

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

Mawathagama Pradeshiya Sabha
Rambukkana Road,
Mawathagama.

PETITIONER

C.A 285/2008 (Writ)

Vs.

1. Hon. Janaka Bandara Tennakoon
Minister of Lands and Land Development
Ministry of Lands and Land Development
80/5, Rajamalwatte Avenue,
Battaramulla.
2. Mr. T. Asoka Peiris
Secretary,
Minister of Lands and Land Development
Ministry of Lands and Land Development
80/5, Rajamalwatte Avenue,
Battaramulla.
3. Basnayake Nilame Maha Vishnu Devalaya,
Maha Vishnu Devalaya,
Kandy.
4. The Divisional Secretary
The Divisional Secretariat,
Mawathagama.

5. Palitha Sarath Kumara
Tissa Timber Mill,
Kandy Road,
Mawathagma.
6. R.D. Sirisena
Oththe Kade
Kahapathwala.
7. S.S.H. Auto Mobile and Investment
Company (Pvt.) Ltd.,
8th Mile Post,
Kandy Road,
Mawathagma.

RESPONDENTS

BEFORE: Anil Gooneratne J. &
Deepali Wijesundera J.

COUNSEL: Nihal Jayamanne P.C., with Anandalal Nanayakkara and M. Jayamanne.
Instructed by Gaithri de Silva for Petitioner
W. D. Weeraratne for 5th & 6th Respondents
W. Dayaratne P.C. with R. Jayawardena for 7th Added Respondent
Chaya Sri Nammuni S.C. for 1st – 3rd Respondents

ARGUED ON: 22.05.2013

DECIDED ON: 30.08.2013

GOONERATNE J.

The Petitioner in this application is the Mawathagama Pradeshiya Sabha. A Writ of Certiorari and Prohibition has been sought to quash the divesting order marked 'X1' (divesting of land which is the subject of this application), contained in gazette dated 28.2.2007. Prohibition is sought more particularly, prohibiting the divestiture of the entirety or part of the acquired land being lot 'E' in plan P13. Certain other interim relief as well as an order to hand over possession as in sub paragraph (c) of the prayer to the petition are also sought in this application. I would at the very outset refer to the facts of this case as presented to court in the affidavit of the Petitioner and the submissions of learned counsel for Petitioner.

The land in question is described as "Rajawatte" was acquired in terms of the Land Acquisitions Act on or about 1986 (vide Gazette under Section 38 marked P1A and shown in plan P1B). Assistant Government Agent, Mawathagama took over possession of the land in question and had handed over the said lot 'E' in plan P1B to the Pilessa Development Council (P2). Petitioner became the successor of the above council with the enactment of Act No. 15 of 1987. Petitioner pleads that it has carried out several improvements and

developments on the land in question, for the benefit of the people within the area of the Petitioner's Pradeshiya Sabha. Petitioner state a public library was set up for the use of the public and it is one of the best libraries in the Kurunegala District (Grade II library). The land in question, borders the Kurunegala – Kandy road. The original acquisition remain unchallenged. By documents P3A & P3B it is shown that the Petitioner was engaged in a concrete work industry and that it was shifted to another part of the same location. Petitioner's position is that until January 2008 Petitioner improved and developed the said land and was in possession of the entirety of lot 'E' in the above plan and carried on the library and concrete works as stated above. P5 indicates it was the only land owned by the Petitioner within the Mawathagama town. The grievance of the Petitioner commence with the receipt of letter P4 and P4a. The 4th Respondent informed the Petitioner that an inquiry was being held on 10.8.2006 by the Parliamentary Committee on Public Petitions into a complaint made by the 5th Respondent and a request to send Petitioners representation. P4 refer to providing alternate land and there was nothing about the divestiture. The events that took place thereafter need to be reproduced verbatim in the manner stated in the Petitioner's written submissions as follows:

- (a) Accordingly, the Secretary of the Petitioner Sabha and the Director, Works of the Petitioner were present before the said Committee Public Petitions on 10.08.2006 and had informed the said Parliamentary Committee on Public Petitions of the development that had been carried out on the said land by the Petitioner. However, the Petitioner states that, at the said inquiry the said Committee on Public Petitions, had arrived at a decision to recommend the divestiture of part of Lot E whilst retaining the portion of the land area upon which the said library was situated. Even though the inquiry was for the purpose of considering alternate land as per the letter P4.
- (b) The Chairman of the Petitioner Sabha and others immediately protested against the said decision. (In this respect, the attention of Your Lordship's Court is respectfully drawn to documents marked P5, P6 and P7A- PK
- (c) Thereafter by letter dated 11.09.2006 the Secretary Committee on Public Petitions has informed the Secretary, Ministry of Agrarian Services of the said decision i.e to pay the Complainant compensation in respect of the portion of land on which the Mawathagama Public Library is situated and divest the remainder of the said land (document annexed to the statement of Objections of the 1st Respondent – marked 1R2)
- (d) Thereafter by letter dated 04.10.2006 (1R2A) the Director Lands, has advised the Divisional Secretary, Mawathagama to inter alia subdivide the land and forward a copy to him accordingly. The Petitioner states that by this act the Respondents have sought to subdivide a single piece of acquired land with the intention of divesting part of it. This the law does not permit. It is further respectfully submitted that in carrying out the said arbitrary subdivision a great part of the land acquired has been identified for divestiture, and so divested with no justification whatsoever. The result of the said subdivision has been that, by simply drawing an arbitrary line, the vehicular access to the said library and part of the septic rank have fallen within the area to be divested and the land on which the concrete works of the Petitioner Sabha has been divested.
- (e) The 1st Respondent thereafter, with no notice to the Petitioner whatsoever and in total breach of the principles of natural justice and acting in an extremely arbitrary and

capricious and unlawful manner published an order purporting to be in terms of Section 39(A) of the Land Acquisition Act, divesting a part of Lot E acquired originally in 1986 and which until January, 2008 was in the possession of and being developed by the Petitioner. This is after the Petitioner had expended considerable resources in developing the said land and putting it to public purpose.

- (f) A copy of the Gazette Extraordinary No. 1486/17 dated 28.02.2007 containing the purported 'order of divestiture' in terms of Section 39A of the Land Acquisition Act is marked X. The said Order X identifies the divested portion of land as Lot No. 44 in the Revised Final Village Plan bearing No. 877 dated 08.01.2007 being 0.174 hectares in extent. A copy of the said revised plan dated 08.10.2007 is marked Y. It is respectfully submitted that, the Plan Y clearly indicates that there are two permanent buildings on the divested land (Lot No.44) and the legend to the said Plan clearly states that these permanent buildings are those constructed by the Mawathagama Pradeshiya Sabha – the Petitioner.

My attention is also drawn to paragraph 32 of the petition which deal with grounds that may be urged before this court. I would also include same in this judgment, since the case itself involves resorting to important provisions under the Lands Acquisitions Act, more particularly, 'divesting' of the land in dispute.

- (i) The requirements of Section 39A have not been fulfilled in the present instance and thus the said divestiture is ultra vires.
- (ii) The 1st Respondent has acted in gross violation of the provisions of the Land Acquisition Act and particularly Section 39A thereof.

- (iii) The 1st Respondent has failed to comply with the mandatory requirements of Section 39A (2) prior to making a Divesting Order in terms of the Land Acquisition Act.
- (iv) The 1st Respondent has unlawfully abdicated his rights and responsibilities in terms of the Land Acquisition Act and Section 39A (2) of the said Act in particular and had acted as a mere rubber stamp for the Committee on Public Petitions.
- (v) Had the 1st Respondent taken steps to ascertain whether the requirements of Section 39A (2) had been fulfilled prior to such divestiture the 1st Respondent would have come to know that the entirety of the land acquired in 1986 had been used for a public purpose by the Petitioner and that the Petitioner had effected improvements to the said land and that therefore the law did not permit the making of a divesting order in respect of such land.
- (vi) In any event the law does not permit a piecemeal divestiture in the nature of what had been carried out in the present instance.
- (vii) The divesting order and the handing over of possession has resulted in the demolishing of the concrete works thus causing immense harm and injury to the Petitioner and its constituents.
- (viii) In any event the 1st Respondent had failed to hold any inquiry into the matter and/or to grant the Petitioner a hearing prior to deciding upon such divestiture which action is arbitrary, capricious and against the principles of natural justice.
- (ix) Without prejudice to what is stated above the Petitioner further states that the 1st Respondent and/or the Committee on Public Petitions has acted on the basis of an objection and/or a request made by person/s who have no right, title or interest in respect of the land in question namely the 5th and/or 6th Respondent/s and that therefore too the said decisions are arbitrary, capricious and unlawful.
- (x) Therefore the Petitioner states that the said divestiture is bad in law and cannot be justified in law in any manner whatsoever.
- (xi) The Petitioner further states that in the circumstances, in terms of the law, this land could never have been divested.

The 1st Respondent, the Minister of Lands and Land Development pleads inter alia that the Petitioner is guilty of laches and that the Petitioner's application in law is misconceived and futile. In the pleadings there is reference to the Section 38A order (1R1) made in terms of the Land Acquisition Act. Document P4 is more or less admitted. It is also stated inter alia in the affidavit that upon receiving intimation in writing from the Committee on Public Petitions that the land in question, excluding the portions on which the public library had been constructed be divested, and the Divisional Secretary was informed by 1R2 and pursuant to which a Notice in terms of Section 39A(1) of the Act was published (1R3).

Paragraph 13 of the 1st Respondent's affidavit very clearly lays down the procedure adopted as regards the compensation inquiry under the Land Acquisition Act (1R4, 1R5) and the award made thereon (1R6). There is also a reference to the fact that by document P11B Committee on Public Petition had informed the 4th Respondent to divest the land in question except the portions of land on which the public library has been constructed. It is pleaded that the decision by the said Committee does not preclude the land in question being acquired again.

This court observes that the Lands Acquisition Act provides for acquisition of lands and also revocation of vesting orders, divesting of lands etc. There is a well recognized procedure spelt out in terms of the provisions of the Land Acquisition Act. Nowhere in the affidavit of the 1st Respondent it is pleaded that the 1st Respondent had followed the procedure laid down in the above Act as regards divesting of the land in question and the publication of the order under Section 39A of the Act. The Minister empowered to take steps under the above Act need to adopt and follow the prescribed criteria under which a divestiture had to take place. The affidavit of the Minister concerned does not give a clue as regards above. It is very apparent that the procedure that need to be adopted has not been followed in terms of the statute. In these circumstances no amount of submissions could rectify or cure the apparent defect.

We have also perused and considered the affidavit filed of record of the 5th Respondent. The 5th Respondent has filed pleadings and along with his affidavit and an answer had been filed and not the required objections. As a preliminary matter 5th Respondent plead delay, suppression of material facts, and non compliance of the Appellate Courts Procedure Rules. 5th Respondent specifically state in paragraph 6 of his affidavit that his land was acquired in 1986 and until year 2000 (14 years) no public purpose was carried out and thus

deprived him of an income. Several other averments are contained in his affidavit and in paragraph 30 an attempt is made to justify his position. This court observes that other than a mere bare statement the 5th Respondent's land was acquired in 1986 there is no other statement or material by way of documentary proof that is placed before this court to prove his title or entitlement to the property in question at any point of time. Nor any submissions made to this court as to whether 5th Respondent has any interest/right to the property in question. This court is of the view that both 5th & 6th Respondents are 'schemers' who very craftily made use of the State machinery and misled persons in authority only for their personal gains. I will deal with the above position of the 5th & 6th Respondents at a subsequent point in this judgment.

The journal entry of 16.6.2008, indicates that the 7th Respondent was added to this case. The subsequent journal entry of 30.6.2008 also shows that this court allowed an application for interim relief and accordingly interim relief was granted operative against the 7th Respondent as per sub paragraph 'F' of the prayer to the petition. The stay order as above had been extended by this court from time to time and such order extended till date of judgment. The land in question had been transferred by transfer deed P18 of 5.2.2008 by the 5th & 6th Respondents in favour of the 7th Respondents. Document P11A & P11B suggest

the modus operandi. The parliamentary Committee on Public Petitions have affirmed a decision to recommend divestiture and to hand over possession of the said land to the 5th & 6th Respondents. Letter P12 suggest the handing over of possession of the land to the 5th & 6th Respondents.

This court observes that it is very unfortunate that a transaction in the nature of a transfer deed (P18) had been executed in favour of the 7th Respondent. perusal of deed P18 indicates a very vague document prepared and executed in a haphazard manner. The so called deed P18 does not give any clue as to how title devolved on the transferor. In paragraph 4 (Pg 1) of the P18 merely states that the land had been divested and possession handed over to the transferor. By any stretch of imagination, this court cannot understand as to how 5th & 6th Respondents derive title to the land after divesting since previous ownership and or the devolution of title had not been specifically stated in the deed. What right, title or interest has the 5th Respondent and 6th Respondent derived, to the land in dispute, to execute the so called deed P18? The material placed before this court of possession of the 5th & 6th Respondents appear to be too artificial and unsatisfactory to be accepted. Before a court can accept as correct, a share in a property or entire ownership of the property in question, there must be clear and unequivocal proof of how the vendor became entitled to

the property or its share in question, and the transfer deed necessarily need to give such important and relevant details in the deed itself. The Proctor who prepared and attested the deed seems to have not acted diligently or for reasons best known to him prepared the deed in a haphazard manner.

The Land Acquisition Act makes provision for the acquisition of lands and servitudes for public purposes. The Act has several parts. Part V of the Act deals with possession and disposal. The Minister as defined in the Act (Section 65) plays a major role with certain powers vested in the Minister as regards acquisition, disposal and or divesting of the land so acquired. The Minister concerned in terms of the Act need to take certain statutory steps which are well defined and explained in the Statute. As such the Minister cannot deviate from such well established statutory provisions. By the Amendment Act No. 8 of 1979 the following new section was inserted immediately after Section 39 and it has the effect as Section 39A of the Statute.

- (1) Notwithstanding that by virtue of an Order under section 38 (hereafter in this section referred to as a "vesting Order") any land has vested absolutely in the State and actual possession of such land has been taken for or on behalf of the State under the provisions of paragraph (a) of section 40, the Minister may, subject to subsection (2), by subsequent Order published in the Gazette (hereafter in this section referred to as a "divesting Order") divest the State of the land so vested by the aforesaid vesting Order.

- (2) The Minister shall prior to making a divesting Order under subsection (1) satisfy himself that –
- (a) no compensation has been paid under this Act to any person or persons interested in the land in relation to which the said divesting Order is to be made;
 - (b) the said land has not been used for a public purpose after possession of such land has been taken by the State under the provisions of paragraph (a) of section 40;
 - (c) no improvements to the said land have been effected after the Order for possession under paragraph (a) of section 40 and had been made; and
 - (d) the person or persons interested in the said land have consented in writing to take possession of such land immediately after the divesting Order is published in the Gazette.

Subsection (1) of the above section empowers the Minister to divest and he may do so. Thereafter sub section (2) use the words the Minister shall prior to divesting satisfy himself of (a) to (d) of sub section (2). The words used above as 'may' is directory and thereafter the insertions of the word 'shall' makes the acts prior to divesting mandatory. The discretion is in the Minister if he so desires (subject to acceptable norms) to divest acquired land. But if the Minister decides to divest acquired land, he has to follow and is bound to follow the criteria laid down in the above subsection (2). If not the Minister would act in breach of the mandatory provisions and a court of law need to step in and make the suitable order within the legal frame work. In other words I take the view that the writ jurisdiction could be invoked for the sake of justice.

As observed above in this judgment the Minister has failed to satisfy himself as regards the ingredients in Section 39A(1)(2) of the Act. The Committee on Public Petitions have no jurisdiction or power to interfere with statutory provisions contained in Section 39A of the act and it is a clear violation of the provisions of the Land Acquisition Act, and any act on the part of the above committee acting in breach of the above statute in the context of this case is unlawful. I do agree with the contention of the Petitioner that the 1st Respondent failed to give the Petitioner any hearing and failed to make any inquiry in respect of the status of the land in question prior to divestiture. We would refer to the judgment in *Amarasinghe Vs. Wijeratne & Others* 2012 BLR 390..

“It is a very basic and fundamental principle in public law that rules of natural justice should be observed by any Court, Tribunal or other body or person empowered by law to inquire into a matter affecting the rights of parties.

There is a general right for both sides to a proper hearing. Fair hearing which should be unbiased would embrace legitimate expectation. A proper and sufficient notice of the case against a party is also necessary so that such notice would enable a party to be prepared and contest contrary positions.

A decision given in breach of the rules of natural justice is a nullity and void in law.

Document 1R6, 1R5, which are notice and award under Section 17 gives no clue of the presence of 5th & 6th Respondents or their participation. This leads this court to disbelieve the position of these Respondents. There is also some material to support the position that the original owner was 'Kandy Vishunu Devale' (P10A to P10E).

I would also advert to the point that piece-meal divestiture of acquired land is not possible. Vide Kinsley Fernando Vs. Dayaratne & Others 1991(2) SLR 129 at 139, Mendis Vs. Jayaratne 1997 (2) SLR 215. The importance of public purpose was discussed in Sugathapala Mendis and another Vs. Chandrika Bandaranaike Kumaratunge & Others S.C F/R 352/2007. The exercise of discretion, particularly under Section 39(A) of the Land Acquisition Act Amendment Act No. 8 of 1979 was discussed by Mark Fernando J. in De Silva Vs. Athukorale Minsiter of Lands & Another 1993 SLR Vol. 1 Pg. 283.

"The True intent and meaning of the Amending Act was to empower the Minister to restore to the original owner land for the acquisition (or retention) of which there was originally (for subsequently) no adequate justification, upon the fulfillment of the stipulated conditions. It was a power conferred solely to be used for the public good and not for his

personal benefit. It was held in trust for the public; to be exercised reasonably and in good faith and upon lawful and relevant ground of public interest”.

The Respondents more particularly the 5th Respondent has pleaded delay, non compliance of rules etc. We are not inclined to accept those objections since very basic provisions in the statute has not been complied with by the 1st Respondent and the question of delay though not properly demonstrated, cannot be a ground to disentitled a party relief in circumstances where the order challenged is a nullity or invalid (Biso Menika’s case) we have considered the position of each party to this application very carefully. We are of the view that the Petitioner is entitled to relief.

In all the above facts and circumstances we are of the view that the 1st Respondent has failed to adhere to the mandatory provisions of the Land Acquisition Act as stated above. The 5th and 6th Respondents are schemers who manipulated state machinery for ulterior motives by deceiving the authorities concerned. Therefore we make order allowing this application as per

subparagraph (b) & (c) of the prayer to the petition. Writ of Certiorari issued as per the prayer to the petition with costs.

Application allowed with costs.

Deepali Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL

JUDGE OF THE COURT OF APPEAL