

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

In the matter of an application for a
mandate in the nature of writ of
mandamus under and in terms of
Article 140 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

CASE NO: CA/WRIT/444/2014

1. D. Palitha Sarath Kumara,
Tissa Timber Mill,
Kandy Road,
Mawathagama.
2. Karunanayakage Nandawathie,
Sirisevana,
Oththekade,
Kahapathwala.

PETITIONERS

VS.

1. The Divisional Secretary,
The Divisional Secretariat,
Mawathagama.
2. The Secretary,
Ministry of Land and Land
Development,
Mihikatha Medura,
Land Secretariat,
1200/6, Rajamalwatte Avenue,
Battaramulla.
3. Janaka Bandara Tennakoon,
The Minister of Land and Land
Development,
Mihikatha Medura,
Land Secretariat,
1200/6, Rajamalwatte Avenue,
Battaramulla.

RESPONDENTS

Before: **M. T. MOHAMMED LAFFAR, J. &
K. K. A. V. SWARNADHIPATHI, J.**

Counsel: Manohara de Silva, P.C. with Nimal Hippola for the
Petitioners.

Chaya Sri Nammuni, S.C. for the Respondents.

Written Submissions on: 13.11.2019 & 28.05.2020 (by the
Petitioners).

03.12.2019 (by the Respondents).

Decided on: 31.03.2021.

MOHAMMED LAFFAR, J.

The Petitioners in this application have invoked the supervisory jurisdiction of this Court under Article 140 of the Constitution seeking the discretionary remedy of writ of mandamus.

When this matter was taken up for argument, both parties had consented to dispose the application by way of written submissions that have already been tendered.

The 1st Petitioner and the 2nd Petitioner's husband R.G. Sirisena were the owners of the property called Rajawatte, approximately one Acre in extend in the town of Mawathagama depicted in Plan No. 480 as Lot 1 which was acquired by the State in terms of the Land Acquisition Act, No. 09 of 1950 (sometimes referred to as the 'Act') for a public purpose on or about 1986.

It is an undisputed fact that the 1st Petitioner held title to 3/4 share of the said land whilst the 2nd Petitioner's husband R.G. Sirisena held title to the balance 1/4 share.

At the section 9 inquiry which was held to determine the compensation payable, the 1st Petitioner and the said R.G. Sirisena had submitted their title documents for the entitlement on their respective shares of the said land. Accordingly, the section 10(1)(a)-Notice and the section 17 award have been published upon the above information received by the State.

The Petitioners state that although the said property acquired in 1986, up to 2002 no compensation was paid. Therefore, the 1st Petitioner complained to the Public Petitions Committee of Parliament for the payment of compensation and for the divesture of the unutilized land and accordingly, the committee gave a recommendation, recommending the divesture of a portion of land which was unutilised and for the payment of compensation for the balance. These facts are reflected in the document marked P12.

Consequently, the portion of the land which is unutilised was divested by Gazette, No. 1486/17 dated 28.02.2007. This document has been marked as 'P15' by the Petitioners.

It was revealed to this Court that the Petitioners later requested for alternative land instead of compensation and upon such request, a portion of land called *Deverwatte* was demarcated for transfer. In the meantime, the Mawathagama Pradeshiya Sabha instituted an action challenging, *inter alia*, the said divesture by way of Writ Application in case bearing No. Writ/285/2008 before this Court.

In the said application, on 30.08.2013 this Court gave a judgment against the Petitioners who were cited, *inter alia*, as 5th and 6th Respondents by quashing the order for divesture.

It was in those circumstances, the 1st Petitioner made a request to the 3rd Respondent, Minister of Land and Land Development that the extend of land to be transferred in lieu of compensation be increased accordingly taking into consideration that the Petitioners did not

benefit from the said divesting order as the same was quashed by this Court (vide document marked P22). Accordingly, the 3rd Respondent issuing a letter marked **P23**, has instructed the 1st Respondent, the Divisional Secretary, Mawathagama to take necessary steps to transfer an alternative land (in lieu of compensation) to the Petitioners.

The Petitioners further submit that although the 1st Respondent is legally bound to comply with the directions made by the 3rd Respondent, he failed to do so. Therefore, the Petitioners argue that the failure of the 1st Respondent to transfer an alternative portion of land in lieu of compensation to the 1st Petitioner and the heirs of R.G. Sirisena is unreasonable, arbitrary, malicious, illegal, and *ultra vires* the provisions of section 36 of the Land Acquisition Act.

The Petitioner sought, *inter alia*, the following relief:

- b. *Grant and issue a mandate in the nature of a writ of mandamus to compel the 1st Respondent to transfer an alternative land being the property of the state to the 1st Petitioner and the heirs of R.G. Sirisena in lieu of compensation for the acquisition of the land called Rajawatte, as reflected in P23.*

In the alternative to (b) above,

- c. *Grant and issue a mandate in the nature of a writ of mandamus to compel the 1st Respondent to act in terms of the provisions of section 36 of the Land Acquisition Act to transfer an alternative land being the property of the state to the 1st Petitioner and the heirs of R.G. Sirisena in lieu of compensation for the acquisition of the land called Rajawatte, as reflected in P23.*

The learned State Counsel for the Respondents admitted the fact that the Petitioners still had not been given an alternative land for the portion of land that had been utilized and therefore, they have had neither compensation nor alternative land.

The learned State Counsel also submitted that in addition to the claims made by the 1st Petitioner and the deceased R.G. Sirisena, the Mahanuwara Sri Vishnu Devalaya has sent a letter dated 05.12.2007 to the 1st Respondent making a claim for the acquired land (vide 1R2). Therefore, she further submitted that since title to the land was unclear, a legal advice was sought, and the Petitioners' claim was not proceeded with.

However, this Court is of the view that according to the Land Acquisition Act, all claims to an acquired land must be submitted to the relevant Acquiring Officer¹ at the time of the inquiry i.e., inquiry into claims for compensation (vide section 9). Therefore, in the instant case, it reveals that the Mahanuwera Sri Vishnu Devalaya neither did not participate in the inquiry nor submitted any such claim before issuing section 17 notice and therefore any claim, they may have, has to be canvassed before the appropriate District Court. The learned State Counsel upholding the highest traditions of the Attorney General's Department, also informed the above legal position in her written submissions.

Therefore, we hold that the above claim of the Mahanuwara Sri Vishnu Devalaya to the acquired land cannot be entertained at this stage.

The learned State Counsel for the Respondents referring to a comment made by this Court in the aforesaid case namely, CA/Writ/285/2008 submitted that entitlement of the 1st Petitioner and the R.G. Sirisena (who have been cited as 5th and 6th Respondents respectively) to the said land has been questioned by the Court.

¹ According to section 65 of the Land Acquisition Act, "acquiring officer", with reference to any land, means the *Government Agent* or *Assistant Government Agent* of the administrative district in which that land is situated, or any other prescribed officer.

In reference to the Affidavit filed by the 5th Respondent who is the 1st Petitioner in the instant application, the above judgment holds that,

“This court observes that other than a mere bare statement the 5th Respondent's land was acquired in 1986 there is no other statement or material by way of documentary proof that is placed before this court to prove his title or entitlement to the property in question at any point of time. Nor any submissions made to this court as to whether 5th Respondent has any interest/right to the property in question. This court is of the view that both 5th & 6th Respondents are 'schemers' who very craftily made use of the State machinery and misled persons in authority only for their personal gains...” [per Anil Gooneratne, J., at pg. 10].

However, this Court is of the view that the aforesaid comments are respectfully *obiter* since the said case (CA/Writ/285/2008) was an application to quash the divesture and not the payment of compensation to the Petitioners. Further, it is important to note that the findings of the section 9 inquiry or the section 17 award was not challenged in the case. In any event, the above observation or comment is not a judgment or pronouncement on the Petitioners' entitlement to the land.

Furthermore, this Court observes that after concluding all the necessary procedural steps including the section 9 inquiry and the section 17 Notice (P7), the Petitioners have jointly entitled to the proposed compensation. Thus, the Respondents now cannot be permitted to take up a different position or cannot be permitted to question the above procedures. A party to a judicial proceeding cannot take up inconsistent positions to suit the occasion. A party cannot blow hot and cold, affirm, and disaffirm and approbate and reprobate simultaneously. *Quod approbo non reprobo* - One cannot take the benefit of an instrument, and at the same time repudiate it (vide *Ceylon Plywoods Corporation vs. Samastha Lanka G.N.S.M Rajya Sanstha Sevaka Sangamaya*²).

² [1992] 1 SLR 157, pg. 163

This Court observed that after the judgment in CA/Writ 285/2008 in which the aforesaid divesting order P15 quashed, the 1st Petitioner made a request to the 3rd Respondent, the Minister of Land and Land Development that the extent of land to be transferred in lieu of compensation (which was pending in respect of the portion of land on which the Public Library was constructed and therefore could not be divested) be increased, taking into consideration that the Petitioners did not benefit from the said divesting order as the same was quashed by this Court. Accordingly, the 3rd Respondent approved the said request of the Petitioner and subsequently the 2nd Respondent instructed the 1st Respondent (vide P23) to take necessary steps to transfer an alternative land (in lieu of compensation) to the Petitioners.

However, being the competent officer i.e., Acquiring Officer, the 1st Respondent has failed to take necessary steps to transfer an alternative portion of land in lieu of compensation to the 1st Petitioner and the heirs of R.G. Sirisena. According to my view, this inaction is, to say the least, unreasonable according to the standard of unreasonableness would amount to an abuse of administrative authority set out in *Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation*³.

Further, the instant application presents peculiar facts and circumstances which warrant interference by this Court to rectify an apparent injustice - acquisition proceedings having commenced as far back as 1986 and the owners are denied due compensation or alternative land for the last 35 years. As the Chief Justice Marshall (then he was) emphasized in *Marbury vs. Madison*⁴, it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.

³(1948) 1 KB 223. See also *Council of Civil Service Unions vs. Minister for the Civil Service* (1984) 3 All ER 935.

⁴(1803) 5 U.S. 1 Cranch 137.

Every right, when withheld, must have a remedy, and every injury its proper redress⁵.

In the circumstances, we make order allowing this application as per sub paragraph (b) of the prayer to the Petition. Accordingly, writ of mandamus issued as per the prayer to the Petition without costs.

Application allowed. No Costs.

Judge of the Court of Appeal

K. K. A. V. SWARNADHIPATHI, J.

I agree.

Judge of the Court of Appeal

⁵Chief Justice Marshall quotes - William Blackstone, *Commentaries on the Laws of England*, vol. 3 (1723–1780) 23, Also see: Tracy Thomas, 'Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process' (University of Akron School of Law, Public Law & Legal Theory Working Paper Series No. 04, 2004)