

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

Henry Nelson Rathnayake
"Nisalki Enterprises",
Lanka Filling Station,
Thihagoda.

CA/WRIT/391/2021

Petitioner

Vs.

1. Umesha Matarage-Divisional
Secretariat,
Divisional Secretariat Office,
Thihagoda.

2. S. M. Chandrasena
Minister of Lands,
"Mihikatha Madura",
Land Secretariat, No. 1200/6,
Rajamalwatte Road,
Sri Jayawardenapura Kotte.

3. R. A. A. K. Ranawake
Secretary,
Ministry of Lands,
"Mihikatha Madura",
Land Secretariat, No.1200/6,
Rajamalwatte Road,
Sri Jayawardenapura Kotte.
4. P. P. D. S. Muthukumarana
Chief Valuer/Assessor,
Valuation House,
No. 748, P De S Kularatne
Mawatha, Colombo 01.
5. W. W. D. Sumith Wijesinghe
Chairman,
Ceylon Petroleum Corporation,
No. 609, Dr. Danister de Silva
Mawatha, Colombo 09.
6. D. M. Dayaratne
Director (Lands),
04th Floor, No.216,
"Maganeguma Mahamedura",
Denzil Kobbekaduwa
Mawatha,
Battaramulla.
7. Hon. Attorney General
Hon. Attorney General's
Department, Colombo 12.

Respondents

Before : Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel : Shrilal Lakthilaka for the Petitioner.
Avanthi Weerakoon, SC for the Respondents.

Supported on : 22.02.2022 and 03.06.2022

Decided on : 22.07.2022

Sobhitha Rajakaruna J.

The Petitioner claims that he became the lawful owner of the land marked Lot.01 in Plan No.3335 dated 08.01.2009, marked 'P5', by virtue of the Partition Deed No. 8303 dated 23.01.2009, marked 'P4'. According to the Petitioner, the 1st, 2nd and 3rd Schedules to the Petition identify the road-facing portions of the said land as Lot No.50 (with the extent of 2.41 Perches), Lot No. 70 (with the extent of 0.04 Perches) and Lot No.71 (with the extent of 3.16 Perches) depicted in the Surveyor General's Preliminary Plan No. 2636. The Petitioner carries out the Lanka Filling Station named "Nisalki Enterprises" ('the filling station') on the said land.

The Petitioner in this application pleads, *inter alia*, for an order in the nature of a writ of Certiorari quashing the application dated 19.03.2021 filed under Section 42(2) of the Land Acquisition Act No.9 of 1950, as amended, ('the Act') by the 1st Respondent Divisional Secretary before the Matara Magistrate's Court in Case bearing No.53455, seeking an order to take possession of the lands described in the Schedule to the Petition.

The Respondents' contention is that the Petitioner's land has been acquired in accordance with an order issued by the 2nd Respondent Minister of Lands and Land Development ('Minister') under Section 38(a) of the Act. However, the learned Counsel for the Petitioner submits that the procedure stipulated by Sections 2, 5, 7 and 9 of the Act has not been

followed prior to filing the said application by the 1st Respondent in the relevant Magistrate's Court under the said Section 42(2) of the Act.

The learned State Counsel who appears for the Respondents tendered to Court the following documents by way of a motion dated 14.03.2022;

- i. The notice dated 14.11.2013 published under section 2 of the Act (marked as 'X1');
- ii. The notice under section 5 of the Act published in the Government Gazette No. 1885/33 dated 23.10.2014 (marked as 'X2');
- iii. The recommendations of the Inquiring Officers after the inquiry held under section 9 of the Act (marked as 'X3');
- iv. The decision dated 02.09.2019 of the Divisional Secretary of Thihagoda under section 10(1)(a) of the Act (marked as 'X4'); and
- v. The valuation report dated 19.11.2021 issued by the Department of Government Valuation (marked as 'X5').

The Petitioner has annexed the order under Section 38(a) of the Act which was published in the Gazette Notification No. 1837/36 dated 01.08.2014, marked as 'P2'. The land which belonged to the Petitioner is depicted as Lot No. 50 (with an extent of 0.0142 hectares) under the order No. 190 of 2014 of the said Gazette Notification marked 'P2'. The Section 7 notice under the said Act has been published in the Government Gazette No. 1964/13 dated 26.04.2016, and the same has been annexed to the Petition marked as 'P3' by the Petitioner.

In view of the foregoing, I observe that the lands which were to be acquired had been precisely identified by the above Gazettes 'P2', 'X2' and 'P3'. It is observed that both Gazettes 'P2' and 'X2' refer to the same land 'BB', which may be ascertained by reference to the Advance Tracing No. MR/THG/2013/761 dated 18.06.2014 and 'Lots 50, 70 and 71' may be ascertained by reference to the Preliminary Plan No. Mara 2636.

Therefore, I am of the view that the land claimed by the Petitioner has been duly acquired by the State. Although, the Petitioner asserts that no proper steps have been taken by the Acquiring Officer including the steps under Section 2 of the Act, the learned State Counsel has substantiated such, by providing the aforesaid documents marked 'X1' to 'X5'.

The learned Counsel for the Petitioner referring to Paragraph 4(iii) and 4(iv) of the Petition submits that, as required by Section 38A(1)(a), it was not confirmed by a preliminary

valuation of the 4th Respondent that the valuation of the said lands does not exceed Rs.25,000.00 as those lands fall within the administrative limits of the Thihagoda Pradeshiya Sabha. Accordingly, he submits that the 1st Respondent as the Acquiring Officer has failed to act in terms of Land Order 248.

At this stage, it is important to distinguish the provisions of Section 38A(1) & Section 38A(2)(a) from those of Section 38(a) and the Proviso to Section 38. J. A. N. De Silva J. (P/CA) (as he was then) in ***Seneviratne and others vs. Urban Council Kegalle and others 2001 3 Sri. L.R. 105 (p.109)*** stated:

“It is to be noted Section 38(A) applies only when a land is being acquired on behalf of a Local Authority. However in this instant the lands are being acquired on behalf of the Urban Development Authority which is not a Local Authority. Thus Section 38(A) has no application. There are several decided cases where the view has been expressed that invocation of the wrong Section does not render an order invalid provided that the authority concerned was actually vested with the power..”

As the disputed portions of the Petitioner's land has been acquired on behalf of the Road Development Authority, which is not a local authority as required by Section 38A(1), the Section 38A has no applicability to the instant application. Therefore, what applies to this application is only Section 38(a) and the proviso to Section 38. Thus, I am not inclined to accept the Petitioner's proposition on Section 38A(1) of the Act

Another contention of the Petitioner is that the due procedure under Section 17 has not been followed by making an award for compensation prior to demanding possession of the Petitioner's land which is in dispute. It is pertinent to note the following observations made by Samarakoon, C.J in ***Marie Indira Fernandopulle and another vs. E. L. Senanayake, Minister of Lands and Agriculture 79 (II) NLR 115 (p.117)***;

“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 a 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."** “ (Emphasis added)

The Section 38(a) provides:

38. 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 the State, or.....

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,... (Emphasis added)

The Proviso to Section 38 therefore empowers the Minister to declare that a land is to be acquired for a public purpose and instruct the relevant acquiring officer to take immediate possession of the land, at any time after notice under Section 2 is exhibited for the first time in the area in which that land is situated. As the Divisional Secretary has issued the Section 2 notice marked 'X1', dated 14.11.2013, the Petitioner's land could then be lawfully acquired at any time after the notice was exhibited upon an urgency. It is to be noted that the 6th Respondent, Director Lands of the Road Development Authority ('RDA') by letter dated 14.07.2014, marked 'P6' has requested the Petitioner to hand over possession of the

portions of land owned by the Petitioner, prior to the publication of the Gazette marked 'P2'. Hence, I am unable to accept the arguments raised by the learned Counsel for the Petitioner in this regard.

Now, I advert to the other contention of the Petitioner. The learned Counsel for the Petitioner asserts that the relevant authorities have not given a realistic value under Section 9 of the Act for the lands morefully described in the Schedules to the Petition and thereby such decisions on valuations are arbitrary, capricious or unreasonable.

The Petitioner submits that there are three underground reserve tanks of the filling station placed within Lots 50 and 71 of the Preliminary Plan No.2636, the acquisitions of the said property will result in the Petitioner having to relocate the said tanks. The Regional Manager of the Ceylon Petroleum Corporation notified the Petitioner by letter dated 02.09.2014 marked 'P13' that the replacing and relocating of the reserve tanks is estimated to cost Rs.3,883,254.78.

According to the Petitioner, the proposed road expansion would require the fuel pumps, which were bordering the road, to also be relocated. The rear walls of the filling station would also be required to be rebuilt to be 12 feet with sidewalls and the filling station's floor raised and leveled with the new road, thus, requiring the flooring to be re-done. Moreover, the drive-ways of the filling station would need relaying. The Petitioner further pleads that the said renovation is estimated to cost around Rs.5,000,000.00, totaling to an estimated cost of Rs.8,883,254.78.

In the circumstances, I am of the view that there is a question to be determined by this Court whether the relevant authorities have exercised their powers duly in terms of the provisions of the Act for the purpose of assessing the compensation, if any, in favour of the Petitioner. However, I see no question exists to be examined by this Court in reference to paragraph (b) and (c) of the prayer of the Petition as the subject land has been duly acquired by the State and further, the Petitioner is not challenging, particularly the order made by the Minister under Section 38(a) of the Act. Hence, prima facie it appears that the Petitioner has no ground to challenge the application made by the 1st Respondent to the relevant Magistrate's Court under Section 42(2) of the Act.

In view of the foregoing, This Court is inclined to issue notice on the Respondents only in reference to the prayer (d) of the Petition of the Petitioner and accordingly, I proceed to

vacate the interim order issued by this Court on 22.02.2022 suspending the proceedings of the case No. 53455 of the Magistrate's Court of Matara. In the circumstances, the learned Magistrate of the Magistrate's Court of Matara is directed to proceed with the said case No. 53455, according to law.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal