

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

CA (Writ) Application No.445/2014

In the matter of an application for the grant of mandate in the nature of *writ of Mandamus* in terms of Article 140 of the Constitution.

**NOORDEEN LEBBE MOHAMED
RASEEK,**
No. 112, Nayawala Road,
Mawanella.

PETITIONER

VS.

1. Mawanella-Hemmathagama
Multi-Purpose Co-operative
Society Ltd.,
Main Street,
Mawanella.
2. Hon. P. Harrison
Minister of Food Security
(Minister In-Charge for Co-
operatives)
CWE Secretariat Building,
No. 27, Vauxhall Street,
Colombo 02.
- 2A. Hon. Abdul Rishad
Bathiudeen,
Minister of Industry &
Commerce, Resettlement of
Protracted Displaced Persons.
Co-operative Development and
Vocational Training & Skill
Development.
3. Hon. Mahipala Herath,
Chief Minister and Minister in-
charge of subject Co-
operatives,
Ministry of Co-operatives of the
Provincial Council,
New Town,
Ratnapura.

RESPONDENTS

BEFORE : **M. M. A. GAFFOOR, J.**

COUNSEL : Hussain Ahamed AAL for the Petitioner

M. Amarasinghe SC for the 2A 3rd Respondents

WRITTEN SUBMISSION

FILED ON : 22.10.2018 (by the Petitioner)

02.10.2018 (by the 2A, 3rd Respondents)

DECIDED ON : **04.04.2019**

M. M. A. GAFFOOR, J.

The Petitioner above named is pleading by a *Writ of Mandamus* for a “Derequisition order” derequisitioning the property which was requisitioned under Section 10 (1) of the Co-Operative Societies (Special Provisions) Act, No. 35 of 1970 published Government Gazette No. 212/7 of 21st July 1972 for the temporary use of the 1st Respondent in 1972 (marked as **P5**).

The Petitioner is the present owner of a land and building depicted as Lot 3 in Plan marked **P4** appended to the Petition and morefully described in the schedule to the Petition under and by virtue of a Deed of Gift marked **P1**. When the father of the Petitioner was the owner, on or about 31st of July 1972, by Gazette Notification marked P5, the said land and building were *temporarily* requisitioned for the 1st Respondent Cooperative Society by then Minister of Internal Trade in terms of Section 10 (1) of the Co-Operative Societies (Special Provisions) Act.

The Petitioner, specifically stated in paragraph 6 of the Petition that, the land and building owned by the Petitioner was temporarily requisitioned as aforesaid for the 1st Respondent Society for the purpose of operation a bakery in order to manufacture and distribute bakery products preventing black marketing of bakery products in the area and on the 30th August 1972 L. R. P. Banda, the Secretary of the 1st Respondent Society took possession of the

said land and building for and on behalf of the 1st Respondent. He further stated that the land and building were requisitioned temporarily in view of the urgency of matter till permanent arrangements were made by construction of a building for the 1st Respondent Society.

The Petitioner further stated that the 1st Respondent Society initially did not pay even rent (or any form of compensation) for many years and on representations made to the Member of the Parliament in his area at the time, and on his request the 1st Respondent paid rent (compensation).

He further stressed that, after demise of his father, the Petitioner, by way of letters personally and through his Attorney-at-Law, (P8-dated 30th August 1985, P9-dated 18th August 1986) requested the Minister of Food and Cooperative to derequisition the said land and building, but however, no steps were taken in that regard,

Pursuant to the documents marked **P17A**, **P17B**, **P18**, and **P19**, it is clear that, when the 1st Respondent Society commenced their purported construction of an additional building on the said land and premises and making structural changes thereto, the Petitioner intensely objected to the said constructions. Therefore, the Petitioner by his Attorney-at-Law sent letters dated 4th April 2013 request the 2nd and 3rd Respondents respectively to stop the constructions and to derequisition the said building.

It is further revealed from the Petition that, having heard the above demands of the Petitioner, the Assistant Commissioner of Cooperative Development (Audit and Investigation), by letter dated 23.06.2013 informed the Coordinating Secretary of the 2nd Respondent that the Petitioner's building had been *legally acquired* by the 1st Respondents Society (vide documents marked **P20-P22**). Furthermore, by letter dated 24.03.2014, the Assistant Commissioner of the Cooperative Development (Audit and Investigation) had requested, the Provincial Commissioner of Cooperative Development Sabaragamuwa Province, to forward a report to the 2nd Respondent since the

1st Respondent Society was within the Provincial jurisdiction and on response the same by a letter dated 11.06.2014 the Provincial Commissioner of Cooperative Development, *inter alia* that the building *legally acquired* by the 1st Respondent Society (vide **P23 & P24**).

In this application, it was the contention of the Petitioner that although the requisitioning was on a temporary basis as provided by the authorities concerned, acting *mala fide* and arbitrarily, continuously kept on permitting the 1st Respondent Society be in possession of the Petitioner's land and building. The contention of the Petitioner mainly rest on on Section 10 of the Co-Operative Societies (Special Provisions) Act.

Thus, Sections 10 (1)-(4) are noteworthy:

- (1) *The Minister may by Order (in this Act referred to as a "requisitioning Order") published in the Gazette, requisition, with effect from such date as shall be specified in the Order, any immovable property in order that it may be temporarily used by a principal society for the purposes of any business of such society.*
- (2) *Before a requisitioning Order takes effect the Minister may from time to time, after consultation with the Registrar, alter, by Order published in the Gazette, the date on which such requisitioning Order takes effect.*
- (3) *A requisitioning Order shall have the effect of authorizing the Registrar, with effect from the date specified in the Order, to take possession of the property specified in the Order and to use such property temporarily for the purposes of any business of such principal society.*

(4) Where any property is requisitioned by a requisitioning Order, the Minister may, by Order (hereinafter in this Act referred to as "derequisitioning Order") published in the Gazette, derequisition such property with effect from such date as shall be specified in the derequisitioning Order

In the light of the above provisions, the Petitioner further submitted that, in gross defines of the said law, the 1st Respondent Society kept on using the said land and building in a *permanent* manner when it had a legal as well as amoral duty to take preliminary steps to hand over possession of the property back to its owner by getting it derequisitioned.

The Petitioner further submitted that according to the Statement of Objections filed by the 2nd Respondent, in paragraph 9 (i), he stated that the said land and building had been "*acquired*", therefore, the Petitioner strenuously countered that this is a clear misdirection and misunderstanding of the provisions in Section 10 of the said Co-Operative Societies (Special Provisions) Act.

Counsel for the Petition, in the written submission stated that the word "may" is used in sub section 10 (4) in referring to the act to be exercised by the Minister. It is an accepted and well established principle of law that in appropriate circumstance, the word "may" should be construed as "shall" or "must". Further, they are fittingly referred the Indian case of *MOHMEDMIYA MOHAMAD SADIK VS. STATE OF GUJARAT [(1975) 16 Guj LR 583]* and stated that when such a discretionary power is vested in an authority, the authority would be bound to exercise that power, and the word "may" conferring discretionary power has to be read as "must", except in those cases where there are grounds for not exercising such power.

It was the contention of the 2nd & 3rd Respondents that the issues in the instant application to be weighed in deciding whether to issue an order derequisitioning the property is that the 1st Respondent still uses premises as

a bakery and has established a business and has renovated the premises after a substantial investment. Although Section 10 (1) of the Act states that the property will be requisitioned temporarily, Section 10 (4) vests the discretion on the Minister to issue a derequisitioning order. They further stated that there is no time frame set out nor conditions to be fulfilled in order issue a derequisitioning order. Moreover, State Counsel for the Respondents has invited an important fact that, an offer was made in open court for the Petitioner to sell the premises at today's market price since he has not utilised the premises so that financial compensation can be made but the Petitioner refused to consider this offer and even to obtain a valuation.

However, finally, Counsel for the Respondent, took up the position that, the derequisitioning is a discretion vested with the Minister and the circumstances of all parties must be considered, therefore, *the Petitioner does not have a statutory right for derequisitioning thus is not entitled to a Mandamus.*

It's clear that, under Section 10 (1) of the Co-Operative Societies (Special Provisions) Act the Minister has the power to requisition any immovable property by publishing an order to that effect in the Gazette. The purpose of such requisition is to allow the property to be ***'temporarily used by a principal Society for the purposes of any business of such Society'*** Furthermore, Section 10 (4) of the same Act also empowers the Minister to derequisition any such property by following the same procedure.

Thus, there could be no question with regard to the Minister's competence to issue a derequisitioning order. However, this Court needs to be determined (as submitted by the Respondents) is whether the Minister's power is amenable to the *writ jurisdiction* of this Court Sections 10 (1) and Section 10 (4) say that the Minister *'may'* issue a requisitioning and derequisitioning order. The text of the Act does not contain any express guidelines regulating the exercise of the discretion. The issuance of the order therefore is a matter that has been left to the discretion of the Minister. Where power is conferred by law to exercise it in a given factual situation, it may either be a duty or a

privilege [See: Aluwihare PC, J. in **SC APPEAL NO. 177/2015**, *SC Minutes dated 31.08.2018*]. Generally, it is only if there is a duty that the repository can be compelled to act by a writ of mandamus. If there is only a discretion (privilege) to act, the writ cannot compel the person to act.

However, I am of the considered view that, it is a fundamental principle in Administrative Law that **no discretion is unfettered and absolute in the public sphere.**

H. W. R. Wade in his work endorses as follows:

“Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose, everything depends upon the true intent and meaning of the empowering Act.”

(Administrative Law, 5th Ed., page 353)

Therefore, I further hold that, even if the empowering statute does not expressly require any jurisdictional fact to be present for the exercise of power, **it will be held invalid if the public authority has acted in total disregard for the purpose for which such discretion/power was vested in him.**

In these circumstances, this Court observes that the requisition had been made for a “temporary use” of the 1st Respondent Co-operative Society and even after 47 years the building still remains as requisitioned property.

Therefore, I proceed to issue a writ of mandamus directing the 2nd and 3rd Respondents forthwith to derequisition the land together with the buildings thereon, requisitioned by order 63 published in the Gazette of the Republic of Sri Lanka dated 21st July 1972 bearing number 212/7 and the 1st Respondent to hand over free and vacant possession of the land and premises to the Petitioner.

Application allowed.

JUDGE OF THE COURT OF APPEAL