THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for Special Leave to Appeal against judgment of Court of Appeal dated 08.08.12 in Case No. CA (PHC) Appeal 37/2001 and in the High Court (Kandy) of the Central Province Case No. Certi 42/97.

Solaimuthu Rasu,

Dickson Corner Colony,

Stafford Estate,

Ragala,

Halgranaoya.

Petitioner-Appellant

S.C. Appeal No. 21/13

S.C: Spl. LA 203/ 12

CA/PHC/Appeal No. 37/2001

HC/CP Certi. 42/97

Vs.

1. The Superintendent

Stafford Estate,

Ragala,

Halgranaoya.

2. S.C.K. De Alwis

Consultant/Plantation Expert,

Plantation Reform Project,

Ministry of Plantation Industries,

Colombo 04.

3. The Attorney-General, Attorney-General's Department,

Colombo 12.

Respondent-Respondents

AND NOW BETWEEN

1. The Superintendent
Stafford Estate,
Ragala,
Halgranaoya.

2. S.C.K. De Alwis
Consultant/Plantation Expert,
Plantation Reform Project,
Ministry of Plantation Industries,
Colombo 04.

3. The Attorney-General, Attorney-General's Department,
Colombo 12.

Respondents-Respondents-Petitioners

Vs.

Solaimuthy Rasu,
Dickson Corner Colony,
Stafford Estate,
Ragala,
Halgranaoya.

Petitioner -Appellant- Respondent

BEFORE: : Mohan Pieris, P.C., C.J.,
Sripavan, J.
Wanasundera, P.CJ.

COUNSEL : Manohara de Silva, P.C. with Palitha Gamage for the 1st Respondent-Respondent Petitioner.

Gomin Dayasiri with Palitha Gamage and Ms. Manoli Jinadasa and Rakitha Abeygunawardena for the 2nd Respondent-Respondent-Petitioner.

Y.J.W. Wijayatillake, P.C. Solicitor General with Vikum de Abrew, S.S.C. And Yuresha Fernando, S.C. for the 3rd Respondent- Respondent-Petitioner.

M.A. Sumanthiran with Ganesharajah and Rakitha Abeysinghe for the Petitioner Appellant-Respondent.

WRITTEN SUBMISSIONS By the 2nd Respondent Petitioner on: 24th July 2013 and 23rd August 2013.

FILED : By the 3rd Respondent - Respondent Petitioner on: 13th March 2013 and 25th July 2013

ARGUED ON : 11th July 2013

17th July 2013

DECIDED ON : 26th September 2013

Mohan Pieris, PC CJ

This is an application for special leave to appeal from the judgment of the Court of Appeal dated 08.08.12 wherein the Court of Appeal set aside the judgment of the Provincial High Court dated 25.10.2000. I have read in draft the judgment of my brother Sripavan J and while I agree with his reasoning and conclusion on the matter, I would set down my own views on the question of law before us.

The instant application before us raises important questions of law and at the inception of the judgment it is pertinent to observe that the Respondent-Respondent-Petitioners (hereinafter called and referred to as "Petitioners") obtained special leave from this Court on the following two questions -

(i) Did the Court of Appeal err by deciding that the Provincial High Court has jurisdiction to hear cases where dispossession or encroachment or alienation of State Lands is/are in issue?

(ii) Did the Court of Appeal err by failing to consider whether there is a right of appeal against the Order of the High Court dismissing the application in limine for want of jurisdiction?

Be that as it may, when this matter came up before us on 17.07.13, all Counsel agreed that they would make their submissions only on the first question of law and accordingly this Court proceeds to make its determination on the first question.

The Facts

The 2nd Petitioner the competent authority initiated proceedings to recover a State Land in respect of an illegal occupation in the Magistrate's Court of Nuwara Eliya in terms of the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979. The Petitioner-Appellant-Respondent (hereinafter referred to as the "Respondent") filed an application in the High Court of the Province holden in Kandy praying for a writ of certiorari to quash the quit notice filed in the case. The 2nd Petitioner filed statement of objections and affidavit, on 27.02.96 and raised the following preliminary objections.'

(a) The said land is a State Land.

(b) The second Petitioner, as the duly designated competent authority in terms of the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 issued quit notice dated 7.10.1997 to the Respondent by virtue of Section 3 of the said Act;

(c) Thus the Respondent has no legal basis to invoke the writ jurisdiction of the Provincial High Court;

(d) The High Court of the Province stands denuded of jurisdiction to hear and determine the matter as the subject of the action pertains to State lands and the subject does not fall within the Provincial Council List - namely List I.

The Provincial High Court, after hearing the oral submissions and written submissions of the parties, by Order dated 17.11.2000, held that it had no jurisdiction to hear and determine the application and upheld the preliminary objection.

Thereupon the Respondent preferred an appeal dated 22.11.2000 to the Court of Appeal on the basis that the reasoning of the Learned High Court judge was erroneous vis-à-vis the provisions of the Constitution of the Democratic Socialist Republic of Sri Lanka.

It was the contention of the Respondent that the Provincial High Court had misdirected itself in holding that the Court was devoid of jurisdiction to inquire into and determine the application for writs in respect of notices filed under the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 as amended. By its judgment dated 08.08.12 the Court of Appeal states, inter alia, as follows

(i) The subject of State Land is included in Appendix II of the "Provincial Council List" (List I) to the 9th Schedule to the 13th Amendment to the Constitution;

(ii) Therefore State Land becomes the subject of the Provincial Council List even though State Land continues to vest in the Republic;

(iii) Therefore, the High Court of the Provinces has the power to hear and determine applications for prerogative remedies filed to quash quit notices issued under the State Lands (Recovery of Possession) Act No 7 of 1979 as amended.

The Court of Appeal in arriving at its conclusion placed reliance on the Determination of this Court dated 10.02.2013 on the Bill titled "Land Ownership "(S.D. No. 26/2003 - 36/2003). The Court of Appeal has also alluded to the judgment of the Supreme Court in Vasudeva Nanayakkara v Choksy and Others (John Keells case) {2008} I Sri.LR 134 wherein it was stated - "a precondition laid down in paragraph 1:3 is that an alienation of land or disposition of State Land within a province shall be done in terms of the applicable law only on the advice of the Provincial Council. The advice would be of the Board of Ministers communicated through the Governor, the Board of Ministers being responsible in this regard to the Provincial Council." In the end after having stated that it was bound by the principles laid down in the judicial decisions, the Court of Appeal concluded that State Land becomes the subject of the Provincial Council.

It is from the said judgement of the Court of Appeal that the petitioners have preferred this appeal and submissions of Counsel were addressed to us, as I have stated at the beginning of this judgment, on the question of law-

Did the Court of Appeal err by deciding that the Provincial High Court has jurisdiction to hear cases where dispossession or encroachment or alienation of State lands is/are in issue?

It remains now for this Court to engage in an analysis of the Constitutional provisions and the judicial precedents to determine whether the Court of Appeal came to the correct finding when it held that the Provincial High Court could exercise writ jurisdiction in respect of quit notices issued under the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 as amended.

The resolution of this question necessarily involves an examination of the nature and content of the subject matter of State Land that lies with a Province by virtue of the 13th Amendment to the Constitution and it is quite convenient to begin this examination by looking at the apportionment of land as delineated by the terms of the Supreme Law of the country that are found in the 13th Amendment. The 13th Amendment to the Constitution refers to State Land and Land in two different and distinct places. In my view the entirety of State Land is referred to in List II (Reserved List) and it is only from this germinal origin that the Republic could assign to the Provincial Councils land for whatever purposes which are deemed appropriate. It is therefore axiomatic that the greater includes the lesser (Omne majus continent in se minus) and having regard to the fact that in a unitary state of government no cession of dominium takes place, the Centre has not ceded its dominium over State Lands to the Provincial Councils except in some limited circumstances as would appear later in the judgment.

It is only from a reserve or pool or a mass that a portion could be translocated and if the entirety of state land is not assigned but a portion with conditions, the se are the attendant circumstances that would demonstrate an unequivocal intention not to cede what belongs

to the Republic. One would be driven to the conclusion that the subject matter in its entirety would belong to the dominant owner of property.

If there is a reservation in List II, the inescapable inference follows that what is reserved to the Republic could only be the larger entirety out of which the 13th Amendment chose to assign some portions of State Land to the Provincial Councils and the pertinent question before us is the parameters with which of what is entrusted to the Provinces. All this has to be gathered from the settlement that the 13th amendment chose to make in 1987 and one cannot resile from their explicit terms of the 13th Amendment and there must be deference to that intendment. If the Constitution contains provisions which impose restraints on institutions wielding power, there cannot be derogations from such limitations in the name of a liberal approach. It must be remembered that a Constitution is a totally different kind of enactment than ordinary statute. It is an organic instrument defining and regulating the power structure and power relationship; it embodies the hopes and aspirations of the people; it projects certain basic values and it sets out objectives and goals. I now proceed to indulge into an inquiry as to the power structure and power relationship as delineated in the 13th Amendment to the Constitution.

Teleological as it may appear, one has to go from List II to List I. As the Counsel for the 2nd Petitioner submitted, Land in Sri Lanka consists of lands belonging to individuals, corporate bodies, unincorporated bodies, charitable, social institutions, local authorities, temples, kovils, churches, mosques and trusts etc. The bulk of the land is vested in the state as state lands and are held by the state and/or its agencies.

State can make grants absolutely and more often it does so provisionally with conditions attached or by way of leases, permits, licenses as per provisions governing disposition of state lands. Such conveyances can be made by the State to any person/organization entitled to hold land including Provincial Councils. All this partakes of the dominium that the State enjoys in having ownership and its attendant incidents of ownership such as its use and consistent with these characteristics it is pertinent to observe that the Constitution unequivocally in List II and in Appendix II has placed State Lands with the Centre, "Except to extent specified in item 18 of List I" [quoted from List II]. Thus the Constitution as far as State Land is concerned traverses from List II via List I to final destination Appendix II.

List II and List I

In List II (Reserved) it reads as follows:

"State Lands and Foreshore except to the extent specified in item 18 of List I"

In List I (Provincial Council) appearing in item 18 the sentence reads as follows

"Land - Land that is to say, rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement to the extent set out in Appendix II"

A perusal of the above two provisions unequivocally points to the fact that State Lands as referred to in List II embraces the comprehensive entirety of the corpus of State Land out

of what is carved out Land. It is not just land but land that is to say, rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement to the extent set out in Appendix II"

List II connotes the greater mass of State Land that includes List 1 as the lesser. But what has been given as land for purposes to be gathered from Appendix II is itself circumscribed by the qualification

-That is to say... One begins from the larger namely List II out of which List I originates. What is allocated remains embedded in item 18 of List I which demarcates the extent delivered to Provincial Councils.

As contended by the Learned Counsel for the 2nd Petitioner, the use of the phrase "that is to say" carries with it the notion that what is allocated as land is all that is specified in item 18 and nothing more. Having set out a narrow scope of the corpus of land in item 18, the Constitution in the same breath answers the question as to what extent land powers have been extended to Provincial Councils. The next phrase delineates and demarcates the extension - "rights in and over land, land settlement, Land tenure, transfer and alienation of land, land use, land settlement and land improvement to the extent set out in Appendix II".

Thus the Constitution, in item 18 of List I circumscribes the land powers in that there are two terminals between which one encompasses the land given to provincial councils. The first terminal,

namely the use of the phrase "that is to say" indicates the limited powers conferred on the Provincial Councils and the second terminal "to the extent set out in Appendix II" indicates as to how far Provincial Councils can go in exercising the land powers that have been bestowed namely - "rights in and over land, Land settlement, land tenure, transfer and alienation of Land, Land use, land settlement and land improvement."

I now proceed to examine Appendix II which is an annexe to List 1.

We have seen that it was the intention of the framers of the Constitution to give an exalted position to State Lands in List II and leave it in the hands of the Republic and deliver a specified portion of State Lands to the Provinces namely - "rights in and over land, land settlement, land tenure, transfer and alienation of Land, land use, land settlement and land improvement." and call it "Land" in List I The lesser nomenclature "Land" in List I connotes the subsidiarity of the role that lands assigned to Provincial Councils play and it becomes patently clear upon a reading of Appendix II which brings out the purposes for which land has been assigned to Provincial Councils.

Appendix II

Appendix II begins with an unequivocal opener -"State Land shall continue to vest in the Republic and may be disposed of, in accordance with Article 33 (d) and written laws governing the matter. "This peremptory declaration is a pointer to the fact that State Land belongs to the Republic and not to a Province. The notion of disposition of State Land in accordance with Article 33 (d) and written laws governing the matter establishes beyond

doubt that dominium over all "State Land" lies with the Republic and not with the Provincial Councils. In fact the relevant portion of Article 33 (d) would read as follows -

"33 (d) - to keep the Public Seal of the Republic, and to make and execute under the Public Seal, the acts of appointment of the Prime Minister and other Ministers of the Cabinet of Ministers, the Chief Justice and other Judges of the Supreme Court, such grounds and disposition of lands and immovable property listed in the Republic as he is by law required or empowered to do, and use the Public Seal for sending all this whatsoever that shall pass the Seal."

Limited Extents of Powers Over Lands

Having set out the overarching dominium of State Lands with the Centre, Appendix II sets out special provisions which would qualify as further limitations on State Lands assigned to Provincial Councils. These special provisions apart from demonstrating the limited extents of Provincial Councils over Land also display unmistakably that State Land continue to be a subject of the Centre.

Having grafted the brooding presence of the Republic on all State Lands in List II, List I and then the Appendix II and subject to these pervasive provisions, State Land is declared to be a Provincial Council Subject in the second paragraph of Appendix II but that declaration is only explanatory of the purposes for which the Provincial Councils have been assigned with lands. Those purposes are evident in the special provisions 1.1, 1.2 and 1.3 of Appendix II.

These special provisions also strengthen the position that State Lands continue to be a subject located in the Centre.

Special Provision 1.1 - State Land required by the Government of Sri Lanka

State land required for the purposes of the government in a Province, in respect of a reserved or concurrent subject may be utilised by the Government in accordance with the laws governing the matter. The Government shall consult the relevant Provincial Council with regard to the utilisation of such land in respect of such subject.

The consultation specified in this special provision would not mean that the Government has to obtain the concurrence of the relevant Provincial Council. State Land continues to vest in the Republic and if there is a law as defined in Article 170 of the Constitution that governs the matter it is open to the Government to make use of the

State Land in the province of the purposes of a reserved or concurrent subject. Consultation would mean conference between the Government and the Provincial Council to enable them to reach some kind of agreement -S.P. Gupta v Union of India A.I.R 1982 SC 140. Such consultation would not detract from the fact that that particular State Land which the government requires continues to vest in the Republic.

Special Provision 1.2

Government shall make available to every Provincial Council State Land within the Province required by such Council for a Provincial Council subject. The Provincial

Council shall administer, control and utilize such State Land, in accordance with the laws and statutes governing the matter.

We saw in item 18 of List 1 that the Provincial Councils have "rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement." These rights, as item 18 of List I itself states, are subject to the special provision 1.2 of Appendix II.

The resulting position, on a harmonious interpretation of the Constitution would be that when the State makes available to every Provincial Council State Land within the Province required by such Council for a Provincial Council subject, the Provincial Council shall administer, control and utilize such State Land, in accordance with the laws and statutes governing the matter.

In other words, Provincial Councils in exercising "rights in and over Land, land settlement, land tenure, transfer and alienation of land, land use, Land settlement and land improvement to the extent set out in Appendix II (conferred by List I) are limited to administering, controlling and utilizing such State Lands as are given to them. In terms of Article 1.2 State Land is made available to the Provincial Council by the Government. In the background of this constitutional arrangement it defies logic and reason to conclude that State Lands is a Provincial Council Subject in the absence of a total subjection of State Lands to the domain of Provincial Councils.

A perusal of the special provision 1.3 also strengthens the view that State Lands do not lie with Provincial Councils.

Special Provision 1.3

Alienation or disposition of the State Land within a Province to any citizen or to any organization shall be by the President, on the advice of the relevant Provincial Council in accordance with the laws governing the matter.

The provision once again emphasizes the overarching position inherent in the 13th Amendment to the Constitution that State Land will continue to vest in the Republic and may be disposed of by the President in accordance with Article 33 (d) and written laws governing the matter. The use of the definite article "the" before the word State Land in this provision conclusively proves that the state land referred to in this provision is confined to the land made available to the Provincial Council for utilization for a Provincial Council subject by virtue of 1.2. If after having made available to a Provincial Council a state land for use, the government decides to dispose of this land to a citizen or organization, the government can take back the land but an element of advice has been introduced to facilitate such alienation or disposition. In the same way the Provincial Council too can initiate advice for the purpose of persuading the government to alienate or dispose of the land made available for a worthy cause. It has to be noted that the absence of the word "only" before the word advice indicates the non-binding nature of the advice the Provincial Council proffers. Thus these inbuilt limitations on the part of the Provincial Council establish beyond scintilla of doubt that the Centre continues to have State Lands as its subject and it does not fall within the province of Provincial Councils.

This Court observes that if the advice of the Provincial Council is non binding, the power of the President to alienate or dispose of State Land in terms of Article 33 (d) of the Constitution and other written laws remains unfettered. In the circumstances I cannot but disagree with the erroneous proposition of the law which this Court expressed in the determination on the Land Ownership Bill (SD Nos. 26 - 36/2003) that the power of disposition by the President in terms of Article 33 (d) has been qualified by 1.3 of Appendix II. This view expressed in that determination is patently in error and unacceptable in view of the overall scheme of the 13th amendment which I have discussed herein. In the same breath the observations of the Supreme Court in Vasudeva Nanayakkara v Choksy and Others (John Keells case) {2008} 1 Sri.LR 134 that "a precondition laid down in paragraph 1:3 is that an alienation of land or disposition of State Land within a province shall be done in terms of the applicable law only on the advice of the Provincial Council" is also not supportable having regard to the reasoning I have adopted in the consideration of this all important question of Law. This reason is a non sequitur if one were to hold the advice of the Provincial Council binding having regard to the absence of the word "only" in 1.3 and the inextricable nexus between 1.2 and 1.3.

It is unfortunate that the Court of Appeal fell into the cardinal error of holding that the Provincial Council has jurisdiction to hear and determine applications for discretionary remedies in respect of quit notices under the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 as amended. This wrong reasoning of the Court of Appeal is indubitably due to the unsatisfactory treatment of the provisions of the 13th Amendment that resulted in patently unacceptable precedents that need a revisit in the light of the fact neither Counsel nor the Bench in the cases cited above has subjected the relevant provisions to careful scrutiny.

Be that as it may, I would observe that the national policy on all subjects and functions which include State Lands in terms of List II is also dispositive of the question within whose competence State Lands lie. Paragraph 3 of Appendix II which provides for the establishment of a National Land Commission by the Government declares in 3.1 that the National Land Commission will be responsible for the formulation of national policy with regard to the use of State Land. It is apparent that Provincial Councils will have to be guided by the directions issued by the National Land Commission and this too reinforces the contention that State Lands lie with the Centre and not with Provincial Councils.

Further there are other provisions that indicate that State Lands lie within the legislative competence of the Centre. Article 154 (G) (7) of the Constitution provides that a Provincial Council has no power to make statutes on any matter set out in List II (Reserved List). One of the matters referred to in that List is "State Lands and Foreshore" except to the extent specified in item 18 of List I. Thus, it is within the legislative competence of Parliament to enact laws in respect of "State Lands" bypassing the powers assigned with Provincial Council, on the premise that the subjects and functions not specified in List I and List II fall within the domain of the Reserved List. The Provincial Councils are also expressly debarred from enacting statutes on matters coming within the purview of the Reserved List.

All these features I have adumbrated above features redolent of the unitary nature of the state. Sharvananda C.J in Re The Thirteenth Amendment to the Constitution (1987) 2 Sri. LR 312 at p 319 referred to the two essential qualities of a Unitary State as (1) the supremacy of the Central Parliament and (2) the absence of subsidiary sovereign bodies. He analyzed the provisions of the 13th Amendment Bill in order to find out whether the Provincial Council system proposed in the Bills was contrary to these two principles. He referred to the essential qualities of a federal state and compared them with those of the unitary state. It is pertinent to recall what he stated in the judgment.

The term "Unitary" in Article 2 is used in contradistinction to the term "Federal" which means an association of semiautonomous units with the distribution of sovereign powers between the units and the Centre. In a Unitary State the national government is legally supreme over all other levels. The essence of a Unitary State is that this sovereignty is undivided - in other words, that the powers of the Central Government power are unrestricted. The two essential qualities of a Unitary State are (1) the supremacy of the Central Parliament and (2) the absence of subsidiary sovereign bodies. It does not mean the essence of subsidiary lawmaking bodies, but it does mean that they may exist and can be abolished at the discretion of the central authority. It does, therefore, mean that by no stretch of meaning of words can subsidiary bodies be called subsidiary sovereign bodies and finally, it means that there is no possibility of the Central and the other authorities come into conflicts with which the Central Government has not the legal power to cope….

On the other, in a Federal State the field of government is divided between the Federal and State governments which are not subordinate one to another, but are co-ordinate and independent within the sphere allotted to them. The existence of co-ordinate authorities independent of each other is the gist of the federal principle. The Federal Government is sovereign in some matters and the State governments are sovereign in others. Each within its own sphere exercises its powers without control from the other. Neither is subordinate to the other. It is this feature which distinguishes a Federal from a Unitary Constitution, in the latter sovereignty rests only with the Central Government.

It is my considered view that the reasoning I have adopted having regard to structure of power sharing accords with the gladsome jurisprudence set out as above by Sharvannda C.J.

Having adopted the above analysis and in light of the structure and scheme of the constitutional settlement in the 13th amendment to the Constitution, the irresistible conclusion is that Provincial Council subject matter in relation to State Lands would only mean that the Provincial Councils would have legislative competence to make statutes only to administer, control and utilize State Land, if such State Land is made available to the Provincial Councils by the Government for a Provincial Council subject. As I pointed out above, if and when a National Land Commission is in place, the guidelines formulated by such Commission would govern the power of the Provincial Councils over the subject matter as interpreted in this judgement in relation to State Lands.

When one transposes this interpretation on the phrase "any matter set out in the Provincial Council List" that is determinative on the ingredient necessary to issue a writ in the Provincial High Court in relation to State Land, the vital precondition which is

found in Article 154P 4 (b) of the Constitution is sadly lacking in the instant case. In terms of that Article, a Provincial Council is empowered to issue prerogative remedies, according to law, only on the following grounds –

(a) There must be a person within the province who must have exercised power under

(b) Any law or

(c) Any statute made by the Provincial Council

(d) In respect of any matter set out in the Provincial Council List.

No doubt the Competent authority in the instant exercised his power of issuing a quit notice under a law namely State Lands (Recovery of Possession) Act as amended. But was it in respect of any matter set out in the Provincial Council List? Certainly the answer to the question must respond to the qualifications contained in 1.2 of Appendix II namely administering, controlling and utilizing a State Land made available to a Provincial Council. The power exercised must have been in respect of these activities. The act of the Competent authority in issuing a quit notice for ejectment does not fall within the extents of matters specified in the Provincial Council List and therefore the Provincial High Court would have no jurisdiction to exercise writ jurisdiction in respect of quit notices issued under State Lands (Recovery of Possession) Act as amended.

In the circumstances the Court of Appeal erred in law in holding that the Provincial High Court of Kandy had jurisdiction to issue a writ of certiorari in respect of a quit notice issued under State Lands (Recovery of Possession) Act as amended. The order made by the Court of Appeal dated 08.08.12 is set aside and the order of the Provincial High Court of Kandy dated 25.10.2000 is affirmed.

The question of law considered by this Court is thus answered in the affirmative.

Mohan Pieris

Chief Justice