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

In the matter of an Application for a mandate in the nature of *Writ of Certiorari and Mandamus* under article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

CA/Writ/ 163/164/166/2013

1. M.S. Sithy Jawahira,
   189, Hirimbura Cross Road,
   Karapitiya, Galle.

2. M.A.M. Riyas,
   189A, Hirimbura Cross Road,
   Karapitiya, Galle.

3. Mohamed Jaleel Samsuluha,
   169, Hirimbura Cross Road,
   Karapitiya, Galle.

4. Mohamed Jaleel Noorul Fareesa,
   169, Hirimbura Cross Road,
   Karapitiya, Galle.

5. Abdul Hameed Sithy Sanooba,
   121, Hirimbura Cross Road,
   Karapitiya, Galle.

6. Abdul Hameed Pathumma,
   121, Hirimbura Cross Road,
   Karapitiya, Galle.

7. Mohomed Muhsin Khairul Bareeya,
   171, Hirimbura Cross Road,
   Karapitiya, Galle.

8. Mohomed Iliyas,
   117, Hirimbura Cross Road,
   Karapitiya, Galle.

9. Mojideen Bawa Sithy Nabeesa,
   129, Hirimbura Cross Road,
   Karapitiya, Galle.

10. Mohamed Muhsin Khairul Bareeya,
    171, Hirimbura Cross Road,
    Karapitiya, Galle

PETITIONERS

Vs,

1. Janaka Bandara Thennekoon MP,
   Minister of Land and Land Development,
   Govijana Mandiraya,
   80/5 Rajamalwatta Avenue,
   Battaramulla.

1A. M.K.D.S. Gunawardena MP,
   Minister of Land and Land Development,
   Govijana Mandiraya,
   80/5 Rajamalwatta Avenue,
   Battaramulla.

1B. Jhon Amaratunga MP,
Minister of Land and Land Development,
Govijana Mandiraya,
80/5 Rajamalwatta Avenue,
Battaramulla.

2. Ravindra Hewavitharana,
District Secretary- Galle
District Secretariat
Galle.

3. Anusha Batawala Gamage,
Divisional Secretary
Galle Four Gravets,
Divisional Secretariat,
Galle.

3A. W.S. Sathyananda,
Divisional Secretary
Galle Four Gravets,
Divisional Secretariat,
Galle.

4. Urban Development Authority,
6th and 7th Floors,
"Sethsiripaya"
Battaramulla.

RESPONDENTS

Before: **Vijith K. Malalgoda PC J (P/CA)**

H.C.J. Madawala J

Counsel: Faiz Musthapha PC for the Petitioner in CA/163/2013

Zibley Aziz PC with H. Hisbullah for the petitioners in CA/ 164/2013

Hijass Hisbullah AAL for the Petitioner in CA/166/2013

M. Jayasinghe SC for the Attorney General

Argued on: - 05.08.2015

Written Submissions on: - 27.07.2016

Judgment on: - 18.11.2016

Order

Vijith K. Malalgoda PC J

Petitioners to the applications CA/Writ/163/2013 M.S. Sithy Jawahira and M.A.M. Riyas, CA/Writ/164/2013 Mohomed Jaleel Samsuluha, Mohamed Jaleel Noorul Fareesa, Abdul Hameed Sithy Sanooba, Abdul Hameed Pathumma, Abdul Carder Sithi Pathumma and Mohamed Haniffa Fathumme Hanoon and CA/Writ/166/2013 Mohomed Mushin Khairul Bareeya, Mohamal Ilyas and Mohideen Bawa Sithy Nabeesa, had come before this court seeking inter alia,

1. Grant and issue a writ of *Certiorari* quashing the order under section 38 (a) of the Land Acquisition Act published in the Gazette marked P-3 in respect of Lot No 7 in Preliminary Plan PPG 3314 (CA/writ/163/2013)
2. Grant and issue a writ of *Certiorari* quashing the order under section 38 (a) of the Land Acquisition Act published in the Gazette marked P-4 in respect of Lot Nos 14,8,4 and 10 in Preliminary Plan PPG 3314 (CA/writ/164/2013)

3. Grant and issue a writ of *Certiorari* quashing the order under section 38 (a) of the Land Acquisition Act published in the Gazette marked P-4 in respect of Lot Nos 13,9 and 5 in Preliminary Plan PPG 3314 (CA/writ/166/2013)
4. Grant and issue a writ of *Mandamus* compelling the 1st Respondent to divest the land under the Land Acquisition Act.

Since the three applications referred to in this judgment have filed, challenging the steps taken under the Land Acquisition Act to Acquire Lands belonging to the Petitioners who lived in the same area, and the impugned decision challenged before this court was referred to in one and the same order, the parties agreed to argue all 3 cases together and obtain single judgment for all three cases.

As revealed before us the Petitioners in CA/ Writ/163/2013 were the owners of premises at Nos 171,117 and 129 Hirimbura Cross Road, Petitioners in CA/ Writ/164/2013 were the owners of premises at Nos. 169,121,131 and 181 Hirimbura Cross Road and the Petitioners in CA/Writ/166/2013 were the owners of premises at Nos. 189 and 189A Hirimbura Cross Road and the Petitioners have filed their title deeds in support of their position.

As submitted by the Petitioners in the year 1998 on the direction of the then Minister of Agriculture and Lands the then Divisional Secretary- Galle Four Gravets Divisional Secretariat had published a notice under section 2 of the Land Acquisition Act, that the premises referred to above are required for a public purpose along with other adjoining land.

Thereafter by notice published in the Gazette Extraordinary No. 1117/20 dated 3rd February 2000 the then holder of the office of the 1st Respondent made order under section 38 (a) of the Land Acquisition Act ordering the Acquiring Officer to take immediate possession of the said Lands.

The Petitioners took up the position before this court that when the said notice under section 38 (a) was published the Petitioners objected to the acquisition on the basis that,

a. The public purpose for which their lands were being acquired was not set out.
b. No development plan/scheme was published or exhibited despite several meetings and discussions with the predecessor's in office of the 2nd and the 3rd Respondents
c. The entire acquisition process was arbitrary and unreasonable
d. In any case there was no urgency meriting an order under section 38(a) of the Land Acquisition Act.

As observed by this court the Petitioners after raising the said objections for the acquisitions referred to above had taken several steps to canvass against the acquisition. This fact is revealed before this court from the several documents filed by Petitioners along with their pleading.

When the Petitioners made representations to several authorities, the said authorities had looked in to the said representation and called for several meetings between the Petitioners and the said authorities in order to resolve the issue.

As revealed by the documentation before this court no decision was taken by the authorities to divest the lands already acquired but the following proposals were forwarded to the Petitioners for their considerations.

a) Payment of compensation to the market value
b) A new houses to be provided from Dadalla area
c) Those who had business premises, to provide them with temporary shop premises and grant of a shop premises from the proposed commercial complex on monthly rent basis.

While the said discussions were in progress, specially with the 4th Respondent, the 2nd and 3rd Respondents had proceeded with the other requirements of the Land Acquisition Act and Section 7 notice too had been publishes in the Gazette Extraordinary 1390/12 dated 27th April 2005.

According to the Respondents, the 4th Respondent, had decided to allocate Rs. 46185000/- as compensation to be payed to the 0.7352 Hectares acquired from preliminary plan PPG 3314 under section 17 of the Land Acquisition Act and the said money had been now deposited for the payment of compensation among the owners of the lands referred to above.

The Petitioners main arguments before this court was based on the failure by the Respondents to disclose the Public purpose for which the Land was to be acquired, which would be fatal to the acquisition proceedings taken place.

Section 2.2 of the Land Acquisition Act which refers to the notice reads thus,

"the notice referred to in subsection (1) shall be in Sinhala, Tamil and English Languages and shall state that land in the area specified in the notice is required for a public purpose and that all or any of the acts authorized by subsection (3) may be done on any land in that area in order to investigate the suitability of that land for that public purpose."

The Petitioners have produced the section 2 notice published with regard to the acquisition referred to above and this court would like to refer to some parts of the said notice which reads thus;

"Having been duly directed by the Minister of Agriculture and Lands under sub-section (1) of section 2 of the Land acquisition Act, as amended by the Land Acquisition (Amendment) Act No 28 of 1964 I hereby give public notice as required by subsection (2) of that section that land in the area described below is required for a public purpose;

Schedule

The allotment in extent of about 1 ½ acres of land shown in the plan attached here with to the application No. 12-2-4-LA-1082 of 05.01.1998 of Housing and Urban Development Secretary which is situated in the village of Karapitiya in the Grama Niladhari Division of Deddugoda North, Divisional Secretary's Division of Galle Four Gravets. The boundaries are as follows;

.....

When going through the section 2, notice referred to above, in the body of the notice there is reference to the purpose of Acquisition as, "Public purpose" but no specific reference was made as to what was the public purpose referred to above but, in the schedule referred to the said notice, reference is made to an application No. 12-2-4-LA-1082 of 05.01.1998 by Secretary of Urban Development.

However when considering their argument, this court observes that the Petitioners heavily relied on the decision by the Supreme Court in the case of ***Manel Fernando and another Vs. D.M. Jayarathne Minister of Agriculture and Lands and Others [2000] 1 Sri LR 112*** where Fernando J had observed, "In my view the scheme of the act requires a disclosure of the public purpose and its object cannot be fully achieved without such disclosure."

The Petitioners have further relied on the Supreme Court decision in ***Mahinda Kulatunga V. Minister of Lands and Land Development and Others [2008] 1 Sri LR 285*** in which their Lordships have decided to follow the decision in Manel Fernado's case.

Since their Lordships have repeatedly decided that the scheme of the act requires the reasons being given when steps are being taken to acquire property for public purpose under the provisions of the Land Acquisition Act, this court, would like to first analyze the decisions referred to above and consider the circumstances under which the said decisions have reached.

In the case of ***Manel Fernando and Other Vs. D. M. Jayarathne Minister of Agriculture and Lands and others***, Fernando J had referred the circumstances under which the impugned decisions has published as follows;

"The Petitioners stated that the 2nd Petitioner is a Ceylon Tamil from Balangoda married to a Sinhala lady. The 2nd Petitioner purchased that land (which contains a substantial house as well as a small rubber plantation) in September 1995 for Rs. 500,000. He raised the purchase price by using his lifelong savings, by pawning jewellery, and by obtaining loans. In October 1995 the 2nd Petitioner and the members of his family went into occupation. A few weeks thereafter the 2nd Respondent, the Grama Sevaka of Henagama, with a team of police officers from the Horana Police Station came to the house and checked all their identity cards; the 2nd Respondent informed the 2nd Petitioner that he suspected that the 2nd Petitioner was a terrorist; and one of the Police Officers said that in the event of a soldier or police officer being killed in action and his body being brought to the village, the first house that would be burnt would be the 2nd Petitioner's. Thereafter the 2nd Respondent came with police officers on many occasions and harassed the 2nd Petitioner and the members of his family, making allegations that they were terrorists. On one occasion, when there was a visitor in the house, the 2nd Respondent had come with police officers and stated, in the presence of the visitor, that any person, other than the members of the household, could enter the premises only with prior permission from the police or himself. Humiliated, the visitor went away, all this compelled the 2nd Petitioner to take up residence elsewhere, although he continued to come to the house regularly to look after his rubber plantation and other cultivations. But as he was prevented, as aforesaid, from enjoying his property, he could not repay the loans he had taken, and he was therefore compelled to advertise the land for sale on 14.07.96 in the Sunday newspapers."

The Petitioner's affidavit went on to state that some of the prospective buyers complained that the 4th Respondent Govi Niyamaka of Henagama,

"had waylaid them and said to refrain from purchasing the house as there were plans to acquire this property. At that time there were no plans whatsoever to acquire this property but the 2nd, 3rd and 4th Respondents connived and instigated a conspiracy to request the Government to acquire this property. A few days thereafter the 3rd Respondent sent letter dated 19.07.96 ['P6'] to the 5th Respondent who is the Member of Parliament and S.LF.P organizer of the area [requesting] his recommendation for acquisition....."

"It was not disputed at the hearing that the question whether the Petitioners' land was required and was suitable for a Govi Sevana Centre was a matter for the Commissioner. However, the available evidence shows that there was no request originating from the Commissioner, or with his knowledge or approval, and that he gave no direction for the inspection of the land....."

"By letter dated 18.04.97 the assistant Commissioner of Agrarian Services, Kalutara, informed the 2nd Petitioner's wife that the Commissioner had directed to inquire into her objections to the acquisitions. The 2nd Petitioner averred that he and his wife attended the inquiry on 02.05.97; that they received a good hearing; and that the Assistant Commissioner informed the 2nd Petitioner that he would not recommended the acquisition as it be unreasonable to acquire that property. The 3rd Respondent had no personal knowledge thereof and could not have controverted those averments. On the contrary, he stated that the Commissioner "has recommended to suspend the acquisition after inquiry", and produced the Commissioner's letter dated 23.10.97 ['3R6'] to the Secretary, Ministry of Lands. In that letter the Commissioner had recommended against acquisition: thus in May itself the 1st Respondent must have known that the acquisition had not been recommended. The Commissioner also requested that the acquisition proceedings be

suspended in accordance with section 50 of the Land Acquisition Act before the publication of an order under section 38...."

Having discussed the above circumstances Fernando J had observed that,

"I hold that the 1st Respondent had no material on which, objectively, it could reasonably have been concluded that the Petitioners' land was required for the stated public purpose of a Govi Sevana Centre; that he did not *bona fide* think that it was so required; and that he had misinformed the Hon. Prime Minister that the Commissioner had made a request for such acquisition. Further, although no formal order had been made under section 4 of the Lands Acquisition Act, an inquiry was held into the 2nd Petitioner's objections to the acquisition, after which the inquiring officer (the Assistant Commissioner) had made a recommendation (which the Commissioner had subsequently approved), that the land should not be acquired: and that the 1st Respondent ignored or failed to consider. On the other hand, he placed undue reliance on the 5th Respondent's factors. I hold that in fact the Petitioners' land was not required for a public purpose, and that the acquisition was unlawful arbitrary and unreasonable."

Similarly in the case of ***Mahinda Kulatunga V. Minister of Lands and Land Development and Others*** apart from the other grounds of appeal raised before their Lordships, it was also raised as one of the grounds of appeal, the failure to specify the public purpose in the notice given under section 2 of the Land Acquisition Act.

In the said case Somawansa J, having considered the following facts revealed before their Lordships to the effect,

"The applicant's main contention is that the land belonging to him and which was acquired has not been used for any public purpose although possession of the same was taken by the 3rd Respondent in December1990 on the ground of urgency. That in or about January 2002 he

discovered that the 4th Respondent has been placed in possession of about 3 acres in extent including the said portion of the land which belongs to the appellant and that the 4thRespondent was placed in possession by the Urban Development Authority the 5th Respondent and that the 4th Respondent was taking steps to construct a private hospital and resort thereon. The appellant contends that having taken possession of the property as far back as 1990 on the grounds of an alleged urgent public purpose and having not developed the property and having failed to specify the public purpose for which the said lands were purported to be acquired a third party was filling portions thereof which had been handed over to the 4th Respondent for its private purpose....."

"Through counsel for the Respondent contends that the provisions of the Land Acquisition Act does not require to specify the public purpose in the relevant notices and that section 5 notice makes it conclusive evidence that the land is needed for a public purpose, I am unable to agree with the aforesaid contention in view of the decision in *Manel Fernando and Another Vs. D.M. Jayaratne, Minister of Agriculture and Lands and Others* where the Supreme Court came to the conclusion that a section 2 notice must state the public purpose- although exceptions may perhaps be implied in regard to purpose involving national security and the like. At 125 *per* Fernando J.

> "The first question is whether the public purpose should be disclosed in the section 2 and section 4 notices.
>
> The minister cannot order the issue of a section 2 notice unless he has a public purpose in mind. Is there any valid reason why he should withhold this from the owners who may be affected?
>
> Section 2 (2) required the notice to state that one or more acts may be done "in order to investigate the suitability of that land for that public purpose"; obviously "that" public

purpose cannot be an undisclosed one. This implies that the purpose must be disclosed. From a practical point of view, if an officer acting under section 2 (3) (f) does not know the public purpose, he cannot fulfill his duty of ascertaining whether any particular land is suitable for that purpose.

Likewise, the object of section 4 (3) is to enable the owner to submit his objections: which would legitimately 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. That object would be defeated, and there would be no meaningful inquiry into objections, unless the public purpose is disclosed. If the purpose has to be disclosed at that stage, there is no valid reason why it should not be revealed at the section 2 stage.

In my view, the scheme of the act requires a disclosure of the public purpose, and its objects cannot be fully achieved without such disclosure. A section 2 notice must state the public purpose- although exceptions may perhaps be implied in regard to purposes involving national security and the like."

In the circumstances, it appears that the failure to specify the public purpose in section 2 notice in respect of the appellant's lands is fatal to the acquisition proceedings."

When carefully analyzing the above decisions of their lordships it is clear that their Lordship have considered the following important aspects of the said cases when reaching the said conclusion;

a) Minister cannot order the issue of a section 2 notice unless he has a public purpose in mind
b) Section 2 (2) required the notice to state that one or more acts may be done "in order to investigate the suitability of that land for that public purpose"

c) Object of section 4 (3) is to enable the owner to subject his objection, where he need to know the purpose him to submit his objections

However when considering the material revealed before this court I would like to make the following observations, which in my view are relevant to reach a decision in the case in hand.

a) Even though the public purpose to which the land is acquired is not mentioned in the notice issued under section 2 of the Land Acquisition Act, there is reference to a plan attached to application number 12-2-4-LA-1882 of 05.01.1998 Secretary of the Housing and Urban Development in the schedule to the said notice.

b) In the said circumstances it is clear that the purpose to which the land is acquired is referred to in the application by the Secretary of the Housing and Urban Development and a plan too had been provided by the said Secretary.

c) Subsequent to the said section 2 notice was published, section 38 (2) notice had been published by the predecessor to the 1st Respondent in the Gazette extraordinary 1117/2 dated 03.02.2000 and 3rd Respondent had requested the Petitioners to hand over the vacant possession to the 3rd Respondent by letters dated 22.03.2000 and 25.07.2000.

d) Since then Petitioners have made representation to various authorities which is evident from their own documents produced before this court marked P-15, P-18, P-18B-I and P-21, there is clear reference to the purpose of the said acquisition as "Karapitiya New Town Development" which is referred to in those correspondence.

e) As revealed before this court the Karapitiya New Town Development which included the construction of the New Hospital, Cancer Hospital, Medical Faculty of the University of Ruhuna, Nurses Training School have now been completed but the said development work could not be completed due to the refusal of the Petitioners to handed over the lands

referred to these proceedings in order to construct a Mixed Development Project to complete the New Town Development Plan.

f) Even though the Petitioners challenged the position taken up by the Respondents that the proposed Mixed Development Project is an afterthought, since the plans referred to by the Respondents have drawn in the year 2013, this court observes that, the main purpose of the said acquisition had remained as "Karapitiya New Town Development." All the necessary constructions to develop the Karapitiya New Town had come up in stages on the availability of funds for the said construction work.

g) The petitioners even though written to several authorities and submitted appeals to them but failed to establish

   i. That the lands acquired were not submitted for the New Town Development in Karapitiya

   ii. There is alternate or more suitable land is available in the area for the said New Town Development work

   iii. That the Respondents acted in *mala fide* when identifying the lands belonging to the Petitioners for the acquisition.

When considering all the matters referred to above it is my view that the facts and circumstances of the case in hand are different to the two cases relied upon by the Petitioners referred to above and therefore this court is not bound to follow the decisions in the said cases.

In the case of ***Senevirathne and Others V. Urban Council Kegalle and Others [2001] 3 SLR 105*** the above position was once again looked into by this court when the Petitioners raised the same objection along with several objections, whilst depending on the same Supreme Court decision in Manel Fernando's case. However J.A.N. de Silva P/CA (as he was then) whilst Amaratunga J concurred with held,

"If the appellant has not been prejudiced by the matters on which he relies on the court may refuse relief even though he has succeeded in establishing some defect. The literal or technical breach of an apparently mandatory provision in a statute may be so insignificant as not in effect to matter. In those circumstances the court may in its discretion refuse relief."

When considering the matters already discussed, I see no merit in all three applications before this court. I therefore make order dismissing all three applications but make no order with regard to cost.

All three applications are dismissed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL