KALU BANDA
v.
UPALI

COURT OF APPEAL.
YAPA, J.,
CA NO. 150/98.
SEPTEMBER 14, 1999.
MARCH 19, 1999.
MAY 25, 1999.

Lease of State land – Cancellation – Failure to comply with certain conditions – Should he be given an opportunity to be heard – State Lands Ordinance, S. 2, S. 6, S. 17 (1), S. 110 – Land Settlement Ordinance, s. 106 – 128.

Held:

(1) Provision has been made that a hearing should be given to a party before a lease permit is cancelled.

(2) On the other hand even if there is no provision made for a party to be heard before his lease permit is cancelled, principles of natural justice will supply the omission of the legislature. The reason being that the court will not readily accept the position that the Parliament intended an administrative authority to exercise a discretion vested in it by Statute in such manner so as to offend the principles of natural justice.

"Procedure is not a matter of secondary importance. As govermental powers continually grow more drastic, it is only by procedural fairness that they are rendered tolerable."

APPLICATION for a Writ of Certiorari.

Case referred to:

Cooper v. Wandsworth Board of Works – 1863 CB Reports (NS) 13-16 – pages 414 at 420.

Chula Bandara for the petitioner.

1st respondent absent and unrepresented.

M. Fernando, SSC for 2nd, 3rd and 4th respondents.

Cur. adv. vult.

November 30, 1999.

HECTOR YAPA, J.

In this application the petitioner has prayed for a writ of certiorari to quash the decision of the 2nd respondent to cancel a lease of State land given to the petitioner. It would appear that the effect of the two letters dated 02.02.1998 and 19.01.1998 marked P7 and P8 sent by the 2nd respondent to the petitioner, will be to cancel the lease permit granted to the petitioner by the lease instrument dated 15.10.1993 produced marked P2. According to P8, the basis of the cancellation of the said lease permit has been the failure of the petitioner to comply with the clause or the condition number 4 of the said lease instrument or permit (P2) which required the construction of a building worth Rs. 500,000 by the petitioner. In addition it has also been stated in the said letter (P8) that the land in question is required for a public purpose in terms of the clause number 15 of the lease permit (P2) and therefore it has been decided to acquire it by the State.

According to the petitioner, originally, he was permitted to run a milk bar on a State land 1.5 perches in extent granted to him in terms of an annual permit issued under the provisions of the State Lands Ordinance. The said permit bearing No. 1439/D dated 3rd July, 1971, was produced marked P3. In 1982, while the petitioner was engaged in the said business, a Buddhist shrine room was constructed at a location close to the petitioner's milk bar and the said Buddhist shrine room became an obstacle to the petitioner's business. Therefore, he made representation to the 3rd respondent and obtained another block

of land 0.012 hectares in extent from another part of same land and the petitioner was issued with the permit bearing No. 4/10/12347 dated 15.10.1993 referred to earlier as P2. According to the said permit (P2) State land had been leased to the petitioner under the Crown/ State Lands Ordinance for a period of 30 years commencing from 16.11.1992 and the lease rental for the said land was fixed at Rs. 1,600 per year. The relevant plan dated 01.12.1992 in respect this land is produced marked P1. Further, according to the said lease permit (P2) the petitioner has to use the said land to construct buildings necessary for the purpose of running a milk bar and such buildings have to be constructed according to a plan approved by the Government Agent and such constructions should conform to the Housing and Town Improvement Ordinance.

The petitioner after obtaining the land on the said lease permit (P2) had submitted a building plan bearing No. 179/A/03 dated 06.08.1992 to the 2nd respondent seeking approval for the construction of a building along with his letter dated 03.01.1993. The said plan and the letter are produced marked P5 and P6. In addition the petitioner had continued to pay the yearly rentals to the 2nd respondent for the years 1993 to 1997. By letter dated 08.01.1998, when the 2nd respondent had requested the petitioner to pay the rental for the year 1998, he had gone to the 2nd respondent's office to make the said payment, when the petitioner was informed that, since steps were being taken to cancel the lease permit given to him, it was not possible to accept the rental for the year 1998. Thereafter, by the said letter dated 19.01.1998 marked P8 the 2nd respondent has informed the petitioner that he has failed to construct the building as required by condition number 4 of P2, that he has failed to seek additional time for the said construction and further that, since the said land was necessary for a public purpose, it has been decided to acquire it by the State. Therefore, the 2nd respondent requested the petitioner to hand over to him the possession of the land in question with the lease document (P2) on or before 27.02.1998. In addition the 2nd respondent by his letter dated 02.02.1998 marked P7 has informed the petitioner to treat the 2nd respondent's letter dated 08.01.1998 requesting the payment of the annual rental for the year 1998 as being cancelled.

Consequent to the receipt of P8, the petitioner has sent a letter dated 29.01.1998 marked P9, informing the 2nd respondent that it was due to the latter's failure to act in accordance with clause number 9 of P2 to approve the plan (P5) sent to him, the petitioner was unable to take any further action in terms of condition number 4 of P2. The said letter (P9) further stated that the construction of a war memorial was not a public purpose and that as far as the petitioner was aware, financial facilities have not been set apart for such a purpose. The petitioner, therefore, alleged that the decision taken by the 2nd respondent to cancel the lease permit (P2) granted to the petitioner without giving him an opportunity to show cause was arbitrary, unreasonable and in violation of the principles of natural justice.

The respondents in their objections have taken up the position that the petitioner has violated the condition number 4, of the lease permit (P2) by failing to develop the land in question, ie by constructing a building required for a milk bar and therefore the respondents were entitled to have the lease permit cancelled. In addition it was stated by the respondents that the land in question was required for a public purpose namely, to construct a war memorial to honour the fallen heroes. Therefore, in terms of clause number 15 of the lease permit (P2) the State could request the petitioner to hand over the land to be used for the said public purpose. Finally, it has been submitted by the respondents that, having regard to the aforesaid reasons, when action is being taken by the 2nd respondent to cancel the lease permit (P2) granted to the petitioner, there was no requirement to give the petitioner an opportunity to show cause against such cancellation.

At the hearing of this application it was submitted by learned counsel for the petitioner that the lease in question had been granted to the petitioner by the President of the Republic of Sri Lanka in terms of section 6 of the Crown/State Lands Ordinance, and in terms of section 6 (3) of the said Ordinance a cancellation of such a lease is required to be done upon an application to a court of competent jurisdiction. In the present case no such application has been made to a court. Therefore, counsel contended that the cancellation of the

lease by the 2nd respondent by his letter dated 19.01.1998 (P8) is not valid in law. On the other hand it was submitted by learned senior State counsel that the particular lease in question had been given to the petitioner by the President of the Republic under section 2 (2) of the Crown/State Lands Ordinance and therefore the contention of the counsel for the petitioner that section 6 of the State Lands Ordinance applied to the lease in question is grossly erroneous.

It would be helpful to examine sections 6 and 2 of the State Lands Ordinance in order to decide this issue. Section 6 (1) of the State Lands Ordinance provides as follows:

> *A special grant or lease of State land may be made at a nominal price or rent or gratuitously for any charitable, educational, philanthropic, religious or scientific purpose, or for any other purpose, which the President may approve.*

Firstly, it should be observed that this provision has catered for special grants and leases. Secondly, such grants or leases are for purposes such as charitable, educational, philanthropic, religious or scientific purposes and the like. Therefore, the lease given to the petitioner in this case being a lease for a commercial purpose, it cannot fall within the purview of section 6 (1) of the State Lands Ordinance. On the contrary when one examines section 2 of the State Lands Ordinance, it would appear that section 2 provides for grants or leases of the type given to the petitioner. Section 2 of the State Lands Ordinance provides as follows:

> *Subject to the provisions of this Ordinance and of the regulations made thereunder, the President may in the name and on behalf of the Republic of Sri Lanka –*
>
> *(1) make absolute or provisional grants of State land;*
> *(2) sell, lease or otherwise dispose of State land;*
> *(3) .....*

Further, it is to be observed that the lease instrument or the instrument of disposition given to the petitioner (P2) itself refers to section 2 of the Crown/State Lands Ordinance and the regulations made thereunder, which would mean that the lease in question had been given to the petitioner in terms of section 2 of the said Ordinance. Therefore, since section 6 of the State Lands Ordinance has no application in this case, it would be section 2 of the said Ordinance that would apply. In the circumstances the submission made by learned counsel for the petitioner based on the applicability of section 6 of the State Lands Ordinance to the lease permit given to the petitioner, has to fail.

Learned counsel for the petitioner formulated another argument on the basis that if the lease given to the petitioner was a permit issued under the State Lands Ordinance, the 2nd respondent should have taken steps in terms of section 17 (1) of the said Ordinance to cancel the lease permit or the instrument of disposition following the procedure provided in sections 106 to 128 of the Land Development Ordinance. Learned counsel's contention was that there was a requirement that the petitioner should have been given an opportunity to show cause before such a cancellation of his permit. Section 17(1) of the State Lands Ordinance provides as follows:

> *Where a Government Agent is of opinion that the grantee of any permit or licence has failed to observe any condition attached to any such permit or licence, he may cancel such permit or licence, and eject the grantee in accordance with the procedure prescribed in sections 106 to 128 of the Land Development Ordinance which shall apply accordingly as though the grantee of a permit or licence under this Ordinance were a permit-holder under that Ordinance and as though the land which is the subject-matter of a permit or licence under this Ordinance were land alienated by a permit issued under that Ordinance:*
>
> *Provided that . . .*

Therefore, it would appear according to the section referred to above that before a cancellation of a permit or a licence due to the failure of a party to observe any condition attached to such permit or licence, a procedure has been prescribed or provided in terms of sections 106 to 128 of the Land Development Ordinance. It should also be noted that the effect of a cancellation of a lease permit or a licence involves the cancellation of an instrument of disposition. The instrument of disposition has been interpreted in section 110 of the State Lands Ordinance to include a grant, lease, permit or licence relating to State land.

It is also necessary to take note of the following provisions of the *Land Development Ordinance. Section* 106 (2) of the Ordinance provides as follows:

> *Where a permit-holder fails to comply with the requirements of a notice issued under subsection (1), or where a permit-holder contravenes a condition of the permit on a second or subsequent occasion, the Government Agent may issue a notice in the prescribed form intimating to the permit-holder that the permit will be cancelled unless sufficient cause to the contrary is shown to the Government Agent on a date and at a time and place specified in the notice.*

Section 110 (1) of the Ordinance makes provision for the Government Agent if he is satisfied after inquiry that there has been a breach of any of the conditions of the permit, to make an order cancelling the permit. Section 113 of the Ordinance makes provision for a permit-holder aggrieved by an order made by the Government Agent under section 110 to appeal to the Land Commissioner. The Chapter IX of the Land Development Ordinance makes provision for the procedure to be followed in cases of ejectment.

An examination of the provisions referred to above would make it clear that before a cancellation of a lease permit or an instrument of disposition, a particular procedure has been clearly laid down in

sections 106-128 of the Land Development Ordinance. Therefore, in terms of section 106 (2) of the Land Development Ordinance the 2nd respondent in this case was required by law to issue a notice to the petitioner intimating to him that his lease permit would be cancelled unless sufficient cause to the contrary was shown. However, the 2nd respondent has failed to take such action in conformity with the procedure so provided in the present case. It may also be noted that once a decision is made by the 2nd respondent to cancel a lease permit in terms of section 110 (1) of the Land Development Ordinance, provision has been made to grant an appeal from such an order to the 3rd respondent. The manner in which the 2nd respondent decided to cancel the lease permit granted to the petitioner in this case has denied the petitioner his right of appeal to the 3rd respondent.

The learned Senior State Counsel for the respondents sought to argue that there is no requirement to follow the procedure laid down in sections 106-128 of the Land Development Ordinance. The basis of the learned counsel's argument was that the petitioner had violated the condition number 4 of the lease permit (P2) and in addition the land in question is required for a public purpose and therefore in terms of clause number 15 of the lease permit (P2) the petitioner is required to hand over the land to the State. In these circumstances it was submitted that there was no necessity to give an opportunity to the petitioner to show cause against the cancellation of the lease permit. Therefore, learned counsel contended that the conduct of the 2nd respondent in cancelling the lease permit was not arbitrary or unreasonable. It was further submitted that there was no political victimization of the petitioner in taking such a decision to cancel the lease and take back the land in question by the State.

It is to be remarked here, that after the grant of the lease permit to the petitioner, he had submitted the plan dated 06.08.1992 (P5) along with his letter dated 03.01.1993 (P6) seeking approval for the building to be constructed. In the objections filed by the 2nd respondent in paragraph 7 of his affidavit, he has admitted the receipt of P5 which is the plan dated 06.08.1992. However, he denies the receipt of the

petitioner's letter dated 03.01.1993 (P6). If this position taken up by the 2nd respondent is accepted, it is evident that the petitioner had submitted the plan (P5) to the 2nd respondent. Why the 2nd respondent failed to take any action on the plan (P5) received by him has not been explained. Even assuming that the 2nd respondent did not receive the petitioner's letter (P6) the failure to take action on the plan (P5) was certainly a lapse on the part of the 2nd respondent. Further, it would appear from the facts of this case that no action has been taken by the 2nd and 3rd respondents to inform the petitioner about the delay in complying with the condition number 4 of P2, until it was decided by the 2nd respondent to cancel the lease permit on 19.01.1998 (P8) without even giving a hearing to the petitioner.

I am unable to subscribe to the view, that a lease permit granted by the President of the Republic of Sri Lanka, for a period of 30 years could be cancelled for whatever reason, without giving an opportunity to the holder of such permit to show cause. As referred to above the petitioner in this case is in a position to show that, at least he had submitted a plan to the 2nd respondent (which is admitted by the 2nd respondent in his affidavit paragraph 7) for consideration and approval. Therefore, where provision is made by law in regard to the procedure to be followed when cancelling a lease permit granted to a person, there is no reason why such procedure should be ignored or overlooked. Such conduct would be illegal and arbitrary and offend the fair administrative procedure expected from public authorities.

On the other hand, even if there was no provision made for a party to be heard before his lease permit is cancelled, principles of natural justice will supply the omission of the legislature. The reason being that the court will not readily accept the position that the Parliament intended an administrative authority to exercise a discretion vested in it by statute, in such a manner so as to offend the principles of natural justice. Further, it is worth referring here to the words of Byles, J. in the case of *Cooper v. Wandsworth Board of Works*[1] where he stated that ". . . a long course of decisions, beginning with Dr. Bentley's case, and ending with some very recent cases, establish

that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature." As Wade points out in his book Administrative Law 5th edition page 413: *"Procedure is not a matter of secondary importance. As governmental powers continually grow more drastic, it is only by procedural fairness that they are rendered tolerable".*

In this case, however, law has very clearly made provision that a hearing should be given to a party before a lease permit is cancelled. The decision taken by the 2nd respondent to cancel the lease permit granted to the petitioner without giving the petitioner an opportunity to show cause is arbitrary, unreasonable and in violation of the principles of natural justice. Therefore, the said decision of the 2nd respondent should be quashed. In these circumstances, it is unnecessary to consider the other points raised by counsel for the petitioner.

Accordingly, the two letters dated 02.02.1998 and 19.01.1998 marked P7 and P8 are hereby quashed. The 2nd respondent is directed to make an appropriate order according to law, after providing the petitioner an opportunity to be heard.

Application allowed.