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

In the matter of an application for writ of Prohibition and Mandamus in terms of the Article 140 and relevant Provisions of the constitution of Sri Lanka.

C.A. Writ Application No: 91/12

Munasinghelage Premawathie,
Munasinghe Niwasa, Pathasgaha Watte,
Bakinigahawela.

Petitioner

-Vs-

1.Divisional Secretary,
Divisional Secretary, Office,
Madagama.

2. District Secretary.
District Secretary's Office,
Monaragala.

3.Commissioner General,
Land Commissioner's Department,
Gregory's Road,
Colombo 07.

4.Hon. Attorney General,
Attorney General's Department,
Hultsdorp,
Colombo 12.

Respondents

Before: C.P. Kirtisinghe – J.
Mayadunne Corea – J.

Counsel: Vijaya Niranjan Perera PC with Oshadee Perera instructed by J.P. Perera for the Petitioner.
Chaya Sri Nammuni, DSG for the Respondents

Supported on: 05.12.2022

Decided On: 28.02.20223

C. P. Kirtisinghe – J.

The subject matter of this case, a land called 'Patasgalahena' alias 'Pathalgashena' in the extent of 47 acres 2 roods and 2 perches had been acquired by the state for a public purpose and 17 ½ acres of the land acquired had been utilized to erect 30 houses. This land was originally owned by one Monis Munasinghe who had transferred same to his wife Alis Nona and Alis Nona's brother and two sisters. Alis Nona had died while the acquisition proceedings are in process and the Petitioner had made a request to the state to divest the unutilized land and also to pay compensation for the land utilized for the public purpose. The Petitioner states that Alis Nona is her mother although she was unable to produce her birth certificate. According to the Petitioner the acquiring officer had declared under section 10(1) of the Land Acquisition Act that 3 acres to be divested and it was also decided that Alis Nona was the owner of the 44 acres and 2 roods and Gunasundara Bandara was the owner of half a acre. After the death of Alis Nona it became imperative to ascertain the heirs of Alis Nona for the purpose of paying compensation and the Gramasevaka of the area had informed the Divisional Secretary that the Petitioner, one Asoka Munasinghe and two others were children adopted by Alis Nona. Search for the birth certificates of them in the registers had yielded nil results. While these proceedings are pending before the Divisional Secretary, the Petitioner filed this writ application seeking for a mandate in the nature of a writ of Prohibition prohibiting the Respondents from taking possession and utilizing the unutilized portion of the land and also prohibiting the Respondents from disturbing or obstructing the Petitioner from utilizing the unutilized portion of the land for putting up a dwelling house. The Petitioner had also sought a mandate in the nature of a writ of Mandamus compelling the

Respondents to take necessary steps to divest the land and also to pay compensation to the Petitioner. When this case was taken up on 30th August 2016, the parties had arrived at the following settlements; the Respondent had agreed to give 2 acres out of the total extend of 4 acres from the land which is the subject matter of this case to the Petitioner and to give the balance 2 acres to one Asoka Munasinghe. It was also agreed that the portion of land containing the structure should be given to the Petitioner. Asoka Munasinghe was not a party in this case and she had never consented to the aforesaid settlement. After some time, the Petitioner filed a motion dated 05.10.2021 informing court that the settlement arrived in this case had not been enforced. After considering the situation the learned deputy Solicitor General informed the court that, due to events that had transpired after the settlement was entered an impossibility has arisen in implementing the terms of the settlement and the 1st Respondent, Divisional Secretary has submitted an affidavit to that effect. The Learned Deputy Solicitor General had made an application to have this matter relisted for argument. In reply to that, the Petitioner has moved court to direct the 1st Respondent to show cause why he should not be punished for committing contempt of court.

With the settlement entered between the parties on 30.08.2016 this writ application came to an end and the application was dismissed without costs. If the case is to be relisted for argument it should be done with the consent of all the parties. The Petitioner is objecting to this relisting application. If the Petitioner does not want to get the matter relisted and make an attempt to get a judgement in his favour, there is no necessity to this court to relist the application. The Respondents in their statements of objections had only asked for a dismissal of this writ application and the court has already dismissed it. Although the 1st Respondent in his affidavit is making an application to get the case relisted, he had never moved court to set aside the settlement on the ground of impossibility of performance. Asoka Munasinghe who was not a party to the settlement and who was not a party to this writ application had never made an attempt to get the settlement vacated. The learned Deputy Solicitor General had cited an article on impossibility of performance which had appeared in Colombia Law Review which says that the impossibility of performance can be treated as an excuse for breach of a contract. She has also cited the judgements of **Eliyathamby vs. Mirando 47 NLR 110** and a passage from Professor C. G. Weeramantrie's treatise "The Law of Contracts". Professor

Weeramantrie in his The Law of Contracts Volume 2 at page 789 states as follows,
"It has been well recognised in English law since Atkinson v. Ritchie that supervening illegality discharges the contract. Supervening illegality may arise in various ways, such as by legislation or by new facts causing a clash with public policy, a common illustration of which is the outbreak of war."

In the case of Eliyathamby vs. Mirando it was held by M.W.H. De Silva J. that in view of the outbreak of war it had become impossible to perform the contract as contemplated by the parties and, under the circumstances, it was open to the Court to do what seemed to be equitable and to provide that a reasonable interest should be given for the principal lent. Justice Weeramanthrie deals with a situation where a contract had been entered outside court. Eliyathamby's case also deals with a similar situation. Both deal with a situation where the defence of impossibility of performance can be brought forward in court in a case based on a contract. Here the settlement itself was arrived in court and the case has come to an end. Now you cannot reopen the case to enable the Respondents to take up such a defence.

Therefore, this court cannot relist this application for further hearing. If the Petitioner wishes to initiate contempt proceedings any of the Respondents he must follow the proper procedure. If there is an impossibility of performance of the settlement the Respondents can take it as a defence at the appropriate stage. Accordingly, we terminate the proceedings.

Judge of Court of Appeal

Mayadunne Corea – J.

I Agree

Judge of Court of Appeal