

**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 Prohibition and Certiorari under
and in terms of Article 140 of the Constitution.*

CA/WRIT/85/2019

Virendra Kirthi Bandara Godamunne,
10, Charles Avenue,
Colombo 03.

And also

Godamunne Walauwwa,
266, Ampitiya Road,
Kandy.

Petitioner

Vs.

1. Road Development Authority,
“Maganeguma Mahamedura”
216, Denzil Kobbekaduwa Mawatha,
Koswatta,
Battaramulla.
2. Chief Engineer,
Road Development Authority,
Kandy.
3. Divisional Secretary,
Divisional Secretariat,
Mahanuwara Four Gravets and
Gangawata Korale.
4. Director General,
Department of Archaeology,
Sir Marcus Fernando Mawatha,
Colombo 7.

Respondents

Before: Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel: S. A. Parathalingam PC with Nishkan Parathalingam, Upeka Sooriyapatabendige and Dinia Thomas for the Petitioner.
Vikum De Abrew PC ASG with Amasara Gajadeera SC for the Respondents.

Argued on: 09.03.2021, 24.02.2023, 27.03.2023, 10.07.2023

Written Submissions: Petitioner- 31.08.2020, 12.06.2023

Respondents- 11.09.2023

Decided on: 18.09.2023

Sobhitha Rajakaruna J.

The Petitioner primarily seeks a writ of Prohibition against the 1st Respondent - Road Development Authority (RDA), prohibiting the said RDA from proceeding with any road construction that would cause damage to the Petitioner's ancestral property called the Godamunne Walauwwa ('*Walauwwa*') and also a writ of Prohibition against the 3rd Respondent - Divisional Secretary of the Kandy Four Gravets and Gangawatakorale (Divisional Secretary) from acquiring any part of the '*Walauwwa*'. The Petitioner also seeks a writ of certiorari quashing the purported notice published under section 7 of the Land Acquisition Act No. 9 of 1950.

The Petitioner pleads that the said '*Walauwwa*' is of historical significance considering the fact that it has been constructed by Dutch Prisoners. It is alleged that the construction of the said '*Walauwwa*' predates the 2nd day of March 1815. The Petitioner states that the 4th Respondent- Director General of the Department of Archeology by letter dated 10.03.2003 ('P5') informed the Petitioner that the said '*Walauwwa*' had been declared a protected monument and such Order of the relevant Minister published in Government Gazette No. 1264 dated 22.11.2002 marked 'P6(a)'. Additionally, the Petitioner states that the said 4th Respondent has inadvertently mentioned the date of publication of the said Gazette as 23.11.2002.

In terms of the interpretation section (section 48) of the Antiquities Ordinance ('Ordinance'), an 'Ancient Monument' is defined as:

"...any monument lying or being or being found in Sri Lanka which dates or may reasonably be believed to date from a period prior to the 2nd day of March, 1815, and includes-

- (a) any other monument which has been declared to be an ancient monument by an Order published in the Gazette under section 16, and
- (b) any tree in respect of which an Order under section 17 has been published in the Gazette;"

In considering whether the said '*Walauwwa*' is an ancient monument, it is alleged that it has been constructed prior to the aforesaid date as mentioned above and however, there is no dispute among parties on this fact. In view of the letter marked 'P5' and the Gazette Notification 'P6(a)', it is evident that the said '*Walauwwa*' has been declared a protected monument.

The main grievance of the Petitioner is that the *Ampitiya* road widening project would cause damage to the '*Walauwwa*' which is a protected monument. It appears that the ongoing road construction work has necessitated the acquisition of part of the property in which the said '*Walauwwa*' is situated. The Petitioner contends that although the said road widening project may not directly damage the '*Walauwwa*', the vibrations from the road constructions and heavy traffic would cause damage to the said '*Walauwwa*'. It is stated that the said '*Walauwwa*' should be preserved and/or protected for future generations and accordingly the Petitioner proposes that any road widening should be carried out on the opposite side of the said *Ampitiya* Road. As per the submissions of the Petitioner, the pathway leading to the '*Walauwwa*' will be reduced from 13 feet to 1 foot if the proposed road construction is carried out.

The Respondents contend that several steps have been taken under the Land Acquisition Act to acquire land for the said construction of the road between *Rathu Bokkuwa* and *Thalathu Oya* on *Kandy - Kirimatiya* Road. An order under section 38A of the Land Acquisition Act has been issued acquiring the respective lots of land depicted in the Survey General's advanced tracing plan No. Maha/Mhn/2013/1133 dated 18.06.2013 ('3R3'). The section 2, section 5 and section 7 notices under the same Act also have been issued in

respect of the said acquisition and such gazette notifications are marked as '3R1', '3R4' and '3R5' respectively.

One of the arguments raised by the Petitioner is that the above section 7 Notice ('3R5') is invalid and/or of no force or avail as far as the '*Walauwwa*' is concerned. The contention of the Petitioner is that the lot No. 507 described under item 56 of the said Notice does not in any manner whatsoever refer to the '*Walauwwa*'. It is submitted that in the absence of a due notice providing a proper description of the '*Walauwwa*' the 3rd Respondent's action of requiring (by '3R6') the Petitioner to attend the inquiry in relation to the payment of compensation was arbitrary and or unfounded and or not in accordance with law.

In spite of the above, the Petitioner strenuously argues that when a building is declared a protected monument the entire premises is protected under the Antiquities Ordinance and not only the building itself. Similarly, the Petitioner contends that the Respondents have failed to follow the expressed procedure laid down in section 43A of the said Ordinance. The Petitioner further argues that in terms of section 48 of the said Ordinance, the term 'archaeological heritage' refers to a wide array of places and the '*Walauwwa*' falls well within the ambit of an archaeological heritage.

In such a backdrop, I must examine whether the 4th Respondent or other Respondents have followed the due procedure prescribed in the said Ordinance. By virtue of section 43A of the Ordinance, it is required that the Director General of the Department of Archaeology issues a report and also cause an impact assessment survey to be carried out prior to any encroachment taking place on or near a protected monument.

Section 43A-

(1) Whenever any development or industrial scheme or project is proposed by the Government or other institution or person entailing the use, encroachment or submergence of any land falling within the inventory prepared under section 40(b), or any land as may be prescribed, such scheme or project shall not be approved or permitted until after a report; is submitted by the Director-General of Archaeology, as to the effects the implementation of such scheme, or project may have upon such land or any antiquities within it.

(2) The Director-General of Archaeology shall cause an impact assessment survey to be undertaken at the expense of the sponsors of such project or scheme to assess the consequences thereof upon the antiquarian, historical or archaeological aspects

or value of the land in question or on any antiquities upon it and shall, within such period of time as may be agreed on (in any event not later than six weeks from deposit of the cost of such survey with the Director-General of Archaeology), submit to the Minister, his written report recommending, objecting to, or recommending subject to such conditions or alterations as may be specified in the report, the proposed project, or scheme, together with an estimate of any such additional costs as may be necessary for the taking of any measures to protect, preserve, excavate, document and publish, and if necessary relocate, any antiquities upon such land at the expense of the project's sponsors.

(3) The sponsors of every such scheme or project as is referred to in this section shall provide for and set apart, a sum not exceeding one per cent of its total cost for the purposes and objectives referred to in this section.

(4) The provisions of this section shall have effect notwithstanding anything to the contrary in any other law.

The Petitioner submits that on a bare reading of the Respondents' objections, it does not appear that any report and/or impact assessment survey has been carried out by the 4th Respondent- Director-General of Archaeology. Anyhow, the Assistant Director (Central) of the Department of Archaeology by letter marked "4R1" has informed the Chief Engineer of the RDA that he had submitted a report after visiting the relevant site. Further, the said Assistant Director recommended the road development project be carried out only after a vibration test conducted by an appropriate institution confirming the fact that no damage would be caused to the '*Walaunwa*' due to such development work.

The attention of this Court was drawn by the Respondents to the Report issued after a vibration test conducted by the National Building Research Organization (NBRO) which has been tendered to Court by way of a motion dated 19.05.2022. The Petitioner's disagreement with the said Report is mainly twofold. Firstly, he submits that the NBRO has issued the said Report without notice to the Petitioner and only in the presence of one witness. Secondly, he claims that the said NBRO Report has not identified the type of structure correctly.

The Petitioner complains that only two officers (though the Report states that four officers were present) arrived at the site for the said Vibration test and entered the premises deceiving the caretaker, stating that they were from the so-called "*AG office*" (Vide 'P22').

The Petitioner also asserts that the said vibration test was conducted on a particular day between two public holidays when there has been reduced traffic movement along the said road. Another allegation against the said NBRO report is that the purported scientists who have placed their signatures therein have not identified themselves and further, it does not confirm that those persons have actually carried out the respective vibration test.

On a careful perusal of the said NBRO Report, it is implied that the concluding remarks of the unidentified Coordinating Scientists referred to 'Type 3' structures which are considered as 'single and two-storied houses and buildings, made of lighter construction, using lightweight materials such as bricks, cement block etc. not designed to resist earthquakes'. It can be assumed easily that the '*Walaunwa*' comes within the 'Type 4' structure stipulated in the said Report. As per Table 03 of the said Report the Type 4 structures are: 'structures that, because of their sensitivity to vibration do not correspond to those listed above 1, 2 & 3, & declared as archaeologically preserved structures by the Department of Archaeology'.

As opposed to the Petitioner's above arguments the Respondents assert that the vibration will have no impact on the protected monument irrespective of the type of structure whether it is Type 3 or Type 4. Anyhow, no substantive reason has been provided by the Respondents as to why the said Coordinating Scientists have not specifically referred to Type 4 structures when they arrived at the conclusion therein. I am unable to accept the proportion of the Respondents right away as it is not fair to interpret the opinions or phrases in the Report prepared by so-called experts merely on assumptions without scientific or other factual explanations. This Court is unaware as to why there are two categories namely Type 3 and Type 4 and different gauges depicted under the column - "Vibration in ppv (mm/sec)" in the said Table 03.

In contrast to the said NBRO Report, the Petitioner places reliance on three reports submitted by one Eng. Anuradha De Silva marked 'P15', 'P17' and 'P23'. Eng. De Silva's professional opinion upon the contents of the aforesaid NBRO Report has been set out in 'P23'. Referring to increasing traffic in the future, Eng. De Silva has predicted an increase in vibration levels over the time and accordingly, he states that vibration testing cannot be used with any certainty as a definite tool to predict future vibration impacts. Further, he has observed that the contractor has failed to take remedial measures to minimize the impact on the structures during the proposed development due to the failure to monitor the vibration levels at the right phase of construction. In addition to several contentions of

his report 'P23', he has recommended introducing transverse rumble stripes or speed humps at the start of bends to control the speed of upcoming heavy vehicles and thereby to minimize the potential risk of damage to the property and to reduce the possible vibration within the premises.

After the said NBRO Report the 4th Respondent has not arrived at a final conclusion considering any of the above factors or else, the 4th Respondent is yet to compile a report in accordance with the provisions of section 43A, particularly under its section 43A (2). In light of the above, I have no reason to be sceptical about the fact that the 4th Respondent has not considered vital aspects that affects the '*Walauwwa*'. In reference to the evidence made available to Court it is observed that the relevant Minister also has not taken a decision based on such Report of the 4th Respondent under section 43A(2). Thus, I am compelled to arrive at the conclusion that the 4th Respondent has failed to take necessary steps in accordance with the provisions of the said section 43A in respect of the subject road widening project. The point of view expressed by the said Eng. De Silva that the construction of the subject road has already been completed, causing damage to the '*Walauwwa*' due to the excessive vibration also need to be taken into consideration.

It is important to note that the reliefs prayed for by the Petitioner are focused on prohibiting the 1st and 3rd Respondents from breaking the parapet wall just in front of the '*Walauwwa*' and acquiring the strip of land between the parapet wall and the main entrance of the '*Walauwwa*'. The contention of the Petitioner is that the space between the roof eave and the present parapet wall of the '*Walauwwa*' is already fairly narrow and also the present boundary markers placed by the RDA for the said road widening is within the premises of the '*Walauwwa*'. It is no doubt that in terms of the interpretation given in section 48 of the Ordinance a 'monument' includes the site of any monument and such portion of land adjoining such site as may be required for fencing or covering in or otherwise preserving any monument. These aspects emphasize the wide scope of the power of the 4th Respondent- Director General, which he must exercise with due care when he uses his discretion to grant approval or permission under the said section 43A.

I do not intend to examine here whether a monument or the land appurtenant to such monument could be acquired by the State under the Land Acquisition Act. It is paramount that the relevant Minister who issued the Gazette notification marked "P6(a)" under section 18 of the Ordinance declaring the '*Walauwwa*' a protected monument has not taken steps up to date to amend, vary or rescind his order. Hence, it cannot be assumed that it is

fair to allow the acquisition of the stretch of land adjoining the 'Walauiwa', which has been declared a protected monument without adhering specifically to the procedure laid down in the said Ordinance.

The instant application depicts a situation where a conflict has arisen between the conservation of an ancient monument and the construction of a road in the interest of public benefit. In such a scenario, this court finds that a proportionate method should be adopted when granting relief. Accordingly, the court needs to gauge the damage caused to a protected monument vis-à-vis the alleged public benefit. The RDA should have reasonably foreseen the obstacles that emanate due to the existence of the subject monument at the very stage of planning the widening of the relevant road. I cannot possibly overlook the alternative of widening the road near the 'Walauiwa' that was proposed during the hearing of the instant Application. The defense of the Respondents against such a proposal was the cost factor. But no adequate material was tendered to Court by the Respondents to substantiate such a claim on any additional cost. When striking a balance in this instance, between 'conservation' and 'construction', I take the view based on the circumstances of this case that the conservation referred to above outweighs the Respondents' defense of the purported cost factor.

The following passage in '*Administrative Law*' by *Wade and Forsyth (11th Edition, Oxford)* at p. 373, referring to procedural justice is very much apt here:

"Just as the courts can control the substance of what public authorities do by means of the rules relating to reasonableness, improper purposes, and so forth, so through the principles of natural justice they can control the procedure by which they do it.....It is true that the rules of natural justice restrict the freedom of administrative action and that their observance costs a certain amount of time and money. But time and money are likely to be well spent if they reduce friction in the machinery of government; and it is because they are essentially rules for upholding fairness and so reducing grievances that the rules of natural justice can be said to promote efficiency rather than impede it."

Now I must advert to the categories of reliefs prayed for in the prayer of the Petition of the Petitioner. Significantly, the Petitioner without challenging the section 38A order issued under the said Land Acquisition Act seeks a writ of certiorari quashing the section 7 notice referred to in the document marked 'P10'. Therefore it is futile to engage in an exercise, based on the circumstances of this case to quash the said section 7 notice. Moreover, a writ of prohibition is sought to prohibit the 1st Respondent from proceeding with any road

construction work that would cause damage to the 'Walaupwa'. The said Eng. De Silva, himself has confirmed that the road just in front of the 'Walaupwa' has already been completed. Thus, it is not appropriate to grant such a relief in the nature of a writ of prohibition.

However, in light of the reasons given above, I take the view that the Petitioner is entitled to a prohibiting order from this court to prohibit the 3rd Respondent from taking steps to take over the possession of the stretch of land between the said parapet wall and the 'Walaupwa'. Hence, considering the overall circumstances of this case, I proceed to issue a mandate in the nature of a writ of prohibition, prohibiting the 1st to 3rd Respondents from taking any further steps under the Land Acquisition Act, including the taking over the possession, in respect of any part of the 'Walaupwa' referred to in the letter dated 10.03.2003 marked 'P5'. It needs to be stressed that I have arrived at such a conclusion mainly due to the failure of the 4th Respondent to follow the procedure laid down in the statute and thereby not observing the procedural fairness and regularity, especially before the commencement of the road widening project, as emphasized earlier. However, based on the grounds explained above, I am not inclined to issue any orders against the steps already taken by the 3rd Respondent or the State in order to acquire land for the subject road widening project.

Application is partly allowed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal