

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

In the matter of an application for Orders in
the name of writ of certiorari under Article
140 of the Constitution

Kegalle Plantations Limited,

No. 130 Glennie Street,

Colombo 02.

Petitioner

Case No. CA (Writ) 534/2000

Vs.

1. Minister of Agriculture and Lands,
"Sampathpaya",
Battaramulla.
2. The Divisional Secretary,
Divisional Secretariat,
Rambukkana.
3. The Minister of Public Administration,
Home Affairs and Plantation Industries,
No. 55/75 Vauxhall Lane,
Colombo 02.
4. The Secretary,
Ministry of Public Administration, Home
Affairs and Plantation Industries,
No. 55/75 Vauxhall Lane,
Colombo 02.

5. Senior Assistant Secretary (Lands),
Ministry of Public Administration, Home
Affairs and Plantation Industries,
No. 55/75 Vauxhall Lane,
Colombo 02.
6. The Secretary,
Ministry of Agriculture and Lands,
"Sampathpaya",
Battaramulla.

Respondents

Before: Janak De Silva J.

Counsel:

Kushan De Alwis P.C. with Chamila Wickremanayake for the Petitioner

Nayomi Kahawita for the Respondents

Written Submissions tendered on:

Petitioner on 15.11.2001 and 11.03.2019

Respondents on 12.12.2001 and 14.03.2019

Argued on: 25.01.2019

Decided on: 07.06.2019

Janak De Silva J.

The Petitioner is seeking a writ of certiorari quashing (a) the decision of the Respondents jointly and severally to acquire the land referred to in document marked P7A and (b) the decision of the 1st Respondent published in Gazette Extraordinary No. 1123/13 of 15.03.2000 marked P7A. It is an order made under proviso (a) to Section 38 of the Land Acquisition Act as amended (Act).

The main ground upon which the writs are sought is that there is no section 2 order made in terms of the Act for the land acquired prior to the making of the order under proviso (a) to Section 38 of the Act. It is not in dispute between the parties that a section 2 Order was made under the Act (P5). The dispute is whether P5 covers the land falling within the order made under proviso (a) to Section 38 of the Act.

Before examining this issue in depth, it is apposite to examine the procedure laid down in the Act in acquiring land for a public purpose.

Purpose of a Section 2 Notice under the Act

Section 2 of the Act reads:

“2. (1) Where the Minister **decides** that **land in any area** is needed for any public purpose, he may direct the acquiring officer of the district in which that area lies to cause a notice in accordance with subsection (2) to be exhibited in some conspicuous places in that area.

(2) The notice referred to in subsection (1) shall be in the Sinhala, Tamil and English languages and shall state that land in the area specified in the notice is **required for a public purpose** and that **all or any of the acts authorized by subsection (3) may be done on any land in that area** in order to investigate the suitability of that land for that public purpose.

(3) **After a notice under subsection (2)** is exhibited for the first time in any area, any officer authorized by the acquiring officer who has caused the exhibition of that notice, or **any officer** acting under the written direction of the officer authorized as aforesaid, **may enter any land in that area**, together with such persons, implements, materials, vehicles and animals as may be necessary, and

- (a) survey and take levels of that land,
- (b) dig or bore into the subsoil of that land,

- (c) set out the boundaries of that land and the intended line of any work proposed to be done on that land,
- (d) mark such levels, boundaries and line by placing marks and cutting trenches,
- (e) where otherwise the survey of that land cannot be completed and such levels taken and such boundaries and line marked, cut down and clear away any part of any standing crop, fence or jungle on that land, and
- (f) do all other acts necessary to ascertain whether that land is suitable for the public purpose for which land in that area is required:

Provided that no officer, in the exercise of the powers conferred on him by the preceding provisions of this subsection, shall enter any occupied building or any enclosed court or garden attached thereto unless he has given the occupier of that building at least seven days' written notice of his intention to do so.

Section 2(1) of the Act is the beginning of a process through which land can be acquired for a public purpose. It first envisages the Minister making a decision that land in any area is needed for a public purpose. Once the Minister so decides, a notice in accordance with Section 2(2) of the Act must be exhibited. After such notice is exhibited for the first time, any officer authorized by the acquiring officer may enter any land in that area and to any of the acts referred to in Section 2(3) of the Act. Thus, the acts that can be done in terms of a Section 2(1) notice are of an investigatory nature.

It is in this context that in *Edirisinghe v. Minister of Lands and another* [(C.A. Application No. 2543/2004; Decided on 16.10.2006] Srisikandarajah J. held as follows (at page 4):

“The Minister of Lands under Section 2 directs the acquiring officer to investigate by publishing a notice under Section 2 whether the land identified is suitable for

the said public purpose. The direction of the Minister under Section 2 or the act of the acquiring officer under this section is not a decision affecting the rights of a person but an investigation leads to a recommendation to the Minister that the said land is either **suitable** or not for the said purpose. “

In *Urban Development Authority v. Abeyratne and Others* [(S.C. Appeal No. 85/2008 and 101/2008; Decided on 01.06.2009] after an exhaustive analysis of the scheme of the Act, S.N. Silva C.J. stated thus (at page 6):

“The process of acquisition under the Land Acquisition Act commences upon a decision made by the Minister in terms of section 2(1) that land in any area is needed for a public purpose. This decision gets narrowed to a particular land or a particular servitude which is suited for the public purpose when the Minister makes a direction to the Acquiring Officer in terms of Section 4(1). Thereafter the Act provides for the various steps in the acquisition of such land or servitude including notices being served on the owner and another being exhibited in a conspicuous place on or near the land. A person having an interest in the land or servitude to be acquired is provided an opportunity in terms of Section 4(4) of the Act to object to such acquisition. The Secretary of the appropriate Ministry for which the land is acquired directs an inquiry into the objections and makes a recommendation to the Minister on the objections that have been made. Thereupon a firm decision is made by the Minister in respect of the acquisition by a declaration under Section 5(1) which is published in the gazette and exhibited on or near the land. In terms of section 5(2) this declaration is conclusive evidence that the land is required for a public purpose...”

Accordingly, our courts have held that it is not possible to quash a section 2 notice issued under the Act by way of a writ of certiorari [*Dayaratne v. Rajitha Senaratne, Minister of Lands and Others* (2006) 1 Sri.L.R. 7].

Therefore, the Act contemplates a section 2 notice to cover a larger AREA while the order made under the proviso (a) to Section 38 of the Act can cover a smaller LAND within that AREA.

The Area/Lands covered by P5 and P7/P7A

In the instant matter the section 2 notice (P5) identifies an area in extent of 40 acres (18.18 Hectares) of the land called "Old Janawasama Land". The section 38(a) order (P7/P7A) covers an area of 13.6739 Hectares.

The learned counsel for the Petitioner submitted that the land identified in the section 2 notice is in the Gajabapura Division of the Eadella Estate whereas the land set out in the order made in terms of proviso (a) to Section 38 of the Act forms part of Suriyapura Division of the Eadella Estate.

The Petitioner seeks to establish that the areas covered by P5 and P7/P&A are different by relying on a sketch marked P6 which seeks to identify the Gajabapura Division and Suriyapura Division of the Eadella Estate. This is just a sketch and does not reveal as to who made it. Section 3 of the Surveyors Ordinance [which was the applicable law when this application was filed] prohibits the reception of such documents as evidence in any civil court. In any event it lacks any evidentiary value.

The learned counsel for the Petitioner contended that the 2nd Respondent, Divisional Secretary, Rambukkana, had admitted its contents. It is true that the 2nd Respondent had at paragraph 6 of his affidavit admitted the contents of document "P6" but he goes onto state that he is "unaware whether the said land form part of the Gajabapura Division of Eadella Estate". More importantly, the 2nd Respondent has, at paragraph 8 of his affidavit, stated that "the land described in the notice published under proviso (a) to Section 38 of the Land Acquisition Act is included in the land referred to in the notice published under section 2 of the said Act".

In any event, I am of the view that the following facts corroborate that the land described in P7/P7A is in fact part of the larger area described in P5:

- (a) The Advance Tracing Plan and Tenement List prepared by the Surveyor General (1R16) clearly show that the Divisional Secretary's reference number and the Land Ministry's reference number contained in P5 are the same. In fact, these reference numbers continue throughout the entire acquisition process without any alteration.
- (b) The Advance Tracing Plan and Tenement List prepared by the Surveyor General (1R16) refer to a land in extent of 13.6738 Hectares out of a total extent of 18.13 Hectares set out in the section 2 notice which indicates that the section 38(a) order was made for a portion of the area set out in P5.
- (c) K.A. Harischandra, the then Grama Niladhari of Marukwatura Division (75D) has affirmed the affidavit marked 1R10 and he is the person who pointed out the boundaries when the survey was done. This is reflected in the last column of the Tenement List 1R16.

The above facts together with the presumption in section 114(d) of the Evidence Ordinance further establishes that the land described in the notice published under proviso (a) to Section 38 of the Act is included in the land referred to in the notice published under section 2 of the Act.

Section 5 Order

The 1st Respondent has issued a declaration under section 5 of the Act that the land in dispute is required for a public purpose (1R15). Hence the question of whether the land in dispute is required for a public purpose cannot be questioned by this Court now. Section 5(2) of the Act makes it conclusive and takes it out of the scope of judicial review. [*Fernandopulle vs. Minister of Land and Agriculture* (79(II) N.L.R. 115), *Urban Development Authority v. Abeyratne and Others* (S.C. Appeal No. 85/2008 and 101/2008; S.C.M. 01.06.2009 at page 11, 12].

Therefore, even if it is established that the land identified in P7/P7A does not fall within the area covered by the section 2 notice this Court cannot quash P7/P7A on the basis that it is not required for a public purpose as claimed by the Petitioner.

Urgency

The only question this Court can inquire into is whether there is an “urgency” compelling the immediate possession being taken of the land forming the subject matter of this application. In *Fernandopulle vs. Minister of Land and Agriculture* [79(II) N.L.R. 115] 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.** (*emphasis added*). Hence the burden of proof was on the Petitioner to adduce evidence that there was no urgency and if he fails to do so, his application must be dismissed.

The Petitioner has failed to do so in this application. On the contrary the documentation before Court clearly establishes that there was an urgent need as the 2nd Pinnawela Zoo had been given land belonging to Wagolla Farm and it was necessary to locate the activities of Wagolla Farm without delay.

For all the foregoing reasons, the application is dismissed with costs.

Judge of the Court of Appeal