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

In the matter of an Appeal under the provisions of Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Divisional Secretary
Kalutara

Petitioner

SC Appeal 246,247,249 & 250/14
SC Spl LA: 188/14,189/14,
SC Spl LA: 186/14, 189/14
C. A. (PHC) Application No.193/2011
Kalutara High Court No. Rev: 14/2011
Kalutara Magistrate's Court No: 78608, 78609,78610 &78613

Vs.

Kalupahana Mestrige Jayatissa
No.09/20, Mahajana Pola
Kalutara South

Respondent

AND

Kalupahana Mestrige Jayatissa
No.09/20, Mahajana Pola
Kalutara South

Respondent-Petitioner

Vs

1. Divisional Secretary
   Kalutara

2. The Attorney General
   Attorney General's Department
   Colombo.

Applicant-Respondents

AND

1. Divisional Secretary
   Kalutara

2. The Attorney General
   Attorney General's Department
   Colombo.

Applicant-Respondent-Petitioners

Vs

Kalupahana Mestrige Jayatissa
No.09/20, Mahajana Pola
Kalutara South

Respondent-Petitioner-Respondent

AND NOW BETWEEN

1. Divisional Secretary
   Kalutara

2. The Attorney General
   Attorney General's Department
   Colombo.

Applicant-Respondents-Petitioner-Petitioners

Vs

Kalupahana Mestrige Jayatissa
No.09/20, Mahajana Pola
Kalutara South

Respondent-Petitioner-Respondent-Respondent

BEFORE: B.P. ALUWIHARE P.C, J
UPALY ABEYRATHNE J
H.N.J PERERA J

COUNSEL: Sumathi Dharmawardane DSG with Chaya Sri Nammuni SSC for the Appellant.
Vijaya Niranjan Perera P.C, with Jeevani Perera for the Respondent-Petitioner-Respondent-Respondent.

ARGUED ON: 28-11-2016

DECIDED ON: 04-08-2017

UPALY ABEYRATHNE J

The Divisional Secretary of Kalutara, the 1st Applicant-Respondent-Petitioner-Appellant (hereinafter referred to as the Applicant) filed four separate actions in the Magistrate's Court of Kalutara against the Respondent-Petitioner-Respondent-Respondent (hereinafter referred to as Respondent) under the State Lands (Recovery of Possession) Act No. 7 of 1979 (hereafter referred to as the "Act") seeking orders for the eviction of the Respondent from the land referred to in the Schedule and a further order directing the Respondent to have the vacant possession handed over to the applicant (the Divisional Secretary).

In all four actions filed, the learned Magistrate made orders for eviction as prayed for by the Applicant. Aggrieved by the said orders the Respondent moved the Provincial High Court by way of Revision. The learned Judge of the High Court by his order dated 8th December, 2011, set aside the orders of the learned Magistrate.

The Applicant (Divisional Secretary) and the 2nd Applicant-Respondent-Petitioner-Appellant the Attorney-General, appealed against the order of the High

Court and the Court of Appeal by its judgment dated 1st September, 2014, affirmed the order of the High Court.

Aggrieved by the said judgment of the Court of Appeal the Applicant sought special leave from this Court and special leave was granted on the following questions of law:

a) Has the Court of Appeal erred in holding that the documents marked V4, V7, V8, V10-21-22, V27V49, V 50 which are mainly payments relating to the operation of the Respondent's business are valid permits or valid written authority issued by the state granting the Respondent permission to occupy state land?

b) Has the Court of Appeal erred in law that the Respondent is in lawful possession of the state land?

c) Has the Court of Appeal erred in law by holding that the Competent Authority is required to prove whether the state land was vested in the Government or acquired when Section 9(2) of the State Lands (Recover of Possession) Act specifically precludes the Magistrate from calling evidence from the Competent Authority to support the application for ejectment?

d) Has the Court of Appeal erred in holding that the title of the state is doubtful when this is beyond the scope of the Magisterial inquiry envisaged by the Act?

e) Has the Court of Appeal erred in law by holding the title of the State is required to be proved in the District Court?

f) Has the Court of Appeal erred in law in questioning the opinion formed by the Competent Authority?

g) Has the Court of Appeal erred in holding that the opinion of the Divisional Secretary who discharged the duties of the Competent Authority under the provisions of the Act is contrary to the land circulars?

h) Has the Court of Appeal erred in law in holding that the SC CaseNo.19/11 has any bearing and/or application in this instant case?

i) Has the Court of Appeal erred in law in holding that the case SC19/11 proves and/or concludes that the land that is the subject matter in this application is not a State Land?

j) Has the Court of Appeal erred in law in holding that the learned Magistrate has reached his determination being biased towards the State?

k) Has the Court of Appeal erred in law in holding that learned High Court Judge has come to a correct conclusion in the judgment dated 4.3.2011?

At the stage of the hearing of this appeal it was argued on behalf of the Applicant, that the order made by the High Court was made without jurisdiction and for that reason is bad in law. Relying on the decision of this court in the case of, *The Superintendent, Stafford Estate Vs. Solaimuthu Rasu in S.C Appeal 21/2013* – SC minutes 17th July 2013, it was contended on behalf of the Applicant that the Supreme Court had held, that there is no basis to invoke the writ jurisdiction of the Provincial High Court on the subject of State Lands, as the subject does not fall within the Provincial Council list.

I do not wish to consider this issue in the present judgment for two reasons. Firstly, in the case referred to, the Supreme Court dealt with the powers of the Provincial High Court under Article 154(P)(4) of the Constitution (writ jurisdiction), whereas in the instant case the Provincial High Court derives jurisdiction under Article 154(P)(3) (power to act in revision). Secondly, this was not an issue on which leave was granted by this court.

In its albeit short judgement, it appears that the only basis on which the Court of Appeal had affirmed the order of the learned High Court judge was, that the 1st Appellant (the state) had failed to produce any documents to prove that the land in question was either vested in the government or the impugned property had been acquired by the state.

For the purpose of clarity and in order to appreciate the basis on which the Court of Appeal arrived at its determination, the relevant passage of the judgement is reproduced verbatim.

> "After analysing the submissions made by both parties, I note appellant's **(the State)** had failed to produce any document to prove that the land in question was either vested in the government or whether it was acquired by the State. Respondent-Petitioner Respondent **(Respondent in the instant case)** had proved his lawful occupation in the said disputed land. I am of the view that the **right or title of the State of the disputed land** is doubtful. There is no material to substantiate that the disputed land has been acquired by the state. Therefore the documents submitted by the appellant do not support the **ownership of the State**, to the land in dispute. (emphasis added).

The learned High Court Judge, on the other hand, had set aside the order of the learned Magistrate, for reasons totally extraneous to that of the reasoning of the

Court of Appeal. The High Court had held that the compliance with sections 3 and 5 of the Act, by the Divisional Secretary was insufficient and that the order for eviction can only be made on an application duly perfected in conformity with section 5 of the Act.

In view of these contrasting decisions, this court cannot escape from the task of considering the legality of the conclusions of the courts below.

As referred to earlier the main question that needs to be considered is whether there is a requirement to establish the title of the State to the land, by the Competent Authority, in an application made to have an order for ejectment issued under the provisions of the Act.

When one considers the structure of the Act, all what is required is for the Competent Authority to **form the opinion** that the person is in unauthorised possession or occupation of any State land and the Competent authority can serve "notice to quit" under the Act.

In considering the provisions of the Act, his lordship Justice Abdul Cader stated that "where the competent authority had formed the opinion that any land is State land, even the Magistrate is not competent to question his opinion. *Farook v. Goonewardena Government Agent Amparai*1980 2 S.L.R 243.

In the said case his lordship went on to state that:

> *"the magistrate cannot call for any evidence from the Competent authority in support of the application under section 5, which means the Magistrate cannot call for any evidence from the competent authority to prove that the land described in the schedule to the application is State land. Therefore, the petitioner did not have an opportunity of raising the question whether the land is a state land or private land before the magistrates" (page 245).*

Thus, it appears the Court of Appeal had fallen into error when it held that the Appellant had failed to prove that the land in question was either vested in the State or acquired by the State. Needless to state that there can be State land which would not fall into any of the categories referred, to by the Court of Appeal.

In my view, the Court of Appeal fell into further error when it held that "the right or title of the State of the disputed land is doubtful"

The Court of Appeal had relied on the judgement of this court in the case of *Senanayake vs. Damunupola* 1982 2SLR 621. In the said case a "notice to quit" issued in terms of section 3 of the Act had been challenged by way of a writ and there had not been an order of the Magistrate under section 5 of the Act. In the said case it had been pointed out that part of the land covered by the "notice to quit" included part of the residential premises of the appellant and the matter however, had not reached the Magistrate's Court. What was in issue was the legality of the administrative action taken by the Government Agent.

A writ had been issued in the said case, quashing the quit notice on the facts and circumstances peculiar to the said case.

In the present case, it had reached the Magistrates Court and order for eviction had been issued and what is challenged is the legality of the order made by the Magistrate. The Act, however, provides a remedy to a legitimate owner to vindicate his rights by filing an action in the District Court in terms of Section 12 of the Act and in terms of Section 13, the State becomes liable to pay damages if it is established that the property in issue does not belong to the State.

As such, I am of the view, that the decision of *SenanayakeV. Damunupola* (supra) has no application to the present case and the Court of Appeal had misdirected itself in that regard.

The Court of Appeal also relied on the decision in the case of *Nirmal Paper Converters (Pvt) Ltd V. Sri Lanka Ports Authority* 1993 1 S.L.R 219.

The Court of Appeal, had referred to the above case and had stated that it had been decided in the said case, that, *"upon the construction of the statute as a whole, the forms of notice, application and affidavit had to be in strict compliance with those which the legislature has thought important enough to set out in the schedules before the jurisdiction of the magistrate to eject the person in possession or occupation could be exercised"*

It must be noted that no such determination had been made by the court in that case, however, the Court did hold that *"the only ground on which petitioner is entitled to remain on the land is upon a valid permit or other written authority of the State as laid down in section 9 (1) of the Act. He cannot contest any of the other matters."*

In the present case, although, the Respondent had produced documents marked V4, V7, V8, V10 to V22, V27 V49 and V50, they had failed to produce either a permit or a written authority. In this context, I hold that the Court of Appeal had misapplied the rationale of the case, *Nirmal Paper Converters* (supra). The documents referred to above, relate to payment of rates to the Local Government authority and a trade license by the Respondent, which in my view do not tantamount to a permit or written authority.

In the case of Muhandiram v. Chairman, Janatha Estate Development board, 1992 1*SLR - page 110,* it was held that:

"*In an inquiry under the State Lands (Recovery of Possession) Act, the onus is on the person summoned to establish his possession or occupation that it is possessed or occupied upon a valid permit or other written authority of the State granted according to any written law. If this burden is not discharged, the only option open to the Magistrate is to order ejectment*".

The learned High Court judge, on the other hand, had set aside the order of the Magistrate purely on a technicality; that the competent authority had not given 30 days notice to the Respondent, in terms of section 3 of the Act. The learned High Court judge had held, therefore, that the application made before the magistrate was defective. The High Court had further held, that as the Competent authority had not fulfilled the requirements of section 5 of the Act, the Magistrate had no jurisdiction to make a valid order under Section 5.

At the inquiry before the High Court (page 6 of the order) it had been argued on behalf of the Competent authority, that the Respondents had not raised any of these (technical) issues before the Magistrate and therefore the Magistrate cannot be faulted and that the High Court ought not to have considered such matters which were raised for the first time before the High Court. The learned judge, however, had disregarded this fact and had proceeded to set aside the order of eviction made by the learned Magistrate on the basis that the Competent authority had not strictly complied with the statutory requirement.

It must be noted that the Respondent had invoked Revisionary jurisdiction of the High Court, which is a discretionary remedy. Thus, if relief is to be granted, the party seeking the relief has to establish that, not only the impugned order is illegal, but also the nature of the illegality is such, that it shocks the conscience of the court. The High Court, it appears had not considered the criteria aforesaid

in setting aside the order of the magistrate. The learned magistrate, in my view, had correctly relied on the criteria set down in the decision of *Farook v. Government Agent Ampara* (supra) in making the impugned order.

I answer the questions of law raised as follows:-

a) The Court of Appeal had misdirected itself in holding that the documents marked V4, V7, V8, V10-21-22, V27V49, V 50 are valid permits or valid written authority issued by the state granting the Respondent permission to occupy State land.

b) The Court of Appeal had erred in law in holding that the Respondent is in lawful possession of the state land.

c) The Court of Appeal erred in law by holding that the Competent Authority is required to prove that the land was vested in the Government or acquired, in terms of Section 9 (2) of the State Lands (Recover of Possession) Act.

d) The Court of Appeal misdirected itself in holding that the title of the State is doubtful when the ownership is beyond the scope of a Magisterial inquiry under the provisions of the Act.

e) The Court of Appeal erred in law by holding that the title of the State is required to be proved.

f) Court of Appeal erred in law in questioning the opinion formed by the Competent Authority, which beyond the scope of the Act.

g) The Court of Appeal had misdirected itself in holding that the opinion of the Divisional Secretary who discharged the duties of the Competent Authority under the provisions of the Act is contrary to the land circulars.

h) The Court of Appeal had erred in law in holding that the decision in SC Case No.19/11 has a bearing to the instant case?

k) The Court of Appeal had erred in law in holding that learned High Court Judge had come to a correct conclusion.

I have not answered the questions of law raised as (i) and (j) in view of the findings on the questions of law referred to above.

For the reasons set out in this judgement, the judgement of the Court of Appeal dated 1-09-2014 and the order of the learned High Court Judge dated 4.03.2011 are hereby set aside. The order of the learned magistrate dated 4-03-2011 is hereby affirmed.

JUDGE OF THE SUPREME COURT

JUSTICE B.P. ALUWIHARE P.C

I agree

JUDGE OF THE SUPREME COURT

JUSTICE H.N.J.PERERA

I agree

JUDGE OF THE SUPREME COURT