

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

Malkavitage Gerard Perera,
No. 2/7,
Thambiligasmulla Junction,
Makola North,
Makola.
Petitioner

CASE NO: CA/WRIT/248/2015

Vs.

1A. Ratnayaka Mudiyansele
Chandrawathi Manike Herath,
Land Commissioner General,
Land Commissioner General's
Department,
"Mihikatha Madura",
Land Secretariat,
No. 1200/6,
Rajamalwatta Road,
Battaramulla.
1A Respondent
And 8 Others

Before: Mahinda Samayawardhena, J.

Counsel: Nishan Premathiratne for the Petitioner.
Ganga Wakishta Arachchi, S.C.C., for the 1A, 2,
5A, 9A Respondents.
Yasas de Silva for the 6th and 7th Respondents.

Decided on: 06.03.2019

Samayawardhena, J.

The petitioner filed this application seeking to quash by way of writ of certiorari the decision of the 3rd respondent (Minister of Lands) as reflected in P22 and P23 to give the acquired land on a long term lease to the 8th respondent (National Savings Bank), and to compel the respondents (except the 8th) by way of writ of mandamus to sell or to give the land on a long term lease to the petitioner.

It is common ground that the land in question which was owned by the petitioner was acquired under the provisions of the Land Acquisition Act, No.9 of 1950, as amended, for a public purpose, i.e. to establish a bus terminus, and compensation was paid to the petitioner. After sometime, the bus terminus was shifted to another location. Thereafter the petitioner has endeavoured to get back the land without success. The 3rd respondent has afterwards changed the public purpose from bus terminus to giving it to the 8th respondent on a long term lease to establish the Kiribathgoda Branch of the National Savings Bank. The

gravamen of the complaint of the petitioner is that the whole exercise is politically motivated.

Section 39A of the Land Acquisition Act deals with the subject of “*Divesting of lands where actual possession has been taken*”. It reads as follows:

39A. (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 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.

Then it is clear that the petitioner cannot demand divesting in view of at least section 39A(2)(a) requirement not being satisfied. If I may repeat, “*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*”. Admittedly, compensation was paid to the petitioner after acquisition.

It is the submission of the learned counsel for the petitioner that “*a nominal compensation was paid to the petitioner which is alarmingly lower amount than the market value at the time of acquisition.*” If that was the case, the petitioner was not without a remedy. He could have, as provided in the Act (vide *inter alia* sections 22 and 28) appealed to the Land Acquisition Board of Review and then to the Court of Appeal. The petitioner has not done so.

At this juncture it is relevant to refer to the Supreme Court case of *De Silva v. Atukorale, Minister of Lands, Irrigation and Mahaweli Development [1993] 1 Sri LR 283*. In that case Mark Fernando J. at page 293 stated:

If compensation has been paid or improvements have been made, then despite the inadequacy of justification, divesting is not permitted. The purpose and the policy of the

amendment is to enable the justification for the original acquisition, as well as for the continued retention of acquired lands, to be reviewed; if the four conditions are satisfied, the Minister is empowered to divest. Of course, even in such a case it would be legitimate for the Minister to decline to divest if there is some good reason-for instance, that there is now a new public purpose for which the land is required. In such a case it would be unreasonable to divest the land; and then to proceed to acquire it again for such new supervening public purpose. Such a public purpose must be a real and present purpose, not a fancied purpose or one which may become a reality only in the distant future. The 1st respondent, however, has not given any such reasons, and I cannot make any assumption in his favour.

This Judgment was quoted with approval by the Supreme Court of *Kapugeekiyana v. Hon. Janaka Bandara Tennakone, Minister of Land* [2013] 1 Sri LR 192. Thilakawardena J. at pages 206-207 stated:

*It is the assessment of this Court that to grant a divesting order on behalf of the Petitioner as per Section 39 A of the Act, the four conditions set out in Section 39 A (2) **must** be satisfied. It is not in dispute that the Respondents have paid compensation to the Petitioner for acquiring his land and furthermore a considerable amount of improvements have been carried out on the land in preparation for building houses. Therefore, it would be unreasonable to divest the land.*

Once again this Court is duty bound to follow the dictum held by Justice Mark Fernando, in the case of De Silva Vs. Atukorale, Minister of Lands, irrigation and Mahaweli Development and Another (supra); “it would be legitimate for the minister to decline to divest if there is some good reason—for instance, that there is now a new public purpose for which the land is required. In such a case it “would be unreasonable to divest the land, and then to proceed to acquire it again for such new supervening public purpose. Such a public purpose must be a real and present purpose, not a fancied purpose or one, which may become a reality only in the distant future”.

From the above dicta there cannot be any doubt that if the compensation has been paid as in this case divesting is not possible. Therefore, the instant matter shall end there.

However, for completeness, I must add that not only the first condition (non-payment of compensation), all four conditions in section 39A(2) shall be satisfied for divesting order to be made.

The above dicta further establish that even if all four conditions are satisfied the Minister can still decline to divest “*if there is some good reason—for instance, that there is now a new public purpose for which the land is required.*” In the instant case, after the bus terminus was shifted, the Minister states that there is a new public purpose, i.e. giving the land on a long term lease to the 8th respondent to establish Kiribathgoda Branch of the National Savings Bank.

The learned counsel for the petitioner for the first time in the written submissions (unknown to the respondents) has taken up the position that “*the purported amended public purpose which is to establish a branch of the 8th respondent does not qualify as a public purpose as the 8th respondent bank is engaged in the banking services which are commercial in nature and will benefit only selected individuals mainly the customers of the 8th respondent*” and therefore divesting can be compelled. The learned counsel further states that the 8th respondent has no actual interest in the land and they did not even file objections to the petitioner’s application.

The National Savings Bank has filed no separate objections may be because it is a state-owned Savings Bank and they have no personal interests as private banks. However, the main contender—the Minister—who has the authority to vest and divest has filed objections. The argument that setting up a branch of the National Savings Bank will benefit only selected individuals mainly the customers of the 8th respondent bank is unacceptable because in the case of other public purposes also, the result is the same. For instance, a bus terminus will benefit only a selected individuals—bus commuters; a public library will benefit only a selected individuals—readers; a school—school going children etc.

If the decision of the 3rd respondent as reflected in P22 and P23 is not *ultra vires*, there is no room to quash it by way of certiorari.

To issue a mandamus compelling the respondents to sell or give on a long term lease of the land to the petitioner, the petitioner must show that he has a legal right to the performance of a legal duty by the respondents against whom mandamus is sought. Mandamus is not intended to create a right but to restore a party who has been denied his legal right. (*Mageswaran v. University Grants Commission* [2003] 2 Sri LR 282, *Perera v. National Housing Development Authority* [2001] 2 Sri LR 50, *Wannigama v. Incorporated Council of Legal Education* [2007] 2 Sri LR 281, *Janak Housing (Pvt) Ltd v. UDA*[2008] 2 Sri LR 302, *Credit Information Bureau of Sri Lanka v. Messrs Jafferjee & Jafferjee (Pvt) Ltd*[2005] 1 Sri LR 89) The petitioner manifestly fails in this requirement.

Application of the petitioner is dismissed but without costs.

Judge of the Court of Appeal