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 Prohibition and Mandamus under and in terms of Article 140 of the Constitution.

1. Romesh Mohan De Mel,
   No. 90, Wijerama Mawatha,
   Colombo 07.

2. Randika Lawson De Mel
   No. 111, Horton Place,
   Colombo 07.

CA / Writ Application No: 115/22

Petitioners

Vs.

1. Hon. S. M. Chandrasena
   Minister of Lands, "Mihikatha Medura",
   Land Secretariat,
   No.1200/6, Rajamalwatta Avenue,
   Battaramulla.

1A. Hon. Harin Fernando
   Minister of Tourism and Lands,
   "Mihikatha Medura",
   Land Secretariat,

No.1200/6, Rajamalwatta Avenue,

Battaramulla.

2. MS. Wasantha Warnakulasooriya
   Divisional Secretary, Divisional
   Secretariat of Ibbagamuwa,
   Ibbagamuwa.

3. Government Surveyor of Kurunegala
   District, Divisional Surveyor's Office,
   No. 3, Sumanadasa Mawatha,
   Udawalpola, Kurunegala.

4. Director, Urban Development Authority
   (North-Western Province),
   Kurunegala.

Respondents

Before	:	Sobhitha Rajakaruna, J. Dhammika Ganepola, J.
Counsel	:	Saliya Peiris, P. C. with Thanuka Nandasiri for the Petitioners. Maithree Amarasinghe, S. S. C. for the Respondents.
Argued On	:	26.06.2023
Written Submission tendered On	:	Petitioners : 06 .09.2023 Respondents : 10.02.2023, 23.08.2023
Decided On	:	18.09.2023

Dhammika Ganepola, J.

The Petitioners are the trustees of the land called 'Ratrankoratuwa Estate' situated in Melsiripura managed by H. L. De Mel & Co (hereinafter sometimes referred to as the 'the Company') established in 1870. The Petitioners came to know that a portion of said land (i.e., 3.5 acres) is going to be acquired by the state. A notice under Section 2 of the Land Acquisition Act No.28 of 1964 (hereinafter sometimes referred to as the Act) dated 02nd of December 2021 has been issued informing that the said land is required for the public purpose (relocating the weekly fair of Melsiripura). The Petitioners claim that they do not know how the 1st Respondent minister decided said land as the most suitable land to be acquired for public purpose. They have reason to believe that the 2nd Respondent is in the process of urgently acquiring the impugned land under Section 38 of the Act. The Petitioners are contesting the attempted acquisition process as they believe it is arbitrary, unreasonable, unfair, and violates natural justice. They argue that:

- the land in question is a model state.
- there are other vacant lands nearby that could be used instead.
- the proposed land is not the most suitable, and its acquisition could lead to significant traffic congestion in the area.
- the government school in front of the proposed land is directly impacted by the weekly fair.
- the Petitioners were not given the chance to object to the acquisition.

Therefore, the Petitioners seek a mandate in the nature of a writ of Certiorari quashing the decision of the 1st and 2nd Respondents to initiate the said process of acquisition under Section 2 of the Act and a writ of Prohibition preventing the 1st Respondent from acquiring the said land under Section 38 of the Act.

The Respondents claim that the acquisition of private land for public purposes cannot be challenged unless the process is found to be illegal or unreasonable as it is the prerogative of the state. However, the Respondents state that they have identified the impugned land claimed by the Petitioners as the most suitable land to relocate the weekly fair pursuant to several meetings and site visits.

writ of certiorari

The main reliefs claimed by the Petitioners are twofold. The first one is to quash the decision to initiate the process of acquisition of the land concerned under Section 2 of the Act. To initiate the process of acquisition of the land under the Act Minister must satisfied that there is a necessity to acquire land for a public purpose. Section 2(1) read 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 the area.*

It is observed in ***Manel Fernando and Another v. D.M. Jayaratne, Minister of Agriculture and Lands and Others [2000]1 Sri LR112 that,*** *"The Minister cannot order the issue of a section 2 notice unless he has a public purpose in mind. …the purpose of section 2 is to ascertain whether land in any area, and if so* ***which land****, is suitable for a public purpose."*

The law only requires that the public purpose be stated in the Section 2 notice and that identification of an area can be challenged if the public purpose is not specified in the said notice. It cannot be an undisclosed one. The scheme of the Act requires a disclosure of public purpose, and its objects cannot be fully achieved without such disclosure. [This position was upheld by the Supreme Court in ***Manel Fernando v. Jayarathna (supra)***]. In the instant case concern, the particular public purpose for which the land is required has been identified in the Section 2 notice marked P10 as relocation of the weekly fair of Melsiripura. Even the Petitioners do not challenge the necessity of the relocation of the said weekly fair (public purpose) which occurred due to the acquisition of the old weekly fair premises for the construction of the Kurunegala-Habarana railway project. The Petitioners challenge only the process of acquisition and the suitability of their land for the above-mentioned public purpose.

After the notice under Section 2(2) of the Act is exhibited acquiring officer may enter any land in that area to ascertain whether that land is suitable for the public purpose for which land in that area is required. [Section 2(3) of the Act]. The notice only indicates an area which is first identified by the Minister for public purpose. This means that the Minister first identifies the larger area for public purpose, but a specific land is not pinpointed at this stage. The purpose of issuing Section 2 notice is purely to gain entry to the land and take initial steps to ascertain its suitability for the public purpose for which land in that area is required.

As per Section 2 of the Act, there is no legal requirement to serve notice personally on all persons whose lands are going to be acquired. All that is required to be done is for notice under Section 2 to be exhibited in a conspicuous area. This is because at the time that Section 2 notice is exhibited, there is no definite determination of the specific land which will be eventually acquired. In the circumstances, the rights of the Petitioner to his land are not affected by such notice except by the authorized officer entering into the land to consider its suitability for acquisition.

The stance was upheld by this Court in the ***P.B.D. Dayaratna v. Hon Dr Rajitha Senaratne, Court of Appeal Application No. 1790/2003, decided on 16.12.2004****. it was observed,*

> "In *the instant case, the order sought to be quashed by certiorari is the notice exhibited under Section 2 of the Land Acquisition Act marked P15. It is clearly not a decision or order which has forced proprio vigore in the scheme of the Land Acquisition Act, Section 2 notice only facilitates authorised officer to enter into land and determine whether such a land is suitable for the public purpose for which the*

land is required. Thus, the Section 2 notice by itself does not affect the right of any person to his land except to the limited extent of permitting the authorised officer to enter upon the said land and consider its suitability for acquisition, which is a very preliminary stage of the entire process."

The steps taken under Section 2 of the Act are only investigative in character. Accordingly mere issuance of notice under Section 2(1) read with Section 2(2) of the Act does not affect or determine the rights of any particular owner of land in the area. This stance is supported by the decisions in ***Gunesekara v. The Principal, MR/Godagama Anagarika Dharmapala Kanishta Vidyalaya and Others C.A. Application 388/2000 (CA Minute dated 17.07.2002), Lucian de Silva v. Minister of Lands CA Application No.233/81 (CA Minutes dated 22.07.1982) and Wickramasinghe v. Minister of Lands CA Application No235/81 (CA Minutes dated 22.071982).***

For the above reasons, the application for a writ of certiorari to quash a Section 2 notice under the Land Acquisition Act may be premature.

writ of prohibition

Secondly, the Petitioners seek a writ of prohibition preventing the 1st Respondent from acquiring the said land under Proviso(a) to Section 38 of the Act. The Petitioner contends that if the present acquisition process continues and if their land is acquired under proviso(a) to Section 38 of the Act grave prejudice would be caused. The Petitioners complain that they have not been given an opportunity to establish why the particular land should not be acquired.

The regular procedure, once the Section 2 steps are completed, is that if the minister considers a particular land is suitable for a public purpose, he directs the acquiring officer in terms of Section 4(1) of the Act to publish a notice calling for written objections to the intended acquisition. After considering such objections, if any, and the relevant minister's observations on such objections, the minister has to decide in terms of section 4(5) of the Act whether such land should be acquired or not. It is thereafter that a written declaration that such land is needed for a public purpose is made by the minister and published in the Gazette as required by Section 5 of the Act. When it becomes necessary to take immediate possession of the land on an urgent basis, the minister has been empowered to bypass the said regular procedure at any time after notice under Section 2(1) or 4(1) of the Act exhibited. This exception to the usual process of taking possession of acquired land is referred to as the proviso(a) to Section 38 of the Act. Said proviso stipulated as follows,

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, and

Accordingly, an order under proviso (a) to Section 38 can be made at any time before or after a landowner is given the opportunity of being heard on any objections he or she may have on the acquisition of their land. However, there is no mandatory legal requirement of giving a fair hearing to the landowner before making an order under said proviso. His Lordship Justice Obeysekera, in ***N. M. Gunathilaka and others v. Hon. Gayantha Karunathilaka, Minister of Lands and Parliamentary Reforms and others, CA (Writ) Application No. 387/2017*** observed, that proviso excuses the Minister from giving a hearing to a landowner when the exception is followed. However, making a considered decision is required.

> *"In my view, whether the ordinary procedure is followed or where the exception is followed, necessity and suitability must be decided by the Minister, and it is only then that the Minister can determine the urgency. I am also of the view that the* ***proviso only excuses the Minister from giving a hearing to a landowner*** *but would still require the Minister to* ***make a considered decision*** *on all three matters prior to acting under the proviso…"*

The above view reflects the well-settled principle in Administrative Law, that public authorities' discretion is never unfettered, as they possess powers to use them for the public good.

urgency

The President's Counsel for the Petitioner submitted, that even though the 1st and the 2nd Respondents moved to acquire the land on an urgent basis under proviso(a) to Section 38 they have failed to prove such an urgency up to the standards. The Petitioners contend that the responsibility of proving urgency is with the Respondents. The Petitioners rely on the decision in the ***Moris Indira Fernandopulle v. E.L. Senanayake, Minister of Lands and Lands Development 79(2) NLR 115***. In the said case where Supreme Court held, *that 'an order by the Minister under the proviso(a) to section 38 of the Land Acquisition Act can be made only in cases of urgency and an order made under this proviso can be reviewed by the Courts'* went on to stated that,

> *"No doubt primarily the Minister decided urgency. He it is who is in possession of the facts and his must be the reasoning. But the Courts have a duty to review the matter. in this case, the need for a playground and a farm had been mooted as far back as 1974. Political influences and extraneous forces delayed the takeover of the land. Four years dragged on and the school's needs were still waiting to be met. The delay and the need decided the urgency."*

In the case of ***Horana Plantations Ltd v. Minister of Agriculture, Livestock, Land and Irrigation [2012]1 SLR 327*** Supreme Court held that the 'requirement for urgency must be satisfactorily set out'.

> *"The proviso to Section 38 is based on the urgency regarding a proposed acquisition and therefore the burden on establishing urgency is on the acquiring authority."*

Accordingly, a duty to establish urgency, when an order is made under *proviso(a) to Section 38,* initially lies upon the Minister. If such burden is discharged by the Minister, then only the burden shifts to the Petitioner to rebut the inference of urgency.

In this application, the Respondents state that the land for the current weekly fair has already been acquired, and any delay in acquiring the land needed for relocating the fair will cause a delay in the Kurunegala-Habarana Railway project's construction, which is of national importance. The relocation of the weekly fair and the construction of the railway project are two disparate projects. Delaying the process of acquisition of the purported land for relocation of the weekly fair could not be made a direct impediment to the construction of the railway project as the required lands for it have already been acquired. Hence the wastage of funds, construction materials or other resources relating to the railway project cannot be considered as grounds for urgency in respect of the questioned acquisition as the Respondents claimed. Further, the specified time period during which the railway project is set to be concluded has also not been revealed. Therefore, I am of the view that the urgency to complete the railway project cannot be considered as urgent as required to acquire the land for the purpose of relocation of the weekly fair under proviso.

Relocation of the existing weekly fair in view of the construction of the Kurunegala - Habarana railway track is not in dispute. The Respondents submit that the construction of the proposed railway line will result in splitting the said fair into two sections rendering it futile for the purpose. Therefore, the necessity has arisen to relocate the said weekly fair.

However, the question remains whether such a necessity alone would suffice to justify the urgent acquisition of the aforementioned land. As submitted by the Respondents, every Sunday, a weekly fair takes place in the centre of Malsiripua town on the Ragedara-Milawana Road. The fair acts as the primary trading hub for agricultural produce in the area, benefiting approximately 400 farmers and 1,500 customers. The absence of a marketing centre is a severe setback for the farmers and business community in the vicinity, impeding the trade of their agricultural commodities and jeopardizing their livelihoods. Furthermore, numerous consumers also miss out on the advantages of these agricultural products. On such grounds delaying of relocation of the weekly fair may badly affect the lives and the day-to-day affairs of the consumers, traders, farmers and other stakeholders. As the document 2R6-(i) divulges the said acquisition process has been initiated as far back as 2019. The importance of addressing this pressing social concern promptly and without delay was emphasized as it significantly impacts individuals. [document 2R6-(ii)]. Once the construction of the railway project over the existing weekly fair premises commences such impact will increase. Furthermore, the repercussions of the absence of a “weekly fair” are further compounded by the fact that such a fair had existed for a prolonged period of time and the residents have adopted their lives to depend on such a trade hub. In the ***Fernandopulle case(supra)*** *the Supreme Court held that “the delay*

and the need decided the urgency." Therefore, as explained above, sufficient reasons exist to come to the conclusion that there is an urgent requirement for the subject acquisition to take place. The Petitioners failed to effectively challenge the above circumstances which were based on urgency. Therefore, I am of the view that the authorities have submitted satisfactory grounds for a requirement of urgency to take immediate possession of the land. The Petitioners have failed to establish sufficiently that there was no urgency. Their main argument is the failure to consider the existence of alternative lands. Therefore, I am unable to accept the position that there are no satisfactory grounds for taking immediate possession of the land under proviso (a) to Section 38 of the Act.

suitability

The Petitioners further claim that the urgency is not the only factor that needs to be proved under said proviso if the Minister declares immediate possession, necessity and suitability also need to be proved before making the decision under proviso to Section 38 of the Act as decided in the ***CA (Writ) Application No. 387/2017.*** The Petitioners claim that the land which is to be acquired is not the most suitable land for the relocation of the weekly fair and alternative lands including several lands owned by the state in the vicinity have not been considered. Nevertheless, after the institution of this application, a field visit and an investigation have been conducted by the 2nd, 4th and other authorities to determine the suitability of the alternative lands including the questioned land [documents 2R7(1) and 2R7(ii)]. During that field investigation, two lands owned by the National Livestock Development Board, as mentioned in the Petitioner's Petition, were also taken into consideration. In the report [2R7(1) and 2R7(ii)], the Respondents have justified their request for acquiring the disputed land by stating that it is suitable for connecting with the remaining portion of land, which was used for the weekly fair, and avoiding the acquisition of any constructions situated in the land.

The Petitioner's claim that a weekly fair, solely conducted during the weekend, would have such a severe impact on the functioning of the government school in the vicinity seems unfounded. Furthermore, the Petitioners also claim that relocating the fair closer to the main road would cause heavy traffic congestion. However, it must also be observed that relocating the weekly fair to a remote and inaccessible location would entirely defeat the purpose of holding the fair in the first place.

In the instant case, the Petitioners seek a writ of prohibition preventing the 1st Respondent from acquiring the land in issue. The order under proviso (a) to Section 38 has not been issued yet. The Petitioners' concern is that the ongoing acquisition process may lead to the actual acquisition under said proviso. However, as mentioned before, authorities have satisfactorily set out the requirement for urgency. It is the duty of the Minister to consider the directions and requests of the authorities and then to make an appropriate order under said proviso. The ruling of this Court should not be an impediment to making such a well-

considered decision by the Minister. In ***Horana Plantations Ltd*** case(supra) Suresh Chandra J. went on to hold as follows,

> *"Since the final authority regarding the decision to acquire land under the provision of the Land Acquisition Act especially in terms of clause (a) of the proviso to S.38 is on the Minister, it is the responsibility of the Minister to consider the directions and requests of the authority which recommends such acquisitions to satisfy himself regarding the true purpose of acquisition."*

Conclution

In such circumstances and the reasons given above, I am not inclined to issue a writ of certiorari nor writ of prohibition as prayed for the prayer of the Petition. The application is dismissed. I order no cost.

Judge of the Court of Appeal

Sobhitha Rajakaruna J.

I agree.

Judge of the Court of Appeal