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

In the matter of an application for Mandates in the nature of Writs of *Certiorari, Prohibition* and *Mandamus* in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Kumarasamy Rasalingam,
No. 23, Purana Vihara Lane,
Pamankada East,
Colombo 06.

Presently at;

Johannisthaler Chaussee-353
12351 Berlin,
Germany.

Appearing by his Attorney;

Chitraadevi Suthakar,
No. 23, Purana Vihara Lane,
Pamankada East,
Colombo 06.

Petitioner

CA (Writ) Case No: 321/2015

-Vs.-

1. Divisional Secretary,
   Thimbirigasyaya,
   No. 563, Elvitigala Mawatha,
   Colombo 05.

2. District Secretary - Colombo,
   P.O. Box 505, Dam Street,
   Colombo 12.
   And of;
   No. 563, Elvitigala Mawatha,
   Colombo 05.
3. John Anthony Emmanuel Amaratunga,
   Minister of Lands,
   "Mihikatha Medura",
   1200/6, Rajamalwatte Road,
   Battaramulla.

3b. Gayantha Karunatilake,
   Minister of Lands,
   "Mihikatha Medura",
   1200/6, Rajamalwatte Road,
   Battaramulla.

4. Commissioner General of Lands
   Land Commissioner General's Department,
   "Mihikatha Medura",
   1200/6, Rajamalwatte Road,
   Battaramulla.
5. The Commissioner,
   Municipality of Colombo,
   Colombo 07.
6. Road Development Authority,
   "Sethsiripaya",
   Battaramulla.
7. Ajitha de Costa,
   Chairman,
   Western Region Megapolis
   Planning Project,
   10th Floor, C-Wing,

Sethsiripaya- Stage II,
Battaramulla.

8. Wilson Karunaratne,
No. 192, Robert Gunawardena Mawatha,
Kirillapone,
Colombo 06.

Respondents

Before : A.L. Shiran Gooneratne J.

Counsel : Manohara de Silva, PC for the Petitioner.

Maithree Amarasinghe, SC for the 1st to 5th, 7th and 8th Respondents.

Senany Dayaratne for the 6th Respondent.

Argued on : 06/11/2017

Written Submission on: 05/03/2018

Judgment on : 23/05/2018

A.L. Shiran Gooneratne J.

The Petitioner has invoked the jurisdiction of this Court, inter alia, for mandates in the nature of writ of Certiorari to quash Gazette Notifications dated 06/01/2015 and 07/10/2015, marked P7A, P8(a), P8(b), and P8(c), and writ of Prohibition to restrain the 1st and 2nd Respondents taking any steps to acquire possession of the Petitioner's property to implement the proposed Phase III of the

Baseline road expansion project in terms of proviso (a), to section 38 of the Land Acquisition Act (sometimes hereinafter referred to as "the Act").

The Petitioner challenges the said acquisition on the following grounds;

(a) i) the Respondents cannot make use of proviso (a) of Section 38, of the Act, as there is no urgency.

ii) no valid notice was given to the Petitioner in terms of Section 2 of the Act.

(b) The Respondents have failed to utilize the already existing reservation over Robert Gunerwardene Mawatha.

The Petitioner states, that as evident in the newspaper articles marked P9(a) and P9(b), the said project was abandoned from time to time, and therefore the Respondents are not entitled to utilize the proviso (a) of Section 38, of the Act in order to divert from the normal acquisition process. The Petitioner has cited the case of ***Fernandopulle Vs. Minister of Lands and Agriculture 79 2NLR 115***, and submits that proviso (a) to Section 38,of the Act is a special provision made available only in instances of urgency, and therefore has been utilized by the Respondents for no valid reason.

Sub paragraph (a) to section 38(a), of the Act reads as follows;

"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

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It is observed that the Section 2 notice bearing No. CO/DSO/2013/605, dated 30/06/2014, has been issued after cancelling the Section 2 notice issued on 15/05/2013. The Section 2 notice dated 30/06/2014 was once again cancelled and replaced by a Section 2 notice dated 29/08/2014. The documents attached to the 1st Respondent's Statement of Objections marked 1R1, and the 4th Respondent's Statement of Objections in the connected cases marked as 4R1A and 4R1B, clearly indicates that as required, notice under Section 2 was exhibited in the area where the land is situated. As the law stands at present, there is no legal requirement to serve notice under Section 2 of the Act on all persons whose lands are eventually acquired. What the law requiresby this Section is that the notice under Section 2 be exhibited in some conspicuous place in the area where the land is situated. Document marked 1R1, clearly indicates that the said notice was exhibited where the land is situated and also at the relevant Grama Niladhari Office. Therefore, it is observed that a valid Section 2 notice on a decision by the Minister was in fact issued by the land acquiring officer, prior to the gazette

notification of the taking of possession of the land, in terms of proviso (a) to Section 38 of the Act.

The delay caused to implement the said road project is attributed to the proposed stages of development of the Road, and the process of acquiring land for pre-defined phases, which were not necessitated to be acquired simultaneously. The delay has been attributed to public protests by the Petitioner and few other occupants of lands in the vicinity and the numerous appeals lodged in respect of the said acquisition and also to the long drawn litigation, initiated by various interested parties. Therefore, the delay caused in implementing the phase III of the Base Line Road extension project could be attributed to reasons not within and/ or outside the control of the authorities.

In the case of ***Fernandopulle Vs. Minister of Land and Agriculture (supra),*** the court considered, inter alia, the Minister's decision regarding urgency and the need to take immediate possession, where the Court held that a Petitioner who seeks a remedy by way of Certiorari should satisfy the Court that there was in fact no urgency. The Court also held that;

"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 a 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 and to direct that possession be taken."

The Petitioner submits that due to the delay caused in the acquisition process, the Respondents have failed to show that there is an urgency compelling the immediate possession of the Petitioner's land and therefore, the said acquisition does not come within the scope of proviso (a) of Section 38 of the Act.

According to the Master Plan, the Base Line Road extension project has been designed to be implemented in three stages. The said road is a key highway connecting the north and south regions of the Greater Colombo area. It is observed that the expansion of the road would undoubtedly contribute to greater mobility to the existing road network and has the capacity to enhance socio-economic development in the area which covers the road expansion project. The implementation of this project would necessitate to identify and acquire large extents of privately owned land. The Respondents submit that the scale of their development project and the obligation to look into all aspects of the rights of the affected citizens has compelled the implementation of the said project in three stages, and therefore deny any delay attributed to the Respondents caused in the said acquisition process.

In the case of ***Fernandopulle Vs. Minister of Lands and Agriculture (Supra)***, the court further held, that;

> *"an order by the minister under the proviso to Section 38 of the Land Acquisition Act can be made only in cases of urgency and an order made under the proviso can be reviewed by the courts. 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."

Both parties have referred to the case of ***Amerasinghe and others Vs. the Attorney General and others (1993) 1SLR 376***, (Colombo Katunayake Expressway Case) where it was held that;

"urgency is always relative; sometimes action may be required within hours; for an enormous project, such as the expressway, urgency may be a matter of months or years. Considering that the project had been in contemplation at least from 1983, and had already been delayed for almost ten years, it is not unreasonable to consider, in the light of increases in population, traffic, economic activity etc., that speedy implementation was imperative".-------

It is common ground that the land to be acquired is for the Baseline extension road, an urban development project which "would meet the just requirements of the general welfare of the people."

As pointed out earlier, the Respondents have adequately explained the delay, if any, attributed to the acquisition process and therefore, I find that the Petitioner has not satisfied Court that there was no urgency to act under proviso (a) to Section 38.

The next question is whether the Respondents should utilize the already existing reservation over Robert Gunerwardene Mawatha.

The Petitioner submits that when there is an existing reservation allowing an extension to the Base Line Road to be implemented, the authorities are proceeding with their plan to extend the road project over De Costa Gardens without any "plausible reason being given." In support, the Petitioner has drawn attention of Court to the survey plan marked P11, P11(a) which depicts a 100 feet reservation on Robert Gunerwardena Mawatha and "the comparison of the two proposed corridors" marked 6R2, emphasizing the reduced cost factor, in the alternate route.

The 5th and the 6th Respondents in their statements of objections and the affidavits filed of record have extensively dealt with the above issue. A comparison of the alternate route has been submitted to Court, marked 4R7, where the following material has been placed in support of the decision made by the authorities, that the;

a. existing road reservation on Robert Gunerwardena Mawatha is limited as shown in paragraph 6.1 in document marked 6R2, which ends abruptly at Balapokuna Road;
b. alternative road proposed by the Petitioner along the road reservation on Robert Gunerwardena Mawatha requires an unsafe diversion of vehicular traffic from the direction of the proposed path of the road;
c. importance of the geometry of the Road and safety on its design should be considered;

d. failure to substantiate that the alternate route proposed by the Petitioner is most suitable for a highway or to propose any costs benefit analysis of the two routes;

and concludes that the extension project through De Costa Gardens is technically and environmentally more feasible.

The Court observes the reasons given for such conclusion, based on the damage to property and resettlement of displaced persons, the length of the road, construction and vehicle operating costs and the Vertical Alignment of the road, among other considerations reflected in the document marked 7R3.

In relation to ***"the costs benefit", Lewis on "Judicial Remedies in Public Law" 5th Edition, states at page 287***, that –

> *"More significantly, the public interest frequently cannot be measured in terms of financial consequences. --- the courts will be placed in the difficult position of trying to place a value on the public interest and balancing that against the financial or other consequences suffered by the individual. --- '*

In ***Amerasinghe Vs. The Attorney General (Supra),*** the court held,

> *"-- it is not for the court to determine whether, upon the consideration of all these factors, the disadvantages outweigh the advantages of the expressway, or whether in its view the expressway meets the just requirements of the general welfare of the people. There is adequate material to show that these factors have been considered and will be considered further in accordance with the relevant statutory provisions. --"*

It is not only the Petitioners land but lands belonging to several other residents have been earmarked to be acquired. The Petitioner has not been denied of the opportunity of having his objections in the matter considered. It appears that the authorities have considered all necessary factors before deciding on the proposed route and selecting the lands for acquisition. The need for a public purpose and the urgency in acquisition of the proposed land is evident on the material placed before Court. Accordingly, the Court is of the view that there is no basis to conclude that the relevant authorities acted ultra vires in deciding to take possession of the land of the Petitioner in terms of proviso (a) of Section 38 of the Land Acquisition Act, as challenged.

In the circumstances, the Petition is dismissed without costs.

Parties in C.A. (Writ) 415/2015, C.A. (Writ) 416/2015, C.A. (Writ) 417/2015, C.A. (Writ) 433/2015, C.A. (Writ) 188/2016 have agreed to abide by the Judgment delivered in this case.

JUDGE OF THE COURT OF APPEAL