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

In the matter of an application under Article 140 of the Constitution for orders in the nature of Writs of *Mandamus*.

D.S Ubeysinghe

No.29/A, Medabowala,

Kandy.

Petitioner

Case No: CA(Writ) 21/2017

Vs.

1. H.M Gamini Seneviratne
   Divisional Secretary,
   Divisional Secretariat,
   Kandy.

2. Director
   Urban Development Authority,
   Keppetipola Mawatha,
   Kandy.

3. Hon. M.K.A.D.S Gunawardene
   Minister of Lands,
   "Mihikatha Medura",
   Land Secretariat,
   No.1200/6, Rajamalwatte Avenue,
   Battarmulla.

3A Hon. Gayantha Karunathileka
   Minister of Lands,
   "Mihikatha Medura",
   Land Secretariat,
   No.1200/6, Rajamalwatte Avenue,
   Battarmulla.

Respondents

Before: Janak De Silva J.

Counsel:

Niranjan De Silva with S. Perera for the Petitioner

Chaya Sri Nammuni SSC for the Respondents

Written Submissions tendered on:

Petitioner on 20.12.2018

Argued on: 05.03.2019

Decided on: 24.05.2019

Janak De Silva J.

The Petitioner is seeking a writ of mandamus compelling and/or directing the 3rd Respondent, in terms of the provisions of the Land Acquisition Act (Amendment) Act No. 8 of 1979, to issue a divesting order in accordance with section 39A of the Principal Act, in respect of Land Lot No. 24 of subsequent Preliminary Plan No. 3787(which refers to the original land Lot No. 3 of Preliminary Plan No. 3640).

The Petitioner states that he became the owner of an undivided ½ share from the northern portion of the total land more fully described in the schedule to deed no. 4757 dated 29.12.1980. According to the Petitioner the remainder of the undivided ½ share was owned by one K.B. Ekanayake.

It is not in dispute between parties that the said land was acquired by the State under the Land Acquisition Act as amended (Act). There is a dispute between parties as to whether the land claimed by the Petitioner is Lot 2 or 3 of Preliminary Plan No. 3640. The Petitioner contends it is Lot 3 whereas the Respondents contends it is Lot 2.

The main issue that arises for consideration is whether a writ of mandamus can be granted as prayed for by the Petitioner in view of the provisions of the Act.

S.N. Silva J. (as he was then) in *Kingsley Fernando v. Dayaratne and Others* [(1991) 2 Sri.L.R. 129] held that section 39A of the Act does not give a right to the former owner to seek a divesting order even where the pre-conditions are satisfied but only vests a discretionary power in the Minister to make a divesting order provided the pre-conditions are satisfied. However, there is a divergence in the approach of the Supreme Court to this issue. In *De Silva v. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another* [(1993) 1 Sri.L.R. 283] Fernando J. held that a writ of mandamus will issue directing the Minister to divest land acquired by the State if the four conditions in section 39A of the Act are fulfilled. This was quoted with approval and followed by the Supreme Court in *Rashid v. Rajitha Senaratne, Minister of Lands and Others* [(2004) 1 Sri.L.R. 312] and *Mahinda Katugaha v. Minister of Lands and Land Development and Others* [(2008) 1 Sri.L.R. 285].

However, the Supreme Court in *Urban Development Authority v. Abeyratne and Others* [S.C. Appeal No. 85/2008 & 101/2008; S.C.M. 01.06.2009] took a different view and held that the exercise of discretionary power vested with the Minister by section 39A of the Act is not amenable to judicial review in an application for a writ of mandamus. Similar line of thinking is found in *Wijewardena v. Minister of Lands and Others* [S.C. Appeal 56/2008; S.C.M. 24.11.2015] where the Supreme Court again took the view that section 39A of the Act merely vests a discretionary power in the Minister to make a divesting order in a case where the pre-conditions referred to in that section are satisfied and that a former owner cannot demand such exercise of power.

I have closely examined the different reasons given by the Supreme Court in the above cases and hold that the reasoning adopted in *Urban Development Authority v. Abeyratne and Others* (supra) is logical and compelling since in *De Silva v. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another* (supra) the Supreme Court failed to consider:

a. the provisions and the scheme of the Act,
b. the judgment in *Gunasekera v. Minister of Lands & Agriculture* (65 N.L.R. 119),
c. that a writ of mandamus covers a situation where there has been no exercise of power and compels the exercise of power,

d. that mandamus would lie when a statutory duty is cast upon a public authority with a correlative right to demand its discharge,
e. that section 39A (1) of the Act uses the word "may" which categorically implies a discretionary power in the Minister,
f. that a writ of mandamus has nothing to do with abuse of discretion.

Furthermore, the reasoning in *De Silva v. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another* (supra. page 293) is in any event inconsistent per se for on one hand the court held that a writ of mandamus will issue if the four pre-conditions are satisfied while on the other hand it held that even in that situation 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.

I therefore hold that the writ of mandamus prayed for by the Petitioner cannot be granted.

The inquiry notes of the section 9 inquiry under the Act (P8a) clearly indicates that the father of the Petitioner appeared on 2.9.1992 and claimed compensation for Lot 2 of Plan 3640. The Petitioner also appeared on 7.7.1999 and testified that he is claiming compensation for Lot 2 of Plan 3640. Even the tenement list of Plan 3640 states that Lot 2 therein is claimed by the Petitioner. The Acquiring Officer deposited the compensation due for Lot 2 of Plan 3640 in the District Court of Kandy Case No. L/A 21433. However, the Petitioner appeared and submitted that he was not making any claim to Lot 2 of Plan 3640 and was making a claim only for Lot 3 therein.

In the aforesaid circumstances, the Petitioner cannot be heard to state that he is claiming Lot 3 of Plan 3640. He cannot approbate and reprobate.

Scrutton, L.J. in *Verschures Creameries Limited vs. Hull & Netherland Steamship Co. Ltd.* [(1921) 2 KB 608 at 612] held:

> "A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage. This is to approbate and reprobate the transaction."

Samarakoon C.J. in *Visuvalingam v. Liyanage* [(1983) 1 Sri L.R. 203 at 227] adopted the principle with a different formulation by stating that one "cannot blow hot and cold."

In *Ranasinghe v. Premadharma and others* [(1985) 1 Sri.L.R. 63 at 70] Sharvananda C. J. held:

> "In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. When the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one, he cannot afterwards assert the other; he cannot affirm and disaffirm"

In any event compensation for Lot 3 of Plan 3640 has been paid to K.B. Ekanayake who has not been made a party to this application. It is trite law that failure to add necessary parties to a writ application is a ground by itself to refuse any relief. Furthermore, it is the position of the Respondents that the land in dispute has been used for a public purpose and compensation paid. Therefore, in any event the requirements of section 39A of the Act has not been satisfied.

Furthermore, the Petitioner is only asking for a divesting of Lot No. 24 of subsequent Preliminary Plan No. 3787(which refers to the original land Lot No. 3 of Preliminary Plan No. 3640) and not the total extent of land acquired by the State. In *Kingsley Fernando v. Dayaratne and Others* (supra), which was quoted with approval in *Mendis v. Jayaratne, Minister of Agriculture, Lands and Forestry* [(1997) 2 Sri.L.R. 215], this Court held that in a divesting what is contemplated is a complete reversal of the status quo ante and not a piece-meal divesting of particular portions of a land that is vested. Hence the application for a divesting of a particular portion of the land that is vested is in any event untenable and mandamus cannot issue. The divesting has to relate to the entire extent covered by the vesting Order.

For all the foregoing reasons, I dismiss the application with costs.

Judge of the Court of Appeal