AGRARIAN SERVICES ACT

Ref: 1 /07/2004 Rs.

Agrarian Services Act – restricting under Sec. 4 the extent of land to be cultivated – imperative duty of the Commissioner to make his determination under Sec. 18

Ramakrishna Mission (Ceylon Branch)
-v- M.A. Thajudeen, Asst. Commissioner of Agrarian services and ten others

C.A. No. 1199/2000

Decided by Ms. Shiranee Tilakawardane, J and P. Wijeyaratne, J on 26.7.2002

The petitioner in this case has preferred this application seeking a mandate in the nature of a writ of Certiorari to quash the findings and the order made by the 1st and 2nd respondents under the Agrarian Services Act.

Ms. Shiranee Tilakawardena J (with P. Wijayaratne, J agreeing) held –

".....The 1st matter that has been urged by the learned counsel for the petitioner is that in terms of section 18 of the Agrarian Services Act, it is imperative that the Commissioner upon an inquiry should determine the question of arrears of rent. Once the decision made taking into account the relevant period, the tenant cultivator is bound to pay the quantum of arrears. There is statutory duty vested upon the Commissioner to notify parties and require the tenant to pay such arrears of rent for the period determined and the quantum specified by him and to inform the tenant of the consequences that would result in a failure to comply with such order, as envisaged under section 18 of the said Act. In the instant case the Commissioner has failed to do that and he has not determined the period of arrears of rent and the quantum of rent, though he has accepted the report of the 1st respondent in toto to the effect that the 3rd respondent had been in arrears of rent since 1989 in respect of the extent of 31 acres of Agricultural land.

Considering the matter in issue namely the non payment of rent since 1989 the Commissioner has failed to make a determination as required under section 18 of the Agrarian Services Act and in coming to whatever the conclusion, the Commissioner has blindly followed the report P7 and has not analysed the same before coming to a conclusion.

However there is no provision for the Commissioner to waive off any rental for any specific period especially when the tenant cultivator admits that he had not paid rent for the period in question.

Learned counsel for the respondent argued that in terms of section 4(1) of the Agrarian Services Act, the maximum extent that can be cultivated by the tenant cultivator is 05 acres and therefore any contract affecting any extent in excess of 5 acres would be illegal. However the scope of the inquiry before the Commissioner is not on the legality of the tenancy agreement but on the question of arrears of rent for a specific period admitted by the parties and in respect of admitted extent of 31 acres. Indeed it is important that the Commissioner should have initiated action in terms of provision of section 4 to restrict the extent that is cultivated by the tenant cultivator in accordance with the law but it does not absolve the Commissioner of his imperative duty of making the determination as required under section 18 of the Agrarian Services Act.

In all the circumstances of this case, as adverted to above, the Court issues an order in the nature of a writ of certiorari to quash the findings contained in P7 made by the 2nd respondent and the orders marked P8(i) to P8(viii) made by the 1st respondent. This Court also issues a writ of mandamus compelling the 1st respondent to hold a fresh inquiry in terms of the provision of the Agrarian Services law and in doing so to determine the several matters according to law which may deal with the rights of the 3rd respondent as the tenant cultivator.

It is noted that the contention of the learned counsel for the 3rd respondent, that in terms of the provision of section 4, the contract in issue is illegal by reason of it exceeding limits envisaged under the law, is a matter that has to be considered between the tenant cultivator and the land lord and this question has never been raised been the Commissioner at the inquiry into the complaint in issue and Commissioner is at liberty to consider this matter if raised before him if the merits of the matter warrant his intervention under section 4 of the Act. The application is allowed without costs.

JUDGMENTS TO BE CITED

FUNDAMENTAL RIGHTS

Ref; 2/07/2004 Rs.

Article 11 of the Constitution – in considering allegations of infringement of fundamental right under that Article it is not necessary for the court to take cognizance of the personal antecedents of the petitioners – the court should consider the question as to whether the petitioners had suffered any kind of cruel inhuman or degrading treatment while they were kept in custody.

Somawathie De Soysa –v- M. A. Jayasena Fernando

S.C. (Special) No. 63/2001

Pathiranage Erandaka and another –v- Gamini Halwela and others

Decided by Sarath N. Silva, CJ, Shirani A. Bandaranayake, J & Nihala Jayasinghe, J on 27.02.2004

The petitioners alleged that their fundamental rights guaranteed in terms of Article 11 of the Constitution was violated by the 2nd, 3rd, and 7th respondents for which the Supreme Court granted leave to proceed under Article 11 of the Constitution.

Shirani A. Bandaranayake, J (with Sarath N. Silva, CJ and Nihala Jayasingh, J agreeing) held:-

".....Article 11 of our Constitution refers to freedom from torture and reads as follows:-

"No person shall be subjected to torture or to cruel inhuman, or degrading treatment or punishment."

The petitioners as submitted by the respondents were arrested by the Police on suspicion of a theft of a water pump.

When an allegation is made in respect of an infringement in terms of Article 11 of our Constitution, it is not necessary fro the Court to take cognizance of the personal antecedents of the petitioner, but

JUDGMENTS TO BE CITED

consider only of the circumstances the petitioner is complaining.
It is well settled law in this country that no personal shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and thereby the protection in terms of Article 11 of the Constitution is guaranteed to all persons. When complaints are made in respect of violation of Article 11 of the Constitution, such allegations are leveled against Public Officers and if proved they could carry serious consequences against them. Therefore it would be essential that allegations that have been complained of be strictly proved. In fact in *Jeganathan v. Attorney General* (1982) 1 Sri L.R. 294, it was held that where public officers are accused of violating the provisions of Article 11, the allegations must be strictly proved. A series of decided cases *[Velmurugu v. Attorney General* (1981) 1 FRD 180, *Thadchanamoorthi v Attorney General* (1980) 1 FRD 129, *Goonewardene v Perera* (1983) 1 Sri L. (1983) 1 Sri L.R. 305, *Kapugeekiyana v. Hetiarachchi* (1984) 2 Sri L.R. 153, and *Malinda Channa Peiris v. Attorney General* (1994) 1 SLLR 1] has clearly laid down the principle that the civil standard of persuasion would apply and a high degree of certainty would be required 'before the balance of probability might be said to tilt in favour of a petitioner' who has been attempting to discharge his burden in proving that his fundamental rights guaranteed in terms of Article 11 had been violated by the respondents. However, as has been pointed out in *Malinda Channa Peiris v. Attorney General* (Supra) 'unless the petitioner has adduced sufficient evidence to satisfy the Court that an act in violation of Article 11 did take place, the petitioner will fail to obtain a declaration that Article 11 was transgressed.'

In the instant case, although the petitioners have complained of violation of Article 11 agianst 2nd, 3rd and the 7th respondents, they have not adduced sufficient evidence to show that the three respondents or some of them had subjected the petitioners to torture or to cruel, inhuman and/or degrading treatment or punishment. In fact according to the material placed before this Court it appears that the 2nd, 3rd and the 7th respondents had not taken part in the alleged assault. In such circumstances, the petitioners have not discharged their burden of proving that these 3 respondents or some of them were responsible for the alleged violation of Article 11 and I am of the view that without having sufficient material supporting the allegations against each individual respondent, viz. the 2nd, 3rd and the 7th respondents they cannot be held responsible for alleged violation.

However, as pointed out earlier the Medico-Legal Reports reveal that both petitioners having been tortured had sustained a considerable amount of injuries. According to the Medical Report submitted by the 1st, 2nd and 3rd respondents at the time the petitioners were produced before the Magistrate they had no injuries. In such circumstances it is apparent that the petitioners have sustained these injuries while they were in Remand Prison and thereby although a particular respondent is not held responsible for the injuries sustained by the petitioners, the State would become responsible for the violation of the petitioners' fundamental right guaranteed to them under Article 11 of the Constitution.

In the circumstances, I hold that the petitioners' ' fundamental rights guaranteed in terms of Article 11 were violated by executive or administrative action. The State is directed to pay a sum of Rs. 25,000/- each for the two petitioners as compensation. This amount to be paid within 3 months form today."

TRUSTS

Ref: 3/ 07/2004

Trusts Ordinance – Sections 3, 65, 66 84 – Personal remedy of a beneficiary under a Trust against a trustee for loss caused by a breach of trust – additional remedy to follow the trust property into the hands of third party – burden of proof.

Somawathie De Zoysa –v- M. A. Jayasena

S.C. Appeal No. 19/2000
C.A. No. 673/1988
D.C. Mt. Lavinia No. 650/ZL

Decided by S.N. Silva, CJ, J.A.N. de Silva, J, & T.B. Weerasuriya, J, on 15.6.2004

The plaintiff-appellant-respondent ("the plaintiff") instituted action against the defendant for a declaration of title to the land described in the schedule to the plaint which constituted two separate portions of land being the northern portion and the southern portion, purchased upon two deeds (P2 and P3) and the ejectment of the defendant. The plaintiff purchased the northern portion of the land form the (former) husband of the defendant and the southern portion from T. Dias. The defendant claimed that before she separated from her (former) husband she sold a property belonging to her for Rs 5000/- and her (former) husband purchased the northern portion of the land, two days later namely on 24.10.1978 for Rs. 5000/- with her money. The defendant therefore pleaded in her answer that her (former) husband held the subject of this action in trust for her and sought a declaration to that effect.

The learned District Judge upheld the defendant's position and held that the property was subject to a trust in favour of the defendant and dismissed the action. The Plaintiff thereafter appealed against the judgment of the District Court, and the Court of Appeal by its judgment dated 26/05/1999 allowed the appeal and entered judgment for the plaintiff as prayed for in the plaint. The defendant appealed therefrom to the Supreme Court after obtaining leave.

T.B. Weerasuriya, J, (with S.N. Silva, CJ and J.A.N. de Silva J agreeing) held:-

".....It is well accepted that a beneficiary under a trust has a personal remedy against a trustee for loss caused by a breach of the trust. Section 65(1) of the Trust Ordinance provides an additional remedy to a beneficiary to follow the trust property into the hands of a third party where trust property has been disposed of by the trustee. .

"It is significant that Section 66(1) makes provisions for a third party to obtain the property free of the trust on proof of certain circumstances. This Section lays down that nothing in section 65(1) entitles the beneficiary to any right in respect of the property in the hands of a tranferree who in good faith for consideration purchases the property without notice of the trust either when the purchase money was paid or when the conveyance was executed.

Having regard to the provisions of section 65(1), there is no dispute that the burden of establishing a constructive trust in terms of section

84 of the Trust Ordinance lies with the defendant. The crucial question in this appeal is on whom does the burden of proof lies in terms of section 66(1) of the Trust Ordinance.

".....I hold that the burden of proof in terms of section 66(1) of the Trust Ordinance to prove the existence of circumstances bringing the case within its provisions lies on the transferee. The Court of Appeal has taken the mistaken view that the burden lies with the beneficiary (defendant)

".....Section 3(j) of the Trust Ordinance has to be considered on the question of notice of the trust by the plaintiff.

"3(j) a person is said to have notice of a fact either (i) when he actually knows that fact (ii) or when but for willful abstention from inquiring or gross negligence he would have known it (iii) or when information of the fact is given to or obtained by any person whom the Court may determine of having been his agent for the purpose of receiving or obtaining such information."

"On the available material it is not possible to hold that the plaintiff had notice of the trust by applying the criteria spelt out in Section 3(j).

"The Court of Appeal had proceeded to evaluate the evidence led at the trial and had drawn certain inferences from the conduct of the defendant vis-à-vis the trust property nd held that the purchaser had no notice of any interest of the defendant in respect of the property. In the light of the above material the contention of the defendant that the Court of Appeal had failed to consider section 98 of the Trust Ordinance has no merit. For the above reasons I hold that the Court of Appeal had correctly held that the Plaintiff had no notice of the trust at the time of his purchase of the property.

"For the foregoing reasons, I dismiss this appeal. However, I make no order as to costs."

WRITS-1

Ref: 4/07/2004 Rs.

Intervention by a third party in writ applications – restraint exercised in dealing with third party intervention applications.

R.H.P. Fernando vs. The Divisional Secretary, Hanguranketha and 2 others And Ven. Divulwewe Pangnnatissa Thero (Intervenient Petitioner)

C.A. No. 456/2003

Decided by: Saleem Marsoof, P.C., J(P, C/A) and K. Sripavan J on 03.06.2004

The Intervenient-Petitioner, Ven. Divulwewe Pangnnatissa Thero of Asoka Ramaya, Minihirigama, Minneriya seeks to intervene into these proceedings on the basis that it was only he, along with few other priests of the area, who had made representations to the 1st Respondent and his predecessor in office that the alleged house to be constructed on the land is intended to be used as a church and a religious center for effecting unethical conversions to Christianity of Buddhists in the area, who constitute more than 90% of the population. The Petitioner in turn has objected to the proposed intervention on the ground that the Intervenient-Petitioner is not entitled in terms of the law and the applicable Supreme Court Rules to intervene into these proceedings insofar as he is not a necessary party to this dispute.

Saleem Marsoof, J (P/CA) with K. Sripavan, J, agreeing held:-

".....It is interesting to note that in its decision in *The Government Dental Therapists Association, et al v. George Fernando, Director of Health Services, et al*, C.A. Application No. 86/93 CA Minutes dated 27th July 1994, this Court sought to adopt a liberal approach in permitting third party intervention into writ proceedings. In the course of his judgment in this case Ameer Ismail J, observed that –

".....In this context, it is pertinent to note that the Court of Appeal (Appellate Procedure) Rules, 1990 made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka setting out the procedure to be followed by this Court in dealing with applications inter alia for prerogative writs, do not provide for third party interventions in these proceedings.

JUDGMENTS TO BE CITED

".....The Petitioner challenges the action of the Respondents on the basis that such action "have been taken maliciously, arbitrarily, capriciously, irrationally, unreasonably and for collateral purposes" (vide paragraph 23 of the Petition). It is not the intention of this Court and indeed it is hardly possible for this Court at this point of time, to enter into the merits of this matter. This Court has to decide on the legality or validity of the actions of the Respondents after considering the objections that will be filed by the Respondents. By the order of this court dated 24th May 2004, the Respondents have been granted time till 26th July, 2004 for filing their objections, to permit the Intervenient-Petitioner to be added as a party and to file objections with respect to the substantive relief sought by the Petitioner against the Respondents would, in the opinion of this Court, open the floodgates to a large number of similar applications which will add further to laws delays.

Before parting with this order, it is necessary to make reference to the decision of the Supreme Court in *Bandaranayake v. de Alwis et al.* (1982) 2 Sri LR 617. Samarakoon C.J. commented at pages 620 of the judgment that "The provisions of Article 134(3) give the Court an unlimited discretion"

".....This observation is relevant to the present case despite the fact that there is no corresponding provision in the Constitution or any other law seeking to confer on a third party a right of audience in the Court of Appeal in the lines of Article 134(3) of the Constitution as it illustrates the restraint that is exercised by even the apex court of the country in dealing with applications for third party intervention in the context of the supervisory jurisdiction of court which is exercised with a view of keeping administrative authorities within their lawful bounds.

For the foregoing reasons, the application of the Intervenient-Petitioner to intervene in these proceedings is refused. There will be no order for costs in all the circumstances of this case.

JUDGMENTS TO BE CITED

WRITS-2

Ref: 5/07/2004 Rs. 32.00

qui aliquid statuerit parte inaudita altera acquum licet discerit, hand acquurn fecerit – and *audi alteram parten* principles – failure to give the petitioner a fair hearing – no man shall be a judge in his own case – proceedings held in violation of fundamental principles of natural justice are a nullity.

L.M.L. Deshapriya v- Captain W.K.M.N. Weerakoon and 3 others

CA Application No.968/2002

Decided by Saleem Marsoof, P.C., J (P, C/A) and K. Sripavan, J on 11.06.2004

This is an application for writs of certiorari to quash the conviction imprisonment and dismissal from service of the petitioner and for a writ of mandamus to re-enlist him to the rank of Petty Officer in the Sri Lankan Navy. The petitioner invoked the writ jurisdiction of the Court of Appeal in terms of Article 140 of the Constitution of Sri Lanka read with section 132(1) of the Navy Act, No. 34 of 1950 as subsequently amended.

Saleem Marsoof, PC, J, (P, C/A) (with K. Sripavan J) agreeing held:

":.....It is worth noting at the outset that the supervisory jurisdiction of this Court extends to proceedings conducted by a court martial or a commanding officer or other officer dealing summarily with an offender in view of Section 132(1) of the Navy Act

"The petitioner has sought to challenge the said conviction, sentence of imprisonment and order of dismissal from service on the ground that they are unreasonable, arbitrary, illegal, capricious, *mala fide* and *ultra vires.* However, at the hearing the learned Counsel for the petitioner was content to rest his case on the ground that the said orders have been made contrary to the procedure established by law and in violation of the rules of natural justice.

"Learned Counsel for the petitioner relied on section 29 of the Navy Act, as amended by Act No. 11 of 1993.

"A plain reading of Section 29 would reveal that an accused charged with a disciplinary offence is entitled to a court martial (except in the situation contemplated by section 148) and cannot be dealt with summarily without being asked whether he desires to be dealt with summarily or by court martial. The 1st Respondent made a mockery of this section by purporting to offer the option after the petitioner pleaded to the charges before him.

Even more serious is the violation of the two cardinal principles of natural justice embodied in the maxims *audi alteram partem* and *nemo judex in causa sua potest.* The first of these principle postulates a fair hearing before the rights of a citizen are affected by a quasi judicial or administrative decision. In this context, it is now recognized that *qui aliquid statuerit parte inaudita alteraacquum licet discerit, hand acquurn fecerit* – which means that he who determines any matter without hearing both sides, though he may have decided right, has not done justice. According to the jurisprudence built around the *audi alteram partem* principle, there should not only be a hearing of both sides, but the hearing should be more than a pretence. The procedure followed should be fair and conducive to the achievement of justice.

Did the petitioner have the benefit of a fair hearing? As noted earlier, the Supreme Court has held in *Lndara Mudiyanselage Lalith Deshapriya v. Captain Weerakoon, Commanding Officer, Sri Lanka Navy Ship 'Gemunu" and others,* SC Application 42/2002(FR) S.C. Minutes dated 8.8.2003, that the petitioner has been subjected to assault and torture while he was in custody.

What is most disturbing to this court is the flagrant violation by the 1st Respondent of the maxim nemo judex in causa sua potest. This is a rule of natural justice that prevents a person suspected of being biased from deciding a matter. That maxim literally means that no man shall be a judge in his own cause.

In the opinion of this Court, the entire proceedings conducted by the 1st Respondent are in violation of the two fundamental principles of natural justice noted above. In the circumstances, the Court finds that the entire proceedings before the 1st Respondent are a nullity and should be quashed along with the consequent order dated 7th February 2002 (IR3) imposing on the petitioner a sentence of 120 days of imprisonment in addition to dismissal from the Sri Lankan Navy with disgrace. It follows that the mandamus prayed for directing the respondents to re-enlist the petitioner to the rank of Petty Officer and to pay him back wages and other allowances for the relevant period should be allowed. Court accordingly makes order granting the writs of *certiorari* and *mandamus* as prayed for by the petitioners in prayers (c), (d) and (e) to the petition. This order will not preclude the respondents from commencing fresh proceedings in accordance with law with respect to any breach of discipline or misconduct that may have been committed by the petitioner. In all the circumstances of this case, the Court makes no order for costs

APPOINTMENT OF PRESIDENT'S COUNSEL

At the Bar Council Meeting held on 26th June 2004, Mr. T. G. Gooneratne stressed the need for the BASL to take immediate steps to ensure that the guidelines which was formulated by the Special Committee which comprised Mr. Desmond Fernando, P.C., Mr. C.F. Sethukavalar, P.C., Mr. Hemantha Warnakulasuriya where they clearly laid down the guidelines to be followed and acted upon, namely that such an Attorney-at-Law should have been in active practice for over 20 years at the Bar, acquired eminence, learned in the law, commands the highest integrity and who are acceptable to the Bar. He should also be an income tax payer and his income particulars should also be submitted. He said that we must review the matter The Hon. Chief Justice, the Attorney General, the Hon. President of the Court of Appeal, the President of the BASL should be consulted in these appointments. Mr. Daya Perera, P.c. endorsed the views expressed by Mr. Gooneratne.

It was decided to send the suggestions forwarded by the Inner Bar Committee to the Hon. Chief Justice, Hon. Attorney-General and to the other authorities mentioned by Mr. T.G. Gooneratne for necessary action.