

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

LANKA

In the matter of an application for an order
in the nature of a Writ of Mandamus under
and in terms of Article 140 of the
Constitution.

Jinapala Senarath Yapa

'Madubhandi', Baddelandayaya, Wellawaya.

Appearing through his Power of Attorney
Holder –

Vithanarachchige Gamini Karunadasa
No. 157, D2 Ela, Embilipitiya.

Petitioner

Case No. CA (Writ) 354/2016

Vs.

1. Dayananda Rathnayake
Divisional Secretary,
Divisional Secretariat, Wellawaya.

2. John A. E. Amarathunga
Minister of Lands,
'Mihikatha Medura', Land Secretariat,
No. 1200/6, Rajamalwaththa Road,
Battaramulla.

3. I. H. K. Mahanama
Secretary to the Ministry of Lands,
'Mihikatha Medura', Land Secretariat,
No. 1200/6, Rajamalwaththa Road,
Battaramulla.

4. Provincial Commissioner of Lands of Uva
Province
Department of Provincial Land
Commissioner, Badulla.
5. Wellawaya Pradeshiya Sabha
Wellawaya.
6. Secretary
Wellawaya Pradeshiya Sabha,
Wellawaya.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Ranjan Suwandarathne P.C. with Shantha Jayawardena for the Petitioner

Manohara Jayasinghe SSC for the 1st to 4th Respondents

Jagath Wickremanayake P.C. with Gimhani Jayaweera for the 5th and 6th
Respondents

Argued on: 27.05.2019

Written Submissions tendered on:

Petitioner on 29.07.2019

5th and 6th Respondents on 29.07.2019

Decided on: 23.01.2020

Janak De Silva J.

The Petitioner claims to be the owner of several lots of land that was vested in the State consequent to several vesting orders, P9, P13 and P14, made under section 38A proviso of the Land Acquisition Act as amended (Act). The lands so acquired are depicted as lots 18, 19, 23, 24, 25 and 26 in plan no. 632 (P8) which are also depicted as lots 28, 29, 30, 37, 13 ½, 39, 40 and 41 in village plan no. 660 supplement no. 2 (P15). According to the Petitioner lot 18 in plan no. 632 is the same as lot 28 village plan no. 660 supplement no. 2 (P15).

The Petitioner is seeking a writ of mandamus directing the 2nd Respondent to divest the unutilised portion of lot no. 28 in village plan no. 660 supplement no. 2 (P15), lot no. 30 and lot no. 39 in village plan no. 660 supplement no. 2 (P15) to the Petitioner under section 39A of the Act.

It is not in dispute between parties that the said land was acquired by the State under the Act. The dispute is whether the criteria for divesting has been satisfied.

Section 39A of the Act reads:

“(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.

(2) The Minister shall prior to making a divesting Order under subsection (1) satisfy himself that

(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;

(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." (emphasis added)

Hence if any improvements have been made on the land the question of divesting cannot arise.

The documentation pertaining to the acquisition indicates that the land in dispute was paddy land when it was acquired. This was not contested by the Petitioner. It is also not disputed that the land has been filled and in the case of lot 18 in plan no. 632 which is the same as lot 28 of village plan no. 660 supplement no. 2, certain constructions have taken place which now houses Sathosa and Bank of Ceylon. It is further in evidence that certain stalls have been constructed on part thereof although it is disputed whether it was by the Petitioner or a third party.

Where paddy land or marshy land was acquired by the State in terms of the Act which has subsequently been developed in a manner where construction could commence these amounts to improvements to the said land within the meaning of section 39A (2)(c) of the Act [*Kapugeekiyana v. Hon. Janaka Bandara Tennakone, Minister of Lands and Others* (S.C. Appeal No. 161/2010, S.C.M. 18.11.2013)]. Accordingly, the question of divesting the land claimed by the Petitioner cannot in any event arise.

In any event, the application for a writ of mandamus is in my view misconceived in law.

S.N. Silva J. (as he was then) in *Kingsley Fernando v. Dayaratne and Others* [(1991) 2 Sri.L.R. 129] held that section 39A of the Act does not give a right to the former owner to seek a divesting order even where the pre-conditions are satisfied but only vests a discretionary power in the Minister to make a divesting order provided the pre-conditions are satisfied. However, there is a divergence in the approach of the Supreme Court to this issue. In *De Silva v. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another* [(1993) 1 Sri.L.R. 283] Fernando J. held that a writ of mandamus will issue directing the Minister to divest land acquired by the State if the four conditions in section 39A of the Act are fulfilled. This was quoted with approval and followed by the Supreme Court in *Rashid v. Rajitha Senaratne, Minister of Lands and Others* [(2004) 1 Sri.L.R. 312] and *Mahinda Katugaha v. Minister of Lands and Land Development and Others* [(2008) 1 Sri.L.R. 285].

However, the Supreme Court in *Urban Development Authority v. Abeyratne and Others* [S.C. Appeal No. 85/2008 & 101/2008; S.C.M. 01.06.2009] took a different view and held that the exercise of discretionary power vested with the Minister by section 39A of the Act is not amenable to judicial review in an application for a writ of mandamus. Similar line of thinking is found in *Wijewardena v. Minister of Lands and Others* [S.C. Appeal 56/2008; S.C.M. 24.11.2015] where the Supreme Court again took the view that section 39A of the Act merely vests a discretionary power in the Minister to make a divesting order in a case where the pre-conditions referred to in that section are satisfied and that a former owner cannot demand such exercise of power.

I have closely examined the different reasons given by the Supreme Court in the above cases and hold that the reasoning adopted in *Urban Development Authority v. Abeyratne and Others* (supra) is logical and compelling since in *De Silva v. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another* (supra) the Supreme Court failed to consider:

- a. the provisions and the scheme of the Act,
- b. the judgment in *Gunasekera v. Minister of Lands & Agriculture* (65 N.L.R. 119),
- c. that a writ of mandamus covers a situation where there has been no exercise of power and compels the exercise of power,
- d. that mandamus would lie when a statutory duty is cast upon a public authority with a correlative right to demand its discharge,
- e. that section 39A (1) of the Act uses the word “may” which categorically implies a discretionary power in the Minister,

f. that a writ of mandamus has nothing to do with abuse of discretion.

Furthermore, the reasoning in *De Silva v. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another* (supra. page 293) is in any event inconsistent per se for on one hand the court held that a writ of mandamus will issue if the four pre-conditions are satisfied while on the other hand it held that even in that situation it would be legitimate for the Minister to decline to divest if there is some good reason - for instance, that there is now a new public purpose for which the land is required.

For all the aforesaid reasons, I dismiss the application of the Petitioner but without costs in the circumstances of the case.

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Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

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Judge of the Court of Appeal