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

In the matter of an application for Special Leave to Appeal from the judgment of the Court of Appeal of the Democratic Socialist Republic of Sri Lanka under and in terms of Article 128 (2) of the Constitution.

Kelani Valley Plantations PLC (formerly Kelani Valley Plantations Limited),
400, Deans Road,
Colombo 10.

Petitioner

S.C. Appeal No. 70/2015
S.C. (Spl) L.A. No. 260/2013
C.A. (Writ) 647/2011

Vs.

1. The Chairman,
   National Housing Development Authority,
   Sir Chittampalam A. Gardiner Mawatha,
   Colombo 02.

2. Nuwara Eliya District Housing Development Co-operative Society Ltd.,
   No. 10, National Housing Scheme,
   Bogawanthalawa.

Respondents

AND NOW BETWEEN

Nuwara Eliya District Housing Development Co-operative Society Ltd.,
No. 10, National Housing Scheme,
Bogawanthalawa.

2nd Respondent-Appellant

Vs.

Kelani Valley Plantations PLC (formerly Kelani Valley Plantations Limited),
400, Deans Road,
Colombo 10.

Petitioner-Respondent

The Chairman,
National Housing Development Authority,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

1st Respondent-Respondent

Before: **Hon. Vijith K. Malalgoda, P.C., J.**

Hon. Janak De Silva, J.

Hon. Arjuna Obeyesekere, J.

Counsel:

Manohara De Silva, P.C. with H. Kumarage and K. Gamage for the 2nd Respondent-Appellant.

Ikram Mohamed, P.C. with Neomal Senatilleke, Taniya Magan and Anuradha Abeysekara for the Petitioner-Respondent

Chaya Sri Nammuni, D.S.G. for 1st Respondent-Respondent

Written Submissions:

24.04.2023 and 05.06.2015 by the Petitioner-Respondent

16.06.2023 and 12.05.2015 by the 2nd Respondent-Appellant

13.10.2015 by the 1st Respondent-Respondent

Argued on: 17.03.2023

Decided on: 03.04.2024

Janak De Silva, J.

The 1st Respondent-Respondent ("1st Respondent") issued a quit notice dated 19.10.2011 ("Quit Notice of 19.10.2011") to the Petitioner-Respondent ("Respondent") in terms of Section 3 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended ("Act").

The **Quit Notice of 19.10.2011 referred to Scrub Estate** (ස්ක්‍රබ්වත්ත). The metes and bounds of the land identified in the Quit Notice of 19.10.2011 are as follows:

ඉහතකී උපලේඛණය

මධ්‍යම පළාතේ, නුවරඑළිය දිස්ත්‍රික්කයේ, ඔය පළාත කෝරළේ, සුළු කොට්ඨාශයේ, කැලේගාල ගමේ (කොට්ඨාශ අංක : 99 හැඩින්හිල්) නුවරඑළිය මහ නගර සභා සීමාව,

උතුරට :- සමන් නානායක්කාර සහ තවත් අය හිමිකම් කියන යුනික්විව් වත්ත මු. පි. නු. 352 කැබැලි අංක: 011 සහ ආනන්ද ද සිල්වා සහ තවත් අය හිමිකම් කියන හයිලන්ඩ්ස්,

නැගෙනහිරට :- අනන්ද ද සිල්වා සහ තවත් අය හිමිකම් කියන හයිලන්ඩ්ස්,

දකුණට :- ආනන්ද ද සිල්වා සහ තවත් අය හිමිකම් කියන හයිලන්ඩ්ස්, රෝයල් මෙන්ඩිස් සහ තවත් අය හිමිකම් කියන හැඩින්හිල් සහ ස්ක්‍රබ්වත්ත,

බටහිරට :- ස්ක්‍රබ්වත්ත සහ සමන් නානායක්කාර සහ තවත් අය හිමිකම් කියන යුනික්විව් වත්ත

යන මායිම් තුල පිහිටි සර්වේයර් ජනරාල් විසින් මැන සාදන ලද 1997. 12. 03 දිනැති මූලික පිඹුරු අංක: නු 1823 හි කැබලි අංක: 1 හැටියට පෙන්නුම් කර ඇති හෙක්ටෙයාර් දෙකයි දශම බින්දුවයි දෙකයි හතරක් (හෙක්: 2.024) වන ස්ක්‍රබ්වත්ත නමැති ඉඩම.

The Respondent invoked the jurisdiction of the Court of Appeal and sought a writ of Certiorari to quash the Quit Notice of 19.10.2011.

The Respondent pleaded that **Pedro Estate** situated in Nuwara Eliya became **vested in** the Land Reform Commission (**LRC**) in 1975. Later, **Pedro Estate with several other estates were vested in** the Sri Lanka State Plantations Corporation (**SLSPC**) **by order** published in Government Gazette (Extra Ordinary) No. 815/510 **dated 21.04.1994** made **under Section 27A of the LRC Act**.

The **SLSPC** granted a **lease** of **Pedro Estate to the Respondent** for a period of 53 years by lease No. 448 dated 30.04.1996. **Pedro Estate consists of several divisions, one of which is called "Scrubbs Division" which is 164 acres 2 roods 16 perches in extent**.

By an **order dated 25.07.2000 made by the Minister** of Public Administration, Home Affairs and Plantation Industries, purporting to act **under Section 27A(1) of the LRC Act**, and published in Gazette (Extra Ordinary) No. 1145/19 dated 17.08.2000, purported to **vest an extent of 2.024 hectares (5 acres) of the Scrub Estate in the National Housing Development Authority (NHDA)**.

Although the Respondent has not specifically admitted that part of Pedro Estate formed the corpus of this order dated 25.07.2000, it is clear that the case pleaded was that since Pedro Estate ceased to be owned by the LRC by 21.04.1994, by virtue of the vesting in the Sri Lanka State Plantations Corporation (SLSPC) by Government Gazette (Extra Ordinary) No. 815/510 dated 21.04.1994, the Minister was not entitled to deal with Pedro Estate in terms of Section 27A (1) of the LRC Act.

Accordingly, the Respondent contended that the said vesting by order dated 25.07.2000 was null and void in law or was of no force or avail in law, and in fact did not vest any part of Pedro Estate in the NHDA. The Respondent further contended that previously, the 1st Respondent had issued a similar quit notice which was impugned by the Respondent in C.A. (Writ) Application No. 323/2006 ("Quit Notice of 26.08.2005") and the Court of Appeal had issued a writ of Certiorari quashing the said quit notice.

The Court of Appeal held that it is quite evident that the impugned Quit Notice of 19.10.2011 is the same as Quit Notice of 26.08.2005 impugned in C.A. (Writ) Application No. 323/2006 which was quashed by the Court of Appeal. Accordingly, Court held that the impugned Quit Notice of 19.10.2011 is null and void in law as the 1st Respondent had no authority in law to re-issue a notice to quit. Moreover, it was held that the 1st Respondent has failed to identify the corpus properly. The Court of Appeal issued a Writ of Certiorari quashing the Quit Notice of 19.10.2011.

This appeal has been filed by the 2nd Respondent-Petitioner ("Petitioner") against the said judgment of the Court of Appeal. Leave to appeal was granted on the following questions:

(1) The Court of Appeal erred in failing to consider that the Petitioner-Respondent Company was unlawfully occupying the entirety of Scrubs Division and/or a portion of Scrubs Division and/or very specifically it is unlawfully occupying the allotment of land more fully described in the Notice to Quit, marked "K",

(2) In the aforesaid circumstances the Court of Appeal erred in holding that the Petitioner Company is entitled to the relief sought in its Petition dated 16.11.2011, marked P1,

(3) The Court of Appeal erred in holding that the Competent Authority has no authority to re-issue the impugned notice to quit in view of the previous notice to quit which was quashed by the Court of Appeal. The 2nd Respondent-Petitioner states that the said previous notice to quit was quashed on a different premise, namely "The Court is not possessed with sufficient material to determine that the Land Reform Commission possessed the Scrub Estate described in the Schedule, to enable such to be vested in the 1st Respondent" (vide page 5 of H3 annexed to the Petition dated 16.11.2011),

(4) The Court of Appeal erred in holding that the 1st Respondent had failed to identify the corpus, when the impugned notice to quit had identified the corpus by reference to boundaries based on specific metes and bounds set out in a Plan drawn by the Surveyor General's Department bearing No. P.P. 1823. The boundaries set out in the said Plan (evinced by the Schedule 1 of 2R6) are the same boundaries found in Plans bearing Nos. 126N and 126L, annexed as 2R12 and 2R13 and the said boundaries are also the same and identical boundaries found in the Notice to Quit marked "K" annexed to the Petition. In any event clearly the onus of identifying the corpus and establishing a claim in respect of the corpus is on the Petitioner-Company.

Identity of the Corpus

This is a pivotal issue in any proceedings instituted pursuant to the Act. The Court of Appeal held that the 1st Respondent had failed to identify the corpus. Hence, I will first examine whether the corpus has been duly identified.

An examination of the Quit Notice of 26.08.2005 and Quit Notice of 19.10.2011 establishes that both refer to one and the same corpus. According to these notices the corpus is identified as Scrub Estate depicted as Lot 1 of P. Plan No. 1823 consisting of 2.024 Hectares.

This is the identical land specified in the order made by the Minister of Public Administration, Home Affairs and Plantation Industries in terms of Section 27A (1) of the LRC Act and published in the Gazette Extraordinary dated 17.08.2000. The 1st Respondent claims to be the owner of the corpus on the strength of this order. The land forming the subject matter of the said order is also identified as Lot 1 of P. Plan No. 1823 consisting of 2.024 Hectares.

Undoubtedly there is a confusion created by the use of different names to refer to the corpus. However, it is not always safe to proceed only on the name of the land in identifying the corpus. This is a case in point. Boundaries of a land provides a stronger basis to identify any land.

The boundaries of Lot 01 in P. Plan 1823 of 30.12.1997 are identical to the boundaries in Quit Notice of 26.08.2005 and Quit Notice of 19.10.2011. This plan has been drawn by the Surveyor General.

In terms of Section 22 of the Survey Act No. 17 of 2002, any plan purporting to be signed by the Surveyor General or any officer acting on his behalf shall be admissible evidence in all cases and for all purposes instead of the original and may be taken as prima facie evidence of the truth of the facts stated there in as being that of the original until evidence to the contrary shall have first been given.

Hence, in the absence of any evidence to the contrary, these documents establish that the corpus is vested in the 1st Respondent. The burden of proving otherwise falls on the Respondent.

In my view, proceedings for judicial review are inherently unsuitable to determine disputed questions of title. Section 12 of the Act states that nothing therein shall preclude any person who has been ejected from a land under the provisions of this Act or any person claiming to be the owner thereof from instituting an action against the State for the vindication of his title thereto within six months from the date of the order of ejectment.

Nevertheless, let me examine the claim of the Respondent that the corpus in question is land leased to it by the SLSPC in terms of Lease No. 448 dated 30.04.1996.

The Respondent claims that the corpus is part of Pedro Estate which was vested in the SLSPC on 18.04.1994 consequent to the order published in the Gazette Extraordinary bearing No. 815/10 dated 21.04.1994. Item 38 of the said order refers to Pedro Estate containing 358 Hectares.

In the Schedule of the Indenture of Lease No. 448 dated 30.04.1996 entered into between the Respondent and the SLSPC for Pedro Estate, the extent of the land is identified as 357.96 Hectares. The Schedule goes on to identify the following four divisions as compromising the said Pedro Estate:

(1) Pedro and Lovers Divisions : 221.27H
(2) Naseby and Moonplains Division : 135.19H
(excluding several fields enumerated therein)
(3) Section of Moonplans Division : 20.46 H
(4) Scrubs Division : 66.46 H

The total extent of the land identified in the Schedule to the Lease No. 448 is 443.56 H which exceeds the extent of land identified in Item 38 of the Gazette Extraordinary bearing No. 815/10 dated 21.04.1994 which covers only 358 Hectares. If Item No. 3 and 4 above are excluded (Section of Moonplans Division : 20.46 H and Scrubs Division : 66.46 H), the total extent of land set out in the Schedule to Lease No. 448 is 356.46 H which is much closer to the extent of land set out in Item 38 of the Gazette Extraordinary bearing No. 815/10 dated 21.04.1994 which covers only 358 Hectares.

Accordingly, there is much merit in the contention of the learned President's Counsel for the Petitioner that items No. 3 and 4 set out above are in excess of the extent specified in Item 38 of the order published in the Gazette Extraordinary bearing No. 815/10 dated 21.04.1994 and the same was never vested in the SLSPC.

For the foregoing reasons, I answer the question of law No. 4 in the affirmative.

C.A. (Writ) Application No. 323/2006

The Court of Appeal took the view that Quit Notice dated 19.10.2011 was null and void since the earlier Quit Notice of 26.08.2005 was quashed in these proceedings. This requires an examination of the facts of those proceedings.

On 26.08.2005, the 1st Respondent served a quit notice ("Quit Notice of 26.08.2005") on the Respondent under the Act. Further proceedings under the Act were instituted in the Magistrate's Court of Nuwara Eliya Case No. 70451/06.

Thereafter, the Respondent made an application to the Court of Appeal in case No. C.A. Application (Writ) 323/06. In those proceedings, the Respondent sought a writ of Certiorari quashing the Quit Notice of 26.08.2005 and an interim order staying all proceedings in the Magistrate's Court of Nuwara Eliya.

The land described in the Quit Notice of 26.08.2005 is as follows:

<u>ඉහතකී උපලේඛණය</u>

මධ්‍යම පළාතේ, නුවරඑළිය දිස්ත්‍රික්කයේ, ඔය පළාත කෝරළේ, සුළු කොට්ඨාශයේ, කැලේගාල ගමේ (කොට්ඨාශ අංක : 9 හැඩින්හිල්) නුවරඑළිය මහ නගර සභා සීමාව,

උතුරට :- සමන් නානායක්කාර සහ තවත් අය හිමිකම් කියන යුනික්විව් වත්ත මු. පි. නු. 352 කැබැලි අංක: 01 සහ ආනන්ද ද සිල්වා සහ තවත් අය හිමිකම් කියන හයිලන්ඩ්ස්,

නැගෙනහිරට :- ආනන්ද ද සිල්වා සහ තවත් අය හිමිකම් කියන හයිලන්ඩ්ස්,

දකුණට :- ආනන්ද ද සිල්වා සහ තවත් අය හිමිකම් කියන හයිලන්ඩ්ස්, රෝයල් මෙන්ඩිස් සහ තවත් අය හිමිකම් කියන හැඩින්හිල් සහ ස්ක්‍රබ්වත්ත,

බටහිරට :- ස්ක්‍රබ්වත්ත සහ සමන් නානායක්කාර සහ තවත් අය හිමිකම් කියන යුනික්විව් වත්ත

යන මායිම් තුල පිහිටි සර්වේයර් ජනරාල් විසින් මැන සාදන ලද 1997. 12. 03 දිනැති මූලික පිඹුරු අංක: නු 1823 හි කැබලි අංක: 1 හැටියට පෙන්නුම් කර ඇති හෙක්ටෙයාර් දෙකයි දශම බින්දුවයි දෙකයි හතරක් (හෙක්: 2.024) වන ස්ක්‍රබ්වත්ත නමැති ඉඩම.

The case pleaded by the Respondent was that **Pedro Estate** situated in Nuwara Eliya was originally owned by the LRC. It was vested in the SLSPC by order published in Government Gazette (Extra Ordinary) No. 815/510 dated 21.04.1994 made under Section 27A of the LRC Act. After a competitive bidding process, the Respondent obtained several estates including Pedro Estate on lease for a period of 53 years. Physical possession of **Pedro Estate** was handed over to the Respondent on 18.06.1992 pending the drawing up of the lease. The Respondent entered into lease bearing No. 448 dated 30.04.1996 for **Pedro Estate** with the SLSPC.

According to the Respondent, **Scrubs Division is one of the Divisions of Pedro Estate**. The **Respondent claimed that the 1st Respondent is, by the impugned Quit Notice of 26.08.2005, seeking to take over 5 acres of prime tea land <u>out of the Scrubs Division of the Pedro Estate</u>**. It was claimed that the Quit Notice of 26.08.2005 was bad as:

(a) The quit notice was given by a person who is not the Competent Authority envisaged in law;

(b) By an ***order dated 25.07.2000*** made by the Minister of Public Administration, Home Affairs and Plantation Industries, purporting to act ***under Section 27A(1) of the LRC Act***, and published in Gazette (Extra Ordinary) No. 1145/19 dated 17.08.2000, purported to ***vest the said 5 acres in the NHDA***. Thereafter, the 1st Respondent sought to take over the said land. However, the Senior Group Manager of the Respondent informed that the order made under Section 27A (1) of the LRC Act in favour of the NHDA was defective and for the NHDA to have proper title, acquisition proceedings should be taken.

The **1st Respondent** in his objections took up the position that the **corpus in question is Scrub Division of <u>Oliphant Estate</u>** which is 5 acres in extent. The said land was handed over to the 1st Respondent by the Government Agent of Nuwara Eliya on 16.07.1979 and that the said land does not form part of the land leased out to the Respondent.

However, later on in his objections, it was stated that **Scrub Estate** depicted as lot. 1 in Preliminary Plan No. 1823 dated 30.12.1997 was vested in the NHDA pursuant to an **order dated 25.07.2000** made by the Minister of Public Administration, Home Affairs and Plantation Industries, acting **under Section 27A (1) of the LRC Act**, and published in Gazette (Extra Ordinary) No. 1145/19 dated 17.08.2000. **An extent of 2.024 hectares (5 acres)** of this portion of land was claimed to be the corpus in that application.

The NHDA decided to hand over the subject matter of this case to the Petitioner for a housing scheme. As there was a delay in handing over, the Petitioner instituted C.A. (Writ) Application No. 922/2005. This case was settled on the condition that the NHDA will issue title deeds and give possession of the land to the members of the Petitioner without delay. The **1st Respondents at the end of his objection's states that the land in issue (Scrub Estate)** does not form any part of the land given to the Petitioner under the lease agreement between the Respondent and the SLSPC.

It is appropriate at this point of time to refer to the confusion created in the case as to the exact name of the corpus in issue in C.A. (Writ) Application No. 323/2006. As far as the Respondent was concerned, it was **5 acres of prime tea land out of the Scrubs Division of the Pedro Estate**. The **Respondent admitted that this land was purportedly vested in the NHDA** pursuant to **order dated 25.07.2000** made by the Minister of Public Administration, Home Affairs and Plantation Industries, purporting to act **under Section 27A (1) of the LRC Act**, and published in Gazette (Extra Ordinary) No. 1145/19 dated 17.08.2000. The Respondent claimed that the said order was of no force or avail in law for the reasons pleaded above.

It is the 1st Respondent who created the confusion surrounding the name of the corpus by using two names to refer to it. Firstly, it was claimed that the corpus is ***Scrub Division of Oliphant Estate***. Next it was claimed to be part of **Scrub Estate**.

However, this confusion was not created by the pleadings but precede the litigation. Several documents forming part of the communication between parties and government officials produced before Court shows of the existence of a land called “Oliphant Estate”. Moreover, there are other documents which use the names “Oliphant Estate”, “Scrubs Estate” and “Scrubs Division”.

The Court of Appeal in its judgment (at pages 4, 5) states as follows:

> *“The version of the Respondents as stated in the objections is that the land in issue is the Scrub Division of Olipent Estate in Nuwara Eliya. The land was handed over to the 1st Respondent by the Government Agent of Nuwara Eliya on 16.07.1979. But the Respondent does not have any document to support this position. The land in issue is identified by the Respondent as “Scrub Division of Olipent Division” (sic) and the land that is described in the quit notice has no reference to a Olipent Division and the land that was vested in the 1st Respondent by document marked G has no reference to a Olipent Division……*
>
> *“But if the land in issue was part of Pedro Estate as described in the schedule to the lease agreement that land was not owned by the Land Reform Commission. According to the document marked, B the Pedro Estate was owned by the Land Reform Commission as at 18th June 1992. And on this basis the ownership had been transferred to the Sri Lanka State Plantation Corporation on 18th April 1994. (vide document F). The Court is not possessed with sufficient material to determine that the Land Reform Commission possessed the Scrub Estate described in the schedule to enable such to be vested in the 1st Respondent. Therefore the court can reasonably conclude that the 1st Respondent had no authority to act under the provisions of Section 3 of the State Lands Recovery of Possession Act, No. 7 of 1979 as amended, as the land in issue is not owned by the National Housing Development Authority. The notice to quit should be issued by the competent authority. ”*

Confronted with the dilemma created by the use of two different names, i.e. *Scrub Division of Oliphant Estate* or *Pedro Estate*, to identify the corpus, the Court of Appeal considered both positions.

As for Scrub Division of Oliphant Estate, it was held that there is no document showing the vesting of title to the said land on the 1st Respondent. Moreover, Court observed that the land described in the Quit Notice of 26.08.2005 has no reference to an Oliphant Estate.

Should the corpus be part of Pedro Estate, Court held that the LRC did not have any title to pass on to the 1st Respondent as it was transferred to the SLSPC on 18th April 1994.

Res Judicata/Estoppel

The Respondent contends that no appeal was lodged against the judgement delivered in C.A. (Writ) Application No. 323/2006 and as such the said judgment is final and binding on all the parties. The Court of Appeal appears the proceed on the basis that the Quit Notice of 19.11.2011 is null and void and could not have been issued in view of the above findings by the Court of Appeal in C.A. (Writ) Application No. 323/2006.

The crux of this contention is that the issue is res judicata or alternatively there is issue estoppel as the Quit Notice of 19.11.2011 impugned in these proceedings is the same as Quit Notice of 26.08.2005 quashed in C.A. (Writ) Application No. 323/2006.

In ***Jayantha Ralalage Ranmenika and Another v. Kiribandage Yogarathne and Others*** **[C.A. Appeal No. 471/2000(F), C.A.M. 23.09.2019]** I had to consider the applicability of issue estoppel in Sri Lanka and concluded that as issue estoppel is part of English Law of Evidence in civil cases, it is part of our law in civil cases in view of section 100 of the Evidence Ordinance. Nevertheless, it must be considered whether proceedings for judicial review is a civil case in that sense.

Moreover, in ***Penner v. Niagara (Regional Police Authority Service Board) and Others*** **[(2013) 2 SCR 125]**, Cromwell and Karakatsanis JJ, delivering the majority judgment of the Supreme Court of Canada, held at paragraph 29:

> *"The one [doctrine] relevant on this appeal is the doctrine of issue estoppel. It balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice."*

Consideration of the res judicata or issue estoppel argument, must first begin by an examination of the nature of the proceedings seeking prerogative remedies. As Lord Devlin held in ***R. v. Fulham etc. Rent Tribunal Ex parte Zerek*** **[(1951) 1 ALL ER 482 at 488]:**

> *"Orders of certiorari and prohibition are concerned principally with public order, it being part of the duty of the High Court to see that inferior courts confine themselves to their own limited sphere. They also afford speedy and effective remedy to a person aggrieved by a clear excess of jurisdiction by an inferior tribunal […] It is recognised that the inferior court will have made a preliminary inquiry itself and the superior court is generally content to act on the materials disclosed at that inquiry and to review in the light of them the decision to assume jurisdiction. This is possible only because* ***the court is not****, as I conceive it,* ***finally determining the validity of the tribunal's order as between the parties themselves […] but is merely deciding whether there has been a plain excess of jurisdiction or not****."* (emphasis added)

The finality of the decision of court is a common requirement for the application of both res judicata and issue estoppel.

The applicability of issue estoppel to proceedings for judicial review was considered in ***R. v. Secretary of State for the Environment, Ex parte Hackney London Borough Council and Another*** **[(1983) 1 WLR 524 at 538-539]** where the court held that in proceedings for judicial review:

> *"[…] there are no formal pleadings and it will frequently be difficult if not impossible to identify a particular issue which the "first" application will have decided…Further, we doubt whether a decision in such proceedings, in the sense necessary for issue estoppel to operate, is a final decision:* ***the nature of the relief, in many cases, leaves open reconsideration by the statutory or other tribunal of the matter in dispute****."* (emphasis added)

In ***R. v. Home Secretary, Ex parte Momin Ali*** **[(1984) 1 WLR 663 at 669]** Donaldson M.R. endorsed the view that the doctrine of issue estoppel has no place in public law and judicial review.

Although in Sri Lanka, formal pleadings must be filed in an application for judicial review in accordance with the applicable rules, the issue of a writ of *Certiorari* will not oust the jurisdiction of the statutory authority to make a fresh determination. For example, where the decision of a statutory functionary is quashed for the failure to follow the rules of natural justice, a fresh decision can be taken after following the rules of natural justice.

Coorey [*Principles of Administrative Law in Sri Lanka*, Vol. II, 4th ed. (2020), page 909] supports this view as follows:

> *"Where an order made by an officer or authority is quashed by certiorari, whether for ultra vires or for error of law on the face of the record, there is no order ab initio, and such officer or authority can (and must, if so urged) proceed afresh to exercise its power in the matter, even if certiorari was not accompanied by mandamus compelling that officer or authority to do so."*

Moreover, a Petitioner in an application for judicial review must first obtain notice from the Supreme Court, Court of Appeal or the High Court as the case may be. It is also discretionary in nature. Court is empowered to refuse relief on a number of grounds such as unexplained delay, suppression or misrepresentation of material facts as well as the availability of an alternative efficacious remedy. These run contrary to the indispensable concept of a final determination of an issue which is at the root of issue estoppel.

In ***R. v. Secretary of State for the Environment, Ex parte Hackney London Borough Council and Another*** **[supra., at 539]** the Court quoted with approval the following passage from Wade on *Administrative Law* [5th ed., (1982), page 246]:

> *"in these proceedings the court 'is not finally determining the validity of the tribunal's order as between the parties themselves' but 'is merely deciding whether there has been a plain excess of jurisdiction or not.'* ***They are a special class of remedies designed to maintain due order in the legal system, nominally at the suit of the Crown, and they may well fall outside the ambit of the ordinary doctrine of res judicata. But the court may refuse to entertain questions which were or could have been litigated in earlier proceedings, when this would be an abuse of legal process:*** *and in the case of habeas corpus there is a statutory bar against repeated applications made on the same grounds."* (emphasis added)

The applicability of the concept of res judicata to proceedings for judicial review has been questioned by De Smith [J.M. Evans, *De Smith's Judicial Review of Administrative Action*, 4th ed., (London Stevens and Sons Limited, 1980), page 108] as follows:

> *"It is difficult not to conclude that the concept of res judicata in administrative law is so nebulous as to occlude rather than clarify practical issues, and that it should be used as little as possible."*

The inapplicability of res judicata or issue estoppel to the exercise of public power has been in principle supported by Wade and Forsyth [*Administrative Law*, 9th ed., (OUP Indian Reprint, Second Impression, 2006), pages 247, 248] as follows:

> *"[…]* ***res judicata, like other forms of estoppel, is essentially a rule requiring a party to accept some determination of fact or law which is wrong.*** *For if the determination is right, no substantive question arises.* ***There are self-evident objections to requiring public authorities to act on wrong assumptions. Public powers and duties […] cannot be fettered in such ways.***
>
> *[…]*
>
> *The same principle ought to apply in all situations where powers have to be exercised in the public interest […] it is therefore free to act on the fresh evidence. The additional dimension of the public interest is what makes the difference"* (emphasis added)

This reasoning applies with greater force in Sri Lanka. According to our Constitution, the sovereignty is in the people and the executive, legislature and the judiciary exercise the executive power of the people, legislative power of the people and the judicial power of the people respectively. These powers must always be exercised in the public interest as they are held in trust on behalf of the people.

Moreover, while an appeal raises the question of the correctness of the decision on its merits, judicial review is only concerned with the legality of the impugned decision. Is the decision lawful or unlawful? Accordingly, where the court determines that the impugned administrative action is ultra vires and quashes it or declares it unlawful, the statutory functionary must make a fresh determination.

As Wade and Forsyth [ibid., page 624] states:

> *"Defective decisions are frequently quashed by certiorari without any accompanying mandamus. Once the decision has thus been annulled, the deciding authority will recognize that it must begin again and in practice there will be no need for mandamus."*

I must hasten to clarify that this is not a situation where a party is seeking to re-agitate the same matter after having unsuccessfully sought the intervention of Court in proceedings for judicial review in an earlier instance. In such situation the question of *res judicata* or *issue estoppel* looms large for consideration by Court.

For the foregoing reasons, I reject the contention of the Respondent that the judgment in C.A. (Writ) Application No. 323/2006 is final and conclusive and continues to bind the 1st Respondent.

The 1st Respondent is entitled to take fresh steps in terms of the Act if there is evidence to support it.

I answer questions of law No. 3 in the affirmative.

Nullity

One common factor in both the previous litigation and the present litigation is the admission on the part of the Respondent that the corpus in both the Quit Notice of 26.08.2005 and Quit Notice of 19.11.2011 is ***5 acres of prime tea land out of the Scrubs Division of the Pedro Estate which is in their possession***. The Respondent admits in both the previous and present litigation that ***Scrub Estate*** depicted as lot. 1 in Preliminary plan No. 1823 dated 30.12.1997 was ***vested in the NHDA*** pursuant to ***Gazette (Extra Ordinary) No. 1145/19 dated 17.08.2000***.

Nevertheless, the Respondent claims that such vesting was null and void in law or was of no force or avail in law, and in fact did not vest any part of Pedro Estate in the NHDA. The claim is based on the assertion that as at the date of the vesting order, the LRC was not the owner of the said land due to it becoming vested in the SLSPC by Government Gazette (Extra Ordinary) No. 815/510 dated 21.04.1994.

The Respondent relies on the decisions in ***Rajakulendran v. Wijesundera*** **(1 Sriskantha's Law Reports 164 at 168)** and ***Bandahamy v. Senanayake*** **(62 NLR 313)** and submitted that void acts are destitute of legal effect and their validity can be attacked if necessary in collateral proceedings when it is sought to be enforced against a party. They can be ignored with impunity until sought to be enforced.

These decisions are based on the statement made by Lord Denning in ***Macfoy v. United Africa Company Limited*** **[(1961) 3 All E.R. 1169 at 1172]**:

> *"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."*

This passage was also relied in ***Elpitiya Plantations PLC v. Land Reform Commission and Others*** **[C.A. (Writ) 315/2016, C.A.M. 04.08.2020]**, ***Sirisena v. Kobbekaduwa, Minister of Agriculture and Lands*** **[(1978) 80 NLR 1 at 182]** and ***Leelawathie v. Commissioner of National Housing*** **[(2004) 3 Sri.L.R. 175 at 179]**.

Nevertheless, the position in English law is different. This was examined by a divisional bench of 5 judges in the **Colombo Port City Economic Commission Bill Special Determination [Decisions of the Supreme Court on Parliamentary Bills, 2021, Vol. XVI, page 23 at 33]** where it was held:

> *"However, Court observes that Clive Lewis, Judicial Remedies in Public Law, 5th ed., South Asian Edition (2017) in discussing the meaning of null and void in Administrative Law states (page 185):*
>
> > *"The primary concern here is the meaning of nullity or voidness solely in the context of the remedies granted by courts. The concept of nullity has been used to solve other problems arising in administrative law. For remedial purposes, the orthodox view is that an ultra vires act is regarded as void and a nullity. An act by a public authority which lacks legal authority is regarded as incapable of producing legal effects. Once its illegality is established, and if the courts are prepared to grant a remedy, the act will be regarded as void from its inception and retrospectively nullified in the sense that it will be regarded as incapable of ever having produced legal effects." (emphasis added)*
>
> *Thus, even where an act of a public authority is ultra vires and a nullity, for remedial purposes the illegality must be established before a court. As stated by Wade and Forsyth, Administrative Law, 9th ed., Indian Edition, page 281:*
>
> > *"…the court will treat an administrative act or order invalid only if the right remedy is sought by the right person in the right proceedings."*

Prior to Macfoy v. United Africa Co. Ltd. (supra), this approach was reflected in the statement of Lord Radcliffe in Smith v. East Elloe Rural District Council (1956) AC 736, 769-770 where it was held:

> *"An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."*

In fact, Wade and Forsyth (supra, page 305), states that the statement of Lord Denning in Macfoy v. United Africa Co. Ltd.(supra) is not the correct position of the law. Wade and Forsyth, Administrative Law, (supra, page 304), after restating the above statement of Lord Radcliffe states as follows:

> *"This must be equally true even where the 'brand of invalidity' is plainly visible for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council, without distinction between patent and latent defects. Lord Diplock spoke still more clearly [F Hoffmann-La Roche & Co. v. Secretary of State for Trade and Industry (1975) AC 295 at 366], saying that;*
>
> *It leads to confusion to use such terms as 'voidable', 'voidable ab initio', 'void' or 'a nullity' as descriptive of the status of subordinate legislation alleged to be ultra vires for patent or for latent defects, before its validity has been pronounced on by a court of competent jurisdiction." (emphasis added)*

This approach is consistent with the 'presumption of validity' according to which administrative action is presumed to be valid unless or until it is set aside by a court [Hoffmann-La Roche & Co. v. Secretary of State for Trade and Industry (1975) AC 295]. However, this 'presumption of validity' exists pending a final decision by the court [Lord Hoffmann in R v. Wicks (1998) AC 92 at 115, Lords Irvine LC and Steyn in Boddington v. British Transport Police (1999) 2 AC 143 at 156 and 161, and 173-4]."

Accordingly, the contention of the Respondent that there was no need to impugn the order published in the Gazette (Extra Ordinary) No. 1145/19 dated 17.08.2000 made pursuant to Section 27A(1) of the LRC Act vesting the corpus in issue on the NHDA is misconceived in law.

The Respondent sought to overcome this legal impediment by contending that the said order can be impugned in collateral proceedings. Reliance was placed on a judgment of mine in the Court of Appeal in ***McCallum Brewing Company (Private) Limited v. Commissioner General of Excise and Another*** **[C.A. Writ 469/2008, C.A.M. 18.12.2019]** where it was held (at page 5) that an ultra vires act can be challenged in two ways including collateral challenge.

Our attention was further invited to ***Administrative Law: Text and Materials*** **[Beatson, Matthews and Elliot (eds.), 3rd ed., Oxford University Press, 2005, page 109]** and ***Judicial Remedies in Public Law*** **[Clive Lewis, 5th ed. (Sweet and Maxwell South Asian Edition, 2017), page 187, paragraph 5-011]** where the opportunity to impugn an invalid administrative act in collateral proceedings is indorsed.

Nevertheless, the question of collateral challenge does not arise in the circumstances of this case. Admittedly, the Respondent became aware of the order published in the Gazette (Extra Ordinary) No. 1145/19 dated 17.08.2000 made pursuant to Section 27A (1) of the LRC Act at least by 12.10.2004 [paragraph 9 (4) of the petition filed in C.A. (Writ)

Application No. 323/2006]. The application in C.A. (Writ) Application No. 323/2006 was filed on 20th February 2006. The Respondent did not seek a writ of certiorari to quash the order published in the Gazette (Extra Ordinary) No. 1145/19 dated 17.08.2000 made pursuant to Section 27A (1) of the LRC Act. No such relief was sought even in these proceedings. It is axiomatic that discretionary relief such as a writ of certiorari can be refused for undue delay.

The Respondent's position both in C.A. (Writ) Application No. 323/2006 and in these proceedings is that the 1st Respondent could not have issued any quit notice for Scrubbs Division of Pedro Estate as it is owned by the SLSPC and leased to the Respondent in 1994 and therefore the NHDA did not get title by the order published in the Gazette (Extra Ordinary) No. 1145/19 dated 17.08.2000 made pursuant to Section 27A (1) of the LRC Act.

Thus, the title of the NHDA to issue the impugned Quit Notice of 26.08.2005 and Quit Notice of 19.11.2011 in C.A. (Writ) Application No. 323/2006 and in these proceedings respectively were core issues in both proceedings. Therefore, that issue could not have been and cannot be impugned in C.A. (Writ) Application No. 323/2006 and in these proceedings. An issue is not collateral if it is the central issue to be decided **[See *Wandsworth LBC v. Winder* [(1985) AC 461]**.

For the foregoing reasons, I reject the contention of the Respondent that the validity of the order published in the Gazette (Extra Ordinary) No. 1145/19 dated 17.08.2000 made pursuant to Section 27A (1) of the LRC Act can be impugned in these proceedings by way of collateral challenge.

In any event, since the Respondent has failed to establish that the corpus in this application is part of the land leased to the Respondent, the necessity to consider the validity of the order published in the Gazette (Extra Ordinary) No. 1145/19 dated 17.08.2000 made pursuant to Section 27A (1) of the LRC Act does not arise.

The evidence establishes that the corpus was vested in the 1st Respondent in 2000. This was to be used for a housing project for the members of the 2nd Respondent-Appellant ("Appellant").

According to the documentation filed by the Appellant, this housing project originated in 1979. The name Oliphant Estate appears to have been used at that time to identify the corpus. On 16.07.1979, the Divisional Secretary of Nuwara Eliya handed over possession of the corpus to the District Manager of the 1st Respondent as evinced by the handing over document marked 2R2f.

Subsequent to possession being taken over, the District Manager of the 1st Respondent informed the 1st Respondent by letter dated 17.07.1979 that the possession of the corpus was taken over by him and that until such time construction of the housing project commences there is no necessity to employ security guards for the land as it was agreed to allow the SLSPC to continue to harvest tea from the corpus and manage it until commencement of the construction of the housing project. This explains the reason for the Respondent to remain in possession of the corpus which was formally vested in the 1st Respondent in 2000. I may add that most of this evidence was not available to the Court of Appeal in C.A. (Writ) Application No. 323/2006.

On the evidence before us, the 1st Respondent was the owner of the corpus and was empowered by the Act to issue the impugned Quit Notice of 19.10.2011.

For the foregoing reasons, questions of law Nos. 1 and 2 are answered in the affirmative.

Accordingly, the judgement of the Court of Appeal dated 02.09.2013 is set aside and the application dismissed.

Appeal allowed. Parties shall bear their costs.

Judge of the Supreme Court

Vijith K. Malalgoda, P.C., J.

I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court