

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

In the matter of an application for a Writ of
Certiorari in terms of Article 140 of the
Constitution.

CA WRIT APPLICATION NO: 29/2023

1. Abdul Azahim Fathima Haleema
No.06, Dharga Town,
China Fort
Beruwala.

2. Pakir Mohamed Sithy,
Mansooriya
No.174, Maradana, Beruwala

Petitioner

Vs.

1. The Divisional Secretary
Divisional Secretariat
Kalutara.

2. The District Secretary
District Secretariat
Kalutara.

3. Hon. Minister of Lands and
Tourism
“Mihikatha Medura”
1200/06, Rajamalwatte Avenue,
Battaramulla.

4. The Secretary
Ministry of lands and Tourism
“Mihikatha Medura”
1200/6,
Rajamalwatte Avenue,
Battaramulla.
5. Director General
Department of fisheries and
Aquatic Resources,
New Secretariat Building
Colombo 10.

Respondents

Before : **N. Bandula Karunarathna P/CA, J.**
 B. Sasi Mahendran, J.

Counsel: Dhammika Jayanetti with Shehan De Vas Gunawardene and Anjana
 Alawatte for the Petitioner
 Yuresha Fernando, DSG with Mihiri de Alwis, SC for the Respondents.

Argued On: 01.03.2024

Written

Submissions: 05.04.2024 (by the Petitioner)

On: 09.05.2024 (by the Respondent)

Decided On: 30.05.2024

B. Sasi Mahendran, J.

The Petitioner has instituted this action to obtain the following reliefs prayed for in the prayer of the Petition dated 19th January 2023,

- a. Issue notice on the Respondents;
- b. Grant a mandate in the Nature of a Writ Certiorari quashing Gazette Extraordinary No. 2240/26 dated 12.08.2021 (P 9A);
- c. Or in the alternative
- d. Grant a mandate in the Nature of a Writ Certiorari quashing the Acquisition of the Land morefully described in the Schedule to the Petition made by Gazette Extraordinary No. 2240/26 dated 12.08.2021, in section 08-392 of the said Gazette;
- e. Grant Interim Relief by restraining the 1st to 5th Respondents or any one of the Respondent from issuing a Quit Notice in terms of the State Lands (Recovery of Possession) Act to the Petitioners in respect of the Land of the Petitioners morefully described in the Schedule to the Petition;
- f. Grant Interim Relief by restraining the 1st to 5th Respondents or any one of the Respondent from instituting proceeding in terms of the State Lands (Recovery of Possession) Act or the Land Acquisition Act against the Petitioners in respect of the Land of the Petitioners morefully described in the Schedule to the Petition;
- g. Grant Interim Relief by staying proceedings instituted in the Magistrate's Court of Kalutara terms of the State Lands (Recovery of Possession) Act or the Land Acquisition Act against the Petitioners in respect of the Land of the Petitioners morefully described in the Schedule to the Petition;
- h. Grant costs;
- i. Grant such other and further reliefs as Your Lordships Court seem meet.

The land which forms the subject matter of this application is a portion of land co-owned by the Petitioner and her sisters. According to the Petitioner, Somewhere around in October 2014, Officers from the Government Survey Department, entered the premises to carry out the survey to the said land. According to the Petitioner, only her mother was present at that time. Therefore, they were not in a position to recall as to whether the notice was affixed to the property.

Later they admitted, that the section 2 notice was served to them and the said notice was published in all 3 languages. According to the Petitioner, after 8 years, they have received a letter dated 21.12.2022 indicating that, lots 1,2 and 3 depicted in the Plan No. KA/BRW/14/265 had been acquired by the order made under the proviso to the section 38

of the Land Acquisition Act for the Beruwala Maradana Anchorage and to handover vacant position on 16.01.2023.

The Petitioner has challenged the particular gazette notification No. 2240/26 dated 12th August 2021 on the basis that there is a long delay to fulfil the Public purpose of constructing an anchorage at Maradana Beruwala. On the other hand, the Respondent has stated that, subsequent to the survey conducted by the Survey Department on the request of the 2nd Respondent they have come to know that, the extent of land which was to be acquired had been greater in extent than the portion of land that was originally depicted in the said notice. Therefore, steps were taken to exhibit a fresh notice, regarding to the additional portion of the land. According to the Grama Niladhari who has informed the 2nd Respondent, that the notice was purportedly exhibited. Further the Respondents have pleaded that, the anchorage which was primarily constructed adjacent to the coast line and established in the impugned land had been declared open on 20.01.2016. They have further stated that, since a larger land to be acquired, there had been a requirement to obtain fresh assessment of expenditure with regard to the acquisition of the said land. Therefore, they sought approval under financial regulation No 53 for the revision of the valuation of the land. They admit the fact that, between 2015 to 2021 there were multiple administrative issues that has to be looked into by the relevant officials which resulted the delay to complete the project. According to the Respondent, they have utilized the portion of land (described in the earlier notice) for the purpose for which it was acquired.

The main argument put forward by the Petitioner was that, since no steps have been taken by the Respondent to construct the anchorage, there was no need for the minister to act under section 38A of the Land Acquisition Act to take over the immediate possession on the ground of urgency.

Section 38A- Immediate possession of certain lands acquired for the purposes of local authorities.

- 1) Where any land is being acquired for the purposes of a local authority and the preliminary valuation of that land made by the Chief Valuer of the Government does not exceed the specified sum, the immediate possession of such land on the ground of urgency, within the meaning of the proviso to section 38, shall be deemed to have become necessary, and accordingly the Minister may make an Order of possession under section 38 of this Act.

When we consider the above section, the decision of the Minister is based on the urgency which initiate the Minister to make order for immediate possession.

Therefore, to quash the said decision, the Petitioner has to satisfy this Court that, there is no urgency for the minister to act under the section.

According to the Section 101 of the Evidence Ordinance, which reads as follows;

Section 101. Whoever desires any Court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

This proposition was considered by Samarakoon CJ in Marie Indira Fernandopulle and Another v. E.L. Senanayake, Minister of Lands and Agriculture, 79 (2) NLR 115 at page 118; Chief Justice held that;

“A reading of section 38 reveals that it comes into operation only after an order under section 2 and/or section 4. Both these sections operate on the Minister's decision under these two sections that the land is required for a public purpose. Section 38 nowhere refers to " public purpose ". It only refers to the sections where the need for such purpose has been decided. The only decision it is concerned with is the " urgency" which necessitates " immediate possession " of the land being taken. The Minister's sole power under that section is to decide the question of urgency to meet the need for which an order was made under section 2 and/or section 4, I therefore find myself unable to follow that decision so far it concerns the provisions of section 38 and must respectfully disagree.

Further held that,

“The next question is whether the Minister's decision regarding ' the urgency, and therefore the need to take immediate possession, can be reviewed by Court. Counsel for the Petitioner stated that the Court must apply an objective test and not a subjective test. State Counsel contended for the latter. 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 of and to direct that possession be taken.

Further held that,

No doubt primarily the Minister decided urgency. He it is who is in possession of the facts and his must be the reasoning. But the Courts have a duty to review the matter. In this case the need for a playground and a farm had been mooted as far back as 1974. Political influences and extraneous forces delayed the take over of the land.

Four years dragged on and school's needs were still waiting to be met. The delay and the need decided the urgency. These being the facts the Petitioner has failed to satisfy me that there was no urgency. I would therefore dismiss the application with costs.”

The above said case was considered by Sriskandharajah, J. in Sheriff and Another v. Rajitha Senaratne and Three others, CA/WRIT application No. 2210/2003, Decided on 14.05.2007, (2007 BLR 153,)

The Respondents have satisfied this Court that, after section 2 notice was published in 2014, steps were taken to set up the anchorage in the year of 2016. And also, the Respondents have produced document (1R5) requesting further approval under financial regulation. It clearly shows that, the acquisition was not abandoned. Therefore, we hold that the Petitioner has failed to satisfy this Court that there was no urgency, when the Minister made the impugned Order.

Further, we observe that, the Petitioner has not challenged the acquisition of the said premises. The effect of the Order under s 38 was described in S 40 of the said Act.

Section 40- Effect of Order under section 38

When an Order of the Minister under section 38 is published in the Gazette,

- a) where that Order is in regard to the taking possession of a particular land, that land shall, by virtue of that Order, vest absolutely in the State free from all encumbrances with effect from the date on which that Order is so published, and

any officer who is authorised to do so by that Order may, on or after that date, take possession of that land for and on behalf of the State; or

- b) where that Order is in regard to the subjection of a particular land to a particular servitude, that land shall be subject to that servitude, and that servitude may be utilised for the public purpose for which it was acquired, on and after the aforesaid date.

The above section was considered in S.M.S. Karuketiya v. S.M.P. Karuketiya and others, CA 419-420-421/94(F), Decided on 04.06.2009, Gooneratne J. (2009) BLR at page 123 held that,

“The effect of a Section 38 order under the Land Acquisition Act as referred to in Section 40 and 40A (Amended by Act No. 28 of 1964) of the said Act is to vest absolutely in the State free from encumbrances with effect from the date of publication of the order (5R4) and such order should be received in all courts as conclusive evidence of title of the State. Therefore the learned District Judge should have excluded State land from the corpus in terms of the Surveyor General's Plan and the prayer to the statement of claim of the added Defendant-Appellant.”

According to the above section, it is clear that the virtue of the Order made under Section 38, the land in question vested absolutely with the State. Therefore, the quit notice issued by the Respondents in terms of the Section 3 of the State Land (Recovery of Possession Act) is legal. Also, we hold that the action instituted in the Magistrate Court Kalutara in terms of State Land (Recovery of Possession Act) by the Respondent is legal.

For the above said reasons, we dismiss the action with costs.

JUDGE OF THE COURT OF APPEAL

N. Bandula Karunarathna,J (P/CA)

I AGREE

PRESIDENT OF THE COURT OF APPEAL