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

Thiththagalla Gamage Renuka
Damayanthi,
No.496, near the Samupakara
Petrol Shed,
Embilipitiya.
Petitioner

CASE NO: CA/WRIT/88/2014

Vs.

1. National Housing and
   Development Authority,
   Sir Chittampalam A. Gardiner
   Mawatha, 1826,
   Colombo 2.
2. Mahaweli Authority of Sri Lanka,
   No.500, T. B. Jayah Mawatha,
   Colombo 10.
3. Wasantha Gunarathne,
   Divisional Secretary,
   Divisional Secretariat,
   Embilipitiya.

3A. Indiketiya Hewage Prasanna
Udayakantha,
Divisional Secretary,
Divisional Secretariat,
Embilipitiya.

4. Janaka Bandara Tennekoon,
Minister of Land and Land
Development,
Ministry of Land and Land
Development,
"Mihikatha Madura",
Land Secretariat,
No.1200/6, Rajamalwatte Road,
Sri Jayawardenapura Kotte.

4A. John Amarathunga,
Minister of Land and Land
Development,
Ministry of Land and Land
Development,
"Mihikatha Madura",
Land Secretariat,
No.1200/6, Rajamalwatte Road,
Sri Jayawardenapura Kotte.

4B. Gayantha Karunathileke,
Minister of Land and Land
Development,
Ministry of Land and Land
Development,

"Mihikatha Madura",
Land Secretariat,
No.1200/6, Rajamalwatte Road,
Sri Jayawardenapura Kotte.

4C. S. M. Chandrasena,
Minister of Land and Land Development,
Ministry of Land and Land Development,
"Mihikatha Madura",
Land Secretariat,
No.1200/6, Rajamalwatte Road,
Sri Jayawardenapura Kotte.

Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Pulasthi Hewamanna with Harini Jayawardhana for the Petitioner.
Dr. Charuka Ekanayake, S.C., for the Respondents.

Argued on: 22.07.2020

Decided on: 03.09.2020

Mahinda Samayawardhena, J.

The land relevant to this application (a portion of Lot 964 of Final Village Plan No.778 marked 2R1)[1] was acquired by the 2nd Respondent Mahaweli Authority[2] under the Land Acquisition Act, in order to alienate the land to the 1st Respondent National Housing Development Authority for the Embilipitiya *Gam Udawa* (Village Awakening) programme.[3] As seen from P7A, the acquisition took place prior to 14.09.1985. P7B/2R3 and P8C/2R4, in particular, decisively prove a portion of land in extent of 1 acre and 2 roods belonging to the Petitioner's father had been acquired in this process and, after an inquiry held under the Land Acquisition Act, the Petitioner's father was awarded compensation for the said acquisition in a sum of Rs. 15,860.45 on 05.12.1991. Having been dissatisfied with the award, the Petitioner's father appealed to the Board of Review within 21 days thereof but, admittedly, the Board of Review has not given its decision up to now.

By P9 dated 28.06.2006, the Petitioner's father requested the Mahaweli Authority to divest the said land, which had hitherto been unutilised for any public purpose. P9 was not replied.

Thereafter, the Petitioner learnt the National Housing Development Authority, by newspaper advertisement marked P10 dated 06.02.2007 read with P11, had called for applications

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[1] *Vide* paragraph 6 of the statement of objections of the 2nd Respondent, the Mahaweli Authority.
[2] *Vide* paragraph 6 of the statement of objections of the 1st Respondent, the National Housing Development Authority.
[3] *Vide* Tenement List marked 2R2 prepared in September 1984.

to sell portions of land, including the land in dispute, on competitive prices for monetary gain.

The Petitioner's father took prompt action against this move and desperately wrote to various State agencies, including the President of the Republic (P12A), the Human Rights Commission (P12C), the Mahaweli Authority (P12E), and the Minister of Lands (P12G), seeking divestiture of his portion of land which had not been used for the intended public purpose. As seen from P12B, P12D, P12F, P13A, P13B, P14, P15A, P15B, all these agencies appear to have taken the view the request of the Petitioner's father was reasonable and ought to be fulfilled.

After an inquiry, the Human Rights Commission, by P12D dated 28.04.2010, recommended to the Mahaweli Authority and the National Housing Development Authority that the land be divested, as it was not utilised for the Embilipitiya Town Development programme for which it had been acquired in 1986, or an alternative portion of land be offered to the Petitioner's father.

As seen from 1R1, after acquisition the land had been alienated to the National Housing Development Authority by way of a Grant dated 24.03.1986, issued under the State Lands Ordinance. This was done, as seen from 2R2, to make the 1986 Embilipitiya *Gam Udawa* programme a success.[4] According to P12F sent by the Mahaweli Authority to the National Housing Development Authority, this Grant was issued in order for the latter to construct houses in Yodhagama, Embilipitiya (for the

[4] *Vide* the 4th item from the top in 2R2.

Gam Udawa housing programme). The fact that the Grant was issued for this purpose is also manifest by *inter alia* P10 and P11, where the said land has been identified as a portion of the land in the Embilipitiya Yodhagama *Gam Udawa* programme. The National Housing Development Authority accepts this in paragraph 9 of the statement of objections, when it says although the Grant states the National Housing Development Authority can utilise the land for any purpose set out in the National Housing Development Authority Act, the land was used for the purpose of the Embilipitiya Yodagama Village Awakening programme.

By P12F, the Mahaweli Authority requested the National Housing Development Authority to return 1 acre and 2 roods of land not ulilised for the said purpose, in order for the Mahaweli Authority to release the same to the Petitioner's father.

P14 sent by the Mahaweli Authority to the National Housing Development Authority, reveals that a joint field inspection was carried out on 13.07.2011 with the participation of officers of the Mahaweli Authority and the National Housing Development Authority. On this inspection, it was found that of the land given on the Grant, a portion of approximately 3 acres in extent had not been utilised for the purpose for which it was given. Hence the Mahaweli Authority requested the National Housing Development Authority to release 1 acre and 2 roods of the unutilised land to the Petitioner to put an end to this longstanding matter. P14 has neither been replied nor fulfilled.

Following the complaints of the Petitioner and her father to the President about this injustice, the Presidential Secretariat sent several letters to the Mahaweli Authority and the National Housing Development Authority, directing or advising them to release a portion of land in favour of the Petitioner. The most recent letter marked P15B dated 09.09.2013, signed by the Secretary to the President himself, informs the Secretary to the Ministry of Irrigation and Water Resource Management to release the land to the heirs of the Petitioner's deceased father.

All attempts by the Petitioner's father and the Petitioner for divestiture of the land having failed, the Petitioner filed this application on 21.03.2014 to quash by certiorari the newspaper advertisement marked P10 read with P11 for the sale of the vacant portions of land covered by the Grant 1R1, and to compel the Respondents by mandamus to divest 1 acre and 2 roods to the Petitioner from the land still unutilised for any public purpose.

Let me now consider the defences taken up by the Respondents in their statements of objections in resisting the Petitioner's application.

The 3rd and 4th Respondents, the Divisional Secretary of Embilipitiya and the Minister of Lands, have not taken up any valid defence in their joint statement of objections, apart from the standard objections found in all writ applications – *vide* paragraph 8 of the objections.

The 2nd Respondent Mahaweli Authority, in its statement of objections, seeks dismissal of the Petitioner's application

predominantly on the basis that as the appeal of the Petitioner's father to the Board of Review against the award of compensation is pending, the Petitioner cannot maintain this application. I have no hesitation in rejecting this objection, which is, in my view, irresponsible, as nearly 30 years have passed since the appeal was submitted and there is nothing on record to suggest when, if ever, the decision of the Board of Review can be expected.

In addition, the 2nd Respondent, by producing a letter marked 2R6, says the 1st Respondent National Housing Development Authority has provided a reason for its inability to release the said land to the Petitioner. I will deal with this letter later in this Judgment.

It is common ground that after the acquisition of the land, it was alienated to the 1st Respondent by way of a Grant. As I have already stated, by paragraph 9 of the statement of objections, the 1st Respondent, whilst admitting the land was used "*for the purposes of Embilipitiya Yodagama Village Awakening Programme (Gam Udawa)*", nevertheless says it was given to the 1st Respondent "*to ulilise the same for any purpose and/or matter stipulated in the National Housing Development Authority Act.*" The latter statement is, I believe, in defence of the advertisement for sale, as reflected in P10 and P11, of portions of land not utilised for the *Gam Udawa* programme.

By P7A the 2nd Respondent admits this land was acquired for the development of the Embilipitiya town. Almost simultaneously the land was given to the 1st Respondent by way

of a Grant, not to do as he pleases but to further the objective of the acquisition of the land, even though the Grant does not specify this in so many words. Hence, I reject the standpoint of the 2nd Respondent that the 1st Respondent is free to sell the remaining portions of land at competitive prices for monetary gain. This is a betrayal of the Public Trust doctrine by State agencies, which the Courts will never condone or tolerate.

In the case of *Sugathapala Mendis v. Chandrika Kumaratunga,*[5] commonly known as *The Waters' Edge* case, the land acquired for a public purpose was sold to a private entrepreneur to set up a golf resort. Quashing the latter transaction and declaring that the Petitioners' fundamental right to equality before the law guaranteed under Article 12(1) of the Constitution had been violated, the Supreme Court observed at page 352:

> *The principle that those charged with upholding the Constitution - be it a police officer of the lowest rank or the President - are to do so in a way that does not violate the Doctrine of Public Trust by state action/inaction is a basic tenet of the Constitution which upholds the legitimacy of Government and the Sovereignty of the People. The Public Trust Doctrine is based on the concept that the powers held by organs of government are, in fact, powers that originate with the People, and are entrusted to the Legislature, the Executive and the Judiciary only as a means of exercising governance and with the sole objective that such powers will be exercised in good faith for the benefit of the People of Sri Lanka. Public power is not for personal gain or favour,*

[5] [2008] 2 Sri LR 339.

> *but always to be used to optimize the benefit of the People. To do otherwise would be to betray the trust reposed by the People within whom, in terms of the Constitution, the Sovereignty reposes. Power exercised contrary to the Public Trust Doctrine would be an abuse of such power and in contravention of the Rule of Law. This Court has long recognized and applied the Public Trust Doctrine, establishing that the exercise of such powers is subject to judicial review. (Vide De Silva v. Atukorale [1993] 1 Sri LR 283 at 296-297; Jayawardene v. Wijayatilake [2001] 1 Sri LR 132 at 149, 159)*

By paragraph 10 of the statement of objections, the 1st Respondent admits having advertised the unutilised land for sale. The 1st Respondent further admits in the same paragraph that only one lot (No.4 of Plan No.598) has been sold to a buyer up to date and the remainder of the allotments are still with the 1st Respondent.

By paragraph 11 of the said objections, the 1st Respondent says, upon receipt of the Human Rights Commission report requiring the 1st Respondent to release the portion of land formerly belonging to the Petitioner's father or offer alternative land to the Petitioner's father, a joint site inspection was carried out by the 1st and 2nd Respondents to ascertain whether there were any vacant portions of land, but the same could not be found. The 1st Respondent has tendered 1R5 dated 16.03.2011 (which was tendered by the 2nd Respondent as 2R6) to explain why the Petitioner's request cannot be allowed. The reason given in 1R5/2R6 is it was revealed from the joint inspection that a

portion of land allocated for the construction of houses and a playground by the 1st Respondent is included in the land identified to be released to the Petitioner.

It is my considered view this reason is plainly unacceptable, as it is not supported by even a scrap of documentary evidence. There is no evidence of a decision taken to construct houses and a playground. At the very least, there is not even a Plan prepared for this purpose.

Furthermore, the reason contained in 1R5 dated 16.03.2011 is in conflict with the newspaper advertisement P10 and P11 dated 06.02.2007, by which the 1st Respondent decided to sell the vacant portions of land at competitive prices. It was never the position of the 1st Respondent that the intended sale was in respect of vacant portions of land excluding the land purportedly reserved for the construction of houses and a playground.

It is also significant to note that in paragraph 11 of the statement of objections, the 1st Respondent speaks of a joint inspection carried out prior to 1R5 dated 16.03.2011. But, as seen from P14 dated 05.09.2012, a letter sent by the Director General of the 2nd Respondent to the Chairman of the 1st Respondent, another joint inspection had been carried out on 13.07.2011, which revealed approximately 3 acres of land still vacant and unutilised.

The 1st Respondent in paragraph 12 of the statement of objections states P14 was not replied because it had already been informed to the 2nd Respondent by 1R5 dated 16.03.2011 that no land is available to be given to the Petitioner's father.

This explanation is unacceptable because P14 was issued after the second inspection on 13.07.2011.

If the land is no longer necessary for the public purpose for which it was acquired, it is the duty of the authorities to divest it to the original owner, provided the requirements under section 39A of the Land Acquisition Act are fulfilled, unless there is a new public purpose which is *prima facie* genuine and existent. "*Such a [new] public purpose*", it was held by the Supreme Court in *De Silva v. Atukorale*,[6] "*must be a real and present purpose, not a fancied purpose or one which may become a reality only in the distant future.*" In the facts and circumstances of this case, I take the view the belated purported new public purpose is not one that is real and existing.

Section 39A of the Land Acquisition Act reads as follows:

> *39A. (1) Notwithstanding that by virtue of an Order under section 38 (hereafter in this section referred to as a "vesting Order") any land has vested absolutely in the State and actual possession of such land has been taken for or on behalf of the State under the provisions of paragraph (a) of section 40, the Minister may, subject to subsection (2), by subsequent Order published in the Gazette (hereafter in this section referred to as a "divesting Order") divest the State of the land so vested by the aforesaid vesting Order.*
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> *(2) The Minister shall prior to making a divesting Order under subsection (1) satisfy himself that*

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[6] [1993] 1 Sri LR 283 at 293.

> *(a) no compensation has been paid under this Act to any person or persons interested in the land in relation to which the said divesting Order is to be made;*
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> *(b) the said land has not been used for a public purpose after possession of such land has been taken by the State under the provisions of paragraph (a) of section 40;*
>
> *(c) no improvements to the said land have been effected after the Order for possession under paragraph (a) of section 40 had been made; and*
>
> *(d) the person or persons interested in the said land have consented in writing to take possession of such land immediately after the divesting Order is published in the Gazette.*

In the written submissions filed after the argument, the Respondents state the Petitioner is disentitled to divestiture as she fails to satisfy 39A(2)(b) above in view of 1R5. I have already stated the purported reason contained in 1R5 to evade divestiture cannot be accepted.

In my view, the Petitioner has fulfilled all four requirements set out in section 39A of the Land Acquisition Act to be eligible for divestiture.

Accordingly, I quash the newspaper advertisement marked P10 by certiorari insofar as it relates to the rights of the Petitioner, but without prejudice to 1R4 whereby an Agreement to Sell has been entered into with a third party for a portion of the land,

and direct the 4th Respondent to divest a portion of land in extent of 1 acre and 2 roods from the 3 acre portion identified in P14. If, and only if, this is not feasible, the Petitioner shall be given an alternative portion of land in close proximity to the land in dispute.

The 1st Respondent shall pay the costs of this application to the Petitioner.

The application of the Petitioner is allowed with costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.
I agree.

Judge of the Court of Appeal