S.C. Appeal No. 161/2010

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

S.C. Appeal No. 161/2010
S.C. Spl. L.A. No. 186/2010
C.A. Application No. 691/2007 [Writ]

In the matter of an application for Special Leave to Appeal from the judgment of the Court of Appeal under Article 128 [2] of the Constitution.

D.F.A. Kapugeekiyana,
No. 29, Halgahadeniya Road, Kalapaluwawa, Rajagiriya.
2nd Petitioner-Petitioner-Appellant

Vs.

1. Hon. Janaka Bandara Tennakone, Minister of Lands, Ministry of Lands, "Govijana Mandiraya", No. 80/5, Rajamalwatta Road, Battaramulla.
2. District Land Officer, Acquiring Officer, Divisional Secretariat, Kaduwela.
3. Urban Development Authority, Sethsiripaya, Battaramulla.
4. Sri Lanka Land Reclamation and Development Corporation, No. 3, Sri Jayewardenepura Mawatha, Welikada, Rajagiriya.
5. Inspector of General of Police, Police Headquarters, Colombo 1.

6. Hon. Attorney General,
Attorney General's Office,
Colombo 12.
Respondent-Respondent-Respondents

E.D. Kapugeekiyana,
No. 29,
Halgahadeniya Road,
Kalapaluwawa, Rajagiriya.
1st Petitioner-Respondent-Respondent

BEFORE : **TILAKAWARDANE. J.**
MARSOOF. P.C. J &
DEP.P.C. J

COUNSEL : Faiz Musthapha, P.C., with Faizer Marcar, Ashiq Hashim and Janaka Kroon instructed by W.B. Ekanayake for the 2nd Petitioner-Petitioner-Appellant.
Milinda Gunatilleke, D.S.G., for the Respondents.

ARGUED ON : 26.06.2013

DECIDED ON : 18.11.2013

TILAKAWARDANE. J.

The Petitioner- Appellant (hereinafter referred to as the Petitioner) has sought Leave to Appeal from the decision of the judgment of the Court of Appeal dated 23.08.2010 whereby

the Court of Appeal refused an application made by the Petitioner seeking a writ of certiorari, and in the alternative, a writ of mandamus. This Court granted Special Leave to Appeal on the following questions of law:

1. Whether the Court of Appeal erred in failing to consider the acquisition as ab initio void for the reason that no purpose was disclosed in the **Section 2** Notice warranting the acquisition.
2. Did the Learned Judges of the Court of Appeal err in law by upholding the acquisition on the basis that there was a supervening public purpose.
3. Did the Learned Judges of the Court of Appeal err on the facts by holding that the acquisition was warranted for the purpose of a subsequent public purpose
4. Did the Learned Judges of the Court of Appeal err in law by placing an unfair burden of proof upon the Petitioner, where there was no ground of urgency to vindicate the acquisition under the provisions of the Land Acquisition Act.

The land in question belonging to the Petitioner was acquired by the Ministry of Lands [hereinafter referred to as the Respondent] under the Land Acquisition Act. The acquisition had taken place under the provisions of **Section 38 (a)** of the Land Acquisition Act. A notice was issued under **Section 2** of the abovementioned Act by the District Land Officer and Acquiring Officer for the Colombo District upon the request of the Minister of Lands and Land Development. On the grounds of urgency an order was made on 02.01.1986, and on 08.01.1986 a Government Gazette was published and the Respondents took possession of the land.

The Petitioner challenged the acquisition by seeking two distinct reliefs from the Court of Appeal against the 1st Respondent. The first relief sought by the Petitioner included a writ of certiorari, quashing the order dated 02.01.1986 marked P5 in that Court, on the basis of failing to provide a clear and adequate 'public purpose' on the S. 2 Notice as per the requirements of the Act, failing to show an existing 'public purpose' at the time of the acquisition and failing to reveal grounds of urgency at the time of issuing an order under the provisions of **Section 38 (a)** of the Act. The Petitioner secondly, in the alternative, sought a

writ of mandamus, directing the Respondent to divest the said land on the basis that the land had not been utilized for any purpose nor have there been any improvements carried out on the land.

The Land Acquisition Act describes the steps that need to be followed when acquiring land; in terms of **Section 2 (1)**, the Minister decides and identifies the area and land that is needed for public purpose. Thereafter, as per **Section 4 (1)**, the Minister directs the Acquiring Officer to serve a notice on the owner and another notice to be exhibited in a conspicuous place on or near the land, thereby giving the owner, or any person who has an interest on the property, an opportunity to object to the acquisition. In the event an objection is made, as per **Section 4 (4)** of the Act, the Minister will carry out an inquiry and come to a final conclusion. The Minister's decision will be published in the Gazette and will also be exhibited on or near the land confirming and establishing the finality of the decision. This publication shall be construed as definite evidence of the land being required for a 'public purpose', as per **Section 5 (2)** of the Act, which notably states as follow: *"A declaration made under sub-section (1) in respect of any land or servitude shall be conclusive evidence that such land or servitude is needed for public purpose",* whilst **Section 7 (2) (c)** allows any person having an interest in the land to make a claim for compensation.

The Petitioner in this case asserts that, the notice issued by the Respondents merely states that the acquisition of the land is for 'public purpose'. The law pertaining to the issuance of notices is found in **Section 2(1)** and **(2)** of the **Land Acquisition Act** which reads as follows:

> *"(1) 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 notice in accordance with subsection (2) to be exhibited in some conspicuous places in that area.*
>
> *(2) the notice referred to in subsection (1) shall be in the Sinhala, Tamil and English languages and shall state that the land in that area specified in the notice is required for a public purpose and that all or any of the acts authorized by subsection (3) may be done on any land in that area in order to investigate the suitability of that land for*

that public purpose."

This Court is in agreement with Justice Mark Fernando's broadened illumination of **Section 2 (2)** of the Act in the case of **Manel Fernando and another V D.M Jayarathne, Minister of Agriculture and Lands**, where the following was established:

> *"The minister cannot order the issue of a Section 2 notice unless he has a public purpose in mind. Is there any valid reason why he should withhold this from the owners who may be affected?*
>
> *Section 2(2) requires the notice to state that one or more acts may be done in order to investigate the suitability of that land for that public purpose: obviously that public purpose cannot be an undisclosed one. This implies that the purpose must be disclosed. From a practical point of view, if an officer acting under Section 2(3)(f) does not know the public purpose, he cannot fulfill his duty of ascertaining whether any particular land is suitable for that purpose"*

It is not in dispute that lands are acquired under the provisions of the Land Acquisition Act for the benefit of the public. Yet, in the process of carrying out greater good for the public of the country, one must not unduly neglect the owner of the land. It would be overly harsh to forget the ties a landowner has to his property. Therefore, it is necessary for the Minister and/or any authority acquiring the land, to have a clear and distinct public purpose for which the acquisition is commissioned.

In the event a Minister or any Government official withholds such vital information from the landowner, it must be construed as exercising his powers negligently and unlawfully. Similarly, if the Minister or Government officials are not aware of the true public purpose of acquiring the land then the act of acquiring the property should be viewed through a lens of zealous concern by the Courts. Acquiring properties under deception and pretense or for a potential and nonexistent future public purpose will be unlawful. Importance and necessity in accordance with the provisions of this Act should be given to the existence of the knowledge

of the genuine public purpose the land would be put to use and to disclose such purpose to the landowner at the time of acquiring the property.

Having said that, it is apparent to this Court, after a thorough examination of all the documentation produced before us, that on 14th December 1989 (P8) the Petitioner, who by then had admittedly received notice of the acquisition, had only requested the appropriate compensation for the land without knowledge as to any illegality in the acquisition of the land. The objections made by the Petitioner were solely with regard to the value of the compensation. He did not avail himself of the first given opportunity to object to the acquisition but rather in the letter has, upon various grounds enumerated by him [such as the land being close to the main Koswatte Road, having access to electricity etc.], strongly recommended his land as the more suitable for acquisition. Although the Petitioner was summoned for an inquiry on 09.10.1990 to determine his claims for compensation, he was not granted compensation on the basis of lack of government funds. The Court of Appeal, on 11.10.2001 directed the State to process the Petitioner's claim and to make an award of compensation according to law. Therefore, it is not disputed that in terms of the said order the process for the award of compensation has been completed in terms of the Land Acquisition Act.

The Petitioner's willingness to surrender his property is evident from the contents of the same document, provided that a satisfactory amount of monies are paid to him as compensation. However, the Petitioner has not made any reference or raised any objections in his communications with the Respondent, with regard to the purported failure of the declaration and/or clarity of the public purpose for which the land was acquired.

This Court has further observed the document issued by the Divisional Secretary of Kaduwela dated 18.09.1998 which clearly states that the land is required for the public purpose of 'urban development'. This Court finds this purpose as a proportionately sufficient explanation for the acquiring of the land under the provisions of the Act. It is not contested that while the war on terrorism was ongoing it had been granted to be utilized for the construction of married

quarters for the families of the special task force.

Accordingly, it is the opinion of this Court that the original claim of the Petitioner was not based on the lack of a definite public purpose but generally set out. Nonetheless, it is this Courts view that the requisite public purpose was clearly clarified and informed by the Respondents to the Petitioner as specified in **Section 2** of the Act. Therefore, this Court agrees with the decision made by the Learned Judges of the Court of Appeal, and holds that there was an urgent supervening public purpose for acquiring the Petitioner's land.

The Petitioner further alleges that there was a lack of urgency warranting the acquisition. It is the Petitioner's claim that since the vesting order published in January 1986 and the possession of the land on 08.04.1986, the initial attempt of using the land was in 2002, when the land was handed over to the Special Task Force to build housing units confirmed by a letter issued by the Urban Development Authority dated 28.08.2002. It is vital that this Court identifies as to whether any development have been carried out since acquiring the Petitioner's land.

The intention of reclaiming land is to make the land suitable for a specific public purpose such as for agricultural development or for the purpose of urban development. Although the procedure and specifications may vary depending on the purpose for which the land is to be utilized, a number of steps need to be carried out on the land. These steps have been clearly identified and established in the guidelines entitled "Land Reclamation and Dredging", published by the **Institute for Construction Training and Development, Publication No: SCA/3/3**, such including:

> ***"Drainage Canal System***
>
> *Before commencing any work at a proposed reclamation site, a study should be done to determine the canals required to drain the run off from the area to be reclaimed as well as to drain the run off from its own catchment area…whilst the reclamation work is in progress sufficient drainage paths should be provided for storm water and on*

completion of the work the required canals, retention areas or lakes should be provided.

The areas to be reclaimed shall be as shown on the drawings. Reclamation shall be carried out with suitable material arising from the dredging operations and approved by the engineer or, if sufficient material is available from this source, the suitable material shall be obtained from approved borrows. All reclamation shall be carried out to the lines and levels shown on the drawings…"

"Filling for Urban Development

Where land is to be used for Urban Development, the surface layer 150mm thick shall be of material suitable for plant growth. This material shall be borrowed from areas approved by the Engineer".

This Court has carried out comprehensive examination of all the documentation provided before us and it is apparent that this acquired land is not mere marshy land or the paddy land it was at the time of acquiring the land; it has been developed in a manner where construction could commence. The photographic evidence tendered to us shows that construction has taken place in this land and it has been brought to our notice by the Counsel of the Respondent in his submissions, that construction was ceased due to the initiation of legal action by the Petitioner.

It is apparent that a large amount of work has been carried out on this land which facilitated the transformation of this acquired paddy land into a land which is ready for construction and development. The filling guidelines, as specified by the **Institute for Construction Training and Development** referred to above, states as follows:

"Fill material shall be obtained from borrow areas approved by the Engineer. The gravelly earth should consist of hard durable particles free from excess clay, vegetable matter or harmful materials.

The following test shall be carried out on samples taken from the proposed borrow site before and during the filling operation:

(i) In-situ moisture content
(ii) Atterbergs limits
(iii) Sieve analysis and hydrometer analysis
(iv) Proctor compaction

A uniform gradation of material is required to achieve a good compaction of the fill material. The percentage of gravel and sand so determined by sieve analysis and hydrometer analysis should be over 70%. Stones greater than 150mm in greatest dimension shall not be permitted in any part of the filling. Similarly any stones or rock which will impede the operation of tamping rollers shall be removed. All roots in the fill material shall be handpicked and removed out of the premises.
Before placing any fill the existing surface of areas to be filled shall be stripped of vegetation and other deleterious matters.
Water logged areas shall be dewatered and, as far as practicable, the surface stripped of all the vegetation and deleterious matter prior to placement of fill material. If in any area it is considered by the Engineer to be impracticable to dewater fully, the material used for filling such areas up to 160 mm above the water level shall be sand or gravel with not more than 15% passing N0.200 US sieve.
In areas where the terrain is clay or peat the material used for initial filling up to 300mm shall be sand or gravel with not more than 15% passing No 200 US sieve. However, the thickness of the initial fill layer shall be the minimum required for the movement of machinery. The material used for earth filling above the stripped ground or sand or gravel layer shall be gravelly or sandy materials from approved borrow areas.
Two important factors to be considered in filling from borrow is the drainage requirements and the sub-soil conditions. The material used for filling should have a

minimum dry density of 1.76 g/ml (110lb/ft) or as decided by the Engineer.

A filled site should have the following.

(i) A well compacted fill.

(ii) Adequate thickness of fill to avoid ground water and flood problems.

(iii) Adequate thickness below proposed foundation to take up the load.

(iv) Sufficient time for settlement leaving only tolerable limits.

(v) *Monitoring rate of settlement within acceptable limits."*

From the aforesaid guidelines it is evident that time, money and resources have been disbursed for the development of this land. It appears that sustained effort over a period of time is needed to fill marshy and paddy lands to convert them into lands suitable for construction. The matter of urgency has been demonstrated by the letter dated 21.03.2005 (R7) to the Petitioner from Special Task Force confirming that the land is best suited and is in immediate need for the construction of married quarters. The documentation submitted to court (R7 to R16) clearly discloses that the Urban Development Authority has further approved this and it was handed over through a cabinet decision for the building of the aforesaid married quarters.

Thus, it is this Court's observation that the property was not acquired for the purpose of water retention as alleged by the Petitioner. By their letter dated 25.06.1999, the Chairman of the Sri Lanka Land Reclamation and Development Board has further confirmed the same. However, this property was acquired for the public purpose of urban development and as such was ideally suited for the construction of married quarters and as a result the authorities have carried out extensive work on the land by filling the land and preparing it for housing development. Consequently, it is the belief of this Court that there appears to be an urgency as well as necessity to acquire the land and such does not constitute discrimination against the Petitioner and does not violate his rights. Indeed he himself has recommended and categorically stated in P8, that his land is eminently more suitable to be acquired than the lands that are adjacent to his land.

It is the Petitioner's claim that successively, he discovered that two lots neighboring to his property that had also been acquired at the same time as his property via the same vesting order, had been divested by the Minister of Lands by an order dated 10.06.2005 with a Government Gazette published on 13.06.2005 confirming the order under **Section 39 A** of the Act. Therefore, it was the Petitioner's position that since the land was acquired for the purpose of water retention and not for the purpose of building quarters, his land should also be divested in accordance with the provisions of **Section 39 A** of the Act as the land is not utilized for the public purpose it was acquired.

Section 39 of the Act has to be reviewed when ascertaining whether the Petitioner is entitled to the relief he claims for, the provisions of **Section 39** reads as follows:

"39 A. (1) Notwithstanding that by virtue of an Order under Section 38 (hereafter in this section referred to as a "vesting order") any land has vested absolutely in the State and actual possession of such land has been taken for or on behalf of the State under the provisions of paragraph (a) of section 40, the Minister may, subject to subsection(2) by subsequent Order published in the Gazette (hereafter in this section referred to as a "divesting Order") divest the State of the land so vested by the aforesaid vesting Order.

(2)The Minister shall prior to making a divesting Order under subsection (1) satisfy himself that-

(a) no compensation has been paid under thus Act to any person or persons interested in the land in relation to which the said divesting Order is to be made;

(b) the said land has not been used for a public purpose after possession of such land has been taken by the State under the provision of paragraph (a) of section 40;

(c) no improvements to the said land have been effected after the Order for possession under paragraph (a) of section 40 had been made; and

(d) *the person or persons interested in the said land have consented in writing to take possession of such land immediately after divesting Order is published in the*

Gazette;"

The Petitioner contends that a Government Agent informed him that the said land has been acquired for the purpose of water retention, yet it is pertinent to point out that the no evidence whatsoever has been adduced by the Petitioner in order to satisfy this Court that the land was required for water retention and that the purpose so specified was subsequently altered by the Urban Development Authority.

This Court does not disagree with Justice Mark Fernando's dictum, in the case of **De Silva v Athukorale Minister of Lands Irrigation (1993)** *(1 SLR 283),* where he held that the true meaning of the amended Land Acquisition Act was to allow Ministers to restore the land to its original owner where the original reason for acquisition cannot be fulfilled. However, due to the lack of evidence by the Petitioner to support his claim that the land was acquired for water retention, this Court is unable to accept the Petitioner's purported reasons for the acquisition of the land by the Respondent. As a result, this Court accepts that the purpose of acquiring the Petitioners land was for 'Urban Development' as the land has been transformed and molded in a manner that is suitable for the construction of houses in accordance with the procedure set out in the **Institute for Construction Training and Development**. This Court also cannot, in view of the evidence placed before it, accept that the development of married quarters for the Officers of the Special Task Force was a new purpose that was introduced belatedly to obstruct relief being granted in this case.

It is the assessment of this Court that to grant a divesting order on behalf of the Petitioner as per **Section 39 A** of the Act, the four conditions set out in **Section 39 A (2)** must be satisfied. It is not in dispute that the Respondents have paid compensation to the Petitioner for acquiring his land and furthermore a considerable amount of improvements have been carried out on the land in preparation for building houses. Therefore, it would be unreasonable to divest the land.

Once again this Court is duty bound to follow the dictum held by Justice Mark Fernando, in

the case of **De Silva v Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another;** *"…it would be legitimate for the minister to decline to divest it there is some good reason-for instance, that there is a now a new public purpose for which the land is required. In such a case it would be unreasonable to divest the land, and then to proceed to acquire it again for such new supervening public purpose. Such a public purpose must be a real and present purpose, not a fancied purpose or one, which may become a reality only in the distant future".*

For the reasons aforesaid, the Petitioner's Application is dismissed. I also order costs in a sum of Rs 50,000/- to be paid by the Petitioner to the Respondent.

JUDGE OF THE SUPREME COURT.

MARSOOF. P.C. J

I agree.

JUDGE OF THE SUPREME COURT

DEP.P.C. J

I agree.

JUDGE OF THE SUPREME COURT