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

In the matter of an Application for a Writ of Certiorari in terms of Article 140 of the Constitution.

CA Writ Application 103/2020

T.M. Chandana De Silva
Sri Sunanda Road
Rukmal Mawatha,
Walgama
Matara

Petitioner

Vs.

1. Hon. Minister of Lands,
   "Mihikatha Medura"
   1200/06, Rajamalwatte Avenue,
   Battaramulla.

2. The Secretary,
   "Mihikatha Medura"
   1200/06, Rajamalwatte Avenue,
   Battaramulla.

3. The Divisional Secretary,
   Thihagoda,
   Matara.

4. Director-Land Acquisition
   Ministry of Lands,
   "Mihikatha Medura"

1200/06, Rajamalwatte Avenue,
Battaramulla.

Respondents

Before : **D.N. Samarakoon, J.**
B. Sasi Mahendran, J.

Counsel : Dammika Jayanetti with for the Petitioner
Amsara Gajadeera, SC for the Respondents

Written Submissions On : 29.06.222 (by the Petitioner)
01.06.2022 (by the Respondents)

Argued On : 05.04.2022

Decided On : 27.07.2022

B. Sasi Mahendran, J.

In the instant application, the Petitioner seeks a Writ of Certiorari to quash the decision of the Secretary to the Ministry of Lands (2nd Respondent) and/or the Director (Land Acquisition) of the Ministry of Lands (4th Respondent) refusing to consider divesting the land depicted as Lot 36 in Preliminary Plan ම්ෆ 1201 and contained in the letter dated 22nd October 2019 (marked as "P14").

The factual matrix is set out in brief.

A notice under Section 2 of the Land Acquisition Act No. 09 of 1950, as amended, was issued on 27th June 1983 in respect of the land in question (Lot 36 in Preliminary Plan ම්ෆ 1201). This was followed by an Order under proviso (a) to Section 38 of the Act dated 31st January 1984 and published in the Gazette No. 282/17 of 03rd February 1984

which contained a Schedule of the lands subject to an acquisition, one of which was the land in dispute. The Petitioner claims that he became aware of the acquisition of the said land for the proposed Nilwala River Project only after he obtained title to an undivided 27/50 share of the land from his mother by Deed of Transfer dated 12th October 2002.

The Petitioner was interested in reclaiming the land, as it was unused and no compensation had been paid to him. The Petitioner having written to the Minister seeking divestiture was informed in response by letter dated 21st August 2006 (marked as "P11") that this request could not be acceded to on the basis that compensation had already been paid. The contents of this letter are as follows:

"උක්ත ඉඩම සඳහා සම්පූර්ණයෙන්ම වන්දි හා පොලී ගෙවා අවසානව ඇති බව තිහගොඩ ප්‍රාදේශීය ලේකම් විසින් මා වෙත දැනුම් දී ඇත.

ඒ අනුව ඔබ විසින් ගරු ඇමතිතුමා වෙත ඉදිරිපත් කර ඇති 2006.04.17 දිනැති ලිපියේ සඳහන් ඔබගේ ඉල්ලීම ඉටු කල නොහැකි බව කණගාටුවෙන් දන්වමි."

The Petitioner once again wrote to the Minister of Lands requesting the land to be divested. The response, communicated to him by letter dated 22nd October 2019, was, yet again, not in his favour. The Director (Land Acquisition) of the Ministry of Lands wrote that since compensation had been paid there was no provision in the Land Acquisition Act to divest the land. The relevant portion of the letter states:

"මෙම ව්‍යාපෘතිය සඳහා අත්කරගත් ඉඩම් කොටස් සඳහා මේ වන විට වන්දි මුදල් ගෙවා අවසන් කර ඇති බව තිහගොඩ ප්‍රාදේශීය ලේකම් විසින් මා වෙත වාතර්ා කර ඇත. වන්දි හා පොළී ගෙවා අවසන් වූ ඉඩම් කොටසක් මුල් හිමිකාරුට හෝ වෙනත් පාශර්වයකට අවසතු කිරීමට ඉඩම් අත්කර ගැනීම් පනතේ ප්‍රතිපාදන සැලසී නොමැති බව කාරුණිකව දන්වා සිටිමි."

Accordingly, the Petitioner seeks to quash the decision to refuse to divest evinced by the letter dated 22nd October 2019. Prior to determining the merits of this application, it is pertinent to set out a general exposition of the meaning and ambit of judicial review.

In a constitutional system premised on the rule of law judicial review is a vital safeguard to guarantee the lawfulness of the exercise of public functions.

The starting point is the often-cited dictum of Lord Atkin in Rex v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co. [1924] 1 K.B. 171:

"Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs"

The Atkinian formula was revised by Lord Diplock in O'Reilly v. Mackman [1982] 3 WLR 1096 by dropping the words "having the duty to act judicially." Lord Diplock held:

"…this phrase gave rise to many attempts, with varying success, to draw subtle distinctions between decisions that were quasi-judicial and those that were administrative only. But the relevance of arguments of this kind was destroyed by the decision of this House in Ridge v. Baldwin [1964] A.C. 40, where again the leading speech was given by Lord Reid. Wherever any person or body of persons has authority conferred by legislation to make decisions of the kind I have described, it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected…"

Administrative law, the core of which is judicial review, is primarily intended to "keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok" (Wade & Forsyth, 'Administrative Law' 11th Edition)

In R (Alconbury Developments) v. Secretary of State for the Environment, Transport & the Regions [2003] 2 AC 295 Lord Hoffmann held,

"There is however another relevant principle which must exist in a democratic society. When ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law. The legality of what they do must be subject to review by independent and impartial tribunals……The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament"

The power of judicial review in the words of Justice Bhagwati (as he then was) in Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789, is:

"an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution."

The classical statement of the grounds of judicial review by Lord Diplock in the landmark judgment of Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 (often referred to as the GCHQ case) sets forth that the principle of judicial review of administrative action is based upon one or more of the following, viz. legality, procedural impropriety, and irrationality. Proportionality was envisaged as a future possibility.

Thus, if a decision is found to be vitiated by illegality, irrationality, procedural impropriety, or is found to be disproportionate, the decision would be nullified.

With this in mind, we will now consider Section 39A of the Land Acquisition Act, as amended, which deals with divesting of land once it has been acquired by the State. This Section reads:

(1) Notwithstanding that by virtue of an Order under Section 38 (hereafter in this section referred to as a "vesting order") any land has vested absolutely in the State and actual possession of such land has been taken for or on behalf of the State under the provisions of paragraph (a) of section 40, the Minister may, subject to subsection(2) by subsequent Order published in the Gazette (hereafter in this section referred to as a "divesting Order") divest the State of the land so vested by the aforesaid vesting Order.

(2) The Minister shall prior to making a divesting Order under subsection (1) satisfy himself that-

(a) ***no compensation has been paid*** *under this Act to any person or persons interested in the land in relation to which the said divesting Order is to be made;*

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

(c) ***no improvements*** *to the said land* ***have been effected*** *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 divesting Order is published in the Gazette.* [emphasis added]

This provision has been discussed in the following cases:

In Kingsley Fernando v. Dayaratne, [1991] 2 SLR 129, his Lordship S.N. Silva J. (as he then was) held:

"Section 39A (1) vests a discretionary power in the Minister to divest any land that has vested upon an order under Section 38 when possession has been taken for or on behalf of the State, ***to be exercised only if the pre-conditions*** *set out in paragraphs (a) to (d) of subsection (2)* ***are satisfied****. The provision does not have the effect of giving a statutory right to any person who had an interest in the land prior to vesting, to demand the exercise of this power by the Minister."* [emphasis added]

In Kapugeekiyana v. Janaka Bandara Tennakone, Minister of Land [2013] 1 SLR 192, her Ladyship Tilakawardane J. held:

"It is the assessment of this Court that to grant a divesting order on behalf of the Petitioner as per Section 39 A of the Act, the ***four conditions*** *set out in Section 39 A (2)* ***must be satisfied****."* [emphasis added]

In De Silva v. Atukorale [1993] 1 SLR 283, his Lordship Fernando J. held:

"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."

The bounden duty of a decision-maker is to correctly understand the law that regulates his decision-making power and give effect to it. In the absence of a suggestion that the Minister, or in the instant case the Secretary to the Ministry of Lands or the Director (Land Acquisition) of the Ministry of Lands, had acted either illegally, irrationally, procedurally improper, or even disproportionately, there is no basis on which this Court can grant a Writ of Certiorari to quash the decision to not divest. The essential pre-requisites set out above have not been satisfied for divestiture to take place. Even if, the conditions are satisfied, as held by his Lordship Fernando J. it would be legitimate to decline to divest if there exists a good reason.

We are of the view that the Respondents have acted within the four corners of the Act by correctly understanding and applying the provisions of the Act. Thus, this Court cannot interfere with that decision.

It must also be noted that no reasons are forthcoming as to why the Petitioner opted to challenge the decision by way of a writ application only in June 2020 when he had been informed in writing in 2006 that divesting could not take place. He has instead challenged the later communication dated 22nd October 2019. There is an undue delay on his part.

Addressing the question of delay his Lordship Sharvananda J. (as he then was) in Biso Menike v. Cyril de Alwis [1982] 1 SLR 368 held:

"When no time limit is specified for seeking such remedy, the Court has ample power to condone delays, where denial of Writ to the petitioner is likely to cause great injustice. The Court may therefore in its discretion entertain the application in spite of the fact that a petitioner comes to Court late."

Her Ladyship Bandaranayake J. (as she then was) in Issadeen v. The Commissioner of National Housing [2003] 2 SLR 10 held,

"It is however to be noted that delay could defeat equity. Although there is no statutory provision in this country restricting the time limit in filing an application for judicial review and the case law of this country is indicative of the inclination of the Court to be generous in finding 'a good and a valid reason' for allowing late applications, I am of the view that there should be proper justification given in explaining the delay in filing such belated applications."

The collective wisdom of these judgments, reflective of the general thinking of our courts, thus holds that delay will be condoned if a grave injustice would occasion to the Petitioner in the event his Petition is rejected or where the order/ decision complained of is manifestly erroneous or without jurisdiction or where there exists a valid explanation for the delay. In the present application, none of this has been put forward by the Petitioner.

For the foregoing reasons, this application is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

D.N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL