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

In the matter of an application for a Writ of Prohibition and Mandamus under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No. 265/2012

1. M.H. Sitthy.

2. M.H.S. Navasiya,
   Both of No. 297,
   School Road, Nawinna, Uluwitike, Galle.

3. M.H.S. Nasmiya,
   No. 298/2, School Road, Nawinna,
   Uluwitike, Galle.

PETITIONERS

Vs.

1. Janaka Bandara Tennekoon,
   Minister of Lands and Land Development.

1A. M.K.D.S. Gunewardena,
   Minister of Lands and Land Development.

1B. John Amaratunga,
   Minister of Lands and Land Development.

1C. Mr. Gayantha Karunathilaka,
   Minister of Lands and Land Development,
   "Mihikata Medura", Land Secretariat,
   6/1200, Rajamal Watte Road, Battaramulla.

2. Divisional Secretary,
   Bope, Poddala.

3. Kithsiri Liyanagamage.

3A. Jayathissa Block,
   Director Education Southern Province,
   Education Department, Galle.

RESPONDENTS

Before:	**Arjuna Obeyesekere, J**
Counsel:	Ghazzali Hussain for the Petitioners
	Dr. Charuka Ekanayake, State Counsel for the Respondents
Written Submissions:	Tendered on behalf of the Petitioners on 26th March 2019
	Tendered on behalf of the Respondents on 27th May 2019
Decided on:	25th September 2020

Arjuna Obeyesekere, J

When this matter was taken up for argument on 16th July 2020, all learned Counsel moved that judgment be delivered on the written submissions that have already been tendered on behalf of the parties.

The question that arises for the determination of this Court is whether the Order made under Section 38(a) of the Land Acquisition Act No. 9 of 1950, as amended (the Act) vesting the land that is the subject matter of this application with the State, should be revoked, or whether the State should divest itself of the said land.

The facts of this matter very briefly are as follows.

The Petitioners **claim** that the original owner of an allotment of land called *Kandalwatta Owita* situated in the District of Galle was their father, Abdul Hameed Mohommed Hussain. The Petitioners state that in March 1984, their father had gifted the said property to his wife (the mother of the Petitioners) and his three daughters (i.e. the Petitioners) by Deed of Gift No. 4718. The Petitioners state that their mother gifted her share to them by Deed of Gift No. 602 executed on 5th March 2009, and that the said land is now co-owned by the Petitioners. The Petitioners state further that they have built houses on the said land and are living on the said property. I must note at this stage that the Respondents have disputed the title of the Petitioners to the said land, claiming that the Petitioners father had *illegally* possessed the said land, and that the first Deed of Gift does not even bear a

reference to its previous registration. The Respondents have also stated that the said Deed of Gift has been executed by A.H.M.Hussain eight years after the publication of the Section 2 notice, which is a contravention of the provisions of Section 4A of the Act.

The Petitioners admit that the State had initiated acquisition proceedings under the Act in respect of the said land for the purposes of a playground for the Nawinna Muslim Kanishta Vidyalaya which is situated on the opposite side of the road leading to the land in question. The Petitioners **claim** that even though the said land was acquired, the said school does have a playground, and hence there is no necessity to have another playground.

The Respondents state that the request for the acquisition of the said land was made in 1976, and that the notice under Section 2(1) of the Act, marked '**2R1a**' was issued on 18th November 1976. The notice in terms of Section 4(1) of the Act, marked '**2R2**' had been issued on 4th April 1977. It is important to note that the Petitioners do not claim that their father objected to the proposed acquisition, as provided for by Section 4(4). The declaration under Section 5(1) of the Act that the said land is needed for a public purpose and will be acquired under the Act, marked '**2R3**' had been published in Extraordinary Gazette No. 205/3 dated 10th August 1982. In terms of Section 5(2), a declaration made under Section 5(1) shall be conclusive evidence that the land is required for a public purpose.

The Respondents state that pursuant to the publication of the notice under Section 7, an inquiry was held in terms of Section 9. By letter dated 28th September 1984 marked '**2R4**', the Petitioners' father had been requested to be present at the said inquiry together with the documents to establish his title to the said land. The Respondents however state that A.H.M. Hussain did not present any documents, and that even though by letter dated 12th December 1984, he informed the then Government Agent that the relevant documents would be submitted, he failed to do so.

The Acquiring Officer had accordingly referred the matter to the District Court of Galle in terms of Section 10(1) of the Act, and deposited a sum of Rs. 108,000 being the compensation payable for the said land in terms of the valuation of the

Department of Valuation – vide '**2R7**'. The award of the Acquiring Officer in terms of Section 17 had thereafter been published in July 1988. I have examined the said award, marked '**2R8**', and the report of the Acquiring Officer marked '**2R9**' and observe that the monies have in fact been deposited in the District Court, Galle.

The Order made by the Minister of Lands under Section 38(a), published in Extraordinary Gazette No. 556/07 dated 3rd May 1989 directing that possession of the said land be taken over on behalf of the State had only been issued after the Respondents went through the procedure set out in the Act for the acquisition of land. I must state that the 1st Respondent has not made an order in terms of proviso (a) of Section 38, as alleged by the Petitioners.

The Respondents have brought to the attention of this Court that A.H.M. Hussain challenged the Order under Section 38(a) in CA (Writ) Application No. 745/89, but that the said application had been dismissed by this Court on 12th December 1995 due to the failure on the part of A.H.M.Hussain to exercise due diligence in pursuing the said application. This was done after his Counsel informed this Court that he does not have instructions from the Petitioners' father.[1] The fact that their father instituted Writ application No. 745/89 has not been divulged to this Court by the Petitioners, with the explanation for the said non-disclosure being that they were not aware of such a case having been filed by their father.

The acquisition proceedings having been completed, the only thing left to be done was to take over actual possession of the land on behalf of the State, and thereby bring the process that started in 1976 to a closure. However, that was not to be.

The following matters relating to the handing over of possession are admitted by the parties:

(a) Possession of the said land has not been handed over by the Petitioners to the Acquiring Officer in spite of the Order under Section 38(a) being published in May 1989;[2]

[1] The petition in the said case has been marked '2R10' while the journal entry of 12th December 1995 has been marked '2R11'.

[2] Vide paragraph 12 of the petition (amended petition filed on 9th October 2012).

(b) The Petitioners were requested by the 2nd Respondent, the Divisional Secretary to hand over the said land as far back as in 1994;[3]

(c) Proceedings have been instituted in the Magistrate's Court of Galle as far back as in 2003, in terms of the State Lands (Recovery of Possession) Act No. 7 of 1979, as amended, to evict the Petitioners from the said land;[4]

(d) After several abortive attempts, the learned Magistrate had issued an order to evict the Petitioners in July 2011;

(e) The application of the Petitioners to set aside the said Order has been rejected by the Provincial High Court of the Southern Province holden at Galle;[5]

(f) The Petitioners have refused to yield possession of the land, in spite of the Fiscal seeking to implement the Order of the Magistrate's Court in August 2011;[6]

(g) The Petitioners have resisted the attempt by the Fiscal to implement the Order of the Magistrate's Court;[7]

(h) This application was filed in September 2012 after the Petitioners were informed by the 3rd Respondent that he is taking steps to move the Magistrate's Court to evict the Petitioners;[8]

(i) The Petitioners continued to occupy the said land in view of the *ex-parte* stay order issued by this Court on 10th October 2012.

Thus, the Respondents were unable to utilise the land as a playground for the School not due to any fault, lapse or negligence on the part of the Respondents, but due to the conduct of the Petitioners.

[3] Vide letter dated 26th May 1994 marked '2R13' sent to the Petitioners and their father.
[4] Vide paragraphs 14 and 15 of the petition.
[5] Vide judgment of the Hon. High Court Judge marked 'P24' – 'P26'.
[6] Vide the Report of the Fiscal marked 'P23'.
[7] Vide paragraph 14 of the petition.
[8] Vide paragraph 29 of the petition.

The issue that gave rise to this application commences with the following letter dated 24th July 2012 marked '**P27**', sent by the 1st Respondent, Minister of Lands to the Minister of Education:

> "<u>ගා/නාවින්න කණිටු විදුහල සඳහා ඉඩම් අත් පත් කර ගැනීම - මාකන්වත්ත ඉඩම</u>
>
> **ගාල්ල දිස්ත්‍රික්කයේ බොපේ පෝද්දල ප්‍රදේශිය ලේකම් කොට්ටාසයට අයත් නාවින්න ගමේ පිහිටි ගා/නාවින්න කණිටු විදුහල සඳහා මාකන්වත්ත ඉඩමෙන් හෙක්ටයාර් 0.228 ක් පවරා ගැනීමට අදාළව අත් කර ගැනීම ආරම්භ කර ඇත්තේ 1976 වර්ෂයේදි වන අතර, 1989.05.13 දින 38 අඥාව නිකුත් කර ඇත.**
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> **02. මෙම අත් කර ගැනීම ආරම්භ කර වසර 37ක් ගතවුවද එම ඉඩම පාසල සඳහා භාවිතයට ගෙන නොමැති බැවින් පාසල සඳහා තව දුරටත් මෙම ඉඩම අවශ්‍ය වේද යන්න පිළිබද ගැටළු මතුවේ. තවද මෙම ඉඩම රජය සතු වි දැනට වසර 23ක් පමණ ගත වුවද, වසර 60ක් පමණ පුරාවට එම ඉඩමේ නිවාස තනාගෙන පදිංචිව සිටි පදිංචිකරුවන්ට වන්දි ලබා දිමක් හෝ ඔවුන් ඉඩමෙන් ඉවත් කර නැවත පදිංචි කරවීම සඳහා වාසස්ථානය ලබා දිමක් හෝ සිදු කර නොමැත.**
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> **03. ඒ අනුව අත් කර ගැනීම අවසන් කොට නොමැති ඉහත සඳහන් ඉඩම මෙතෙක් එම විදුහලේ ප්‍රයෝජනයට යෙදාගෙන නොමැති හෙයින්, එම විදුහලට අනවශ්‍ය ඉඩමක් සේ සැලකිය හැකිය. එබැවින් මෙම ඉඩම අත් කර ගැනිමෙන් එම ඉඩම් හිමියන් අවතැන්වීම වලක්වාලීම සඳහා එම ඉඩම අවසතු කිරිම සුදුසු බවට යෝජනා කරන අතර, ඒ සඳහා ඔබ තුමාගේ නිර්දේශ ලබා දෙන ලෙස කාරුණිකව ඉල්ලා සිටිමි.**"

The Petitioners state that as the 1st Respondent has recommended the divestiture of the said land by '**P27**', they too wrote to the 1st Respondent the following letter dated 20th August 2012, marked '**P28**':

> **"ඉඩම් අත්කර ගැනීමේ පනතේ 38 වැනි වගන්තිය ප්‍රකාර අපසතු හා අපට අයිති ඉඩම පොදු කටයුත්තක් සඳහා එනම් ඉහත විද්‍යාලය සඳහා අත්පත් කර ගැනිම පිළිබඳ වු නිවේදනයෙන් පසු අද වන තෙක් එම ඉඩම රජය වෙනුවෙන් හෝ/හා රජයට භාරගෙන නොමැති අතර අපද එය රජයට භාරදි නොමැත. 38 වැනි වගන්තිය යටතේ ගැසට් නිවේදනය පළකර ඇත්තේ 1989 බව ඔබතුමාගේ කාරුණික අවධානයට යොමු කිරිමට කැමැත්තෙමු.**
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> **ඔබතුමා ගරු අධ්‍යාපන ඇමතිතුමා අමතන ලද ඔබේ සමාංක 03/ජේ/76/ඊ/711 හා 2012.07.24 දින දරණ ලිපිය මගින් මෙම ඉඩම එකී මහජන කටයුත්ත සඳහා තවදුරටත් අවශ්‍ය නොවන බැවින්, එකී ඉඩම අවසතු කිරිම සුදුසු බව ඔබතුමා විසින් යෝජනා කර ඇති නිසා ඉඩම් අත්පත් කිරිමේ විධි විධාන යටතේ මෙම ඉඩම අවසතු කිරීමට කටයුතු කරන මෙන් ඉතා බැගෑපත්ව ඉල්ලා සිටිමු."**

Having sent '**P28**', the Petitioners invoked the jurisdiction of this Court soon thereafter, seeking a Writ of Mandamus directing the 1st Respondent to divest the

land in terms of Section 39A of the Act, or in the alternative to act in terms of Section 39 of the Act and revoke the vesting order made under Section 38(a).

In terms of Section 39A(1) of the Act, *"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*."

While Section 39A(2) contains four conditions that must be satisfied prior to an order for divestiture being made in terms of Section 39A(1), the condition precedent to an Order under Section 39A(1) is that actual possession of such land should have been taken for or on behalf of the State. It is not disputed that even though the State has tried several times over the years to take possession of the said land, it has not been successful due to stiff resistance from the Petitioners. In these circumstances, as the Petitioners are still in possession of the land, the necessity for me to consider the prayer for a Writ of Mandamus directing the 1st Respondent to act in terms of Section 39A(1) does not arise.

I must however state that there are conflicting judgments of the Supreme Court whether a Writ of Mandamus would lie even if the conditions set out in Section 39A(2) have been satisfied. In **Urban Development Authority v Alexander Pintuge Abeyratne and Others**, Chief Justice Sarath Silva, having considered the judgment in **De Silva v Atukorale, Minister of Lands, Irrigation and Mahaweli Development and another**,[9] took the view that a former landowner does not have a legal right to seek a divesting and that as the Minister has a discretion whether to act in terms of Section 39A, Mandamus does not lie. The necessity for me to enter that debate in this application does not arise, in view of the fact that actual possession of the land has not been taken over by the State.

As actual possession of the said land is still with the Petitioners, the first question that I must consider is whether the Petitioners are entitled to seek a revocation of

[9] [1993] 1 Sri LR 283.

the vesting order. The necessity for me to consider whether the Petitioners have a legal right to seek a Writ of Mandamus directing the Minister to act in terms of Section 39(1) of the Act would arise only if I answer the first question in favour of the Petitioners.

The starting point of this discussion would naturally be Section 39(1) of the Act, which reads as follows:

> "*Notwithstanding that by virtue of an Order under section 38 (hereinafter in this section referred to as a "vesting order") any land has vested absolutely in the State, the Minister may, if possession of the land has not actually been taken for and on behalf of the State in pursuance of that Order, by subsequent Order published in the Gazette revoke the vesting order*."

Except for the requirement that the State should not have taken over actual possession of the land, Section 39(1) does not set out the criteria that must be satisfied for an Order to be made under the said Section, nor does the said Section set out the circumstances in which the Minister must act in terms of Section 39(1).

I shall now consider several cases which have laid down the test that should be applied by the Minister when determining whether a vesting order must be revoked.

In **Silva vs Minister of Lands and Others**,[10] this Court held as follows:

> "*The question that arises is, in these circumstances is it justifiable for the respondents to have this land without any plan to utilize the same for any public purpose. It appears that the purpose for which the said land was acquired by the 3rd respondent is now evaporated. The 3rd respondent has not shown to Court that they have any public purpose for which this land could be utilized. As the possession of the said land has not been taken over and the public purpose for which the said land was acquired is not in existence, the Minister of land has authority under section 39(1) of the Land Acquisition Act by order published in the gazette to revoke the vesting order of the said land made under section 38 of the Act.*

[10] [2008] 1 Sri LR 188.

When the public purpose is not in existence and the authority which had sought the acquisition has no other identified public purpose for which it could be used it is the duty of the Minister to revoke the vesting order if the possession of the land has not been taken over by the State."

In **Gnanawathie Ranasinghe and Another v Minister of Lands and Others**,[11] the Supreme Court, referring to Section 39(1) of the Act stated that:

"*The governing part of the above section, in my view, is the following phrase: "if possession of the land has not actually been taken for and on behalf of the State in pursuance of that order." In my view if the possession of the land has not been taken for and on behalf of the State, the Minister has the power to make an order under Section 39(1) of the Act*."

The above is a reflection of the position laid down by the Supreme Court in **De Silva v Atukorale, Minister of Lands, Irrigation and Mahaweli Development and another**,[12] where Mark Fernando, J held as follows:

"*The purpose of the Land Acquisition Act was to enable the State to take private land, in the exercise of its right of eminent domain, to be used for a public purpose, for the common good; not to enable the State or State functionaries to take over private land for personal benefit or private revenge.* ***Where the element of public benefit faded away at some stage of the acquisition proceedings, the policy of the Act was that the proceedings should terminate*** *and the title of the former owner restored;* ***hence, Section 39*** *and Section 50."*[13]

Thus, whether the Minister is under a duty to act in terms of Section 39(1) is dependent on the all important question, is the land still required for a public purpose? In other words, does the State still require the land for a public purpose? If it is, the Minister has no duty to act in terms of Section 39(1). If the land is no longer

[11] SC Appeal No. 87A/06; SC Minutes of 13th September 2017.
[12] Supra.
[13] In terms of Section 50(1), 'The proceedings commenced under this Act for the acquisition of any land or servitude may, at any time before an Order under section 38 in respect of that land or servitude is published in the Gazette, be abandoned.'

required, I am of the view that the Minister **may** act in terms of Section 39(1), even though a vesting order made under Section 38(a) has the effect of conferring ownership of the said land in the State. It would perhaps be important to bear in mind that the public purpose for which the land was initially required may have changed but as long as there exists a public purpose for which the land is required, I am of the view that the Minister is not under a public duty to act in terms of Section 39(1). This position is succinctly set out in the following paragraph of **De Silva v Atukorale:**

> "*Of course, even in such a case it would be legitimate for the Minister to decline to divest if there is some good reason - for instance, that there is 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."*

Whether a land owner has a legal right to compel the Minister to make an Order in terms of Section 39(1) where the land is no longer required for a public purpose had been considered by this Court in **Kingsley Fernando v Dayaratne and Another**.[14] In that case, Sarath Silva, J (as he then was) having considered whether a Writ of Mandamus would lie where a divestiture is sought in terms of Section 39A, held as follows:

> *"The procedure of such acquisition commences upon* ***a decision made by the Minister, in terms of section 2(1) that land in any area is needed for a public purpose****. The decision gets narrowed down to a particular land or a particular servitude, when the Minister makes a direction to the acquiring officer in terms of section 4(1). Thereafter, the Act provides for the various stages in the acquisition of the particular land or servitude. A person having an interest in the land or the servitude to be acquired, is provided an opportunity in terms of section 4(4) of the Act to object to such acquisition. After a firm decision is made by the Minister in respect of the acquisition by a declaration under section 5(1), a person having such an interest has a right to make a claim for compensation*

[14] [1991] 2 Sri LR 129.

in terms of section 7(2)(c). The succeeding provisions of the Act afford an opportunity to such person to vindicate his claim for compensation and, to title where there is a dispute.

Section 50(1) provides for the abandonment of the acquisition proceedings at any time before a vesting order is made under section 38. Section 39(1) provides for the revocation of a vesting order under section 38, which may be made only if the possession of the land has not actually been taken for or on behalf of the State. As noted above, section 39A introduced by the amendment applies in a situation where the possession of the land has also been taken. These sections that deal with abandonment, revocation and divesting, stand out from the general procedure as contained in the Act. In my view these sections constitute a different class of power vested in the Minister, ***to be exercised only if it is considered that the land is no longer required for a public purpose****. They provide for a reversal of the acquisition that commences upon a decision of the Minister made in terms of section 2(1) that land or a servitude is needed for a public purpose, at different stages of the process. It would therefore be totally inconsistent with the statutory scheme to contend that any of these provisions, section 50(1), 39(1) or 39A afford a statutory right to a person interested in the land to demand the exercise of such power by the Minister. As noted above, the right of a person interested in the land or the servitude to be acquired, to object to such acquisition and to claim compensation, is specifically provided for. Therefore such a person could have no statutory right to demand a reversal of the acquisition process by invoking any of the provisions set out in section 50(1), 39(1) or 39A.* ***I am also of the view that the underlying basis of the exercise of the powers vested in the Minister by this group of sections is a situation where the land is no longer required for a public purpose****."* (emphasis added)

In my view, the last sentence sets out the precise legal position that a Court must address when called upon to consider whether the Minister may act in terms of Section 39(1). Where the acquisition of a land is sought for a public purpose, and even though a vesting order has been made under Section 38, where the possession remains with the original landowner, he does not have a right to seek a revocation of the Order as long as the said public purpose or any other public purpose as explained in **De Silva v Athukorale** remains.

I shall now consider the position of the Respondents on whether the said land is required for a public purpose.

Even though the 1st Respondent has written '**P27**', in his affidavit tendered to this Court, the 1st Respondent has stated as follows:

a) By '**P27**', '*I have merely sought confirmation from the Minister of Education whether the said land should be divested* ***solely based on representations made to me****.*'

b) '**P27**' '*does not contain any decision to divest the said land.*'

c) '*I have not come to a finding and/or decision to divest the land and I have now been informed that since this land is needed urgently for the development of the Nawinna Muslim Vidyalaya, vacant possession of the land is essential.*'

The Respondents have produced several documents marked '**3R1**' – '**3R4**' issued during the period 2008 – 2010 by the School Development Society and the Nawinna Mosque urging the Respondents to expedite the taking over of the land for the school, as the land is required for the School.

Having considered the above explanation of the Respondents in the context of '**P27**', and the fact that the said land could not be utilised for the intended public purpose:

(a) Due to the refusal by the Petitioners to hand over the property;

(b) Due to the resistance on the part of the Petitioners to yield possession in spite of orders of the Magistrate's Court;

(c) Not due to the fault, lapse or negligence of the Respondents,

I am satisfied that '**P27**' has been written by the 1st Respondent without having a proper knowledge of the ground situation, namely that the public purpose was not implemented not due to the fact that the land was no longer required for the said

public purpose, but due to the conduct of the Petitioners. Hence, I am inclined to accept the explanation offered by the 1st Respondent in his affidavit.

Thus, I accept the position of the Respondents that the land is still required for the public purpose for which the land was initially acquired. I am therefore of the view that:

(a) The factual situation that must exist for an Order to be made under Section 39(1) does not exist in this application;

(b) The necessity for me to consider whether the Petitioners have a legal right to seek a Writ of Mandamus therefore does not arise.

In the above circumstances, I see no legal basis to grant the relief prayed for by the Petitioners. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal