IN THE SUPREME COURT OF SRI LANKA

In the matter of an application for Special Leave to Appeal in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Namunukula Plantations Limited,
130, Glennie Street,
Colombo 2
and presently of
310, High Level Road,
Navinna, Maharagama.

Petitioner-Appellant

v

1. Minister of lands,
   Govijana Mandiraya,
   80/5, Rajamalwatte Road,
   Battaramulla.

2. Secretary, Ministry of lands,
   Govijana Mandiraya,
   80/5, Rajamalwatte Road,
   Battaramulla.

3. Divisional Secretary Pittabeddara
   Divisional Secretariat,
   Pitabeddara.

4. Southern Development Authority
   14A, Akuressa Road,
   Nupe,
   Matara.

5. The Minister of Regional Infrastructure Development,
   29, Galle Face Terrace,
   Colombo 3.

6. Sri Lanka State Plantation Corporation,
   55/75, Vauxhall Lane,
   Colombo 2.

7. The Attorney-General,
   Attorney-General's Department,
   Colombo 12.

Respondent - Respondents

C.A. Application No. 663/2005
SC(Sp. LA) No. 55/2008
SC Appeal No. 46/2008

BEFORE	:	Hon. N.G. Amaratunga, J., Hon. Saleem Marsoof, P.C., J. and Hon. S. I. Imam, J.
COUNSEL	:	Sanjeewa Jayawardane with Sandamali Chandrasekere for the Petitioner-Appellant B. Tilakaratne, Deputy Solicitor General, for 1st to 5A, 6th and 7th Respondent-Respondents
Argued on	:	14.5.2009;23.6.2009; 24.9.2009; 26.11.2009; 3.2.2010
Written Submissions on	:	5.4.2010; 5.7.2010
Decided on	:	13.3.2012

SALEEM MARSOOF J.

This is an appeal from a decision of the Court of Appeal dated 5th February, 2008, by which the application of the Petitioner-Appellant (hereinafter referred to as the "Appellant") seeking a writ of *certiorari* to quash the order dated 18th February 1999 (P7A) made by the 1st Respondent-Respondent, the Minister of Agriculture and Lands, purportedly in terms of Section 38 proviso (a) of the Land Acquisition Act (Cap. 460), and published in the Gazette Extra-ordinary dated 24th February 1999 (P7), was dismissed without costs.

In the application dated 25th April 2005, filed by the Appellant in the Court of Appeal seeking the aforesaid writ for the quashing of the said order, the main ground urged by the Appellant was that P7A is *ultra vires* the powers of the 1st Respondent-Respondent (hereinafter referred to as the "1st Respondent") under the Land Acquisition Act, insofar as a mandatory condition precedent for the making of such an order, has not been complied with. Admittedly, the land in question is within the "designated area" of the Southern Development Authority, established under the Southern Development Authority of Sri Lanka Act, No. 18 of 1996, and it was the contention of the Appellant that no land situated in such designated area could be acquired for any purpose of the Southern Development Authority without obtaining the approval of the relevant Minister in terms of Section 17(1) of the Southern Development Authority of Sri Lanka Act. It was the Appellant's contention that obtaining the approval of the relevant Minister in terms of Section 17(1) of the said Act was a mandatory condition for such an acquisition, and the failure to do so, vitiated the order marked P7A.

Section 17(1) of the Southern Development Authority of Sri Lanka Act provides as follows:-

> "Where any land or any interest in any land in any designated area is required by the Authority for any of its purposes, and the Minister, by Order published in the Gazette, approves of the proposed acquisition, that land or interest in any land, shall be deemed to be required for a public purpose and may accordingly be acquired under the Land Acquisition Act and be transferred to the Authority."

In this connection, it is important to note that the Court of Appeal, in its judgement dated 5th February 2008, has specifically noted that the Respondents have not filed any objections in the case, even after taking several dates for doing so, and thereby the Court of Appeal has been deprived of any opportunity of ascertaining whether the relevant Minister had in fact approved the proposed acquisition as contemplated by Section 17(1) of the said Act. However, learned Deputy Solicitor-General, who appeared for the Respondents in the Court of Appeal, submitted that the land in question, though situated in a designated area, was needed for a specified public purpose, and the appropriate procedure for such acquisition has been followed.

On the basis of the evidence placed before it, the Court of Appeal was not in a position to make any finding in regard to the purpose for which the land in question was purportedly acquired, and in fact noted in the course of its judgement that although the Appellant had expressly admitted in paragraph 28(a) of its Petition filed in that court, that it had received notice under Section 2 of the Land Acquisition Act, a copy of the said notice had not been tendered with the said Petition. It is trite law that a notice issued under Section 2 should disclose the public purpose for which a land is sought to be acquired, and in *Manel Fernando v. Jayaratne,* [2000] 1 SLR 112, this Court went on to hold that the notice issued in that case purportedly under Section 2, was a nullity as it merely stated that the land in question was required for a public purpose, without disclosing the particular public purpose for which the land was needed. Although the Appellant did not in this case seek to challenge in the Court of Appeal the legality of the Section 2 notice, the production of a copy of the said notice with the Petition filed in that court would have shown the particular purpose for which the Appellant's land was acquired, eliminating the need for the court to enter into any speculation.

It is noteworthy that the Court of Appeal has, in fact shown some indulgence to the parties, who have all been guilty of starving the Court of vital factual information, and has gone on to consider the question which was pressed by the Appellant, namely, whether an acquisition of land for the purposes of the Southern Development Authority of Sri Lanka under the land Acquisition Act, will become invalid if an order under Section 17(1) of the Southern Development Authority Act, No. 18 of 1996 was not published prior to the acquisition of the said land. In doing so, the Court has carefully analysed the relevant provisions of the Land Acquisition Act as well as the Southern Development Authority Act, and sought to distinguish between two types of acquisition, namely, one for a "development project" co-ordinated by the Southern Development Authority within its designated area, and the other, for an identified public purpose, not being for the purpose of any development project co-ordinated by the Authority within such area.

Adverting to the first type of acquisition, S. Sriskandarajah J., President of the Court of Appeal, who sat alone to hear this case, explained the utility of Section 17(1) or the Southern Development Authority Act in the following words:-

> "By the above provision, the Southern Development Authority of Sri Lanka is empowered to acquire land that is required by the Authority for any of its purpose. But the Authority for that mater has to follow the procedure of acquisition laid down in the land acquisition Act. When the procedure of acquisition under the land acquisition Act is followed, one of the essential prerequisites that has to be satisfied is that the land proposed to be acquired has to be for a public purpose and it has to be disclosed in the Section 2 notice. *But a land required for the Authority for any of its purpose cannot be for a public purpose.* That is why Section 17(1) of the said Act provides that when the Minister, by Order published in the Gazette,

> approves the proposed acquisition of a land required by the Authority for any of its purposes, that land or interest shall be deemed to be required for a public purpose."(*Italics added*)

Sriskanadarajah, J. pointed out that the situation is different whenever land is required for the Southern Development Authority, for a purpose other than a "development project" co-ordinated and implemented by the Authority within its designated area. In such a situation, he pointed out that an "order of the Minister under Section 17(1) is redundant." Sriskandarajah, J. went on to give expression to his decision in the following concluding paragraph of his judgment:-

> "In this instant case the Petitioner admits that the Section 2 notice under the Land Acquisition Act was published and a copy was received by the Petitioner. It is a requirement that the specific public purpose for which the land proposed to be acquired has to be mentioned in the said notice. The Petitioner has not filed the said notice with the Petition and therefore the Petitioner has failed to prove that there is no specific public purpose. The Petitioner has also failed to prove that there is no urgency to acquire the said land under Section 38 Proviso (a) of the Land Acquisition Act. Hence this court dismisses this application of the Petitioner without costs."

The Supreme Court has granted special leave to appeal against the said decision of the Court of Appeal, primarily on the basis of two questions of law, and the first of which, as set out in paragraph 12(a) of the Petition dated 14th March 2008 filed by the Appellant on this Court, reads as follows:-

> " Whether any land or any interest in any land in any designated area specified in the schedule to the Southern Development Authority of Sri Lanka Act No. 18 of 1996 required by the Southern Development Authority for any of its purposes can be acquired under the land Acquisition Act and be transferred to the said Authority where no order has been published in the gazette approving the proposed acquisition by the Minister in terms of Section 17(1) of the Southern Development Authority of Sri Lanka Act No. 18 of 1996? "

The second question on which special leave was granted as set out in paragraph 12(b) of the said Petition, reads as follows:-

> "Whether an order made under proviso (a) to Section 38 of the Land Acquisition Act can be made when there is no urgency."

In answering the first of these questions, which involves the issue of *ultra vires*, it is necessary to first deal with the premise, upon which it is obviously postulated, namely that all development projects coming within the purview of the Southern Development Authority, are necessarily public sector projects, and that any land acquisition undertaken "for any of its purposes" can be said to be required for a "public purpose" within the meaning of the Land Acquisition Act. It is clear that the Court of Appeal, has not acted on such a premise, and as already seen, distinguished between acquisitions of land for a "development project" co-ordinated by the Southern Development Authority, and land acquired for an identified public purpose, not being for the purpose of any development project co-ordinated by the Authority. It is necessary to examine whether the Court of Appeal was right in drawing such a distinction, and in rejecting the said premise.

It appears from the preamble as well as Section 3 and 13 of the Southern Development Authority Act, that the Southern Development Authority was established for the singular objective of "co-ordinating the planning and implementation of development projects within the area as specified in the Schedule to the Act and referred to as the "designated area", and that it was not envisaged that such development projects should be restricted or confined to the public sector. Section 13(k) of the Act expressly confers on the Authority, the function of implementing development projects "through any public or private institution or jointly by private and public institution". It is clear from the Act that the primary function of the Authority is to co-ordinate the development project planning and implementing activities of not only the public sector, but also the private sector and even what may be called "public-private partnerships" within the designated area identified in the schedule to the Act, and with such broad objectives and powers, the purposes of the Authority cannot be classified as entirely public in character.

Section 17 of the Act clearly shows that the "deeming provision" contained in sub-section (1) of the said section was introduced for the specific purpose of facilitating the acquisition of land for a wider range of development projects traversing both the public and private sectors. When the relevant Minister makes an order approving a proposed acquisition under Section 17(1), the land or interest in land in question is, by a legislative fiction, so to speak, "*deemed to be required for a public purpose*, and may accordingly be acquired under the Land Acquisition Act and be transferred to the Authority." The higher quantum of compensation payable on such acquisitions as laid down in Section 17(2) and (3) is also explicable on the same basis.

It is therefore vital, in answering this question, to consider the particular purpose for which the Appellant's land has been acquired. However, the Appellant has failed to produce in court, without any explanation for failing to do so, a copy of the Section 2 notice admittedly served on it, and in the absence of any objections filed by the Respondents, it is only possible to speculate the purpose for which the land of the Appellant was acquired. Learned Counsel for the Appellant has, in this connection, invited our attention to the letters received by the Appellant dated 29th July 1998 (P14) and 26th January 2005(P6) from the Divisional Secretary of Pitabeddera, and the letter dated 8th January 1998 (P14A) received from the Ministry of Public Administration, Home Affairs and Plantation Industries, all of which have been sent under the caption "Acquisition of Land for the Southern Development Authority" which, it has been submitted by the learned Counsel for the Appellant, conclusively establish that the acquisition in question was for the purposes of the Southern Development Authority.

Learned Deputy Solicitor General has submitted that these letters are responses to correspondence initiated by the Appellant, and that the caption in the aforesaid letters merely reproduce what has been used by the Appellant in its correspondence with these authorities. Without a full and detailed examination of all correspondence exchanged by the Appellant with these authorities, it is not possible to come to any finding as to who first used the said caption, and hence, none of these can shed any light on the purpose of the acquisition of the Appellant's land.

The admission made by the Appellant in paragraph 18(a) of the Petition dated 25th April 2005 filed by it in the Court of Appeal that a Section 2 notice was served on the Appellant, it must be noted in passing, was not readily forthcoming. In fact, Court takes note of the fact that the Appellant has categorically denied receiving a Section 2 notice in its letter dated 31st January 2005 (P8) addressed to the Divisional Secretary of Pitabeddera, and signed on behalf of the Appellant by none other than its General Manager. It is also

noteworthy that the said letter was the Appellant's response to the letter of the said Divisional Secretary dated 26th January 2005(P6), by which the Appellant has alleged in his Petition filed in the Court of Appeal, it had first intimation of the proposed acquisition, which as would appear from P7 and P7A, had resulted in an order in terms of Section 38 proviso (a) of the Land Acquisition Act being made on or about 18th February 1999, almost six years prior to such alleged first intimation of acquisition proceedings.

However, in fairness to the Appellant, in paragraph 18(a) of its Petition filed in the Court of Appeal, as part of its purported "full disclosure of all facts" it had not persisted with the said denial, and had disclosed the receipt of the Section 2 notice which is usually made prior to the making of an order under Section 38 proviso (a) of the Land Acquisition Act. It is also disclosed in the said paragraph of the Petition that the said notice was objected to by its letter dated 31st March 1998 (P12) addressed to the Government Surveyor, but the said letter does not disclose the purpose, if any, set out in the said notice for the proposed acquisition of the land of the Appellant.

Even this so called "full disclosure" made by the Appellant, did not extend to the letter dated 30th November 2000 (A) which has been addressed to the Divisional Secretary, Pitabeddara, by the Executive Director of the Appellant. A copy of the said letter was produced for the first time in this Court by the Attorney-at-law for the Respondent with the motions dated 16th July 2008 and 22nd July 2008, well before the matter was taken up for argument, and the Appellant has not denied that the said letter was sent or its integrity and genuineness.

In fact, by its order dated 29th July 2008 this Court has admitted the said letter in evidence. In view of the fact that the Appellant has failed to disclose this letter, which for more reasons than one, cuts across the entire case of the Appellant, the said letter is reproduced below in its entirety:-

Namunukula Plantations Limited
Managing Agents: Keells Plantation Management Services (Pvt) Limited.
320/1, Union Place, Colombo 2, Sri Lanka

REGISTERED POST

Mr. P G Kularatne,
Divisional Secretary,
Divisional Secretariat,
Pitabeddara.

30th November 2000

Dear Sir,

ACQUISITION OF LAND FOR THIS SOUTHERN DEVELOPMENT AUTHORITY

We write with reference to your letter dated 16th November 2000 under the above caption addressed to the Gramasevaka, Dankotuwa and copied to us amongst others.

Please be advised that the purported notice made under Section 5 of the Land Acquisition Act by the Acting Minister of Agriculture and Lands by Gazette dated 23/8/1999 is invalid in law and has no basis whatsoever for failure to comply with mandatory provisions of law as contained in the Southern Development Authority of Sri Lanka Act No. 18 of 1996.

Accordingly, any action taken by you or others on your instructions would be void and illegal and we reserve our rights in that regard.

Yours faithfully
NAMUNUKULA PLANTATIONS LIMITED
D.V. Seevaratnam,
Executive Director

Copt to: Gramasevaka, Dankotuwa
Surveyor, Survey Office, Matara
Chairman, Southern Development Authority
Secretary, Ministry of Agriculture and Lands
Superintendent, Tennahena Estate.

In the aforesaid letter, the Appellant has taken up the position that the acquisition in question should have been approved by the relevant Minister by an order under Section 17(1) of the Southern Development Act, and without such approval, it cannot be proceeded with under the provisions of the Land Acquisition Act. In fact, this is the primary basis on which the *vires* of the order marked P7A was sought to be challenged by the Appellant in Court of Appeal and this Court. However, as already explained, to deal with this contention and to decide whether the acquisition proceeding which culminated in P7A is lawful, it is vital to ascertain the purpose for which the land in question has been acquired, in particular, whether it was needed for the purpose of a "development project" co-ordinated by the Southern Development Authority, or for any public purpose not involving any such development project. The letter dated 30th November 2000 (A) does shed some light on this question.

The aforesaid letter dated 30th November 2000 (A) is both material and important because its contents revealed two things which are, on its face, unfavourable to the Appellant. In the first place, it is clear from its contents that a declaration (erroneously described in the said letter as a "notice made under Section 5") has been made by the Minister of Agriculture and Lands under Section 5 of the said Act, and that the same has been published in the "Gazette dated 23/8/1999". The significance of this is that, as it is expressly provided in Section 5(3) of the Land Acquisition Act that "the publication of a declaration under subsection (1) in the Gazette shall be conclusive evidence of the fact that such declaration was duly made", and such a declaration is, as provided in Section 5(2) of the Act, "*conclusive evidence that such land or servitude is needed for a public purpose*."

The conclusive nature of such a declaration was recognised by this Court in *Fernandopulle and Another v. E.L. Senanayake, Minister of Lands* (1978) 79 (1) NLR 115, in which Samarakoon CJ., (with Ismail J. and Walpita J. concurring) after citing the earlier decision of *Gunasekera v. The Minister of Lands and Agriculture,* (1963) 65 NLR 119, observed at pages 116 - 117 that such a declaration is "conclusive evidence that the land is required for a public purpose and therefore cannot be canvassed in a Court of Law." Having been signed by a key official of the Appellant, the said letter is an admission by the Appellant that a conclusive declaration of "public purpose" has been made by none other than the Minister of Lands. This letter, no doubt, strengthens the position taken by the Respondents in this case, both in the Court of Appeal as well before this Court that the land that has been acquired by the order marked P7A was made for a public purpose and not for any purpose connected with a development project of the

Southern Development Authority, which has the effect of weakening the contention of the Appellant that it was made ultra vires the powers of the Minister of Lands.

Secondly, the said letter also establishes, equally conclusively, that the Appellant became aware as far back as November 2000 that the land in question has been acquired by the State, and it refutes the misrepresentation made in the Petition filed in the Court of Appeal, which is also repeated in the Petition to this Court that the Appellant was unaware of the acquisition proceedings till it received the letter dated letter of the said Divisional Secretary dated 26th January 2005(P6) from the Divisional Secretary of Pitabeddera. Even if the Appellant was correct in its position that in the absence of the approval of the relevant Minister in terms of Section 17(1) of the Southern Development Authority Act, the land in question cannot be acquired, in the absence of any explanation in regard to the significant delay of more than five years till 25th April 2005 when the Appellant sought relief from the Court of Appeal, that Court could have found the non-disclosure of the letter marked 30th November 2000 (A) when the case was presented in that Court as material, sufficient for it to refuse discretionary relief.

In all these circumstances, particularly in the light of the fact that said letter dated 30th November 2000 (A) is potentially favourable to the Respondents and equally unfavourable to the Appellant, its non-disclosure in the Petition filed by the Appellant in the Court of Appeal by which it sought the prerogative writ of *certiorari,* is a matter for serious concern. In view of the non-disclosure of the said letter by the Appellant till it was "unearthed" by the 1st to 5th and 7th Respondent-Respondents during the pendency of the appellate proceedings in this Court, learned Deputy Solicitor General has taken strenuous objection to the maintainability of this appeal on the ground that the Appellant is guilty of suppression and misrepresentation of material facts in the Court of Appeal and before this Court, and argued that the appeal as well as the application filed in the Court of Appeal ought to be dismissed *in limine*.

It is settled law that a person who approaches the Court for grant of discretionary relief, to which category an application for *certiorari* would undoubtedly belong, has to come with clean hands, and should candidly disclose all the material facts which have any bearing on the adjudication of the issues raised in the case. In other words, he owes a duty of utmost good faith (*uberrima fides*) to the court to make a full and complete disclosure of all material facts and refrain from concealing or suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. Learned Deputy Solicitor General has in this connection invited our attention to the decision of this Court in *W.S.Alphonso Appuhamy v L. Hettiarachchi (Special Commissioner, Chilaw)***,** (1973) 77 NLR 131, in which it was found that an applicant for a mandate in the nature of a writ of *mandamus* had suppressed and misrepresented material facts. This Court decided the case on its merits, but observed that the case was one in which the principles set out in the celebrated English decision of *King v The General Commissioners for the Purpose of the Income Tax Acts for the District of Kensington-Ex-parte Princess Edmond de Poignac* (1917) 1 K.B. 486 would have applied, and the Court, in its discretion, could have dismissed the application *in limine*.

The latter English case involved an application made by Princess Edmond de Poignac for a writ of *prohibition*, and a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. The appeal to the English Court of Appeal failed, and the view taken by the Divisional Court was approved, with Scrutton LJ., placing great emphasis on the inveterate practice of court, which he stressed was of the greatest

importance to maintain, that when an applicant comes to the Court, "he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts...." Since the applicant, Princess Edmond de Poignac, had suppressed material facts in her affidavit, the Court of Appeal had no hesitation in holding that the Divisional Bench was justified in refusing a writ of prohibition without going into the merits of the case. In the course of submissions in the Court of Appeal, learned Counsel for the applicant had endeavoured to distinguish prior decisions of the English courts on the basis that they were in the context of *ex parte* applications for injunctions, but Lord Cozens-Hardy M.R., observed at page 506 that-

> "There are many cases in which the same principle would apply. Then it is said "That is so unfair; you are depriving us of our right to a prohibition on the ground of concealment or misstatement in the affidavit." *The answer is that the prerogative writ is not a matter of course. The applicant must come in the manner prescribed and must be perfectly frank and open with the Court*."(*Italics added*)

The above noted rules have been applied by this Court in a large number of cases both in England and in other common law jurisdictions including Sri Lanka, and it is interesting to note that the Supreme Court of India has recently lamented, in the course of its decision in *Dalip Singh v. State of Uttar Pradesh* (2010) 2 SCC 114, on the increase in the number of cases in which parties have attempted to misuse the process of Court by making false or misleading statements or by suppressing the relevant facts or by trying to mislead the Court in passing order in their favour. Making a pertinent observation on the state of affairs in India, the court observed that-

> "For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahimsa" (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

The above observation is not only of relevance to India, as it may apply with equal force to other nations, neighbouring as well as more distant, where there is a great need for the courts to be more vigilant in their quest to ascertain the truth, and to deal more strictly than they may have done in the past, with litigants whose deception or fraudulent conduct is detected.

If any party invoking the discretionary jurisdiction of a court of law is found wanting in the discharge of its duty to disclose all material facts, or is shown to have attempted to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such

person. It is therefore my considered opinion that this Court need not, and should not, answer any of the questions on which special leave to appeal was granted, as the letter dated 30th November 2000 (A), which is reproduced in full in this judgement, clearly demonstrates that the Appellant has been guilty of deceptive conduct, and has not only suppressed, but also misrepresented material facts before the Court of Appeal as well as this Court. There is little doubt that, had the Appellant disclosed the existence of the said letter and attached a copy thereof to its petition filed in the Court of Appeal seeking relief by way of *certiorari*, that court would have refused even the issue of notice on the Respondents, saving them the time and money expended on defending the said application.

For all these reasons, the appeal is dismissed with costs fixed in a sum of Rs. 35,000/- each, payable to the 1st and 4th Respondent – Respondents.

JUDGE OF THE SUPREME COURT

N. G. AMARATHUNGA, J.

I agree.

JUDGE OF THE SUPREME COURT

S. I. IMAM, J.

I agree.

JUDGE OF THE SUPREME COURT