

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

In the matter of an Appeal from an
Order of the High Court of
Negombo

Divisional Secretary
Acquiring Officer, Minuwangoda,
Minuwangoda Divisional
Secretariat,
Minuwangoda.

Applicant

**Court of Appeal
Application No.CA (PHC) 112/2008
Minuwangoda Magistrate's Court
Case No. 61912/LP
High Court Revision
Case No. HCRA 342/07**

VS.

1. Mohamad Ismail Noor Faiza
No.87, Negombo Road,
Minuwangoda
2. R. Jayantha Pushpakumara
Gunathilake,
No.52 B,
Jayantha Furnitures,
Negombo Road,
Minuwangoda.

Respondents

AND NOW

1. Mohamed Ismail Noor Faiza,
No.87, Negombo Road,
Minuwangoda
2. R. Jayantha Pushpakumara
Gunathilake,
No. 52B, Jayantha Furnitures,
Negombo Road,
Minuwangoda.

Respondent-Petitioners

VS.

1. Divisional Secretary,
Acquiring Officer, Minuwangoda,
Minuwangoda Divisional
Secretariat,
Minuwangoda.

Applicant-Respondent

2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent

AND NOW

1. Divisional Secretary,
Acquiring Officer, Minuwangoda,
Minuwangoda Divisional
Secretariat,
Minuwangoda.

Applicant-Respondent-Appellant

2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent-Appellant

VS.

1. Mohamad Ismail Noor Faiza,
No.87, Negombo Road,
Minuwangoda.
2. R. Jayantha Pushpakumara
Gunathilake,
No.52 B,
Jayantha Furnitures,
Negombo Road,
Minuwangoda.

**Respondent-Petitioner -
Respondents.**

**BEFORE: W.M.M. Malinie Gunaratne, J. and
 P.R. Walgama, J.**

**COUNSEL: Milinda Gunatillake, D.S.G. for the Appellant
 Faiz Mustapha, P.C. with A. Hasim for Respondents.**

Argued on : 06.07.2015

Written Submissions filed on: 26.08.2015 and 13,11,2015.

Decided on : 14.12.2015

Malinie Gunaratne, J.

B.L.P.R Abayarathna, the Divisional Secretary of Minuwangoda, on 05.01.2007, applied to the Magistrate's Court of Minuwangoda, under Section 42(2) of the Land Acquisition Act for an order directing the Fiscal to deliver possession of the land in question to the Applicant – Respondent – Appellant (hereinafter referred to as the 1st Appellant) for and on behalf of the State and to eject the Respondent – Petitioner – Respondents (hereinafter referred to as the Respondents) from the land in question.

A notice had been issued on the Appellants and they claimed a right to show cause against this application. Their claim was disallowed by the learned Magistrate and delivered her Order on 03rd August 2007, issuing an order to fiscal in terms of Section 42(2) of the Land Acquisition Act enabling the Appellants to eject the Respondents from the land in question.

Being aggrieved by the said Order, the Respondents sought to move in revision against the said Order by the Revision Application No. 342/2007 filed before the High Court of Negombo.

The learned High Court Judge of Negombo, delivering her order on 23.10.2008 revised and set aside the Order of the learned Magistrate after having heard the Counsel for the respective parties.

The Appellants have preferred this Appeal against the decision of the learned High Court Judge, praying for annulling of the said Order and for the reliefs prayed for in the Petition.

The facts that have given rise to the present application may be briefly stated as follows:

The 1st Appellant took steps in or about January 2007 to take over possession, on behalf of the State, the land which forms the subject matter of this Application on the basis that the said land has been acquired by the State in terms of the provisions of the Land Acquisition Act, No.60 of 1961, as amended.

The Respondents objected to obtaining possession of the land and refrained from handing over possession. Thereafter, the Appellants made an application to the Magistrate's Court in terms of Section 42(2) of the Act for an order directing the fiscal to deliver possession of the land in dispute for and on behalf of the State and the learned Magistrate made an Order to that effect.

In the course of the hearing of this case the learned President's Counsel for the Respondents contended that the Respondents refused to hand over the possession of the land as the acquisition was not done lawfully and according to the provisions of the Act. It was the contention of the learned Deputy Solicitor General, that the Appellants had satisfied all the statutory requisites for an acquisition in accordance with the provisions of the Act and thus acted lawfully in obtaining an order in terms of Section 42 (2) of the Act.

He further contended, in their objections filed in the High Court took up the position that prior to the application made by the 1st Appellant to the Magistrate's Court under Section 42(2), the Respondents had filed a Writ Application No. 222/05 in the Court of Appeal with regard to the

Acquisition and it was terminated upon a settlement reached by parties. Hence it is the contention of the learned Deputy Solicitor General, that consequent to the settlement, the legality of acquisition was no longer in issue.

On examining the said order it appears that the case has been settled between the 1st Respondent and the 1st Appellant. The settlement was the 1st Appellant had agreed to hold an inquiry under Section 9 of the Land Acquisition Act and to make an order as to compensation on or before 31/03/2007.

It is important to note, that the Respondents in not disclosing of the Court of Appeal case initiated by the 1st Respondent and its settlement, had in fact suppressed a material fact from the learned High Court Judge and also from the learned Magistrate.

The Respondents were under a duty to disclose all material facts to this Court to arrive at a correct adjudication on the issues. In the decision of *Alphonso Appuhamy vs. Hettiarachchi* 77 N L R 121, Justice Pathirana held that when a party is seeking a relief from the Court upon an application he enters into a contractual obligation with the Court when he files an application in the Registry and in terms of that contractual obligation he is required to disclose all material facts fully and frankly to the Court.

It is manifestly clear that the Respondents have been remiss in duty and have failed to carry out their imperative legal duty and obligation to Court. In such circumstances, Justice Pathirana ruled that the Court is entitled to raise this matter in limine and dismiss the application without investigating into the merits of the application.

I hold that the Respondents have failed to make a full and frank disclosure of all material facts to Court and the Respondents have been remiss in complying with the aforesaid contractual obligation to Court.

The learned Deputy Solicitor General has adverted Court to the document filed in the High Court which is marked V 16 along with the objections. It is relevant to note, the Respondents have not denied or disputed the Appellant's contention either in a reply or by an affidavit.

On examining the said Order it appears, that the case has been settled between the 1st Respondent (the Petitioner of the case) and the 1st Appellant (2nd Respondent). The settlement is that the 1st Appellant had agreed to hold an inquiry under Section 9 of the Land Acquisition Act and to make an order as to compensation on or before 31.03.2007.

The contention of the learned Deputy Solicitor General is, despite the fact that numerous notices were issued, the 1st Respondent did not attend the compensation inquiry as directed by the Court of Appeal. Learned Deputy Solicitor General further contended, in abiding by the said Order the compensation was deposited in the District Court of Negombo and thereafter the Respondents made an application to the Magistrate's Court in terms of Section 42(2) of the Land Acquisition Act, for an order directing the fiscal to deliver possession of the land in dispute.

In the Written Submissions filed in this Court by the learned President's Counsel, it was contended that the compensation payable to the Respondents, relates to Lot 16 and have no relevance to Lot 30. However, it is the position of the Appellants that dispute with regard to compensation is

not relevant to the validity of an acquisition under Section 38 Proviso (a) of the Land Acquisition Act.

Hence, I am agreeable with the contention of the learned Deputy Solicitor General and the view of this Court also is that the Respondents estopped by challenging the validity of acquisition of the land in dispute, since the Writ Application No. 222/05 filed by the Respondents challenging the validity of the acquisition had been settled. Hence the view of this Court is the legality of acquisition was no longer an issue.

I am now prepared to deal with the Section 42(2) of the Land Acquisition Act. Section 42(2) which reads as follows:

“Where any officer directed by an Order under Section 38 to take possession of any land is unable or apprehends that he will be unable to take possession of that land because of any obstruction or resistance which has been or is likely to be offered, such officer shall, on his making an application in that behalf to the Magistrate’s Court having jurisdiction over the place where that land is situated, be entitled to an order of that Court directing the Fiscal to deliver possession of that land to him for an on behalf of Her Majesty”.

An examination of the relevant Sections in the Act show that the scheme of the ordinance is to enable the State to take immediate possession of a land which is urgently needed for a public purpose. The words of Section 42(2) quoted above clearly show that “any officer directed by an Order under Section 38 to take possession *shall be entitled to an Order of Court directing the Fiscal to deliver possession*”.

In view of the provisions of the Land Acquisition Act, every application for ejectment should be conclusive evidence of the facts set out therein. In the case of M. Mohamed Lebbe and Others Vs. Ananda Madana (D.R.O. Yatinuwara), 66 N.L.R. 239, it was held that the Land Acquisition Act makes provision for the issue of Writ upon an *ex-parte* application and in the first instance, upon an application the Magistrate has no option but to make order for the issue of the Writ.

It was held in the case of H.S.H.P. Gunawardana vs. D.R.O. Weligama Korale 69 N.L.R. 166 before an Order for delivery of possession of a land is made by a Magistrate in terms of Section 42(2) of the Land Acquisition Act, evidence should be led before the Magistrate either orally or on affidavit in support of the averments in the application for the ejectment order. It was held the evidence may be led *ex parte*.

In the context of the case in hand the 1st Respondent has filed an affidavit along with the application in support of the averments in the application.

It is important to note, although the Section 42(2) does not provide any mechanism to grant an opportunity to show cause before the Magistrate after filing an application under Section 42(2) of the Land Acquisition Act, the learned Magistrate has allowed the Respondents to show cause why they should not be issued an order for ejectment.

The main ground set out by the Respondents was that the vesting order under Section 38 A of the Act is of no force or avail in law in as much as there has been non compliance with the provisions of the Land Acquisition Act.

The learned Magistrate pronounced her order dated 03.08.2007, holding that since the Respondents have not provided any valid grounds to show that physical possession should not be handed over, the 1st Appellant is entitled to take possession of the land in dispute under Section 42(2) of the Act.

Since the legality of acquisition was no longer an issue at the time of filing the application by the 1st Appellant under Section 42(2) of the Land Acquisition Act, the learned Magistrate correctly had not addressed her mind to the said fact. The learned Magistrate considering all the facts and the law, had delivered her Order ejecting the Respondents from the land in dispute and the learned Magistrate had arrived at the above determination to eject the Respondents from the land in dispute does not merit any variation.

Hence, I am also of the view, that the grounds set out by the Respondents do not find any matters which are legally relevant to the question of ejectment.

On perusal of the entirety of the Judgment of the learned High Court Judge it is apparent that the learned High Court Judge has failed to consider the right question. The learned High Court Judge has considered only the legality of acquisition of the land in dispute. Hence I am of the view that the learned High Court Judge was misdirected in law in rejecting (It is important to note that the learned High Court Judge has rejected the order of the learned Magistrate but not set aside) the order made by the learned Magistrate.

Taking into consideration all these matters, it is my considered view that the learned High Court Judge was clearly wrong when she reversed the determination of the learned Magistrate.

For the foregoing reasons I allow the Appeal and accordingly set aside the Judgement of the learned High Court Judge. Consequently, the determination that was challenged by way of Revision in the High Court will now prevail and the learned Magistrate is directed to give effect to the same.

JUDGE OF THE COURT OF APPEAL

P.R. Walgama, J.

I agree

JUDGE OF THE COURT OF APPEAL

Appeal is allowed.