

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

In the matter of an application for Special Leave to appeal from an order of the Court of Appeal in terms of Article 128 of the Constitution.

Archbishop of Colombo,
Bishop's House,
Colombo 08.

Petitioner

SC/ Appeal 54/2017

SC/ Appeal 54A/2017

SC SPL LA 06/2017 / SC SPL LA 07/2017

CA (WRIT) APPLICATION No. 1413/2006

Vs,

1. Hon. Akila Viraj Kariyawasam,
Minister of Education,
Ministry of Education,
Isurupaya,
Battaramulla.
2. Mr. W.M. Bandusena,
The Secretary,
Ministry of Education,
Isurupaya,
Battaramulla.
3. Hon. Ranjith Somawansa,
Provincial Minister of Education,
Cultural and Art Affairs,
Ranmaga Paya,
Kaduwela Road,
Battaramulla.
4. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

5. Kolamba Thanthrige Janaka Pushpakumara,
Secretary- School Development Society,
Pamunuwila Primary School,
No. 123/3, Pamunuwila,
Gonawala.
6. M.L.S. Perera,
Auditor School Development Society,
No. 370, Bathalahena Watta,
Gonawala

Added Respondents

And Now

1. Hon. Akila Viraj Kariyawasam,
Minister of Education,
Ministry of Education,
Isurupaya,
Battaramulla.
2. Mr. W.M. Bandusena,
The Secretary,
Ministry of Education,
Isurupaya,
Battaramulla.
3. Hon. Ranjith Somawansa,
Provincial Minister of Education,
Cultural and Art Affairs,
Ranmaga Paya,
Kaduwela Road,
Battaramulla.
4. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents- Appellants

5. Kolamba Thanthrige Janaka Pushpakumara,
Secretary- School Development Society,
Pamunuwila Primary School,
No. 123/3, Pamunuwila,
Gonawala.
6. M.L.S. Perera,
Auditor School Development Society,
No. 370, Bathalahena Watta,
Gonawala

Added Respondents-Appellants

Archbishop of Colombo,
Bishop's House,
Colombo 08.

Petitioner-Respondent

Before: **K. Sisira J. de Abrew J**
Vijith K. Malalgoda PC J &
Murdu N.B. Fernando PC J

Counsel: Sanjaya Rajaratnam PC ASG for 1st to the 4th Respondents-Appellants
S.N. Vijithsingh with S. Rajapakse and T. Edirithilaka for 5th and 6th Added Respondents-Appellants
Ikram Mohamed PC with R. Hettiarachchi for Petitioner-Respondent instructed by
Mallawarachchi Associates

Argued on: 02.05.2018

Decided on: 22.06.2018

Vijith K. Malalgoda PC J

The Hon. Attorney General and the 5th and 6th Added Respondents-Appellants have preferred the present appeals before this court challenging the decision of the Court of Appeal in Writ Application No. 1413/2006.

As revealed before us, the Petitioner in the said Writ application namely the Archbishop of Colombo had challenged the decision of the 1st Respondent which was produced marked P-11, in the said Writ application. When the said application was pending before the Court of Appeal, the 5th and the 6th Added Respondents moved the said court to be add them as parties to the said application and accordingly Kolamba Thanthrige Janaka Pushpakumara Secretary- School Development Society of Pamunuwila Primary School and M.L.S. Perera Auditor, School Development Society of Pamunuwila Primary School were added to the said application as the 5th and 6th Added Respondents.

The Court of Appeal by its decision dated 25th November 2016 granted relief as prayed in paragraphs (b) and (c) to the Petition which reads as follows,

- b) Grant and issue a mandate in the nature of a Writ of Prohibition, Prohibiting the 1st Respondent from cancelling and/or revoking and/or annulling the divesting order published in the Government Gazette marked P-11 and/or from publishing and/or causing the publication of any such order revoking/cancelling/annulling the said divesting order marked P-11
- c) Grant and issue a mandate in the nature of a Writ of Mandamus directing the 1st, 2nd and/or 3rd Respondents to deliver vacant possession of the property so divested by the said divesting order published in the Government Gazette marked P-11 to the Petitioner

When the two appeals preferred by the Hon. Attorney General (SC/SPL/LA/07/2017) and by the 5th and 6th Added Respondents-Petitioners (SC/SPL/LA/06/2017) were supported before the Supreme Court, this court after considering the material placed, had decided to grant leave on the questions of law set out in paragraphs 11(ii), 11(iii) and 11(iv) of the Petition in SC/SPL/LA 07/2017 which reads as follows,

- 11(ii) Did the Court of appeal err in law and in fact by holding that section 18 of the interpretation Ordinance does not permit the revocation of the order made to revoke the Gazette notification dated 17.02.2006 marked P-11?

11(iii) Did the Court of Appeal err in law by holding that section 18 of the Interpretation Ordinance does not permit the revocation of the order made to revoke the Gazette notification dated 17.02.2006 marked P-11?

11(iv) Did the Court of Appeal err in fact by holding that section 18 of the Interpretation Ordinance does not permit the revocation of the order made to revoke the Gazette notification dated 17.02.2006 marked P-11?

At the time the leave was granted the parties further agreed to argue both appeals together and to abide by one single judgment.

During the arguments before this court all the parties referred to above were represented and as observed by me the entire argument of the two petitioners were based on the applicability of section 18 of the Interpretation Ordinance in order to revoke the divesting order published in the Gazette notification produced marked P-11.

Whilst deciding the above matter as against the arguments raised by the Respondents in both these applications, it is important to consider the factual matrix of the matter before us.

The Petitioner-Respondent was the lawful owner of the land called "Kongahawatta" alias "Kahatagahawatte" situated in the village of "Pamunuwila" containing in extent 1 Acre 2 Rods and 4 Perches and a school by the name Pamunuwila Roman Catholic Sinhalese Mix School was functioning in the said premises.

The said school was vested in the state under and by virtue of the provisions of the Assisted Schools and Training Colleges (Special Provisions) Act No 5 of 1960 read with Assisted Schools and Training Colleges (Supplementary Provisions) Act No 08 of 1961 by order published in the Government Gazette dated 15th December 1961. Since then the said land was utilized to conduct the said school namely Pamunuwila Roman Catholic Sinhalese Mixed School and was later renamed as Kelaniya Pamunuwila Primary School.

In 1978 the Government acquired another land containing an extent of 8 Acres, 1 mile away from the Pamunuwila Primary School in order to construct a Maha Vidyalaya. In 1994 steps were taken to establish the new school and entire upper classes of the Kelaniya Pamunuwila Primary School namely the classes from year six shifted to Pamunuwila Maha Vidyalaya.

During this period the Petitioner-Respondent made several requests to the Minister of Education to divest the unutilized part of the property acquired in the year 1961.

Accordingly the then Minister of Education divested 0.0658 hectares of the land and buildings by divesting order published in the Government Gazette dated 14th December 2001.

Petitioner-Respondent made a further request to divest the remainder of the premises so vested in the Government.

The then Minister of Education by Divesting order published in the Government Gazette dated 17th February 2006 divested with effect from 30th January 2006 0.0539 hectares of the land vested by order published in Gazette bearing No. 12826 dated 15th December 1961 (P-11)

The then Minister of Education who made the divesting order under section 10 (1) of the Assisted Schools and Training Colleges (Supplementary Provisions) Act No. 8 of 1961 had decided to revoke and cancel the said divesting order on 18th August 2006 and requested the Government Printer to publish an order to that effect (R-11) but the publication of the said request was prevented by an interim order issued by the Court of Appeal during the pendency of the Writ Application referred to above.

As revealed before us the said decision by the then Minister of Education who was the 1st Respondent before the Court of Appeal to revoke the divesting order was reached after careful consideration of the material placed before the said minister to the effect that,

- a) At the time the said divesting order was made, Kalaniya Pamunuwila Primary School was functioning in the premises in question with 99 children studying in three grades namely grade 3, 4 and 5.
- b) Several civil organizations including the School Development Society and Pasal Surekeeme Sangamaya had confirmed the above position
- c) Under section 10 (1) (a) of the Assisted Schools and Training Colleges (Supplementary Provisions) Act No 08.of 1961 the Minister is empowered to divest a property, comes under the said act only,

"If such property ceases to be used or is not needed for the purpose of a school conducted and maintained by the Director for and on behalf of the crown."

Whilst relying on the above position taken up by the Minister the learned Additional Solicitor General who represented the 1st- 4th Respondents-Appellants in SC Appeal 54A/2017 submitted that, the divesting order marked P-11 was made without jurisdiction by the 1st Respondent-Appellant as he was misled at the time he made the said order.

When questioned by this court, all parties including the Petitioner-Respondent admitted that three grades of Kalaniya Pamunuwila Primary School are still operating in the premises in question and therefore one cannot argue that the premises in question ceases to be used or is not needed for the purpose of a school.

Even though the Appellants in both appeals before us took up the position that the divesting order referred to in P-11 was made contrary to the provisions in section 10 (1) (a) of the said act, and therefore it was made without jurisdiction, the counsel admitted that there was no specific statutory provision available in the said act to rectify such error or to revoke and/or cancel any order made under section 10 of the Assisted Schools and Training Colleges (Supplementary Provisions) Act No 08.of 1961.

In the said backdrop the Respondents in the Writ application No. 1413/2006 before the Court of Appeal had relied on section 18 of the Interpretation Ordinance which reads as follows,

Section 18; Where any enactment, whether passes before or after the commencement of this Ordinance, confers power on any authority to issue any proclamation, or make any order or notification, any proclamation, order or notification so issued or made may be at any time amended, varied, rescinded or revoked by the same authority and in the same manner and subject to the like consent and conditions if any by or in which or subject to which such proclamation, order or notification may be issued or made.

When going through the provisions of the above section it appears to me that the provisions of section 18 apply when the enabling statute contains the power to issue a proclamation or to make any order or notification without a corresponding power to amend, vary, rescind or revoke them. In the said circumstances it is understood that, in the statute, the power to revoke or amend is expressly provided, thus section 18 of the Interpretation Ordinance has no application.

In support of the above contention both the Petitioners heavily relied on two decisions, one by the Court of Appeal and the other before the Supreme Court.

In the case of ***James Perera V. Government Agent of Kandy 46 NLR 287*** Jayathilake J observed that,

“The Petitioners contend that the Respondent had no power under the Village Communities Ordinance (chap.198) to cancel the notice issued by him on November 7, 1944 I think a very short and simple answer to that contention is to be found in section 15 of the Interpretation Ordinance” (presently section 18)

Basnayake CJ in the case of ***Silva V. Attorney General 60 NLR 145*** had observed that,

“In the instant case, as stated above the Public Service Commission was free to revoke its delegation by order published in the Government Gazette by virtue of section 15 of the Interpretation Ordinance (present section 18) although the empowering section itself, as in the case of the English Statute referred to in the case of *Huth V. Clark* (supra), does not confer a power to revoke a delegation once made”

I see no reason to reject the above position taken up by the Petitioners but observe that the provisions of section 18 of the Interpretation Ordinance will only apply when the enabling statute contains the power to issue a proclamation or to make any order or notification without a corresponding power to amend, vary, rescind or revoke them.

As already discussed in this judgment the Minister had made the divesting order under section 10 of the Assisted Schools and Training Colleges (Supplementary Provisions) Act No.08 of 1961 which reads as follows,

Section 10

- 1) Notwithstanding that any property used for the purpose of any school to which this Act applies has been vested on the Crown by virtue of a Vesting Order, the Minister, by subsequent Order published in the Gazette (in this Act referred to as a ‘Divesting Order’)

- a. Shall, if such property ceases to be used, or is not needed for the purpose of a school conducted and maintained by the Director for an on behalf of the Crown, revoke that Vesting Order in so far as it relates to such property with effect from the date on which such property so ceases to be used or was not so needed; or
- b. Shall, if the Director ceases to be manager of that school by virtue of the operation of any Order made under the principal Act, revoke that Vesting Order with effect from the date on which the Director so ceases to be the manager; or
- c. Shall, if a determination is made on a reference to arbitration under this Act that any property in respect of which that Vesting Order was made is not property liable to vesting, revoke that Vesting Order in so far as it relates to such property with effect from the date on which that Vesting Order took effect

2) Where a Vesting Order in respect of any property is revoked by a Divesting Order in whole or in part, the property in respect of which the Divesting Order is made shall be deemed never to have vested in the Crown by virtue of that Vesting Order, and any question which might arise as to any right, title or interest in or over that property shall be determined accordingly

When going through the provisions in the above section (especially sub-section 1) it appears that the provisions of the above section will only apply to properties which were already being vested with the Crown and nothing else. In the said circumstances it is important to consider the intention of the legislation before this court.

In the case of ***Aldin V. Sannasgala* 48 NLR 236** Dias J quoting the observation by Sampayo J in 529-531 MC Badulla 8612 (1912 1 Times of Ceylon 213) stated that, “the preamble of an Ordinance is a good means to find out its meaning, and may legitimately be consulted for the purpose for solving any ambiguity; but it cannot control or restrict the actual provisions when they are clear and not open to doubt”

The preamble of Act No. 8 of 1961 explains purpose for which the said Act is enacted as follows;

“An Act to provide for vesting in the Crown, without compensation, the property to assisted schools of which the Director of Education is or becomes, the manager under the assisted schools and training colleges (Special Provisions) Act No. 5 of 1960, to provide for such Director for and on behalf of the Crown to conduct and maintain schools on such property, to provide for the imposition of penalties on persons who offer resistance or obstruction to the entry of such Director to such school and to the taking of possession of property vested in the Crown, to provide for Government making good or repairing any loss or damage caused to the property of assisted schools and for the recovery of the cost thereof by the Government from the persons responsible for such loss or damage in a summary manner and to regulate the establishment of schools on or after the date of the commencement of this Act.”

and it's understood that one of the intention of the above legislation, is to make provisions to vest the assisted schools of which the Director of Education is or becomes the manager under the provisions of Assisted Schools and Training Colleges (Special Provisions) Act No. 5 of 1960.

As further observed by me the provisions of the said Act had provided for the Minister to make the said vesting orders and other matters relating to administrative steps in taking over such schools.

When going through the above provisions along with the provisions I have already referred to in section 10 of the said Act it is clear that section 4 of the Assisted Schools and Training Colleges (Supplementary Provisions) Act No. 8 of 1961 had provided the Minister to make order vesting properties comes within the purview of Act No. 5 of 1960 and section 10 had provided divesting any property already vested under section 4 if such property comes within section 10 (1) (a) of the same Act.

In the said circumstances, it appears that the provisions of section 18 of the Interpretation Ordinance, will not apply to any order made by the Minister under section 4 of the said Act since there are provisions identified under section 10 of the same Act to divest such property. It is further observed by this court that the provisions of section 18 of the Interpretation Ordinance had not made any provisions beyond this point or in other words provisions of section 18 apply when the enabling statute contains the power to issue a proclamation or to make any order or notification

without a corresponding power to amend, vary, rescind or revoke them and in the said circumstances the above provisions cannot be made use for amend, varied, rescind or revoke divesting order issued under section 10 of the said Act since the intention of the said legislation is for vesting of property comes within the purview of the provisions of Act No. 5 of 1960. Thus once the power to vest and subsequent power to divest is exercised by the Minister, section 18 has no application in respect of a further step (revoke to revocation) taken by the Minister which has not been identified under the provisions of section 18 of the Interpretation Ordinance.

In this regard I am further mindful of the decision by *S.N. Silva CJ* in the case of ***Patrick Lowe V. Commercial Bank of Ceylon 2000 (1) Sri LR 280 at 284*** where his Lordship recognized the principle of “authority exercising powers cannot exceed the express statutory provisions” in following terms,

“It is a fundamental principle of law that a person who functions in terms of statutory power vested in him is subject to an implied limitation that he cannot exceed such power or authority. The *ultra vires* doctrine, now recognized universally, evolved in England on this premise (vide Ashbury) *Railway Carriage and Iron Co. Ltd., Vs. Hector Riche* and the *Attorney General Vs. the Great Eastern Railway*. It follows that what is not permitted by the provisions of the enabling statute should be taken as forbidden and struck down by court as being in excess of authority.”

When considering the matters already discussed in this judgment, I see no merit in the arguments placed before me by the Petitioners in both the appeals. In the said circumstances, I answer the questions of law raised in appeals in favour of the Petitioner-Respondent and affirm the order made by the Court of Appeal in Writ Application No. 1413/2006.

Judge of the Supreme Court

K. Sisira J. de. Abrew J

I agree,

Judge of the Supreme Court

Murdu N.B. Fernando PC J

I agree,

Judge of the Supreme Court