

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

In the matter of an application for Orders in
the nature of Writs of Mandamus under in
terms of Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

1. D. M. A. K Paranathala,
Ambuluwawa Bungalow,
No. 606, Hemmathagama Road,
Gampola.

PETITIONER

CA No. CA/Writ/0290/2019

v.

1. Gayantha Karunathilake,
Minister of Lands and Parliamentary
Reforms,
Ministry of Lands,
“Mihikatha Medura”, No. 1200/6,
Rajamalwatta Road,
Battaramulla.
2. W. H. Karunarathna,
Secretary to the Ministry of Lands and
Parliamentary Reforms,
Ministry of Lands,
“Mihikathamedura”, No: 1200/6,
Rajamalwatta Road,
Battaramulla.

3. Medha Bemmulla,
Director (Land Acquisition),
Ministry of Land and Parliamentary
Reform,
“Mihikathamedura”, No: 1200/6,
Rajamalwatta Road,
Battaramulla.
4. R. A. D. T. N. Tennakone,
Divisional Secretary,
Divisional Secretariat,
Udawalpala,
Gampola.
5. S. M. P. P. Sangakkara,
Surveyor General,
Sri Lanka Department of Survey,
No. 150, Kirula Road,
Colombo 5.
6. U. M. A. B. Alahakoon,
District Senior Superintendent of Surveys,
District Survey Office,
Kandy.
7. G. W. Chandrarathne,
Senior Superintendent of Surveys (Bim
Saviya),
District Survey Office,
Kandy.
8. K. A. K. Ranjith Dharmapala,
Commissioner General of Title Settlement,
Department of Land Settlement,
“Mihikatha Medura”, No. 1200/6,
Rajamalwatta Road,
Battaramulla.

9. E. M. Prasad Edirisinghe,
No. 31/55, Riverdale Gardens,
Riverdale Road,
Aniwatte,
Kandy.

RESPONDENTS

BEFORE : M. Sampath K. B. Wijeratne J. &
Wickum A. Kaluarachchi J.

COUNSEL : Shantha Jayawardena with Chamara
Nanayakkarawasam for the Petitioner.

Nayoumi Kahawita, SC for the
Respondents.

WRITTEN SUBMISSIONS : 22.06.2023 (by the Petitioner)
26.06.2023 (by 1st to 8th Respondents)

ARGUED ON : 08.06.2023

DECIDED ON : 27.07.2023

M. Sampath K. B. Wijeratne J.

Introduction

The Petitioner instituted these proceedings against the 1st to 9th Respondents seeking *inter-alia*, a writ of *mandamus* directing the 1st Respondent to Act under Section 39 of the Land Acquisition Act, No. 9 of 1950, as amended, (hereinafter sometimes referred to as ‘the Act’) to revoke the vesting order in so far as it pertains to Lot B of the tracing Maha/UDP-BS/2010/299 dated 26th August 2010, if the said portion is in fact vested in the State. Without prejudice to the above relief, the Petitioner has sought a writ of *mandamus* directing the

1st to 8th Respondents to cause an appropriate survey to identify whether a portion of the Petitioner's land depicted in the plan marked 'P 2' is in fact included in the land acquired by the State depicted in advanced tracing No. Maha/UDP/98/892 (Page 2 of 'P 41').

The 4th Respondent has filed a statement of objections seeking to dismiss the application of the Petitioner. The Petitioner has tendered a Counter affidavit in reply to the statement of objections filed by the 4th Respondent.

Upon closure of pleadings, the matter was fixed for argument and the learned Counsel for the Petitioner and the learned State Counsel for the 4th Respondent have made their submissions.

Factual background

The Petitioner purchased the land depicted in plan 'P 2' in an extent of 1A. 2 R. 23 P., situated in Ambuluwawa in Sinhapititya North Grama Niladhari Division in the Kandy District, on the 29th March 2000, from the 9th Respondent, upon deed marked 'P 1'. Thereafter, the Petitioner went in to residence in the land. According to the Petitioner, several lands in the area have been acquired by the state for the construction of '*Ambuluwawa Dissanayake Mudiyansele Jayarathne Religious Centre and Bio-Diversity Complex*' and had taken over possession of those lands in or around the year 2000. The Petitioner states that the State never took possession of any portion of his land.

It is also stated that in or around the year 2007, the Department of Land Settlement launched the '*Bim Saviya*' programme in the area for the issuance of Certificates of Title under the Title Registration Act No.21 of 1998. As the Petitioner was not issued with a Certificate of Title for his land, the Petitioner had made inquiries from the relevant authorities. The 4th Respondent in his statement of objections filed in response to the Petition has stated that a Certificate of Title could not be issued to the Petitioner in view of the fact that the subject land being acquired by the State under the provisions of the Land Acquisition Act, as amended. Consequent to the representations made by the Petitioner, in or around January 2010, the Survey General's Department has caused a survey of the Petitioner's land for the purpose of Title Registration. Thereafter, the Petitioner was issued with the tracing No. Maha/ UDP-BS/2010/299 ('P 10') dated 26th August 2010 prepared by the Government

Surveyor, Mr. H.M.C.B.B. Hitihamu. Lot B in the said tracing in an extent of 31.19 Perches, a portion of the Petitioner's land, was shown as a portion of Lot No. 1 in preliminary plan No.5059 ('P 12') dated 21st March 2000, prepared for the acquisition of lands by the State.

However, the Petitioner submitted that the acquisition of lands in the area was done in terms of advanced tracing No. Maha/UDP/98/892 ('P 41-page2'). Plan No. 5059 ('P 41-page 4') was made subsequent to the acquisition of the lands in the area.

However, in response to the letter written by the Attorney At Law for the Petitioner ('P 14'), the Deputy Survey General (Title Registration) informed by his letter marked 'P 25' that Plan No. 5059 is prepared to finalize the acquisition of the lands and according to the investigation carried out, Lot B in tracing No. Maha/UDP/2010/299 is part of Lot. No. 1 in plan No. 5059. The Petitioner states that plan No. 5059 is a plan dated 21st March 2000 prepared during the period of November 1999 to March 2000, subsequent to the taking of possession of the land depicted in the advanced tracing No. Maha/UDP/98/892. However, the document 'R 6' indicates that the Divisional Secretary had submitted an application to the Magistrate's Court of Gampola on 16th February 2001, moving for an issue of a writ of possession under Section 42 (2) of the Act in respect of Lot No. 6 in advance tracing No. Maha/UDP/98/892. Thus, it is evident that the State was unable to take over possession of at least Lot No. 6 in plan No. 5059 made on the 21st March 2000. Yet, it is important to note that the acquisition occurred prior to the preparation of the above plan.

The Divisional Secretary of 'Udapalatha-Gampola' had informed the Petitioner that he has requested the Senior Superintend of Survey, Kandy, to conduct a fresh survey to identify whether a portion of Petitioner's land is acquired by the State ('P 31'). However, the Petitioner states that no fresh survey was done by the Survey Department.

Thereafter, the Director of Land Acquisition of the Ministry of Lands and Parliamentary Reforms confirmed ('P 33') that a portion of the Petitioner's land, Lot B of tracing No. Maha/UDP/2010/299, is part of Lot No.1 of preliminary plan No. 5059.

Later, in consequence of a complaint made by the Petitioner to the Human Rights Commission, certain information regarding the acquisition was revealed. Thus, the Petitioner made an application to the Divisional Secretary of Udapalatha under the Right to Information Act, requesting copies of relevant documents. Consequently, the Petitioner had been able to obtain copies of the advance tracing No. Maha/UDP/98/892, copy of the Notice published under Section 7 of the Act in the Gazette on the 3rd August 2000, ('P 43'), order published in the Gazette notification dated 7th January 1999, under Section 38 A ('P 42').

In reply to the Petition, the 4th Respondent states that the Order under Section 2 of the Act was made on the 13th November 1998 ('R 1a') and the Notice under Section 2 of the Act was published on the 17th November 1998 ('R 1b'). According to the 4th Respondent, advance tracing No. Maha/UDP/98/892 has been prepared for the limited purpose of publishing notice under Section 2 of the Act. It is easily perceived that lot No. 6 in advanced tracing No. Maha/UDP/98/892¹, Lot No. 1 in Plan No. 5059 dated 21st March 2000² and Lot No. 1 in Plan No. 5059 prepared on the 4th August 2001 ('P 12') are one and the same and it is the subject land of this application. However, the Order under Section 2 of the Act³ and the notice under Section 2 of the Act⁴ are published in respect of Lots No. 1, 2, 3, and 4 of advanced tracing No. Maha/UDP/98/892. Therefore, it appears that the aforementioned two documents 'R 1a' and 'R 1b' are not relevant to the present application and do not confirm the fact that Section 2 notice was published in respect of the subject land.

Be that as it may, the land has been acquired in terms of Proviso to Section 38 of the Act, under the order published in Gazette No.1061/10 dated 7th January 1999 ('R 2' and 'P 42'). The 4th Respondent states that upon following the due procedure under Section 5 of the Act, the preliminary plan No. 5059 dated 21st March 2000 was prepared under Section 6 of the Act. The 4th Respondent produced the declaration made by the Minister under Section 5 (1) of the Act

¹ Page 2 of 'P 41'.

² Page 4 of 'P 41'.

³ 'R 1a'.

⁴ 'R 1b'.

marked as 'R 3'. However, no Gazette notification published under Section 5(1) is produced by the 4th Respondent.

Thereafter, notice under Section 7 was published in the Gazette notification No. 1143/22 dated 3rd of August 2000 ('R 4') and also exhibited⁵. But the copies of the newspapers or the notices exhibited were not produced. However, the fact that the process was followed is not contested by the Petitioner. The other Gazette notification marked 'R 5', published under Section 7 is in respect of a land depicted in a different preliminary plan which is not relevant to the instant application.

According to the 4th Respondent, upon failure to hand over possession of the subject land acquired by the State, as required by law, the 4th Respondent, Divisional Secretary instituted proceedings in the Magistrate's Court of Gampola, on the 16th February 2001, in terms of Section 42 (2) of the Act ('R6').

After a long delay from the date of the order made under Section 38 A of the Act, the Divisional Secretary of 'Udapalatha' has taken steps under Section 9 of the Act to conduct a compensation inquiry ('R 9'). The 4th Respondent states that neither the Petitioner nor the Petitioner's predecessor in title, the 9th Respondent, were present or represented at the inquiry. Only an individual named H. M. Rashik and certain others have submitted and substantiated a claim to the subject land. Upon conclusion of the compensation inquiry, the Divisional Secretary made his decision under Section 10 (1) of the Act regarding compensation, on or around 21st November 2011 ('R 9'). However, no award was made pursuant to Section 17 of the Act. Consequent to a request made by H. M. Rashik and others, an unsuccessful attempt was made to provide alternative land to the claimants.

According to the 4th Respondent, tracing No. Maha/UDP-BS/2010/299 ('P10') and the annexed report 'P 11' were prepared to ascertain whether the land occupied by the Petitioner had been acquired by the State. The 4th Respondent states that the advance tracing 'P 10' conclusively establishes the fact that the land occupied by the Petitioner forms part of the land acquired by the State, depicted in plan No. 5059. It was stated that part of the land said to

⁵ Paragraph 24 of the 4th Respondent's objections.

have been acquired by the State is shown as Lot B in Plan ‘P 10’ which is part of Lot 1 in Plan ‘P 12’⁶, prepared on the 4th August 2001.

The 4th Respondent’s contention is that plan No. 5059 marked ‘P 12’, the plan made under Section 6 of the Act, is the valid and legal plan which identifies the land acquired by the State⁷.

Accordingly, in this application, firstly the Court has to decide whether the Respondents have precisely ascertained the land acquired by the State before arriving at the decision whether a portion of the Petitioner’s land consists of a portion of the land acquired.

Analysis

The Petitioner obtained title to his land from his predecessor in title, the 9th Respondent, on the 29th March 2000 (‘P 1’). The Petitioner admits that several lands in the area where his land is situated have been acquired by the State, *inter-alia*, for the construction of the ‘*Ambuluwawa Dissanayake Mudiyanseelage Jayarathne Religious Centre and Bio Diversity Complex*’. According to the Petitioner in or about the year 2000, State took over possession of those private lands acquired by the State. However, possession of the Petitioner’s land or part of the same was not taken over by the State. As I have already observed above in this judgment, the fact that the State took over possession of all the private lands acquired is factually incorrect.

According to the Petitioner, when the Petitioner requested from the relevant authorities for his Certificate of Title under the Registration of Title Act, he had been informed by the 7th Respondent that his land had already been surveyed for the Registration of Title. However, the Petitioner had no knowledge of his land being surveyed for the purpose of Registration of Title. Accordingly, the Petitioner has requested a re-survey with notice to him. Consequently, a re-survey was caused and plan No. Maha/UDP-BS/2010/299 (‘P 10’) was made. In ‘P 10’ Lot B, in an extent of 31.19 P is identified as part of the land acquired in terms of Section 38 of the Land Acquisition Act, which forms part of Lot 1 depicted in preliminary plan No. 5059⁸.

⁶ At paragraph 25 (c) of the statement of objections.

⁷ At paragraph 25 (f) of the statement of objections.

⁸ Page 4 of ‘P 41’.

The Petitioner contended that the lands had been acquired in terms of the advance tracing No. Maha/UDP/98/892 and the preliminary plan No.5059⁹ is a subsequent plan prepared after the acquisition of the lands in the area. I observe that the advance tracing No. Maha/UDP/98/892 dated 31st December 1998 was prepared in consequence to a survey done from November to December 1998. Further the Plan No. 5059 dated 21st March 2000¹⁰ had been prepared following a survey done from November 1999 to March 2000. The Order made under Section 38A of the Land Acquisition Act was published in the Gazette notification on the 7th January 1999. Therefore, the assertion of the Petitioner that plan No.5059 is a plan made subsequent to the order made under Section 38A of the Act is factually correct.

The Petitioner also challenged the authenticity of the preliminary plan No.5059 on the ground that there are discrepancies in the two tenement lists attached to the two copies of plan No 5059 issued to the Petitioner¹¹. According to the tenement list attached to ‘P 12,’ the survey and preparation of the plan were done by government surveyor Mr. M. W. S. Chandrarathna. However, according to the tenement list attached to ‘P 41’,¹² the survey and preparation of the plan were done by Government Surveyor G. W. Chandrarathne. According to the former tenement list, boundaries had been shown by K. G. N. W. Surendra, Grama Niladhari of Sinhapitiya North. According to the latter tenement list, boundaries had been shown by the said Grama Niladhari and also by the owners of the land. More importantly, the date of the tenement list attach to ‘P 12’ is 4th August 2001 and the survey had been done from July 2001. According to the tenement list attached to ‘P41’,¹³ the date of the plan is 31st December 1998 and the survey had been done from November to December 1998.

According to the surveyor’s notes appearing in ‘P 12’, the plan is prepared subsequent to the making of plan No. 5059 dated 21st March 2000 for the purpose of re-defining the boundaries. Hence, it is clear that although the two

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ ‘P 12’ and page 4 of ‘P 41’.

¹² page 4.

¹³ *Ibid.*

plans have the same number, the two plans had been prepared on two different dates. Therefore, the above contention of the Petitioner has no merit.

According to the 4th Respondent, tracing No. Maha/UDP/98/892 is intended to identify the land sought to be acquired for the limited purpose of publishing notice under Section 2 of the Act. The 4th Respondent states that the land is acquired under the Order published in the Gazette No. 1061/10 dated 7th January 1999, under the Proviso to Section 38A ('P 42').

However, it is important to observe that the Gazette notification is published in respect of land depicted in tracing No. Maha/UDP/98/892 dated 31st December 1998.

Therefore, on the 4th Respondent's own admission, it is clear that the land acquired is the land depicted in advance tracing No. Maha/UDP/98/892 and not the land depicted in plan No. 5059 dated 21st March 2000.

One may argue that Lot No. 6 in tracing No. Maha/UDP/98/892 is as same as Lot No. 1 in plan No 5059. To the naked eye, this appears to be so. However, on an examination of the two tenement lists attached to the two plans, there is a considerable discrepancy in the extent of Lot No. 6 in tracing No. Maha/UDP/98/892 and the extent of Lot No. 1 in plan No. 5059 dated 21st March 2000. The extent of Lot 6 is 2.625 Hectares and the extent of Lot No. 1 is 2.436 Hectares, 0.189 Hectares less. Therefore, it is obvious that Lot No. 6 in tracing No. Maha/UDP/98/892 and plan No. 5059 are not one and the same land.

Although the Respondents have submitted that plan No. 5059 was made to publish notices under Section 5 of the Act, no such notice published in the Gazette was submitted to this Court. The document marked 'R 3' is not the Gazette notification published under Section 5 of the Act; it is only the declaration made by the Minister under Section 5 (2). Notably, 'R 3' is also made on tracing No. Maha/UDP/98/892.

If there is no plan that is suitable for proceeding after the publication of notice under Section 5, Section 6 mandates that a surveyor plan be made. However, in this instance, the relevant authorities have opted to make use of advanced tracing No. Maha/UDP/98/892 to publish the order under Section 38A, instead of making a plan under Section 6 of the Act. More importantly, plan

No. 5059 is made on the 21st March 2000, well after the Order of acquisition published under Section 38A of the Act on the 7th January 1999 ('P 42').

Furthermore, in both the advanced tracing No. Maha/UDP/98/892 and in plan No 5059, the Petitioner's predecessor in title, 9th Respondent's land is shown to the South of the land acquired by the State. In both tenement lists, the aforementioned land is stated to be the land situated on the southern boundary. Accordingly, the Petitioner has submitted that his land was never a part of the land surveyed and depicted in tracing No. Maha/UDP/98/892 or in plan No 5059. However, in tracing No. Maha/UDP-BS/2010/289 ('P 10'), Lot B of the same is depicted as part of Lot 1 of plan No. 5059. It appears from the report 'P 11' attached to plan 'P 10' that the surveyor who made plan 'P 10' has prepared his plan in accordance with the available boundary stones. He does not state that plan No. 5059 was superimposed on his plan. Therefore, the surveyor's finding that Lot 'B' in Plan 'P 10' is part of Lot No. 1 in Plan 5059 is irrational. I am aware that disputed facts are not to be decided in a writ application¹⁴. Yet, the aforementioned facts clearly establish that the Respondents have failed to precisely ascertain as to whether Lot 'B' in plan 'P 10' is part of the land acquired by the State.

It is evident from the above analysis that until the boundaries of advanced tracing No. Maha/UDP/98/892 are laid down on the ground and the precise identification of the acquired land is made, it is uncertain whether a portion of the Petitioner's land has been acquired or not.

Accordingly, the Petitioner or his predecessor in title, the 9th Respondent, would not have been present at the compensation inquiry since their land was not a part of the land acquired by the State.

The 4th Respondent states that although the Petitioner has sought an order to conduct an appropriate survey to identify whether the land occupied by the Petitioner was infact acquired by the state, the Petitioner persistently obstructed and/or prevented the relevant officials from entering the subject land and carrying out the survey. As proof of the above fact, the 4th Respondent has tendered a report made by a surveyor attached to the Survey Department ('R13'). However, upon consideration of the above letter, it appears to me that the objection raised by the Petitioner was for the survey being done according

¹⁴ *Wijenayake and others v. Minister of public Administration*, [2011] 2 Sri.L.R. 247.

to plan No. 5059 ('P 12') which in my view is not without merit for the reasons stated in this judgment.

I will now turn to the relevant provisions of the Land Acquisition Act. When the Minister decides that land in any area is *needed* for a public purpose, under Section 2 of the Act, a notice has to be exhibited in some conspicuous place in the area stating that land in the area is required for a public purpose. This notice authorizes the acquiring officer to *investigate the suitability* of any land. After such investigation, when the Minister considers that a *particular land* is *suitable* for the public purpose, the acquiring officer should cause a notice to be given to the owners of that land and also exhibit such notice in some conspicuous place on or near the land calling for objections, if any. If there were no objections after the time allowed for tendering objections or if there are objections, the Minister having considered the objections shall decide whether the land should or should not be acquired. Thereafter, the Minister has to make a written declaration under Section 5 (1) of the Act that the land is needed for a public purpose and will be acquired. The declaration should be published in the Gazette and also in some conspicuous places on or near the land¹⁵. After publishing the declaration in the Gazette, if there is no plan of the land made by the Government Survey Department or if the plan is not suitable, the acquiring officer should cause a survey and a plan made by the Government Survey Department. Thereafter, the acquiring officer has to publish a further notice under Section 7 of the Act, in all three languages in the Gazette, Newspapers and also cause that notice exhibited near the land or in some conspicuous places, stating the intention to acquire the land and requiring the claims for compensation to be made to the acquiring officer.

Thereafter, the acquiring officer has to hold an inquiry and award compensation accordingly¹⁶. If a necessity arises, the acquiring officer can refer the matter to the District Court or the Primary Court having jurisdiction¹⁷ over the place where the land is situated.

After an award of compensation is made under Section 17, by an Order under Section 38 published in the Gazette, the Minister may direct the acquiring officer to take possession of the land acquired on behalf of the State. In terms

¹⁵ Section 5 (1) of the Act.

¹⁶ Section 9 and 17 of the Act.

¹⁷ Sections 10, 11, 12, 13 and 14 of the Act.

of Section 40 of the Act, once an Order under Section 38 is published in the Gazette, by virtue of that Order, the land is vested in the State *with effect from the date on which the Order is published*. Section 40 A provides that an Order under Section 38 published in the Gazette is conclusive evidence of the title of the State to the land.

The Proviso of Section 38 read along with Section 38 A of the Act provides that at any time after a notice under Section 2 and/or 4 is exhibited, on the ground of urgency, the Minister may by Order published in the Gazette direct the acquiring officer to take immediate possession of the land on behalf the state.

According to Section 41 (b) of the Act, if a declaration under Section 5 has not been published in terms of Section 5 (1) of the Act, prior to the making of the Order under the Proviso to Section 38 for the taking of immediate possession of any land, such a declaration should be made and published. However, as I have already stated above in this judgment, no material was produced by the Respondents that the declaration under Section 5 (1) has been *published* as provided in the Section.

Be that as it may, upon careful consideration of Sections 38 and 40 of the Act, it is clear that it is the Gazette notification published under Section 38 A, read along with Proviso of Section 38 that vest the land absolutely in the State.

Conclusion

As I have already analysed above in this judgment, the Gazette notification under Section 38 A is published in respect of the land depicted in advanced tracing No. Maha/UDP/98/892. Consequently, the land vested in the State is the land depicted in the above plan. However, in tracing No. Maha/ UDP-BS/2010/299 ('P 10') the Government Surveyor has identified Lot. B as a portion acquired by the State, based on plan No. 5059 made on the 21st March 2000. As stated above, the aforementioned plan No. 5059 had been made subsequent to the publication of the Order in the Gazette under Section 38 A on the 7th January 1999 ('P 42'). Therefore, in my view, the issue of whether lot B in tracing No. Maha/ UDP-BS/2010/299 ('P 10') is acquired by the State cannot be precisely be determined without superimposing advanced tracing No. Maha/UDP/98/892. Furthermore, whether Lot. B in plan 'P 10' constitutes part of the Petitioner's land could be ascertained only by

superimposing Petitioner's title plan No. 819 dated 22nd August 1971 made by D. A. Jayagoda, licensed surveyor ('P 2') on plan 'P 10'.

Therefore, this Court is not inclined to issue the writ of *mandamus* prayed for in paragraph (c) of the prayer of the Petition directing the 1st Respondent to revoke the vesting order, acting Under Section 39 of the Act.

The Petitioner has requested the 1st Respondent to cause a superimposition of his title plan 'P 2' on advanced tracing No. Maha/UDP/98/892 by his letter dated 9th March 2019 ('P 44'). According to the Petitioner, although his request was forwarded to the Senior Superintendent of Survey, Kandy, by the 1st Respondent no response was received up to the time of filing of this application on the 9th July 2009¹⁸. Accordingly, the Petitioner submits that the conduct of the 1st Respondent amounts to a refusal of the demand made by the Petitioner. I am in favour of this submission.

In light of the aforementioned facts, this Court is inclined to grant writ of *mandamus* prayed for in prayer (d) of the Petition directing the 1st to 8th Respondents or any one or more of them to cause an appropriate survey to identify whether a portion of the Petitioner's land in plan marked 'P 2' is in fact include in the land acquired by the State depicted in advanced tracing No. Maha/UDP/98/892.

JUDGE OF THE COURT OF APPEAL

Wickum A. Kaluarachchi J.

I Agree.

JUDGE OF THE COURT OF APPEAL

¹⁸ At paragraph 40 of the Petition.