

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

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

Rajapaksa Appuhamilage Dona Emilda  
Perera,  
No. 04,  
Haddon Hill Road,  
Nuwara-Eliya.

**PETITIONER**

**C.A. Case No. WRT/0007/19**

**Vs.**

1. Hon. Gayantha Karunatileke,  
Minister of Lands and Parliamentary  
Reforms,  
Ministry of Lands and Parliamentary  
Reforms,  
“Mihikatha Medura”, Land Secretariat,  
No. 1200/6,  
Rajamalwatta Avenue,  
Battaramulla.

Hon. Ramesh Pathirana,  
Minister of Lands and Land Development,  
“Mihikatha Medura”,  
Land Secretariat,  
No. 1200/6,  
Rajamalwatta Avenue,

Battaramulla.

**SUBSTITUTED 1<sup>ST</sup> RESPONDENT**

2. Hon. Vajira Abeywardena,  
Minister of Internal and Home Affairs and  
Provincial Councils and Local Government,  
Ministry of Internal and Home Affairs and  
Provincial Councils and Local Government,  
Independence Square,  
Colombo 07.

Hon. Janaka Bandara Tennakoon,  
Minister of Public Administration, Home  
Affairs, Provincial Councils and Local  
Government,  
Ministry of Public Administration, Home  
Affairs, Provincial Councils and Local  
Government,  
Independence Square,  
Colombo 07.

**SUBSTITUTED 2<sup>ND</sup> RESPONDENT**

3. Hon. Faiszer Musthapha,  
Former Minister of Provincial Councils and  
Local Government and Sports,  
Ministry of Provincial Councils and Local  
Government and Sports,  
No. 330, Union Place,  
Colombo 02.
4. Mr. Sarath Premawansa,  
Chief Secretary,  
Central Provincial Council,  
The Chief Secretary's Office,

Pallekelle,  
Kundasale.

5. Municipal Council Nuwara-Eliya,  
Old Udapussellawa Road,  
Nuwara-Eliya.
6. Divisional Secretary – Nuwara-Eliya,  
Divisional Secretariat,  
Old Udapussellawa Road,  
Nuwara-Eliya.

**RESPONDENTS**

7. Gamini Palitha Ratnayake  
No. 31, Jayasooriya Mawatha,  
Kandana.
8. Renuka Nishanthi Ratnayake  
No. 33/8, Maria Goreththi Mawatha,  
Rilaulla,  
Kandana.

**ADDED RESPONDENTS**

**BEFORE : K.M.G.H. KULATUNGA, J**

**COUNSEL :** Sanjeewa Jayawardena, PC, with Lakmini Warusavithana for the Petitioner.

Dilantha Sampath, SC, for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

M.S.A. Wadood with Hashane Mallawarachchi, and Jerome Senanayake instructed by Mallawarachchi Associates for the 5<sup>th</sup> Respondent.

Saliya Pieris, PC, with Rukshan Mendis and Dhimarsha Marso for the Added Respondents

**ARGUED ON :** 30.04.2025

**DECIDED ON:** 18.07.2025

**JUDGEMENT**

**K.M.G.H. KULATUNGA, J**

1. The petitioner is seeking writs in the nature of *certiorari* and *mandamus*, primarily seeking a writ of *mandamus* directing the 1<sup>st</sup> respondent for a divesting Order under Section 39A of the Land Acquisition Act No. 09 of 1950 (hereinafter referred to as 'the Act'). The original vesting Order was in respect of a land in extent of 1 rood and 20 perches depicted in Plan No.181, dated 13.11.1981, prepared by Licensed Surveyor Aelian Rajapakse. The original vesting Order in terms of Section 38A of the Act was published in Gazette Notification bearing No. 221/3, dated 29.11.1982.
2. Thereafter, the Order under Section 07 of the Act was published in Gazette Notification bearing No. 2009/22, dated 22.02.2017, according to which the land was described under six lots as depicted in the preliminary Plan No. PP.Nu.2914 of 26.11.2013, prepared by the Surveyor General. This notice was published for the purposes of determining compensation. The original owners in respect of all six lots were Rajapakshe Appuhamilage Dona Magiperera and her daughter Rajapakshe Appuhamilage Dona Emilda Perera (the petitioner of this application). Prior to the publication of the said Notice under Section 7, the petitioner requested for the divesting of an unutilized parcel of 9.25 perches of the total extent of 1 rood and 20 perches originally vested. The original request for the divesting Order was made by letter dated 30.12.2013 by the petitioner to the Divisional Secretary.
3. The said land was originally acquired for the purpose of providing parking for the local authority, namely the Municipal Council of Nuwara Eliya. This portion of land, admittedly, remains unutilized for the

purpose acquired and is not required for any other public purpose either. The Divisional Secretary has by his letter dated 09.08.2011 informed the Municipal Commissioner that the unutilized portion be surveyed and demarcated and accordingly Plan bearing No. 1706B was prepared. The said parcel of land is now separately defined and demarcated and depicted as Lot No. 2 in Plan No. 1706B prepared by licensed surveyor R. Wickramasinghe dated 20.02.1987 (P-2).

4. The said request for divesting had been considered by the Divisional Secretary and the Municipal Council of Nuwara Eliya, and as the said portion of land had not been utilized for the original public purpose acquired and not required for any other, it was decided have the same divested. Then as stated above, upon so determining the request and the recommendation for divesting had been made to the 1<sup>st</sup> respondent the Minister of Lands, by the Chief Secretary of the Central Province by letter, dated 30.12.2015, bearing Reference No. සිසිසි/සිඑස්/1/21/08/15.
5. When the divesting Order was pending, the 3<sup>rd</sup> respondent Minister of Provincial Councils and Local Government, has inquired into objections by certain persons who claim to be heirs of Rajapakshe Appuhamilage Dona Magiperera (who was since deceased) and decided to revoke the original recommendation and request to divest. The basis is that the divesting of a part of the original land would affect the rights of the heirs. The 3<sup>rd</sup> respondent has conveyed this to the Minister of Lands by letter P-16, dated 23.11.2016. The divesting has not proceeded thereon. The respondents concede to this in the objections.
6. This application had been filed consequent upon the said decision being made and the petitioner is *inter alia* seeking a writ of *certiorari* to quash the said decision made by P-16, dated 23.11.2016. Paragraph 2 of the said letter confirms that a recommendation to divest 9.25 perches which remained unutilized had been conveyed to the Minister of Lands. The said paragraph reads as follows:

“02. මධ්‍යම පළාත් ප්‍රධාන ලේකම්ගේ අංක සීපීසී/සීඑස්/1/21/08/15 හා 2015.12.30 දිනැති ලිපියෙන් ලබා දී තිබූ නිර්දේශය අනුව ම විසින් ද රාජපක්ෂ අප්පුහාමිලාගේ දෝන එම්ලේඩා පෙරේරා මිය හිමිකම් කියන මෙතෙක් නුවරඑළිය මහ නගර සභාව ප්‍රයෝජනයට නොගත් පර්චස් 9.25ක භූමිය අවසතු කිරීම නිර්දේශ කර උක්ත ලිපියෙන් ඔබ වෙත යොමු කරන ලදි.”

7. Having so said by paragraph 5 thereof, the 3<sup>rd</sup> respondent revokes and cancels the original recommendation to divest, on the basis that divesting a portion would cause injustice to other heirs of Dona Magi Perera. The said paragraph reads as follows:

“05. මෙම කරුණු හා විරෝධතා සැලකිල්ලට ගෙන අත්කරගත් ඉඩමක කොටස් පමණක් අවසතු කිරීමෙන් අනෙක් පාර්ශවයට අසාධාරණයක් සිදුවිය හැකි බැවින් කිසිදු ඉඩමක් අවසතු නොකිරීමට නිර්දේශ කරන බව කාරුණිකව දන්වා සිටිමි.”

8. The relevant arguments advanced in opposition to this application, by the respective learned Counsel on behalf of the respondents, are:

- i) no formal request or application had been made to the 1st respondent Minister for divesting;
- ii) *mandamus* will not lie as Section 39A vests a discretion;
- iii) the petitioner has failed to name all necessary parties;
- iv) a partial divesting of land is not possible upon the statutory interpretation of Section 39A of the Act, especially when the land is co-owned; and
- v) the petitioner has not satisfied all four requirements under Section 39A (2) of the Act; (i.e.; 39A (2) (d) consent in writing to take possession).

**No formal request or application had been made to the 1st respondent Minister for divesting.**

9. The learned State Counsel, as well as the Counsel for the other respondents and the intervenient respondents (now added respondents) in unison argued that the petitioner has failed to make a formal request for divesting to the Minister of Lands who is vested with the power and

discretion to divest under Section 39A of the Act. Section 39A 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.*

10. It is correct that the Minister in charge of the subject of Land is vested with the power of divesting. Whilst a discretion is so vested, it does not expressly provide or specify that the request should be made by any particular person. But in the normal course a request or an intimation requesting a divesting Order should precede an application for a writ of *mandamus*. If a property acquired by a vesting Order has not been utilized, or is not required for the public purpose which it was so acquired, or there be no other public purpose for which the said property is required, then the State will then no longer have the legitimate basis to hold and retain the said land. The Minister is of course vested with a discretion to divest the property under Section 39A provided that the four requirements as prescribed by subsection (2) of Section 39A are satisfied.

11. It is now settled law that the Minister should be satisfied of all the four requirements specified therein (*vide* ***Malkavitage Gerard Perera vs. Ratnayaka Mudiyanseelage Chandrawathi Manike Herath***, CA/WRIT/248/2015, decided on 06.03.2019 by Samayawardhena, J). The said requirements to be satisfied are that compensation had not been paid, the said land has not been used for the public purpose, no improvements have been effected, and that the person or persons

interested in the said land have consented in writing to take possession immediately after the divesting Order is published.

12. In the instant application, it is common ground and evident from the correspondence and documentation that Lot No. 02 depicted in Plan No. 1706B remains unutilised and is not required for any public purpose and is now a defined and demarcated portion of the land acquired. Upon a request being made by the petitioner to the Divisional Secretary of Nuwara Eliya, the Divisional Secretary has considered this request and determined that the said Lot No.02 had not been utilised for the public purpose and is no longer required for any other public purpose, and recommended the divesting of the same. It is the subsequent objection raised by the heirs of Magi Perera (now added respondents) that prompted the Minister of Provincial Councils and Local Government, the 3<sup>rd</sup> respondent, to revoke and recall the request for a divesting Order.

13. It is significant and relevant to note that this decision is evident from letter A-16, dated 23.11.2016, written by the 3<sup>rd</sup> respondent to the Minister of Lands. Paragraph 2 clearly states that by letter dated 30.12.2015, bearing Reference No. CPC/CS/1/21/08/15, the divesting of 9.25 perches had been recommended as the same had not been utilised by the Nuwara Eliya Municipal Council. The said paragraph 2 reads as follows:

“මධ්‍යම පළාත් ප්‍රධාන ලේකම්ගේ අංක සීපීසී/සීඑස්/1/21/08/15 හා 2015.12.30 දිනැති ලිපියෙන් ලබා දී තිබූ නිර්දේශය අනුව ම විසින් ද රාජපක්ෂ අප්පුහාමිලාගේ දෝන එම්ලේඩා පෙරේරා මිය හිමිකම් කියන මෙතෙක් නුවරඑළිය මහ නගර සභාව ප්‍රයෝජනයට නොගත් පර්චස් 9.25ක භූමිය අවසතු කිරීම නිර්දේශ කර උක්ත ලිපියෙන් ඔබ වෙත යොමු කරන ලදි.”

14. This clearly establishes that a request and recommendation had been made to the Minister of Lands to divest a part of the said property that remained unutilised. Therefore, the argument that no request had been made to the Minister, is misconceived and erroneous. Further the 3<sup>rd</sup> respondent has by paragraph 5 of the said letter, purported to cancel or



revoke the said recommendation to divest made by the aforesaid letter dated 30.12.2015. Paragraph 5 reads as follows:

“මෙම කරුණු හා විරෝධතා සැලකිල්ලට ගෙන අත්කරගත් ඉඩමක කොටස් පමණක් අවසතු කිරීමෙන් අනෙක් පාර්ශ්වයට අසාධාරණයක් සිදුවිය හැකි බැවින් කිසිදු ඉඩමක් අවසතු නොකිරීමට නිර්දේශ කරන බව කාරුණිකව දන්වා සිටිමි.”

15. Therefore a request and recommendation has been made and the same had been cancelled or revoked by the 3<sup>rd</sup> respondent. The petitioner is seeking to quash this decision to revoke or cancel the original recommendation for divesting.

**Has the Minister a discretion under Section 39A? Will a *mandamus* lie where there is a discretion?**

16. Acquiring and vesting of property necessarily results in the deprivation of a private property and infringes upon proprietary rights. Though property rights are not directly enshrined or recognized as a fundamental right, such proprietary rights are well-recognized and established by international instruments. John Locke (1632–1704) who is one of the most influential political philosophers of the modern era considers the right to property as being a natural right. In *Two Treatises of Government*, he propounded and defended the theory that men are by nature free and equal, against claims that God had made all people naturally subject to a monarch. However, he argued that right to life, liberty, and property of the people are natural rights, having a foundation independent of the laws of such society. Locke’s theory is that people surrender their individual rights to the community and not to the government, and yet for all, individuals retain the natural rights of life, liberty, and property [*John Locke, The Second Treatise of Government (1690), The Liberal Arts Press, (New York, 1952)*].
17. These *natural rights* are subject to statutory law. Under the provisions of the LDO, the deprivation of property of private individuals by the State is provided for if such property is required for a public purpose. Thus

upon acquisition, the legitimacy to hold title and retain such title will subsist if and only if such property is utilised or required for such or other public purpose. In the absence of such, the State would not have the legitimacy to continue to keep and retain title of such property. The rationale and the basis of incorporating Section 39A is to enable the divesting of acquired land in such circumstances subject to the satisfaction of the requirements under Section 39A (2).

18. This is buttressed and confirmed by the speech made by the then Minister, Mr. Gamini Dissanayake as he moved the Amendment to the Land Acquisition Act, found in the Parliamentary Hansard Report, dated 04<sup>th</sup> January 1979 (page 104), which is as follows:

*“Under the present Land Acquisition Act it is not possible for me, as Minister, to divest the State of the ownership of land even where representations are made by an Hon. Member of Parliament that the land is not being used for the purpose for which it was taken over. There is no provision under the present law to hand the land back to the owner or possessor of it at the time it was taken over.*

*So, this is a lacuna in the law which we are now trying to fill. This is a very necessary amendment to the law; otherwise, the State will be saddled with the ownership and possession of numerous lands all over the country, taken over for burial grounds and co-operative shops, which are not being used for the purpose for which they were taken over and for which the State has no use. And the person who has been dispossessed is rightly expecting that he will be made the owner of that land once again”* (at page 104 of the Parliamentary Hansard Report, dated 04<sup>th</sup> January 1979).

19. Accordingly, when circumstances exist that such land is not required for the immediate public purpose or any other prospective public purpose, an obligation arises and a duty is cast upon the Minister to

divest the said land. This duty arises and the obligation is imposed upon the Minister on the arising of the said non-requirement for a public purpose. When such a duty is cast upon the Minister, a corresponding right accrues to the original owners to have such property divested. In these circumstances, when a discretion is vested upon the Minister under Section 39A, that discretion ceases to be absolute and unfettered. As held in **Rajeswari Nadaraja vs. Hon. M. Najeed Abdul Majeed and others**, SC Appeal No. 177/2015, decided on 31. 08.2018, Justice Aluwihare, PC, held that the power and discretion to vest as well as divest is held in trust for the public.

20. It was submitted that a *mandamus* will not lie where there is a discretion. The argument was based on the English law principle of Administrative Law pertaining to judicial review of executive action. This principle was adopted and applied in **Kingsley Fernando vs. Dayaratne and Others** [1991] 2 Sri L.R. 129, S. N. Silva, J., as he was then in the Court of Appeal, considering Section 39A (1), opined that the use of the word “*may*” in the statute indicates a permissive rather than a mandatory power and that a discretion is vested in the Minister to divest any land vested under Section 38, provided certain requirements are met. Then it was concluded that Section 39A (1) of the Land Acquisition Act does not grant the former owner a statutory right to demand a divesting Order, *as it merely confers discretion upon the Minister*. Accordingly, it was held that a writ of *mandamus* could not be issued to compel the Minister to exercise his discretionary power. Then in **Alexander Pintuge Abeyratne vs. Minister of Lands, Ministry of Lands Battaramulla and 6 others**, (SC Appeal No.83/08 & 101/08, decided on 01.06.2009), S. N. Silva, C.J., reiterating the above view, held that Section 39A is not amenable to judicial review in an application for a writ of *mandamus*.

21. In both the above decisions of **Kingsley Fernando vs. Dayaratne and Others** as well as **Alexander Pintuge Abeyratne vs. Minister of Lands**, Justice S. N. Silva applied and followed the English law principle

that *obligatory duties are required to be distinguished from discretionary powers, as mandamus has nothing to do with the latter and where there is a discretion, no mandamus will lie.* (Wade on Administrative Law, 8<sup>th</sup> Ed., pg. 609). This principle may be applied in its absolute form in the British Constitutional tradition based on the notion of Parliamentary Sovereignty, whereas in Sri Lanka, Article 3 of the Constitution provides that “*In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and franchise,*” providing that sovereignty is in the People. In the Supreme Court determination ***In Re the Nineteenth Amendment to the Constitution*** (2002) 3 Sri L.R, at page 97, it was held that, “...*power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People.*” Thus, under the Sri Lankan Constitution, it is the People who are sovereign and the particular organ of government being a part of the State is merely holding the power of the sovereign People **in trust** as custodian.

22. When power, be it discretionary or otherwise, so vested in public authorities are held in public trust, it must be exercised for the purposes for which they were granted. The legitimacy to vest and hold such land is singularly the existence of the requirement of such land for a public purpose. The State is not entitled to vest or retain such property if it is not required for a public purpose. When circumstances stipulated by Section 39A (2) are shown to exist, the Minister is then obligated and duty bound to act under 39A (1) and make a divesting Order. This is so as the discretion ceases with the loss of the legitimate basis to hold such land due to the absence of the critical requirement of a public purpose, as the State is reposed with such powers ‘in trust’ and required to exercise the same for the benefit of the People. Accordingly, I find that, when the requirements under Section 39A (2) are shown to be present, then, it obligates and imposes a **duty** on the Minister to **exercise that discretion in a particular manner.**

23. In ***Silva and others vs. Minister of Lands and Land Development and Minor Exports and others***, Srisikandarajah, J., issuing a writ of *mandamus* directing the 1<sup>st</sup> respondent Minister of Lands to revoke the vesting Order under Section 39 opined that,

*“...when the public purpose is not in existence and the authority which had sought the acquisition has no other identified public purpose for which it could be used it is the duty of the Minister to revoke the vesting Order if the possession of the land has not been taken over by the State.”*

Thus, with the preconditions under Section 39A (2) shown to be present, the discretionary power of the Minister becomes an obligatory duty. If such power under Section 39A (1) to divest is then not exercised, such action or inaction is amenable to writ and compellable by *mandamus*.

24. I observe that in both decisions of ***Kingsley Fernando vs. Dayaratne and Others*** as well as in ***Alexander Pintuge Abeyratne vs. Minister of Lands and 6 others***, Justice Sarath N. Silva, has failed to consider or advert to the public trust doctrine in the above context. However, in contrast, I find that in the decisions of ***De Silva vs. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another*** [1993] 1 Sri L.R. 283 and ***Rashid v. Rajitha Senaratne, Minister of Lands and Others*** [2004] 1 Sri L.R 312, Justice Mark Fernando, considering the discretion vested by Section 39A and advert to the public trust doctrine has concluded that it is amenable to and is enforceable by *mandamus*. In ***De Silva vs. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another*** (supra), Justice Mark Fernando considered the discretion vested by Section 39A, and whilst acknowledging the Minister's discretionary power to divest if the statutory conditions are met, His Lordship held that the power to divest was deemed

*“...a power conferred solely to be used for the public good, and not for his personal benefit; it is held in trust for the public; to be*

*exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest."*

25. In ***Rashid vs. Rajitha Senaratne, Minister of Lands and Others*** (supra), the above principle was followed and affirmed, and held that, to compel a divesting Order under Section 39A, the critical factor is whether the land has been used for a public purpose after possession was taken, and whether improvements have been made. The Minister's failure to assert a continuing public purpose for the land or deny that the conditions for divesting were met, especially after a prolonged period of non-use, supported the appellant's claim for divesting; and the appellants were granted and issued a writ of *mandamus* directing the Minister to divest under Section 39A (1).

26. Similarly, in ***Rajeswari Nadaraja vs. Minister of Industry and Commerce and Co-operatives Development and Others***, (SC Appeal No. 177/2015, decided on 31.08.2018), Justice Aluwihare, P.C., considering a similar provision under the Co-operative Societies (Special Provisions) Act No. 35 of 1970, in relation to a 'Derequisition Order' held that;

*"The discretion vested in the Minister in this regard does not mean that he is empowered to withhold issuing the order as he pleases. Where circumstances warrant ... the law imposes a duty to exercise that discretion in a particular manner - which in the present case is a derequisitioning order. Where there is a failure in this regard, that duty would be made enforceable by a mandamus."*

27. Justice Aluwihare then emphasized that statutory powers, even if phrased with "*may*" are conferred "*upon trust*" for public purposes and must be exercised in the "*right and proper way*" intended by Parliament. Crucially, His Lordship ruled that when the factual circumstances clearly indicate a departure from the legislative intent, the law discerns

a **duty to exercise that discretion in a particular manner, enforceable by mandamus.**

28. I am convinced and inclined to follow ***De Silva vs. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another*** [1993] 1 Sri L.R. 283, ***Rashid vs. Rajitha Senaratne, Minister of Lands and Others*** [2004] 1 Sri L.R 312, and ***Rajeswari Nadaraja vs. Minister of Industry and Commerce and Co-operatives Development and Others***, [SC Appeal No. 177/2015, decided on 31.08.2018].

### **Objections by heirs; are heirs necessary parties?**

29. The said heirs were permitted to intervene. Let's now consider if the concerns and objections of the heirs warrant or justify the non-divesting of the said unutilised portion of the land. The persons objecting are the heirs of Magi Perera. Magi Perera along with the petitioner, were the persons interested in the land at the time of the vesting. Magi Perera died on 13.03.1986 after the vesting Order was made. The legitimate basis or the *locus* of the heirs to object arises only if they have a legal right or an interest in the said land at the point of raising such objection. The immediate issue for determination is whether they were entitled to any portion or part of the vested land *qua* heirs at the point of so objecting. In determining this issue, the provisions of Section 39A (4) and Section 40, are relevant. The said provisions specify the effect and import of the vesting Order published under Section 38 and that of a divesting Order under Section 39A (4), which reads as follows:

*(4) The following provisions shall apply in any case where any land vested in the State by a vesting Order referred to in subsection (1) is subsequently divested by a divesting Order under the said subsection:*

*(a) that land shall be deemed never to have vested in the State by virtue of that vesting Order;*

*(b) every right, title, or interest in or over that land of a person interested in that land existing at the time the vesting Order was published in the Gazette shall be deemed not to have been extinguished and every such right, title or interest shall be valid and enforceable notwithstanding such vesting Order;*

*(c) the person or persons interested in that land at the time the vesting Order was published in the Gazette shall forthwith be restored to possession of the said land;*

*(d) all claims made under this Act to the compensation payable in respect of that land and all proceedings taken under this Act in relation to such claims before the divesting Order took effect shall be deemed to be null and void;*

*(e) no fresh claims to compensation in respect of that land and no claim for damages against the State, a public officer or the Minister by any person or persons interested in that land at the time the vesting Order was published in the Gazette or subsequent thereto, shall be entertained or allowed in any court or tribunal; and*

*(f) the preceding provisions of this section shall have effect notwithstanding anything in any other provision of this Act or in any other written law.*

30. Section 40 reads as follows:

*40. When an Order of the Minister under section 38 is published in the Gazette, then*

*(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 authorized 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 utilized for the public purpose for which it was acquired, on and after the aforesaid date.*

31. Accordingly, when an Order is made under Section 38, the land shall vest in the State absolutely, free from all encumbrances, with effect from that date. Correspondingly, the original persons interested or the owners would cease to have any right, title, or interest in the said land by virtue of said vesting Order. Therefore, both Magi Perera as well as the petitioner were relieved of any right, title, or interest with effect from 29.11.1982. The necessary consequence of this deprivation are that both of them ceased to have any right, title, or interest and will not have any such right, title, or interest until or unless a divesting Order is published in the Gazette under Section 39A.

32. In these circumstances, at the point of the demise of Magi Perera, she did not have any right, title, or interest or any proprietary rights of whatever nature or ownership in respect of the corpus of this application. That being so, when Magi Perera has nothing, the heirs inherit nothing. Therefore, in law, until and unless a divesting Order is made, the heirs will not have any rights inherited *qua* heirs of the original owner. This is so, as Section 39A (4)(a) clearly states that upon the divesting Order being published *land shall be deemed never to have vested in the State*. This deeming provision is required as the Law does not and cannot recognize an interval between the passing of property at any point of time. In **Welgama vs. Wijesundera (2006) 1 Sri L R 110**, this requirement of law is expounded as follows:

*“The Law does not and cannot recognize an interval between the death and the passing of property, since rights and obligations, from which perspective only, property and legal relationships are*

*identified in law, have to be, at any given point of time vested or reposed in a person or legal entity.”*

33. However, nothing accrues to heirs until a divesting Order is made.

Section 39A (4) (b) provides that the right, title, or interest over the land of the person interested that existed at the time of the vesting Order shall be deemed not to have been extinguished. Similarly, it provides that such right, title, or interest thereonwards, shall be revived valid and enforceable notwithstanding the vesting Order. This puts it beyond doubt that until and unless a divesting Order is published in the Gazette, the heirs will have no legal entitlement of inheritance. As stated above, upon the divesting Order being made, such persons’ right of inheritance will revive in view of the deeming provisions. Thus, legally, the prospective heirs will have no standing or a legitimate basis to object to the divesting on the said basis.

34. The intervenient parties (now added respondents) have annexed copies of decisions made under Section 10 (1) (a) of the Land Acquisition Act, where the Divisional Secretary has determined the entitlements to compensation of the heirs. On this basis, the added respondents attempt to argue that they have an interest which enables them to object to the divesting. The legal basis of their entitlement to compensation is that with the vesting Order, the original owners, namely Magi Perera and the petitioner, acquired and accrued the right to compensation. This acquired right and entitlement to compensation remained with Magi Perera at the point of her demise. It is this entitlement that became a part of her estate and the heirs became entitled to. Therefore, the entitlement to compensation does not create or support any right, title, or interest in the land vested in the State.

35. Any rights or entitlements to the vested property may accrue and enure to the heirs of Magi Perera only upon divesting. If such heirs desire to pursue and vindicate their interests, the remedy is to resort to the

relevant civil action, to vindicate any of their rights, title, or interest. Subject to this, there is no legal right or standing for the prospective heirs of a deceased interested person (owner) to object to a divesting. Correspondingly, such objection by possible heirs is not a ground that inhibits or prevents the Minister from making a divesting Order if the conditions stipulated by Section 39A (2) are satisfied.

36. The respondents as well as the added respondents argue that if a portion is carved out and divested, it would cause prejudice to the heirs who claim to be co-owners of the larger portion as well. This argument, to my mind, is totally misconceived and has no legal basis. Even when a portion of a larger land is divested, if there be any co-owners, each of them would be entitled to their share on a proportionate basis from the portion which is so carved out and divested. Therefore, there cannot be any prejudice as alleged by the added respondents as well as the respondents. Accordingly I hold that the heirs are not necessary parties to this application.

### **Divesting of a part of the land vested.**

37. It was the submission of learned Counsel for the respondents that the divesting of a part of the land vested is not lawful and it should be the entirety of the land covered by the vesting Order. S. N. Silva, J., in **Kingsley Fernando vs. Dayaratne and Others** (supra), observed that;

*“Section 39A (1) empowers the Minister to “divest” the State of the land so vested by the vesting order. The vesting order referred to is that made under Section 38. It is clear from the papers filed in the previous application that there was one vesting order in respect of the entire extent of 12 acres. Therefore, I am inclined to agree with the submission of Learned Counsel for the Respondents that the divesting was to relate to the entire extent covered by the vesting order. This view is further supported by Section 39A (4) (a) which provides that upon a divesting order that land shall be deemed never to have vested in the State by virtue of the vesting*

*order. Hence 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.”*

38. As opposed to that in ***De Silva vs. Atukorale, Minister of Lands, Irrigation, and Mahaweli Development and Another*** (supra), the divesting was ordered in respect of a part of the original land acquired. In the said application, a total of seven allotments of land, consisting of 19 acres, 1 rood and 23.8 perches in extent were acquired. That too, had been co-owned land. Possession had been taken and handed over to the Urban Development Authority. The public purpose was for the Bibile Town Development Project. However, at a particular point of time, the implementation of the said project had been suspended for the non-availability of funds. Simply, it was a failure to utilise the land for the intended public purpose. It was held that the only provision under which the Minister could have acted is Section 39A, and to divest, provided that the four requirements under subsection (2) were satisfied. The land was acquired for the purpose of construction of a proposed shopping complex. It was observed that 19 acres of land is far beyond the requirement to satisfy this public purpose, and the Supreme Court upheld the divesting of a part thereof. His Lordship held thus;

*“However, in his affidavit in the Court of Appeal, he sought to justify his inaction on the different, but patently erroneous, basis that the land was required for a shopping Complex ignorant or forgetful of the fact that the land was over 19 acres in extent while the complex required only about 3% of that extent; a manifestly erroneous basis for his refusal to exercise his discretion. The affidavits and documents produced, show, beyond doubt, **that had the matter been considered properly, the 1st respondent had no option but to make a divesting order, retaining only the land actually required for the shopping complex, subject to compliance with section 39A (2) (d).**”* (emphasis added)

39. Accordingly, there are two lines of authority. As aforesaid, Justice S.N. Silva in ***Kingsley Fernando vs. Dayaratne and Others*** has not considered the public trust doctrine, whereas, Justice Mark Fernando in ***De Silva vs. Atukorale, Minister of Lands, Irrigation, and Mahaweli Development and Another*** having considered the same, has made a specific Order to divest a portion of the land originally vested. In fact, when it was opined that “*the 1<sup>st</sup> respondent had no option but to make a divesting order, retaining only the land actually required for the shopping complex, subject to compliance with section 39A (2) (d),*” it simply is that divesting of an unutilised portion is not only lawful but is mandatory. This is a necessary consequence arising from the loss of the basis of legitimacy due to the failure to utilise such vested land for a public purpose. This is exactly what Justice Mark Fernando opined.

40. Section 39A (1) does specifically refer to ‘such land’. However, when this is considered in conjunction with the public trust doctrine and the above dicta, if such land or a portion thereof is not utilised and not required for any public purpose, by operation of these legal principles the State loses its legitimate basis to hold and retain such unutilised portion and the State is then obligated and mandated to divest such portion or part thereof which remains so unutilised. Accordingly, it should necessarily follow that ‘such land’ in Section 39A(1) necessarily means and includes the divesting the entirety or such unutilised part or portion thereof. Any other interpretation would lead to the absurdity of the State having to hold and retain a parcel of land which the State is not legitimately entitled to retain. Correspondingly, this will deprive the legitimate right of the original owner to effectively obtain his lawful entitlement by divesting of such parcel of land that remains so unutilised. Accordingly, I hold that the divesting of a part of the land is lawful and possible.

#### **Consent in writing to take possession [Section 39A(2)(d)].**

41. Section 39A (1) of the Land Acquisition Act empowers the Minister to divest any land that has vested upon an Order under Section 38 and

when possession has been taken under Section 40 (a) on behalf of the State. However this is subject to the conditions stipulated in paragraphs (a) to (d) of Section 39A (2) namely: (a) no compensation has been paid; (b) the said land has not been used for a public purpose; (c) no improvements to the said land have been effected; 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.

42. It was submitted that the written consent stipulated by **Section 39A (2) (d)** to take possession of such land is not provided in that form. Let's now consider the basis and rationale of requiring the consent in writing to take possession immediately after a divesting Order is published in the Gazette. Divesting under Section 39A arises only if possession of the land has been taken over by the State. In these circumstances, with the divesting Order being published the possession held by the State, will also come to an end and unless an interested person takes possession, it would lead to a situation of the land being in a state of limbo, not being in the possession of any person. It is to ensure that the possession is returned and handed over to the interested persons and thereby revert to the *status quo ante* immediately preceding the vesting Order that such a provision was so required. This is further confirmed by Section 39A (4) (c) where it provides that the person or persons interested in the land, at the time the vesting Order was made and published, to forthwith be restored to possession.

43. On a perusal of the petition I observe that the petitioner, by letter dated 10.04.2011 (P-11), has made a request for the divesting of 9.25 perches. Then the petitioner has also tendered the affidavit P-16 to the respondents by which, at paragraph 7 thereof, the petitioner specifically informs as follows:

“මෙම ඉඩම් ප්‍රමාණය නැවත ධාර ගැනීමට මගේ කැමැත්ත ප්‍රකාශ කරන අතර, ඒ අනුව, පළමුව ඉහත කී පර්චස් 9.25ක ඉඩම් ප්‍රමාණය නැවත මා වෙත මුදවා හරින ලෙස ගෞරවයෙන් ඉල්ලා සිටිමි.”

This clearly is an expression of the consent to take possession. According to paragraph 44 of the petition, this affidavit has been submitted to the 6<sup>th</sup> respondent Divisional Secretary. This satisfies the condition stipulated by Section 39A (2) (d).

## Conclusion

44. In the above circumstances, it is common ground that Lot No. 2 depicted in Plan No. 1706B is a defined and demarcated portion of land, that which was originally vested. It is also not in dispute that the said Lot No. 2 remains unutilised and is no longer required for any public purpose. Similarly, all other requirements specified by Section 39A (2) are also satisfied. Accordingly, the petitioner is entitled as of right, and the 1<sup>st</sup> respondent Minister is under an obligation and duty to make a divesting Order under Section 39A (1).

45. In the above premises, I hold that the petitioner is entitled to a writ of *mandamus* directing the 1<sup>st</sup> respondent and his successors in office to revoke the vesting Order made and published in the Extraordinary Gazette bearing No. 221/3, dated 29.11.1982, in respect of Lot No. 2 of Plan No. 1706B prepared by P. Wickremasinghe, Licensed Surveyor, being 9.25 perches. Further, the petitioner is entitled to a writ of *certiorari* to quash the purported revocation of the recommendation, depicted in letter dated 23.11.2016 of the 3<sup>rd</sup> respondent. Accordingly I hold that the petitioner is entitled to relief sought by prayers (c) and (d).

46. Accordingly,

- (i) a writ of *certiorari* is hereby issued quashing the decision reflected in the letter addressed to the 1<sup>st</sup> respondent dated 23.11.2016, by the 3<sup>rd</sup> respondent to revoke the original recommendation and the request to divest the said land defined, demarcated, and

depicted as Lot No. 02 in Plan No. 1706B, prepared by P. Wickremasinghe, Licensed Surveyor, being 9.25 perches; and

- (ii) a writ of *mandamus* is hereby issued directing the 1<sup>st</sup> respondent to issue a divesting Order under Section 39A (1) of the Land Acquisition Act in respect of the portion of land defined, demarcated, and depicted as Lot No. 02 in Plan No. 1706B, prepared by P. Wickremasinghe, Licensed Surveyor, being 9.25 perches.

47. Application is allowed to that extent, however no order is made as to costs.

**JUDGE OF THE COURT OF APPEAL**