

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

In the matter of an application in the nature of Writs of Certiorari and Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S. S. Yaseen

No. 20/1, Kandy Road, Dambulla.

Petitioner

Vs.

Case No. C. A. (Writ) Application 236/2013

1. Hon. Janaka Bandara Tennekoon, MP
Minister of Land and Land Development,
No. 80/5, 'Govijana Mandiraya',
Rajamalwatte Road, Battaramulla.
2. Lakshmi Hewapathirana
The Divisional Secretary,
The Divisional Secretariat, Dambulla.
3. H. A. Dayananda
Director (Sacred Area Development Project),
Greater Dambulla Project Office,
Urban Development Authority,
6th and 7th Floors, Sethsiripaya, Battaramulla.

4. D. Hettiarachchi
Director (Central Province),
Central Province Office,
Urban Development Authority,
6th and 7th Floors, Sethsiripaya, Battaramulla.
5. Nimal Perera
Chairman,
Urban Development Authority,
6th and 7th Floors, Sethsiripaya, Battaramulla.
6. Urban Development Authority,
6th and 7th Floors, Sethsiripaya, Battaramulla.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Hejaaz Hisbullah with Shifan Maharooof for the Petitioner

Manohara Jayasinghe SSC for the Respondents

Written Submissions tendered on:

Substituted Petitioners on 03.05.2019

Respondents on 03.05.2019

Argued on: 07.05.2019

Decided on: 09.08.2019

Janak De Silva J.

According to the Petitioner this application relates to land and premises at 20/1 Kandy Road, Dambulla known as Millagawatte which was gifted to him by his parents by deed of gift (P1). Presently the land is occupied by the Petitioner, his children and their families.

The Petitioner states that the said land and premises were acquired by the State by order published in the Gazette bearing no. 300/14 dated 08.06.1984 (P2) under the proviso to section 38(a) of the Land Acquisition Act as amended (Act).

The Petitioner claims that although the land was acquired by the State it remained in the possession of the Petitioner and that it has not been used for any public purpose, no compensation has been paid and that representations has been made from time to time that the said land will be divested or in the alternative that alternative land from the vicinity will be provided which created a legitimate expectation in the Petitioner. However, by letter marked P8 dated 18.07.2013 the Petitioner has been asked to demolish the buildings standing on the premises.

The Petitioner prays for the following relief:

- (a) A writ of certiorari quashing the decision in the letter marked P11 and rendering the said decision null and void and of no force or avail in law;
- (b) A writ of certiorari quashing the order made under section 38(a) of the Act marked P2;
- (c) A writ of mandamus compelling the 1st Respondent to revoke the vesting order acting under section 39(1) of the Act; or in the alternative
- (d) A writ of mandamus compelling the Respondents to grant the Petitioner suitable alternative land and premises.

Writ of Certiorari Quashing Decision in P11

The Petitioner seeks to quash the decision in P11 by which the Petitioner was requested to demolish the buildings standing on the relevant land and premises failing which the Urban Development Authority was to demolish them. The writ is sought essentially on the legitimate expectation said to have been created in the Petitioner that the said land vesting order will be revoked or in the alternative land will be provided.

In *Council of Civil Service Unions v. Minister for the Civil Service* [(1985) A.C. 374, 408-9] Lord Diplock stated that for a legitimate expectation to arise, the decision:

“must affect [the] other person by depriving him of some benefit or advantage which either (i) he had in the past been **permitted by the decision maker to enjoy** and which he can legitimately expect to be permitted continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has **received assurance** from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.” (emphasis added)

Such legitimate expectations may arise where a public authority has made a clear, unqualified and unambiguous representation to a particular individual that it will act in a particular way. The burden is on the individual to demonstrate that an unqualified, unambiguous and unqualified representation was made [Clive Lewis, *Judicial Remedies in Public Law*, 5th Ed., 248 (South Asian Edition)].

The Petitioner relies on document marked P4 in particular P4A where it is stated that certain lands, which according to the Petitioner includes the land in issue, should not be acquired for the Dambulla Sacred Area Development Project. This purported decision is said to have been made by Janaka Bandara Tennakoon, Minister of Provincial Councils and Local Government. However, he was not at that the Minister of Lands and did not have power to give such a representation.

An ultra vires representation should not be binding on the body which made it as it would entirely destroy the whole doctrines of ultra vires and separation of powers which are related. In *Robertson v. Minister of Pensions* [(1949) 1 K.B. 227] Lord Denning used the doctrine of estoppel to give relief to an individual who had relied on an unlawful representation. However, the House of Lords in *Howell v. Falmouth Boat Construction Co.* [(1951) A.C. 837] disapproved of Lord Denning's remarks relating to an ultra vires assurance and its legal consequences.

In *Regina v. Inland Revenue Commissioners, Ex Parte M.F.K. Underwriting Agents Ltd. and others* [(1990) 1 WLR 1545 at 1573] Judge J. states that "No legitimate expectation could arise from an ultra vires relaxation of the relevant statute by the body responsible for enforcing it."

The principle that the court will not give effect to a legitimate expectation where to do so would involve the decision-maker acting contrary to law is fundamental [*Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629 at 638; *R. v. North and East Devon Health Authority, Ex parte Coughlan* (2000) 2 WLR 622 at 647, 651, 656; *R v. Secretary of State for Education and Employment, Ex parte Begbie* (2000) 1 WLR 1115 at 1125, 1132].

In *Tokyo Cement Company (Lanka) Ltd. vs. Director General of Customs* [(2005) BLR 24] the Supreme Court held that the representation must be intra vires for there to be a legitimate expectation.

The Petitioner also relies on document marked P5 which is a letter written by Janaka Bandara Tennakoon, then Minister of Lands and Land Development. However, it does not contain any holding out by the Minister of Lands.

Quashing of Order made under the Proviso to Section 38(a) of the Act (P4)

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 learned counsel for the Petitioner submitted that for 30 years since the land was acquired by the State nothing has been done on it and that this fact itself proves that there was no urgency which justified an order been made under the proviso to section 38(a) of the Act.

The acquisition order No. 123 of 1984 (P4 pages 2A to 4A) refers to 33 different lots which were admittedly acquired for the Dambulla sacred area development as reflected in P7A item 10 which is a document relied on by the Petitioner. P4 deals with 33 different parcels of land. Admittedly the Petitioner is not the owner of all 33 lots. Hence in any event a writ of certiorari as prayed for by the Petitioner cannot be issued to quash the whole of P4.

The evidence shows that development work has been carried out on parts of the land so acquired. In those circumstances, merely because no such development work was done on the land occupied by the Petitioner for more than 30 years does not necessarily mean that there was no urgency in taking possession of the total land reflected in P4.

On the other hand, the lapse of over 30 years from the making of P4 also shows that there has been undue delay on the part of the Petitioner in impugning P4.

In *Sarath Hulangamuwa v. Siriwardena, Principal, Visakha Vidyalaya, Colombo 5 and 5 others* [(1986) 1 Sri.L.R. 275] it was held that certiorari being a discretionary remedy will not be granted where there was delay in seeking the remedy.

In *Jayaweera v. Asst. Commissioner of Agrarian Services Ratnapura and another* [(1996) 2 Sri.L.R. 70] Jayasuriya J. held:

" A Petitioner who is seeking relief in an application for the issue of a Writ of Certiorari is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has discretion to deny him relief having regard to his conduct, delay, laches, waiver, submission to jurisdiction - are all valid impediments which stand against the grant of relief."

In that case relief was refused since there was a delay of over two and half years since making the order challenged.

In *Jayarathne v. Wickremaratne and Others* [(2003) 2 Sri.L.R. 276] it was held that even when the Petitioner is entitled to the relief on grounds of error of law, the Petitioner is guilty of laches which stands against the grant of relief by way of writ of certiorari. In this case, the Court specifically came to a finding that the decision impugned in that application was irrational, arbitrary and unreasonable. Yet the relief was refused since the application was made to Court 7 years after the impugned decision.

Hence, I hold that the Petitioner is in any event not entitled to a writ of certiorari quashing the order made under section 38(a) of the Act marked P4 for reasons of delay.

Writ of Mandamus Compelling Revocation of The Vesting Order

Section 39(1) of the Act vests the Minister in charge of Land with the power to revoke a vesting order made under section 38 of the Act if possession of the land has not actually been taken for and on behalf of the State.

Although document R1 indicates that the constructive possession of the land in dispute has been handed over to the Urban Development Authority it is not in dispute that actual possession is not with the State and hence it is arguable that a revocation of the vesting order is at least in theory possible.

But there are two questions which in my view must be addressed by Court namely whether the Minister has a discretion in deciding whether to revoke the divesting order and secondly whether revocation of the whole vesting order is possible where the vesting order relates to several lots of lands and the possession of some of which have been taken over by the State.

I am minded only to consider the second question in the instant case and leave the other question to be considered in the future in an appropriate case with the benefit of a full argument by parties.

The acquisition order No. 123 of 1984 (P4 pages 2A to 4A) refers to 33 different lots which were admittedly acquired for the Dambulla sacred area development as reflected in P4A item 10 which is a document relied on by the Petitioner. The evidence shows that development work has been carried out on parts of the land so acquired which shows that possession has been taken over by the State. The prayer is for the revocation of the order P4 and not only the part dealing with the land claimed by the Petitioner.

In *Kingsley Fernando v. Dayaratne and Others* [(1991) 2 Sri.L.R. 129], which was quoted with approval in *Mendis v. Jayaratne, Minister of Agriculture, Lands and Forestry* [(1997) 2 Sri.L.R. 215], this Court held that in a divesting what is contemplated is a complete reversal of the status quo ante and not a piece-meal divesting of particular portions of a land that is vested. Hence the application for a divesting of a particular portion of the land that is vested was held to be untenable and that mandamus cannot issue. It was further held that the divesting has to relate to the entire extent covered by the vesting Order.

The same rationale applies in the case of revocation of the vesting order under section 39(1) of the Act. This section refers to revoke "the vesting order". "The vesting order" is a reference to the complete vesting order made under the proviso section 38(a) of the Act. However, that cannot be granted in this case as the evidence is that possession of some of the lots of land in P4

has been taken over by the State and development work carried out. Therefore, the writ of mandamus compelling the revocation of the vesting order must be denied.

Writ of Mandamus Compelling Grant of Suitable Alternative Land

It is trite law that to issue a writ of mandamus there must be a public or statutory duty. [*De Alwis v. De Silva* (71 N.L.R. 108); *Weligama Multi Purpose Cooperative Society Ltd. v. Chandradasa Daluwatta* (1984) 1 Sri.L.R. 195; *Hakmana Multi Purpose Cooperative Society Ltd. v. Ferdinando* (1985) 2 Sri.L.R. 272; *Piyasiri v. People's Bank* (1989) 2 Sri.L.R. 47; *Sannasgala v. University of Kelaniya* (1991) 2 Sri.L.R. 193 and *Samaraweera v. Minister of Public Administration* (2003) 3 Sri.L.R. 64].

The Act does not establish a duty on the part of the State to provide alternative land for land acquired by the State. There is a statutory duty to pay compensation for the land acquired. As such no writ of mandamus will lie to compel the Respondents to grant the Petitioner alternative land and premises.

For all the foregoing reasons, the application is dismissed without costs.

However, this Court makes direction that the 2nd Respondent or the relevant acquiring officer shall take immediate steps to pay compensation according to law for any land acquired consequent to P4. The payment of compensation must be completed within 6 months of the date of this judgment.

Judge of the Court of Appeal

N. Bandula Karunaratna J.

I agree.

Judge of the Court of Appeal