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

**CA (Writ) No: 0350/2020**

Vajira Maninngamuwa Bangsa Jayah,
No. 13/1, Uswatte Mawatha
Ethul Kotte

**PETITIONER**

**Vs.**

1. Samarakoon Mudiyanselage
   Chandrasena, Minister of Lands
   "Mihikatha Medura',
   No. 1200/6, Rajamalwatta Road
   Battaramulla

2. S. Vijayakumar
   Divisional Secretary,
   Divisional Secretariat Laggala

3. Mahaweli Authority of Sri Lanka,
   No. 500, T.B. Jayah Mawatha,
   Colombo 01

**RESPONDENTS**

**Before: M. T. Mohammed Laffar, J.**

**S. U. B. Karalliyadde, J.**

**Counsel:**

Senany Dayaratne with Ms. Nishadi Wickramasinghe and Nisala Seniya Fernoando instructed by T. Tharmajah for the Petitioner.

Vickum De Abrew PC, DSG with S.W. Wimalasena, SSC and R. Gooneratne, SC for the Respondents.

**Written submissions tendered on:**

06.12.2021 by the Petitioner

04.01.2022 by the 1st to 3rd Respondents

**Argued on: 15.11.2021**

**Decided on: 10.02.2022**

**S.U.B. Karalliyadde, J.**

By this Writ Application the Petitioner challenges the procedure followed by the 1st Respondent under the Land Acquisition Act, No. 9 of 1950 (as amended) (hereinafter referred to as 'the Act') to recover the possession of her land for Moragahakanda-Kaluganga Development Project (hereinafter referred to as "the Project") implemented under the Ministry of Mahaweli. The Petitioner's land is 60 Acres in extent and one of the lands which she has inherited from her paternal grandmother. The paternal grandmother and the grandmother's brother who hails from Dullewa family had 6500 Acres of land and from time to time their lands were acquired by the State. Ultimately the Petitioner and her 7 siblings were left with only 380 Acres. The land in dispute known as Dikyaya is one of the remaining lands. It is situated at Amunawela village within the Grama Niladhari Division of Akarahendiya in the Divisional Secretariat area of Laggala in Matale District. A decision was taken by the State to acquire lands for resettlement of displacing families of the area due to the implementation of the Project and accordingly, a Notice (marked as P 13) was exhibited in terms of section 2 of the Act, to identify a land within the boundaries mentioned in the schedule to the Notice in

the area of Akarahediya - Ward No. E 396 B Grama Niladhari Division. It is the position of the Petitioner that even though, the impugned land owned by her is situated in Akarahediya Grama Niladhari Division, it is not situated within the boundaries mentioned in the schedule to the Notice. Nevertheless, the Petitioner alleges that the 1st Respondent published a Gazette Notification dated 27.08.2020 (marked as P 23 (c)) granting power to the 2nd Respondent to recover the possession of her land under the proviso (a) to the section 38 of the Act and accordingly, the 2nd Respondent sent a letter dated 14.09.2020 (marked as P 23) demanding to hand over the vacant possession of the land by 22.09.2020. The position of the Petitioner is that the 1st and 2nd Respondents are attempting to take the possession of her land acting under proviso (a) to the section 38 of the Act even though, the steps had not been taken in terms of sections 2 or 4 to acquire the land. Therefore, by this writ Application she seeks to quash the Order published by the 1st Respondent in the Gazette Notification marked as P 23 (c) granting powers to the 2nd Respondent to recover the possession of the impugned land and the letter marked as P 23 sent by the 2nd Respondent to the Petitioner demanding to hand over the vacant possession of the land. The position of the Respondents is that the impugned land is situated within the area described in the schedule to the Notice exhibited under section 2 of the Act and therefore, the Order published in the Gazette by the 1st Respondent under the proviso (a) to the section 38 of the Act and the letter sent by the 2nd Respondent to the Petitioner demanding to hand over the vacant possession of the land is legal.

Section 38 of the Act states thus;

*"At any time after an award is made under section 17, the Minister may by Order published in the Gazette-*

*(a) where the award relates to the acquisition of any land, direct the acquiring officer of the district in which that land is situated, or any other officer authorized in that*

*behalf by such acquiring officer, to take possession of that land for and on behalf of Her Majesty, or*

*(b) where the award relates to the acquisition of any servitude, declare that the land over which that servitude is to be acquired shall be subject to that servitude:*

*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) where it becomes necessary immediately to acquire any servitude on the ground of any urgency, at any time after a notice under section 4 is exhibited for the first time on or near the land over which that servitude is to be acquired."*

Therefore, it is clear that the proviso (a) to the section 38 provides a mandatory requirement that sections 2 or 4 Notice should exhibit before making an Order by the Minister to recover the possession of a land.[1]

The fundamental matter which this Court should consider in this writ Application is whether the impugned land owned by the Petitioner is situated within the area mentioned in the schedule to the section 2 Notice. The position of the Petitioner is that her land is situated not within the area mentioned in the schedule to the section 2 Notice whereas the position of the Respondents is that it is situated within that area. As alleged by the Petitioner, if her land is not situated within the area mentioned in the schedule to the section 2 Notice, the Order made by the 1st Respondent under the proviso (a) to the section 38 of the Act is illegal and *ultra vires* and therefore, the letter issued by the 2nd

[1] *W. Neela De Silva and other vs Chamal Rajapakse and 11 others,* CA (WRIT) Application No. 1748/2006 dated (24.08.2007).

Respondent demanding to hand over the possession of the land is also illegal and *ultra vires*. If so, the decision containing in the Gazette Notification published by the 1st Respondent and the letter sent by the 2nd Respondent to the Petitioner are liable to be quashed. If the land is situated, within the area mentioned in the schedule to the section 2 Notice, the Application for Writs is liable to be dismissed. The submission of the learned Deputy Solicitor General appeared for the Respondents was that the steps had been taken to acquire all the lands situated in Akarahediya Grama Niladhari Division in Amunuwela village for the Project and section 2 Notice marked as 2R2 was exhibited to identify all the lands situated in the entire area of Akarahediya Grama Niladhari Division. The same document has been marked as P 13 by the Petitioner also. The argument of the learned DSG is that, since the land in dispute is situated in the Akarahediya Grama Niladhari Division, section 2 Notice applies to that land as well. The submission of the learned Counsel for the Petitioner is that the section 2 Notice exhibited does not apply to the entire Grama Niladhari Division of Akarahediya and it applies only to the Ward E 396 B of Akarahediya Grama Niladhari Division. The learned Counsel appearing for the Petitioner therefore, argued that since the Petitioner's land is situated not within the area which section 2 Notice applies and the steps have not been taken as yet to acquire her land, the possession of that land could not be recovered under the proviso (a) to the section 38.

As per the submissions made by the learned DSG, Advanced Tracing bearing No. Ma/LGG/2017/567 dated 31.05.2018 marked as 2R1 had been prepared by the Surveyor General to show the entire area which the section 2 Notice was exhibited and the impugned land is situated within the area which shows in the Advanced Tracing marked 2R1. Even though, the appropriate and acceptable way of establishing that the impugned land is situated within the area shown in the Advanced Tracing is making a superimposition plan, a superimposition plan has not been prepared. On the other hand, as contended by the learned DSG if that Notice covers the entire Grama Niladhari Division of Akarahediya and since 2R1 shows the entire Grama Niladhari Division of

Akarahediya, a necessity does not arise to prepare a superimposition plan. The schedule to the section 2 Notice dated 19.05.2009 reads as follows;

**"<u>උපලේඛනය</u>"**

මධ්‍යම පළාතේ මාතලේ දිස්ත්‍රික්කයේ ලග්ගල-පල්ලේගම ප්‍රාදේශීය ලේකම් කොට්ඨාසයේ **අකරහැඩිය (E396B) ග්‍රාම නිළධාරී වසමෙ පහත සඳහන් මායිම් තුළ පිහිටි ඉඩම්;**

**උතුරට- E402B, මා ඔය සහ E402 හත්තොට අමුණ යන ග්‍රාම නිලධාරී වසම්**

**නැගෙනහිරට - 397A,396A,396C දරන ග්‍රාම නිලධාරී වසම් හා අභය භූමිය**

**දකුණට - 397C, 397A, 396A සහ 396C දරන ග්‍රාම නිලධාරී වසම්**

**බටහිරට - කළු ගඟ රක්ෂිතය**"

According to that schedule, the area which the investigation under section 2 was intended to be done to select a suitable land for acquisition had been Ward No. E 396 B of the Akarahediya Grama Niladhari Division. It appears that all four boundaries other than the western boundary of the land mentioned in the schedule are the different Wards in the Akarahediya Grama Niladhari Division. Therefore, it is apparent that the lands intended to be acquired were not the entire lands situated in the Akarahediya Grama Niladhari Division, but the lands situated in Ward No. E 396 B in Akarahediya Grama Niladhari Division.

The Application submitted by the 3rd Respondent through the Minister of Mahaweli to the Minister of Land (the 1st Respondent) in 2008 in terms of Clause 248 (b) 3 of the Land Manual to acquire a land has been submitted to Court marked as 2R6(a). It has been specifically stated in sub-item (v) of item No.4 that the 3rd Respondent needs a land situated in the Ward No. E 396 B of Akarahediya Grama Niladhari Division. Furthermore, the boundaries of the land mentioned in the schedule to the section 2 Notice and the boundaries of the land mentioned under item No.16 of the Application are identical. Therefore, it is apparent that section 2 Notice has been exhibited to

identify a suitable land situated in Ward No. E 396 B in Akarahediya Grama Niladhari Division and not from the entire Akarahediya Grama Niladhari Division.

On behalf of the 3rd Respondent, a letter dated 07.08.2019 written by the Project Director of the 3rd Respondent to the Secretary to the Ministry of Mahaweli is marked as 3R19. In paragraph 5 of that letter, it has been stated thus;

"***ඒ අනුව සංවර්ධන කටයුතු සඳහා නිදහස් කොට ගෙන ඇති සමස්ථ ප්‍රදේශය මධ්‍යයේ පිහිටා ඇති*** Ma/LGG/2017/567 දරන ප්‍රගමන අනුරේඛනයේ කැබලි අක්ෂර A මගින් පෙන්නුම් කරන ඉඩම, ව්‍යාපෘතිය යටතේ කුඹුරු ඉඩම් කොටස් සහ වාරි ඇළවල් සකස් කිරීම සඳහා යොදා ගැනීමට සැලසුම් කොට ඇත. ***මෙකී ඉඩම අවට ප්‍රදේශය තුළ මේ වන විට සංවර්ධන කටයුතු සිදු කර ඇති අතර, මෙම කොටස පෞද්ගලික ඉඩමක් වීම හේතුවෙන්*** 38 (ආ) අතුරු විධානය යටතේ භුක්තිය භාර ගැනීමෙන් අනතුරුව එම කටයුතු ආරම්භ කිරීමට සිදුව ඇති බව කාරුණිකව දන්වමි"

The lot A in the Advanced Tracing mentioned in that letter is the impugned land owned by the Petitioner and that Advanced Tracing is produced to Court marked as 2R1. When considering the above stated facts mentioned in 3R19, it is apparent that the Project Director of the 3rd Respondent had admitted that the impugned land is a private land which is situated in the middle of the area which was developed under the Project.

It has been stated in paragraph 7 of the same letter that;

"***තවද, මෙකී ඉඩම වැනි පෞද්ගලික ලෙස මේ වන විට තහවුරු වී ඇති ඉඩම් කොටස් ද මේ ආකාරයෙන් පවරා ගැනීමට කටයුතු කරමින් පවතින බවත්,*** එම ඉඩම් කොටස්ද කළු ගඟ දකුණු ඉවුර සංවර්ධන ප්‍රදේශය තුළ පිහිටා ඇති බවත්, මෙකී ඉඩමද ඊට යාව පිහිටා තිබෙන බව තහවුරු වීම සඳහා සිතියම් අංක 02 ඉදිරිපත් කරමි"

Therefore, it is clear that the said Officer had further admitted that other than the impugned land there are other private lands in the vicinity and the steps have been

initiated to recover the possession of those lands also in term of the proviso (a) to the section 38 of the Act.

According to the schedule to the section 2 Notice, the extent of the land intended to be identified for the acquisition is about 464 Hectares. In the annexure to the Notice, the extents of the land which forms the land described in the schedule and the names of the owners of those lands are given individually. The total extent of the lands mentioned in that annexure is approximately 464 Hectares. Therefore, it is apparent that the section 2 Notice relates only to the lands mentioned in the annexure. In that annexure, neither the Petitioner's name nor a land in extent of 60 Acres is mentioned. The learned DSG appearing for the Respondent submitted to Court that only the names of the land owners who could be identified by that time were included into the annexure. The Court cannot accept that submission of the learned DSG for the reason that the extent mentioned in the schedule to the Notice tallies with the extent of the lands mentioned in the annexure. Therefore, it is apparent that the land owned by the Petitioner is not situated within the area which the section 2 Notice was exhibited.

A letter dated 12.10.2017 has been tendered to the Court by the Petitioner marked as P 18. In that letter the 2nd Respondent has requested from the Surveyor General to survey the impugned land owned by the Petitioner for acquisition on the premise of the details mentioned in the section 2 Notice. It is important to note that the section 2 Notice is dated 19.05.2009 and the request made by P18 to survey the impugned land is dated 12.10.2017. Therefore, it is clear that the 2nd Respondent has requested from the Surveyor General by the P 18 to survey the impugned land after about eight years from the date of the section 2 Notice was exhibited. P 18 further states that it was later found that even though there are lands which the owners and the possessors could be identified, those lands were not included into the preliminary survey done for the acquisition. Therefore, that document elicits the fact that even though, the impugned land had not been initially included into the preliminary survey which the section 2

Notice applies, the 2nd Respondent later wanted to include it to the acquisition by executing a subsequent survey.

A letter dated 18.01.2021 has been tendered to the Court by the 2nd Respondent marked as 2R6(b) to prove that the impugned land is situated within the area mentioned in the section 2 Notice. The letter has been issued by the Government Surveyor to the 2nd Respondent. In that letter it is stated that the impugned land is situated within the Akarahediya Grama Niladhari Division. But it does not say that the impugned land is situated within Ward No. E 396 B in the Akarahediya Grama Niladhari Division, in which a land wanted to be identified for the acquisition.

Furthermore, a sketch which shows the entire area intended to be acquired is tendered to Court marked as 3R14 (a). In that sketch, the impugned land is drawn and coloured manually. 3R14 (a) is a computer-generated document and not a plan prepared by a surveyor according to the surveying standards.

The Respondents have relied on a letter marked as 2R7 written by the Petitioner to the 2nd Respondent. In that letter the Petitioner has stated, *inter alia,* that she is the owner of the impugned land, it is due to be acquired for the Project, inadvertently it is not included in the list of lands which were intended to be acquired, the Superintendent of Surveyors has identified her land as a land which is due to be acquired. The learned DSG argued that by that letter, the Petitioner had admitted that the impugned land is situated within the area which section 2 Notice relates. The position of the Petitioner is that she had written it due to the misinterpretation of facts by the Respondents that in as much as her property was not included in the formal statutory acquisition process and in as much as the State would in any event take possession of the land, she would be placed in a situation where she would neither have the property, nor compensation. When coming to a conclusion, the Court cannot consider 2R7 in insolation and it should be considered with the other evidence placed before the Court. When weighing the evidence of both parties, the Court can be satisfied that the Petitioner has placed strong

evidence to establish that the impugned land is situated outside the area which the section 2 Notice relates.

When considering all the above stated facts and circumstances, it is evident that the impugned land owned by the Petitioner is situated not within the area which the section 2 Notice was exhibited and at the time of exhibiting the Notice the Respondents had no intention to identify a land in the area which the impugned land is situated for acquisition. In terms of the proviso (a) to the section 38 it is a mandatory requirement that before making an Order to recover possession of a land section 2 Notices should be exhibited.

In their book on *Administrative Law,* H. W. R Wade and C. F Forsyth articulate that, *"Procedural safeguards, which are so often imposed for the benefit of persons affected by the exercise of administrative powers, are normally regarded as mandatory, so that it is fatal to disregard them…."*[2]

Furthermore, Alex Carroll elaborates that,

*"A mandatory procedural requirement must be complied with if the action or decision taken is to be valid in law. As a general principle such a requirement will be regarded as mandatory if non-compliance with it might cause substantial prejudice to the person or persons affected by the exercise of the power. The requirement will usually have been imposed to improve the quality of the decision-making process."*[3]

The cardinal principle of *ultra vires* is of two forms i.e., substantive *ultra vires* and procedural *ultra vires*. Procedural *ultra vires* is the declaration of invalidity for reason

[2] H. W. R Wade and C. F Forsyth, *Administrative Law*. (11th edn, Oxford University Press, 2004) at page 185-187.

[3] Alex Carroll, *Constitutional and Administrative Law* (9th edn, Pearson Education Limited, 2017) at page 368.

of non-compliance with the procedure laid down by statute or failure to comply with the rules of natural justice or mandatory procedure.

In the landmark decision of *Council of Civil Service Union v. Minister for the Civil Service (GCHQ Case)*[4], Lord Diplock stipulated the grounds of Judicial Review as follows,

*"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review.*

*The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety."*

*By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*

*I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice…."*

In the instant action, since no Notice has been exhibited under section 2 of the Act in the area which the impugned land is situated, I hold that the attempts of the Respondents

[4] (1985) AC 374(HL) at page 950 and 951.

to take the possession of the impugned land in terms of the proviso (a) to the Section 38 of the Act are illegal and *ultra vires*. Therefore, I hold that the Petitioner is entitled to writs of Certiorari to quash the Order of the 1st Respondent containing in the Gazette Notification marked as P 23 (c) and the Demand of the 2nd Respondent containing in the letter marked as P 23 to hand over the possession of the impugned land to him and writ of Prohibition prohibiting the 1st - 3rd Respondents from recovering the possession of the said land in terms of the proviso (a) to the section 38 of the Act. Accordingly, the reliefs prayed for in the prayers (d) and (e) in the Petition dated 20.09.2020 are granted. This decision should not affect the rights of the Respondents to take necessary legal steps to acquire the impugned land of the Petitioner, if necessary, in the future. The 1st - 3rd Respondents should pay Rs.20, 000/= each to the Petitioner as the costs of this Application.

**JUDGE OF THE COURT OF APPEAL**

**M.T. MOHAMMED LAFFAR, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL.**