

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA**

In the matter of an application for mandate in
the nature of writ of Certiorari in terms of
Article 140 of the Constitution.

Lional Benjamin Goonathilaka,
No 35/25 Green field Park,
Madiwela,
Kotte.

Petitioners

C.A. Writ Application No: 738/2008

Vs

1. Hon. Attorney General,
Attorney General Department,
Colombo 12.
2. Minister of Education
'Isurupaya' Palawatta,
Battaramulla.
3. The Secretary,
Ministry of Education
'Isurupaya' Palawatta,
Battaramulla.
4. Ministry of Land and Land Development,
No. 80/5, "Govijana Mandiraya",
Rajamalwatta Road Battaramulla.
5. The Secretary,

Ministry of Land and Land Development,
No. 80/5, "Govijana Mandiraya",
Rajamalwatta Road Battaramulla.

6. District Land Officer,
Government Agent's Office,
Kachcheri, Galle.
7. Minister of Social Services,
No. 61, Isipathana Mawatha,
Colombo 5.
8. Secretary,
Ministry of Environmental Affairs
No.82, "Sethsiripaya",
Rajamalwatta Road,
Battaramulla.

Respondents.

BEFORE : S. SRISKANDARAJAH, J.
COUNSEL : S.A.Parathalingam, PC with K.S.Ratnavel and
S.R.R.Samarokoon
for the Petitioner.
: Deepthi Tilakawardana SC ,
for the Respondents.
Argued on : 24.11.2010
Decided on : 18.01.2011

S.Sriskandarajah, J,

The Petitioner is the owner of the land described as lot No 1,2 and 3 in Plan No1324 dated 12.07.1978 situated within the Gramasevaka Division of Kitulampitiya in the

District of Galle. The Petitioner was informed in 1973 that the Ministry of Education is making preparation to acquire the said land. On a request made by the Minister of Education to acquire a land for the Kithulampitiya School by his letter of 25th July 1973, the Minister of Land after satisfying himself that the land is needed for a public purpose directed that a notice under Section 2 of the Land Acquisition Act as amended be published. Accordingly a notice under Section 2 of the said Act was exhibited in the said land on 6th August 1973. The Minister after satisfying that the said land is suitable for the said purpose published a notice under Section 4(3) of the said Act. By this notice the Petitioner was given an opportunity to tender his objection. Even though the Petitioner failed to attend the objection inquiry his objection set out in the letter dated 16th April 1974 was taken into consideration. The Minister thereafter made a declaration on the 19th of November 1976 in terms of Section 5 of the said Act that the said land is needed for the said public purpose and it was published in the news papers and in the Government Gazette.

On a request made by the Minister of Education that there was an urgent need to take possession of the said land, the Minister in charge of the subject of land upon being satisfied of the urgent need to take possession of the said land made order in terms of proviso (a) of Section 38 of the Land Acquisition Act as amended. The said order was published in the Gazette Extraordinary No 249 dated 21st January 1977. Thereafter Section 7 notice was published and Section 9 inquiry was held to determine the payment of compensation. The Petitioner was paid compensation and the Petitioner admitted that he accepted the compensation under protest.

In this application the Petitioner is seeking a writ of certiorari to quash the said order of acquisition made on 21st of January 1977 and a mandamus to hand over possession of the said land.

The Petitioner contended that the said land was not used for the specific purpose for which it was acquired by the state namely for the purpose of the development of Ananda Maha Vidyalaya. The Petitioner further contended that the Ministry of Environmental Affairs on 1st July 2008 laid foundation for the construction of a building for the use of the said Ministry and this was nothing to do with the "public purpose" for which the said land was acquired by the state. The Petitioner's position is that since the said land has not been utilised for the "public purpose" for which it had been acquired, the said land ought to be returned to the Petitioner.

The Respondents submitted that the said land is presently being used as the play ground of the said school. The Zonal Director of Galle by his letter of 17th November 2003 has informed the Respondents that the said land is required for the development of the school.

The notice under Section 2 was published in 1973 and the vesting order in terms of section 38 proviso (a) was made in 1977 but the proceedings to challenge the said order was instituted in this Court was in September 2008. The question whether a land should be acquired or not is one of policy to be determined only by the Minister and in this acquisition the procedures laid down in the Land Acquisition Act was properly followed and that there is no illegality in the acquisition process. The Petitioner could only challenge the order of acquisition only on the ground that there is no urgency. An order made under Section 38 proviso (a) of the Land Acquisition Act by the Minister can only be made in case of urgency. This decision can be reviewed by court by way of a writ of certiorari only if the Petitioner satisfies the court that there was in fact no urgency.

Marie Indira Fernandopulle and Another, v E. L. Senanayake, Minister of Lands and Agriculture, 79 (II) N.L.R 115. The Supreme Court held:

"No doubt primarily the Minister decided urgency. He it is who is in possession of the facts and his must be the reasoning. But the Courts have a duty to review the matter. In this case the need for a playground and a farm had been mooted as far back as 1974. Political influences and extraneous forces delayed the take over of the land.

Four years dragged on and school's needs were still waiting to be met. The delay and the need decided the urgency. These being the facts the petitioner has failed to satisfy me that there was no urgency. I would therefore dismiss the application with costs."

The documents and affidavits submitted by the Respondents shows that the school urgently needs the land for its development and part of the land is already is being used for a play ground. The Petitioner has failed to prove that there is no urgency. On the other hand the Petitioner cannot challenge the said order of acquisition on the ground that there is no urgency after lapse of eleven (11) years and after participating in the compensation inquiry. The Courts have over and again held in, *President of Malalgodapitiya Co-operative Society v Arbitrator of Co-operative Societies* 51 N.LR167, *Gunasekera v Weerakoon* 73 N.L.R262, *Atula Ratnayake v Lieut. Col. G. R. Jayasinghe and four Others* 78 N.L.R 35, and *Biso Menika vs. Cyril de Alwis and Others* 1982 (1) Sri L.R 368 that delay vitiate a remedy by way of writ of certiorari if there is no illegality. Therefore the Petitioners application for a writ of certiorari is dismissed as the petitioner has not established any illegality.

The Petitioner also has prayed for a mandamus against the Respondents directing them to hand over possession of the said land. As the acquisition is in order the possession of the land can only be handed over to the Petitioner by divesting the said lands in terms of Section 39A (1) read with 39A (a) and (b). Under Section 39A (2) the Minister shall prior to making a divesting order under subsection (1) has to satisfy himself with those matters that are provided in sub sections (2)(a),(b),(c) and (d). If the Minister is not satisfied with one of the said matters he cannot divest the property. In other words the Minister cannot divest the property unless he is satisfied with all four matters stated therein. In this instant acquisition the possession of the land was taken over by the state. In addition the Respondents also submitted that land is being used for the playground of the school. In *De Silva v Atukorale, Minister of Lands, Irrigation and Mahaweli*

Development and Another [1993] 1 Sri L.R 283 at 292 Justice Fernano J with Deeralatne J and Wadugodapitiya J agreeing observed:

“that the amending Act was enacted in 1979 to enable relief to be granted even where possession had been taken. The long title of the Act refers to land acquired “without adequate justification”. The learned Deputy Solicitor General contended that this referred only to the point of time at which the land was initially acquired. I cannot agree. The Act contemplates a continuing state of things; it is sufficient if the lack of justification appears at any subsequent point of time; this is clear from paragraph (b) of section 39A (2) : if the land has not been used for a public purpose after possession has been taken, there is then an insufficiency of justification; and the greater the lapse of time, the less the justification for the acquisition. If compensation has been paid or improvements have been made, then despite the inadequacy of justification, divesting is not permitted.”

In this instant case the compensation had been paid and the land is being used for a playground of the school. In these circumstances this court cannot issue a writ of Mandamus to divest the said land.

Therefore this court dismisses this application without costs.

Judge of the Court of Appeal