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

In the matter of an Appeal against the judgment of the Provincial High Court holden in Colombo dated 08.07.2014 in terms of Article 154(ශ) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with High Courts of the Provinces (Special Provisions) Act No.19 of 1990.

M.Chandrika Jayamali,
No.9/1,
Meethotamulla Road,
Kolonnawa
Respondent-Petitioner-Appellant

C.A.(PHC)Appeal No. 100/2014
P.H.C. Colombo Case No. HCRA 45/2012
M.C. Colombo CaseNo. 12171/05/07

Vs.

01. U.W.Senaratne,
Divisional Secretary,
Divisonal Secretariat
Kolonnawa

02. Petroleum Corporation
No.609, Danister de Silva Mawatha,
Colombo 09.

03. T.A.Peiris,
Secretary,
Ministry of Lands Development
No.80/5,
Govijana Mandiraya,
Rajamalwatta Road,
Battaramulla.

04. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Applicant-Respondent-Respondents

BEFORE : **JANAK DE SILVA, J. &**
ACHALA WENGAPPULI, J.

COUNSEL : Jefrry Zeinudeen for the Respondent-Petitioner-Appellant.
Suranga Wimalasena SSC for the 1st, 3rd and 4th Applicant-Respondent-Respondents.

WRITTEN SUBMISSIONS
TENDERED ON : 10-07-2018(by the Appellant)
13-07.2018 (by the Respondent)

DECICED ON : 08th October, 2018

ACHALA WENGAPPULI, J.

The Respondent-Petitioner-Appellants (hereinafter referred to as the "Appellants") have invoked the appellate jurisdiction of this Court in appeal Nos. CA (PHC) 126/2014, CA (PHC) 100/2014, CA (PHC)101/2014, CA (PHC) 97/2014 and CA (PHC)173/2014 in respect of a common order pronounced by the Provincial High Court of the Western Province holden in Colombo on 08.07.2014 in respect of their revision application Nos. HCR 38/2012, 43/2012, 44/2012, 45/2012, 46/2012, 47/2012, 48/2012 and 50/2012.

In seeking revisionary jurisdiction of the Provincial High Court, the Appellants sought to set aside orders of the Magistrate's Court of Colombo, upon applications made under Section 42(2) of the Land Acquisition Act as well as Section 5 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended.

In issuing the impugned order under Section 42(2) of the Land Acquisition Act, the Magistrate's Court had ordered the fiscal on 05.09.2007 to deliver possession of the lands described in the schedule to the application as part 1 and 2. Thereafter, it made another order on 16.11.2011, directing the fiscal to re-deliver possession of the land. Upon application, further time was granted by that Court to the fiscal to deliver possession and with his report dated 12.02.2015, it was reported that he could not deliver possession of the land, due to public intervention.

At that stage, the Appellants sought to invoke revisionary jurisdiction of the Provincial High Court.

It is stated by the Appellants, in their applications to Court that they have occupied the land in dispute for a very long time and it has been acquired by the State under provisions of Land Acquisition Act on the basis that the lands are adjacent to the *Kolonnawa* Oil Refinery and there exists a security threat to that facility.

The 1st, 3rd and 4th Applicant-Respondent-Respondents (hereinafter referred to as the "1st , 3rd and 4th Respondents") in their statement of objections took up the position that the land under dispute had already been acquired under the provisions of the Land Acquisition Act and they have completed the payment of compensation to the list of interested parties who were in possession when the acquisition process began. They also stated that the notices of possession had been issued as admitted by the Appellants and the Magistrate's Court has issued the impugned orders after applying the relevant statutory provisions.

In dismissing the Appellants applications for revision, the Provincial High Court is of the view that by the publication of an order in the Government Gazette No. 488/13 of 13.01.1988 the land in dispute is clearly vested in the State and is entitle to take its possession. It is further noted that in an application under Section 42(2) of the Land Acquisition Act, the Magistrate's Court had to issue an order as requested for if it is satisfied that the applicant apprehends that he will be unable to take possession of the State land because of any obstruction or resistance likely to be offered.

In this instance, the 1st Respondent, in his application under Section 42(2) clearly averred in paragraph 4 that he apprehends that he will be unable to take possession of the State land because of any obstruction or

resistance likely to be offered. It also noted that prior to acquisition, the Appellants had to be given an opportunity to present their position at various levels, but once an application is made under Section 42(2) for an order of possession, the law has not afforded an opportunity for the Appellants to *show cause*.

The Appellants, in seeking to challenge the validity of the orders contended that;

a. the 1st Respondent instituted eviction proceedings before the Magistrate's Court under the provisions of the State Lands (Recovery of Possession) Act, whereas the Court had made order under provisions of Land Acquisition Act,

b. since the Appellants were served with quit notice under the provisions of the State Lands (Recovery of Possession) Act, they have a "mandatory right" to show cause in terms of Section 6 of the said Act,

c. the Provincial High Court has failed to consider the fact that there is a long delay of taking steps and as at now the public purpose for which it was acquired, namely the security concerns of the refinery no longer exits,

d. the Appellants were not paid any compensation.

The proceedings before the Magistrate's Court had begun with the filing of applications under Section 42(2) of the Land Acquisition Act. In addition to his application under the said law, the 1st Respondent, having served quit notice on the Appellants, had made a parallel application under Section 5 of the State Lands (Recovery of Possession) Act as well.

However, the order of the Magistrate's Court was made under Section 42(2) of the Land Acquisition Act and it appears that the application under Section 5 of the State Lands (Recovery of Possession) Act deemed abated since no order was made and no further interest was shown by the 1st Respondent in pursuing it.

The Magistrate's Court, nonetheless acted correctly in making its order under one of the statutes, although the 1st Respondent has invoked its jurisdiction also under different statute, seeking identical relief.

The validity of the order under Section 42(2) of the Land Acquisition Act could not be challenged merely because a parallel application is also made by the 1st Respondent under Section 5 of the State Lands (Recovery of Possession) Act, which had not been acted upon by the Court.

In relation to the Appellant's second ground of appeal that the Appellants were served with quit notice under the provisions of the State Lands (Recovery of Possession) Act and as such they have a "mandatory right" to show cause in terms of Section 6 of the said Act should be considered next.

In the preceding paragraphs, this Court noted that although parallel applications were made by the 1st Respondent under two different statutes,

the Magistrate's Court had acted only under provisions of the Land Acquisition Act.

A respondent in an application under Section 5 of the State Lands (Recovery of Possession) Act, could show cause under Section 6(1) of the said Act. Section 6(1), lays down the initial step a Court should take, as it imposes a duty on the Court to issue summons on him. It is on the summons, that a Respondent is directed to show cause, why he and his dependents *"should not be ejected from the land as prayed for in the application for ejectment."* In this particular instance, the Court had acted under Section 42(2) of the Land Acquisition Act. It did not assume jurisdiction by issuing summons on the Appellants to show cause under Section 6(1) of the State Lands (Recovery of Possession) Act.

In contrast to Section 6(1) of the State Lands (Recovery of Possession) Act, Section 42(2) of the Land Acquisition Act lays down the applicable considerations as follows;

> *"Where any officer directed by an Order under section 38 to take possession of any land is unable or apprehends that he will be unable to take possession of that land because of any obstruction or resistance which has been or is likely to be offered, such officer shall, on his making an application in that behalf to the Magistrate's Court having jurisdiction over the place where that land is situated, be entitled to an order of that court directing the Fiscal to deliver possession of that land to him for and on behalf of the State."*

The scope of the jurisdiction under Section 42(2) of the Land Acquisition Act has already received attention of this Court. In ***Gunawardene v D.R.O. Weligam Korale*** 69 N.L.R. 166, it was held that;

> *"The wording of section 42 (2) seems to contemplate that before an officer could obtain an order under that section he must satisfy the Court that he is unable or apprehends that he will be unable to take possession of the land because of any obstruction or resistance which has been or is likely to be offered. I find from the cyclostyled application that has been filed in Court by the District Revenue Officer that he proceeded to the land on 24. 9. 66 in order to take possession of the land from the owner thereof who wrongfully and unlawfully refused to allow the applicant to take possession. The District Revenue Officer also states in the same application that he apprehends he will be unable to take possession of the said land by reason of obstruction or resistance that is likely to be offered by the owner. While I agree with the observations of my brother Sirimane, J. in* **Mohamed Lebbe v. Madana** *[(1964) 66 N. L. R. 239.], that when an order under section 42 (2) directing the Fiscal to deliver possession of the land is made, any person in occupation of the land is not entitled to be heard in opposition to the application, I think it desirable, even though these proceedings are in the nature of execution proceedings, that there should be evidence either orally or on affidavit led before the Magistrate in support of the averments in the application before an ejectment order is made, particularly when a request is made for the use of force, if necessary, to take possession of the land. This evidence may be led ex parte and if the Magistrate is satisfied with the*

material placed before him, an ejectment order under section 42 (2) may be issued." (emphasis added)

Thus, it is clear that in an instance where an application is made under Section 42(2) of the Land Acquisition Act to the relevant Magistrate's Court, there is no opportunity afforded to any Respondent to offer *show cause* as to why he and his dependents *"should not be ejected from the land as prayed for in the application for ejectment"* as in Section 6(1) of the State Lands (Recovery of Possession) Act.

In relation to the contention of the Appellants that there is a long delay in the application to evict them would not make them entitle to relief as the issue placed before the Provincial High Court for its determination was the legality and propriety of the order made by the Magistrate's Court, and not the validity of the actions of the 1st Respondent.

The complaint that the Appellants were not paid any compensation is also made without a legal basis. The 1st, 3rd and 4th Respondents, in the objections filed before the Provincial High Court had adequately explained this issue. When the authorities initiated the process to acquire the land described in the 1st part of the schedule to the application under Section 42(2) of the Land Acquisition Act, they have clearly identified the individuals who were in possession of the said land and they were already paid compensation. In any event, in an application under Section 42(2) of the Land Acquisition Act, the non-payment of compensation could not be considered as a relevant ground a Court should take note of.

In view of the reasoning contained in the preceding paragraphs, it is our considered view that the appeals of the Appellants are devoid of any merits and therefore ought to be dismissed.

The appeal Nos. CA (PHC) 126/2014, CA (PHC) 100/2014, CA (PHC)101/2014, CA (PHC) 97/2014 and CA (PHC)173/2014 are accordingly dismissed with costs fixed at Rs. 5000.00 on each appeal.

JUDGE OF THE COURT OF APPEAL

JANAK DE SILVA, J.

I agree.

JUDGE OF THE COURT OF APPEAL