

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

In the matter of an application under and
in terms of Article 17 and 126 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

Thevanayaki Kunanayagam
No.25, 42nd Lane,
Wellawatta.

Petitioner

S.C.(FR) Application No. 238/2013

Vs.

1. Commander of the Army
Army Headquarters, Colombo 03.

- 1A General Shavendra Silva
Commander of the Army
Army Headquarters,
Sri Jayawardenepura,
Colombo.

2. Commanding Officer
Security Forces, Jaffna Division, Palaly.

- 2A. Major General W.L.P.W. Perera
Commanding Officer
Security Forces, Jaffna Division, Palaly.

3. Chief Co-ordinator
Civil Affairs Unit, Sri Lanka Security
Forces,

Hospital Road, Jaffna.

4. The Secretary- Ministry of Defence and Urban Development,
No. 15/5, Baladaksha Mawatha,
Colombo 03
- 4A. General G.D.H. Kamal Gunaratne (Retd.)
The Secretary- Ministry of Defence and State Ministry of National Security,
Home Affairs and Disaster Management,
No. 15/5, Baladaksha Mawatha,
Colombo 03.
5. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
6. Divisional Secretary- Jaffna
Jaffna Town-West, G.S. Division J/73,
Divisional Secretariat, Main Street,
Chundikuli, Jaffna. (Opposite St. John 's
College Jaffna).
- 6A. Mr. Kanapathipillai Mahesan
Divisional Secretary- Jaffna
Jaffna Town-West, G.S. Division J/73,
Divisional Secretariat, Main Street,
Chundikuli, Jaffna.(Opposite St. John 's
College Jaffna).
7. Land Commissioner General
Land Commissioner General's Department,
"Mihikatha Madura", No.1200/6,
Rajamal Waththa Road, Battaramulla.
- 7A. R.P.R. Rajapaksha

Land Commissioner General
Land Commissioner General's Department,
"Mihikatha Madura", No.1200/6,
Rajamal Waththa Road, Battaramulla.

Respondents

BEFORE : P. PADMAN SURASENA, J.
ACHALA WENGAPPULI, J.
MAHINDA SAMAYAWARDHENA, J.

COUNSEL : Viran Corea with Pasindu Silva &
Ms. Thilini Vidanagamage for the Petitioner
instructed by Sanjeeva Kaluarachchi.
Ms. Kanishka de Silva Balapatabendi
SSC for the Hon. Attorney General.

ARGUED ON : 21st October, 2021

DECIDED ON : 27th October, 2023

ACHALA WENGAPPULI, J.

The Petitioner in SC (FR) No. 236 of 2013, *Surendrani Amirthanathan*, is alleging continued infringement of her fundamental rights guaranteed to her under Articles 12(1) and 14(1)(h) of the Constitution. The impugned act of administrative or executive action is that one or more of the Respondents forcefully and illegally seized her property located in *Jaffna* town, over which she has paper title.

It was stated by the Petitioner that her father bought the said property in 1969 and built a dwelling house on it. She lived in that house with her parents until her marriage in 1987, after which she moved to *Peradeniya* with her husband. In 1988, her parents too had come to live with her after renting out their house in *Jaffna* to an elderly couple. In 1990, their house became uninhabitable due to damages it had sustained consequent to the war situation that erupted between the LTTE and *Sri Lanka Army*. With hostilities continuing unabated, it was not possible for the Petitioner to repair their house at that point of time. The Petitioner further states that due to the situation that prevailed at the time in the *Jaffna* peninsula, she and her family had moved to *Australia* in 2003, but her father had arranged a caretaker to look after the said property during their absence.

The Petitioner alleges that in October 2012, the *Sri Lanka Army* had illegally entered into her property and occupied same by erecting a fence around the property denying any access to the land by her agent. The Petitioner claims that her property had not been acquired by the State in terms of law and therefore asserts that she still is its lawful owner. It is also alleged by the Petitioner in SC (FR) No. 236/2013 that, in addition to her property, the Army had fenced off two other allotments of land that abuts her land. These two allotments of land are also depicted in Plan No. 665A by T. *Candiah*, as lot Nos. 2B and 3 respectively (said plan was annexed to the petition marked "P1(b)").

The Petitioners in SC (FR) Nos. 237 of 2013 and 238 of 2013, *Constance Selvaranee Niles* and *Thevanayaki Kunanayagam*, made similar allegation in their respective petitions claiming that the Army had

unlawfully seized their lands by fencing off them. These Petitioners further allege that the Army, with its continued illegal occupation of their lands, infringed fundamental rights guaranteed to them under Article 12(1) of the Constitution.

The Petitioner in SC (FR) No. 237 of 2013, *Constance Selvaranee Niles* claims that she and her late husband, *Rev. Wesley Dayalagunan Niles*, purchased lot No 2B (as depicted in Plan No. 665A dated 9th July 1969 (drawn by *Tirunavukarasu Candiah*, Licensed Surveyor and also depicted in Plan No. 2021 by *Perimpanayagam* Licensed Surveyor dated 23rd June 1973), which is in an extent of about 17 perches, on Deed of Transfer No. 810 attested by *Gnanapragasam* Notary Public on 26th October 1970. The Petitioner, *Thevanayaki Kunanayagam*, had purchased the southern half of lot No 3 on Deed of Transfer No. 801, attested by *Devarajan* Notary Public on 3rd August 1969. Northern half of the same Lot was purchased on Deed of Transfer No. 1351, attested by Notary Public *Saravanamuttu Selvarajah* on 27th November 1961 and thus became the owner of Lot No. 3, which is in an extent of about 40 perches, in its entirety. These two Petitioners support the claim of the Petitioner in SC (FR) No. 236/2013, that in 2012, the Army had illegally entered their lands and continued to occupy them.

After hearing the parties, this Court granted leave to proceed under Article 12(1) of the Constitution, in respect of SC(FR) No. 236 of 2013 and fixed the matter for hearing along with the other two applications. On 21st October 2021, when the three applications were taken up for hearing, learned Counsel who represented the three Petitioners as well as the learned Senior State Counsel, who represented the Respondents, invited this Court to amalgamate the three applications and to pronounce a

common Judgment in respect of them, in view of the fact that the attendant circumstances are almost identical to each other, except for the three separate allotment of lands in respect of which the three Petitioners claim title.

The Respondents have resisted the three applications and in the Statement of Objections of the 1st Respondent, it is stated after 1996, the year in which Operation *Riviresa* was conducted by *Sri Lanka Army*, *Jaffna* Town was liberated from the clutches of LTTE and civil administration in *Jaffna* peninsula was restored. It is further averred by the 1st Respondent that, after the termination of military operations against LTTE on 19th May 2009, the Army had periodically released such private lands it had to occupy for strategic reasons in order to minimize inconvenience caused to those land owners, but, it did so only after conducting threat assessments and redeployment of its troops to other locations.

However, it was decided by the Army that the *Jaffna* town had to be secured with deployment of military units stationed at strategic locations and, with a view to achieve this objective, an abandoned land near *Jaffna* Hospital, that adjoins the playground of *Sinhala Maha Vidyalaya*, was occupied. The said occupied parcel of land which is in an extent of about 20 perches is located within the larger land depicted in Plan No. 665A dated 09.07.1969 and situated within the *Grama Niladhari* division of J 73 *Jaffna*. After occupying the land, it was utilised by constructing a building on it, which is being used as the official residence of the 512 Brigade Commander of the 51 Division.

The 1st Respondent also disclosed that the Minister of Land and Land Development had, by letter dated 7th May 2014, directed the 6th Respondent, Divisional Secretary of *Jaffna*, to publish a public notice in terms of Section 2 of the Land Acquisition Act with a view to acquire the said parcel of land for the public purpose described therein. It is asserted by the 1st Respondent that once the acquisition process is completed in terms of law, compensation would be paid to the rightful owner of the land under the occupation of the Army.

The Petitioners in their counter affidavits, denied of any pending acquisition process in respect of their lands and further asserted that they had not received any such notice.

At the hearing, it was contended by the learned Counsel for the Petitioners that the material presented by them clearly established that the lands belong to them were illegally occupied by the Army in view of the fact that there was no legally sanctioned process of acquisition. It was therefore submitted that the continued illegal occupation of their lands is an infringement of their fundamental rights under Article 12(1) of the Constitution. Learned Counsel further submitted that if the lands under occupation of the Respondents could not be released back to the Petitioners, they must at least be compensated adequately in order to mitigate the loss of their property.

Learned Senior State Counsel sought to counter the said contention by submitting that the Petitioners could have vindicated their rights before the District Court by instituting action, which is the proper legal remedy in a situation where any one of them were denied of their rights to property,

consequent to an act of illegal occupation. It appears that, in advancing the said contention, the Petitioners seek to differentiate themselves from a litigant, who had been illegally dispossessed from his or her property by a trespasser, by placing reliance on the fact that the Respondents, in depriving them of their rights, had acted under the colour of office.

The three Petitioners, in the prayer to their respective petitions, had prayed for the grant of following reliefs;

- a. declare that any one or more of the Respondents violated their fundamental rights guaranteed to them under Articles 12(1) and or 14(1)(h) of the Constitution,
- b. direct any one or more of the Respondents to release the property reflected in the respective petitions with vacant possession forthwith.

In view of the allegation of the Petitioners of an illegal denial of their right to property, I wish to quote from the judgment of *Manawadu v The Attorney General* (1987) 2 Sri L.R. 30, where *Sharvananda* CJ held that (at p. 43) “[A]mong the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the *Universal Declaration of Human Rights* (1948). Article 17 (1) of which states that everyone has the right to own property and Article 17(2) guarantees that no one shall be arbitrarily deprived of his property.” Thus, this Court had recognised the traditional right to own property, although not included in Chapter III of the Constitution as a fundamental right, and it could only be denied by a process prescribed by law.

In view of the nature of the declaratory reliefs sought by the Petitioners, it becomes their responsibility to satisfy this Court on a balance of probability that they hold valid legal title to the individual tenements in respect of which such declarations were sought, and that one or more Respondents are in illegal occupation of each of these specific parcels of land. If those factors had been established to the required degree of proof, the Petitioners are entitled to a declaration that they were arbitrary deprived of their right to property in denial of equal protection of law, a fundamental right guaranteed to them by Article 12(1).

The Petitioners had relied on their title deeds to establish ownership over the three individual tenements referred to in them. The Petitioner in SC (FR) No. 236/2013, *Surendrani Amirthanathan*, had relied on Deed of Gift No. 107, executed by her father *Reginald Jeremiah Dharmaratnam Ariyaratnam* and attested by *Sharmini Mecheta Dushanthi Kamaragoda*, Notary Public on 1st March 1991, in proof of her legal ownership to a parcel of land in an extent of two *Lachcham* (20 perches), described in its schedule as lot No. 2A of Plan No. 665A, drawn by *Tirunavukarasu Candiah*, Licensed Surveyor, on 9th July 1969.

Land claimed to be owned by *Constance Selvaranee Niles* (the Petitioner in SC (FR) No. 237/2013) and her late husband, Rev. *Wesley Dayalagunan Niles*, is depicted as Lot No. 2B in Plan No. 665A, together with rights over the road reservations depicted therein as Lot Nos. 1C and 2C. She relied on Deed of Transfer No. 810, attested by *David Gnanapragasam*, Notary Public, on 26th October 1970, in proof of her title to the said land. The Petitioner in SC (FR) No. 238/2013, *Thevanayaki Kunanayagam*, also claims that her land is occupied by the *Sri Lanka Army*

and relied on Deeds of Transfer Nos. 1351 and 801, through which she received title to both northern and southern half of lot No. 3, as depicted in the Plan No. 665A. The said Deed of Transfer No. 1351 was attested by S. *Selvarajah*, Notary Public, on 27th November 1961. The said Deed conferred title to the said lot in favour of her father *Mylvaganam Sabaratnam*, who died without leaving a will. The Petitioner, being the only child of *Mylvaganam Sabaratnam*, claims to be his sole heir.

In his Statement of Objections, the 1st Respondent specifically denied the claim of title made by the Petitioners to the three allotments of lands and put them in strict proof of same. The title deeds that were relied upon by the three Petitioners were notarially executed instruments and registered in the relevant Land Registries. Except for the Deed of Gift No. 107 (relied on by the Petitioner in SC (FR) No.236/2013), other deeds were executed more than thirty years ago. Therefore, the Petitioners have placed material before this Court seeking to establish title to the individual allotments of lands referred to in their respective petitions.

Perusal of plan No. 665A, relied on by both parties, indicate that it had been drawn for the purpose of subdivision of a larger land, which was in an extent of 13 *Lachchams* and 06 *Kulies* (over 130 perches). The said larger land was since subdivided into six individual allotments consisting of lot Nos. 1A, 1B, 2A, 2B, and 3, along with the road reservation shown as Lot Nos. 1C and 2C. The three Petitioners claim title to Lot Nos. 2A, 2B and 3, that are located adjacent to each other and separated by a common boundary, forming the southern part of the said larger land, while lot Nos. 1A, 1B consists of the northern part. The Lot No. 2A is about 20 perches in extent, Lot No. 2B is about 17 perches and Lot No. 3 is about 40 perches.

Collectively these three allotments form a land area of 77 perches from the total extent of the said larger land of over 130 perches.

The 1st Respondent admitted in his Statement of Objections that a building was constructed by the Army on the 20 perch parcel of land it occupied. The 1st Respondent further stated that the said 20 perch land is located within the *Grama Niladhari* Division of J 73 *Jaffna-West*, and depicted in Plan No. 665A, marked as "RX-1". This is the identical plan relied on by the three Petitioners in support of their claims. The 1st Respondent, despite making a reference to Plan No. 665A, did not make any reference to a particular lot number, in order to denote a particular parcel of land under occupation, in relation to the said plan.

The three Petitioners collectively assert that the Army had occupied their land and erected fences around them. It is observed that the Petitioners did not carry out any survey in order to indicate the exact location of these fences in relation to their respective lands *vis a vis* the 20 perch land occupied by the Army. The difficulties of the Petitioners in making out such a survey plan, demarcating the exact location of the fences, is understandable given the practicalities involved in such an exercise.

However, none of the Petitioners thought it fit to indicate the location of the fences that have been erected around their properties or to the location of the buildings put up by the Army in relation to their respective lots, either by way of a sketch or an indication of same on Plan No. 665A itself, in view of the bare admission made by the 1st Respondent in his Statement of Objections. The Petitioner in SC (FR) No. 236/2013, in

fact did refer to a sketch in her letters P2 to P5 but did not think it necessary to annex same to the instant petition. When the Respondents claim that they built a residence for the Brigade Commander on that 20 perch land, the Petitioners have merely reiterated what they alleged in the petitions in their counter affidavits that the land was fenced off and did not make any reference to a building erected on any of their lands.

With the said admission of the 1st Respondent in his Statement of Objections, it becomes clear that the Army is in fact occupying a parcel of land in extent of 20 perches within the larger land depicted in Plan No. 665A, with a building constructed by it. The fact of Army occupying a land in extent of only 20 perches from the said larger land is supported by the direction issued by the Minister of Lands to the 6th Respondent, directing the latter to initiate acquisition process. Each of the three Petitioners claim that the Army is occupying their lands. The question whether the land admittedly occupied by the Army belong to any of the three Petitioners.

In the absence of a specific admission to that effect, a question necessarily arises whether the land occupied by the Army belongs to any one or more of the Petitioners. The determination of the exact location of the said occupied land in relation to the three parcels of land to which the Petitioners individually claim title could be one way of determining that issue. It must be noted that the admission made by the 1st Respondent in turn give rise to several probabilities that this Court should consider before it ventures to answer the said question.

Lot No. 2A consists of 20 perches in extent and accordingly the occupied land could well fit into that parcel of land. That is one

probability. The occupied 20 perch could also be located completely within the demarcated Lot No. 3, which is over 40 perches in extent and thus presents another probability. The occupied land could also be located in lot No. 2B consuming it in totality as the said parcel of land is only about 17 perches. There exists another probability that the 20 perch land is located well within land area covered by all three lots. It appears that the likelihood of occurring any one of these probabilities are of equal in value.

In addition to the probabilities that are referred to, there is yet another probability that exists. The larger land, as per Plan No. 665A, consists of about 130 perches in total. As already noted, the three lots to which the Petitioners claim ownership, forms the southern part of the said larger land. The said three allotments are about 77 perches in its total extent, leaving a balance of 53 perches for the remaining lot Nos. 1A and 1B, which forms its northern part. It could well be that the said 20 perch lot with a building standing on it is located within the land area forming the said northern part, to which none of the Petitioners could claim title to. If the 20 perch land, occupied by the Army, is located within the said northern part of the larger land, then none of the Petitioners are entitled to the declaration they sought from this Court.

The 1st Respondent specifically avers that the Army had carried out construction work on the said occupied land and had annexed building plans and several photographs of the buildings that had been put up on that land to his Statement of Objections (photographs marked RX2 to RX5). The photographic evidence tends to indicate that the construction activities of the building are already completed. The building plan of the said construction is annexed to the Statement of Objections as RX-8 and is

indicative of the fact that the Army had constructed the said building from its foundation level as totally a new construction and not merely repaired a damaged or an uninhabitable building that stood on the occupied land.

Strangely, none of the Petitioners did offer any additional material to indicate that the 20 perch land occupied by the Army with a building on it falls within the boundaries of any or more of the three lots to which they claim title. In other words, it was imperative for the Petitioners to satisfy this Court that any one or more of them had title to the 20 perch land occupied by the Army. The Petitioners have filed their petitions in 2013. Statement of Objections of the 1st Respondent were tendered to Court in 2017 and the Petitioners countered the assertions made in the objections with their counter affidavits filed in 2018.

Given the fact that the existence of a building is clearly visible through a fence, unlike a building constructed within a premises surrounded by high parapet walls and thereby totally blocking any visual access, the reason as to why none of the Petitioners referred to a building put up by the Army on their lands and thus limiting their allegation only to the act of fencing is somewhat intriguing. If the building was constructed after the petitions were tendered to this Court, the Petitioners could have easily clarified that position, despite the absence to any reference to a construction in their original petitions.

In these circumstances, I am of the considered view that each of the Petitioners have failed to satisfy this Court on a balance of probabilities that their lands were occupied by one or more of the Respondents as alleged. Their failure to exclude the probability of the location of the 20

perch land under occupation within the northern part of the larger land depicted in plan No. 665A, makes the 1st Respondent's claim that no land belonged to any of the Petitioners is being occupied by Army, a more probable one when compared with the others.

In view of the above considerations, the Petitioners in SC (FR) Nos. 236/2013, 237/2013 and 238/2013, have either individually or collectively failed to satisfy their allegation that the Respondents have deprived their rights to property by illegally occupying their lands infringing their fundamental rights, guaranteed under Article 12(1) of the Constitution, as described in the three petitions.

Accordingly, I dismiss the said three petitions without costs.

JUDGE OF THE SUPREME COURT

PADMAN SURASENA, J.

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J.

I agree.

JUDGE OF THE SUPREME COURT