

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

W.A.D. Siriwardana,
No.466/5/7/7,
Sea Street,
Colpetty,
Colombo 03.
Petitioner

CASE NO: CA/WRIT/251/2017

Vs.

1. Gayantha Karunathilake,
Minister of Lands,
Mihikatha Madura,
Land Secretariat,
No.1200/6, Rajamalwatta Road,
Sri Jayawardhenapura Kotte.
2. Dr. W.H. Karunaarathna,
Secretary to the Ministry of
Lands,
Mihikatha Madura,
Land Secretariat,
No.1200/6, Rajamalwatta Road,
Sri Jayawardhenapura Kotte.

3. Mahinda Amaraweera,
Minister of Irrigation and
Agriculture,
Ministry of Irrigation and
Agriculture,
No.80/5,
Govijana Mandiraya,
Rajamalwatta Road,
Battaramulla.
 4. B. Wijayarathna,
Secretary to the Ministry of
Irrigation and Agriculture,
Ministry of Irrigation and
Agriculture,
No.80/5,
Govijana Mandiraya,
Rajamalwatta Road,
Battaramulla.
 5. Divisional Secretary,
Divisional Secretariat – Kaduwela,
Malabe.
 6. Attorney General,
Attorney General's Department,
Hulftsdorp,
Colombo 12.
- Respondents

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

Counsel: Reshaal Seresinhe with Lasodha Siriwardhane
for the Petitioner.
Suranga Wimalasena, S.S.C., for the
Respondents.

Argued on: 25.06.2020

Decided on: 24.07.2020

Mahinda Samayawardhena, J.

There is no dispute the Petitioner's land was acquired under the provisions of the Land Acquisition Act, but compensation was not paid to him.

As seen from the Gazette marked P6, a vesting order had been made by the 1st Respondent Minister of Lands in 1979. For the purpose of acquisition, Preliminary Plan No.5415 marked R6 was prepared. According to paragraphs 17 and 18 of the statement of objections of the Respondents, the Petitioner's land is identifiable in the said Preliminary Plan:

17. However upon the Petitioner's continued requests to be paid compensation for land acquired under the P.Plan 5451, Plan no 1552 of the Petitioner was superimposed upon the P.Plan 5451 and Plan CO/KDW/2005/470 dated 10.05.2006 has been prepared, which is marked X2 and is pleaded as part and parcel hereof.

18. Upon the said plan CO/KDW/2005/470, it was apparent that the land of the Petitioner identified in Plan 1552 was within the land identified in P.Plan 5451.

The Respondents admit in paragraph 14(h) of the statement of objections:

The Petitioner has neither been called for inquiry (into payment of compensation) under section 9 of the Act nor paid compensation subsequent to an inquiry under section 10(1) of the Act.

As seen from P12 and P13 issued in 2010, the 1st Respondent Minister admits the following:

- (a) the Petitioner's land, acquired several years ago, has not been used for any public purpose;
- (b) no improvements have been effected to the land;
- (c) no compensation has been paid to the Petitioner;
- (d) the Petitioner has consented to take possession of the land;
- (e) a divesting order can be made.

For clarity, let me quote the relevant portions of the said two letters.

In P12 the Minister *inter alia* states:

ඉහත අංක 5415 දරණ පිඹුරේ කැබලි අංක 1 තුලට ගැනෙන අක්කර 2 රූඩ් 02 පර් 32.5 ක ප්‍රමාණයෙන් යුත් ඉඩම් කැබැල්ලට ඉහතකී

සිරිවර්ධන මහතා හිමිකම් පාන අතර ඔහුට වන්දි නොගෙවූ බව දේපල හිමිකරුගේ ඉහතකී ඇටෝනි බලපත්‍ර ලාභී ප්‍රකාශ කරයි. එහෙත් මෙම කැබැල්ලෙහි කිසිම සංවර්ධන හෝ වැඩිදියුණු කිරීමේ කටයුත්තක් මෙනෙක් ආරම්භකර නොමැති බවත්, එය රජයේ ප්‍රයෝජනයට භාජනය කොට නැති නිසාත් දේපල හිමිකරු එම ඉඩම් කැබැල්ල ආපසු ලබාගැනීමට එකඟතාවය ප්‍රකාශ කරමින් එම ඉඩම් කැබැල්ල අවසතු කරදෙන ලෙස මාගෙන් ඉල්ලීමක් කර තිබේ.

ඉහත කරුණු අනුව රජයට පවරාගෙන මෙනෙක් වන්දි නොගෙවා සංවර්ධන කටයුත්තකට යොදා නොමැති මෙම ඉඩම් කැබැල්ල අවසතු කිරීම සුදුසු බව පෙනී යන බැවින් ඉහතකී අක්කර 2 රූඩ් 2 පර් 32.5 කින් ඉඩම් කැබැල්ල අවසතු කිරීම පිණිස ඔබගේ එකඟතාවය කාරුණිකව අපේක්ෂා කරමි.

In P13 the Minister *inter alia* states:

මෙම කරුණු සලකා බැලීමේදී ඉඩමේ හිමිකාර සිරිවර්ධන මහතාට අසාධාරණයක් සිදුවී තිබෙන බව පෙනීයන බැවින් මෙනෙක් වන්දි ගෙවා නැති ඔහුගේ ඉඩම් කොටස අවසතු කරදීම හෝ වන්දි ගෙවීම සිදුකළ යුතු වේ. අවසතු කිරීම සඳහා කෘෂිකර්ම අමාත්‍යතුමාගේ එකඟත්වය ලැබී නැති නිසා සිරිවර්ධන මහතා වෙත ලැබිය යුතු වන්දි මුදල් ගෙවීමට කටයුතු කරන ලෙස කඩුවෙල ප්‍රාදේශීය ලේකම්වරයාට උපදෙස් දෙන ලෙස දන්වමි.

After the said acquisition under the Land Acquisition Act by the Minister of Lands in 1979 (on behalf of the Urban Development Authority), the same land was again acquired in 1997 by the Minister of Lands, as seen from the Gazette marked R2(2). Why there was a second acquisition remains a mystery; learned Senior State Counsel appearing for the Respondents is unable to explain the reason for it.

In the letter marked X, tendered with the counter affidavit of the Petitioner, the 5th Respondent Divisional Secretary of Malabe *inter alia* admits:

- (a) the Petitioner's land is included in Preliminary Plan No.5415;
- (b) the Petitioner has not been paid compensation;
- (c) the Petitioner's request (for divestiture or payment of compensation) is reasonable;
- (d) alternatively, the Petitioner can be given another portion of land.

Let me quote paragraphs 7 and 8 of the said letter for better understanding.

07. ඒ අනුව සිරිවර්ධන මහතාගේ ඉඩම් කොටසක් කො.5415 දරණ මූලික පිඹුර තුළ ඇතුළත් බව ඔහුගේ ඉල්ලීම සම්බන්ධයෙන් කටයුතු කිරීම සඳහා වරින් වර කරන ලද මැනීම් කටයුතු අනුව තහවුරු වේ. එසේ වුවද පළමුවරට රජයට ඉඩම් අත්කර ගන්නා අවස්ථාවේ පවත්වන ලද වන්දි හිමිකම් පරීක්ෂණ සඳහා ඔහු ඉදිරිපත්ව නොමැති බවත්, වන්දි පොළී ගෙවා අවසන් වීමෙන් පසු ඔහු ඉදිරිපත්ව ඇති බවත් ගොනුව අනුව තව දුරටත් පැහැදිලි වේ.

08. කෙසේ වුවද මෙම අයගේ ඉඩමෙහි කොටසක් රජයට අත් කර ගෙන ඇති බවත්, වන්දි ගෙවා නොමැති බවත් පැහැදිලි වන බැවින් ඔහුගේ ඉල්ලීම ඉටු කිරීම සාධාරණ බවද පෙනී යයි.එහෙත් මේ වන විට වන්දි ගෙවීම් අවසන් කර ඇති බැවින් ඔහුගේ ඉඩම් රජයට අත්කර ගන්නා අවස්ථාවේදී කරන ලද වන්දි තක්සේරුව අනුව ඔහුට හිමි විය යුතු වන්දි

මුදල ගණනය කර ඊට සමාන බිම් කොටසක් අවසතු කිරීම විකල්ප යෝජනාවක් ලෙස ඉදිරිපත් කරමි.

The said letter sent by the 4th Respondent is dated 04.07.2018. It is the same Officer who filed the corresponding affidavit dated 26.09.2018 to the statement of objections of the Respondents.

With regard to non-payment of compensation to the Petitioner, the position of learned Senior State Counsel for the Respondents is the Petitioner did not make his claim to the acquiring officer within the time period allowed in the Act. The Respondents state in paragraph 14(f)-(h) of the statement of objections “*the Respondent issued Notice under section 7 of the Land Acquisition Act*” and a total of 35 claimants had been called for inquiries under section 10(1) of the Act, of whom 27 were paid compensation.

It is the position of the Petitioner that he was totally unaware of such an inquiry for payment of compensation and he was not served with notice. Learned Counsel for the Petitioner draws the attention of the Court to section 17 of the Act to formulate the argument that the acquiring officer shall give written notice to persons entitled to compensation. Clearly, section 17 has no application in this context, as the written notice referred to therein relates to the award of compensation made after the inquiry under section 9 of the Act.

However, in my view, in the facts and circumstances of this case, the contention of the Petitioner that he was unaware of the inquiry is acceptable. Let me explain.

After the initial procedure for acquisition has been followed as laid out by the Act, the acquiring officer shall, in terms of section 7, cause notice to be published in the following manner:

- (a) in the Gazette in the Sinhala, Tamil and English languages, and
- (b) if the value of the land exceeds five hundred rupees, in a Sinhala newspaper, Tamil newspaper and an English newspaper, and
- (c) cause the notice in those languages to be exhibited in some conspicuous place on or near the land.

In the notice under section 7, the acquiring officer shall *inter alia* state/direct:

- (a) claims for compensation for the acquisition of the land may be made to the acquiring officer,
- (b) the date, time and place for persons interested in the land to appear before the acquiring officer for an inquiry into claims for compensation, and
- (c) particulars of such claims to be made at least seven days prior to the date scheduled for the inquiry.

The Respondents have tendered only the document marked R7(1) to prove compliance with section 7 of the Act. The said document reads as follows:

මගේ අංකය: අත් 19/15
 1981 දෙසැම්බර් මස 30 වැනි දින,
 කොළඹ දිසාපති කාර්යාලයේ දී ය.

1964 අංක 28 දරණ ඉඩම් අත්කරගැනීමේ (සංශෝධන) පනතින් සංශෝධිත පරිදි
 ඉඩම් අත්කරගැනීමේ පනතේ 7 වන වගන්තිය යටතේ දැන්වීමයි.

මෙහි පහත සඳහන් උපලේඛනයේ විස්තර කරන ඉඩම් රජයට ලබාගැනීමට
 බලාපොරොත්තු වේ. වැඩි විස්තර සඳහා වර්ෂ 19ක්වූ මස වැනි දින අංක දරණ ශ්‍රී
 ලංකා ජනරජයේ ගැසට් පත්‍රයේ (III) කොටස බලන්න.

උපලේඛනය

ප්‍රා.ආ.නි.කොට්ටාශය: කඩුවෙල

ගම: බත්තරමුල්ල දකුණ

පිහිටීම: බත්තරමුල්ල තලංගම සු.න.ස. සීමාවතුල

ඉඩමේ නම: දියවන්නා වගුර

මූලික සැලැස්ම අංකය: කො.5415

කැබලි අංක: 1-4

එච්.සී.ගුණවර්ධන
 කොළඹ දිස්ත්‍රික්කයේ අත්කරගැනීමේ
 නිලධාරී හා දිස්ත්‍රික් ඉඩම් නිලධාරී.

The document R7(1) reproduced above is not proof of publishing and exhibiting notice in the Gazette, newspapers and on the land. The Respondents state in paragraph 14(f) of the statement of objections “*the Respondent issued Notice under section 7 of the Land Acquisition Act a copy of which is annexed as R7(1) and is pleaded as part and parcel hereof.*” It is not clear what the

Respondents mean by “*issued notice under section 7 of the Act*”. They do not say notice was published and exhibited in the Gazette, newspapers and on the land.

In the facts and circumstances of this case, it is my considered view “*notice to persons interested*” under section 7 of the Act has not been properly given by the acquiring officer in terms of the express provisions of the Act.

De Smith recognises the imperative nature of certain procedural requirements, stating:

*Some classes of procedural requirements are so important that they will nearly always be held to be “mandatory”. For example, an authority which fails to comply with a statutory duty to give prior notice or hold a hearing or make due inquiry or consider objections in the course of exercising discretionary powers affecting individual rights will seldom find the courts casting an indulgent eye upon his omissions. Non-compliance or inadequate compliance with an express duty to give particulars of rights of appeal may render an administrative determination invalid. A provision requiring consultation with named bodies before a statutory power is exercised is also likely to be construed as mandatory.*¹

De Smith goes on to state:

Thus, where powers are conferred to issue orders or certificates that affect civil liberties or rights to compensation, the courts have insisted that the decision-

¹ De Smith’s *Judicial Review* (8th Edition), pp.275-276.

*maker must closely observe all material requirements as to form.*²

However, De Smith immediately thereafter acknowledges, whereas formalities pertaining to *inter alia* notices were previously construed literally and rigorously, the Court is at present more likely to pardon omissions if no substantial prejudice is caused to the affected party.

Given the facts and circumstances of this case, I am of the view substantial prejudice has been caused to the Petitioner due to non-adherence to the provisions of publishing notice under section 7.

As I have already stated, the acquiring officer refuses to pay compensation because the Petitioner did not come forward at the right time. This is unacceptable in view of the abovementioned facts.

However, the Petitioner in the prayer to the petition does not seek compensation.

As seen from X1 tendered by the Respondents with the statement of objections, the Petitioner has been agitating for relief with the proper authorities since at least 1983. The documents marked P9, P10, P14, P15, P16, P17, P21, X, clearly establish this position. The Petitioner has not been sleeping over his rights.

² *De Smith's Judicial Review* (8th Edition), p.276.

By filing this application, the Petitioner seeks to compel the 1st Respondent Minister by a writ of mandamus to make a divesting order in his favour under section 39 of the Act.

In terms of section 39A(2) of the Act, the Minister can make a divesting order upon satisfaction of four criteria.

- (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.*

If the said four criteria are satisfied, the Court can by mandamus compel the Minister to make a divesting order. *Vide J.K. Anura Banda Piyaathna v. Minister of Lands and Land Development*;³ *E.M.P. Erandathi Ratnayaka v. Minister of Lands*

³ CA/WRIT/344/2012, CA Minutes of 20.02.2020.

and Land Development;⁴ and *N.W. Leelawathi v. Minister of Lands and Land Development*.⁵

In light of the contents of the Minister's letters marked P12 and P13 quoted above, I am of the view the Petitioner has satisfied the four criteria stipulated in 39A(2) of the Act. The Petitioner has tendered photographs marked P18-P20, albeit undated, whereby it appears the said land has been left untended and unutilised. The Respondents do not claim either that the said land has been utilised or improved thus far.

At the argument, it was submitted condition (a) under section 39A(2) has not been satisfied because, as seen from R8(1), compensation was paid to *some* persons interested in the land. It was stressed, if compensation has been paid to "*any person or persons*" interested in the land, as specified in condition (a), a divesting order in terms of section 39A(2) cannot be made. I regret my inability to agree with this contention without qualifications.

In the first place, the said argument is against the clear position of the Minister in P12 and P13, whereby he acknowledges that the Petitioner has satisfied all four criteria for divestiture.

Secondly, "*any person*" in section 39A(2)(a) cannot be given an unduly narrow interpretation to the detriment of citizens whose lands have been unreasonably acquired by the State.

⁴ CA/WRIT/302/2014, CA Minutes of 20.02.2020.

⁵ CA/WRIT/306/2014, CA Minutes of 20.02.2020.

Why I say “unreasonably” above is because the land in this case was acquired under proviso (a) to section 38 of the Land Acquisition Act in the year 1979 “*on the ground of urgency*” but has been left undeveloped for more than 40 years. The State or State functionaries cannot use the Land Acquisition Act to irresponsibly take over private lands in the guise of urgency and then let the land stand idle for several decades. That is a betrayal of the public trust doctrine (*vide The Colombo Buddhist Theosophical Society v. The Secretary, Ministry of Education*)⁶.

As held by this Court in *K.P.S.D. De Silva v. L.H.S.C. Silva, Commander of the Sri Lanka Army*,⁷ when a statute can be interpreted in favour of either the subject or the State, the tendency is to interpret it in favour of the former, for it is the fundamental obligation of the State to protect the interests of citizens, for the benefit of whom alone the latter exists. There is a presumption the legislature does not intend what is unreasonable and unjustifiable.

If a large extent of land is acquired for a public purpose, and, for instance, only half of it is used for the said purpose, a divesting order for the remaining portion cannot be refused relying on section 39A(2)(a) on the basis that compensation was paid to the persons whose portions were used for the public purpose. Such an interpretation leads to an absurdity. It is the duty of the Court to give purposive interpretation to the section. If the portion of land sought to be divested can be separated from the rest of the land and no compensation has been paid to any

⁶ CA/WRIT/338/2009, CA Minutes of 28.05.2020.

⁷ CA/WRIT/380/2016, CA Minutes of 19.05.2020.

person in respect of the said portion, in my view, a divesting order shall be made, provided the claimant satisfies the other three requirements stipulated in section 39A(2) of the Act.

Bindra⁸ recognises the importance of interpreting legislation in a manner that avoids injustice but maintains the purpose of the Act:

Where there are two constructions, the one of which will do great and unnecessary injustice, and the other of which will avoid that injustice, and will keep exactly within the purpose for which the statute was passed, it is the bounden duty of the court to adopt the second and not to adopt the first of those constructions...It is a legitimate method of construction to give an Act a liberal meaning if that can be done reasonably. Too literal a construction should not be followed when it leads to an absurdity if a somewhat more liberal construction would lead to an effective application of the Act.

The interpretation of section 39A(2)(a) given above is in consonance with the Judgments of the superior Courts handed down under the Land Acquisition Act. For instance, in the Supreme Court case of *De Silva v. Atukorale*,⁹ nearly 20 acres of land had been acquired under the Land Acquisition Act for the Bibile Town Development Project and compensation was paid for some portions of the land. Several years later, a decision was taken to construct a shopping complex on part of the acquired

⁸ *Bindra's Interpretation of Statutes*, 12th Edition, p.347.

⁹ [1993] 1 Sri LR 283.

land. The application of the Petitioner to issue a writ of mandamus compelling the Minister to divest the land, on the ground that the whole process was politically motivated, was dismissed by the Court of Appeal. On appeal, the Supreme Court did issue mandamus to divest the portion of land not required to construct the shopping complex.

A similar conclusion was reached by this Court in the related cases of *J.K. Anura Banda Piyarathna v. Minister of Lands and Land Development (supra)*, *E.M.P. Erandathi Ratnayaka v. Minister of Lands and Land Development (supra)*, and *N.W. Leelawathi v. Minister of Lands and Land Development (supra)*.

For the aforesaid reasons, I direct the 1st Respondent by way of a writ of mandamus to make a divesting order in favour of the Petitioner in respect of the portions of the Petitioner's land not used for any public purpose up to now. The said portions of the land are admittedly identifiable by Plan No. CO/KDW/2005/470 dated 10.05.2006.

During the course of the argument, learned Counsel for the Petitioner expressed his willingness to accept compensation in lieu of divestiture. The above order shall not stand as an obstacle if both parties come to a compromise in this regard.

The reliefs prayed for in paragraphs (c) and (d) are granted.

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