of P5. The said lease was obtained for the purpose of felling trees to supply timber

and logs on contracts with the (1) Plywoods Corporation on P1 and P2 and the (2) State Timber Corporation on P3. The plaintiff engaged staff, labourers and hired elephants necessary for the purpose of felling trees and removing and stacking logs. According to the plaintiff he commenced felling trees on or about 1st August 1972 prior to P6 and obtained a permit from the Assistant Government Agent, Atakalanpanna for the transport of 90 logs. Of this quantity the plaintiff says he transported 74 logs within the times stipulated on the permit. The plaintiff says he asked for an extention of the permit to transport the balance 16 logs on 19.8.72. But this extension was withheld. On the same day he says he asked for another permit to transport another consignment of 90 logs. Here too a permit was withheld.

By a telegram (P7) dated 28.8.72 the Assistant Government Agent directed the plaintiff not to fell any more trees. Letter (P8) from the Assistant Government Agent confirmed the telegram. P8 stated that felling is stopped ..... "until the boundaries of reserved forests in private land are defined ..... Please define the boundaries and show same to the Grama Sevaka...". The plaintiff says he accordingly stopped all felling operations. Section 26 of the Forests Ordinance empowers a Government Agent to order an *owner* of a land to define boundaries in certain cases. It was however submitted for the plaintiff-appellant that P7 and P8 could not have issued under powers of s.26 as the section does not contemplate a power to direct the stoppage of felling of trees in private land and the plaintiff was not the owner of the land.

There were according to the plaintiff 206 felled trees, 101 logs, 600 round poles or logs and 400 yards of firewood lying on the said leased land at the time of stoppage of work, all to the value of Rs.34,700. The plaintiff had also to pay and discharge the workforce and the elephants and pay for other incidentals amounting to a sum of Rs.13,300. The aggregate sum thus claimed is Rs.48,000.

A short point taken by learned State Counsel for the defendant-respondent was that for delictual liability to arise there must be a statutory duty to do something, in this case to issue a permit to transport timber, and there must be a breach of such duty. It was contended that the Forest Ordinance did not cast such a duty on the conservator of forests or his agents. What the Ordinance did was to confer a discretionary *power* on the authorities to issue a permit. The

permit is a privilege; it is not a right. Counsel referred to the relevant s. 24(1) of the Ordinance and the Regulations made thereunder and published in Government Gazette No. 14710/7 of 29.8.66, in particular Regulations 5(1) and (2). Regulation 5(1) reads:

> "The Conservator of Forests may by notification published in the Gazette for purposes of s. 24(1)(*b*) of the Ordinance specify any area as an area within, into or out of which *timber* of any specified species .... shall not be transported without a permit issued by ... an authorised officer."

It was contended that s. 24(1) gave the Minister power to regulate or prohibit the transit of forest produce and the said regulation was made in the exercise of such power. It was admitted by the plaintiff-appellant that the Rakwana District was an area to which the above regulation applied and that he had to have a permit to transport the timber. Regulation 5(2) reads:

> "No person shall within or out of any such area transport ... timber .... without a permit issued by .... (an authorised) officer."

The appellants admitted that this regulation also applied.

Learned State Counsel contended that these regulations were intended to conserve and regulate the movement of timber. The Ordinance itself was to conserve forests and forest produce which included trees–vide s. 24(2) and regulate the felling and transport of timber. In other words it was to protect forests, forest trees and timber. Thus if the Ordinance considered as a whole and the circumstances to which it relates was intended to protect forests etc.; the regulations cited were intended to confer powers in order to fulfil those objects and not intended or designed to cast a duty or obligation on the authorities to grant and issue permits to the populace to transport timber. There being no statutory obligation to issue a permit, the plaintiff-appellant is unable to establish an interest which the statute was designed to protect and consequently must fail to establish a cause of action in tortious liability. It is important to distinguish between a statutory power and a statutory duty in this case. It was thus contended that there was no breach of statutory duty for which the defendant–respondent would be liable in damages and was thus outside the scope of an Aquilian action in Roman-Dutch Law. The action was misconceived and therefore in any event the appellant cannot succeed as no tortious liability could be established

by the plaintiff against the defendant. Counsel relied on passages in Halsbury's Laws of England, 4th Edition, Vol. 45, pp. 588–592, paras. 1279–1282.

It was State Counsel's position that in the instant case, there being no breach of statutory duty and a consequent absence of culpa the proper approach may have been to ask for a writ of mandamus under the English public law if the authorities had improperly exercised a discretionary power in refusing a permit. This has not been done. In the result the appellant is not entitled to any relief.

In the light of the above submissions it becomes necessary to examine the provisions of the Ordinance with a view to determining whether there is a statutory duty on the authorities to issue a permit, the breach of which would entitle a person to damages.

It is true that Parliament intended to consolidate the law relating to forests and the felling and transit of timber. But one is immediately struck by the preamble to the Ordinance and the fact of a need for regulation; timber is put to use in numerous ways by the populace. To identify a few of them what springs to mind is housing, fuel, furniture and innumerable governmental and commercial uses in road and rail transport etc. Timber has been an essential commodity in everyday life. There is an urgent need for it in daily life. In such circumstances it is difficult to accept an argument that the Ordinance was designed solely to protect forests and trees etc. Conservation of timber was one intention of the legislature but at the same time its need as an essential commodity in the lives of people was also recognised. That accounts for Regulation 5(1) and 5(2) where transport of timber was permitted under supervision. This recognition of the need for its use by people creates a legitimate interest in the nature of a right to the people to be allowed to transport timber for one's legitimate need. Once such a legitimate interest is recognised as a correct interpretation of the statute and its regulations the law must also recognise a corresponding duty on the authorities to avoid causing wrongful injury to another. Such a negative statutory duty is cast on those working the Ordinance, in keeping with its several objectives, to exercise a discretionary power properly without causing wrongful or unnecessary injury to another. There is thus a duty to exercise the discretionary power of issuing or refusing to issue a permit to transport timber bona fide and properly. The people have a right to a permit in appropriate circumstances. The breach of such statutory

duty would give rise to a 'fault' and in the event of loss a claim in damages in an Aquilian action as the loss suffered may have been prevented by diligence and the exercise of reasonable care if it were not intended.

I am therefore of the view that this action can succeed if a breach of statutory duty is proved by the plaintiff–appellant and that the alternative course of asking for a mandate in the nature of a writ of mandamus on the Government Agent to issue a permit under administrative law was also available to the defendant if he so chose. The choice of a remedy where alternatives are available as in this case is often influenced by several circumstances. Here we have perishable goods and obtaining a mandamus may not have served much purpose if the time taken in obtaining it affected the value of the goods resulting in a diminished value. On the other hand, the goods being perishable the more profitable course would doubtless be an action in damages to recover its present value.

Upon these conclusions the Court must now examine the facts and the conduct of the parties. The evidence discloses that upon an application for a permit to transport timber made by the plaintiff-appellant in early August a permit was granted. Thereafter the Assistant Government Agent has said that he received information that the plaintiff had felled trees from a reserved forest lying adjacent to the private land he had taken on lease. He passed that information on to the Grama Sevaka for investigation and report and acting in terms of s. 26 of the Forest Ordinance directed the plaintiff to (*a*) refrain from felling trees on the private land and (*b*) to demarcate the boundaries of the private land. In response to this the plaintiff says he stopped felling trees altogether and he wrote P9 dated 4.9.72 to the Assistant Government Agent stating that he had already submitted a plan showing the leased land made by a Kachcheri Surveyor and marked P4. However complains the plaintiff he got no relief. So he wrote to the Government Agent–P10–dated 14.9.72 complaining of the situation. The Government Agent referred P10 to the Assistant Government Agent for report and that report dated 30.10.72 has been produced by the defendant–D1.

It would be convenient to turn now to what had transpired regarding the felling of trees by the plaintiff from about 1.8.72. Besides felling trees on the private leased land of 100 acres, the Janatha Committee of the area reported to the Assistant Government Agent that 47 trees

in an adjoining reserved forest had also been illicitly felled by the plaintiff's agents and logged. This information had been given on about August 26th and he proceeded to have it investigated. The Assistant Government Agent denied that an application had been made for an extension of the earlier permit or a fresh application to transport another 90 logs on 18th August as stated by the plaintiff. At that stage the Grama Sevaka reported that 40 trees in the reserved forest had been felled.

It may be noted at this point that the People's Committees Act No. 16 of 1971 (which was in operation at the times relevant to this case) in s. 12 sets out the aims and objects of a People's Committee. Clause (2) reads:

> ".....by maintaining vigilance and making complaints to the proper authorities to prevent ..... illegal ..... activities etc."

Section 13 sets out the powers of a Committee. Clause (*a*) includes:

> ".....making inquiries and receiving written replies from Government Departments, etc..... regarding matters ..... in the opinion of the Committee ..... are matters relating to the aims and objects of a Committee."

The evidence was that the Janatha Committee was activated only after the first permit was issued on 16.08.72. Counsel for appellant complained that the Janatha Committee members and party supporters of the Sri Lanka Freedom Party accompanied the Government Agent and other officers when they came on inspection of the site, and that the plaintiff objected to their participation. It was in evidence that the Government Agent had asked those people to leave and that only Government officials engaged in the inspection. The law entitled the People's Committee to report illegal felling of the trees. Their interest therefore was lawful. Counsel however urged that their activities would have overawed the public officials into submission to their views which was why the permit was withheld.

It was also in evidence that there were reserved forests in the midst of the leased private land. The plan P4 submitted by the plaintiff in early August is not a plan showing the entirety of the leased land. It shows only the Eastern boundary of the private leased land. To the East of this boundary are reserved forests. Several streams about 3 or

4 in number, flow down from the private land towards the East. The forest on either side of each stream would be reserved forest. The boundaries of the forests are not demarcated in P4. In the result P4 does not serve much purpose and is not helpful to the authorities in determining whether or not to issue a permit.

The Government Agent, Ratnapura, took control of the investigation. The plaintiff showed the areas of illicit felling to the Grama Sevaka on 06.11.1972. On 10.11.1972 there was an inspection of the site–(vide diary entry P16) of felling by the Government Agent, Ratnapura and the Assistant Government Agent, the Grama Sevaka and a Kachcheri Surveyor. The boundaries of the reserved forest where illicit fellings had in fact taken place were seen. Boundary stones were seen. The stumps in the reserved forest were counted and found to be 50 in number. The felled trees and logs were seen in the private land. All logs were counted and stamped. The illicitly felled logs were separated. The surveyor spent several days again at the site between 27.11.1972 and 03.12.1972. The surveyor submitted a report to the Government Agent. Acting in terms of s.51(1) the Government Agent compounded the offence of illicit felling in accepting a sum of Rs.926.90 as a royalty from the plaintiff on 03.01.1973–P12. The Government Agent however did not release the illicitly felled timber seized under the powers he had by s.51(2)(*b*). Instead the Assistant Government Agent recommended that it be removed to a Government Store. That was done in 1975. Therefore the question of releasing the property seized as contemplated by s.51(2) did not arise and the plaintiff can lay no claim whatever to the timber illicitly felled. There was also evidence–particularly D18–that in a reply to a letter written by the plaintiff on 01.09.1972 the Assistant Government Agent had said that the agreements P5 and P6 entered into with the owner of the private land were not notarially executed suggesting therefore that the plaintiff had no rights even to the trees felled on the private land. Appellant's Counsel branded this conduct as a manifestation of a malicious intent.

In challenging the position of the plaintiff that he made two applications for transport of timber in middle of August it was pointed out by the respondent that the plaint bears no reference to such subsequent applications. The plaintiff could have asked the defendant to produce those applications if they were relied upon by the plaintiff.

The above is the background to the plaintiff's application for a renewal of the earlier permit to transport the balance timber still lying on the private land made in February 1973. The plaintiff-appellant's position is that there were no more fellings after 26.08.1972. It is alleged that the defendant maliciously and unlawfully refrained from issuing a permit. The issue before this Court is whether by such conduct in not issuing a permit the defendant is in breach of a statutory duty and therefore liable in damages.

The incidents of January and February 1973 were as follows:

The offence of illicit felling was compounded on 08.01.1973 by P12. Thereafter the plaintiff by P13 dated 08.02.1973 applied to the Government Agent Ratnapura for renewal of the permit to transport the balance 16 logs (all stamped) remaining on his land. The available correspondence shows that the Assistant Government Agent gave instructions to the Grama Sevaka–vide P19–letter dated 23.02.1973. In the letter the Assistant Government Agent states that:

(1) It is necessary in view of plaintiff's application P13 to determine whether in fact the trees have been felled before 26.08. 1972 as claimed as since 26.08.1972 the private land was vested in the Land Reform Commission under the Land Reform Law No. 1 of 1972.

(2) If you find that trees have been felled on this private land after 26.08.1972 they must be separately stamped.

(3) Further the Government proposes to acquire 100 acres of this land and the first steps towards such acquisition have been taken.

Therefore ascertain if there have been fellings on the portion of the proposed acquisition.

Thereafter the Grama Sevaka has directed the plaintiff to visit the land on 08.03.1973 in order to show the stumps of timber lying on the private land (presumably for the purpose of proving that that timber had indeed been cut from trees on the private land). Thereafter the Grama Sevaka has reported to the Assistant Government Agent by undated letter V4 that a representative of the plaintiff visited the land on 08.03.1973 and showed him logs but that he asked him to come

again to match those logs to the stumps on 13.03.1973 and on 13.03.1973 that person told him that as now it is apparent that a permit is not being issued they are not interested in obtaining a permit any more.

The Assistant Government Agent in his evidence has taken up the position that upon application P13 he had to satisfy himself that the trees in respect of the balance 16 logs have been felled on private land and that the plaintiff should produce a writing that he had a right to fell trees on such land (having in mind the Land Reform Law which was passed on 26.08.72 and that in effect the Assistant Government Agent asked for a letter from the Land Reform Commission that they were prepared to release this timber lying on vested land). It was appellant's counsel's submission that vesting came only with regulations passed under the Land Reform Commission Law which was well after 26.08.72. Appellant's counsel submitted that it was impossible to match the logs to the stumps on the private land. There were 206 logs. The number of trees felled would be less than the number of logs prepared for transport. Those trees were felled over an area of 100 acres. How was one expected to match trees felled with an axe? In the case of the illicit felling on the reserved forest all the authorities had to do was to count the stumps on the reserved forest. This request was in the circumstances most unreasonable and calculated to harass the plaintiff. Reference to the Land Reform Law as late as February/March 1973 was also intended to place an impediment in the way of the plaintiff. The Land Reform Law was certified on 26.08.72. Why did the authorities not investigate this aspect between September 1972 and January 1973 when inquiries were afoot. The Government Agent himself with his officials had inspected the site, demarcated boundaries, surveyed the land, identified illicit fellings, stamped all logs and compounded the offence and had not charged the plaintiff in a Court of Law. Malice was therefore apparent contended counsel for the appellant.

Respondent's counsel contended that the Assistant Government Agent was justified in the stand he had taken in February 1973 upon application P13 as there was a possibility that all illicit fellings may not have yet been discovered and that some of the logs lying on the private land may have been from illicitly felled trees from state land not so far discovered. This submission is a little different to what the Assistant Government Agent has said in his testimony already referred to which was that he wanted to be satisfied that the logs were from

trees felled on private land and not from land vested in the Land Reform Commission. State Counsel submitted that there was a duty on the Assistant Government Agent to act with caution in the background of the proved and admitted illicit fellings and the coming into force of the Land Reform Law and that his response to P13 was reasonable, proper and lawful in the circumstances. The plaintiff had failed to respond to the Grama Sevaka's directions, had said he cannot show the stumps on the private land and had in fact declared his decision not to pursue his application any further and that therefore P13 had been abandoned. The authorities were therefore justified in suspending further action on P13. There were no improper motives and he had acted bona fide.

The District Judge had held that the Assistant Government Agent had acted correctly, bona fide and lawfully.

Where an enabling statute confers powers for a particular purpose then in view of the duty of care there will be abuse of power where it is exercised to achieve some other purpose. It is submitted by the appellants that in this instance the power was exercised to frustrate the plaintiff. Again when there is a duty of care there may be abuse of power by taking improper considerations or irrelavant considerations into account. Here the Court is concerned with what factors were or were not considered in reaching a decision. Again the Court should consider whether the decision was patently unreasonable. In this case illicit fellings were discovered in August/September 1972, full investigations were made and the plaintiff's offence was compounded and State timber confiscated. The plaintiff was not charged before a Court. The matter of the illicit fellings was thus settled by January 1973. After all of this the Assistant Government Agent has directed the plaintiff to take yet another step by proving that the felled timber lying on the leased land matched the stumps on that land to prove that those logs were from private land. This directive I consider almost impossible to fulfil. One would literally have to carry and fit logged tree trunks to stumps over a 100 acre extent. This is patently unreasonable. The probability of discovery of further illicit fellings after all the investigations is also in my view too remote. For this reason too this directive is unreasonable. Again, directing the plaintiff to obtain a

letter from the Land Reform Commission that the fellings were on private land and not on Land Reform Commission land is irrelevant for the reason that–

(*a*) even if it was land which had vested in the Commission, yet under the definition of 'agricultural land' in s.66 of the Land Reform Law, anything attached to the earth would be considered as part of 'agricultural land' for the purposes of this case and not that which has been detached such as felled trees or logs lying on the ground.

There was no evidence that any fellings had occurred after 26.8.72. So this matter of the Land Reform Commission's possible interest in the land was irrelevant. In fact the plaintiff insisted that there had been no fellings after that date. With the activation of the Janatha Committee of the area and the interest shown by the Sri Lanka Freedom Party supporters it is overwhelmingly, unlikely and improbable that the plaintiff would have continued illicit fellings surreptitiously or indeed ignored or acted in defiance of the Assistant Government Agent's directive not to fell trees. Thus the Assistant Government Agent's conduct in February and March 1973 on receipt of P13 as seen by his evidence and that of the Grama Sevaka is manifestly unreasonable. He has also taken irrelevant matters into consideration which has affected the plaintiff. This conduct amounts to negligence. It has influenced the plaintiff into abandoning his legitimate interests; it has frustrated the contracts he had with the Plywood Corporation and the State Timber Corporation on P1, P2 and P3 and caused damage to him. There has therefore been a breach of the statutory duty of care of the plaintiff's interests caused by the negligence of the public authorities concerned in refusing or refraining from issuing a permit to transport timber upon application P13 in the circumstances of this case. This breach has resulted in damage to the plaintiff. He is therefore entitled to his claim in damages.

I accordingly set aside the judgment of the Court below and allow this appeal. Costs are fixed at Rs. 1,050.

DHEERARATNE, J.–I agree.

Appeal allowed.