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

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

CA (Writ) Application No. 129/2017

The Superior Regular of the Society of Jesus in the Diocese of Trincomalee,
Xavier Residence,
Akkara Panaha, Negombo.

PETITIONER

Vs.

1. Hon. John Amaratunga,
   Minister of Lands.

1A. Gayantha Karunatileka,
   Minister of Lands and Parliamentary Reforms.

   1st and 1A Respondents at
   Mihikatha Medura, Land Secretariat,
   No. 1200/6, Rajamalwatte Road,
   Sri Jayawardenepura, Kotte.

2. The Divisional Secretary,
   Trincomalee Town and Gravets,
   Divisional Secretariat, Trincomalee.

3. Commander of the Air Force,
   Sri Lanka Air Force,
   Sri Lanka Air Force Headquarters.
   Colombo 1.

RESPONDENTS

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

Counsel: M.A. Sumanthiran, P.C., with Viran Corea and Niran Anketel for the Petitioner

Manohara Jayasinghe, Senior State Counsel for the Respondents

Argued on: 31st August 2020

Written Submissions: Tendered on behalf of the Petitioner on 10th June 2019 and 5th October 2020

Tendered on behalf of the Respondents on 10th June 2019

Decided on: 11th June 2021

Arjuna Obeyesekere, J., P/CA

The Petitioner is the Superior Regular of the Society of Jesus in the Diocese of Trincomalee and has been incorporated by an Order made under Section 114 of the Trusts Ordinance, published in Gazette No. 12,077 dated 11th March 1960, marked '**P1**'.

The Petitioner states that by virtue of Deed No. 1788 dated 1st September 1962, marked '**P2a**', and Deed No. 2423/621 dated 24th July 1969 and 23rd July 1970, marked '**P2b**', the Petitioner acquired ownership of a land called "Thalaiaddikadu" situated at Neeroddumunai Tamblegam Pattu in the Trincomalee District. The Petitioner has produced Plan No. 366 dated 16th May 1994 marked '**P3**', which gives the extent of the said land as 22A 3R and 29P. '**P3**' is a re-survey of Preliminary Plan No. 4196/294.

The Petitioner states that since about 2011, the Sri Lanka Air Force (the SLAF) has been in possession of the said land and using the land to operate a tourist hotel. Aggrieved by the use of the land by the SLAF, and the denial of access to the Petitioner to the said land by the SLAF, the Petitioner filed Fundamental Rights Application No. 404/2013 in the Supreme Court on 26th November 2013, against the 3rd Respondent, the Commander of the SLAF and others complaining that its fundamental rights guaranteed under Articles 12(1) and 14(1)(h) of the Constitution have been violated as a result of

the alleged unlawful occupation of the said land by the SLAF and the denial of access to the said land. The petition in the said fundamental rights application marked '**P5(a)**' was amended in 2014 – vide '**P5(b)**'. The said application was later withdrawn on 11th September 2017 – vide '**R2**' – as the Petitioner had filed this application.

The Petitioner states that during the course of the proceedings before the Supreme Court, the 2nd Respondent, the Divisional Secretary, Trincomalee had filed an affidavit marked '**P5(c)**', in which he stated that the land has been acquired by the State under the provisions of the Land Acquisition Act (**the Act**). The 2nd Respondent had also stated that the material pertaining to the acquisition which were in the custody of the District Secretary, Trincomalee had been destroyed during the conflict, but that the material obtained from National Archives have revealed the following matters:

a) A notice had been issued under Section 2(1) of the Tourist Development Act No. 14 of 1968 approving the acquisition of the said land, as well as several other lands in the area, for a Tourism Development Project. The said notice has been published in Gazette No. 152 dated 21st February 1975 - vide '**P6**';

b) Pursuant to a requisition for a survey made by the Tourist Board, an Advanced Tracing depicting the said land as Lot 'B' had been prepared by the Surveyor General in December 1975;[1]

c) Final Village Plan No. 26 (Supplement No.3) dated 30th November 1977 has been prepared by the Surveyor General, in which the said land has been depicted as Lot No. 287 containing in extent 22A 2R 37P;[2]

d) The Supplementary Tenement List pertaining to the above Final Village Plan has specified the Petitioner as being the claimant to the said land;

e) A notice issued under Section 7 of the Act had been published in respect of the said land in Gazette No. 318 dated 19th May 1978 – vide '**P10b**';

[1]Vide document marked 'C' and annexed to the affidavit of the 2nd Respondent.
[2]Vide document marked 'D' and annexed to the affidavit of the 2nd Respondent.

f) An Order under proviso (a) to Section 38 of the Act had been published in respect of the said land in Gazette No. 330 dated 11th August 1978 – vide '**P7**'.

It must be noted that the Petitioner has not named the Ceylon Tourist Board as a respondent to this application.

The 2nd Respondent had also stated that the Section 7 notice marked '**P10b**' had been found only during a further search at the National Archives and that by then, steps had already been taken to publish (a) a notice under Section 5 of the Act in Gazette No. 1924/40 dated 23rd July 2015, marked '**P8**', and (b) a notice under Section 7 of the Act in Gazette No. 1968/12 dated 25th May 2016, marked '**P9**'.

The Petitioner states that it was not aware of the fact that the said land had been acquired and that they came to know of the said acquisition for the first time by way of '**P5(c)**'. The Petitioner instituted this action in 2017, seeking *inter alia* the following relief from this Court:

(a) A Writ of Mandamus compelling the 1st Respondent, the Minister of Lands to issue an Order in terms of Section 39 of the Act revoking '**P7**';

(b) A Writ of Mandamus compelling the 1st Respondent to issue a divesting order in terms of Section 39A of the Act;

(c) Writs of Certiorari to quash '**P6**', '**P7**', '**P8**', '**P9**' and '**P10b**'.

The Petitioner states that the Respondents have failed to produce the Section 2 or Section 4 notices in respect of the said acquisition referred to in '**P7**', and that the only inference that could be drawn by the failure to produce such notices is the absence of such notices. The Petitioner's first complaint therefore is that '**P7**' is *ultra vires* the provisions of the Act, in that the mandatory provisions of the Act leading up to a vesting order under proviso (a) to Section 38 have not been complied with. The Respondents, while disputing the claim of the Petitioner that the relevant Section 2 and Section 4 notices were not published, has submitted that the documents have been destroyed.

Section 38 of the Act sets out that at any time after an award for compensation is made under Section 17, the State can take possession of the land to which the said award relates to. In terms of the proviso (a) to Section 38, under which '**P7**' has been issued:

> *".... 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;"*

In terms of Section 40(a) of the Act:

> "*When an Order of the Minister under section 38 is published in the Gazette, then where that Order is in regard to the taking possession of a particular land, that land shall, by virtue of that Order, vest absolutely in the State free from all encumbrances with effect from the date on which that Order is so published, and any officer who is authorized to do so by that Order may, on or after that date, take possession of that land for and on behalf of the State*;"

Therefore, in terms of proviso (a) to Section 38, possession of the land that is sought to be acquired can be taken any time after a Section 2 notice or Section 4 notice is exhibited in respect of the said land. Section 41 of the Act provides that if the provisions of Section 4 have not been complied with, it is not necessary to comply with those provisions, and that if a declaration in terms of Section 5 has not been made, such declaration can be published notwithstanding that Section 4 has not been complied with. Be that as it may, with the publication of '**P7**', the said land has vested absolutely in the State.

As noted earlier, the 2nd Respondent has submitted that the notices published prior to the Section 7 notice '**P10b**' under and in terms of Sections 2, 4 and 5 of the Act have been destroyed and therefore are not available. It is clear from the above sequence of

events that the notice under proviso (a) to Section 38 has been published only after the Section 7 notice had been published, thereby demonstrating that the order to take over possession has been made only after claims for compensation have been called. In these circumstances, I am satisfied that a Section 7 notice would not have been published unless the notices under Sections 2, 4 and 5 had been published.

The learned Senior State Counsel for the Respondents submitted that in any event, in terms of '**P7**', the said land has been vested with the State since 11th August 1978 and that there has been inordinate delay on the part of the Petitioner in invoking the jurisdiction of this Court challenging the said order. He therefore submitted that this application is liable to be dismissed on that ground alone.

The Superior Courts of this country have consistently held that a petitioner seeking a discretionary remedy such as a Writ of Certiorari must do so without delay, and where a petitioner is guilty of delay, such delay must be explained to the satisfaction of Court. In other words, unexplained delay acts as a bar in obtaining relief in discretionary remedies, such as Writs of Certiorari and Mandamus.

In **Biso Menika v. Cyril de Alwis**[3] Sharvananda, J (as he then was) set out the rationale for the above proposition, in the following manner:

> "*A Writ of Certiorari is issued at the discretion of the Court. It cannot be held to be a Writ of right or one issued as a matter of course. But exercise of this discretion by Court is governed by certain well accepted principles. The Court is bound to issue a Writ at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, like submitting to jurisdiction, laches, undue delay or waiver..... The proposition that the application for Writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and the longer the injured person sleeps over his rights without any reasonable excuse the chances of his success in a Writ application dwindle and the Court may reject a Writ*

[3][1982] 1 Sri LR 368; at pages 377 to 379. This case has been followed by the Supreme Court in Ceylon Petroleum Corporation v. Kaluarachchi and others [SC Appeal No. 43/2013; SC Minutes of 19th June 2019].

application on the ground of unexplained delay..... An application for a Writ of Certiorari should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed."

In **Seneviratne v. Tissa Dias Bandaranayake and another**,[4] the Supreme Court, adverting to the question of long delay, held as follows:

"*If a person were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance to enforce his rights; the law both to punish his neglect, nam leges vigilantibus, non dormientibus subveniunt,*[5] *and for other reasons refuses to assist those who sleep over their rights and are not vigilant*."

The explanation offered by the Petitioner for the delay is that it was not aware of any of the steps that were taken with regard to acquisition from 1975 and that it came to know of that position only through the aforementioned affidavit filed by the 2nd Respondent in the Fundamental Rights application. However, it appears from the aforementioned Advanced Tracing that the surveyor has visited the land in November 1975 and that the boundaries of the said land have been shown by the Grama Sevaka of the Vellaimanal Division No. 229. The same position applies with regard to the Final Village Plan prepared in November 1977. Furthermore, the name of the Petitioner and in particular the name of the Superior Regular of the Petitioner is given as the claimant to the said land. With all of the above activity going on, the Petitioner could not have been unaware of the above steps taken to acquire the said land. Thus, I am unable to accept the explanation offered by the Petitioner for the delay. I agree with the submission of the learned Senior State Counsel that the Petitioner is guilty of *laches* and that the Petitioner is not entitled to challenge '**P7**' at this point of time.

The next complaint of the learned President's Counsel for the Petitioner was that the Section 5 notice published in 2018 – '**P8**' - is not preceded by a Section 2 notice and is therefore illegal. It appears from the explanation offered by the 2nd Respondent that the State resorted to a fresh Section 5 notice prior to locating the Section 7 notice ('**P10b**')

[4] [1999] 2 Sri LR 341 at 351.
[5] For the law assists the watchful, (but) not the slothful.

issued in 1978. In any event, '**P8**' is superfluous in view of the conclusion that I have already arrived at that there has been a valid vesting of the land in terms of '**P7**'.

The Petitioner has also sought a Writ of Mandamus directing that an Order be made under Section 39 of the Act, or in the alternative under Section 39A of the Act.

Section 39 reads as follows:

> "*Notwithstanding that by virtue of an Order under Section 38 (hereinafter in this section referred to as a "vesting order") any land has vested absolutely in the State, the Minister may,* ***if possession of the land has not actually been taken for and on behalf of the State*** *in pursuance of that Order, by subsequent Order published in the Gazette revoke the vesting order*."

A precondition to an order under Section 39 of the Act is that *possession of the land has not actually been taken for and on behalf of the State*. The argument of the learned President's Counsel for the Petitioner is that even if '**P7**' was issued after following due procedure set out in the Act, the State did not take possession of the land in 1978 or thereafter until the Air Force took over the land in 2011. As submitted by the learned Senior State Counsel, this land is situated in close proximity to the SLAF base at China Bay and had been used by terrorists to launch attacks on SLAF aircrafts, which demonstrates that even though the State may have taken possession of the land in 1978, the State may not have been in possession of the land at the height of the conflict. I must note that the Petitioner has not produced any material to demonstrate that it was in possession of the said property or that it visited the said property, paid rates, cultivated any crops etc, or that it was in possession when the said land was taken over by the SLAF. The Petitioner has produced marked '**P12**' a letter written in January 1995 by a person who had visited the said land at the request of the Petitioner. '**P12**' shows that the Petitioner was not in possession of the land and that the land was occupied by squatters. While the writer of '**P12**' has shown an interest in purchasing the land or taking it on a long lease, the Petitioner has not apprised this Court as to what its response was. Be that as it may, the fact remains that the State is now in possession of the land.

It is admitted that the land was acquired in terms of '**P7**' for a Tourism Development Project, as stated in '**P6**'. However, the 2nd Respondent has stated in the affidavit tendered in the Fundamental Rights application that from or about 2001, the Armed Forces have been in possession of the said State land which is of strategic importance for the national security of Sri Lanka. The 2nd Respondent has stated further that the Cabinet of Ministers by a decision dated 28th November 2012 had decided to allocate an extent of approximately 600 acres including the said land to the Sri Lanka Air Force in order to protect the China Bay Air Force Camp and for development activities connected therewith, including the runway and related facilities at China Bay as an alternative to the Katunayake Air Force Camp. The Cabinet Memorandum and Cabinet Decision have been marked as 'J' and 'I' to '**P5(c)**'. There is now a new public purpose for which the land is required.

The issue to be considered here is whether once an acquisition is carried out, and the land is vested in the State, whether the State can thereafter take possession of the land and/or use it for a public purpose other than the public purpose for which it was initially intended.

This issue was considered in the case of **Kingsley Fernando v. Dayaratne and Others**,[6] where Sarath N. Silva, J (as he then was) held as follows:

> "*In any event the fact that land was acquired for a particular public purpose does not prevent the land being used for another public purpose. The following observations made by Alles J. in the case of Gunawardena vs. D.R.O. Weligama Korale*[7] *are relevant:*
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> > *"Even assuming that after the order made under section 38 the Crown had decided to utilise the land for some other public purpose, I do not think that it is open to a person whose land has been acquired and the title to which has been vested in the Crown to maintain that the acquisition proceedings are*

[6] [1991] 2 Sri LR 129.
[7] 73 NLR 333.

bad.....I can however see no objection to the Crown utilising the land for a different public purpose than that for which it was originally intended to be acquired. Circumstances may arise when it may become necessary for the Government to abandon the original public purpose contemplated and utilise the land for another public purpose."

A similar view that a change in public purpose was permissible was taken by Mark Fernando, J in the case of **De Silva v. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another**[8] where it was held as follows:

"If compensation has been paid or improvements have been made, then despite the inadequacy of justification, divesting is not permitted. The purpose and the policy of the amendment is to enable the justification for the original acquisition, as well as for the continued retention of acquired lands, to be reviewed; if the four conditions are satisfied, the Minister is empowered to divest. ***Of course, even in such a case 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.*** *In such a case it would be unreasonable to divest the land, and then to proceed to acquire it again for such new supervening public purpose.* ***Such a public purpose must be a real and present purpose, not a fancied purpose or one which may become a reality only in the distant future****."*

I am satisfied with the explanation offered by the Respondents that there is a new requirement of the land, which is buttressed by the relevant Cabinet Memorandum and Decision. Therefore, I am of the view that possession of the said land has been taken over on behalf of the State for a public purpose, and that the Petitioner is not entitled to the revocation of '**P7**'.

As an alternative, the Petitioner has sought a divesting Order under Section 39A of the Act if this Court is of the view that the occupation of the Sri Lanka Air Force amounts to possession of the land.

[8] [1993] 1 Sri LR 283.

The following conditions must be satisfied for a divesting Order to be made under Section 39A(2):

(a) No compensation should have been paid under the Act to any person or persons interested in the land in relation to which the said divesting Order is to be made;

(b) The land has not been used for a public purpose after possession of such land has been taken by the State under the provisions of paragraph (a) of section 40 ;

(c) No improvements have been effected to the said land after the Order for possession under paragraph (a) of section 40 had been made; and

(d) The person or persons interested in the said land have consented in writing to take possession of such land immediately after the divesting Order is published in the Gazette."

On the basis of the material that is before this Court, I have already held that the State has taken over possession of the land and that the land is now being used by the SLAF for purposes of the China Bay Air Force Camp, and for national security. As the land is being used for a public purpose, the conditions that need to be satisfied for a divesting order to be made under Section 39 has not been met.

This brings me to the final issue raised by the learned President's Counsel for the Petitioner that the Petitioner has not been paid any compensation. Acquisition proceedings having taken place and title to the said land having vested with the State, the Acquiring Officer has called for claims for compensation in 1978, but no further steps have been taken in that regard thereafter. The 1st and 2nd Respondents are hereby directed to:

a) Call for claims for compensation in pursuance of the notice under Section 7 published in 1978, with notice to the Petitioner;

b) Determine entitlement to compensation; and

c) Thereafter take steps in terms of the Act to pay compensation, within six months of today.

Subject to the above, this application is dismissed, without costs.

President of the Court of Appeal