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

In the matter of an Application for orders in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Srikanthi Chandralatha Rodrigo
alias Dehiwalaliyanage Srikanthi Chandralatha Rodrigo (nee De Silva Abhayanayake)
No. 53/1, Gregory's Road, Colombo 07.

Petitioner

Case No. C. A. (Writ) Application 75/2019 **Vs.**

1. Gayantha Karunathilake
   Minister of Lands and Parliamentary Affairs,
   'Mihikatha Medura', Rajamalwatte Road,
   Battaramulla.

2. W. H. Karunarathne
   Secretary to Minister of Lands and Parliamentary Affairs,
   'Mihikatha Medura', Rajamalwatte Road,
   Battaramulla.

3. Colombo Municipal Council, Colombo 07.

4. Rosy Senanayake
   Mayor,
   Colombo Municipal Council, Colombo 07.

5. Municipal Commissioner
   Colombo Municipal Council, Colombo 07.

6. Loku Bogahawattage Kumudulal
   Chief District Engineer,
   District Engineering Office No. 4 (CMC),
   Robert Gunawardana Mawatha, Kirulapana,
   Colombo 03.

7. Divisional Secretary
   Divisional Secretariat, Thimbirigasyaya.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Shantha Jayawardena with Chamara Nanayakkarawasam for the Petitioner

Nayomi Kahawita SSC for 2nd Respondent

Senany Dayaratne with Nisala S. Fernando for 3rd, 4th, 5th and 6th Respondents

Supported on: 17.06.2019 and 19.06.2019

Written Submissions tendered on:

Petitioner on 05.07.2019

2nd Respondent on 15.07.2019

3rd to 6th Respondents on 05.07.2019

Decided on: 28.10.2019

Janak De Silva J.

The Petitioner is assailing certain steps taken under the Land Acquisition Act as amended (Act) to acquire a portion of land belonging to her. The following reliefs have been claimed:

(a) Writ of Certiorari quashing the Order dated 27.09.2018 made under Section 38 Proviso (a) of the Act [published in the Government Gazette (Extraordinary) dated 09.10.2018] marked P7, in so far as it relates to the Petitioner's land P7(a) depicted as Lot 1 in Advanced Tracing marked P8,

(b) Writ of Certiorari quashing the notice under Section 2 of the Act, if any, pertaining to the acquisition of the Petitioner's land depicted as Lot 1 in the Advanced Tracing marked P8,

(c) Writ of Certiorari quashing the notice under Section 4 of the Act, if any, pertaining to the acquisition of the Petitioner's land depicted as Lot 1 in the Advanced Tracing marked P8,

(d) Writ of Prohibition prohibiting the 1st to 6th Respondents or anyone or more of them and/or anyone acting under them from taking possession of the Petitioner's land depicted as Lot 1 in the Advanced Tracing marked P8.

This matter was supported for notice and interim relief. Court is now called upon to decide whether notice should be issued and if so whether interim relief should be granted. In this exercise Court is guided by the following tests formulated in *Billimoria v. Minister of Lands, Land Development and Mahaweli Development and Two Others* [(1978-79-80) 1 Sri.L.R. 10] and *Duwearatchi and another v. Vincent Perera and Others* [(1984) 2 Sri.L.R. 94]:

(a) Whether the Petitioner has made out a prima facie case?

(b) Where does the balance of convenience lie?

(c) Will irreparable mischief and/or injury be caused to either party?

Whether the Petitioner has made out a prima facie case must be considered in the context of the relevant statutory provisions and the interpretation given thereto by Courts.

Section 2 Notice

The Petitioner on one hand claimed that no section 2 notice was published under the Act before the Order under Section 38 Proviso (a) of the Act was made. Court directed the 1st and 2nd Respondents to produce to Court a copy of section 2 notice issued under the Act. Accordingly, the learned Senior State Counsel appearing for the 2nd Respondent by motion dated 21.06.2019 submitted a copy of the section 2 notice issued under the Act for Lot 1 of Surveyor General's Advanced Tracing bearing No. CO/DSO/2017/100 which contains part of the land belonging to the Petitioner.

It was further contended that the section 2 notice was not served on the Petitioner. Section 2 of the Act only requires the notice to be exhibited conspicuously in the area where the land is situated. Documents marked 3R3 and 3R4 show that it has been done including sending a copy to the brother of the Petitioner who was the registered proprietor of the relevant land.

Hence the remaining question is whether a Writ of Certiorari is available to quash a notice issued under section 2 of the Act.

Section 2 of Act reads:

"2. (1) Where the Minister **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.

(2) The notice referred to in subsection (1) shall be in the Sinhala, Tamil and English languages and shall state 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.

(3) **After a notice under subsection (2)** is exhibited for the first time in any area, any officer authorized by the acquiring officer who has caused the exhibition of that notice, or **any officer** acting under the written direction of the officer authorized as aforesaid, **may enter any land in that area**, together with such persons, implements, materials, vehicles and animals as may be necessary, and

(a) survey and take levels of that land,

(b) dig or bore into the subsoil of that land,

(c) set out the boundaries of that land and the intended line of any work proposed to be done on that land,

(d) mark such levels, boundaries and line by placing marks and cutting trenches,

(e) where otherwise the survey of that land cannot be completed and such levels taken and such boundaries and line marked, cut down and clear away any part of any standing crop, fence or jungle on that land, and

(f) do all other acts necessary to ascertain whether that land is suitable for the public purpose for which land in that area is required:

Provided that no officer, in the exercise of the powers conferred on him by the preceding provisions of this subsection, shall enter any occupied building or any enclosed court or garden attached thereto unless he has given the occupier of that building at least seven days' written notice of his intention to do so." (emphasis added)

Section 2(1) of the Act is the beginning of the process through which land can be acquired for a public purpose. It first envisages the Minister making a decision that land in any area **is needed** for a public purpose. Once the Minister so decides, a notice in accordance with section 2(2) of the Act must be exhibited. After such notice is exhibited for the first time, any officer authorized by the acquiring officer may enter any land in that area and to any of the acts referred to in section 2(3) of the Act. **Thus, the acts that can be done in terms of a section 2(1) notice is investigatory nature**. It is clearly not a decision or order which has force *proprio vigore*.

It is in this context that this Court as well as the Supreme Court has consistently held that a notice under section 2(1) of the Act is not liable to be quashed by a Writ of Certiorari [*Edirisinghe v. Minister of Lands and another* [(C.A. Application No. 2543/2004; C.A.M. 16.10.2006, *Dayaratne v. Rajitha Senaratne, Minister of Lands and Others* (2006) 1 Sri.L.R. 7, *Urban Development Authority v. Abeyratne and Others* (S.C. Appeal No. 85/2008 and 101/2008; Decided on 01.06.2009), *Kegalle Plantations Limited v. Minister of Agriculture and Lands and Others* (C.A. Writ No. 534/2000, C.A.M. 07.06.2019].

Section 4(1) of the Act states that where the Minister considers that a particular land **is suitable** for a public purpose notice is required to be given to the owner. Hence, a **section 2 notice only signifies that land is needed** whereas a **Section 4 notice signifies that a land is suitable.** Therefore, a section 4(1) notice signifies that the Minster is of the opinion that the land is suitable for a public purpose whereas a section 2 notice signifies that the Minister is of the opinion that land is needed for a public purpose.

The Petitioner sought to overcome this legal impediment by contending that the section 2 notice forming the subject matter of this application has already identified her land and as such is liable to be quashed by a Writ of Certiorari. The Petitioner relied on the decision of *Manel Fernando v. Jayaratne* [(2000) 1 Sri. L. R.112]. I disagree.

Manel Fernando's case was a fundamental rights application and was not concerned with the grounds on which a writ of *certiorari* can be issued. In fact, in *Dayaratne's* case (supra), Marsoof J. stated (at page 21) that:

> "Although Manel Fernando's case (Supra) was a fundamental rights application which was not circumscribed by the parameters enunciated by Lord Atkin in the Electricity Commissioners case (Supra) as developed by our Courts in the decisions mentioned above, I find that the above quoted dicta of Fernando J. support the view that Section 2 notice is exhibited to facilitate investigation into the suitability of the land, and that it would be premature to challenge a Section 2 notice which sets out the particular public purpose for which the land is needed, at a stage prior to a decision being made by the Minster under Section 4(5) of the Land Acquisition Act that the land in question should be acquired." (emphasis added)

Section 4A of the Act (amendment made in 1964) is **indicative** that a **Section 2 notice can be issued in respect of any land.** It reads:

> "4A. **Where a notice has been issued** or exhibited **in respect of any land under section 2** or section 4..." (emphasis added)

If the contention of the Petitioner is correct, then section 4A should have stated "Where a notice has been issued or exhibited in respect of any **area** under section 2" and not "Where a notice has been issued or exhibited in respect of any **land** under section 2 ..."

Even where a particular land is identified in a section 2 notice, can it be said that the said notice per se affects the rights of the owner making it liable to be quashed by a writ of certiorari? It does not appear to be so for me. The **legal effect of the notice cannot be considered independent of the scheme of the Act.** Even where a particular land is identified in the section 2 notice, that cannot be the basis to issue a writ of certiorari since all what a section 2 notice permits is an investigation into the suitability of the land. It does not deprive the owner of title. Only a decision made in terms of Section 4(5) of the Act has the legal effect of affecting the rights of the owner and it is in this context that in the unreported decision of the Supreme Court *Urban Development Authority v. Abeyratne and Others* (supra), S.N. Silva C.J. stated that "Hence if at all the decision of the Minster should be challenged ...when the decision is made in terms of Section 4(5) that the land or servitude should be acquired under the Act."

The Petitioner seeks to make a distinction between the words "any area" and "land" used in section 2 of the Act and contends that all what can be described in a section 2 notice is an "area" and where instead of an "area" a particular "land" is identified with metes and boundaries, it reflects that a decision has been taken to acquire that "land". This contention is erroneous in the light of the scheme of the Act and in particular, section 4A as amended in 1964 as explained above.

Even where a particular land is identified in the notice, all that the law enables is an investigation into the suitability of the land. That is why Section 2 (3) (f) directs any authorized officer to "do all other acts necessary to **ascertain whether that land is suitable for the public purpose** for which land in that area is required". If the land is not suitable for the public purpose further proceedings cannot be taken under the Act. That is why Section 4(1) starts by stating that "Where the Minister considers that a **particular land is suitable for a public purpose...**" and goes on to specify the next steps in the acquisition proceedings.

It is in this context that the distinction made between "needed" and "suitable" between Section 2(1) and Section 4(1) becomes relevant. For all the foregoing reasons, a Writ of Certiorari quashing the notice under section 2 of the Act, pertaining to the acquisition of the Petitioner's land depicted as Lot 1 in the Advanced Tracing marked P8 cannot be issued.

Order under Section 38 Proviso (a) of the Act

In considering the prayer for a Writ of Certiorari quashing the Order dated 27.09.2018 made under Section 38 Proviso (a) of the Act [published in the Government Gazette (Extraordinary) dated 09.10.2018] marked P7, in so far as it relates to the Petitioner's land P7(a) depicted as Lot 1 in Advanced Tracing marked P8, I will first examine the scope of such an order and the burden of proof.

The learned counsel for the Petitioner submitted that the Petitioner can assail P8 on two grounds namely lack of public purpose and lack of urgency. He relied on the decision in *Fernandopulle v. Senanayake, Minister of Agriculture* [79(II) N.L.R. 115] and submitted that *Hewawasam Gamage v. Minister of Lands* (76 N.L.R. 25) does not recognise or support the proposition that an Order under section 38 proviso (a) of the Act can be challenged only on the ground of "lack of urgency". In *Hewawasam Gamage v. Minister of Lands* (supra) the Supreme Court held that that the validity of a decision of the Minister under section 2 (1) of the Act and an order of the Minister under

proviso (a) to section 38 of the Act cannot be questioned in a Court of law. The question whether a land should be acquired is one of policy to be determined only by the Minister.

In *Fernandopulle v. Senanayake, Minister of Agriculture* (supra. at page 118) Samarakoon C.J. held:

> "Section 38 nowhere refers to "public purpose ". It only refers to the sections where the need for such purpose has been decided. The only decision it is concerned with is the "urgency" which necessitates " immediate possession" of the land being taken. The Minister's sole power under that section is to decide the question of urgency to meet the need for which an order was made under section 2 and/or section 4"

Clearly the Supreme Court held that the Minister can make an Order under this section only on the grounds of urgency. It follows that in assailing such an Order the only ground on which it can be done is the lack of urgency. It is immaterial that an order under section 5(1) of the Act has not been made.

Furthermore, in *Fernandopulle v. Senanayake, Minister of Agriculture* (supra) the Supreme Court also held that **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.** *(emphasis added)*. Hence the burden of proof was on the Petitioner to adduce evidence that there was no urgency and if he fails to do so, his application must be dismissed.

The proposed acquisition is for the expansion of Vijitha Road which is sequel to representations made by the residents of the area which disclose the difficulty for vehicles to enter and exist the said road [3R1]. These representations indicate that the widening of the said road commenced more than 15 years ago and was hampered due to one owner resorting to court action resulting in a delay of over 12 years. This culminated in the 3rd Respondent Municipal Council paying compensation to this owner and expanding the road. However, it is said that the point at which Vijitha Road connects to Havelock Road, the width is about 3 feet which makes it difficult for access. It appears that the portion of land claimed by the Petitioner is to widen the road at that point. The request is to widen the road up to the street lines of the 3rd Respondent Municipal Council [3R1]. These facts establish urgency.

In this context it is observed that in the plan marked P2 showing the land belonging to the Petitioner the sanctioned street line is indicated [3R9(b) is to the same effect] which apparently existed even prior to the construction of the cinema hall. The building permit issued to the brother of the Petitioner for building on the land specifically state at paragraph 5 that the permit does not give a right to build within sanctioned Street Lines [Motion dated 20.06.2019 filed by 3rd to 5th Respondents].

The Petitioner states that there is an alternative to the proposed acquisition namely the expansion of the narrow footpath currently used by the residents of Vijitha Road to access Havelock Road. However, as pointed out by the 3rd to the 5th Respondents, it is not viable for:

(a) This footpath is unsanctioned and not falling within any sanctioned street line;

(b) To expand that footpath requires acquisition of land on which there are permanent constructions unlike the proposed acquisition.

For the foregoing reasons, I hold that the Petitioner has failed to fulfil the burden of proof and as such the Petitioner has not made out a prima facie case for the issuance of notice.

For all the foregoing reasons, I see no reason to issue notice in this application.

Notice refused. Application dismissed without costs.

However, Court directs the Respondents to expedite further steps under the Act to ensure that compensation for the land acquired is paid within six months from this date.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal