

VEN. ELLAWALA MEDANANDA THERO
vs
DISTRICT SECRETARY, AMPARA AND OTHERS

SUPREME COURT
S. N. SILVA C. J.
GAMINI AMARATUNGA J.
P. A. RATNAYAKE J.
SC FR 178/08.
JUNE 19, 2008.
SEPTEMBER 9, 2008.
OCTOBER 30, 2008.

Fundamental Rights - Constitution Article 10, 12 (1), 12 (2) -13th Amendment - Alienation of land - Fair and equitable process in effecting alienation of lands? - Doctrine of ultra vires - Public Law - Rule of Law - State land held by executive in trust for the people - Land Development Ordinance.

The petitioners allege that the executive and or administrative action taken to alienate the land - about 60 Acres to 500 Muslim families infringe the fundamental rights guaranteed under Article 10, 12(1), 12(2) of the constitution. The land is located 13km to the South of the Deegavapi Raja Maha Viharaya and the settlement of such a large number of Muslims within a close proximity to the Raja Maha Vihara would bar further expansion of Sinhala Buddhist residents who are living close to the Viharaya. The petitioners contend that, there is a total failure on the part of the respondents to act in terms of the 13th amendment and the Land Development Ordinance.

The respondents contended that the beneficiaries were selected in terms of a Circular, that the land is not State land and that no provision of the 13th Amendment or the Land Development Ordinance prohibit the impugned alienation.

Held:

- (1) Although the 1st respondent has stated that the selection process of the allottees had taken place in 2005 - after Tsunami, this position is untenable since none of the beneficiaries have stated that they went

through a selection process in 2005. The State has failed to produce any evidence as to the official or authority who selected the land and the beneficiaries.

- (2) The Circular relied on by the 1st respondent was issued by the Secretariat of the President, it has not been issued in terms of any applicable law, it appears to have been a general executive measure taken in the immediate aftermath of the Tsunami to relocate families that were affected. The Circular does not specify the basis of selection of land for relocation of displaced person by the Tsunami.

Per S. N. Silva. C. J.

“Even assuming that the land is not State land but vested in the Sugar Corporation as contended by the respondents, the petitioners do not claim that the land was alienated to them by the Corporation or the successor, they claim that the land was promised to them by the Divisional Secretary - 1st respondent - then, if the land remained vested in the Corporation this action of the 1st respondent would *per se* be valid - on the other land if the land is State land, the ground relied on would make the case worse for the respondents”.

- (3) The contention that, an action of a public authority is valid, so long as it is not prohibited by the applicable law, is a totally untenable contention in Public Law and is contrary to Rule of Law and the doctrine of *ultra vires*.

Action of an official should have -

- (1) legal justification;
 - (2) be not in excess of lawful authority;
 - (3) be authorized by law.
- (4) State land is held by the executive in trust for the public and may be alienated only as permitted by law.

APPLICATION under Article 126 of the Constitution.

Case referred to:-

Liyanage vs. Gampola U. C. 1991 1 Sri LR 1 of 7

Manohara de Silva PC with A Wijesundara for petitioners

Faiz Musthapha PC with Ms. Faizer Marker, Thushani Machado for intervenient petitioners

M. A. Sumanthiran with E. Keegal for intervenient petitioners.

Dilshan Kayasuriya for 1st intervenient petitioner
Prasanth Lal de Alwis with *Sampath Gamage* and *Anusha Perusinghe* for 9th - 10th respondents
 No appearance for 5th and 11th respondents
J. C. Weliamuna with *M. Ratnayake* for 1 intervenient petitioner
Razick PC with *U. L. M. Mowjood* for 2 intervenient petitioners.
Iqbal Mohamed with *M. I. M. Ishan* for 2 intervenient petitioners.
Iqbal Mohamed with *M. I. M. Nazeer* for 2 intervenient petitioners.
Nimal Fernando PC with *Rajendra Jayasinghe* and *Gamini Perera* for 1 intervenient petitioner
Uditha Egalahewa with *Ranga Dayananda* for 2 intervenient petitioners
D. P. Kumarasinghe PC with *Shameendra Rodrigo* and *Mahendra Kumarasinghe* for 2 intervenient petitioners
Palitha Kumarasinghe PC with *Priyantha Abeyagunawardane* for 2 intervenient petitioners
Upul Jayasuriya with *Lelum Kumarasinghe* and *M. Madhubashini* for 3 intervenient petitioners
I. S. de Silva with *Vinod Wickremasinghe*, *Deeptha Perera*, *Dilshan Wijewardane* and *Wishva Mettananda* for 3 intervenient petitioners
W. D. Weeraratne with *Eranga Abeykumara* for 2 intervenient petitioners
Sanjeewa with *Sandamali Chandrasiri* for 1 intervenient petitioner
Kushan de Alwis with *Kaushalya Nawaratne* for 3 intervenient petitioners
Pubudinie Wickremaratne for 1 intervenient petitioner
Vishwa Gunaratne with *Lasitha Chaminda* for 1 intervenient petitioner
Prasanthlal de Alwis with *Sampath Gamage* for 1 intervenient petitioner
Mrs. Jayasinghe B. Tillakaratne DSG with *Sudharshi Herath* SC for 1st - 4th, 6th - 8th, 12th respondents.
S. de Silva with *Deeptha Perera* for 30th and 55th respondents

Cur.adv.vult.

December 02, 2009

SARATH N SILVA, C. J.

Petitioners have been granted leave to proceed on the alleged infringement of the fundamental rights guaranteed by Articles 10, 12(1) and 12(2) of the Constitution. Interim relief was granted by the bench which dealt with the matter at the stage of considering leave to proceed, restraining the Respondent from leasing or in any way alienating the

land in question situated at Norochcholai in the Ampara District. The petitioners include the Venerable Thera, being the Viharadhipathi of the Deeghavapi Raja Maha Viharaya situated in the Ampara District, the President of the Dighavapi Surakeemay Sanvidanaya and Theras actively engaged in the protection of the Buddha Sasana.

The 9th and 10th Respondents being the Deeghavapi Pratisanskarana Sabhawa and the President of that Sabhawa have filed papers in support of the petition. Further, the 29th to 44th and 51st to 63rd Respondents have all intervened in support of the petition. They belong to different Buddhist organizations and represent the interests of persons concerned in preserving the Deeghavapi Raja Maha Viharaya.

The alleged infringement is the executive and/or administrative action taken to alienate the land in question which is about 60 Acres in extent to 500 families being entirely of the Muslim community. The land is located 13 kilometers to the south of the Deeghavapi Raja Maha Viharaya. The case of the Petitioner and the Respondents referred to above who support the Petition is that the settlement of such a large number of Muslims within close proximity to the Raja Maha Viharaya would bar further expansion of Sinhala Buddhist residents who are now living close to the Viharaya. They allege that the infringement results from a total failure on the part of the Respondents, to act in terms of the applicable law, being the 13th Amendment to the Constitution and the Land Development Ordinance and to follow a fair and equitable process in effecting the impugned alienation of lands. It is alleged that the alienation is arbitrary and discriminates against Sinhala and Tamil persons who are without land and have requested that they be alienated State land and, is biased in favour of Muslims. It is further alleged that the settlement of 500 families of Muslims in an area proximate to the Viharaya would infringe the freedom of religion. The infringement of the fundamental rights guaranteed under Articles 12(1), 12(2) and 10 are alleged on the aforesaid basis.

At the outset it is to be noted that there has been no compliance with the provisions of the Land Development Ordinance and of the 13th Amendment to the Constitution with regard to alienation of the land in question. None of the Respondents have claimed that they have acted in terms of the applicable law.

Whilst one Minister of Government, being the 10th Respondent in his capacity as the President of the Deeghavapi Pratisanskarana Sabhawa supports the petitioners, on the basis that the impugned alienation of land is illegal and adversely affects the Buddhists, another Minister of Government being the 7th Respondent supports the alienation on the basis that the land is 13 kilometers away from the Viharaya. She however denies any involvement in the selection of the particular persons to whom the land was allocated. She denies any involvement of her Ministry, as well.

The 13th to 28th Respondents and the 45th to 50th Respondents were allowed to intervene on the basis that they are the beneficiaries of the impugned alienation. They claim that their houses at Akkaraipattu about 20 kilometers away from the land in question were affected by the tsunami of December 2004 and that their houses were located within the 200 meter buffer zone demarcated after the tsunami. Paragraph 4 (e) of the objections of the 45 - 50th Respondents states as follows:

"In 2007 these Respondents were promised houses by the then Divisional Secretary of Akkaraipattu. The said houses were on part of the non-irrigable highland which was administered by Hingurana Sugar Corporation for many years."

It is significant that none of the persons who have been allowed to intervene as beneficiaries of the impugned

alienation have disclosed the process by which they were selected for the allotment of land.

I would now refer to the position of the State represented by the Deputy Solicitor General who appeared for the relevant officials and the Minister of Lands. The 1st Respondent being the District Secretary has stated that he assumed office on 27.12.2006 and that the selection process of the allottees had taken place in 2005. This position is plainly untenable since as pointed out above, none of the beneficiaries who intervened have stated that they went through a selection process in 2005. The State has failed to produce any evidence as to the official or authority who selected the land and the beneficiaries. This lacuna in the case for State lends much credibility to the case of the petitioners as to the illegality and arbitrariness of the impugned alienation. It is nevertheless claimed by the State that the beneficiaries were selected in terms of the Circular IR25. This was purportedly issued by the Secretariat of the then President. It has not been issued in terms of any applicable law. It appears to have been a general executive measure taken in the immediate aftermath of the tsunami to relocate families that were affected. The Circular cannot in any event warrant administrative action four years after the tsunami affected the Island. It is to be noted that the Circular does not specify the basis for the selection of land for relocation of persons displaced by the tsunami, being the matter in dispute in this case. It contains an elaborate process of selection with public notifications, objections, inquiries and so on. But, as observed above, the beneficiaries who have intervened do not claim to have gone through any such process of selection. Further, no official has claimed that he followed such a process for the selection of the beneficiaries in question. In the circumstances the Circular IR25 cannot possibly ascribe validity of the impugned alienation of State land.

The Petitioners and the Respondents who support the petition submitted that the Deeghavapi Rajamaha Viharaya is one of the 16 most venerated sites of Buddhists in this country. According to the Mahavamsa the Buddha in his third visit to Sri Lanka attended the site of the Viharaya. These matters urged by the Petitioners are supported by the comprehensive Report of the Director General of Archaeology, which has been produced by the 1st Respondent himself marked 1R9. According to this report the name Deeghavapi has been used from the 2nd Century B. C. and the Viharaya was constructed by King Saddhatissa in the 1st century B. C. Further, the sacred Viharaya had been reconstructed by King Kirthsiri Rajasinghe of the Kandyan Kingdom in 1746 A. D. In the circumstances nothing further need to be stated as regards the sensitivity which has been affected by the impugned action from the perspective of the Buddhist, not only in that area but in the entire country.

The Petitioners further submit that the 7th Respondent in an interview given to the newspaper produced marked "P31" admitted that "she asked for 60 acres to house 500 Muslim families who had been victims of the tsunami". It is alleged that this is discrimination in favour of Muslims since the request does not take into account the claims of persons of other ethnicity who are landless in the matter of allocation of land. The Petitioner rely on documents produced marked P32A to F and P33A to D to establish claims of Tamil persons who are landless and who live closer to the land in question than the beneficiaries who are from the coastal areas, that have been ignored by the administration. Similarly documents marked P33E and P34A to D and P35A and B are objections and claims that have been made by Sinhala persons and ignored by the administration. Some of the claims are from victims of terrorism who are entitled to be considered in the matter of allocation of State land.

The Petitioners further allege that the purported premise of there being 500 tsunami victims being Muslims who require land for construction of houses is a sham to cover up a long standing demand to settle Muslims in the area. They seek to establish this position on a twofold basis. Firstly, it is alleged that the figure of 500 tsunami victims is a highly inflated one. For this purpose they rely on document P30A dated 30.03.2007 sent by the 11th Respondent to the District, Secretary, Ampara, which states as follows: .

“Today, we were informed that there is a Housing Scheme Project proposed for tsunami displaced families. Our inquiries revealed that there are only about 50 families awaiting houses. However, an extent of land suitable for the construction of houses for 50 families could be released from the available area.”

It is common ground that the land in question had been vested in the Hingurana Sugar Corporation which matter would be adverted to subsequently. The letter P30A sent by M. M. Ifthikar, General Manager of the Corporation has been written in the context of a request to release an extent of land of the Corporation to house tsunami victims of Akkaraipattu. The contents of the letter have not been denied. The letter forms part of official correspondence on the matter and has to be accepted by Court.

The Petitioners have also undertaken a meticulous analysis to establish from the addresses given and the like that there could not have been 500 families affected in the buffer zone of 200 meters in the Akkaraipattu area. It would not be necessary for the purpose of this judgment to analyze the copious material produced in this regard, since in my view P30A being contemporaneous official correspondence establishes that as at 30.03.2007 there were only about 50 families who had been displaced by the tsunami and required land for housing.

The second basis relied on by the Petitioners is a historic survey.

The Petitioners have submitted that the issue with regard to the allocation of land in the area had been a matter of dispute from about 1960, when the settlements on the right bank of the Gal Oya Valley Irrigation Project commenced. It is common ground that the area in question is situated on the right bank. The Petitioners contend with reference to documents that there was a demand for the settlement of Buddhists in the area proximate to the Rajamaha Viharaya from the year 1962. On the other had there was a competing claim for land in the area to settle landless Muslim families, espoused by the husband of the 7th Respondent who was the then Minister. The Petitioners have produced marked P16, letter dated 29.6.98 addressed by the husband of the 7th Respondent to the then Minister of Lands. I would reproduce the entire content of the letter which reads as follows:

*“June 29. 1998
Hon. D. M. Jayaratne, M. P.,
Minister of Land & Forestry,
Rajamalwatta,
Battaramulla.*

My Dear Minister

RELEASE OF NORRAICHOLAI HIGHLAND TO
AKKARAIPATTU PEOPLE FOR RESETTLEMENT PURPOSE

I have received representations from about 500 landless farmers of Akkaraipattu to the effect that they are desperately in need of land for settlement.

The D. S. of the area had recommended that there is an extent of nearly 125 acres of highland in Noraicholai area. This highland was earlier alienated to the Hingurana Sugar

Corporation for cultivation of sugarcane but was found unsuitable for that purpose and therefore left abandoned for the past 20 years.

This land could be utilized for distribution among landless people - ½ area per family of the area and could be developed with the existing resources.

I am forwarding herewith a self explanatory request of the DS Akkaraipattu already sent to the Commissioner of Lands in this regard.

I shall be grateful if you could please consider this request sympathetically and help these poor landless people to get themselves settled peacefully by issuing necessary directives to those concerned.

Thank you,
Sincerely yours,

M. H. M. Ashroff P.C., M. P.,
Minister of Port Development, Rehabilitation
& Reconstruction
Leader/Sri Lanka Muslim Congress

It is thus clear that the demand for the allocation of the land in question to 500 Muslim families from Akkaraipattu ante dates the tsunami of 2004 by nearly 6 years.

Counsel for Respondent who are beneficiaries of the impugned allocation of land have urged three grounds to oppose the application. One of which is the reliance on the Circular IR25 issued by the Secretariat of the then President which has been dealt with above in reference to submissions of the State addressed on the same basis.

The other two grounds are -

- (i) The land in question is not State land since it is vested in the Sri Lanka Sugar Corporation by virtue of

an order made in terms of Section 25 of the State Industrial Corporations Act No. 49 of 1957 (vide P36) and the provisions of the 13th Amendment to the Constitution and the Land Development Ordinance relied on by the Petitioners would not apply to the land;

- (ii) That in any event there is no provision in the 13th Amendment to the Constitution or in the Land Development Ordinance which prohibits the impugned alienation.

As regards ground (i) above, even assuming that land remains vested in the Corporation by virtue of P36, these Respondents do not claim that the land was alienated to them by the Corporation or its successor. I have reproduced paragraph 4e of the objections of these Respondents which states that they were promised land by the Divisional Secretary of Akkaraipattu. If the land remained vested in the Corporation this action of the Divisional Secretary would be per se invalid. On the other hand the position of the State is that the land was allocated to the beneficiaries on the basis that it was State land. Hence the ground relied on would make case worse of these Respondents.

Ground (ii) relied on by these Respondents seemed to be based on the premise that action of a public authority is valid so long as it is not prohibited by the applicable law. This is a totally untenable contention in Public Law and is contrary to the Rule of Law and the doctrine of ultra vires A.V. Dicey in his work titled "Law of the Constitution" has stated the second meaning of the phrase "Rule of Law" as follows (at page 193):

"In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit.

With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person"

The citation implies the action of an official should have :

- (i) legal justification;
- (ii) be not in excess of lawful authority and
- (iii) be authorized by law

Wade and Forsyth in their work on Administrative Law (9th Edition at page 21) states the same proposition as the primary meaning of the Rule of Law as follows:

"The British constitution is founded on the rule of law, and administrative law is the area where this principle is to be seen in its most active operation. The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong (such as taking a man's land), must be able to justify its action as authorized by law and in nearly every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power, i. e. every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree...."

The use of the phrase “legal pedigree” implies that authority for official action has to be derived from the law itself.

In the case of *Liyanage vs Gampaha Urban Council*⁽¹⁾ at 7 I have examined the same question from the perspective of the doctrine of ultra vires in relation to the powers of an Urban Council and stated as follows:

“Anything purported to be done, by the Council, in excess of what is permitted by the statutory provisions will be considered as wholly invalid in law, on the application of the doctrine of ultra vires. However, in construing the relevant statutory provisions the Court will bear in mind the need to promote the general legislative purpose underlying these provisions and consider whether the impugned act is incidental to or consequential upon the express provisions. If it is so considered necessary, the impugned act will not be declared ultra vires.”

State land is held by the executive in trust for the People and may be alienated only as permitted by law. For the reasons stated above I hold that the impugned alienation is bereft of any legal authority and has been effected in a process which is not bona fide. Accordingly, the Petitioners have a locus standi to implead such action in a proceeding under Article 126(2) of the Constitution. On the preceding analysis of evidence, the Petitioners have established an infringement of the fundamental rights guaranteed by Articles 12(1), 12(2) and 10 of the Constitution.

The application is allowed and I grant to the Petitioners the relief prayed for in paragraph (b), (c), (d) and (e) of the prayer to the Petition. The State will pay a sum of Rs. 150,000/- as costs to the Petitioners.

AMARATUNGA J. - I agree

RATNAYAKE J. - I agree

Relief granted.