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

In a matter of an application in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

M.T. Mallika,
No 55, Jasmine Villa, Nittambuwa Road, Veyangoda

PETITIONER

-Vs-

SC FR Application No. 542/2009

1. **Jeevan Kumaratunga,**
   Hon. Minister of Land and Land Development, Govijana Mandiraya, 80/5, Rajamalwatte Avenue, Battaramulla

2. **S.G. Wijayabandu,**
   Attanagalle Divisional Secretary, Divisional Secretariat, Nittambuwa

3. **Hon. Attorney General**,
   Attorney General's Department, Colombo 12.

RESPONDENTS

1A. **John Amaratunga**,
Minister of Land, Ministry of Lands, 'Mihikatha Medura', Land Secretariat, No.1200/6, Rajamalwatte Road, Battaramulla.

1B. **S.M. Chandrasena**,
Minister of Land, Ministry of Lands, 'Mihikatha Medura', Land Secretariat, No.1200/6, Rajamalwatte Road, Battaramulla.

2A. **D. M. Rathnayake**,
Attanagalle Divisional Secretary,Divisional Secretariat, Nittambuwa.

2B. **S. P. Gunawardhana**,
Attanagalle Divisional Secretary,Divisional Secretariat, Nittambuwa.

SUBSTITUTED- RESPONDENTS

Before : Priyantha Jayawardena, PC, J
L.T.B. Dehideniya, J
P. Padman Surasena, J

Counsel : Asthika Devendra with Wasantha Vidanage and Sudarsha de Silva for the petitioner.
Suren Gnanaraj, SSC for the 1st to 3rd respondents

Argued on : 10th September, 2020

Decided on : 20th January, 2021

Priyantha Jayawardena, PC, J

Facts of the Application

The petitioner filed the instant application challenging the acquisition of a land for the development of St. Mary's College, Veyangoda.

The petitioner stated that she was the owner of the land depicted as 'Lot 1' in Plan No.790 dated 13th of March, 1988 prepared by Licensed Surveyor A.D.M.J. Rupasinghe, in an extent of 1 rood and 0.62 perches.

The petitioner further stated that a notice under section 2 of the Land Acquisition Act, No. 09 of 1950, as amended [hereinafter referred to as "the Land Acquisition Act"] was published by

the 2nd respondent on the 13th of June, 2002 stating that the land known as *Gorakagahalanda*, in an extent of 04 acres and 03 roods, is intended to be acquired for the public purpose of developing St. Mary's College.

Moreover, the petitioner stated that her house and the appurtenant land, in an extent of 1 rood and 0.62 perches, are situated in the said *Gorakagahalanda* land. Further, she claimed that she had servitude rights to use an access road and the well situated in the said *Gorakagahalanda* land.

Thereafter, a notice under section 4 of the Land Acquisition Act was published on the 10th of October, 2003 by the 2nd respondent calling for objections, if any, to the intended acquisition of the said land. In response to the said notice, at the request of the petitioner, her husband had forwarded objections to the proposed acquisition.

The petitioner stated that on the 12th of May, 2005 a government surveyor attempted to survey the said *Gorakagahalanda* land where the petitioner's house and the appurtenant land are situated.

Hence, she had filed the writ application bearing CA(Writ) Application No. 1016/05, on the 22nd of June, 2005, in the Court of Appeal seeking, *inter alia*, a writ of certiorari to quash the notices issued under sections 2 and 4 of the Land Acquisition Act.

The petitioner stated that whilst the said writ application was pending in the Court of Appeal, a declaration in terms of section 5 of the said Act was published by the 1st respondent, in the Gazette No. 1461/16 dated 08th of September, 2006, stating that a part of the said *Gorakagahalanda* land depicted as **'Lot 2'**, in the Advanced Tracing No. GAM/ATH/02/275 prepared by the Surveyor General, was required for the public purpose of St. Mary's College.

Further, in the said Advanced Tracing, the land intended to be acquired, in an extent of 1.2298 hectares, was depicted as '**Lot 2'** while the petitioner's house and the appurtenant land to the house, in an extent of 1 rood and 0.62 perches, were depicted as '**Lot 1**'. Accordingly, the petitioner's house and the appurtenant land had been excluded from the acquisition process.

Subsequent to the said declaration, the petitioner had withdrawn the said writ application on the 28th of November, 2006 reserving the right to file a fresh application with additional documents.

The petitioner stated that the 2nd respondent, by letter dated 21st of January, 2009, informed her that steps were being taken to acquire the said land *Gorakagahalanda* for the development of St. Mary's College excluding the petitioner's house and the appurtenant land. Further, by the said letter, the petitioner was asked to contact the Zonal Director of Education or the Secretary to the Ministry of Education to discuss the issues pertaining to the petitioner's servitude rights claimed over the land intended to be acquired.

The petitioner further stated that the access road proposed by the State was unacceptable as, *inter alia,* it was situated four and a half feet below her house and gave access from the rear side of the house.

Thereafter, a meeting had been convened on the 13th of February, 2009 to discuss the issues pertaining to the petitioner's alleged servitude right to use the access road and the well situated in 'Lot 2' of the said *Gorakagahalanda* land intended to be acquired.

The petitioner further stated that at the said meeting, she conveyed, *inter alia*, that she would be amenable for her house and appurtenant land situated in 'Lot 1' to be given for acquisition, if an alternative land in an extent of 90 perches was given to her. Accordingly, the 2nd respondent had offered an alternative land in extent of 60 perches in lieu of her house and the appurtenant land, by letter dated 04th of March 2009. However, the petitioner stated that she refused the said offer, by letter dated 09th of March, 2009, as the value of the house, appurtenant land and the servitude rights attached were greater than the value of the 60 perches offered.

Moreover, the petitioner stated that the exclusion of the house owned by one Sanath Karunarathne and the shop owned by one Jayawardene, which were situated in between the school premises and its playground, from the acquisition process was discriminatory.

The petitioner stated that even though she was informed by letter dated 22nd of June, 2009 that the land sought to be acquired would be surveyed, a government surveyor conducted the survey on the 02nd of July, 2009 of not only the land intended to be acquired but the entire land including the petitioner's house and the appurtenant land.

Subsequent to the said survey of the land, the petitioner has filed the instant application on the 16th of July, 2009 stating, *inter alia*, that the land acquisition process had reverted to the initial stage whereby steps were being taken to acquire the entire land of '*Gorakagahalanda'* including her house and the appurtenant land that she and her family had been residing for over

forty years constituting to an infringement of her Fundamental Rights under Article 12(1) of the Constitution.

In the circumstances, the petitioner prayed, *inter alia*:

> *"(b) [To] declare that anyone or more or all of the respondents have violated the fundamental rights of the petitioner guaranteed under Article 12(1) of the Constitution of Sri Lanka.*
>
> *(c) [To] make order directing the respondents to grant the petitioner an alternative land in an extent of 90 perches as demarcated in P14, in the event of the Petitioner's house and appurtenant land being acquired.*
>
> *(d) [To] make order directing the respondent to provide a convenient alternative route in the event of the acquisition of the entire land (Lot 2 of P2) excepting the petitioner's house and the appurtenant land.*
>
> *(e) [To] make order directing the respondents to grant compensation to the petitioner in accordance with the Land Acquisition Act, for the portion of the land that would be acquired."*

This court has granted the petitioner leave to proceed for the alleged violation of the petitioner's Fundamental Rights enshrined under Article 12(1) of the Constitution.

Objections of the 2nd Respondent

The 2nd respondent filed an affidavit objecting to the granting of the reliefs prayed for in the petition and stated that the land sought to be acquired was for the public purpose of providing better learning facilities for about 2200 students of St. Mary's College, Veyangoda. He stated that the said public purpose, which was not disputed by the petitioner, is being frustrated due to the conduct of the petitioner.

The 2nd respondent further stated that as described in the declaration issued under section 5 of the Land Acquisition Act, the land sought to be acquired by the State was **'Lot 2**' of the land called *Gorakagahalanda*. Hence, the petitioner's house and the appurtenant land which is situated in **'Lot 1**' of *Gorakagahalanda* would not be acquired by the State.

Further, the 2nd respondent had informed the petitioner, by letter dated 21st of January, 2009, that the petitioner's house and the appurtenant land had been excluded from the acquisition

process considering the objections raised by the petitioner. Hence, the petitioner's contention that the land acquisition process has reverted to the initial stage has no merit.

The 2nd respondent further stated that a meeting was held on the 13th of February, 2009 to discuss the concerns of the petitioner pertaining to the servitude rights, claimed by her, over the land proposed to be acquired, and that at the said meeting, the petitioner had suggested to give her house and the appurtenant land to the State and to have an alternative land as compensation for the acquisition of her house and the appurtenant land.

Consequently, the 2nd respondent, by letter dated 04th of March, 2009, had asked the petitioner whether she would be amenable to accept an alternative land in an extent of 60 perches as compensation for the acquisition of her house and the appurtenant land. In response, the petitioner has refused the said offer, by letter dated 09th of March 2009, stating that the value of the house, appurtenant land and the servitude rights attached to 'Lot 2' were greater than the 60 perches offered by the 2nd respondent.

Responding to the alleged servitude right to use an access road over the land that is sought to be acquired, the 2nd respondent stated that in lieu of the petitioner's said servitude right over 'Lot 2' of *Gorakagahalanda*, the petitioner has been provided a suitable access road, bordering the western boundary of the petitioner's house, which connects to a by-road that leads directly to the Nittambuwa-Veyangoda main road. He further stated that using the said road does not cause any impediment to access the house and appurtenant land of the petitioner as it is situated only two feet above the said access road.

Responding to the allegation that the two lands situated near St. Mary's College, Veyangoda, owned by one Sanath Karunarathne and one Jayawardena have been excluded from the acquisition process, the 2nd respondent stated that a final decision on the acquisition of the said two properties had not yet been taken. In any event, as the petitioner's house and the appurtenant land have been excluded from the acquisition process the petitioner's contention on discrimination is without merit.

In the circumstances, the 2nd respondent prayed *inter alia;*

(a) The petitioner's application is filed out of time,
(b) The petitioner is not entitled to the reliefs sought in the prayer to the petition, and
(c) The petitioner has misrepresented material facts and that her application lacks *uberrimae fides*.

Is the application filed out of time?

In view of the above preliminary objections raised on behalf of the respondents, the objection that the instant application of the petitioner is filed out of time will be considered first.

Article 126(2) of the Constitution states:

> *"Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges".* [Emphasis Added]

A plain reading of the said Article 126(2) shows that any person who alleges a violation of a Fundamental Right shall file an application within one month of the alleged violation.

Our courts have held that the one-month time limit stipulated in the aforesaid Article should be strictly adhered to by the petitioners.

In the case of ***Edirisuriya v. Navaratnam and others,*** (1985) 1 SLR 100 at page 105, it was held:

> *"This Court has consistently proceeded on the basis that the time limit of one month set out in Article 126 (2) of the Constitution, is mandatory".*

It is settled law that the mandatory time limits set out by the legislator shall be strictly complied with as it affects the invoking of the jurisdiction of a court.

This view was expressed in ***Gamaethige v. Siriwardena*** (1988) 1 SLR 384 at page 400 where Mark Fernando J. cited the case of ***Jayawardena v. Attorney-General***, (F.R.D. (1) page 175) with approval where it was held:

> *"... an application made more than one month after the alleged infringement was refused on the ground that the jurisdiction of this Court cannot be exercised after the lapse of one month from the date of the executive or administrative act complained of."* [Emphasis Added]

Similarly, the requirement to comply with stipulated time limits to invoke the jurisdiction of a court was discussed in the case of ***Edward v. De Silva***, 46 NLR 342 at pages 343-344, where it was held:

> *"It is hardly necessary to labour the point since the language of Chapter 49 of the Code makes it sufficiently clear that the Legislature in enacting, as it did, was creating an exception to the ordinary rule, but in a qualified and limited way. In other words, the Legislature continued the jurisdiction, that is to say, the competency of the Court as the Court appointed to try and determine the case, beyond its ordinary limits, but it took care to see, as it almost invariably does, that its jurisdiction, in the sense of its power to act, and of its correct action are made dependent on the observance of rules of procedure. Some of those rules are so vital, being of the spirit of law, of the very essence of judicial action, that a failure to comply with them would result in a failure of jurisdiction or power to act, and that would render anything done or any order made thereafter devoid of legal consequence..."* [Emphasis Added]

When did the petitioner become aware of the alleged infringement?

Article 126(2) of the Constitution states that an application for infringement or imminent infringement of Fundamental Rights can be filed "within one month thereof" in the Supreme Court.

The word "within" used in the said Article requires the period of one month to be calculated from the date of the alleged infringement, imminent infringement, or from the date on which the petitioner became aware of the alleged infringement, if knowledge on the part of the petitioner is required to establish the alleged infringement.

This was discussed in ***Gamaethige v. Siriwardena*** *(supra) at page 402* which states:

> *"Three principles are discernible in regard to the operation of the time limit prescribed by Article 126(2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (e.g of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both infringement and knowledge exist."*

In the instant application, the land acquisition process had commenced with the publication of the notice under section 2 of the Land Acquisition Act on the 13th of June, 2002. Thereafter, a notice under section 4 of the said Act had been published on the 10th of October, 2003. The petitioner had filed the writ application challenging the said land acquisition proceedings in the Court of Appeal on the 22nd of June, 2005. In the said writ application, the petitioner had prayed for, *inter alia*, a writ of certiorari to set aside or quash the notices issued under sections 2 and 4 of the said Act.

However, the petitioner had withdrawn the said writ application with liberty to file a fresh application with additional documents on the 28th of November, 2006 consequent to the publication of the declaration issued by the 1st respondent under section 5 of the Land Acquisition Act on the 08th of September, 2006. Accordingly, the said application had been *pro forma* dismissed. Thereafter, the instant application had been filed in this court on the 16th of July, 2009.

In view of the above, I am of the opinion that on the 08th of September, 2006, with the publication of the declaration issued under section 5 of the Land Acquisition Act, the petitioner became aware that her house and the appurtenant land, situated in 'Lot 1', have been excluded from the acquisition process under reference. Further, the petitioner had come to know that the servitude rights claimed by the petitioner over '**Lot 2**' of *Gorakagahalanda* land to use an 'access road' and the 'well' would be affected by the proposed acquisition.

Is there a continuing infringement?

The learned Counsel for the petitioner, citing the case of ***Demuni Sriyani de Soyza and others v. Dharmasena Dissanayake***, SC/FR/206/2008, SC Minutes dated 09th of December, 2016, submitted that in the event of a continuous infringement, the one-month time limit stipulated in Article 126(2) of the Constitution is not applicable.

The learned Counsel for the petitioner contended that that even following the withdrawal of the petitioner's writ application, the issues surrounding the acquisition process were animate as the respondents were negotiating with the petitioner to obtain her consent to have her house and the appurtenant land to be acquired to the State. As such, it was submitted that the infringement alleged in the instant application is a continuous infringement.

Accordingly, it is useful to examine the provisions of the Land Acquisition Act in order to ascertain whether the alleged violation is a continuous infringement as contended by the petitioner.

The land acquisition process under reference has proceeded until the publication of the declaration under section 5 of the Land Acquisition Act. The notices published under sections 2 and 4 of the Land Acquisition Act for the said land acquisition process have included the petitioner's house and the appurtenant land. However, the words used in the said sections 2 and 4 clearly indicate that during the said stages, the State only investigates the suitability of a particular property for the public purpose of the acquisition and considers the objections raised by the property owners against the intended acquisition.

Section 5 of the Land Acquisition Act states as follows:

> *"(1) Where the Minister decides under subsection (5) of section 4 that a particular land or servitude should be acquired under this Act, he shall make a written declaration that such land or servitude 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 or over which the servitude 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 or servitude shall be conclusive evidence that such land or servitude 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".*
>
> [Emphasis Added]

In view of the above, the declaration published under section 5 of the said Act is justiciable as it is considered "conclusive evidence" that a land or a servitude is needed for a public purpose. In the instant application, the said declaration has excluded the petitioner's house and the appurtenant land. Thus, it is conclusive evidence that neither the petitioner's house nor the appurtenant land will be acquired by the State.

Further, the reliefs as prayed for by the petitioner in *subparagraph (c)* and *(e)* of the prayer will not arise for consideration by this court as her property is excluded from the land acquisition process. In any event, the question of compensation has not arisen as the acquisition process has not been completed.

Moreover, the Counsel for the petitioner submitted that with the receipt of the notice dated 22nd of June, 2009 by the surveyor informing of the survey of *Gorakagahalanda* land, the petitioner believed that her house and the appurtenant land were going to be acquired by the State. As such, he submitted that the one-month period should be computed from the date of the said notice by the surveyor.

However, upon perusal of the said notice dated 22nd of June, 2009, it is evident that it gives notice to the petitioner that the *Gorakagahalanda* land would be surveyed on the 02nd of July, 2009.

In any event, section 6 of the said Act enables the Survey Department to survey a land after a declaration is made under section 5 of the said Act in order to prepare a plan for the purpose of proceeding with the procedure stipulated in the Act.

Thus, since the land sought to be acquired is a portion of *Gorakagahalanda* land, it is necessary to survey the entire land to prepare a plan demarcating the boundaries of the Lots that are to be acquired and to be excluded from the acquisition process.

Further, the said notice has only stated what the petitioner was already aware of since the 08th of September, 2007 consequent to the publication of the declaration under section 5 of the said Act and thus, the said notice cannot be construed as an attempt to acquire the property of the petitioner. In any event, the 1st respondent has clearly stated in his affidavit that her property has been excluded from the land acquisition process under reference.

In the circumstances, I am of the view that there is no continuous infringement of the petitioner's rights as contended by the learned Counsel for the petitioner.

Delay in filing the application

As stated above, the petitioner has withdrawn the writ application filed in the Court of Appeal after the said declaration under section 5 of the Land Acquisition Act was published.

Further, subsequent to the withdrawal of the said writ application on the 28th of November, 2006, a meeting had been held between the petitioner and the 2nd respondent on the 13th of February, 2009 to discuss issues of the petitioner pertaining to the acquisition process under reference. During the said meeting, even though her house and the appurtenant land were excluded from the acquisition process, the petitioner had proposed to hand over the same in exchange for a 90-perch block of land as compensation.

As an amicable settlement, the petitioner had been offered an alternative land in an extent of 60 perches in lieu of her house and the appurtenant land by letter dated 04th of March, 2009. However, by letter dated 09th of March, 2009, the petitioner had rejected the said offer on the basis that her house and the appurtenant land are more valuable than the said offer.

A surveyor had given notice to the petitioner of the survey of *Gorakagahalanda* land on the 22nd of June 2009, and the said survey had been conducted on the 02nd of July, 2009. Thereafter, the petitioner had filed the instant application on the 16th of July, 2009.

The abovementioned events show that the petitioner had spent two and a half years, from the date of the publication of declaration in terms of section 5 of the Land Acquisition Act, seeking administrative reliefs, before she filed the instant application in the Supreme Court on the 16th of July, 2009.

Thus, it is necessary to consider whether the time spent in seeking administrative reliefs can be excluded when computing the one-month period stipulated in Article 126(2) of the Constitution.

Can the time spent in seeking administrative reliefs be excluded from the computation of one month?

Article 126(2) does not specify any instances which could be excluded from the computation of the one-month period. However, if a person has filed a complaint in the Human Rights Commission, section 13 of the Human Rights Commission Act, No. 21 of 1996 provides that the time period where an inquiry is pending before the Human Rights Commission shall not be taken into account when computing the one-month time limit prescribed in Article 126(2) of the Constitution.

Further, in the case of ***Namasivayam v. Gunawardena*** (1989) 1 SLR 394, the Supreme Court held that if a person was hindered from having access to the Supreme Court due to his detention, the said period should be excluded when computing the one-month time limit.

It is pertinent to note that none of the aforementioned grounds are applicable to the instant application. On the contrary, the petitioner had been seeking administrative relief since she had withdrawn the said writ application filed in the Court of Appeal.

Accordingly, the time spent in seeking administrative reliefs without invoking the Fundamental Rights jurisdiction of the Supreme Court cannot be excluded when computing the mandatory one-month time limit stipulated in Article 126(2) of the Constitution.

A similar view was expressed in ***Gamaethige v. Siriwardena*** (supra) at page 396 wherein Mark Fernando J. further held**:**

> *"It was the Petitioner's contention, however, that although he might have been entitled to apply to this Court in January or February 1986, it was the refusal of his final appeal that constituted the operative infringement for the purpose of computing the time limit of one month. This contention is untenable. If a person is entitled to institute proceedings under Article 126(2) in respect of an infringement at a certain point in time, the filing of an appeal or an application for relief, whether administrative or judicial does not in any way prevent or interrupt the operation of the time limit. Thus, a person aggrieved by an unlawful arrest may institute Civil proceedings for damages for wrongful arrest or complain to the Ombudsmen, under Article 156. If he is unsuccessful, in that his action or complaint is dismissed, he cannot claim that the computation of time for the purposes of a subsequent petition under Article 126(2) commences from the date of such dismissal. That example relates to a judicial or constitutional remedy; the position of an aggrieved person can hardly be better if he opted to pursue an administrative remedy. The Constitution provides for a sure and expeditious remedy. In the highest Court, to be granted according to law, and not subject to the uncertain discretion of the very executive of whose act the aggrieved person complains; <u>if he decides to pursue other remedies, particularly administrative remedies, the lapse of time will (save in very exceptional circumstances) result in the former remedy becoming unavailable to him"</u>.* [Emphasis Added]

Moreover, *at page 397***,** it was held:

> *"... An aggrieved person who chooses not to pursue his constitutional remedy, and later finds that other remedies are of no avail, can grant himself an extension of time, by the simple device of filing yet another appeal; if he had previously appealed only to the Secretary to the Ministry, he will appeal to the Minister; or from the Minister, to the Prime Minister; and then to the President; or he will make a second or a third appeal, before ultimately deciding to petition this Court. Article 126 neither permits, nor was intended to permit, such a course of action: on the contrary, the remedy under Article 126 must be availed of at the earliest possible opportunity, within the prescribed times, and if not so availed of, the remedy ceases to be available".* [Emphasis Added]

In the circumstances, I am of the view that the petitioner became aware that her alleged Fundamental Rights were violated at least on the 08th of September, 2006, when the declaration under section 5 of the Land Acquisition Act was published. Thereafter, she had been seeking administrative relief to resolve her alleged grievances relating to her house, the appurtenant land and alleged servitude rights for a period of two and half years from the publication of the said declaration. The instant application had been filed after exhausting all the other remedies available to the petitioner including resorting to judicial remedies.

The said Court of Appeal judgment states that the Counsel for the petitioner moves to withdraw the application with liberty to file fresh application with additional documents. However, in such an instance, a party who had withdrawn an application is bound to comply with the mandatory time frames stipulated by law. As such, the one-month time limit stipulated in Article 126(2) will be computed from the date of the alleged infringement or imminent infringement of the Fundamental Right.

Hence, the time spent by the petitioner in seeking administrative reliefs and other judicial remedies cannot be excluded from the computation of the one-month time limit stipulated in Article 126(2) of the Constitution.

In view of the above, I am of the opinion that the petitioner has not invoked the jurisdiction of this court by filing the petition within one month of the alleged infringement of her Fundamental Rights enshrined in Article 12(1) of the Constitution and thus, the petition should be dismissed.

Accordingly, for the reasons stated above, the application is dismissed with Rs. 50,000/- as costs to be paid to the State.

Judge of the Supreme Court

L.T.B. Dehideniya, J.

I agree **Judge of the Supreme Court**

P. Padman Surasena, J.

I agree **Judge of the Supreme Court**

.