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

Maheshwary Thambirajah,
Ward No. 12,
Pungudutivu.
And 4 Others
Petitioners

CASE NO: CA/WRIT/376/2014

Vs.

W. Waragoda,
Land Acquiring Officer-Jaffna District,
District Office,
District Secretariat,
Jaffna.
And 6 Others
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: M.A. Sumanthiran, P.C., with Luwie Ganeshathasan for the Petitioner.
Vikum De Abrew, Senior D.S.G., for the Respondents.

Decided on: 17.05.2019

Samayawardhena, J.

The petitioners filed this application seeking to quash by way of writ of certiorari Section 2 Notice marked P21 issued under the Land Acquisition Act, No.9 of 1950, as amended, and to prohibit by way of writ of prohibition the implementation of P21.

Section 2 of the Land Acquisition Act deals with "*Investigations for selecting land for public purpose*". According to this section, when the Minister of Lands 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 stating 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.*"

This is a general Notice to be exhibited and not to be served to the alleged owner or owners of the land. Further, this Notice under section 2 is even not intended to be exhibited in some conspicuous places on or near that land but in some conspicuous places in that area.

It is abundantly clear that Section 2 Notice does not involve any decision on the part of the Minister, which could be enforced *proprio vigore*[1], to quash by certiorari. That is the investigational stage for selecting a land for a public purpose, which may or may not end up with acquisition upon several subsequent steps

[1] Meaning "of or by its own force-independently".

mandated by Law being taken. At that stage an application to quash the Section 2 Notice by certiorari is premature and not ripe for review.

In *Ranawickrema v. Minister of Agriculture and Lands*[2], Sriskandarajah J. elaborated this point in the following manner:

> *The Petitioner in this application is seeking to quash the order P4B made by the 1st Respondent. The said order is in fact is not an order but a notice under Section 2 of the Land Acquisition Act. This notice is to investigate for selecting a land for public purpose.*
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> *In D. L. Jayawardana vs. V.P. Silva (72 NLR 25) the court held that certiorari does not lie against a person unless he has legal authority to determine a question affecting the rights of subjects and, at the same time, has the duty to act judicially when he determines such questions.*
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> *Administrative Law by H.W.R. Wade & C.F. Forsyth, Ninth Edition the authors in pages 611,612 & 613 states:*
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> *"As the law has developed, certiorari and prohibition have become general remedies which may be granted in respect of any decisive exercise of discretion by an authority having public functions, individual or collective. The matter in question may be an act rather than a legal decision or determination, such as the grant or refusal of a license, the making of a rating list on wrong principles, taking over of a school, the dismissal of employees who have statutory protection, or the issue of a search warrant. They will lie*

[2] [2006] 1 Sri LR 42 at 46-47.

where there is some preliminary decision, as opposed to a mere recommendation, which is a prescribed step in a statutory process which leads to a decision affecting rights even though the preliminary decision does not immediately affect rights itself."

"If confusion and complication are to be avoided judicial review must be accurately focused upon the actual existence of power and not upon the mere preliminaries. The House of Lords perhaps appreciated this point in refusing to review letters in which a Minister refused to accept that legislation about unfair dismissal and redundancy pay was sexually discriminate or contrary to European community law. That was a case of prematurity, where the issue was not ripe for review."

In this instant case on an application of the Ministry of Provincial Councils dated 10th March 2000 to the Ministry of Lands, the Minister of Lands, the 1st Respondent decided under section 2 of the Land Acquisition Act that a land in an area specified in the request is needed for a public purpose. A notice was published under section 2(2) of the said Act to investigate a land for selecting a land for the said public purpose. In this instant the decision of the 1st Respondent under section 2 is that a land in a specific area is needed for public purpose. To identify a land in that area for the said public purpose is the function of the requesting Ministry. The Minister of Lands under section 2 directs the acquiring officer to investigate by causing a notice under section 2 whether the land identified is suitable for the said public purpose. The direction of the Minister under section 2

or the act of the acquiring officer under this section is not a decision affecting the rights of a person but an investigation which leads to a recommendation to the Minister that the said land is either suitable or not suitable for the said purpose. The Minister after considering the suitability of the said land as provided in section 4(1) of the said Act makes a preliminary decision to acquire.

The decision that is challenged in this application is P4B, a notice under section 2 of the Land Acquisition Act to investigate a land and this investigation will not necessarily result in a subsequent acquisition of that land. Therefore, this is not a decisive exercise of discretion by the Minister. The first decisive exercise of discretion by the Minister under the Land Acquisition Act affecting the rights of a person is made at the stage of section 4(1) of the said Act. At this stage the person who has an interest in the land could object to the acquisition of the land as provided by that section. Therefore, seeking a writ of certiorari to quash a notice under section 2 of the Land Acquisition Act marked P4B or for a writ of prohibition at this stage from taking any steps to acquire any part of the Petitioner's land is premature and not ripe for review. Therefore the court dismisses this application without costs.

In *Dayaratne v. Rajitha Senaratne, Minister of Lands*[3], the counsel for the respondents took up two preliminary objections. The second one was: "*Is the (section 2) notice marked P15, a decision or determination amenable to writ of certiorari?*"

[3] [2006] 1 Sri LR 7.

This Court upheld that objection and dismissed the application *in limine*. Marsoof J.[4] held:

> *In the instant case, the order sought to be quashed by certiorari is the notice exhibited under Section 2 of the Land Acquisition Act marked P15. It is clearly not a decision or order which has force proprio vigore. In the scheme of the Land Acquisition Act, a Section 2 notice only facilitates an authorized officer to enter into a land and determine whether such a land is suitable for the public purpose for which the land is required. Thus the Section 2 notice by itself does not affect the right of any person to his land except to the limited extent of permitting the authorised officer to enter upon the said land and consider its suitability for acquisition, which is a very preliminary stage of the entire process. Therefore, if the Minister considers that a particular land is suitable for a public purpose, he directs the acquiring officer in terms of Section 4(1) of the Act to publish a notice calling for written objections to the intended acquisition, and after considering such objections, if any, and the relevant Minister's observations on such objections, the Minister has to decide in terms of Section 4(5) of the Act whether such land should be acquired or not. It is thereafter that a written declaration that such land is needed for a public purpose is made by the Minister and published in the Gazette as required by Section 5 of the Act. It is for this reason that this Court in Gunasekara v. The Principal, MR/Godagama Anagarkika Dharmapala Kanishta Vidyalaya and Others (CA 388/2000-CAM*

[4] At 19-20.

17.07.2002) held that an application for a writ of certiorari to quash a Section 2 notice under the Land Acquisition Act was premature and thereby upheld the preliminary objections to that effect. As Shiranee Tilakawardena J. observed at page 7 and 8 of her judgment-

"Another matter that is relevant to this application is that at the time of filing of this application the acquisition proceedings were at an initial stage, and only notice under Section 2 of the Land Acquisition Act had been issued. A notice in terms of Section 2 of the Land Acquisition Act is issued when the Minister decides that the land in any area is needed for any public purpose. The Section 2(1) notice is issued with the objective of making a survey of a land and making boundaries thereon and to determine whether a land would be found within its parameters that would be suitable for the public purpose of the said Act."

Justice Tilakawardene went on to hold in this case that the application for writ of certiorari was premature in the circumstances of that case, and should be dismissed in limine. Similarly, in Lucian de Silva v. Minister of Lands (CA 233/81-CAM 22.07.1982) and Wickremasinghe v. Minister of Lands (CA 235/81-CAM 22.07.1982), it was held that steps taken under Section 2 of the Land Acquisition Act are only investigative in character, and that it is premature to invoke the writ jurisdiction of our courts with a view of quashing a Section 2 notice.

The public purpose stated in Section 2 Notice relevant to the present case is "*To establish a training school under 52nd Brigade Headquarters of Sri Lanka Army*".

Although this Notice marked P21 issued in terms of section 2 has also been served on the 1st petitioner, that is redundant, and is not a legal requirement. Service of Notice on the owner or owners becomes necessary in law, if and only if the Minister considers that a particular land is suitable for a public purpose. That is the second stage. That Notice is not under section 2, but under section 4. It is in Section 4 Notice (not in Section 2 Notice) a period shall be specified within which objections must be made by the owner or owners, such period being not less than fourteen days from the date on which such Notice is given.

The land in issue in this action, admittedly, used by the LTTE during the 30-year long war. According to the Gramaseva Officer of that area, this land had been used by the LTTE to establish their military camp until the Sri Lanka Army recaptured the Jaffna peninsula.[5]

I am not impressed by the argument of the learned President's Counsel for the petitioners that Section 2 Notice dated 23.06.2014 is a pretext as "*the Army in or about the 8th January 2014 declared open the Headquarters 52 Division Camp on part of the subject land.*"[6]

According to the schedule to the petition, the land claimed by the petitioners is 51 Acres 2 Roods and 10 Perches in extent,

[5] Vide 6R2.
[6] Vide paragraph 23 of the petition.

and according to Section 2 Notice (P21), the land identified for the consideration to be acquired to establish a Training School under 52nd Brigade Headquarters of Sri Lanka Army is about 40 Acres in extent.

The petitioners do not, in these proceedings, canvass the decision to establish "*The new headquarters of the Sri Lanka Army's 52nd division in Mirusuvil*"[7] "*on part of the subject land*"[8].

Their complaint is against Section 2 Notice, which is in relation to the acquisition of (the balance portion of) about 40 Acres "*To establish a training school under 52nd Brigade Headquarters of Sri Lanka Army*".

Establishment of the Brigade Headquarters of the 52nd Division of the Sri Lanka Army and establishment of a Training School under 52nd Brigade Headquarters of Sri Lanka Army may be interconnected but not the same.

I must also add that these are matters in relation to National Security, which need not and should not be discussed and probed openly. National Security shall be the top priority. That is for the common benefit of all Sri Lankans, whether he be Sinhalese, Tamil, Muslim or any other.

In the Privy Council case of *The Zamora*[9], Lord Parker of Waddington observed:

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[7] Vide P18(a).
[8] Vide paragraph 23 of the petition.
[9] [1916] 2 AC 77 at 107

> *Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of Law or otherwise discussed in public.*

This was cited by Sriskandarajah J. in *Major Dhammi Gonadeniya Hewage v. Commander Sri Lanka Army*.[10] In the same case Sriskandarajah J. cited *Council of Civil Service Unions v. Minister for the Civil Service*[11] to express that "*The right to a fair hearing may have to yield to overriding considerations of national security*."

When it comes to National Security, Section 2 Notice may not even state the public purpose.[12]

I reject with dismay the argument of the petitioners that "*a military installation on the premises of a valuable agricultural land which was used to cultivate coconuts and palmyra which would have provided jobs for residents of the area and contributed the national economy is irritational and cannot be categorized as a public purpose*."[13] Planting coconuts cannot be more important than national security.

Section 2 Notice in the Land Acquisition Act cannot be quashed by certiorari.

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[10] CA/Writ/114/2005 decided on 22.10.2007.
[11] [1985] 1 AC 374
[12] In Manel Fernando v. D.M. Jayaratne, Minister of Agriculture and Lands [2000] 1 Sri LR 112 at 126, Mark Fernando J. stated: "A section 2 notice must state the public purpose-although exceptions may perhaps be implied in regard to purposes involving national security and the like."
[13] Vide paragraph 32 of the petition.

I dismiss the application with costs.

Judge of the Court of Appeal