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

SC Appeal No. 06/2009

SC (Special) LA No. 215/2008

Court of Appeal (Writ) Application

No. 1364/2004

Horana Plantations Limited

8, Sir Chittampalam A.

Gardiner Mawatha

Colombo 2

Petitioner

Vs

1. Hon. Anura Kumara Dissanayake,
   Minister of Agriculture, Livestock,
   Land and Irrigation
   Ministry of Agriculture, Livestock,
   Land and Irrigation
   Govijana Mandiraya
   Rajamalwatta Road
   Battaramulla

2. P.D. Siriwardena
   Divisional Secretary & Acquiring
   Officer
   Divisional Secretariat
   Bulathsinhala

Respondents

3. Hon. Jeewan Kumaranatunga
   Minister of Land and Land Development
   1st Floor,
   Govijana Mandiraya
   No.80/5, Rajamalwatte Road
   Battaramulla

4. Menaka Priyanthi Abeyratne
   Divisional Secretary and Acquiring Officer
   Divisional Secretariat
   Bulathsinhala

Added Respondents

AND NOW

Horana Plantations Limited

8, Sir Chittampalam A.

Gardiner Mawatha

Colombo 2

Petitioner – Petitioner - Appellant

Vs

1. Hon. Anura Kumara Dissanayake,
   Minister of Agriculture, Livestock, Land and Irrigation

Ministry of Agriculture, Livestock,
Land and Irrigation
Govijana Mandiraya
Rajamalwatta Road
Battaramulla

1st Respondent – Respondent

1(a). Hon. Maithripala Sirisena,

Minister of Agriculture Development &
Agrarian Services Development

Ministry of Agriculture Development &
Agrarian Services Development

No. 500, T.B. Jaya Mawatha

Colombo 10

**Substituted 1(a) Respondent –
Respondent**

1(b). Hon Mahinda Yapa Abeywardena

Minister of Agriculture,

No.80/5, Govijana Mandiraya

Rajamalwatta Road

Battaramulla

**Substituted 1(b) Respondent –
Respondent**

2. P.D.Siriwardena
Divisional Secretary & Acquiring
Officer

Divisional Secretariat
Bulathsinhala
2nd Respondent – Respondent

2(a). Irangani Weerasinghe

Divisional Secretary & Acquiring Officer
Divisional Secretariat
Bulathsinhala
Substituted 2(a) Respondent – Respondent

3. Hon. Jeewan Kumaranatunga
Minister of Land and Land Development
1st Floor,
Govijana Mandiraya
No.80/5, Rajamalwatte Road
Battaramulla
Added 3rd Respondent – Respondent

3(a). Hon. Janaka Bandara Tennakoon
Minister of Land and Land Development
No.80/5, Govijana Mandiraya
Rajamalwatte Road
Battaramulla

Added Substituted 3(a)
Respondent – Respondent

4. Menaka Priyanthi Abeyratne
   Divisional Secretary and Acquiring Officer
   Divisional Secretariat
   Bulathsinhala
   Added 4th Respondent – Respondent

Before: Tilakawardane J.
Imam J.
Suresh Chandra J.

Counsel:

Harsha Soza, PC. with N.R. Sivendran for the Petitioner - Petitioner - Appellant

Ashan Fernando, SC. for the Respondents

Argued on : 04.11.2011

Decided on : 02.07.2012

Suresh Chandra, J

This is an appeal against the Judgment of the Court of Appeal exercising its Writ Jurisdiction dismissing the Petitioner's Application seeking a Writ of Certiorari to quash the order of acquisition published in the Government Gazette No.46 dated 17th March

2004 made under clause (a) of the proviso to Section 38 of the Land Acquisition Act No.09 of 1950 and to quash the notices issued under S.2 and S.4 of the said Act.

The application for special leave to appeal had been taken up by this Court on 10.02.2009 and leave had been granted on the following questions.

1) Has a public purpose been manifested and/or stated in the notice under S.2 of the Land Acquisition Act?
2) Do the facts and circumstances of this case warrant an order under clause (a) of the proviso to S.38 of the Land Acquisition Act on the ground of urgency?

The Appellant in their application to the Court of Appeal had stated as follows.

'That the Appellant was a Regional Plantation Company established under Act No.23 of 1987 and that the Sri Lanka State Plantations Corporation had executed a lease whereby Neuchatel Estate had been leased to the Appellant for a period of 99 years. From time to time various portions of land which was leased to the Appellant had been acquired for specified public purposes which aggregated to about 190 Acres.

By letter dated 06.06.2003 (X12) the Divisional Secretary of Bulathsinghala had written to the Superintendent of Neuchatel Estate stating that the Houses of 9 persons in the Dewamulla Grama Niladhari Division had been destroyed by floods and that it would be an invaluable service if 10 perches per person could be given to those affected 9 persons from Kokhena Division of the Estate. By notice dated 29.07.2003 issued in terms of S.2 of the Land Acquisition Act signed by the said Divisional Secretary, a portion of Kokhena Division in extent 4.94 Hectares (approximately 12 Acres) was to be acquired as alternative lands for flood victims.

By letter dated 08.08.2003 (X15) the Appellant informed the Divisional Secretary of the availability of 4.94 Hectares from Nagahakanda Division of Neuchatel Estate as alternate land for flood victims and objected to the release of land from Kokhena Division.

However the Divisional Secretary had not been agreeable to the alternative proposal of the Appellants as Nagahakanda fell outside the limits of the Bulathsinghala Divisional

Secretariat. On 24th November 2004 S.4 Notice (X24a) was published signed by the same Divisional Secretary to which the Appellant had protested and objected to its publication, stating that 10 workers from Kokhena Division would lose employment, and that there were good yielding rubber trees, and also that administration will be difficult because of less Hectarage. Notwithstanding the objections of the Appellant and their willingness to provide alternate land the Honourable Minister of Lands sought to acquire the said land by an order published in Gazette Extraordinary No 1332/20 of 19th March 2004 (X26), under S.38A of the Land Acquisition Act in terms of its proviso on the grounds of urgency.'

It is at that stage that the Appellant made an application for a Writ of Certiorari to the Court of Appeal to have the said notice quashed and set aside. The basis of the application was mainly that there was no urgency of any form to warrant the making of the said order of acquisition. In view of the absence of urgency at the time of issuing, the said order offends the principle of reasonableness and vitiates the validity of the said order.

The 1st Respondent (The Minister) in the Affidavit filed before the Court of Appeal stated that the purpose in the S.2 notice was a public purpose in view of a Cabinet decision taken to give relief to the families displaced due to floods and earthslips, that the alternate land proposed was not within the Division of Bulathsinghala, that the granting of relief to the displaced families was a function of the National Disaster Management Committee which had been appointed consequent to a Cabinet decision and that State policy was to consider granting relief to families affected by floods as a part of village expansion. In the said Affidavit the allegation of the Appellant that there was no urgency to acquire the said land was denied. No further matters had been set out regarding the urgency of acquiring the said land. The Affidavit filed by the 2nd Respondent was also on the same lines as that of the Affidavit filed by the Minister.

In both Affidavits of the Respondents referring to X21 which was a document filed by the Petitioner in respect of a move to acquire land from a different Estate of the Appellant namely Hillstream Estate, it was stated that the proposed acquisition was given up as the flood victims for whom such land was to be acquired had opted to

continue living in the same area that they were living in and had accepted funds to rebuild their houses which had been affected by the floods. However they had stated that the acquisition process in respect of Kokhena Division continued which resulted in the publication of the notice under clause (a) of the proviso to S.38.

S.38A (1) of the Land Acquisition Act No.09 of 1950 states that

" Where any land is being acquired for the purposes of a local authority and the preliminary valuation of that land made by the Chief Valuer of the Government does not exceed the specified sum, the immediate possession of such land on the **ground of urgency, within the meaning of the proviso to section 38**, shall be deemed to have become necessary, and accordingly the Minister may make an Order of possession under section 38 of this Act…" (emphasis added)

The Appellant had in response to the S.2 notice published on 29th July 2003 intimated to the Divisional Secretary by letter dated 8th August 2003 (X15) of the availability of 4.94 Hectares from Nagahakande Division of Neuchatel Estate as alternate land for flood victims and objected to the release of land from Kokhena Divison as stated above.

The document X18 filed by the Appellant discloses another proposed acquisition from Hillstream Estate which is different from Neuchatel Estate regarding to which a Section 2 notice had also been published. In response to that notice the Superintendent of Hillstream Estate had informed the Divisional Secretary that the portion of the land proposed to be acquired was situated close to the Superintendent's bungalow and office, and that it was undesirable and inconvenient to have outsiders residing in close proximity to the said places. Document X21 dated 26th August 2003, filed by the Appellant shows that the Divisional Secretary had been in agreement with the representations made by the Superintendent of Hillstream Estate and thereafter the proposal to acquire land from Hillstream Estate had been withdrawn.

It would be seen from the above backdrop that the purpose for which the proposed acquisition was sought was to grant relief to flood victims according to the S.2 notice which in fact appeared to be in respect of nine persons who were affected by the floods and regarding whom a request for land in extent of ten perches for each person was

requested according to the document X12 referred to earlier. Although only an extent of 90 perches was required the proposed acquisition was for 4.94 Hectares which was approximately 12 Acres.

It would be necessary to construe the true intent and purpose of the proposed acquisition as regards "public purpose". Document X29 dated 11th June 2004 sent by the Divisional Secretary shows that the land sought to be acquired was to be distributed among the people in Paragoda, Molcava, Ihala Welgama and Dewamulla Divisions, whereas the document X12 stated that the land was needed for nine persons in Dewamulla Division. There was no material to show as to whether the people in Paragoda, Molcava and Ihala Welgama were affected by floods, as the correspondence made available to Court only showed that only nine families of Dewamulla Divison had been affected by floods. In fact the extent of land that was required for these 9 persons was only 90 perches whereas what was sort to be acquired was about 12 Acres in extent which itself causes doubt as to the true purpose of acquisition. It would appear therefore that there was a **collateral purpose** other than the purpose of providing land for flood victims which was purported to be the reason for acquiring the said extent of land from the Estate.

It was held in Manel Fernando v D.M.Jayaratne, Minister of Agriculture and Lands and others 2000 (1) S.L.R. 112 (followed in Katugaha v Minister of Lands and Land development S.C.Appeal 68/2007, S.C. Minutes 23.7.2008) that a S.2 notice must state the public purpose although exceptions may perhaps be implied in regard to purpose involving national security and the like. In the present case although the purpose was stated in the S.2 notice namely "Alternative lands for flood victims" the subsequent correspondence shows that there was a collateral purpose as well, which was not disclosed in the said notice namely to provide for people in other divisions, without any evidence to show that such persons were flood victims. The nature of the public purpose sought to be achieved by the proposed acquisition thus becomes seriously doubtful due to the said collateral purpose, and therefore the true purpose of the proposed acquisition is not spelt out in the said S.2 notice. When lands are acquired for

public purposes it is important to spell out the true purpose for which such acquisition is being made to justify such acquisition.

In the judgment of the Court of Appeal, it is stated that the Appellant had objected to the proposed acquisition on the basis that the proposed land to be acquired was in close proximity to the Superintendent's bungalow and office. This observation is erroneous as such objection was in respect of a proposed acquisition of a different portion of land from Hillstream Estate and not in respect of the land which was the subject matter in this case. The Court of Appeal based its decision on the ground that the question whether a land should be acquired is one of policy to be determined only by the Minister and that the court cannot interfere unless it can be established that there was no urgency or on the ground that there was mala fides on the part of the acquiring authority.

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.

Clause (a) of the proviso to S.38 of the Land Acquisition Act states that the Minister may make an Order under the provisions of the Section 38A,

"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…"

The proviso to S.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.”

In reviewing the matter regarding urgency as stated by court in that case what was meant was that the requirement for urgency has to be satisfactorily set out. In the present case, the affidavits filed by the Minister and the Second Respondent do not effectively establish the urgency for such acquisition specially in the background to the proposed acquisition which has been discussed above. In the circumstances of the present case, the requirement of urgency has not been established by the acquiring authority and placing the burden of showing that there was no urgency, on the Appellant, would with respect amount to a misdirection in law by the Court of Appeal.

In the Indian Supreme Court judgment in the case of Ram Dhari Jindal Memorial Trust Vs. Union of India and Others, C.A. No. 3813 of 2007 it was held that the urgency clause can be invoked by the government only in exceptional cases after "applying its mind". The apex court in India said the burden of justifying acquisition by invoking the urgency clause under Section 17(1)(4) of Land Acquisition Act solely rests on the government as otherwise it amounts to depriving a person of his or her property.

S.38A (3) of the Land Acquisition Act states that

“The provisions of subsection (1) shall not be construed to limit in any way the powers of the Minister to make any Order of possession of any land on the ground of any urgency under section 38 of this Act which he may lawfully make under that section, whether such land is being acquired for the purposes of a local authority or not.”

The Court of Appeal has in its judgment stated that the Appellant has not alleged mala fides against the Minister or the acquiring officer and that the Respondent had

submitted that the acquisition of land was on the direction and the request of the committee for disaster management in the Southern Province appointed by the Cabinet and therefore the Appellant cannot allege mala fides against the Minister or against the acquiring officer. Since the final authority regarding the decision to acquire land under the provisions of the Land Acquisition Act specially in terms of clause (a) of the proviso to S.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. The 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. Exercise of unfettered discretion could be the subject of challenge as has been recognized in several decisions of this Court. It was held in the landmark judgment of the House of Lords in Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 that unfettered discretion is not conferred on a public authority and what needs to be considered is the intention of Parliament when conferring such discretion to a public body to promote the policy and objectives of an Act. The policy and objectives of the Act can only be determined by construing the Act as a whole and construction is always a matter of law for the Court.

The importance of the decision in the Padfield case was summarized by Lord Denning MR in Breen v Amalgamated Engineering Union [1971] 2 QB 175 at p.190 where he stated that

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by Padfield v Minister for Agriculture, Fisheries and Food which is a landmark in modern administrative law."

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 interests of the public.

The questions of law on which leave was granted in this case are answered as follows:

(1) The public purpose has not been clearly manifested in the notice under Section 2 (X14) of the Land Acquisition Act.

(2) The facts and circumstances of this case do not warrant an order under proviso (a) to Section 38 of the Land Acquisition Act on the ground of urgency.

For the reasons set out above, the appeal of the Appellant is allowed and a mandate in the nature of a writ of certiorari is issued quashing the order of acquisition No.46 of 2004 dated 17th March 2004 made under clause (a) of the proviso to S.38 of the Land Acquisition Act and published in the Gazette Extraordinary bearing No.1332/20 dated 19.03.2004, and the orders made under Sections 2 and 4 of the said Act. There shall be no costs.

JUDGE OF THE SUPREME COURT

TILAKAWARDANE J.

I agree.

JUDGE OF THE SUPREME COURT

IMAM J.

I agree.

JUDGE OF THE SUPREME COURT