

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

In the matter of an application of an order in the nature of writs of Certiorari under and in terms of Article 141 of the Constitution of the Republic of Sri Lanka.

K.A. Romesh Fernando

c/o R.I Fernando

No.137, Colombo Road,

Negambo.

Petitioner

Case No: CA(Writ) 81/2008

Vs.

1. The Hon. Minister of Education
Ministry of Education,
Isurupaya, Battaramulla.
2. The Secretary
Ministry of Education,
Isurupaya, Battaramulla.
3. The Hon. Minister of Lands and Land
Development
Ministry of Lands and Land
Development,
Govijana Mandiraya, Rajamalwatte
Road, Battaramulla.

4. W.P.M.G.R.S Kumara Muhandiram
The Divisional Secretary,
Divisional Secretariat,
Negambo.
5. K.K.S.A Perera
The Assistant Divisional Secretary,
Divisional Secretariat,
Negambo.
6. The Principal
St. Mary's College,
Main Street, Negambo.
7. The Commercial Bank of Ceylon
Limited
No.21, Bristol Street,
Colombo 01.
8. The Hon. Minister of Education of
the Western Province
The Office of the Chief Minister,
Srawasthi Mandiraya,
Colombo 07.
9. Hon. Attorney General
Attorney General's Department,
Hulftsdorp, Colombo 12.

Respondents

Before: Janak De Silva J.

Counsel:

Vikum De Abrew SDSG for the 1st to 6th and 8th and 9th Respondents

Written Submissions tendered on:

Petitioner on 06.12.2011

Respondent on 05.12.2011

Decided on: 04.04.2019

Janak De Silva J.

This matter was fixed on top of the list for 06.03.2019. The name of the Petitioner was called in open court. He was absent and unrepresented. The learned SDSG submitted that parties had filed written submissions as far back as 2011 and he was in agreement for the matter to be disposed on the written submissions filed. As this is a matter filed in 2008 and as it was fixed on top of the list court decided to consider the written submissions of the parties and deliver judgment accordingly.

The Petitioner is seeking to challenge an order (P5a) made under the proviso to section 38(a) of the Land Acquisition Act as amended (Act). He claims that the said order is arbitrary and capricious for the reason that there is no urgency to acquire the said land under the proviso to section 38(a) of the Act without proceeding under the ordinary procedure laid down by the Act. It is further submitted that the Respondents have failed to identify and establish the existence of any urgency in acquiring the said land especially when the alleged public purpose has not in any event been declared by the Respondents. The Petitioner further submitted that there are other lands in the vicinity which can be used for any public purpose.

The 1st to 6th and 8th and 9th Respondents (Respondents) contend that the land forming the subject matter of the order P5a is required for a public purpose, namely the necessity to expand the premises of St. Mary's College, Negombo to meet the educational and sports needs of the school.

In *Fernandopulle v. Minister of Land and Agriculture* [79(II) N.L.R. 115 at 119] the legal position applicable to the instant case was stated by the Supreme Court as follows:

“If one looks at the entire Act two main powers are given to the Minister. They are:

1. The power to decide whether the land is required for public purpose and to direct that it be acquired, and
2. Whether there is an urgency compelling the immediate possession being taken of the land and to direct that possession be taken.

As pointed out earlier, **the former decision is by enactment (section 5(2)) made conclusive and therefore removed from scrutiny by the Courts.** The latter has not been so treated and it is legitimate to hold that the legislature did not intend to remove the Court's power of scrutiny.” (emphasis added)

However, the Supreme Court held that while an order by the Minister under the proviso to section 38 of the Land Acquisition Act can be made only in cases of urgency, **it is however a matter for a Petitioner who seeks the remedy by way of Certiorari, to satisfy the Court that there was in fact no urgency and his application cannot succeed should he fail to do so.** Hence the burden of proof is on the Petitioner to adduce evidence that there was no urgency and if he fails to do so, his application must be dismissed. This then is the ambit of the inquiry before this court.

The Petitioner at paragraph 14 of the written submissions have submitted that “up to date the Respondents have failed to identify and establish the existence of any urgency in acquiring this land”. This is not the correct position of the law. The burden was on the Petitioner to do so and I am of the view that on the facts he has failed to fulfil the burden of proof.

The Petitioner submits that the public purpose for which the land was acquired was not disclosed. However, section 2 notice issued under the Act [P2(b)] states that the acquisition is for Neg/St. Mary's College. The documentation before Court shows that the Petitioner was aware of the public purpose for which the land was to be acquired. In *Seneviratne and others v. Urban Council Kegalle and others* [(2001) 3 Sri.L.R. 105] J.A.N. De Silva J. (as he as then) held that as the public

purpose was known to the petitioner in that case there was no material prejudice caused to the petitioners in that case by not stating the public purpose in the section 2 notice. In any event, a notice in terms of section 2 of the Act is not subject to a writ of certiorari [*Dayaratne v. Rajitha Senaratne, Minister of Lands* and others (2006) 1 Sri.L.R. 7] and in fact no such relief has been sought by the Petitioner.

The Petitioner has adverted to the fact that the Minister of Lands who made the impugned order is Mr. Jeewan Kumaranatunga and that there is no affidavit from him stating that he was satisfied of the "urgency". This submission is misplaced for the burden of proving that there was no urgency was on the Petitioner.

For the foregoing reasons, the application of the Petitioner is dismissed with costs.

Judge of the Court of Appeal