

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

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

D. S. Fernando,
No. 01, G. H. Perera Mawatha,
Rattanapitiya.

Petitioner

S.C.(F.R.) Application No: 360/2016

Vs.

1. Hon. Laxman Kiriella,
The Former Minister of Higher Education and Highways,
The Ministry of Highways,
Denzil Kobbekaduwa Mawatha,
Koswatta,
Battaramulla.

1(a). Hon. Johnston Fernando,
The Former Minister of Roads and Highways,
The Ministry of Roads and Highways,
Denzil Kobbekaduwa Mawatha,
Koswatta,
Battaramulla.

1(b). Hon. Bandula Gunawardane,
Minister of Mass Media, Transport and Highways,
The Ministry of Highways,
9th Floor, Maganeguma Mahamedura,
Denzil Kobbekaduwa Mawatha,

Pelawatta,
Battaramulla.

2. Hon. John Amarathunga,
The Former Minister of Lands,
No. 1200/6,
Rajamalwatta Road,
Battaramulla.

2(a). Hon. S. M. Chandrasena,
The Minister of Lands and Land
Development,
The Ministry of Lands and Land
Development,
No. 1200/6,
Rajamalwatta Road,
Battaramulla.

2(b). Hon. Harin Fernando,
The Minister of Land and Tourism,
No. 1200/6,
Rajamalwatta Road,
Battaramulla.

3. The Secretary,
The Ministry of Highways,
No. 216,
Denzil Kobbekaduwa Mawatha,
Koswatta,
Battaramulla.

4. The Road Development Authority,
3rd Floor, Sethsiripaya,
Battaramulla.

5. M. P. K. L. Gunarathne,
The Director General,
The Road Development Authority,

Sethsiripaya,
Battaramulla.

- 5(a). L. V. S. Weerakoon,
The Director General,
The Road Development Authority,
Maganeguma Mahamedura,
Denzil Kobbekaduwa Mawatha,
Pelawatta,
Battaramulla.
6. Director (Lands),
The Road Development Authority,
Sethsiripaya,
Battaramulla.
- 6(a). N. K. L. Neththikumara,
The Director (Lands),
The Road Development Authority,
Maganeguma Mahamedura,
Denzil Kobbekaduwa Mawatha,
Pelawatta,
Battaramulla.
7. W. K. Kodithuwakku,
The Project Director,
National Highways Sector Project,
No. 434/2, Danny Hettiarachchi
Mawatha,
Ganahena,
Battaramulla.
8. L. A. Kalukapuarachchi,
The Divisional Secretary,
Divisional Secretariat of Kesbewa,
Piliyandala.

9. The Surveyor General,
The Department of Surveyor
General,
Narahenpita,
Colombo 05.

10. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before: Hon. Buwaneka Aluwihare, P.C., J.

Hon. Janak De Silva, J.

Hon. Arjuna Obeyesekere, J.

Counsel:

Rasika Dissanayake with Shabeer Huzair for the Petitioner

Yuresha de Silva D.S.G. for the Respondents

Written Submissions:

Not filed by either party

Argued on: 10.01.2023

Decided on: 10.08.2023

Janak De Silva, J.

The Petitioner owns a parcel of land that is situated in Rattanapitiya, Boralesgamuwa and facing the Pamankada-Horana main road. According to the Petitioner this is the sole residential property owned by him. The State acquired two portions of the same parcel of land on two separate occasions for road development.

The factual circumstances of the two acquisitions are as follows.

A section 2 notice under the Land Acquisition Act (Act) dated 08.04.2008 (9R1) was published asserting that land was required for the public purpose of “*widening of Colombo – Horana Highway [...] under the National Highways Sector Project*”. On 06.02.2012, a section 5 notice under the Act (9R2) was published reflecting the decision of the Minister of Lands, *inter alia*, that Lot No. EF depicted in the Advance Tracing bearing No. CO/KSB/2008/198 (9R3) was required for the said public purpose. On 19.02.2013, an order (9R4) was made in terms of section 38 (a) of the Act (9R4). The notice in terms of section 7 of the Act (9R5) was published on 08.05.2013.

On 27.05.2013, an inquiry was held in terms of section 9 of the Act with the participation of the Petitioner. A decision in terms of section 10(1)(a) of the Act (9R8) was made accepting the claim of the Petitioner in respect of Lot No. 1 depicted in Plan bearing No. 9332 subject to the life interest of the mother of the Petitioner. On 10.03.2014, an award in terms of section 17 (1) of the Act (9R9) was made awarding a sum of Rs. 2,840,000/- as compensation for the acquisition of 2.29 perches.

Subsequently, the Petitioner preferred an appeal to the Land Acquisition Board of Review. Later, the Petitioner made an appeal to the Ministerial Committee as reflected in document marked P17. Upon considering the appeal, the Land Acquisition and Resettlement Committee (“LARC”), increased the compensation to Rs. 4,070,041/-. This decision was later affirmed by the Ministerial Compensation Appeal Board (“SUPER LARC”). The Petitioner refused to accept the said compensation along with the *ex-gratia* payment of Rs. 500,000/- claiming that he found the proposed compensation insufficient and that he wanted to seek an enhancement of the proposed compensation. The State has taken possession of the said portion of land.

In the second acquisition, a section 2 notice under the Act was published on 12.12.2013 for the same public purpose, namely widening of the Pamankada-Horana Road. A section 38 (a) order under the Act was published on 05.05.2014, covering 1.38 perches of land belonging to the Petitioner. On 08.02.2017 and 19.04.2017 respectively steps were taken to publish notices in terms of Sections 5 and 7 of the Act. On 08.05.2017, an inquiry in terms of section 9 of the Act was held with the participation of the Petitioner. The Petitioner's claim to the said land was accepted in terms of section 10 (1) (a) of the Act in the decision marked 9R26 dated 16.05.2017. On 03.10.2017, an award in terms of section 17 (1) of the Act was made awarding Rs. 1,496,500.00 as compensation. This was subsequently increased to Rs. 3,235,750.00 by LARC and to Rs. 4,623,875.00 by SUPER LARC. The State has taken possession of this portion as well.

Hence, a total sum of Rs. 8,693,916.00 has been determined to be paid as compensation to the Petitioner for the acquisition of a total of 3.64 perches of land. The Petitioner has thus far refused to accept this amount.

Leave to proceed has been granted under Articles 12(1), 12(2) and 14(1)(g) of the Constitution.

The Petitioner is seeking the following reliefs:

1. Declaration of an infringement and/or continuing violation of the Petitioner's fundamental rights guaranteed under Articles 12 (1) and/or 12 (2) and/or 14 (g) of the Constitution by the 1st – 10th Respondents; and,
2. A direction that the 1st – 10th Respondents pay compensation to the Petitioner for the acquisitions together without any delay.

Articles 12 (1) and 12(2)

Article 12(1) of the Constitution encompasses two distinct principles. The negative concept is that all individuals are equal before the law and that no one should be treated differently. The positive concept is that all individuals are entitled to equal protection of the law, which requires them to be treated equally in similar circumstances.

The negative concept requires the application of the law to everyone. No one is entitled to be treated differently, except where the law recognises a specific exemption to its application such as Articles 12(4), 15(7) and 15(8) of the Constitution. Any act which contravenes the law will violate the rule of law embedded in Article 12(1).

In ***C. W. Mackie and Company Ltd. v. Hugh Molagoda, Commissioner General of Inland Revenue and others*** [(1986) 1 Sri L.R. 300 at page 309] Sharvananda C.J. held that:

*“[...] [T]he equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act. Via Article 12, **one cannot seek the execution of any illegal or invalid act.** Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law.”* (Emphasis added)

This decision was quoted with approval in ***Farook v. Dharmaratne, Chairman, Provincial Public Service Commission, Uva and Others*** [(2005) 1 Sri L.R. 133 at 140] where Dr. Shirani Bandaranayake C.J. observed that:

*“**Article 12 (1) of the Constitution does not provide for any situation where the authorities will have to act illegally. The safeguard retained in Article 12 (1) is for the performance of a lawful act and not to be directed to carry out an illegal function. In order to succeed the petitioner must be in a position to place material***

before this Court that there has been unequal treatment within the framework of a lawful act.” (Emphasis added)

Therefore, where there is an allegation of a violation of Article 12(1) of the Constitution, it is incumbent on the Petitioner to, inter alia, establish that the Respondent will not have to act contrary to law in providing the relief sought by the Petitioner.

The Petitioner does not challenge the legality of the acquisition of the two parcels of land. In fact, he makes a laudable assertion that he did not challenge the acquisition in the public interest. His grievance is that the compensation paid for the two acquisitions is inadequate as it was calculated based on the acquisition having been made on two different dates. The Petitioner contends that he is entitled in law to have the authorities calculate the compensation assuming the two acquisitions were done together and not independently.

In this context, I have to examine the basis on which compensation is calculated in terms of the Act.

Part VI of the Act deals with compensation. Section 46 of the Act deals with the "market value" of the land or servitude that is to be acquired for the stated public purpose. Section 45 of the Act specifies the factors that must be taken into account when determining the market value for compensation assessment.

It states that this market value refers to the value specified in section 7 of the Act. This position is clearly defined in the Act, but it has been reaffirmed in ***C.E.A Perera v. The Assistant Government Agent, Kaluthara (74 N.L.R. 130)***, where Weeramantry, J. held:

“Section 45 (1) of the Land Acquisition Ordinance (Cap. 460) provides that the market value of a land for the purposes of that Ordinance shall be the amount which the land might be expected to have realized if sold by a willing seller in

the open market as a separate entity on the date of publication of notice under Section 7.” (Emphasis added)

It is evident that the market value of the land acquired must be determined on the date of the notice under section 7 of the Act. The section 7 notices for the two acquisitions were published on two different dates, 08.05.2013 and 19.04.2017. Thus, the market value of the two portions of land must be determined based on those two different dates on which the section 7 notices were made although acquired for the same public purpose. There is no provision in the Act to apply one date to both acquisitions.

The State has followed the provisions of the Act when calculating the compensation. The Petitioner is asking the State to determine the compensation for the two portions of land acquired in the two different days, assuming they were done on the same day. That basis may lead to the Petitioner receiving a higher compensation. Nevertheless, the existing law does not permit the Court to order such a course of action.

Court is certainly exercising just and equitable jurisdiction in terms of Article 126(4) of the Constitution. In ***Noble Resources International Pte Limited v. Hon. Ranjith Siyambalapatiya, Minister of Power and Renewable Energy and Others*** [S.C. FR No. 394/2015, S.C.M. 24.06.2016] The Court issued directives pursuant to Article 126(4) even if no violation of a fundamental right has been established. However, the Court cannot under the guise of just and equitable jurisdiction enshrined in Article 126(4) of the Constitution grant any remedy which requires any person to act contrary to law.

I hold that the Petitioner has failed to establish any violation of Article 12(1) of the Constitution. Moreover, the Court cannot direct the State to calculate compensation assuming both acquisitions were done on the same day as it would require the State to act contrary to law.

Furthermore, the Petitioner has failed to show that he was discriminated in calculating the compensation contrary to Article 12(2).

Article 14 (1) (g)

The petitioner contends that he and his wife were forced to cease their self-employment of supplying readymade garments because of the lack of space in their residence after the acquisition.

Article 14 (1) (g) of the Constitution states that “[e]very citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise.”

The right to engage in any lawful trade or profession is infringed if that right is restricted contrary to law. [***W.M.K. De Silva v. Chairman, Ceylon Fertilizer Corporation (1989) 2 Sri L. R. 393 at pages 407-408, Nuwan Chathuranga Padmasiri and Others v. C.D. Wickremaratne and Others (S.C. (F/R) No. 46/2021, S.C.M. 23.11.2022)***].

Moreover, the fundamental right to engage in a trade or business, must be read together with Articles 15 (5), 15 (7) and 15 (8) which demonstrate that Article 14 (1) (g) is not an unrestricted fundamental right.

Specifically, Article 15 (5) states that:

“15 (5). The exercise and operation of the fundamental right declared and recognized by Article 14 (1) (g) shall be subject to such restrictions as may be prescribed by law in the interests of national economy or in relation to –

(a) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise and the licensing and disciplinary control of the person entitled to such fundamental right; and

(b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise.” (Emphasis added)

In ***Licensing of Produce Brokers Bill*** [Decisions of the Supreme Court on Parliamentary Bills, 1978-1983 (Vol. I), page 32], it was observed that Article 15 (5) restrictions are permitted only in accordance with law. Restrictions over an individual's employment shall be permitted in the interest of the general public [***Jeshingbhai v. Emperor AIR 1950 Bombay 363 at page 367***].

Road transport is a significant part of economic activity, particularly in developing countries like Sri Lanka. Although it may be difficult to quantify in economic terms, the contribution of transport for national development, there is no doubt that developed road network plays an indispensable role in providing access to a myriad of economic activity including health, education and facilitating markets for economic growth.

Admittedly, the impugned acquisition has been made for a road widening project. The Petitioner in paragraph 14 of the affidavit dated 12.10.2016 states that he "*did not intend to stand in the way of the said road widening project considering the national importance of the same*". The national importance of the project is thus conceded.

Nevertheless, any restriction on the right *to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise* must be reasonable and proportionate to the object sought to be achieved. Such restrictions would not be reasonable if they arbitrarily and excessively invade the freedom of individuals [***Chintamoan Rao v. State of M.P. AIR 1951 SC 118; Rashid Ahmed v. Municipal Board, Kairana AIR 1950 SC 163***].

I observe that the State has in this instance resorted to a least intrusive approach in the acquisition of land in the instant case by first acquiring a portion which was deemed to be absolutely necessary for the stated public purpose. The second acquisition followed sometime thereafter.

Moreover, in *Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries* [(1985) 1 Sri. L. R. 285 at 323] Sharvananda, C. J. held that the discontinuance of a job or employment in which any person is engaged in does not by itself infringe his fundamental right to carry on an occupation or profession which is guaranteed under Article 14 (1) (g) of the Constitution. Despite the claim of discontinuance of self-employment by the Petitioner, attachment marked P26(iv) shows that the Petitioner, at the time of filing this action, continued to engage in his employment, albeit somewhat restrictively for lack of space, and hence, the Petitioner was not completely deprived of his ability to engage in his trade or business.

In any event, the Respondents have factored in the employment of the Petitioner and the impact the acquisition had on it when compensation was calculated. In the final determination of the SUPER LARC dated 12.05.2015 marked as P35, that part has been addressed as “අවිධිමත් ව්‍යාපාර අහිමිවීම” in the computation of Rs. 4,070,041/=.

For all the foregoing reasons, I hold that the Petitioner has failed to establish any violation of Article 14(1)(g) of the Constitution.

Before parting with this judgment, I wish to draw attention to a shortcoming in the Act that must be corrected. The comity between the legislature and the judiciary requires the Court to draw the attention of the legislature to situations where a lacuna in the law prevents the Court from remedying an injustice. The State has chosen a less intrusive method of acquiring land for the project's development by doing it in two stages. This is in line with the principle of proportionality mentioned earlier and should be encouraged to be followed in future acquisitions as well. The Act does not provide for the compensation to be calculated equitably in such a situation, given the provisions in section 7.

The attention of the legislature is drawn to this deficiency in order to examine an appropriate amendment to the relevant provisions to provide for equitable compensation in similar situations.

The application is dismissed without costs.

JUDGE OF THE SUPREME COURT

Buwaneka Aluwihare, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

Arjuna Obeyesekere, J.

I agree.

JUDGE OF THE SUPREME COURT