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

In the matter of an Application for a Writ of Certiorari under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 387/2017

1. N.M. Gunathilake,
   No. 2/E/7,
   Moruthanna Aluthgama,
   Bogamuwa, Yakkala.

2. B.R.J. Kumarihamy,
   No. 2/E/7,
   Moruthanna Aluthgama,
   Bogamuwa, Yakkala.

3. Arachchige Lakshman Susantha Amarasinhge,
   "Crotan" Kandana Road, Ganemulla.

   Presently residing at Scala B,
   Via Gianconio Leodardi, 80125, NAPOLI,
   Italy.
   (By his power of Attorney holder)
   N.M.N. Nilmini Gunathilake,
   "Crotan" Kandana Road, Ganemulla.

PETITIONERS

Vs.

1. Hon. Gayantha Karunathilake,
   Minister of Lands and Parliamentary Reforms,
   Ministry of Lands and Parliamentary Reforms,
   "Mihikatha Medura",
   No. 1200/6, Rajamalwatta Avenue,
   Baththaramulla.

2. Divisional Secretary Gampaha,
   Divisional Secretary's Office, Gampaha.

3. Road Development Authority.

4. A.P.M. Warnakulasooriya,
Project Director,
"UK Steel Bridge Project, 8th Floor,
Wing A, Sethsiripaya, - Stage II,
Battaramulla.

5. D.K.R. Swarna,
Director General,
Road Development Authority,
"Maganaguma Mahamadura",
Denzil Kobbekaduwa Mawatha,
Koswatta, Battaramulla.

6. Hon. Ajith Mannapperuma,
Member of Parliament,
(Gampaha District),
No. 27, Parakrama Road, Gampaha.

RESPONDENTS

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

Counsel: Dr. Sunil Cooray for the Petitioners

Suranga Wimalasena, Senior State Counsel for the Respondents

Argued on: 15th July 2020

Written Submissions: Tendered on behalf of the Petitioners on 28th May 2019 and 20th August 2020

Tendered on behalf of the Respondents on 27th May 2019

Decided on: 21st September 2020

Arjuna Obeyesekere, J

The Petitioners are the owners of the lands referred to in the Schedule to the petition, situated in the Ganemulla town. The Petitioners state that, having obtained the approval of the Gampaha Pradeshiya Sabha in October 2015, they constructed a wedding reception hall on the said premises, at an approximate cost of Rs. 38 million.

In this application, the Petitioners are seeking a Writ of Certiorari to quash the decision of the 1st Respondent, the Minister of Lands to issue the Order marked '**P8**' under proviso (a) of Section 38 of the Land Acquisition Ordinance, as amended (**the Act)**,[1] to take immediate possession of the said lands on the ground of urgency.[2]

As the said decision involves the exception as opposed to the norm, in taking possession of a land that is sought to be acquired under the provisions of the Act, I would like to briefly set out at the outset the procedure that must be followed when the State wishes to acquire a land belonging to a private individual.

Procedure for the acquisition of land

The acquisition process set out in the Act commences with Section 2(1), which reads as follows:

> *"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."*

Thus, in order to initiate the first step in the acquisition process, the State must be satisfied that there is a **necessity** to acquire land for a public purpose, which must therefore be stated in the notice published under Section 2(1).[3] A notice under

[1] Vide paragraph (b) of the prayer to the petition.

[2] Section 38 proviso (a) reads as follows: "The Minister may make an Order under the preceding provisions of this section – Where it becomes necessary to take immediate possession of any land on the ground of any urgency, at any time after a notice under section 2 is exhibited for the first time in the area in which that land is situated or at any time after a notice under section 4 is exhibited for the first time on or near that land."

[3] Vide Manel Fernando and Another v. D.M. Jayaratne, Minister of Agriculture and Lands and Others [(2000) 1 Sri LR 112]; Also see Seneviratne and others v. Urban Council, Kegalle and Others [(2001) 3 Sri LR 105].

Section 2(1) would generally refer to land in any area out of which a particular land is to be chosen pursuant to investigations as to its suitability.

In terms of Section 2(3), any officer authorised by the Acquiring Officer may carry out on any land in the area referred to in Section 2(1), the activity set out in Section 2(3), and all other acts necessary, in order to investigate the **suitability** of that land for the public purpose mentioned in the notice, including the carrying out of surveys, checking the subsoil, demarcating boundaries, etc.

Section 2(3) therefore sets out the second step of the acquisition process, which is to investigate the **suitability** of the land referred to in the Section 2(1) notice for the implementation of the public purpose referred to in such notice.

In terms of Section 4(1), once the Minister considers that **a particular land is suitable for a public purpose**, he shall direct the Acquiring Officer to cause a notice in accordance with Section 4(3) to be given to the owner or owners of that land and to be exhibited in some conspicuous place on or near that land. The notice under Section 4(3) shall state *inter alia* that the State intends to acquire that land for a public purpose, and that **written objections to the intended acquisition** may be made to the Secretary to such Ministry as shall be specified in the notice.

The Supreme Court, in **Manel Fernando and Another v. D.M. Jayaratne, Minister of Agriculture and Lands and Others**[4], held that, "*the object of section 4(3) is to enable the owner to submit his objections: which would legitimately include an objection that his land is not suitable for the public purpose which the State has in mind, or that there are other and more suitable lands.*"

I am of the view that necessity and suitability are but two sides of the same coin, and that the objections of the landowner to the Acquiring Officer can extend to challenging the necessity of an acquisition.

In terms of Section 4(4), where a notice relating to the intended acquisition is exhibited, and objections are made to the Secretary by any persons interested in such land and within the time allowed, **the appropriate Secretary shall consider such objections**, either by himself, or through an Officer appointed by the Secretary.

[4] Supra.

Section 4(4) specifies further that, '*when such objections are considered every objector shall be given an opportunity of being heard in support thereof.*' It is only after the consideration of the objections that the Secretary shall **make his recommendations to the Minister**, which shall be considered by the appropriate Minister, and who is then required to make his own recommendations to the Minister in charge of the subject of lands. In terms of Section 4(5) of the Act, the Minister in charge of the subject of lands (the Minister of Lands / the Minister) shall consider the said recommendations of the Minister at whose request the acquisition had been initiated, and, who shall then **decide whether the land should or should not be acquired** under the Act.

In other words, the Minister of Lands must be satisfied that there is a necessity of a land for a public purpose and suitability of a particular land for that particular purpose, in order to arrive at a decision in terms of Section 4(5) that the land referred to in a Section 4(1) notice must be acquired.

Acquisition of private property, although for a public purpose, is an interference with the property rights of an individual. Hence, the rationale for:

(a) The landowner being granted an opportunity of challenging both the necessity and suitability of his land for the public purpose;

(b) The requirement for the Secretary to afford the landowner a hearing and consider the objections of the landowner;

(c) The requirement for the Minister at whose request the process has been initiated to consider the recommendations of the Secretary, and make his own recommendations; and

(d) The requirement for the Minister of Lands to consider the recommendations of the appropriate Minister, prepared after considering the objections of the landowner, and arrive at a decision whether the land should be acquired in spite of any objections.

It is thus seen that the legislature, in its wisdom, has put in place multiple layers of safeguards to ensure that the necessity and suitability of a land for a public purpose is

examined with utmost care, with the ultimate view of affording a landowner the maximum protection against arbitrary and unfair acquisitions. In fact, these layers of protection foreshadow the next step in the acquisition process.

Section 5 of the Act reads as follows:

> *"(1) Where the Minister decides under subsection (5) of section 4 that a particular land ... should be acquired under this Act, he shall make a written declaration that such land ... is needed for a public purpose and will be acquired under this Act, and shall direct the acquiring officer of the district in which the land which is to be acquired ... is situated to cause such declaration in the Sinhala, Tamil and English languages to be published in the Gazette and exhibited in some conspicuous places on or near that land.*
>
> *(2)* ***A declaration made under subsection (1) in respect of any land ... shall be conclusive evidence that such land ... is needed for a public purpose****.*
>
> *(3) The publication of a declaration under subsection (1) in the Gazette shall be conclusive evidence of the fact that such declaration was duly made."*

Thus, it is my view that:

(a) The processes put in place by Sections 4(4) and 4(5) must be carried out scrupulously in view of the effect that the declaration made under Section 5(1) would have in terms of Section 5(2);

(b) The deference that Court would give to the conclusive nature of a declaration made under Section 5(1) would therefore depend on how compliant the Officials have been of the obligations conferred in terms of Sections 4(4) and (5).

Section 6 of the Act provides that once a declaration is made under Section 5(1), the Acquiring Officer may cause a survey and a plan of that land to be made by the Survey Department.[5]

[5] See Hewawasam Gamage v. The Minister of Agriculture and Lands [76 NLR 25 at page 38] - "*In my opinion section 6 of the Act makes it imperative and obligatory that the acquiring officer should, after the section 5 declaration, cause a survey and a plan of the land to be made, if a plan has not been made under section 2 (3) or if there is no other suitable plan available."*

Payment of compensation to landowners

Although the provisions relating to compensation are not directly relevant to the issue before this Court, I will refer to these provisions in order to highlight the protection that is afforded in the form of compensation to a person whose land has been acquired against his will, as well as to place in perspective the stage at which possession can be taken on behalf of the State.

Section 7(1) of the Act requires the Acquiring Officer to cause a notice in accordance with Section 7(2) to be published in the Gazette in all three languages and cause those notices to be exhibited in some conspicuous places on or near that land.

Section 7(2) reads as follows:

> "*The notice referred to in subsection (1) shall-*
>
> *(a) describe the land ... which is intended to be acquired;*
>
> *(b) state that it is intended to acquire such land ... under this Act and that claims for compensation for the acquisition of such land ... may be made to the acquiring officer mentioned in the notice; and*
>
> *(c) direct every person interested in the land which is to be acquired ... to appear, personally or by agent duly authorized in writing, before such acquiring officer on a date and at a time and place specified in the notice (such date not being earlier than the twenty first day after the date on which the notice is to be exhibited for the first time on or near the land), and, at least seven days before the date specified in the notice, to notify in writing under the hand of that person or any agent duly authorized as aforesaid to such acquiring officer the nature of his interests in the land, the particulars of his claim for compensation, the amount of compensation and the details of the computation of such amount ...."*

The purpose of holding the Inquiry referred to in Section 7(2)(c) is set out in Section 9(1) of the Act.[6] In terms of Section 10(1), at the conclusion of an inquiry held under Section 9, the Acquiring Officer holding the inquiry shall either;

(a) make a decision on every claim made by any person to any right, title or interest to, in or over the land which is to be acquired or over which a servitude is to be acquired and on every such dispute as may have arisen between any claimants as to any such right, title or interest, and give notice of his decision to the claimant or to each of the parties to the dispute; or

(b) refer the claim or dispute for determination as provided for in section 10(2) to the District Court.

Section 17(1) of the Act provides as follows:

> "*The Acquiring Officer who holds an inquiry under section 9 shall, as soon as may be after his decisions under section 10 have become final as provided in that section or after the final determination of any reference made under that section and subject to the other provisions of this section, make an award under his hand determining-*
>
> *(a) the persons who are entitled to compensation in respect of the land or servitude which is to be acquired;*
>
> *(b) the nature of the interests of those persons in the land which is to be acquired or over which the servitude is to be acquired;*
>
> *(c) the total amount of the claims for compensation for the acquisition of the land or servitude;*
>
> *(d) the amount of the compensation which in his opinion should, in accordance with the provisions of Part VI of this Act, be allowed for such acquisition;*[7] *and*

[6] The purposes are, to inquire into the market value of the land sought to be acquired, consider the claims for compensation submitted to the acquiring officer, the respective interests of the persons claiming compensation, and any other matter which needs investigation for the purpose of making an award under Section 17.

(e) the apportionment of the compensation among those persons.

Such Acquiring Officer shall give written notice of the award to the persons who are entitled to compensation according to the award"

Section 22 has provided a landowner dissatisfied with the quantum of compensation with a right of appeal to the Board of Review, and Section 28 of the Act has conferred a landowner who is dissatisfied with the decision of the Board of Review with a right of appeal to this Court, on a question of law.

Taking possession of the acquired land

It is only after an award is made under Section 17 that the Minister may, in the course of an ordinary acquisition, by an Order published in the Gazette in terms of Section 38 (a), direct the Acquiring Officer to take possession of the land, for and on behalf of the State, thus bringing the process of acquisition to a closure. The above provisions demonstrate that the State cannot take possession of the land that is sought to be acquired, until and unless:

(a) It is satisfied of the **necessity** of the land for the public purpose specified in the Section 2 notice;

(b) It is satisfied of the **suitability** of the land for the said public purpose, which is determined after hearing the objections of the landowner; and

(c) An award has been made in relation to compensation.

[7] In terms of Section 45(1) of the Act, 'market value of a land in respect of which a notice under Section 7 has been published shall, subject as hereinafter provided, be the amount which the land might be expected to have realised if sold by a willing seller in the open market as a separate entity on the date of publication of that notice in the Gazette;...'.

Taking immediate possession of the land on the ground of urgency

This brings me to the provision of the Act which is at the core of this application.

Having set out the above procedure, the legislature has recognised that there may be circumstances which demand that possession be taken over on behalf of the State earlier than what the aforementioned procedure provides for, and has given effect to such requirement by including a proviso to Section 38, which reads as follows:

> *"Provided that the Minister may make an Order under the preceding provisions of this Section –*
>
> *(a) where it becomes **necessary to take immediate possession** of any land **on the ground of any urgency**, at any time after a notice under Section 2 is exhibited for the first time in the area in which that land is situated or at any time after a notice under Section 4 is exhibited for the first time on or near that land, and*
>
> *(b) .....".*

Thus, once a notice has been published in terms of Section 2(1) indicating the **necessity**, or where a notice under Section 4(1) has been published indicating **suitability** of a particular land for the public purpose mentioned in Section 2(1), the Minister may make an order to take immediate possession of a land on the ground of urgency.

In **Marie Indira Fernandopulle and Another v E. L. Senanayake, Minister of Lands and Agriculture**,[8] the Supreme Court, referring to the above scheme of the Act, stated as follows:

> "*The provisions of section 38 states that the Minister may by order published in the Gazette "at any time after the award is made under section 17" direct the acquiring officer to take possession of the land or servitude acquired, as the case may be. Such an order is a vesting order and vests title in the State absolutely and*

[8] 79 (II) N.L.R 115 at page 117.

free from all encumbrances from the date of the order. It must be noted that the Minister ordinarily has no power to vest the land in the State until an award is made in terms of section 17 of the Act. Even though the market value is calculated as at the date of the notice under section 7 the award can only be made after 21 days of the date of the notice. If there is a reference to Court under the provisions of section 10 of the Act such award will be made at such later date (section 17). ***Whatever the length of time*** *the Act makes it clear that in the first place possession only be taken after the award is made and after the quantum of compensation offered is made known to the claimants. Any vesting order made before such award would be an act in excess of powers.* ***The intention of the legislature is clear, i.e., that the officers of the State cannot take possession until and unless an offer of payment of compensation is made and the acquisition proceedings are concluded. It is only then that the Act recognises the State's right to possession of the land.***

The proviso to section 38 is a departure from this general rule*. It empowers the Minister, on behalf of the State, to take immediate possession "where it becomes* ***necessary to take immediate possession*** *of any land on the ground of any urgency."*

<u>The arguments on behalf of the Petitioners</u>

Having laid down the provisions of the Act, I shall now consider the arguments of the learned Counsel for the Petitioners as to why '**<u>P8</u>**' is illegal, unreasonable and arbitrary, and which therefore formed the basis for the Writ of Certiorari sought to quash '**<u>P8</u>**'.

His first argument is that the Respondents have not established either the necessity to acquire the land or the suitability of the land for the public purpose mentioned in the notice under Section 2(1), and that by the Minister resorting to the exception set out in proviso (a) to Section 38 after the publication of the notice under Section 2(1), the Petitioners have been deprived of their right to be heard, whereby they could have challenged both the necessity and suitability of the acquisition of their land. The gravamen of this argument is that in case the Respondents have failed to discharge their burden in establishing that there exists an urgency which warrants steps being

taken in terms of proviso (a) of Section 38 and therefore, '**P8**' is *ultra vires* the powers of the 1st Respondent, and liable to be quashed by a Writ of Certiorari.

The response of the learned Senior State Counsel was that the Respondents have established necessity and suitability by the surrounding facts,[9] which warrants the immediate possession being taken over of the Petitioners' land in terms of proviso (a) of Section 38. He submitted that in any event, this Court cannot question the necessity or suitability of the said land for the public purpose, especially where a declaration has been made in terms of Section 5(1) of the Act, in view of the provisions of Section 5(2). The learned Senior State Counsel submitted further that the burden of proving that there is urgency does not lie with the Minister of Lands, and that it is up to the Petitioners to prove to this Court that there was no urgency, which he alleged the Petitioners have failed to do.

Grounds on which a Writ of Certiorari would lie

In considering the above arguments, this Court shall bear in mind that in exercising judicial review, Courts play a limited role and must be mindful not to substitute its own decision for that of the public authority that has been conferred with the power of making that decision. In other words, Courts defer to the findings of fact of the public authority, and its intervention would be on limited grounds. In the words of Lord Bingham, '*they (judges) are auditors of legality; no more, but no less*.'[10]

Having examined the development of judicial review over the years, Lord Diplock in **Council of Civil Service Unions vs Minister for the Civil Service**,[11] [the GCHQ case] stated that, "*one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'*."

He then went on to state that "*by 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision*

[9] The surrounding facts, which I will discuss later, being that the said project is necessary for the general public to reap the maximum benefit from the original flyover project, and that the necessity to reduce the traffic congestion experienced in the Ganemulla town warrants an Order under proviso (a) of Section 38 to take immediate possession of the Petitioners' lands.
[10] Tom Bingham, *The Rule of Law* [2011] Penguin Books at page 61.
[11] [1985] AC 374

making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."

Even where a decision is purportedly within the "*four corners of the law*", Courts may still intervene if it is unreasonable or irrational.

The test routinely applied for this purpose is the test set out in **Associated Provincial Picture Houses, Limited v. Wednesbury Corporation**,[12] where Lord Greene defined unreasonableness as '*something so absurd that no sensible person could ever dream that it lay within the powers of the auth*ority.' The famous example of the red-haired teacher who was dismissed due to the colour of her hair, illustrates the high threshold for "unreasonableness" that was expected to justify judicial intervention on this ground.

Subsequently, in the GCHQ Case,[13] Lord Diplock, crystallised *irrationality* as a standalone ground for judicial review.[14] The ground of irrationality however was intrinsically linked to *Wednesbury unreasonableness*, and only applied '*to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*', thus keeping the threshold for judicial intervention still very high.[15]

A common feature in the above cases is that they invite a very low level of judicial scrutiny, where a decision is within the purported "*four corners of the law*". As Lord Bingham has noted, this threshold is "*notoriously high*" and a claimant has a "*mountain to climb*."[16] This reaffirms the limited role that Courts can play in exercising judicial review, and the deference shown to the view of the public authority, especially where judges have no expertise in the subject matter they are reviewing.

[12][1948] 1 KB 223 at pages 229-230.
[13]Supra.
[14]The test laid down by Diplock, J has been applied in Sri Lanka as far back as in 1987 – see Sudhakaran v. Bharathi and Others [1987] 2 Sri LR 243, at page 254.
[15]Although the terms, 'irrationality' and 'unreasonableness' are often used interchangeably, irrationality is only one facet of unreasonableness.
[16]R v. Lord Chancellor Ex parte Maxwell [1997] 1 WLR 104 at 109; as referred to in *De Smith's Judicial Review* (Harry Woolf, Jeffery Jowell, Catherine Donnelly, Ivan Hare, *De Smith's Judicial Review* [8th Edition, 2018] Sweet and Maxwell) at page 599.

The case of **Secretary of State for Education and Science v. Tameside Metropolitan Borough Council**,[17] decided prior to the GCHQ case provides for what can be considered a more balanced test:

> "*In public law, "unreasonable" as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt*."

Lord Cooke in the case of **R v Secretary of State for the Home Department, ex parte Daly**[18] identified that, *"the depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd."*

Authorities acting on behalf of the public ought to be accountable for the overall quality of the decision making process. It is now an accepted fact that the level of scrutiny exercised by Courts depends on the nature and gravity of what is at stake, and that Courts would take cognizance of the context in which such decisions are taken, in as much as a decision maker himself would place varying degrees of scrutiny, depending on the context. I am of the view that Courts must take an active and more effective approach in fulfilling its function of probing the quality of decisions to ensure that decisions taken by public authorities are properly substantiated, and justified. Therefore, while being mindful not to overstep their legitimate bounds, Courts must ensure that decisions are reviewed in a holistic manner.

Can this Court consider necessity?

I would first consider the argument of the learned Senior State Counsel that it is not the function of this Court to determine necessity and suitability and that in any event, once a declaration has been made in terms of Section 5(1), that such declaration is

[17] [1977] AC 1014 at page 1064.
[18] [2001] 3 All ER 433 at page 447.

conclusive evidence that such land is needed for a public purpose, in terms of Section 5(2).

In support of his argument, the learned Senior State Counsel drew the attention of this Court to the judgment in **D.H. Gunasekera and Others v Minister of Lands and Agriculture and another**,[19] where it had been held as follows:

> "*Counsel for the Petitioners concedes that a declaration under Section 5(1) of the Act has been published by the Minister in the Gazette. The consequence of the publication of that declaration is that sub-section (2) of Section 5 operates to render the declaration conclusive evidence that the land was needed for a public purpose. The question whether the land should or should not be acquired is one of policy to be determined by the Minister concerned and even if that question may have been wrongly decided, sub-section (2) of section 5 renders the position one which cannot be questioned in the Courts."*

A similar position was taken up in **Hewawasam Gamage v. The Minister of Agriculture**[20] where it was held as follows:

> "*I am of opinion that on the construction I place of section 2(1) and proviso (a) to section 38, the Court cannot question the decision or the order of the Minister and substitute its judgment in place of that of the Minister and hold that the decision of the Minister was wrong, namely, that the land was needed for a public purpose. The decision whether the land should or should not be acquired is one of policy to be determined by the Minister concerned and therefore cannot be questioned by the Court of Law*."[21]

A similar conclusion was reached in **Fernandopulle**,[22] which I shall advert to later.

However, a contrary position has been taken by the Supreme Court in **Manel Fernando and Another v. D.M. Jayaratne, Minister of Agriculture and Lands and Others**,[23] where it was held as follows:

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[19] 65 NLR 119 at 120.
[20] Supra at page 32.
[21] See Gnanawathie Edirisinghe v. Minister of Lands and Land Development CA (Writ) 500/2008; CA Minutes of 21st February 2011.
[22] Supra.

"I hold that the 1st Respondent had no material on which, objectively, it could reasonably have been concluded that the Petitioners' land was required for the stated public purpose of a Govi Sevana Centre; that he did not bona fide think that it was so required; and that he had misinformed the Hon. Prime Minister that the Commissioner had made a request for such acquisition. Further, although no formal order had been made under section 4 of the Land Acquisition Act, an inquiry was held into the 2nd Petitioner's objections to the acquisition, after which the inquiring officer (the Assistant Commissioner) had made a recommendation (which the Commissioner had subsequently approved), that the land should not be acquired: and that the 1st Respondent ignored or failed to consider. On the other hand, he placed undue reliance on the 5th Respondent's recommendation which failed to take account of the relevant factors. I hold that in fact the Petitioners' land was not required for a public purpose, and that the acquisition was unlawful, arbitrary and unreasonable."

I must state that the thinking of the Supreme Court in **Manel Fernando** reflects the giant strides made in the field of public law in the last two decades, and the principles of fairness that public authorities must seek to achieve in its decisions. I would therefore prefer to align myself with the reasoning in **Manel Fernando** for two reasons.

The first is the doctrine of Public Trust. In **Gnanawathie Edirisinghe v. Minister of Lands and Land Development and others**[24], although Sriskandarajah, J held that the petitioner could not justify the need to question the decision of the Minister that the land is needed for a public purpose, he identified that the law has developed to a stage where the decision of the Minister could be questioned if it is against the public trust doctrine, and held as follows:

"*The Petitioner cannot question the decision of the Minister that a land is needed for a public purpose, it is a decision entrusted to the Minister by the statute and the question whether the land should be acquired is one of policy to be determined by the Minister and therefore cannot be questioned by a Court of*

[23] Supra at page 121.
[24] CA (Writ) Application No. 500/2008; CA Minutes of 21st February 2011; as per Sriskandarajah J.

Law, Mendis v Jayaratne, Minister of Agriculture, Lands and Forestry, [1997]2 Sri L.R 215, Hewawasam Gamage v Minister of Lands 76 N.L.R 25.

But subsequent development in law as interpreted and pronounced by (the) judiciary, a decision to acquire a land by the Minister could be questioned if it is against the public trust doctrine. *In this instant case the Petitioner cannot rely on the violation of public trust doctrine as the stretch of land is acquired for the purpose of a roadway which is necessary for a housing scheme of over 40 families*."

As observed by the Supreme Court in **Heather Therese Mundy v. Central Environmental Authority**:[25]

"*The jurisdiction conferred by Article 140, however, is not confined to "prerogative" writs, or "extraordinary remedies", but extends - "subject to the provisions of the Constitution" - to "orders in the nature of" writs of Certiorari, etc. Taken in the context of our Constitutional principles and provisions, these "orders" constitute one of the principal safeguards against excess and abuse of executive power: mandating the judiciary to defend the Sovereignty of the People enshrined in Article 3 against infringement or encroachment by the Executive, with no trace of any deference due to the Crown and its agents. Further, this Court itself has long recognized and applied the "public trust" doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes (see de Silva v Atukorale, [1993] 1 Sri LR 283, 296-297; Jayawardene v Wijayatilake, [2001] 1 Sri LR 132, 149, 159; Bandara v Premachandra, [1994] 1 Sri LR 301, 312);*"

Subsequently in **Sugathapala Mendis and another v. Chandrika Kumaratunga and Others (Waters Edge case)**,[26] the Supreme Court held that:

[25] SC Appeal 58/2003; SC Minutes of 20th January 2004.
[26] [2008] 2 Sri LR 339 at 352.

"The principle that those charged with upholding the Constitution - be it a police officer of the lowest rank or the President - are to do so in a way that does not "violate the Doctrine of Public Trust" by state action/inaction is a basic tenet of the Constitution which upholds the legitimacy of Government and the Sovereignty of the People. The "Public Trust Doctrine" is based on the concept that the powers held by organs of government are, in fact, powers that originate with the People, and are entrusted to the Legislature, the Executive and the Judiciary only as a means of exercising governance and with the sole objective that such powers will be exercised in good faith for the benefit of the People of Sri Lanka. Public power is not for personal gain or favour, but always to be used to optimize the benefit of the People. To do otherwise would be to betray the trust reposed by the People within whom, in terms of the Constitution, the Sovereignty reposes. Power exercised contrary to the Public Trust Doctrine would be an abuse of such power and in contravention of the Rule of Law. This Court has long recognized and applied the Public Trust Doctrine, establishing that the exercise of such powers is subject to judicial review (Vide De Silva v Atukorale[27], Jayawardene v Wijayatilake."[28]

In **De Silva v Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another**[29] the Supreme Court, quoted the following paragraph from Administrative Law by H.W.R Wade:[30]

"The common theme of all the passages quoted is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether

[27][1993] 1 Sri LR 283, 296-297.
[28][2001] 1 Sri LR 132, 149, 159.
[29] [1993] 1 Sri LR 283,
[30]5th Edition (1982) Clarendon Press, at pages 355-356. Also at Administrative Law by Wade and Forsyth, 11th Edition (2014) at pages 295-296..

the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.

The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependents, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do neither unless it acts reasonably and in good faith and upon the lawful and relevant grounds of public interest. Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good."[31]

Thus, it would be anathema to the doctrine of Public Trust, if a decision made by a public authority is beyond scrutiny by Courts. If I may add, the deference that the legislature requires Court to extend to a declaration under Section 5(1) could only be done if the Court is satisfied that the procedure set out in Sections 4(4) and 4(5) have been carefully followed, and the necessity and suitability have been considered. After all, it is an accepted fact that there is no unfettered discretion, and as Chief Justice H.N.G.Fernando stated in **Municipal Council of Colombo v. T.P. De S. Munasinghe**[32] with reference to an arbitrator appointed under the Industrial Disputes Act, the Legislature did not intend to confer on the Minister *the freedom of a wild horse*.

The second reason is that the sanctity afforded to a Section 5(1) declaration by Section 5(2) is, in any event, contingent upon the ordinary procedure contemplated by the Land Acquisition Act.

As demonstrated above, an Order under proviso (a) to Section 38 can be made '*at any time after a notice under Section 2 is exhibited for the first time, or at any time after a notice under Section 4 is exhibited for the first time*.' Therefore, an Order under proviso

[31] The final passage cited in De Silva v. Atukorale, was referred to by the Supreme Court in the Waters Edge case (Supra).
[32] 71 NLR 223 at page 225.

(a) of Section 38 can be made before or after a landowner is given the opportunity of being heard on any objections he or she may have on the acquisition of their land.

Under the ordinary procedure, a Section 5(1) declaration is made *after* the Minister had made a decision under Section 4(5), and after considering any and all objections that the landowners might have in respect of the acquisition process. This would also be the case where an Order under proviso (a) of Section 38 is made after a decision is made in terms of Section 4(5).

However, where an Order under proviso (a) of Section 38 is made prior to the rigorous inquiry contemplated by Section 4(4) and the subsequent decision under Section 4(5), a Section 5(1) declaration can still be issued in terms of Section 41 of the Act, which states as follows:

> "*In any case where an Order is made under the proviso to section 38 for the taking of immediate possession of any land or for the immediate acquisition of any servitude on the ground of urgency, then-*
>
> *(a) If the provisions or any of the provisions of Section 4 have not been complied with prior to the making of the Order it shall not be necessary to comply with those provisions or such of those provisions as have not already been complied with;*
>
> *(b) If a declaration under Section 5 has not been made prior to the making of such Order**, a declaration shall be made and published in terms of that section notwithstanding that all or any of the provisions of Section 4 have not been complied with**;*..."

This raises the question whether the sanctity afforded to a Section 5(1) declaration armed with a Section 4(5) decision, could be afforded to a Section 5(1) declaration issued in terms of Section 41. I am of the view that the two declarations would invite varying degrees of scrutiny of Courts. A Section 5(1) declaration issued in the ordinary procedure would attract a very low level of scrutiny of Courts, ideally limited to instances where the violation of the Public Trust doctrine could be invoked, as the affected parties are afforded an opportunity to air out their grievances prior to the

declaration being made. A Section 5(1) declaration issued in terms of Section 41 on the other hand, would attract a higher level of scrutiny by Courts, owing to the fact that the landowner has been deprived of an opportunity to be heard. Therefore, I am of the view that a Section 5(1) declaration made in terms of Section 41 cannot be afforded the sanctity conferred by Section 5(2).

For the reasons set out above, I hold that this Court is not precluded from considering necessity, especially in cases where acquisition has been carried out under proviso (a) of Section 38.

Can this Court consider urgency?

The judgment that is frequently cited when discussing urgency in land acquisition is the judgment of Chief Justice Neville Samarakoon in **Marie Indira Fernandopulle and Another v E. L. Senanayake, Minister of Lands and Agriculture**.[33]

In that case, an Order was made under proviso (a) to Section 38, directing the Assistant Government Agent, Negombo, to take possession of a land claimed by the petitioner in that case. It was said that the land was required for the purpose of providing a playground and agricultural farm for the Muruthana Mixed Farm School. A notice under Section 2 was first published on 20th December 1974, followed by the notice under Section 4 on 15th November 1976. An inquiry into the objections of the Muruthana Rural Development Society to the said acquisition had been held on 22nd February 1977. A declaration under Section 5 had thereafter been published on 13th May 1977 prior to an Order for immediate possession being made on grounds of urgency, under proviso (a) to Section 38 on 7th December 1977, vesting the land in the State. The petitioner sought a Writ of Certiorari to quash the said Order on the grounds that the land was not required for a public purpose and that it was made in excess of the power conferred by proviso (a) to Section 38, as the 1st respondent in that case had failed to disclose the grounds of urgency.

I have highlighted (a) the dates on which the Section 2 and Section 4 notices were made, (b) the fact that the objections were considered, and (c) the fact that the Section 5(1) declaration had been made after the objections were considered, in the

[33] Supra.

above case, to emphasise the fact that all these steps had been taken prior to the Order under proviso (a) of Section 38 being made, and thereby place in perspective, the contents of the said judgment.

The Supreme Court, having held that a declaration made under Section 5(1) is conclusive evidence the land is required for a public purpose and therefore, cannot be questioned in a Court of law, went on to define the role of a Court in examining an Order made under proviso (a) of Section 38 in the following manner:

> *"As observed earlier, **there is no express conclusive effect given to this decision as is given to the decision regarding "public purpose" in section 5 of the Act. This is a distinction which is significant**. It was contended by State Counsel that the notice under section 38 (Proviso) had already been published and the title now vests absolutely in the State free from all encumbrances. Therefore, the argument goes, it is futile for the Court to judge the correctness or otherwise of the Minister's act. In fact it cannot now look into it as title has vested in the State absolutely. **I cannot agree.** If in fact the Court has the power its jurisdiction cannot be extinguished by a mere vesting order*."[34]

The Supreme Court went on to state as follows:

> *"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 a 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.*
>
> *As pointed out earlier, the former decision is by enactment (Section 5(2)) made conclusive and therefore removed from scrutiny by the Courts. The latter has not*

[34] Supra at page 117.

been so treated and it is legitimate to hold that the legislature did not intend to remove the Court's power of scrutiny.

Another important fact is that ***section 38 circumscribed the Minister's power to interfere with private rights or property by stating that possession can only be interfered with after an award is made****. It is only in cases of urgency that an exemption is made.* ***To my mind this is a clear indication, that the Minister was only permitted to act with due regard to Common Law rights. When Common Law rights are involved the Court always has a right of review."*** [35]

Thus, there is no doubt that this Court can consider whether the Minister acted reasonably when he arrived at the decision that immediate possession of the Petitioners lands must be taken over on the ground of urgency. Moreover, the reasons that led me to conclude that necessity would be the subject of judicial review, would apply with greater force with regard to urgency, in view of the absence of any legislative sanctity given to the decision on urgency.

Establishing urgency

I would now consider the submission of the learned Senior State Counsel that the Respondents need not prove urgency, and that the burden on establishing there was no urgency lies with the Petitioners.

The starting point of this discussion, I believe should be the provisions of the Evidence Ordinance. It is the Minister who is claiming that the public purpose is of such importance that immediate possession of the land must be taken over on an urgent basis in order to give effect to the public purpose for which the said land is required, without following the ordinary procedure laid down in the Act. In terms of Section 101 of the Evidence Ordinance, '*Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person*'. Similarly, in terms of Section 103, '*The burden of proof as to any particular fact lies on that person who wishes the Court*

[35] Supra at page 119.

to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.'

Thus, in my mind, there is no doubt that whether immediate possession must be taken over on the ground of urgency is a fact which is known only to the Minister and other Officials of the relevant Ministries that are involved in the said acquisition, and therefore the burden of proving urgency is with the Respondents. The question that begs an answer is how an innocent landowner could assume the reasons that led to a Minister to conclude that there was in fact urgency.

In **Fernandopulle**[36], the Supreme Court, referring to the burden of proof, held:

> "***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*."

To my mind, the above conclusion of the Supreme Court is clear. That is, the acquisition process, having commenced in December 1974, and the inquiry into the objections having been concluded in February 1977, where the necessity had been decided, was sufficient for the Supreme Court to conclude that, "*four years dragged on and school's needs were still waiting to be met.* ***The delay and the need decided the urgency****".* It is only because the Supreme Court was satisfied that there is urgency, that it went onto hold that *these being the facts the petitioner has failed to satisfy me that there was no urgency.* Thus, to my mind, the ratio in **Fernandopulle** is that the duty to establish urgency lies with the Minister. Once that burden has been discharged by the Minister, and only then, does the burden shift to the landowner to rebut that inference. Therefore, I cannot agree with the submission of the learned Senior State

[36] Supra at page 120,

Counsel that the Minister owes no duty to prove urgency, and that the duty to establish there was no urgency is with the Petitioners.

This issue as to on whom lies the burden of proof has been conclusively dealt with by the Supreme Court in **Horana Plantations Ltd v. Minister of Agriculture, Livestock, Land and Irrigation**,[37] where it was held as follows:

> *"The Court of Appeal relied on the judgment in Marie Indira Fernandopulle and Another v E.L.Senanayake, Minister of Lands, and Agriculture 79 (II) N.L.R. 115 in arriving at the conclusion that the Appellants had failed to show that there was no urgency. This reasoning of the Court of Appeal places the burden on the party affected by the proposed acquisition to show that there was no urgency to proceed with the acquisition.*
>
> *The proviso to Section 38 is based on the urgency regarding a proposed acquisition and therefore* ***the burden on establishing urgency is on the acquiring authority****. In Fernandopulle's case, the land that was to be acquired was for the purpose of a playground for a school and various factors had delayed the taking over of the land. The need for the playground for the school had remained and had not changed and it is in those circumstances that the Court held that the delay and the need decided the urgency. There the Supreme Court 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."*

The factors that the Minister must consider when making an Order under proviso (a) of Section 38

I would start this discussion by quoting the following paragraph from **Fernandopulle**[38]:

> *"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****.*

[37] [2012] 1 Sri LR 327.
[38] Supra at page 118.

> *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 wish to reiterate the fact that in **Fernandopulle**, the Order under proviso (a) of Section 38 was made after a Section 5(1) declaration was issued following a Section 4 inquiry. The above passage should therefore be viewed in that light. It reflects the position where an Order is made under proviso (a) of Section 38 after affording the landowner a hearing in terms of Sections 4(4) and 4(5) where the objections of the landowner had been considered. In such a situation, **Fernandopulle** only requires the Minister to consider urgency when called upon to make an Order under proviso (a) of Section 38. However, where an Order is made soon after a notice is made either under Section 2(1) or Section 4(1), I am of the view that the Minister must consider urgency in the light of necessity and suitability.

In other words, urgency does not obviate the need for the Minister to consider necessity and suitability. In my view, whether the ordinary procedure is followed or where the exception is followed, necessity and suitability must be decided by the Minister, and it is only then that the Minister can determine urgency. I am also of the view that the proviso only excuses the Minister from giving a hearing to a landowner, but would still require the Minister to take a considered decision of all three matters prior to acting under the proviso.

Where necessity and suitability have been conclusively decided upon by the Minister having followed the procedure set out in Section 4(4) – 4(5), the Minister need not engage in the same exercise of determining necessity and suitability at the time he is called upon to make an Order in terms of the proviso, but instead, the Minister can limit himself to the question of whether there is an urgency that warrants immediate possession of the land being taken over, in the context of the necessity and suitability already determined.

It is therefore my view that necessity, suitability and urgency are interlinked, and should not be considered in airtight compartments. If I may use the words of Laws LJ[39] in **R vs The Department of Education and Employment, Ex. P Begbie**,[40] necessity, suitability and urgency '*are not hermetically sealed*'.

Necessity to build a flyover in Ganemulla

Having established the factors that must be considered by the Minister when called upon to make an Order under proviso (a) of Section 38, let me now consider the necessity for the proposed acquisition, as explained by the learned Senior State Counsel.

It is common ground that Ganemulla, which is located 9 km away from the Kadawatha Town, is a fast developing city. It has a main railway line with two tracks extending towards the North, Central and Eastern directions from Colombo, laid across the main road link of the town. The town is mainly developed around the Ganemulla Railway Station. On either side of the Railway Station are the road coming from Kadawatha, known as the Ganemulla-Kadawatha Road (B058) and the road leading to Kirindiwita, known as the Ganemulla-Kirindiwita Road (B226). The town spreads about 500m, and 250m in the direction of Kadawatha and Kirindiwita, respectively, from the railway crossing.

The Respondents have submitted that around 76 slow trains pass through the Ganemulla level crossing on a daily basis stopping over at the Ganemulla railway station. At the same time, 47 express trains and 4 freight trains operate across the said level crossing on a daily basis. The Respondents state further that the average rail gate closure time during the period 7am-7pm is around 3 hours and that in these circumstances, a necessity arose to provide for a flyover across the railway line to ease the traffic congestion at Ganemulla town.

The 3rd Respondent, the Road Development Authority had entered into an Agreement with a Spanish based contractor for the design, manufacture, supply and construction of three flyovers including a flyover across the abovementioned level crossing at

[39] Stated in the context of legitimate expectation.
[40] [2000] 1 WLR 1115.

Ganemulla. Thus, the original project proposal was to build a flyover over the Ganemulla – Kelaniya road near the Ganemulla Railway Station to prevent the traffic congestion caused as a result of the closure of the railway gate. The flyover, 256m in length, was to be built on pile foundations with a seven span steel superstructure, and was to consist of a 3.5m wide two lane carriageway and two 1.2m wide pedestrian ways. The Respondents have stated further that the Loan Agreement to fund the cost of construction of the flyover was signed in December 2015, and that the construction of the flyover project had commenced in March 2016 and had been completed by June 2017.

The Respondents state that the agreed scope of work between the Contractor and the 3rd Respondent contemplated any person travelling from Kadawatha towards Kirindiwita and who wished to avoid the level crossing at the Ganemulla Town, to enter the approach road to the flyover from the Ganemulla-Kadawatha road, which approach road is situated to the left around 250m prior to the rail crossing, travel through the Gamsabha Road, connect with the steel flyover section situated over the railway line and get onto the approach road that is connected to the Ganemulla-Kandana road.[41] Thereafter, the person who wished to proceed towards Kirindiwita on the B226 road was required to turn right, travel a distance of 100 meters and turn left on to the B226 road, and proceed with his journey.

It would perhaps be safe for me to assume that the 3rd Respondent carried out studies to determine the extent of the build-up of traffic as a result of the closure of the railway gate on either side of the railway gate, and that the points at which the approach roads to the proposed flyover should be placed was determined only thereafter.

According to the Respondents, this was the project that was funded in terms of the abovementioned Loan Agreement. The Petitioners have no complaint with **this Project**, as explained by the Respondents.

[41] Vide paragraph 6.0 of '3R4'.

Proposal for an extended approach road

The Respondents state that at a meeting held on 30th September 2015, a proposal had been made to extend the approach road of the flyover, which was originally intended to stop at the Ganemulla-Kandana road, right up to the B226 road, thereby, obviating the need to turn right at the exit of the approach road of the flyover and thereafter turn left in order to enter the B226 road.[42] Such an extension of the approach road required a new road to be created over private land. However, according to the minutes of the above meeting,[43] which has been confirmed by the Report of the Technical Committee marked '**3R4**', it was only a proposal, and as it was outside the original Scope of Work of the Contractor, an agreement had been reached at the said meeting that the Urban Development Authority (UDA) shall study the traffic arrangement/ restriction on vehicle movement and parking arrangement between the rail-gate and the junction at B226 where the road merges with the Ganemulla-Kandana road, in order to establish necessity prior to a decision being taken whether the access road should be extended, for the reason that the proposed extension required the acquisition of private land.

The Respondents have not made available to this Court the study that was carried out by the UDA or a report of the UDA, as agreed when the proposal was initially mooted. The report prepared in October 2017 by the Technical Committee that was appointed to consider the extension of the approach road marked '**3R4**' tendered to this Court by the 3rd Respondent, the Road Development Authority does not contain any indication that the proposed study was done, and if so, details of the said study, although paragraph 4.5 of '**3R4**' contains a reference to traffic arrangements.

Urgency – as pleaded by the Respondents

The Respondents claim that the construction of the extended approach road is essential for the general public to reap the maximum benefit from the flyover project and that the said project is essential to reduce the traffic congestion experienced in the Ganemulla town. The 3rd Respondent has therefore sought to justify the issuance of the Section 38 proviso (a) notice on the basis that there is an urgent public need to

[42] Vide Minutes of the Meeting, marked '3R2'.
[43] Ibid.

expedite the construction of the extended approach road or else the public purpose of building the flyover would be negated.

Grievance of the Petitioners

This brings me to the complaint of the Petitioners. The learned Counsel for the Petitioners has raised serious issues regarding the necessity of the extended approach road. He submitted that any person travelling towards Kadawatha from Kirindiwita can enter the approach road to the flyover without any difficulty through the Ganemulla-Kandana Road. The Petitioners have submitted by way of an additional affidavit dated 2nd July 2018, which is after the flyover was opened for public use in January 2018, photographs marked '**A1**' – '**A4**' that they claim depict that there is no traffic at the turn off to the Ganemulla Kandana road, from the B226 road. Although the said photographs may not be conclusive, I observe that the Respondents have not provided any material to counter this argument of the Petitioners.

The Petitioners state further that any person travelling towards Kirindiwita, and getting off the flyover onto the Ganemulla-Kandana road can access the Kirindiwita B226 road through Perera Mawatha which is situated 150m onto the left of the present flyover approach road, or else through another existing road, which in fact are the other two options that were considered by the Technical Committee. While it is not the function of this Court to comment on the suitability of the other two roads, the fact remains that the Respondents have not rebutted the argument of the Petitioners that there is no necessity to acquire their lands, and that in any case, there is no necessity to take immediate possession on any ground of urgency.

Issues relating to necessity

I have two concerns with regard to necessity. The first is that the extension of the approach road was mooted at the discussion held after the initial scope of work for the flyover was agreed upon. At this meeting, it was agreed that the UDA shall prepare a study of the traffic arrangement / restriction on vehicle movement and parking arrangement between the rail-gate and the junction at B226 where the road merges with the Ganemulla-Kandana road, prior to a decision being taken. This was a sensible approach to determine necessity. Most importantly, this underscores the fact that in

the minds of those at the said meeting necessity had not been established. If I may elaborate, once the railway gate closes, if there is a buildup of traffic from the railway gate to the turn off to the Ganemulla Kandana Road on the B226 road, then the objective sought to be achieved by the construction of the flyover at a staggering sum of money, that too on a loan, would be lost. However, as I have noted earlier, either such a study was not carried out, or if it was, the findings of the UDA have not been considered by the Technical Committee in the preparation of its report '**3R4**', nor have the said findings been presented to this Court.

It is admitted that the process to initiate the Order in terms of proviso (a) to Section 38 commenced in January 2017, and culminated with the Order '**P8**' being published in the Extraordinary Gazette of 4th August 2017. The second concern I have is that the Committee that was appointed to select a suitable land on which the extension was to be built, and which Committee considered three different land options (A, B and C in '**3R4**'), had submitted its report only in October 2017. Even though the 3rd Respondent has stated that '*by document dated 2nd February 2017, the Project Director's report informing the suitability of taking steps in this regard under proviso (a) of Section 38 of the Land Acquisition Act was submitted to the Secretary, Ministry of Lands*', and documents purporting to support such position was said to have been annexed to the Statement of Objections of the 3rd – 5th Respondents marked '**3R6**' and '**3R6a**',[44] no such documents had been annexed to the Statement of Objections filed of record.

If the report that determined suitability of acquiring the Petitioners land, as well as several other lands, for the extension of the approach road was not available until October 2017, on what basis was the Order under proviso (a) of Section 38 made on 2nd August 2017? In other words, what is the material that was available before the Minister of Lands when he made the Order '**P8**'? While no explanation has been given by the Respondents, it appears to me that the Respondents are attempting to take a *free ride* on the necessity, and perhaps the urgency that existed for the original flyover project i.e. the disruption to traffic arising from the closure of the railway gate over hundred times a day.

[44] Vide paragraph 8(j) of the Statement of Objections.

Suitability in the absence of necessity

The Respondents have submitted in '**3R4**' that they considered three options for the extended approach road and chose 'Option B' that runs through the Petitioners' property as it had the advantage of *inter alia* being the shortest route, the number of buildings that were to be affected being less than the other two options, and since it only required the shifting of utilities at the beginning and the end of the proposed road whereas the other two options would have required the shifting of utilities alongside the existing roads. The Respondents claim further that 'Option B' will result in less traffic, and considering the vehicle travel time, cost of land acquisition, road geometry, construction cost, 'Option B' is the most suitable and feasible option.

I must state that while '**3R4**' considered the suitability of the land required for the extension of the approach road, it has done so in the absence of any consideration of the necessity for the said extension, as per the agreement reached at the meeting held on 30th September 2015, nor have the Respondents submitted any material before this Court justifying necessity. In other words, the 3rd Respondent has proceeded on the assumption that an extension of the approach road was necessary to ease the traffic congestion, without actually having any material to support its position. It appears to me that the 3rd Respondent has put the cart before the horse, and decided on suitability prior to determining necessity.

It is in these factual circumstances that I am called upon to consider the basis on which the Minister arrived at a decision to issue an Order in terms of proviso (a) of Section 38.

The decision of the Minister

The onus cast on the Minister in arriving at a decision in terms of proviso (a) of Section 38 has been explained by the Supreme Court in the following paragraph of **Horana Plantations Ltd. v Minister of Agriculture, Livestock, Land and Irrigation**:[45]

> "*Since the final authority regarding the decision to acquire land under the provisions of the Land Acquisition Act, specially in terms of paragraph (a) of the*

[45] Supra.

proviso to Section 38 is on the Minister, it is the responsibility of the Minister to consider the directions or requests of the authority which recommends such acquisitions and to satisfy himself regarding the true purpose of the acquisition. Minister has a duty to act with care in arriving at such decisions as the discretion conferred on him is not one which is unfettered.

The Minister must endeavour to make proper inquiries and only pursue such acquisitions if no alternative is available as otherwise such actions would jeopardize the interest of the public."

I shall now consider the affidavit of the 1st Respondent, the Minister of Lands to ascertain the matters that were considered by him prior to issuing the Order under proviso (a) to Section 38.

The starting point is the letter dated 16th December 2016, marked '**1R1**' sent by the Secretary, Ministry of Higher Education and Highways to the Secretary, Ministry of Lands requesting the publication of a notice in terms of Section 2 in respect of a land in extent of 0.8H. The last paragraph of '**1R1**' reads as follows:

"**කරුණාකර මෙම අත්පත් කර ගැනීම සඳහා 2 වගන්තිය යටතේ නියමය නිකුත් කිරීමට කටයුතු කරන්නේ නම් මැනවි.**

38 (අ) අතුරු විධානය යටතේ කටයුතු මෙහයවීම සඳහා ගරු උසස් අධ්‍යාපන හා මහාමාර්ග අමාත්‍යතුමාගේ නිර්දේශය සහ උපලේඛණ අංක 11 (යෝග්‍යතා වාර්තාව) පසුව එවීමට කටයුතු කරමි."

Thus, the intention to act in terms of proviso (a) of Section 38 has been spelt out in '**1R1**' as early as December 2016.

The 3rd Respondent has not placed any material before this Court to establish that the facts peculiar to this application – i.e. the fact that the land that was now required was for the extension of the approach road, and not for the flyover, and that even without the said extension, the public purpose has been achieved - had been placed before the Minster of Highways, or considered by the Minister of Highways. This probably resulted in the Minister of Highways failing in his responsibility to consider the

necessity and suitability of the land for the public purpose, prior to making a request to the Minister of Lands.

The next step is the letter dated 7th February 2017, marked '**1R4**' sent by the Minister of Higher Education and Highways to the Minister of Lands, which reads as follows:

> "ගනේමුල්ල ගුවන් පාලම ප්‍රවේශ මාර්ගය ඉදිකිරීම සඳහා ඉඩම් අත්කර ගැනීම 2 වන වගන්තියේ නියමය
>
> **ඉහත විස්තර සඳහන් කාර්යයෙහි කටයුතු කඩිනමින් නිම කළයුතු වන අතර, ඒ සඳහා අත්පත්කර ගතයුතු බිම් කැබලිවල නිරවුල් භුක්තිය රජයට පවරා ගැනීමේ කටයුතු ද කඩිනමින් කළයුතු වේ.**
>
> 02. අදාළ ඉඩම් අත්පත් කර ගැනීම සඳහා වූ අයදුම්පත හා විස්තර ප්‍රකාශය මෙම අමාත්‍යාංශ ලේකම් විසින් මාගේ සමාංක හා 2016.12.16 දිනැතිව ඔබ අමාත්‍යාංශය වෙත ඉදිරිපත් කර ඇත.
>
> 03. මෙම බිම් කැබලිවල නිරවුල් භුක්තිය නොපමාව රජයට පවරා ගැනීමට හැකිවනු පිණිස ඉඩම් අත්කර ගැනීමේ පනතේ 38(අ) අතුරු විධානය යටතේ ආඥාවක් නිකුත් කරන මෙන් කාරුණිකව ඉල්ලමි."

The only ground urged by the Minister of Highways to support the Order in terms of proviso (a) of Section 38 is that the Project must be completed early. He does not mention the fact that the Project can be completed without the extension of the approach road. The failure on the part of the 3rd Respondent to place the proper facts before the Minister of Highways has in turn contributed to the Minister of Highways failing to apprise the Minister of Lands of the correct factual position. Thus, no material has been presented by the Minister of Higher Education and Highways in '**1R4**' to the Minister of Lands to establish the necessity and urgency, nor has the Minister of Lands presented to this Court the material that prompted him to come to the conclusion that there is a necessity and urgency that required him to act in terms of proviso (a) of Section 38.

In this background, the position of the Minister of Lands in his affidavit to this Court that,

> "*The town of Ganemulla experiences heavy traffic congestion especially due to the railway crossing situated at the heart of the City. This project is essential to*

reduce the said traffic congestion. Hence, it was an urgent public need to expedite the construction, whereas any delay would negate the relevant public purpose,"

cannot be considered as reasonable or rational, for the reasons that I have already discussed when I considered the material provided by the Respondents to establish necessity.

There is one other matter that I wish to advert to, which is the complaint of the Petitioners that the 3rd – 5th Respondents have sought to proceed with the extension of the approach road in a haphazard manner. This is borne out by the admission of the 3rd – 5th Respondents that (a) the funds made available under the loan agreement were sufficient to cover only the construction of the flyover,[46] (b) foreign funding cannot be increased, (c) construction of the extension would have to be carried out by the 3rd Respondent, and (d) funds for this purpose would have to be obtained from the Government.[47] The Respondents have not however apprised this Court if funding was in fact available by the time '**P8**' was issued, and therefore it appears that the 3rd Respondent was attempting to proceed with acquisition of private property without having the funds available, not only for the payment of compensation to landowners, but even for the construction. While this begs the question, where is the urgency for the immediate taking of possession in the absence of funding, it also gives context to the allegation of the Petitioners that all what the 3rd – 5th Respondents wanted was a contract which would personally benefit them.[48]

Is the decision of the Minister to act in terms of proviso (a) of Section 38 illegal and/or unreasonable?

It is in the above circumstances that I am called upon to decide whether the decision of the 1st Respondent reflected in '**P8**' is illegal, unreasonable and irrational.

Having considered the fact that:

[46] Vide paragraph 8(d) of the Statement of Objections.
[47] Vide letter dated 23rd May 2016 marked '3R3'.
[48] Vide paragraph 6(i) of the petition.

(a) The Respondents have not provided any material to establish the necessity for an extended approach road, having themselves noted that a study was necessary to establish such necessity;

(b) The Minister of Highways has not apprised the Minister of Lands of the necessity for the extended approach road;

(c) The Minister of Lands has been guided by the necessity of the flyover project and has not considered that the acquisition relates to the extension of the approach road,

(d) The Respondents have not provided any material to establish that there existed a necessity to take immediate possession of the Petitioners' lands in the absence of urgency,

I am of the view that:

(a) The Minister of Lands has failed to consider the necessity of taking over the land for the extension of the approach road;

(b) The Minister of Lands could not have considered urgency in the absence of being satisfied of the necessity of the said land for the extended approach road;

(c) The Minister of Lands acted outside the powers conferred on him by proviso (a) of Section 38 when he issued '**P8**', and therefore, the Minister has acted *ultra vires* his powers;

(d) The decision to take immediate possession of the Petitioners' land is a decision that no sensible person who had applied his mind to the question to be decided could have arrived at;

(e) '**P8**' is therefore liable to be quashed by a Writ of Certiorari.

In the above circumstances, I issue the Writ of Certiorari prayed for in paragraph (b) of the prayer to the petition. I make no order with regard to costs.

Judge of the Court of Appeal

Mahinda Samayawardhena, J

I agree

Judge of the Court of Appeal