

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

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

Wakkumburage Ananda Weerasinghe,
No. 19, Elapatha,
Rathnapura.

PETITIONER

CA No. CA/Writ/0468/2019

v.

1. S. A. Dilruk,
Divisional Secretary - Elapatha,
Divisional Secretariat,
Elapatha,
Rathnapura.
2. Gayantha Karunathilleke,
Minister of Land and Parliamentary
Affairs,
“Mihikathamedura”
Rajamalwatte Road,
Battaramulla.
- 2A. S. M. Chandrasena
Minister of Lands and Lands Development,
“Mihikathamedura”
Rajamalwatte Road,
Battaramulla.

3. W. H. Karunaratne
Secretary to the Ministry of Lands and
Parliamentary Affairs,
“Mihikathamadura”,
Rajamalwatte Road,
Battaramulla.

3A. R. A. K Ranawaka
Secretary to the Ministry of Lands and
Lands Development,
“Mihikathamadura”,
Rajamalwatte Road,
Battaramulla.

Substituted 3A Respondent

4. Director (Land Acquisition),
Ministry of Lands and Parliamentary
Affairs,
“Mihikathamadura”,
Rajamalwatte Road,
Battaramulla.

5. Vajira Abeywardena
Minister of Internal & Home Affairs and
Provincial Councils & Local Government,
“Nila Medura”,
Elvitigala Mawatha,
Narahenpita, Colombo 05.

5A. Janaka Bandara Thennakoon
Minister of Public Administration, Home
Affairs, Provincial Councils & Local
Government,
Independence Square,
Colombo 07.

Substituted 5A Respondent

6. Gamini Senevirathna
Secretary to the Ministry of Internal &
Home Affairs and Provincial Councils &
Local Government,
“Nila Medura”
Elvitigala Mawatha,
Narahenpita, Colombo 05.
- 6A. S. Hettiarachchi
Secretary to the Ministry of Public
Administration, Home Affairs, Provincial
Councils & Local Government,
Independence Square,
Colombo 07.
7. District Secretary of Rathnapura,
District Secretariat,
Rathnapura.
8. W. A. Silva
Elvitigala, Rathnapura.
9. Batakada Liyanage Mallika
Elapatha, Rathnapura.
10. Batakada Liyanage Punyakanthi
Ketaliyanpalla,
Kahengama,
Rathnapura.
11. Batakadage Panditharathna
Samagipura Mawatha,
Kanadola.

RESPONDENTS

BEFORE

: M. Sampath K. B. Wijeratne J. &
Wickum A. Kaluarachchi J.

COUNSEL : Shantha Jayawardena with Chamara
Nanayakkarawasam for the Petitioner.

A. Gajadeera, SC for the 1st – 7th
Respondents.

ARGUED ON : 22.02.2023 and 16.03.2023

DECIDED ON : 15.06.2023

M. Sampath K. B. Wijeratne J.

Introduction

The Petitioner instituted these proceedings seeking *inter-alia*; a writ of certiorari quashing the order made under Section 38 Proviso (a) of the Land Acquisition Act, published in the Gazette (Extra Ordinary) marked ‘P 16’; a writ of certiorari quashing the notice under Section 4 of the Land Acquisition Act marked ‘P 12’; a writ of certiorari quashing the decision of the 2nd Respondent, *if any*, made under Section 4 (5) and/or 5 of the Land Acquisition Act for acquiring the Petitioner’s land depicted as lot ‘A’ and ‘B’ of the advanced tracing marked ‘P 17’, a writ of prohibition prohibiting the 1st to 7th Respondent from taking over possession of Petitioner’s land depicted as lot A and B of advanced tracing marked ‘P 17’.

At the time the notices were to be served upon the Respondents, the Petitioner informed the Court that no relief would be sought against the 8th, 9th, 10th, and 11th Respondents. The 1st to 7th Respondents who were before Court informed that they will abide by the limited objections already filed by them in respect of interim reliefs sought by the Petitioner and no further objections will be filed. In the limited objections filed by the 1st to 7th Respondents, sought the dismissal of Petitioner’s Petition. The Petitioner also filed a counter affidavit refuting several averments in the limited objections filed by the 1st to 7th Respondents.

Analysis

Notice under Section 2 of the Land Acquisition Act

The acquisition procedure under the Land Acquisition Act commences with Section 2. According to the Petitioner, the purpose of a notice under Section

2 of the Land Acquisition Act is to investigate a larger area of land in order to identify suitable lands for the required public purpose. The Petitioner submitted that in this instance the 1st Respondent specified a particular land and therefore, the Section 2 notice is *ultra-vires*.

In reply, the Respondent submitted that there is no merit in the Petitioner's submission and that the purpose of Section 2 notice is to identify a land suitable for the intended public purpose and to declare the public purpose for the knowledge of the public.

It was stated in the case of *N. M. Gunethilake and others v. Hon. Gayantha Karunathilake and others*¹ that Section 2(1) would generally refer to land in any area out of which a particular land is to be chosen pursuant to the investigation as to its suitability.

However, in this instance, the 1st Respondent acquiring officer chose the land belonging to the Petitioner to be acquired for the purpose of relocating the Elapatha Divisional Secretariat and the quarters for the Divisional Secretary, not taking into account other available land, which in my view is unreasonable.

Alternative lands and initial steps

In the description of the lands proposed to be acquired ('R 1') the 1st Respondent stated under item 21 that there are no other alternative lands owned by the State or by the Land Reform Commission. However, the Petitioner has disclosed six such lands in paragraph 10 of his Petition. Answering paragraph 10 of the Petition, 1st to 7th Respondents stated that they are unaware of the averments in paragraph 10. However, further answers stated that the lands mentioned are situated at a considerable distance away from the main road and are not suitable for the purpose. The 1st Respondent failed to disclose convincing reasons beyond the distance from the main road. Even the distance from the main road is not disclosed, which would have allowed the Minister to make a decision about its reasonableness.

Hence, it is clear that the 1st Respondent, before submitting the document marked 'R 1', has not taken into account the alternative lands available for the required purpose. Further, in the report submitted by the 1st Respondent regarding the suitability of the land to be acquired under Section 38 Proviso

¹ CA. Writ 387/2017 Court of Appeal minutes dated 21.09.2020.

(a) of the Land Acquisition Act² there is a specific question regarding the amount estimated for the acquisition and whether a specified amount is deposited with the Divisional Secretary. Answering the said question, the 1st Respondent stated that funds would be provided by the Ministry of Lands. Therefore, it is clear that no funds had been allocated for the acquisition. The next question is whether there are funds available for the purposes for which the land is acquired. Answering the said question, the 1st Respondent states that funds will be allocated in the 2019 budget under the Ministry of Internal Affairs. Another question is whether the building plans had been prepared and the tenders had been called. This question was also answered in the negative.

Hence, the Respondent's own documents establish that without taking the initial steps such as allocation of funds, the 1st Respondent has proceeded to acquire the land for the construction.

Urgency, necessity, and suitability

The Respondent's main contention is that the land in which the present Divisional Secretariat and the quarters of the Divisional Secretary are situated is subject to the risk of landslide. However, the Respondents have failed to substantiate this position by obtaining a report from the National Building Research Organization (NBRO) or any other competent authority. However, the 1st Respondent has obtained the services of a Geologist to inspect the Petitioner's land³. The Respondents relied on the statement made by the Grama Niladhari of Elapatha Division who gave evidence at the inquiry held in respect of the objections made by the Petitioner. Even in Grama Niladhari's statement, all that she has stated is that earth slips occur in the land where the present Divisional Secretariat is located and steps have to be taken to make it stable. She has not stated that there is a risk of landslides.

Another ground stated by the Respondents is that the present Divisional Secretariat is housed in an old building where there was a Village Council. It was also submitted that the building is in dilapidated condition and with the increase of the number of members of staff almost to double, 150 - 200 in number, the building is insufficient to house the present number of staff. Further, it was submitted that a large number of the public come to the Divisional Secretariat for their needs, daily.

² Tendered along with the motion filed by the 1st to 7th Respondents on the 17th September 2020.

³ Item 22 of 'R 1'.

The Respondents have failed to obtain a report from competent personnel regarding the present condition of the building and to submit the same to the Minister, facilitating the Minister to arrive at his own conclusion as to whether he should act in terms of Section 38 Proviso (a) of the Land Acquisition Act. The other ground, an increase in the number of members of the staff and the number of the general public coming to the Divisional Secretariat daily are not grounds which emerged abruptly and would have been there for a considerable period. The Respondents have not pleaded it as a sudden increase in number and therefore, cannot be considered as a ground to relocate the Divisional Secretariat urgently. The latter two grounds are not applicable to the relocation of the quarters. In the circumstances, the risk of landslide is not substantiated, the Divisional Secretariat could have easily relocated temporarily and the existing building could have been converted to a story building, as it was submitted by the learned Counsel for the Petitioner at the argument.

As it was observed by His Lordship Arjuna Obeyesekere J., in the case of *N. M. Gunathilake v. Hon. Gayantha Karunathilake and others*⁴ (Mahinda Samayawardhena J., agreeing) (sitting in Court of Appeal as their Lordships then was) the burden lies on the Respondents to prove the grounds for urgency and the burden shifts to the land owner to rebut that inference only when such burden is discharged.

Whether the minister should only take into account the urgency or the necessity, and suitability as well

In the case of *Marie Indira Fernandopulle and another v. E. L. Senanayake, Minister of Lands and Agriculture*⁵ the Supreme Court observed that if an inquiry under Section 4 (4) and 4 (5) had been held the Minister requires only to consider the matter of urgency in issuing an order under Section 38 Proviso (a) of the Land Acquisition Act. But, if Section 38 Proviso (a) notice is published immediately after the notice under Section 2 (1) or 4 (1) is published, Minister requires to consider the necessity and suitability of the land, apart from urgency. But, in the recent case of *N. M. Gunathilake v. Hon. Gayantha Karunathilake and others*⁶ Arjuna Obeyesekere J., held that ‘the

⁴ *Supra* note 1.

⁵ 79 (II) N.L.R. 115.

⁶ *Supra* note 1.

Minister is still required to consider all three matters prior to acting under proviso to Section 38 (a).'

In the instant application, the main relief sought by the Petitioner is to quash the order made by the Minister under Section 38 Proviso (a) of the Land Acquisition Act. In view of the above decision of His Lordship Obeyesekere J., in the above case, the Minister is required to consider urgency as well as necessity and suitability. Hence, I am of the view that it is important for the Minister to have all the necessary material on these matters to arrive at his own conclusion.

Acquisition procedure under the Land Acquisition Act

The acquisition procedure in the Land Acquisition Act starts with Section 2 (1).

Section 2 (1) reads as follows;

'2 (1) Where the Minister decides that land in any area is needed for any public purpose, he may direct the acquiring officer of the district in which that area lies to cause a notice in accordance with subsection (2) to be exhibited in some conspicuous places in that area.'

The 1st Respondent signed the *'description of the land proposed to be acquired'* on the 29th March 2017 ('R 1'). The Section 2 (1) notice was published on the 23rd March 2018 ('P 5'/R2 (a) to (c)').

Thereafter, in terms of Section 2 (3) of the Act, an officer authorized by the acquiring officer has to proceed to investigate the suitability of the land for the purpose for which the land is to be acquired by carrying out surveys, examining the subsoil, demarcating boundaries, etc. Thereafter, if the Minister considers that the land is suitable for the public purpose for which it is to be acquired, he shall direct the acquiring officer to cause a notice published in terms of Section 4 (3) of the Act calling for written objections for the acquisition, if any.

In the case of *Manel Fernando and another v. D. M. Jayaratne, Minister of Agriculture and Land and others*⁷ it was held that *'the object of Section 4 (3) is to enable the owner to submit his objections: which would legitimately*

⁷ [2007]1 S. L. R 112.

include an objection that his land is not suitable for the public purpose which the state has in mind, or that there are other and more suitable lands’.

Where a notice under Section 4 (3) is exhibited, objections are made to the Secretary of the appropriate Ministry who should consider such objections either by himself or through an officer appointed by him. Accordingly, the Secretary to the Ministry of Internal and Home Affairs and Provincial Councils and Local Government has caused an inquiry to be held by the District Secretary of Colombo (‘R 7’). Thereafter, the Secretary to the Ministry has made his recommendation to the Secretary to the Ministry of Land and Parliamentary Reforms in terms of Section 4 (4) of the Act, to continue with the acquisition procedure.

However, according to Section 4 (4) of the Act, after consideration of the objections, the Secretary has to make his recommendations to the Minister of the Ministry of which he is the Secretary and the said Minister should consider the recommendations and make his own recommendations to the Minister in charge of the subjects of lands. In this instance, the Secretary to the Ministry of Internal and Home Affairs and Provincial Councils and Local Government has made his recommendations directly to the Secretary to the Land and Parliamentary Reforms Ministry (‘R 8’). The Petitioner argued that ‘R 8’ is a recommendation made directly to the Secretary to the Ministry of Lands by the Secretary of the relevant Ministry and therefore, it contravenes provisions of Land Acquisition Act. In reply, the Respondents contended that this is a new ground setup by the Petitioner which was not in the Petition for which the Respondents filed their objections and therefore, not entitled to be raised at the stage. In the case of *Sahul Hameed Mohomed Jawahir and others v. Hon. Minister of Lands and Development and others*⁸ it was held that a party cannot setup a new case which was not the subject matter in the original Petition.

Be that as it may, in this instance the Minister of Home Affairs also has recommended the acquisition under Section 38 Proviso (a) of the Act to the Minister of Land and Parliamentary Reforms (‘R 8a’). Therefore, it appears that although the Secretary to the Ministry of Internal and Home Affairs and Provincial Councils and Local Government has made his recommendation directly to the Secretary to the Ministry of Lands and Parliamentary Reforms,

⁸ CA. Writ 76/2013, CA minutes dated 26th May 2020.

following due process his Minister, the Minister of Home Affairs, has made his recommendation to the Minister of Lands and Parliamentary Reforms.

The Minister of Land and Home Affairs has proceeded to publish a notice under Section 38 Proviso (a) of the Act in the Gazette (Extra Ordinary) No. 2137/27 dated 20th August 2019 ('P 16').

Consequently, the 1st Respondent has informed the Petitioner to hand over possession to the State ('R 9'). However, I observe that even after the publication of the order under Section 38 Proviso (a), the Secretary to the Ministry of Lands and Parliamentary Reforms has continued to proceed under the ordinary procedure of acquisition and caused the 1st Respondent to take consequential steps under Sections 5, 6 and 7 of the Act ('R 10'). The Minister of Lands and Parliamentary Reforms has also proceeded to make a declaration under Section 5 of the Act, on the 18th October 2019. The relief sought under paragraphs (f) and (g) of the prayer of the Petition relates to this decision of the 2nd Respondent Minister.

Application and recommendation for the acquisition

Another argument advanced by the Petitioner is that the application for the acquisition and the recommendation for the acquisition both are done by one and the same person, the 1st Respondent, and its *ultra vires*⁹. The Petitioner's argument is based on the document marked 'R 1'. However, the learned State Counsel submitted that 'R 1' is not the application made for the acquisition. In fact, the heading of 'R 1' reads as '*the description of the land proposed to be acquired*'. The Petitioner submitted a copy of the '*application for the lands to be acquired to the state*' along with the written submissions marked as 'X 1'. According to 'X 1' the Head of the Department has to make his recommendation regarding the acquisition whereas no such recommendation is to be made in R 1'. Therefore, the above submission made by the Petitioner that both the application and the recommendation for the acquisition of the Petitioner's land is made by the 1st Respondent has no merit.

A further argument brought forward by the Petitioner is that 'R 1' must be signed by the head of the department, but signed by the 1st Respondent Divisional Secretary who is not the head of the department. The Petitioner made the above submission on the basis that 'R 1' is the application for the

⁹ Paragraph 3.14 of the Petitioner's written submissions.

acquisition¹⁰. However, as I have already analysed above in this judgment, 'R1' is not the application for acquisition. Be that as it may, the Petitioner's submission was that in terms of Article 55 (2) of the Constitution, heads of department are appointed by the Cabinet of Ministers. According to the document 'P 20' submitted by the Petitioner, Divisional Secretaries are appointed by the Public Service Commission and it is the District Secretaries who are appointed by the Cabinet of Ministers. Accordingly, it was submitted that the Divisional Secretary is not the head of a department.

In reply, the Respondent submitted that in terms of Section 41 of the Land Acquisition Act where an order is made under Section 38 Proviso (a) the requirements under Sections 2, 4, and 5 recede to the background and the former takes precedence. Therefore, non-observance of any requirement under such Sections is not an impediment to proceeding with Section 38 Proviso (a). Above all, as I have already stated, 'R 1' is not the application for acquisition. Therefore, the above submission of the Petitioner does not hold water.

Alleged false statements made by the 1st Respondent

The Petitioner also submitted that the 1st Respondent's statement in 'R 1' that there are no houses on the land to be acquired is incorrect and that implies malice on the part of the 1st Respondent. The plan No.1694, made in the Partition action No. 27779/P clearly establish the fact there are buildings on either side of the road on the Petitioner's land. However, the plan marked 'R5' had been made carving out small portions where there are buildings. The plan 'R 1' had been made in May 2018. The 1st Respondent signed the document marked 'R 1' on the 29th March 2017, before the preparation of the plan 'R5'. In 'R 1' the entire extent of the land is given as 177 A, 1 R, 17 P whereas the land to be acquired is a portion of a land in an extent of 3 A, 2 R, 22.98 P, the subject matter of a partition action. Therefore, it appears to me that the 1st Respondent has acted with the intention of acquiring the land required for the Divisional Secretariat and the Divisional Secretary's quarters, leaving out three small portions of the land at three different places, depriving the Petitioner of using his land for a meaningful purpose¹¹. In my view, the

¹⁰ Ibid paragraph 3.19.

¹¹ Lot 2, part of lot 4 where buildings marked B and F are situated and part of lot 1 where the building marked A is situated.

manner in which the portion of land sought to be acquired is carved out is irrational and unreasonable, but does not establish malice.

Inquiring officer's recommendations

In the recommendations made by the inquiring officer in 'R 7' it is stated that the matters raised by the Petitioner as opposed to the acquisition are ordinary reasons and acquiring of the Petitioner's land would not cause loss of livelihood or destitution of the Petitioner. It is true that in plan 'R 5' the portion of land to be acquired is described as a barren land. However, as I have already stated in this judgment 'R 5' plan is prepared leaving out the portions where there are buildings. According to plan 'P 1' and attached report 'P 2' there are two houses and a rubber store on the land. There had been a tea plantation and a mixed plantation of coconut and other trees. I am mindful that plan 'P 1' is made in the year 2014 and plan 'R 5' is made in the year 2018. Therefore, one can expect a change in the plantation on the land. The Petitioner submitted that the land could not be utilized for cultivation due to the pending Partition action.

Notably, the inquiring officer has failed to take into consideration the alternative lands available for acquisition.

Therefore, in my view, the inquiring officer has failed to consider relevant factors and also has taken into consideration irrelevant factors.

Professor H.W.R. Wade stated as follows;

'There are many cases in which a public authority has been held to have acted from improper motives or upon irrelevant considerations, or to have failed to take account of relevant considerations, so that its action is ultra vires and void. It is impossible to separate these cleanly from other cases of unreasonableness and abuse of power, since the court may use a variety of interchangeable explanations, as was pointed out by Lord Greene. Regarded collectively, these cases show the great importance of strictly correct motives and purpose¹².'

I am of the view that the recommendation of the inquiring officer that no harm would be caused to the Petitioner by acquiring his land is irrational and unreasonable.

¹² H.W.R. Wade and C. F. Forsyth, *Administrative Law, Eleventh Edition*, at p. 323.

It came to light in this case that the State has decided not to proceed with the order made under Section 38 Proviso (a) of the Act consequent to the undertaking given to this Court. However, the said undertaking was given pursuant to the Petitioner's application for interim reliefs which included suspending the operation of the order made under Section 38 Proviso (a) of the Act. Therefore, cannot be considered as an abandonment of proceedings under the above order. Accordingly, in my view, the Court must consider this application in the form it is presented to this Court.

Alleged malice and ulterior motive on the part of the 1st Respondent

The Petitioner's main allegation on malice is that in April, 2017 the 1st Respondent Divisional Secretary together with her driver came and met the Petitioner and demanded to sell a portion of Petitioner's land for her to build a house. The Petitioner refused the demand and thereafter, the 1st Respondent maliciously took steps to acquire the Petitioner's land to build the Divisional Secretariat and her quarters. However, in my view, this allegation is highly improbable and unsupported by evidence. The letter 'R 1', the description of the lands proposed to be acquired, was signed by the 1st Respondent on the 29th March 2017, before the date on which she has visited the Petitioner. Therefore, I am not inclined to accept the Petitioner's allegation. The other ground of malice is choosing Petitioner's land for the required purpose without considering other options, unfounded allegation of landslide risk at the land where the present Divisional Secretariat and Divisional Secretary's quarters are situated, making both the application and recommendation by the 1st Respondent and the 1st Respondent signed the document 'R 1' in the purported capacity as the head of the department¹³. The foregoing grounds are already dealt with above in this judgment.

Accordingly, it is my considered view, that the Petitioner has failed to establish malice on the part of the 1st Respondent. However, I am of the view, the 1st Respondent's conduct is irrational and unreasonable.

Finally, the Respondents argued that even if the order made under Section 38 Proviso (a) is quashed, the Section 2 notice will remain intact since the Petitioner has not sought to quash the Section 2 notice. I observe that this submission is contrary to their own submission that once the Section 38

¹³ Chapter 3 of the Petitioner's written submission.

Proviso (a) order is made, the pre requisites recede to the back ground and the order made under Section 38 Proviso (a) takes precedence.

Be that as it may, in the case of *Dayaratne v. Rajitha Senarathne, Minister of Lands and others*¹⁴ the Court of Appeal observed that the Section 2 notice only facilitates an authorize officer to enter into the land and determine whether such land is suitable for the public purpose for which it is required. Further, a Section 2 notice by itself does not affect the rights of any person to his land except to the limited extent of the authorized an officer to enter upon the said land and consider its suitability for acquisition. Section 2 notice is clearly not a decision or order which has the *proprio vigore*, its own force.

Therefore, in my view, a plea to quash the Section 2 notice is unwarranted.

Conclusion

In light of the analysis made above in this judgement, I am of the view that the decision to acquire the portion of land of which the Petitioner is a co-owner, depicted in plan 'R 5' is irrational, unreasonable and *ultra-vires*.

Hence, I am inclined to issue writs of *certiorari* prayed for in paragraphs (d), (e), (f), (g) and the writ of prohibition prayed for in Paragraph (h), of the prayer of the Petition.

Parties shall bear their own costs.

JUDGE OF THE COURT OF APPEAL

Wickum A. Kaluarachchi J.

I Agree.

JUDGE OF THE COURT OF APPEAL

¹⁴ [2006] 1 S. L. R. 7.