

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

CA Writ application No. 845/2007

In the matter of an application under Article
140 of the Constitution for an order in the
nature of a writ of *certiorari*.

1. D.S.J. Peiris
2. D.P.M.K. Peiris.

Both of No.37, Kumaratunga Mawatha,
Kaluthara North.

Petitioner.

Vs.

1. The Kalutara Bodhi Trust, Kalutara.
2. Ministry of Lands and Land
Development, Ministry of Lands and
Land Development,
“Govijana Mandiraya”
Rajamal Watta Road, Battaramulla.
3. Divisional Secretary, Kalutara.
4. Ms. D.S.D.L. Peiris, No. 37,
Kumaratunga Mawatha, Kalutara North.
Respondents.

Before : K.T. Chitrasiri, J &
L.T.B. Dehideniya, J

Counsel : Dr. Sunil Cooray with B. Gamage for the Petitioner.
N. Batholameasu with S. Gnanaratne for the 1st Respondent.
Janak de Silva, DSG for the 2nd and 3rd Respondents.

Argued on : 27 03 0215

Decided on : 17.07.2015

L.T.B. Dehideniya, J.

This is an application for mandates in the nature of writs of *certiorari* to quash the notices issued under section 2 and 38 of the Land Acquisition Act, by which, the Petitioner's land had been acquired by the 3rd Respondent and wanted to obtain possession before paying compensation on the basis of urgency under the proviso to the section 38 of the Act. At the hearing, the Petitioner confined the application to quash the section 38 notice.

The Petitioners submit that their father was the owner of the land in question. They further submit that the 1st Respondent encroached in to this land and started to use it as a part of its car park. Thereafter the Petitioners' father instituted an action in the District Court, Kaluthara for a declaration of title and ejection against the 1st Respondent and obtained judgment in his favour. While that case was pending in the District Court, the Petitioners' father had passed away and the Petitioners and the 4th Respondent, being the children of the said deceased Plaintiff in that action in the District Court, were substituted in his place. The 1st Respondent has appealed against the said judgment. While the appeal is pending, the land had been acquired by the 3rd Respondent saying that it is necessary to have a car park under the Kaluthara development project. They further submit that after acquiring the land, it had been handed over to the 1st Respondent, the Kaluthara Bodhi Trust, who is a private person in law, to run a car park, for a fee. Petitioners further say that in any event the land in question was in the possession of the 1st Respondent and therefore there was no urgency in obtaining the possession of the land under the proviso of section 38.

The 1st Respondent in its objections *inter alia* states that it was necessary to run a car park for the devotees who come in thousands a day to worship the Kaluthara Bodhiya. The Petitioners, after obtaining the judgment in Kaluthara D.C. case had taken the possession forcibly, without an order from court, taking the law into their own hands. The 1st Respondent had to rush to Court to obtain a mandatory order to regain the possession. Under these circumstances, the 1st Respondent says that there was urgency in obtaining possession after acquisition.

The 2nd and 3rd Respondents also confirm the above facts and state that it was necessary to obtain possession urgently after acquisition. Even though the

possession was with the 1st Respondent, it was necessary to obtain possession as a formality. The 2nd Respondent, The Minister in charge of the subject, sworn an affidavit and submitted to Court that he has directed the acquiring officer to acquire the land in question for a public purpose namely for the construction of a car park. He further submits that he was of the opinion that it was necessary to take immediate possession of the land in question on the ground of urgency; he made order under section 38 proviso (a) of the Land Acquisition Act.

As it is pointed out earlier, the acquisition itself is not in issue. Section 2 notice is not being challenged. On 27.01.2012 it was recorded that;

“the Petitioner is not proceeding in the prayer ‘d’ of the petition. No writ is sought in section 02 notice. A copy of the section 05 Gazette Notification is tendered to Court today by learned DSG.”

Section 2 of the Land Acquisition Act reads thus;

2.(1) Where the Minister decides that land in any area is needed for any public purpose, he may direct the acquiring officer of the district in which that area lies to cause a notice in accordance with subsection (2) to be exhibited in some conspicuous places in that area.

(2) The notice referred to in subsection (1) shall be in the Sinhala, Tamil and English languages and shall State that land in the area specified in the notice is required for a public purpose and that all or any of the acts authorized by subsection (3) may be done on any land in that area in order to investigate the suitability of that land for that public purpose.

(3) After a notice under subsection (2) is exhibited for the first time in any area, any officer authorized by the acquiring officer who has caused the exhibition of that notice, or any officer acting under the written direction of the officer authorized as aforesaid, may enter any land in that area, together with such persons, implements, materials, vehicles and animals as may be necessary, and

(a) survey and take levels of that land,

(b) dig or bore into the subsoil of that land,

- (c) *set out the boundaries of that land and the intended line of any work proposed to be done on that land,*
- (d) *mark such levels, boundaries and line by placing marks and cutting trenches,*
- (e) *where otherwise the survey of that land cannot be completed and such levels taken and such boundaries and line marked, cut down and clear away any part of any standing crop, fence or jungle on that land, and*
- (f) *do all other acts necessary to ascertain whether that land is suitable for the public purpose for which land in that area is required :*

Provided that no officer, in the exercise of the powers conferred on him by the preceding provisions of this subsection, shall enter any occupied building or any enclosed court or garden attached thereto unless he has given the occupier of that building at least seven days' written notice of his intention to do so.

State can acquire private lands only if it is needed for a public purpose; not for any other purpose.

Manel Fernando and another V. D .M. Jayaratne, Minister of Agriculture and Lands and others [2000]1 Sri L R 112

Per Fernando, J.

The statutory power given in order to enable the state to acquire land needed for a public purpose cannot be used for any other purpose.

Deciding authority as to the necessity of the land for a public purpose is the Minister in charge of the subject. The Minister has acted under section 2 and the notice had been issued. The Petitioner is not challenging the said notice. It was brought to the notice of Court that the notice under section 5 of the Act is also published in the Gazette thereafter. Therefore, the legality of the acquisition is not in issue. It had been held in several decisions that the decision of the

Minister as to the “necessity for a public purpose” is not subject to the scrutiny of the Court.

Marie Indira Fernandopulle and another, v. E. L. Senanayake, Minister of Lands and Agriculture, 79 (II) NLR 115 at 119

If one looks at the entire Act two main powers are given to the Minister.

They are: -

- 1. The power to decide whether the land is required for public purpose and to direct that it be acquired, and*
- 2. Whether there is an urgency compelling the immediate possession being taken of the land of and to direct that possession be taken.*

As pointed out earlier, the former decision is by enactment (section 5(2) made conclusive and therefore removed from scrutiny by the Courts. The latter has not been so treated and it is legitimate to hold that the legislature did not intend to remove the Court's power of scrutiny. Another important fact is that section 38 circumscribed the Minister's power to interfere with private rights or property by stating that possession can only be interfered with after an award is made. It is only in cases of urgency that an exemption is made.

Hewawasam Gamage (alias J. A. William), v. The Minister of Agriculture and Lands (The Hon. H. S. R. B. Kobbekaduwa) and another, 76 NLR 25

Held, (i) that the validity of a decision of the Minister under section 2 (1) of the Land Acquisition Act and an order of the Minister under proviso (a) to section 38 of the Act cannot be questioned in a Court of law. The question whether a land should be acquired is one of policy to be determined only by the Minister.

(ii) that the Minister is entitled, on the ground of urgency, to make an order under proviso (a) to section 38 to take immediate possession of a

portion of a larger land, even though, owing to the absence of a Plan, the boundaries of such portion are uncertain and indeterminate at that stage. In such a case the boundaries will be demarcated at a subsequent stage when a survey and plan are prepared in compliance with the requirements of section 41 (c) read with section 6.

Under these circumstances, even if the Petitioner has not abandoned the claim to quash the section 2 notice, the Court cannot go into the said claim.

The second issue that has to be considered is the urgency. Under section 38 proviso, the State can take over possession of the land even before paying compensation if the land is needed urgently. In this case the Minister has decided that the land is urgently needed. Section 38 of the Act reads thus;

38. At any time after an award is made under section 17, the Minister may by Order published in the Gazette"

(a) where the award relates to the acquisition of any land, direct the acquiring officer of the district in which that land is situated, or any other officer authorized in that behalf by such acquiring officer, to take possession of that land for and on behalf of the State, or

(b) where the award relates to the acquisition of any servitude, declare that the land over which that servitude is to be acquired shall be subject to that servitude :

Provided that the Minister may make an Order under the preceding provisions of this section-

(a) where it becomes necessary to take immediate possession of any land on the ground of any urgency, at any time after a notice under section 2 is exhibited for the first time in the area in which that land is situated or at any time after a notice under section 4 is exhibited for the first time on or near that land, and

(b) where it becomes necessary immediately to acquire any servitude on the ground of any urgency, at any time after a notice under section 4 is exhibited for the first time on or near the land over which that servitude is to be acquired.

The land in question was acquired by the State and handed over to the 1st Respondent to run a car park. It is an admitted fact even before the acquisition, this block of land was in possession of the 1st Respondent and it was a part of their car park. The Petitioners' father instituted an action in the District Court on the basis that the land in question was in 1st Respondent's possession. The 1st Respondent is the Kaluthara Bodhi Trust, a charitable trust incorporated. The Kaluthara Bodhiya (the sacred Bo tree at Kaluthara) is maintained by the 1st Respondent. In its objections, the 1st Respondent says that thousands of pilgrims visit this religious place a day to pay their homage. This fact has not being challenged by the petitioners. A proper car park is an essential element for this sacred place. If a proper car park is not provided, the vehicles will have to be parked by the side of the road, which will obstruct the smooth traffic flow. Therefore, the State giving assistance to 1st Respondent to establish a proper car park cannot be heard to say is not done for public purpose.

The Petitioners' conduct shows the urgency of acquiring the land and obtaining possession. After obtaining judgment in his favour in D.C. case, he took the law into his own hands and acquired the possession forcibly. The 1st Respondent had to seek the Courts assistance to regain the possession. Even in the Petition they say that they want to enjoy the fruits of their victory. It is true that a winning party in a civil suit is entitle to enjoy the victory, but the conduct of the Petitioners show that unless the State intervened and take necessary action to preserve the car park, it will be obstructed if the appeal is decided in the Petitioners favour. In these circumstances, the urgency is obvious.

On the other hand, the land in question is in 1st Respondent's possession. As such, taking over the possession by the State and handing over to the 1st Respondent is only a formality. I do not see any reason for the Petitioners to object to taking over possession urgently. Specially, when the legality of the acquisition, is not in question. When it is looked from the Petitioner's point of view, there is no difference in paying compensation first and then taking

possession or taking possession first and then paying compensation, because the Petitioners have already lost the possession.

It is the Petitioners who are asking to quash the section 38 notice. Therefore, the burden of proof rests on the Petitioner to prove that there was no urgency in obtaining possession by the State. It was held in the *Fernandopulle* case (supra) that it is however a matter for a petitioner who seeks the remedy by way of Certiorari, to satisfy the Court that there was in fact no urgency and his application cannot succeed should he fail to do so. In the present case the Petitioner did not adduce any evidence to show that there was no urgency other than the argument that it was not necessary to obtain possession because it is already in 1st Respondent's possession. I have already discussed this argument earlier in this judgment.

For the reasons stated above, I hold that the Petitioners have failed to establish that their entitlement to a writ of certiorari to quash the section 38 notice.

The application dismissed subject to costs fixed at Rs. 25000/-

Judge of the Court of Appeal

K.T.Chitrasiri J.

I agree.

Judge of the Court of Appeal