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 a Writ of Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 380/2017

Kotagala Plantations PLC,
53 1/1, Sir Baron Jayatilleke Mawatha,
Colombo 1.

PETITIONER

Vs.

1. H.A. Kamal Pushpakumara,
   Divisional Secretary,
   Divisional Secretariat Office, Horana.

2. Ranjith Madduma Bandara,
   Hon. Minister of Public Administration.

2A. Janaka Bandara Thennakoon,
   Hon. Minister of Public Administration.

   2nd and 2A Respondents at
   Ministry of Public Administration,
   Independence Square,
   Colombo 7.

3. Gayantha Karunathilake,
   Hon. Minister of Lands and
   Parliamentary Reforms.

3A. S.M. Chandrasena,
   Hon. Minister of Lands.

   3rd and 3A Respondents at "Mihikatha Madura",

No. 1200/6, Rajamalwatta Road,
Sri Jayawardenepura, Kotte.

4. Sagala Rathnayake,
Hon. Minister of Law and Order.

4A. Hon Maithripala Sirisena,
Hon. Minister of Law and Order.

4B. Hon. Gotabhaya Rajapaksa,
Hon. Minister of Law and Order.

4th, 4A and 4B Respondents at
14th Floor, "Suhurupaya",
Subhuthipura Raod, Battaramulla.

5. Naveen Dissanayake,
Hon. Minister of Plantation Industries,
13240, Sri Jayawardenapura Kotte.

5A. Hon. Ramesh Pathirana,
Minister of Plantation Industries and
Export Agriculture,
Sethsiripaya, 2nd Stage, Battaramulla.

6. Sri Lanka State Plantations Corporation,
No. 11, Duke Street,
Colombo 1.

7. Pujitha Jayasundera,
Inspector General of Police (IGP),
Police Headquarters, Colombo 1.

8. Hon. Attorney General,
Attorney General's Department.
Colombo 12.

RESPONDENTS

Before: **Arjuna Obeyesekere, J / President of the Court of Appeal**

Counsel: Mahinda Nanayakkara with Nirosh Bandara and Wasantha Widanage for the Petitioner

Ms. Nayomi Kahawita, Senior State Counsel for the 1st – 5th, 7th and 8th Respondents

Argued on: 27th July 2020

Written Submissions: Tendered on behalf of the Petitioner on 12th July 2019 and 21st August 2020

Tendered on behalf of the 1st – 5th, 7th and 8th Respondents on 27th July 2020

Decided on: 3rd June 2021

Arjuna Obeyesekere, J., P/CA

By an Order made in 1992 under Section 2 of the Conversion of Public Corporations or Government Owned Business Undertakings into Private Companies Act No. 23 of 1987, the Petitioner was incorporated under the name of 'Kotagala Plantations Limited' to take over the functions of the Janatha Estates Development Board and the 6th Respondent, the Sri Lanka State Plantations Corporation in respect of the lands and estates mentioned in the Schedule to the said Order.

The lands and estates mentioned in the said Order marked '**P3**' includes an estate known as 'Sorana Estate' situated in Horana, which estate had been vested in the 6th Respondent by the Land Reform Commission by virtue of an order made under Section 27A of the Land Reform Commission Law No. 1 of 1972. The Petitioner states by an Indenture of Lease marked '**P5**' executed in 1996, the 6th Respondent had leased 'Sorana Estate to 'Kotagala Plantations Limited' for a period of fifty three years. In 2007, the Petitioner had been registered under the provisions of the Companies Act No. 7 of 2007 as a public limited liability company and is now known as Kotagala Plantations PLC.

The Petitioner states that it received a notice dated 13th July 2016 published under Section 2 of the Land Acquisition Act (**the Act**) issued by the 1st Respondent, the Divisional Secretary of Horana, informing that an extent of approximately 75 acres of land from Sorana Estate is required for the public purpose of establishing stables for the Sri Lanka Police and a Recovery Centre for Policemen who are disabled. The Petitioner states that a group of unidentified people had entered the said land without permission in August 2016 and carried out a survey of the said land. The Petitioner states further that by a letter dated 15th September 2017 marked '**P13**', the 1st Respondent had informed the Petitioner that possession of the land described in Preliminary Plan No. 2030/5 would be taken over on 21st September 2017.

'**P13**' also refers to the fact that an Order has been made by the 3rd Respondent, the Minister of Lands under proviso (a) to Section 38 of the Act enabling the 1st Respondent to take over immediate possession of the said land on the ground of urgency. The said Order marked '**P14**' had been published in Extraordinary Gazette No. 2030/5 dated 31st July 2017. Thus, even though immediate possession of the land was sought to be taken over on the basis of an urgent need of Sri Lanka Police, a period of over one year has lapsed between the publishing of the notice under Section 2 and the order under proviso (a) to Section 38.

Aggrieved by the decision of the 3rd Respondent to act in terms of proviso (a) to Section 38, the Petitioner filed this application on 17th November 2017 seeking a Writ of Certiorari to quash '**P14**'.

The learned Counsel for the Petitioner submitted that the entire extend of land referred to in '**P14**' forms part of Sorana Estate and that the Petitioner has made substantial investments in such land including the replanting of new rubber trees. He submitted further that the rubber plantation on the said land produces an extremely high yield of rubber each year and forms part of the most profitable areas of Sorana Estate. He stated that with the re-planting that has taken place, the Petitioner expects to have between 8-20 years of rubber tapping from the trees situated on the said land. It was

also pointed out that the factory that processes the rubber from the entire estate is situated adjacent to the area of land that has been identified for acquisition, and that in the event the factory has to be shut down, over 250 employees will lose their employment.

The learned Counsel for the Petitioner submitted further that after the Petitioner came into possession of the said land, the Government has acquired a total of (a) 933.6 hectares of land from estates managed by the Petitioner, and (b) 65.9 hectares out of Sorana Estate on 19 occasions. This includes 41 hectares for village expansion and 11 hectares for the Horana Town Development Project. The learned Counsel for the Petitioner also submitted there are many other lands in the area which have been leased to the Petitioner that could be acquired for the intended public purpose, including:

(a) 84 acres at Hegalla Estate, Horana which incidentally is a land that had been acquired and later divested;

(b) 20 acres in Sorana Estate which has already been acquired for the Prisons Department but where no development has taken place; and

(c) Over 300 acres from Perth Estate, Horana which has not been utilized by the Petitioner.

The learned Counsel for the Petitioner submitted further that there is no urgency that requires the immediate possession of the land to be taken over. He submitted further that as a result of the publication of '**P14**', the Petitioner has been denied the protection afforded by Section 4 of the Act which confers on a person who is entitled to such land the right to object to the acquisition. It appears that all what the Petitioner is seeking is an opportunity of placing its side of the story in order to protect its leasehold rights and its investment and for the Respondents to take a well informed and well considered decision. It was in this background that it was submitted on behalf of the Petitioner that the decision to issue '**P14**' is illegal and arbitrary.

The learned Senior State Counsel submitted that by a letter dated 22nd December 2015 marked '**R5**', the Inspector General of Police had informed the then Minister of Lands that the climate in Colombo 11 where the stables of Sri Lanka Police are situated, is no longer suitable for the horses and that Veterinarians have recommended that the horses be moved to an area where the climate is cooler than Colombo. He had also submitted that there is a necessity for the Sri Lanka Police to establish a care centre for disabled Policemen. The Inspector General goes onto state that having made inquiries, Sri Lanka Police has observed that Ellakanda Division of Sorana Estate would serve its purpose and had made the following request:

> "උක්ත කාර්යයන් දෙක ඉටු කර ගැනීම සඳහා අක්කර 75 කින් යුත් සුදුසු පරිසරයක පිහිට භූම ප්‍රමාණයක් අවශ්‍ය වන බැවින් සුදුසු ඉඩමක් පිළිබඳ පරීක්ෂා කරන ලදි.
>
> ඉඩම් ප්‍රතිසංස්කරණ කොමිෂන් සභාව සතු හොරන පිහිට ඇල්ලකන්ද වත්ත නම් අක්කර 647 ක් වන ඉඩමෙන් කොටසක් මෙම කාර්යය සඳහා ලබා ගැනීමට සුදුසු බවට නිරීක්ෂණය විය. ඔසේ හෙයින් ඉහත ඉඩමෙන් හොරණ පාදුක්ක මාර්ගයේ අරමනිගොල්ල ග්‍රාම නිලධාරී වසමට යාව පිහිට ප්‍රදේශයෙන් අක්කර 75ක භූම ප්‍රදේශයක් පොලිස් දෙපාර්තමේන්තුව වෙත අත්පත් කර ගැනීමට අවශ්‍ය කටයුතු සලසා දෙන මෙන් කාරුණිකව ඉල්ලා සිටිම."

The Petitioner is not disputing the fact that Sri Lanka Police may want to relocate its stables nor is the Petitioner disputing the need for a care facility for disabled policemen. It is clear that the Inspector General of Police has already identified the land that is required for the Sri Lanka Police, and the extent of land required for the said purposes. The Respondents have however not submitted any material as to how the Inspector General of Police came to such conclusion and why Sri Lanka Police requires such an extent of land from that particular location. Nor have the Respondents submitted any material to substantiate the suitability of this land for the above purposes, especially in light of the averment by the Petitioner that this land has a slope and is not suitable for the said purpose.

In **N.M. Gunathilake and Others vs Hon. Gayantha Karunathilake, Minister of Lands and Parliamentary Reforms and Others**[1] this Court, having examined the procedure laid

[1] CA (Writ) Application No. 387/2017; CA Minutes of 21st September 2020.

down in the Act that must be followed when the State wishes to acquire a land belonging to a private individual, and in particular the provisions of Section 4,[2] which affords a landowner an opportunity of objecting to the acquisition of his land,[3] held as follows:

> "*Acquisition of private property, although for a public purpose, is an interference with the property rights of an individual. Hence, the rationale for:*
>
> *(a) The landowner being granted an opportunity of challenging both the necessity and suitability of his land for the public purpose;*
>
> *(b) The requirement for the Secretary to afford the landowner a hearing and consider the objections of the landowner;*
>
> *(c) The requirement for the Minister at whose request the process has been initiated to consider the recommendations of the Secretary, and make his own recommendations; and*
>
> *(d) The requirement for the Minister of Lands to consider the recommendations of the appropriate Minister, prepared after considering the objections of the landowner, and arrive at a decision whether the land should be acquired in spite of any objections.*
>
> *It is thus seen that the legislature, in its wisdom, has put in place multiple layers of safeguards to ensure that the necessity and suitability of a land for a public purpose is examined with utmost care, with the ultimate view of affording a landowner the maximum protection against arbitrary and unfair acquisitions*."

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[2] Vide– the notice issued under Section 4(3) shall state *inter alia* that the State intends to acquire that land for a public purpose, and that written objections to the intended acquisition may be made to the Secretary to such Ministry as shall be specified in the notice.

[3] Vide Manel Fernando and Another v. D.M. Jayaratne, Minister of Agriculture and Lands and Others [(2000) 1 Sri LR 112 - "*the object of section 4(3) is to enable the owner to submit his objections: which would legitimately include an objection that his land is not suitable for the public purpose which the State has in mind, or that there are other and more suitable lands."*

Unless the Minister makes an order that immediate possession be taken over, possession of a land can be taken over in terms of Section 38 (a) only after the provisions of Sections 7, 9 and 10 of the Act have been complied with and an award has been made under Section 17. The above provisions of the Act demonstrate that the State cannot take possession of the land that is sought to be acquired, until and unless:

(a) It is satisfied of the necessity of the land for the public purpose specified in the Section 2 notice;

(b) It is satisfied of the suitability of the land for the said public purpose, which is determined after hearing the objections of the landowner; and

(c) An award has been made in relation to compensation.

Having set out the procedure to acquire private land, which I must admit can take a fair amount of time, the legislature has recognised that there may be circumstances which demand that possession be taken over on behalf of the State earlier than what the aforementioned procedure provides for, and has given effect to such requirement by including a proviso to Section 38, which reads as follows:

> *"Provided that the Minister may make an Order under the preceding provisions of this Section –*
>
> *(a) where it becomes **necessary to take immediate possession** of any land **on the ground of any urgency**, at any time after a notice under Section 2 is exhibited for the first time in the area in which that land is situated or at any time after a notice under Section 4 is exhibited for the first time on or near that land, and*
>
> *(b) ....."*.

Thus, once a notice has been published in terms of Section 2(1) indicating the necessity, or where a notice under Section 4(1) has been published indicating suitability of a particular land for the public purpose mentioned in Section 2(1), the Minister may make

an order to take immediate possession of a land on the ground of urgency by making an order under proviso (a) to Section 38.

The judgment that is frequently cited when discussing urgency in land acquisition is **Marie Indira Fernandopulle and Another v E. L. Senanayake, Minister of Lands and Agriculture**,[4] where Chief Justice Neville Samarakoon, referring to the above scheme of the Act, stated as follows:

> "*The provisions of section 38 states that the Minister may by order published in the Gazette "at any time after the award is made under section 17" direct the acquiring officer to take possession of the land or servitude acquired, as the case may be. Such an order is a vesting order and vests title in the State absolutely and free from all encumbrances from the date of the order. It must be noted that the Minister ordinarily has no power to vest the land in the State until an award is made in terms of section 17 of the Act. Even though the market value is calculated as at the date of the notice under section 7 the award can only be made after 21 days of the date of the notice. If there is a reference to Court under the provisions of section 10 of the Act such award will be made at such later date (section 17).* ***Whatever the length of time*** *the Act makes it clear that in the first place possession only be taken after the award is made and after the quantum of compensation offered is made known to the claimants. Any vesting order made before such award would be an act in excess of powers.* ***The intention of the legislature is clear, i.e., that the officers of the State cannot take possession until and unless an offer of payment of compensation is made and the acquisition proceedings are concluded. It is only then that the Act recognises the State's right to possession of the land.***
>
> ***The proviso to section 38 is a departure from this general rule****. It empowers the Minister, on behalf of the State, to take immediate possession "where it becomes* ***necessary to take immediate possession*** *of any land on the ground of any urgency."*

[4] 79 (II) N.L.R 115 at page 117.

The grievance of the Petitioner is that there is no urgency and that by issuing an order under proviso (a) of Section 38, preceded only by a notice under Section 2, the Respondents have effectively deprived the Petitioner of the safeguards contained in Section 4 of the Act.

In **Fernandopulle** the notice under Section 2 was first published on 20th December 1974, followed by the notice under Section 4 on 15th November 1976. An inquiry into the objections of the Muruthana Rural Development Society to the said acquisition had been held on 22nd February 1977. A declaration under Section 5 had thereafter been published on 13th May 1977 prior to an Order for immediate possession being made on ground of urgency, under proviso (a) to Section 38 on 7th December 1977, vesting the land in the State. The petitioner sought a Writ of Certiorari to quash the said Order on the grounds that the land was not required for a public purpose and that it was made in excess of the power conferred by proviso (a) to Section 38, as the 1st respondent in that case had failed to disclose the grounds of urgency. It is thus clear that in **Fernandopulle**, prior to making the Order under proviso (a) of Section 38, the objections of the land owner had been considered.

As in this application, an objection was taken that the Order under proviso (a) of Section 38 cannot be reviewed. The Supreme Court rejected this argument and held as follows:

> *"The next question is whether the Minister's decision regarding the urgency, and therefore the need to take immediate possession, can be reviewed by Court. Counsel for the petitioner stated that the Court must apply an objective test and not a subjective test. State Counsel contended for the latter.* ***If one looks at the entire Act two main powers are given to the Minister****. They are:*
>
> 1. *The power to decide whether the land is required for a public purpose and to direct that it be acquired, and*
>
> 2. *Whether there is an urgency compelling the immediate possession being taken of the land of and to direct that possession be taken.*

As pointed out earlier, the former decision is by enactment (Section 5(2)) made conclusive and therefore removed from scrutiny by the Courts. The latter has not been so treated and it is legitimate to hold that the legislature did not intend to remove the Court's power of scrutiny.

Another important fact is that ***section 38 circumscribed the Minister's power to interfere with private rights of property by stating that possession can only be interfered with after an award is made****. It is only in cases of urgency that an exemption is made.* ***To my mind this is a clear indication, that the Minister was only permitted to act with due regard to Common Law rights. When Common Law rights are involved the Court always has a right of review."*** [5]

Thus, it is clear that this Court can consider whether the Minister acted reasonably when he arrived at the decision that immediate possession of the land leased to the Petitioner must be taken over on the ground of urgency.

This brings me to the submission of the learned Senior State Counsel that the Respondents need not prove urgency, and that the burden of establishing there was no urgency lies with the Petitioners. This question was considered by this Court in **N.M. Gunathilake and Others vs Hon. Gayantha Karunathilake, Minister of Lands and Parliamentary Reforms and Others**[6] where it was held as follows:

"*The starting point of this discussion, I believe should be the provisions of the Evidence Ordinance. It is the Minister who is claiming that the public purpose is of such importance that immediate possession of the land must be taken over on an urgent basis in order to give effect to the public purpose for which the said land is required, without following the ordinary procedure laid down in the Act. In terms of Section 101 of the Evidence Ordinance, 'Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person'. Similarly, in terms of Section 103, 'The burden of proof as to any particular fact lies*

[5] Supra at page 119.
[6] Supra.

on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.'

Thus, in my mind, there is no doubt that whether immediate possession must be taken over on the ground of urgency is a fact which is known only to the Minister and other Officials of the relevant Ministries that are involved in the said acquisition, and therefore the burden of proving urgency is with the Respondents. The question that begs an answer is how an innocent landowner could assume the reasons that led to a Minister to conclude that there was in fact urgency."

In ***Fernandopulle***[7]*, the Supreme Court, referring to the burden of proof, held:*

> "***No doubt primarily the Minister decided urgency***. ***He it is who is in possession of the facts and his must be the reasoning***. *But the Courts have a duty to review the matter. In this case the need for a playground and a farm had been mooted as far back as 1974. Political influences and extraneous forces delayed the takeover of the land.*
>
> *Four years dragged on and school's needs were still waiting to be met.* ***The delay and the need decided the urgency***. ***These being the facts*** *the petitioner has failed to satisfy me that there was no urgency. I would therefore dismiss the application with costs*."

To my mind, the above conclusion of the Supreme Court is clear. That is, the acquisition process, having commenced in December 1974, and the inquiry into the objections having been concluded in February 1977, where the necessity had been decided, was sufficient for the Supreme Court to conclude that, "four years dragged on and school's needs were still waiting to be met. ***The delay and the need decided the urgency****". It is only because the Supreme Court was satisfied that there is urgency, that it went onto hold that* ***these being the facts*** *the petitioner has failed to satisfy me that there was no urgency. Thus, to my mind, the ratio in* ***Fernandopulle*** *is that the duty to establish urgency lies with the Minister. Once that burden has been discharged by the Minister, and only then, does the burden*

[7] Supra at page 120,

shift to the landowner to rebut that inference. Therefore, I cannot agree with the submission of the learned Senior State Counsel that the Minister owes no duty to prove urgency, and that the duty to establish there was no urgency is with the Petitioners."

The issue with regard to the burden of proof has been conclusively dealt with by the Supreme Court in **Horana Plantations Ltd v. Minister of Agriculture, Livestock, Land and Irrigation**,[8] where it was held that *"No doubt primarily the Minister decided urgency. He it is who is in possession of the facts and his must be the reasoning. But the Courts have a duty to review the matter."*

This brings me back to the submission of the learned Counsel for the Petitioner that there is no urgency to take over possession of the land and that the decision to deprive the Petitioner of the safeguards available under Section 4 is illegal and arbitrary.

Pursuant to '**R5**', Sri Lanka Police has made a formal application dated 10th March 2016 marked '**R6**' seeking the acquisition of the land that is the subject matter of this application. I have examined '**R6**' and observe that Sri Lanka Police has been of the view that the land is owned by the Land Reform Commission. This is erroneous in that the land has been vested in the 6th Respondent and has thereafter been leased to the Petitioner, who is carrying out a successful rubber cultivation on the said land. Furthermore, it has been pointed out in '**R6**' that there is no other suitable land in the said area for the said purpose whereas the Petitioner states that it can offer unproductive land from the said Sorana Estate to Sri Lanka Police. In my view, the very fact that the standard application form that must be filled by an entity seeking acquisition of private land requires such entity to specify if alternative land is available is proof that the availability of alternative land for the proposed public purpose is a relevant factor in deciding whether the land identified should be acquired.

The Section 2 notice having been published on 13th July 2016, it took over a year for the Section 38 proviso (a) notice to be published. The only activity that took place during that period was the surveying of the land on 18th August 2016. If there was an urgency as claimed by the Respondents that required the jettisoning of the safeguards provided

[8] [2012] 1 Sri LR 327.

by Section 4 of the Act, the Respondents ought to have acted sooner than what they did. Taking into consideration all of the above circumstances, I am of the view that the Respondents have failed to satisfy this Court that there was an urgency to take over possession and that the Petitioner must be afforded an opportunity of placing its objections.

There is one other matter that I must advert to. The learned Senior State Counsel submitted that the possession of the land has already been handed over to the 1st Respondent by the officials of the Land Reform Commission. However, as I have already referred to, the Minister of Lands and Mahaweli Development has made an order in terms of Section 27A of the Land Reform Commission Law vesting Sorana Estate in the 6th Respondent. It has been held in **Balangoda Plantations PLC vs Janatha Estates Development Board and Others**[9] that in view of the provisions of Sections 27A(1) – (3), title of the Land Reform Commission stands transferred to the 6th Respondent upon the said Order being published in the Gazette and that the Land Reform Commission does not have any legal authority thereafter over the agricultural and estate lands vested in the 6th Respondent. In any event, the learned Counsel for the Petitioner submitted that the Petitioner continues to be in possession of the land. This appears to be correct as the learned Senior State Counsel submitted that even though an interim order has not been issued, steps have not been taken to develop the said land in deference to this Court.

In the above circumstances, I issue a Writ of Certiorari quashing '**P14**'. If the necessity for the aforementioned public purpose still exists, the Respondents may take immediate steps in terms of Section 4 of the Act, prior to taking a decision in terms of the law. I make no order with regard to costs.

President of the Court of Appeal

[9] CA (Writ) Application No. 858/2009; CA Minutes of 7th November 2019.