

CHANDRASENA

v.

DAHANAYAKE AND OTHERS

COURT OF APPEAL.

H. A. G. DE SILVA, J. AND SIVA SELLIAH, J.

C.A. APPLICATION No. 973/81.

NOVEMBER 15, 1984.

Writs of Certiorari and Mandamus – Is a trespasser in possession of State land an aggrieved person although he was unsuccessfully sued for eviction in the District Court by a permit holder under the Land Development Ordinance? – Will Certiorari issue at the instance of such a person? Mandamus – When will it lie?

The petitioner had been unsuccessfully twice sued in the District Court in respect of a land called Nidangala Pottedeniya. This land had been originally allotted in 1937 on a permit to one K. Dingi Appu under the Land Development Ordinance. In 1940 the said Dingi Appu nominated the 1st respondent as his successor. After the death of Dingi Appu, the land was given to 1st respondent on a permit but in June 1959 it was cancelled as he was not residing on the land. The petitioner entered into the land and possessed it for 16 or 17 years. The Government Agent issued instructions for taking over the land. Thereafter by letter dated 6th August 1981 (X1) the Commissioner of Lands (2nd respondent) informed the petitioner of a proposed division of the allotment by allotting one acre to the 1st respondent, one rood and thirty-two perches to the 5th respondent and the balance after excluding a road reservation to the petitioner. The petitioner sought to have this decision quashed by certiorari and a writ of mandamus directing the Commissioner of Lands to hold an appropriate inquiry under the Land Development Ordinance.

Held—

- (1) Certiorari will not lie at the instance of the petitioner who is an avowed trespasser and therefore not an aggrieved person with a locus standi to make such an application.
- (2) Mandamus will lie only to compel a functionary to perform some statutory duty. It will not lie to compel the performance of a moral duty or anything contrary to law nor will it lie to undo that which has been already done in contravention of a statute or to enforce a duty to abstain from acting unlawfully.

APPLICATION for Writs of Certiorari and Mandamus.

N. R. M. Daluwatta for the petitioner.

H. M. P. Herath for the 1st respondent.

P. L. D. Premaratne, D. S. G. for 2nd, 3rd and 4th respondents.

Cur. adv. vult.

February 22, 1985.

H. A. G. DE SILVA, J.

In this application the petitioner who seeks a Writ of Certiorari and/or Mandamus has averred that he has been in possession of a land called Puwakwattehena Deniya depicted as Lot 221 in F.V.P. 43, for a period of over 16 years; the 1st respondent instituted action in D.C., Matara Case No. 3016/L against the petitioner seeking a declaration that he was entitled to the possession of a land referred to as Nidangala Pottedeniya on the basis that he was the lawful permit holder and sought the ejection of the petitioner from it, the said action was withdrawn by the 1st respondent with liberty to file a fresh action, (vide Decree P1), thereafter the 1st respondent filed action in District Court Matara Case No. L/3491 praying for a declaration that he was entitled to the said land Nidangala Pottedeniya and to have the

petitioner evicted therefrom and for damages ; after trial the 1st respondent's action was dismissed with costs (vide judgment P2 and Decree P3)

The petitioner further avers that thereafter he had been summoned for an inquiry to the Kachcheri on a number of occasions, which he had duly attended but since the 1st respondent was absent, the inquiry was repeatedly adjourned and never held ; the land which the petitioner is possessing is partly high land and partly paddy field and on the high land is the petitioner's residing house ; the said land is part of a scheme for the landless and when the petitioner entered into possession of it 16 or 17 years ago it was not being possessed by anyone ; it was held in case No. 3491/L that the permit under the Land Development Ordinance, the basis on which the 1st respondent claimed the land was of no force or avail in law, and that the 1st respondent was not a person entitled to get land in a scheme for the landless ; the petitioner is a landless person ; the 4th respondent who is an official concerned in the implementation of the Land Development Ordinance is a close relative of the 1st respondent, and that on 28th April 1981 threatened the petitioner by stating that the petitioner would be evicted and the land given to the 1st respondent.

The petitioner goes on to aver that, by letter dated 6th August 1981 (X1) the 2nd respondent has informed the petitioner that in view of Attorney-General's letter of 16th January 1981 (X2) Lot No. 221 is to be divided by allotting one acre to the 1st respondent, one rood 32 perches to the 5th respondent and from Lot 91G excluding the road reservation the rest to the petitioner. The petitioner prays for (1) an Order in the nature of a Writ of Certiorari quashing the decision to give the said land to the 1st respondent and (2) an Order in the nature of a Writ of Mandamus on the 2nd respondent ordering him to hold an inquiry if necessary, in accordance with the provisions of the Land Development Ordinance.

The 2nd to 4th respondents in their statement of objections and the affidavit of the 3rd respondent aver that, Lots Nos. 91C and 91F in F.V.P. 43(X) were first allotted to one K. Dingi Appu under the Land Development Ordinance on permit No. 4172 of 1st July 1937 and in 1940, the said K. Dingi Appu nominated the 1st respondent as his successor to this land ; after the death of the said K. Dingi Appu, the land was given over to the 1st respondent and in June 1959, the permit issued to the 1st respondent was cancelled as he was not

residing on the land ; on 27th August 1962 the 2nd respondent had instructed the Govt. Agent, Matara to take over possession of the entirety of Lot 91C & 91F as there was a dispute between the 1st respondent and the 5th respondent and to take action to give the land earlier possessed by the 1st respondent to him on a ten year lease ; further instructions were given on 3rd March 1964 that out of one acre one rood and thirty two perches of Lot 221, an extent of one acre be given to the 1st respondent and the balance of one rood and thirty two perches and the entirety of Lot 91C be given to the 5th respondent and possession of the said land was given over as instructed.

The said respondents go on to state that in 1969 the petitioner without any right whatsoever had illegally and unlawfully encroached on the paddy land area in Lot 221 which had been given to the 1st respondent and disputed the latter's right to possess the said land ; on representations made by the 1st respondent to the 2nd respondent a report was called for from the Government Agent, Matara (vide report R1) ; the 2nd respondent after consideration of all relevant material had instructed the Government Agent, Matara by R 2 to issue a permit to the 1st respondent in respect of the land possessed by him under the middle class allocation scheme in terms of the Land Development Ordinance ; a permit dated 29th August 1964 was therefore issued to the 1st respondent in respect of one acre which is now depicted as Lot 221A.

The said respondents further aver that, subsequent to the decision in D. C. Matara Case No. 3941/L, The Government Agent, Matara sought instructions from the 2nd respondent and also later from the Attorney-General in respect of the disputed land. (vide R 3 and R 4) ; in response to R 4 the Attorney-General sent his advice on 16th January 1981 (X2).

No counter-affidavits have been filed by the petitioner.

Learned Counsel for the petitioner confined his submissions to (1) the question as to whether the petitioner has a legal right to ask for the Writs prayed for and (2) bias.

The learned Deputy Solicitor-General for the 2nd to 4th respondents on the first submission of the petitioner's Counsel has submitted that the petitioner is, according to his own admission, a trespasser on Crown land and is in unlawful and illegal occupation of it and as such

he has no right to ask for an Order to quash the decision to give the land to the 1st respondent. He submits that an application for a Writ of Certiorari can be made by a person who is aggrieved by a decision. He cites passages from De Smith, *Judicial Review of Administrative Action* (4th edition) page 419 which states :

"As has been indicated, a court is in practice unlikely to allow an application for Certiorari unless it has been made by someone who it regards as a person aggrieved for this purpose ; persons aggrieved have been defined as those who have a particular grievance of their own beyond some grievance suffered by them in connection with the rest of the public."

and again at page 420 it is stated :

"A narrow view of locus standi may, however, be taken by the Courts when the grounds upon which the decision is challenged as that some person other than the applicant was denied a fair opportunity to be heard".

He submits that the petitioner has absolutely no right to be heard in the allocation of State land. Further the petitioner is an avowed trespasser and as such he should quit the land and thereafter make an application for the allocation of State land. Up to date he has made no such application and as such he has no right to be heard nor is he a person aggrieved.

It is abundantly clear from the facts averred by the 2nd to 4th respondents that in addition to the petitioner being a trespasser, his statement that he is a landless person and is residing on the portion of high land forming part of the land in dispute has been denied. The said respondents have stated that the petitioner is the owner of 3 1/2 acres of paddy land in the Gombadella Grama Sevaka area. They have further averred that the allocation of this land is not under a scheme for land for the landless but under a middle class scheme. From these facts it is clear that the petitioner has taken possession of the land in 1965 or so, after the land had been allocated and handed over to the 1st respondent in 1964. Thus he was a trespasser. A consideration of the facts averred by both the petitioner and by the respondents do not in my view place the petitioner in the position of an aggrieved person nor has he sufficiently discharged the burden cast on him to prove bias on the part of any of the respondents in making the decision contained in X1. I therefore hold that in these circumstances a Writ of Certiorari would not lie.

As far as the application for a Writ of Mandamus is concerned, though learned Counsel for the petitioner did not make submissions on that remedy, it would suffice for it to be said that petitioner could ask for a Writ of Mandamus only to compel a functionary to perform some statutory duty. What the petitioner is seeking to achieve is to compel a State officer to allocate land to an avowed trespasser. Further, the petitioner has not even made an application for allocation of land. What he is attempting to do is to legalise his otherwise illegal occupation of State land by obtaining a permit therefor from the State. In these circumstances there is no necessity even to hold an inquiry. De Smith (supra) at page 542 states :

"Mandamus will not of course lie to compel the performance of a mere moral duty, or to order anything to be done that is contrary to law nor, in general will it lie for the purpose of undoing that which has already been done in contravention of statute. It would seem moreover, that Mandamus is not the proper means of enforcing a duty to abstain from acting unlawfully. Thus, if a public authority or officer threatens to act ultra vires the appropriate remedy will be an injunction or a declaration and not an application for Mandamus not to exceed the powers conferred by law".

It appears therefore that the petitioner's application for a Writ of Mandamus must necessarily fail. I accordingly dismiss this application with costs fixed at Rs. 105 payable to the 1st respondent and Rs. 315 payable to 2nd to 4th respondents.

SIVA SELIAH, J. – I agree.

Application dismissed.
