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

A.M. Sanjaya Nayanaka Darshana,
"Riverside" Restaurant,
Daragala, Welimada.
Petitioner

SC/FR/38/2018

Vs

1. J.J. Chamila Indika Jayasinghe,
1A. M.M.K. Pushpakanthi,
1B. Suvineetha Gunasekara,
Divisional Secretary, Uvaparanagama,
Divisional Secretariat, Lunuwatta.
2. R.P.R. Rajapaksha,
2A. R.M.C.M. Herath,
G.D. Keerthi Gamage,
Land Commissioner General,
Land Commissioner General's
Department,
"Mihikatha Madura",
No. 1200/6, Rajamal Waththa Road,
Battaramulla.
3. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
Respondents

Before: S. Thurairaja, P.C., J.
E.A.G.R. Amarasekera, J.
Mahinda Samayawardhena, J.

Counsel: Uditha Egalahewa, P.C., with Vishva Vimukthi for the Petitioner.
Rajiv Goonetilleke, D.S.G., for the Respondents.

Argued on: 10.01.2023

Written submissions:

by the Petitioner on 02.07.2019 and 31.01.2023.
by the Respondents on 16.06.2021 and 15.02.2023.

Decided on: 28.06.2023

Samayawardhena, J.

The Petitioner was issued the Annual Permit (P8) under the State Lands Ordinance by the 1st Respondent Divisional Secretary of Uvaparanagama on 12.02.2013. The endorsements on this Permit show that the validity period of it has been extended on yearly basis for the years 2014, 2015 and 2016 ending on 31st of December each year. The Permit is for a portion of Lot 4 in extent of 10 perches in Final Village Plan No. 196 made by the Surveyor-General marked P1(a). The Petitioner has shaded on P1(a) the area he occupies, which is located immediately adjacent to the Doolgolle Oya. This is also made clear by Plan marked P11, another recent Plan prepared by the Surveyor-General. It may be observed that although the Annual Permit is for 10 perches, according to P11, the Petitioner is in occupation of a land in extent of 20 perches. The Petitioner has constructed a building on the Permit land and has been carrying on a business by the name of Riverside Restaurant. A liquor licence has also been obtained to the premises.

In 2016, he requested from the Divisional Secretary a long-term lease for this land instead of a yearly Permit. The Divisional Secretary has not flatly refused this request. As a prerequisite to the issuance of a long-term lease, the Divisional Secretary has taken steps to have a survey done through the Surveyor-General to ascertain whether the land falls within reservations of Doolgolle Oya and Road (*vide* R2). By R3 the Surveyor-General has informed the Divisional Secretary that, according to the List of the Lands (which appears to be a reference to the Tenement List), Lot 4 has been reserved for Doolgolle Oya and therefore new survey is unnecessary. It may be recalled that the Petitioner's Permit is in respect of part of Lot 4 in the Final Village Plan 196. The Tenement List marked P1(b) attached to the Final Village Plan 196 *inter alia* states that Lot 4 is "*Reservation for Doolgolle Oya*". According to P1(b), this remark has been made as far back as 1928, when the Plan was originally prepared. Hence the Divisional Secretary has informed the Petitioner by P13 dated 07.12.2017 that the Annual Permit cannot be renewed. He has further informed the Petitioner that steps have also been taken under the State Lands (Recovery of Possession) Act to recover possession of the adjoining lands. The Notice to Quit dated 12.01.2018 marked P15 has been issued to the Petitioner under the State Lands (Recovery of Possession) Act.

Without defending the action in the Magistrate's Court in terms of the State Lands (Recovery of Possession) Act if a case is filed against him or without invoking the writ jurisdiction of the Court of Appeal against the decisions of the Divisional Secretary as the law provides, the Petitioner filed this application on 24.01.2018 seeking declarations that his fundamental rights guaranteed under Articles 12(1), 12(2) and 14(1)(g) of the Constitution have been violated by the 1st to 5th Respondents (whereas there are only three Respondents – the Divisional Secretary, the Land Commissioner General and the Attorney-General), and that the Quit Notice P15 is null and void. He also sought six interim reliefs primarily

preventing the Divisional Secretary from taking action to evict the Petitioner as initiated by the Quit Notice.

This Court has granted leave to proceed under Article 12(1) of the Constitution and an interim relief preventing the Respondents from making an application to the Magistrate's Court for an order of ejectment pending determination of this application.

Let me now consider the arguments presented on behalf of the Petitioner.

The first argument of the learned President's Counsel for the Petitioner is that, in view of condition 5 of the Permit, the Permit is personal to the Petitioner. Therefore, in terms of section 16 of the State Lands Ordinance, "*all rights under such Permit or licence shall be finally determined by the death of such grantee*." According to the learned President's Counsel, this means that the Petitioner is entitled to enjoy the land until his death, or in other words, the Permit is valid for life. Hence, he argues that, before the Divisional Secretary decides not to renew the Permit, the procedure laid down for cancellation of a Permit (section 17 of the State Lands Ordinance and sections 106-128 of the Land Development Ordinance) shall be followed. This argument is clearly misconceived in law.

The meaning of condition 5 of the Permit that the Permit is personal to the Permit holder can be understood by reading condition 6 which states that the Permit holder shall not sublet, mortgage or alienate his rights in the land during the time the Permit is in force.

This can also be understood by comparing section 11 with section 16. Section 11 of the State Lands Ordinance states "*Where the rights under any instrument of disposition are not personal to the grantee but may be assigned by act inter vivos or may pass on his death to his heirs or devisees, the burden of any covenants or conditions inserted in such instrument shall*

run with the land and shall be binding upon the grantee and upon all persons claiming that land through, from or under the grantee."

What section 16 states is:

(1) Where it is provided in any Permit or licence that such Permit or licence is personal to the grantee thereof, all rights under such Permit or licence shall be finally determined by the death of such grantee.

(2) Where it is provided in any Permit or licence that such Permit or licence shall be personal to the grantee thereof, the land in respect of which such Permit or licence was issued and all improvements effected thereon shall, on the death of the grantee, be the property of the Crown; and no person claiming through, from or under the grantee shall have any interest in such land or be entitled to any compensation for any such improvements.

The procedure laid down in section 17 of the State Lands Ordinance and sections 106-128 of the Land Development Ordinance shall be followed in the cancellation of a Permit during its validity period. After the yearly Permit lapses due to effluxion of time, the question of cancellation does not arise. Hence those sections have no relevance in this context. The condition 1 of the Permit is very clear: unless renewed for one year at the discretion of the Divisional Secretary, the Permit shall lapse at the end of one year period.

The argument of learned President's Counsel for the Petitioner that "*As a result of the statutory protection afforded by the aforesaid Ordinance to the Petitioner [section 17 of the State Lands Ordinance and sections 106-128 of the Land Development Ordinance], the Petitioner made improvements which amounting to 15 million rupees in the said land while carrying out business for 17 years. Every year, the Petitioner renewed his Permit and excise license after complying the conditions and making due payments. Therefore,*

the Petitioner had a legitimate expectation that his Permit would be renewed as he has not violated any conditions for the past 17 years while doing business." is unacceptable. As I explained earlier, there is no such statutory protection afforded to the Petitioner.

The condition 11 of the Permit expressly and unambiguously states that no compensation is payable for any improvements on the land and no damages are payable for any loss caused. Even in the case of cancellation of the Permit, section 18 of the State Lands Ordinance states that neither the grantee nor any other person shall be entitled to any compensation or damages whatsoever by reason of the cancellation of a Permit or licence under section 17, and no claim for compensation or damages shall in any such case be entertained by any Court.

On the facts and circumstances of this case, the decision of the 1st Respondent Divisional Secretary not to renew the Annual Permit when he was satisfied that the land is part of Doolgolle Oya reservation is not illegal. If he had done the opposite, it would have been an illegality. No legitimate expectation can be founded on or arise from illegality. The representation made by the public authority shall be *intra vires* as opposed to *ultra vires* to form a legitimate expectation enforceable in law. The principle of legality is a fundamental ingredient of the rule of law.

Wade in *Administrative Law* (11th Edition) page 454-455 state:

> *An expectation whose fulfilment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the power of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect*

> *to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice.*

People expect that the public authorities act within the scope of their powers in accordance with the law; if they fail to do so and people who place their trust in *ultra vires* representations act upon them, innocent representees are not without a remedy. Wade states at page 455 that such representees can seek compensation. This he states "*not upholding an ultra vires representation but simply recognising that the undoubted fact of the representation may be an element in establishing that the compensation should be paid.*" However, Wade stresses: "*The protection of the trust placed in an expectation is important; but it is not as important as upholding the rule of law.*"

De Smith's Judicial Review (8th Edition) pages 702-703 states:

> *In R. v. Ministry of Agriculture, Fisheries and Food Ex p. Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714 at 731, Sedley J. said that to bind public bodies to an unlawful representation would have the "dual effect of unlawfully extending their statutory power and destroying the ultra vires doctrine by permitting the public bodies arbitrarily to extend their powers." On the other hand, to bind bodies to a promise to act outside the powers would in effect endorse an unlawful act. It must, on this view, be doubtful whether the expectation that a body will exceed its powers can be legitimate.*

In *C.W. Mackie & Co. Ltd. v. Hugh Moragoda, Commissioner-General of Inland Revenue and Others* [1986] 1 Sri LR 300 at 309, Sharvananda C.J. stated:

> *[T]he equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of any illegal or invalid act. Fundamental to this postulate*

> *of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law. … In the exercise of its powers under Article 126(4) of the Constitution this court can issue a direction to a public authority or official commanding him to do his duty in accordance with the law. It cannot issue a direction to act contrary to the provisions of the law or to do something which in law, would be in excess of his powers.*

In the case of *Nimalsiri v. Colonel P.P.J. Fernando and Others* (SC/FR/256/2010, SC Minutes of 17.09.2015) Jayawardena J. held:

> *An expectation the fulfilment of which results in the decision maker making an unlawful decision cannot be treated as a legitimate expectation. Therefore, the expectation must be within the powers of the decision-maker for it to be treated as a legitimate expectation case.*

In the original petition, the Petitioner did not take up the position that the land in dispute is not part of reservation of Doolgolle Oya. The Petitioner was challenging the decision not to extend the yearly Permit for other reasons, the main of which was political victimization because his family had been involved in politics. This was not pursued at the argument. At the argument, one of the main contentions was that the land had not been identified as a reservation. As I stated earlier, relying on the Plans of the Surveyor-General, the Divisional Secretary has come to the finding that the land in dispute is within the Doolgolle Oya reservation. The Petitioner has not countered that position by tendering a different Plan. The Petitioner in his counter affidavit drawing attention of the Court to section 50 of the State Lands Ordinance which deals with reservations states that no regulations have been made prescribing the limits of reservation for public streams except for the Western Province.

Section 50 of the State Lands Ordinance states:

> *Subject as hereinafter provided and without prejudice to the powers conferred by section 49, any Crown land which is immediately adjacent to a public stream and lies within a prescribed distance therefrom measured in such manner as may be prescribed shall, for the purposes of this Ordinance, be deemed to be a Crown reservation constituted by Notification under section 49; and all the provisions of this Part shall apply accordingly to any such reservation:*

At the argument, learned Deputy Solicitor General for the Respondents drew the attention of Court as well as learned President's Counsel for the Petitioner to the Gazette dated 15.10.1948 and paragraph 228 of the Land Manual that had been tendered to Court with the motion dated 29.10.2021, which addresses this issue.

By the Ceylon Government Gazette No. 9,912 dated 15.10.1948, Crown Lands Regulations have been published. In reference to section 50 of the State Lands Ordinance on the subject of Crown reservations for public streams, it states:

> *11. (1) The distance to be prescribed for the purpose of section 50 of the Ordinance-*
>
> *(a) in the case of any Crown land which is referred to in that section and is not marked, described or indicated as a stream reservation in any plan prepared by or under the authority of the Surveyor-General shall-*
>
> > *(i) where the width of the public stream does not extend fifteen feet, be one chain,*
> >
> > *(ii) where the width of such stream exceeds fifteen feet but does not exceed fifty feet, be two chains,*

(iii) where the width of such stream exceeds fifty feet, be three chains …

In terms of section 81 of the Evidence Ordinance, the Court shall presume the genuineness of Gazettes. In terms of section 83 of the Evidence Ordinance, the Court shall presume that maps, plans, or surveys purporting to be signed by the Surveyor-General or officer acting on his behalf were duly made by his authority and are accurate.

In terms of section 49 of the State Lands Ordinance, the Minister in charge of the subject can by Notification published in the Gazette declare that any State land is considered a State reservation *inter alia* for the protection of the source, course or bed of any public stream, springs, tanks, reservoirs, lakes, ponds, lagoons, creeks, canals, aqueducts, elas, channels (whether natural or artificial), paddy fields and land suitable for paddy cultivation.

The submission of learned Deputy Solicitor General that, when the Surveyor-General has not specifically demarcated an area next to a public stream as a reservation, the deeming provision in section 50 of the State Lands Ordinance would apply to bring such areas within a reservation, is acceptable.

In any event, the Petitioner in this case does not seek a direction to the Divisional Secretary to issue a yearly Permit or a long-term lease to this land. He seeks a declaration that the Notice to Quit issued under the State Lands (Recovery of Possession) Act is a nullity. The Notice to Quit has been issued on the basis that the Petitioner is in unlawful occupation of a State land, not that the Petitioner is in unlawful occupation of a reservation for a public stream.

The Petitioner in his counter affidavit says "*The 1st Respondent has not taken any steps to remove existing illegal constructions in Uwaparanagama*

which built along the river bed obstructing the water flow of Doolgolla Oya. Such illegal constructions show that the 1st Respondent has no genuine interest to remove the illegal constructions other than to politically victimize me and damage my family business and reputation." But he has not stated whether what is stated in paragraph two of P13 where the 1st Respondent states that eviction orders have already been obtained from Court against people who have made unauthorized constructions in the vicinity of the Petitioner's business premises is false. The Petitioner has tendered a number of photographs to show the danger to the riverbed by those constructions. But he had been careful not to attach a photograph of his business establishment for the Court to get an idea about the real location of his business establishment. In any event, two wrongs do not make a right, and on proof of the commission of one wrong the equal protection of the law cannot be invoked to obtain relief in the form of an order compelling commission of a second wrong (*Gamaethige v. Siriwardena* [1988] 1 Sri LR 384 at 404). Article 12 of the Constitution cannot be understood as requiring the authorities to act illegally in one case because they have acted illegally in other cases (*Jayasekera v. Vipulasena* [1988] 2 Sri LR 237). Article 12 of the Constitution guarantees equal protection of the law and not equal violation of the law. For a complaint of unequal treatment to succeed, the Petitioner must demonstrate unequal treatment in the performance of a lawful act (*Seelavansa Thero v. Tennakoon, Additional Secretary, Public Service Commission* [2004] 2 Sri LR 241 at 248).

On the facts and circumstances of this case, the decision of the 1st Respondent Divisional Secretary not to renew the Annual Permit for another year is not illegal.

I hold that there is no violation of Article 12(1) of the Constitution and there is no reason to declare that the Quit Notice P15 is a nullity. I dismiss the application of the Petitioner with costs.

As agreed at the argument, this decision would be binding on the connected case SCFR/14/2018.

Judge of the Supreme Court

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekera, J.
I agree.

Judge of the Supreme Court