
PUSHPAKUMARA AND OTHERS**Vs.****SURVEYOR GENERAL OF SRI LANKA AND OTHERS**

COURT OF APPEAL
SAMAYAWARDHENA, J.
CNWRIT/98/2012

Writ of certiorari Survey Act, No. 17 of 2002, sections 4, 6, 39, 40, 41, 44— Ultra vires—Annual Practising Licence—Government surveyors engaging in private practice

The petitioners who are private surveyors filed a writ application seeking to quash by a writ of certiorari Circular No. 5/2011 dated 25. 11. 2011 issued by the Surveyor General, whereby Government Surveyors are allowed to engage in private practice subject to terms and conditions.

Held:

1. Under sections 39 and 40 of the Survey Act, No. 17 of 2002, all surveyors-Government and Private-need to be registered in the Land Survey Council in order to engage in land surveying. Those who have so registered are known as “Registered Surveyors”. In terms of section 41, every Registered Surveyor who wishes to practice land surveying shall obtain an Annual Practising Licence, but a Registered Surveyor in the Government Service need not obtain such an Annual Practising Licence for land surveying “on behalf of the Government”. A Government Surveyor who wishes to practise land surveying noton behalf of the Government shall obtain an Annual Practising Licence.

2. According to section 44, a Registered Surveyor (both Government and Private) can engage in land surveying in two instances: (a) If in Government Service, when authorised by the Surveyor General

(in which case, no Annual Practising License is required, and no fee or reward can be accepted); (b) If a holder of an Annual Practising License, for a fee or reward.

3. The impugned Circular is not ultra vires of the powers of the Surveyor General.

Cases referred to:

1. Surveyors' Institute of Sri Lanka v. Surveyor General [1994] 2 Sri LR 319

2. Hevavitharana v. Themis de Silva (1961) 63 NLR 68 at 72

3. Narasingh Das v. Mangal Dubey (1883) 5 Allahabad 163 at 172

J. C. Weliamuna, P. C., with Senura Abeywardena and Thilini Vidanagamage for the Petitioners in CA/WRIT/98/2012.

Sanjeeva Jayawardena, P. C., with Rajeev Amarasuriya for the Petitioner in CA/WRIT/73/2012.

Dr. Sunil Coorey with Nilanga Perera for the Petitioner in CA/ WRIT/682/2011.

Saliya Peiris, P. C., with Lilan Warusavitharana for the Petitioner in CA/ WRIT/61/2012.

Manohara De Silva, P. C., with Pubudini Wickremaratne and Anusha Perusinghe for the 7th- 9th Respondents.

Manohara Jayasinghe, S. S. C., for the 1st and 2nd Respondents. Razik Zarook, P. C., with Rohana Deashapriya and Chaanakya Liyanage for the 11th Respondent.

Ranjan Goonaratne for the 5th Respondent in CA/WRIT/682/2011. Ranil Samarasooriya for the 12th Respondent.

cur. adv. vult.

September 11, 2019

SAMAYAWARDHENA, J.

This case (CA/WRIT/98/2012) is connected to three more cases: CA/ WRIT/82/2011, CA/WRIT/61/2012 & CA/WRIT/73/2012. As the relief sought by the Petitioners in all four connected cases is the same, learned

counsel for the parties, despite making submissions separately, agreed to abide by a single Judgment to be delivered in this case. The issue in all the cases is whether or not the Government Surveyors can do private practice under the present Law.

With the approval of the Minister of Land and Land Development, and the permission granted by the Secretary to the said Ministry, and also upon the passing by majority vote at the Land Survey Council of the Field Staff Circular No. 5/2011 dated 25. 11. 2011 of the Surveyor General, private practice by Government Surveyors has been allowed subject to strict terms and conditions.

It is this Circular, the Petitioners, being Registered Surveyors purely engaging in private practice, seek to quash by way of writ of certiorari in these proceedings. This the Petitioners do predominantly on the basis that it would adversely affect or rather dilute their own practice.

According to the Circular, the Secretary to the Ministry has imposed two conditions:

(i) Subject to the other conditions imposed from time to time by the Surveyor General, in addition to the rules and conditions relating to the appointment

(ii) Private practice should be based on the Annual Practising Licence and it is strictly limited to outside Government office hours and public holidays only.

In terms of (i) above, the Surveyor General has for the time being imposed 15 conditions. They are as follows:

- 1. All the officers in the Sri Lanka Surveyors' Service who are qualified to register in the Land Survey Council according to the Survey Act, No. 17 of 2002 are considered to be eligible to obtain annual licence.*
- 2. The Surveyor General shall not recommend to obtain annual licence to an officer, who has not satisfactorily completed the duties assigned to the officer in the previous year or who has been subjected to ongoing disciplinary inquiry or who has been punished by a disciplinary inquiry during the last 5 years or who has caused loss or discredit to the Survey Department.*

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3. *The officers may be called upon for urgent duties required by the Surveyor General during the weekends and public holidays and the officer should adhere to such orders.*
 4. *All the rules and regulations applicable to Registered Licensed Surveyors with regard to the usage of old plans and other documents for surveying and preparation of plans are also obeyed. In case of an officer who belongs to Sri Lanka Surveyors' Service while engaged in private practice, prepares a plan using an old statutory plan, the officer is liable to provide the information to Surveyor General at any point of time, as to how the details of old plan were obtained.*
 5. *Priority should be given to surveys required by the government and important surveys should be completed on time. One has to complete a specified quantity of work and above matters should be evaluated once in six months and the officers are subject to cancellation of licence if the Surveyor General is reported that the officer's duties are hindered.*
 6. *All officers who obtain permission for private practice should follow accepted office hours of the Government to ensure that the office time is used for Government duties.*
 7. *The officers who engage in private practice should never use in any manner the departmental resources for private work and if any such incident is disclosed, action will be taken to recommend cancellation of the licence with immediate effect in addition to taking disciplinary action against the officers.*
 8. *The approval of the Surveyor General should be obtained by the District Snr. Supdt. of Surveys to assign the statutory surveys, that shall be carried out by the Surveyor General under Departmental supervision, to the Licensed Surveyors in the Survey Department. Surveyor General shall appoint an officer to supervise such surveys.*
 9. *Legal or administrative matters related to private surveys performed by any officer are governed by Survey Act, No. 17 of 2002 and if it is reported that the Department is discredited due to such matters, action will be taken to recommend cancellation of the licence with immediate effect in addition to follow up disciplinary procedure.*

10. *Application for annual practising licence should be submitted to the Land Survey Council with the recommendation of the Surveyor General in the month of July in all the years in which the officer is qualified.*

11. *An officer in the Surveyors' Service who obtained permission for private practice is prohibited from engaging in a private survey on a plan prepared by the officer for a duty, within one year.*

12. *The officers, who apply for private practice, should maintain 100% progress in the previous year as well as up to month of June in the year of application submitted, and also during the completed previous year.*

13. *The recommendation for issuing of licence to officers in Surveyors' Service in the post of Supdt. of Surveys and higher, will be done by the Surveyor General based on recommendation by the supervising officer.*

14. *The premises used as offices of the Survey Department should not be used for private practice under any circumstances.*

15. *The application form attached to this circular should be used to get approval for private practice.*

The Private Surveyors say that a similar move by the Government Surveyors by Circular No. 5/1992 dated 05. 02. 1992 was successfully thwarted by way of another writ application. The said Judgment of the Supreme Court is *The Surveyors' Institute of Sri Lanka v. The Surveyor General*.¹ Therefore, they argue that the matter is res judicata and shall be dismissed in limine. I have no hesitation in rejecting that argument for the reasons stated below.

At the time that Judgment was delivered by the Supreme Court, the subject of land surveying was governed by the Land Surveys Ordinance, No. 4 of 1866, as amended, and the Surveyors Ordinance, No. 15 of 1889, as amended. These two Ordinances were repealed and replaced by the Survey Act, No. 17 of 2002, which is now in operation.

Under the Surveyors Ordinance, all the powers regarding land surveying were centred around the Surveyor General. The Surveyor General was empowered inter alia to grant and cancel Annual Licences and to regulate

the conduct of surveyors. He had the sole authority, under section 4 of the Ordinance, to issue Annual Licences to those who pass an examination to practice as Land Surveyors. Section 6 of the Ordinance inter alia stated that a surveyor who has served in the Survey Department was entitled to an Annual Licence without passing the examination.

In the said case, when the decision of the Surveyor General to call for applications from the Government Surveyors for the issuance of Annual Licences to do private practice was challenged before this Court, this Court has held with the Surveyor General taking the view that the expression “has served” referred to in section 6 read with item 9 of Schedule A could also include a person who was in service at the time he made the application for an Annual Licence.

On appeal, the Supreme Court set aside the Judgment of this Court mainly relying on section 18 of the Ordinance, which stated that the procedure set out in the preceding sections of the Ordinance regarding licensing shall not apply to any Land Surveyor for the time being in the service of the Ceylon Survey Department.

The repealed Ordinance thus allowed only the surveyors not in the employment of the Survey Department to obtain Annual Licences to practice land surveying.

Kulatunga J. on behalf of the Supreme Court at page 323 stated that:

It is apparent that the provisions of sections 2- 17 of the Ordinance are essentially applicable to the licensing and regulation of private surveyors; and section 18 provides-”Nothing hereinbefore contained shall apply to any land surveyor for the time being in the service of the Ceylon Survey Department.”

Accordingly, Kulatunga J. at pages 324~325 concluded thus:

After giving consideration to the submissions of parties, I am satisfied that the effect of section 18 is clearly to confine the persons exempted by section 6 from the requirement of having to pass the examination to persons mentioned in paragraph 9 of the Schedule who have ceased to hold office in the Survey Department. I agree that the Court below has misdirected itself by interpreting the Schedule independently of section 6; in the result, it failed to consider the impact of section 18 on section 6.

As regards the appellant's submission that the Surveyor-General/ holding office for the time being is clearly without power to grant a licence to himself in view of the anomaly which would result if he could do so, the Court considered it irrelevant in ascertaining the intention of the legislature. This too is a misdirection.

I hold that the Field Staff Circular No. 05/92 dated 05. 02. 92 is ultra vires and its implementation is in excess of the 1st Respondent's power to grant annual licences to land surveyors under the Ordinance.

Then it is clear that the Supreme Court set aside the Judgment of this Court and held with the Private Surveyors on two grounds:

- (i) Failure on the part of the Court of Appeal to consider section 18 of the Ordinance, and
- (ii) The anomaly which would be created if the Surveyor General could issue a Licence to himself.

The law was drastically changed by the Survey Act, No. 17 of 2002. By the new Act the powers of the Surveyor General were substantially pruned and conferred on the newly created Land Survey Council, a body corporate with perpetual succession which can sue and be sued in such name.

After the new Act, inter alia, maintaining standards and procedures relating to land surveying, registration of surveyors and issuance of certificates of registration, issuance of Annual Practising Licences to practise land surveying are within the purview of the Council, and not the Surveyor General. Hence the anomaly that the Supreme Court was anxious to avoid will not arise under the new Act.

Further, there is no section in the new Act similar to section 18 of the Surveys Ordinance, which made the sections as to the issuance of Annual Licences inapplicable to Government Surveyors.

Let me now consider whether the new Act permits the issuance of Annual Practising Licences to Government Surveyors, which would enable them to do private practice.

Section 39(1) of the Survey Act of 2002 states:

From or after the date of commencement of this Act no person, other than a person who possesses the qualification specified in

the Schedule hereto and has obtained registration with the Council and has been issued with a certificate of registration which is for the time being in force, may engage in land surveying.

There is no dispute that under sections 39 and 40 of the new Act, all the surveyors-Government and Private-need to be registered in the Land Survey Council in order to engage in land surveying. Those who have so registered are known as “Registered Surveyors”. Be it noted that there was no such requirement for registration for the Government Surveyors under the repealed Surveyors Ordinance.

Section 41 (1) of the Act reads as follows:

Every registered surveyor who is desirous of practising or attempting or professing to practise land surveying, shall apply to the Council for an Annual Practising licence.

Every Registered Surveyor issued with an Annual Practising Licence is known as “Registered Licensed Surveyor”.

The proviso to section 41 (1) states:

Provided however, Registered Surveyors in the Survey Department engaging in land surveying under the supervision of the Surveyor General shall not be required to obtain an Annual Practising Licence for the purpose of engaging in land surveying on behalf of the Government.

I am unable to agree with the argument of the Private Surveyors that:

[T] he legislature has created such a distinction with the use of a proviso to section 41(1) for the sole purpose of distinguishing professionally qualified surveyors in the service of the government and those engaged in private practice, and as section 41 does not empower the Council to grant annual practising licences to surveyors belonging to the government service, the decision of the Council to grant such licences is clearly ultra vires.

It is not correct to say that “section 41 does not empower the Council to grant annual practising licences to surveyors belonging to the government service”. What that section states is that every Registered Surveyor-whether in Government Service or Private Sector-who wishes to practise land surveying shall obtain an Annual Practising Licence, but a Registered Surveyor in the Government Service need

not obtain such an Annual Practising Licence for land surveying “on behalf of the Government. In other words, the Government Surveyors shall also obtain Annual Practising Licences if they are to practice land surveying not on behalf of the Government. The qualification “on behalf of the Government is not without significance. The concession given to the Government Surveyors when engaging in land surveying on behalf of the Government cannot be interpreted to mean that the Land Survey Council is prohibited from issuing Annual Practising Licences to Government Surveyors.

If the intention of the legislature was not to issue Annual Practising Licences to Government Surveyors, the proviso to section 41(1) could have been simply drafted in the following manner:

Every registered surveyor who is desirous of practising or attempting or professing to practise land surveying, shall apply to the Council for an Annual Practising licence.

Provided however. Registered Surveyors in the Government Service shall not be issued with Annual Practising Licences.

The requirement for the Council to maintain a Register, in terms of section 42 of the Act, of all Registered Surveyors and Registered Licensed Surveyors makes no difference. I cannot accept the argument that “*this is where one register is divided into two, and it is where a surveyor would fall into one list or the other.*” That is to distinguish Registered Licensed Surveyors from Registered Surveyors because all the Registered Surveyors do not wish to and are not required to compulsorily register as Registered Licensed Surveyors.

Section 44 is the crucial or central section in deciding this question. Both parties-Government Surveyors and Private Surveyors-have interpreted this section in their favour. That section reads as follows:

A registered surveyor-

(a) may engage in land surveys in the service of the Government and when authorized by the Surveyor-General; or

(b) who holds an Annual Practising License, may engage in the practice of land surveying for fee or reward.

On behalf of the Private Surveyors much emphasis is placed on the word “or’ found between the two subsections. They say the word “or’

is used there to clearly keep apart Government Surveyors from Private Surveyors. It is further argued that:

[T] he legislature clearly used the term “or” between subsections (a) and (b) of section 44 to stipulate that a surveyor who falls within the category prescribed in section 44(a), i. e. surveyors of the Department cannot fall within the category prescribed by section 44(b). There can be no doubt that it can only be one or the other and not both.

I regret my inability to agree with this argument.

After the 16th Amendment to the Constitution, Article 23 of the Constitution states that: “All laws and subordinate legislation shall be enacted or made and published in Sinhala and Tamil, together with a translation thereof in English”. The first proviso to that Article further states “*Parliament shall, at the stage of enactment of any law determine which text shall prevail in the event of any inconsistency between texts*”. Section 67 of the Survey Act states “*In the event of any inconsistency between the Sinhala and Tamil texts of this Act, the Sinhala text shall prevail.*”

Sinhala text of section 44 reads as follows:

ලියාපදිංචි මිනින්දෝරුවරයෙකු විසින් -

(අ) ආණ්ඩුවේ සේවයෙහි යෙදෙමින් සිටින විටදී සහ සර්වයේර් ජනරාල්වරයා විසින් බලය පවරනු ලැබූ විටදී ඉඩම් මැණුම්කරණයේ යෙදිය හැකිය.

නැතහොත්

(ආ) වෘත්තීය යෙදීමේ වාර්ෂික බලපත්‍රයක් දරන විටදී ගාස්තුවක් හෝ ත්‍යාගයක් සඳහා ඉඩම් මැණීමේ වෘත්තීය යෙදිය හැකිය.

It is the word “නැතහොත්” which has been translated into English as “or”, and not *vice versa*. In my view, the better, if not the best, Sinhala translation of the word “නැතහොත්”, in this context, is “*otherwise*”. The word “*otherwise*” as a conjunction means “*if not*” or “*or else*”.

On the other hand, if the Sinhala translation of the word “නැතහොත්” shall be taken as “or”, “or” is used as a conjunction to link or connect two or more alternatives or possibilities.

Either way, the translation of the word “නැතහොත්” does not favour the Private Surveyors.

Section 44 has not been introduced to draw a dichotomy between Government Surveyors and Private Surveyors. It is, in my view, to further amplify or explain in clearer terms what has already been stated in section 41 (1) and the proviso to it, which I have already discussed above.

According to section 44, a Registered Surveyor (both Government and Private) can engage in land surveying in two instances:

(a) If in Government Service, when authorised by the Surveyor General (in which case, no Annual Practising Licence is required, and no fee or reward can be accepted).

(b) If a holder of an Annual Practising Licence, for a fee or reward. The same position is reflected in (i) and (ii) of section 45(1)(c) when dealing with “professional misconduct”, which is nothing wrong.

Section 54 deals with “continuing education” to improve the knowledge and skills in land surveying of all the Registered Surveyors. Section 54(2)(a) says that when a Registered Surveyor who has been issued with an Annual Practising Licence fails to comply with the requirements of continuous education, he can be dealt with by the Council. Section 54(2)(b) says that when a Registered Surveyor who is in the Government Service fails to comply with such directions regarding continuing education, he shall be dealt with by the Surveyor General. It is significant to note that section 54(2)(b) speaks of Registered Surveyors in Government Service in general without making a distinction between those who have been issued with Annual Practising Licences and those who have not been issued with Annual Practising Licences. The subject of continuing education for Government Surveyors in land surveying shall come under their Head of Department who is the Surveyor General. That has nothing to do with the issuance of Annual Practising Licences to Government Surveyors.

Let me make this point clear. There cannot be an argument that there is a difference between Surveyors in the Government Service and those who are not. That is not the issue although Private Surveyors have taken an enormous effort to portray such a distinction within the Act. The issue is whether, within the scheme of the Act, the former can be allowed to engage in private land surveying for a fee (subject to conditions).

On behalf of the Private Surveyors it is vehemently submitted that if the legislature intended to issue Annual Practising Licences for the

Government Surveyors to engage in private practice, it could have been expressly stated so in the Survey Act. I beg to disagree. If the legislature intended not to issue Annual Practising Licences for the Government Surveyors to engage in private practice, then it should have been expressly stated in the Act and not vice versa. Nowhere in the Act does it say that a Government Surveyor is prohibited from obtaining an Annual Practising Licence. It is a well-accepted principle that prohibitions cannot be presumed. In *Hevavitharana v. Themis de Silva*,² Tambiah J. quoted with approval dictum of Mahmood J. in *Narasimha Das v. Mangat Dubey*³

Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibition cannot be presumed.

Another argument is that allowing private practice to Government Surveyors violates the Establishments Code. Section 1: 4 of Chapter XXX of the Establishments Code states that:

The permission of the Secretary is required before an officer may undertake for a fee any work outside his normal official duties. Permission will not be given unless it is not shown that no other means of getting the work are reasonably available.

There is no dispute that the permission of the Secretary has been given for the Government Surveyors to do private practice outside working hours subject to conditions. Whether “*no other means of getting the work are reasonably available*”, has not been put in issue in these proceedings.

It is significant to note that similar provisions are applicable for Government Medical Officers to engage in private practice outside duty hours under certain terms and conditions.

Yet another argument is potential conflicts of interest with the State if the Government Surveyors are allowed to do private practice outside duty hours. It is a mistake to think that conflicts of interest will emerge only if Government Surveyors are allowed to do private practice. That can happen even during the course of their official commitments. Conflicts of interest can also arise in cases of surveyors who engage exclusively in private practice. Under the new Act, as the Council is the controller of all the Registered Surveyors, Government and Private alike, it appears

that, when necessity demands, the Council can assign Government land surveying to Private Surveyors. Then the same argument will be applicable to Private Surveyors as well. I might add that the prospect of conflict of interest is relevant to any profession including the legal profession irrespective of whether one is a Judge, or a lawyer in the official or unofficial Bar. If there is a likelihood of a conflict of interest, the officer concerned is expected to desist from such engagements. Such a degree of professionalism is expected not only from Government Surveyors but also from Private Surveyors.

Connected to the above, the Private Surveyors argue that if private practice is allowed for Government Surveyors, that will impinge upon the independence of the Surveyor General and his officers.

Government Surveyors who engage in private practice will be under the strict scrutiny of the Surveyor General and necessary checks and balances have been put in place by the said Circular itself to regulate such private practice. Private practice is not automatic. A Government Surveyor who wishes to do private practice shall obtain a licence from the Land Survey Council, which can be extended annually, based on various factors including the performances of the previous year. Permission to engage in private practice is subject to several conditions designed to maintain the integrity and efficiency of the Survey Department. More importantly, the conditions in the Circular are not fixed. If those conditions are not adequate, more conditions can be introduced both by the subject Minister and the Surveyor General to address the particular issues.

The impugned Circular No. 5/2011 of the Surveyor General whereby Government Surveyors are permitted to do private practice subject to the conditions stated therein is, in my view, not *ultra vires*.

The application of the Petitioners is dismissed. On the facts and circumstances of this case, I make no order as to costs.

Application dismissed.

Judgment by: Mahinda Samayawardhena, J.

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