

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

1. Devakumar Ragith Hettiarachchy
No. 39, Baddegana Road (South),
Pita Kotte, Kotte.
2. Palithawadana Arachchige Rienzie
Pascal Christopher Perera
No. 19, Bogahahena Road,
Battaramulla.

PETITIONERS

C.A 469/2009 (Writ)

Vs.

1. Jeevan Kumaranatunge
Minister of Agriculture,
Lands and Land Development
Ministry of Lands "Govijanamandhiraya"
Rajamalwatta Road,
Battaramulla.
- 1A. Janaka Bandara Tennakoon
Minister of Lands,
Ministry of Lands "Govijanamandhiraya"
Rajamalwatta Road,
Battaramulla.
2. Sri Lanka Land Reclamation & Development
Corporation,
No.3, Sri Jayawardenapura Mawatha,
Welikada, Rajagiriya.

3. Dinesh Gunawardena
Minister of Urban Development,
Ministry of Urban Development and
Sacred Area Development
Sethsiripaya,
Battaramulla.

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

RESPONDENTS

BEFORE: Anil Gooneratne J. &
Deepali Wijesundera J.

COUNSEL: Manohara De Silva P.C. with H. Wijesurendra and
H. Munasinghe for the Petitioners
Chaya Sri Nammuni S.C., for Respondents

ARGUED ON: 27.08.2013

DECIDED ON: 22.01.2014

GOONERATNE J.

The two Petitioners in this Writ Application have sought Writs of Certiorari and Mandamus. A Writ of Certiorari to quash letters marked P28 & P30,

wherein it is more particularly stated in the said letters that lands available for retention of water or flood water which had been acquired by the Government cannot be released since the lands so retained had got reduced and as such plot of land claimed by the Petitioners cannot be released. Mandamus is sought to divest the lands claimed by the Petitioners in terms of Section 39A(1) of the Land Acquisition Act. Letters P28 & P30 had been issued by the 2nd Respondent. The case of the two Petitioners could be summarized as far as possible as stated below.

Petitioners were members of the 'Diyawanna Nivasa Yojana Kramaya saha Nivasa Subasadhaka Samitiya' (hereinafter referred to as the Society). The said society was established in 1970 mainly to provide houses for its members who do not own houses of their own. Society purchased 6 ½ acres of land from Nawala Kotte, by deeds referred to in paragraphs 3:3 of the petition. The land is shown in plan No. 647 comprising of 57 blocks and block Nos. 16 & 18 are claimed by the Petitioners (P2a & P2b) who on deeds marked P3 & P4 executed in 1974 became the owners, of those separate lots. It is pleaded that the land purchased by the society as above was not developed properly and due to several years of stagnant progress society sought the intervention of the state and offered the land to be acquired and developed at the expenses of the State and to ultimately

sell it to its members on a rent purchase scheme. P5 letter gives certain details. It was the position of the Petitioners and the society that the National Housing Department and the National Housing Development Authority undertook to develop as pleaded in paragraphs 4:1, 4:2 & 4:3 of the petition. Acquisition procedure was completed and possession taken over by the Department of National Housing and the National Housing Development Authority. (P6a & P6b, P7a & P7c).

However it was the position of the Petitioners despite the acquisition, steps were not taken by the State to develop the land in dispute for some period of time (vide P7a to P7c). It is pleaded that from time to time Petitioners and other members of the society experienced delays on the part of the state organization i.e NHDA. Petitioners plead that Petitioners and the society appealed to the NHDA to divest the lands to its members. On such request to give it back to the society, the Survey General was requested to survey the land and accordingly Survey General's plan 5843 of 25.5.1982 was prepared (P8 & P8a). Thereafter Petitioners and the society had to undergo further delays as pleaded and only by 1989 that blocks of land were re-transferred. Accordingly 1st Petitioner received lot 33 in plan P8 and 2nd Petitioner lot 45 in P8 by deeds marked P11 & P12 respectively.

The main complaint of the Petitioners more or less as submitted by learned President's Counsel proceed on the basis of the 2nd Acquisition of land in dispute for the purposes of flood control. Thereafter steps had been taken by the authorities in terms of the land Acquisition Act to acquire the land and the relevant notices under Section 38A, 10(1)(a) & 17 of the Land Acquisition Act were published within a certain time period (vide P17, P23, P24a & P24b & P25b) Learned President's Counsel submitted that several attempts were made to get the land released without success (vide P18, P19, P20a & P20b, P21, P22a & P22b). It was also submitted that Petitioners were paid compensation in terms of the Land Acquisition Act and they appealed to the Board of Review since the amount offered by way of compensation was not enough. However Petitioner had withdrawn the appeal before the Board of Review at a subsequent stage.

It is pleaded in paragraphs 9:1 to 9:3 of the petition that several requests and appeals were submitted to the 2nd to 4th Respondents to either release the lands or to allocate the lands for development. Despite the several attempts by the Petitioners as pleaded in the body of the petition letters P28 & P30 were received by the petitioners where the contents of same are self explanatory i.e due to the shortfall of land in the flood retention area, it is decided to keep hold of the Petitioner's lands. The Petitioners having received

P28 & P30 made further appeals without success. This court note the contents of paragraphs 9:3 of the petition. I would prefer to refer to paragraphs 10:1 of the petition for purposes of clarity as follows:

1. The Petitioners state that the aforesaid decision/s as contained in P28 and P30 are discriminatory and are therefore capricious, malicious, illegal and arbitrary inasmuch as,
 - (a) Out of the 61 blocks in Plan No. 5843 (vide P8), 21 blocks have been purportedly deemed not necessary for “flood retention projects” and have been released to respective parties and now they are either developed or are presently undergoing development. The particulars of some of the said development are given below;
 - (i) Block No. 22 and 24 which are immediately adjacent to block No. 33 claimed by the 1st Petitioner are developed.
 - (ii) Block No. 39,46, which are immediately adjacent to block No. 45 claimed by the 2nd Petitioner are developed.
 - (b) Approximately 16 blocks in plan No. 5843 have been filled by the State and are no longer marshy land. Therefore the Petitioners state that such land cannot serve the purpose of the “Land Acquiring Office of the Greater Colombo Flood Control Project of the Urban Development Ministry” any further.

This court note the following points referred to in the objections of the Respondents and the corresponding affidavit, as well as the submissions made to this court by learned State Counsel.

- (1) By order marked 2R1 issued under Section 2 of the Colombo District (low lying areas) Reclamation & Development Board Act No. 15 of 1968 in Gazette No. 43 the area specified in schedule of 2R` declared to be a

Reclamation & Development Area. This includes lands claimed by Petitioners.

- (2) 2nd Respondent entrusted with the task of implementing the Greater Colombo Flood Control Project which includes the Rehabilitation and Development of the new work of canals, and to provide the retention areas.
- (3) Filling and developments of lands within the acquired lands in the Greater Colombo area likely to result in flooding in the Greater Colombo area.
- (4) Security of numerous inhabitants of the Greater Colombo region from the threat of flooding is paramount.
- (5) Not possible to exclude or exempt the lands requested by the society. As such P13 issued
- (6) Divesting committee of the 2nd Respondent decided to cut a canal through lots 33 & 45 claimed by the Petitioners including several other lots – 2R4.
- (7) 1000 acres acquired for water retention and only 700 (2R5) acres remaining. 2nd Respondent decided that no steps be taken to release the balance.
- (8) Project launched on the basis of a report prepared by International Consultants of U.K which recommended 380 hectares of marsh land to be reserved for flood retention 2R2 and 2R3 is the plan setting out the network of canals in the area.
- (9) Recent Survey (2R6) the land to the east of the canal area lower lying while the lands to the west of the canal are at a higher elevation. As such east of the land are conducive for water retention.

(10) Release of land carried out pursuant to the divesting committee report and/or a decision of the Cabinet. Table of the basis of divestiture referred to in paragraph 16a of the affidavit of the General Manager of the 2nd Respondent.

There is no doubt that the land in dispute fall within the area identified as the Greater Colombo Flood Control Project and with the publication of Gazette 2R1 which is an order made in terms of Section 2 of Act No. 15 of 1968 such an area is declared to be a reclamation and development area. Rains, sunshine and wind may be natures/God's gift to mankind but all the same also have its evil effects on earth. As such the Respondents in this case would have to act and take certain steps to avert a disaster and especially the 2nd Respondent would be bound to minimize the bad effect of flooding due to heavy rains, and for such purpose need to serve the civil society with its expertise. Over the years and from time to time, the need arose to study and make recommendations to retain certain plots of land and in the process to build canals to ensure that flood waters and waste water is properly drained and also to ensure that as far as possible land owners are not made to suffer any inconvenience or at least to minimize its losses. It is unfortunate that the two Petitioners being members of a 'society' as stated above, a society established to provide housing facilities were deprived of

their right to property in the manner demonstrated and described in the pleadings filed of record, but some others in the same society were successful to retain their plots of land, allocated to them.

This court having consider the case of both parties and on verifying facts relevant to the case, cannot conclude that the authorities concerned acted maliciously, merely because the plots of land claimed by the Petitioners had not been released to them in comparison to others. It is also a difficult question in the context of this case to conclude that the authorities concerned were discriminatory of the Petitioners. Nor can I find sufficient material to issue a Writ of Mandamus in the manner pleaded and prayed for in the petition. The required statutory duty and or the public duty to issue a Writ of Mandamus does not seem to surface from the available material. Therefore I would reject and dismiss the relief prayed for a Writ of Mandamus. What remains to be decided is whether a Writ of Certiorari could be issued in the circumstances of this application. Even if certain grounds that need to be established for the issue of certiorari cannot be easily proved, the reasonableness of the decision contained in documents P28 and P30 need to be considered. A decision which if found to be unreasonable or irrational is liable to be quashed by a Writ of Certiorari.

Survey General's plan P8 and the tenement list P8a are not disputed.

Lot No. 33 & 45 are claimed by the Petitioners. Respondents in paragraph 16(a) of the affidavit refer to the release of lands carried out pursuant to the Divesting Committee report and a decision of the Cabinet. Several lots as pleaded by the Respondent are released. Namely lots 2, 3, 5, 6, 7, 8, 10 (part) 11 & 12 all of which is more to the Northern part of the land in dispute and in extent of more than 15 perches. Lot 33 which is claimed by the Petitioner is only 15 perches. The other lots released are 21, 22, 34, 35, 37, 39 & 46 are more or less in the middle and adjacent to the land in dispute and some of those lots are in extent of about 20 perches. Lot 45 claimed by the Petitioner is in extent of 13.4 perches. The question is whether a plot of land lesser in extent could retain more water than other lots which are more or less larger in extent than that of the Petitioners. If that be the case there appears to be a very clear imbalance of the decision taken in documents P28 & P30.

The other explanation is the higher elevation of the lands that are more prone to be released. It is pleaded by the Respondents that by reference to plan 2R6, that area to East of the canal are in a lower lying level, whilst the lands to the west of the canal are at a higher elevation and as such East of the canal are conducive to retain water. Document 2R6 gives a brief description (though not so

legible). It is stated that several lots could not be measured for the reasons given in 3, 4 & 5 of 2R6. This indicates that plan annexed to 2R6 is incomplete for this reason and measured according to the sea level (limited to certain lots). What is shown in red lines in the plan is described as the 'ella'. If that be so the portion shown in red lines only takes a portion of lot 33 & 45. At a glance it is less than half of lot 33 & 45. Entirety of 33 & 45 do not fall within the canal on their own showing with reference to the plan. If one compares the height from the sea level lot 33 gives 1.899 & 1.319 from the sea level. Lot 45 gives 1.601 & 1.076 from the sea level. The adjacent lot 34, 35 & 39 (adjacent to 33) is less in height at a certain point, compared to lot 33. Lots 26, 25 & 24 are less in height in comparison to lot 33.

In view of the above facts this court is of the view that it is unreasonable to retain the entirety of lots 33 & 45 as per plans annexed to 2R6 and survey plan P8. We have also perused document X1 filed with motion of 12.7.2011 which explains that Petitioner Perera's land stands a "greater chance of getting released". Letter X1 is a letter of the 2nd Respondent (AG.M) dated 8.7.2008. On the other hand there is material disclosed before this court that there had been a selective release of about 300 acres of land and what remains is

above 700 acres from the Greater Colombo area. Case law support the view that unreasonableness and irrationality is an extension of the principle of ultra vires.

Development in administrative law usually spread all over the globe. There is no reason to doubt such development and in Sri Lanka the Court of Appeal did not hesitate to follow the dicta in Lord Diplock's formal statement on judicial review. In *Desmond Perera and Others vs. Karunaratne Commissioner of National Housing 1994(3) SLR 316* At 318...

In the question of the right to be heard administrative action could be made subject to control by judicial review under three heads:

- (i) Illegality
- (ii) Irrationality
- (iii) Procedural impropriety

...

Irrationality may succinctly be referred to as unreasonableness. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

In *Fazrul Hefeera and Another Vs. Sockalingampillai and Others 1998 (3) SLR 60*

The decision on "equities" is a matter where the Commissioner could exercise his discretion. Such a decision could be reviewed on the ground of "irrationality". As Lord Diplock in *GCHQ Case Council of Civil Service Unions v. Minister for the Civil Service* explained "Wednesbury Unreasonableness" applies to a "decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". Unless "unreasonableness" or "irrationality" could be treated as an extension of the

principle of ultra vires, the petitioner is faced with the obstacle of section 39(3) read with section 22 of the Interpretation Ordinance.

In all the above facts and circumstances of this case we are mindful of the magnitude role of the 2nd Respondent in a project dealing with flood water and the retention areas needed for the purpose. However this court is of the view that it is unreasonable not to release the plots of lands claimed by the Petitioners as stated above. As such we allow the Writ of Certiorari as per sub paragraph (b) of the prayer to the petition, and quash the decision in letters P28 & P30 without costs.

Application allowed as above only.



JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I agree.



JUDGE OF THE COURT OF APPEAL