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

1. N. W. Leelawathi,
   No. 501/1, Kurunegala Junction,
   Dambulla.
2. Sankapala Arachchige Sujeewa,
   Siriwardena,
   No. 501/1, Kurunegala Junction,
   Dambulla.
3. S. A. Jayanandani Siriwardana,
   No. 508/A, Kurunegala Junction,
   Dambulla.

   Petitioners

CASE NO: CA/WRIT/306/2014

Vs.

1. Hon. Janaka Bandara Tennakoon,
   Minister of Lands and Land Development,
   Ministry of Lands and Land Development,
   "Mihikatha Medura", Land Secretariat,
   Rajamalwatta Avenue,
   Battaramulla.

1A. Hon. M. K. D. S. Gunawardena,
Minister of Lands and Land Development,
Ministry of Lands and Land Development,
"Mihikatha Medura", Land Secretariat,
Rajamalwatta Avenue,
Battaramulla.

1B. Hon. Gayantha Karunathilaka,
Minister of Lands and Parliamentary Reforms,
Ministry of Lands and Parliamentary Reforms,
"Mihikatha Medura", Land Secretariat,
Rajamalwatta Avenue,
Battaramulla.

2. Gotabhaya Rajapaksha,
Secretary,
Ministry of Defense and Urban Development,
Colombo 1.

2A. Eng. Karunarathna Hettiarachchi,
Secretary,
Ministry of Defense and Urban Development,
Colombo 1.

2B. Dr. I. H. K. Mahanama,
Secretary,
Ministry of Lands and Parliamentary Reforms,
"Mihikatha Medura", Land Secretariat, Rajamalwatta Avenue,
Battaramulla.

3. Urban Development Authority,
Sethsiripaya, Battaramulla.

4. Nimal Perera,
Chairman,
Urban Development Authority,
Sethsiripaya, Battaramulla.

4A. Ranjith Fernando,
Chairman,
Urban Development Authority,
Sethsiripaya, Battaramulla.

4B. Jagath Nandana Munasinghe,
Chairman,
Urban Development Authority,
Sethsiripaya, Battaramulla.

5. Harshana de Silva,
Director (Central Province),
Urban Development Authority,
Sethsiripaya, Battaramulla.

5A. Nayana Mawilmada,
Director General,
Urban Development Authority,
Sethsiripaya, Battaramulla.

5B. Sumedha Rathnayaka,
Director General,
Urban Development Authority,
Sethsiripaya, Battaramulla.

6. Lalith Wijerathna
Director (Central Province),
Urban Development Authority,
Sethsiripaya, Battaramulla.

6A. N. A. S. N. Nissanka,
Director (Central Province),
Urban Development Authority,
Sethsiripaya, Battaramulla.

7. H. A. Dayananda
Director (Land Development and Management),
Urban Development Authority,
Sethsiripaya, Battaramulla.

7A. K. A. W. Perera,
Director (Land Development and Management),
Urban Development Authority,
Sethsiripaya, Battaramulla.

8. E. M. S. B. Ekanayaka,
Deputy Director (Planning/Project),
Director,
Greater Dambulla Development Plan,
Urban Development Plan,
Urban Development Authority,
Dambulla.

9. Municipal Council,
   Dambulla.
10. Jaliya Opatha,
    Chairman,
    Municipal Council,
    Dambulla.
11. H. P. P. A. Hewapathirana,
    Divisional Secretary,
    Divisional Secretariat,
    Dambulla.
12. Hon. Attorney General,
    Attorney General's Department,
    Colombo 12.

    Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Gamini Hettiarachchi for the Petitioners.
Manohara Jayasinghe, S.S.C. for the Respondents.

Argued on: 22.01.2020

Decided on: 20.02.2020

Mahinda Samayawardhena, J.

The three Petitioners filed this application naming 12 parties as Respondents seeking (a) a mandate in the nature of a writ of certiorari to quash the decision taken by the 1st Respondent Minister of Lands under proviso (a) to section 38 of the Land

Acquisition Act, No. 9 of 1950, as amended, to take possession of the land described in item No.5 in the Extraordinary Gazette bearing No.300/14 dated 08.06.1984 marked P2, and morefully described as Lot 12 in the Surveyor General's Plan No.842 marked P3/3R7; (b) a mandate in the nature of a writ of mandamus to have the said acquisition revoked; or (c) a mandate in the nature of a writ of mandamus to divest the said land.

During the course of the argument learned President's Counsel for the Petitioners informed Court that he would only pursue the relief stated in (c) above.

The 3rd-8th and 11th Respondents have filed objections to this application. The 1st Respondent, for reasons best known to him, has not filed objections to the Petitioners' application.

By paragraph 9(i) of the statement of objections of the 3rd-8th Respondents and paragraph 7(i) of the statement of objections of the 11th Respondent, the Respondents admit that the land claimed by the Petitioners is Lot 12 in Plan No. 842.

The order of the 1st Respondent Minister of Lands, made under proviso (a) to section 38 of the Land Acquisition Act, to take possession of the said land together with some other allotments was published in the Gazette as far back as in 1984.

I might mention that in terms of this section, such an order can be made "*where it becomes necessary to take immediate possession of any land on the ground of any urgency*".

By paragraph 12 of the statement of objections of the 3rd-8th Respondents and paragraph 9 of the statement of objections of the

11th Respondent, the position taken by the Respondents is that possession of the land was taken and thereafter handed over to the 3rd Respondent Urban Development Authority on 20.06.1996 for the purpose of implementing the Dambulla New Town Development Plan.

However, the Petitioners state that since 1984 when the publication in the Gazette was made, up to now more than 35 years later, the land remains undeveloped and not utilised for any public purpose.

The Petitioners further state that despite the Respondents' claim that possession of the land was taken, the Petitioners continue to be in *de facto* possession of the land.

As seen from P10-P12, at a meeting at the Urban Development Authority in Colombo in 2011, with the participation of the relevant authorities and former landowners, the authorities accepted that some lands acquired in 1984 for the Dambulla Development Plan remain undeveloped.

As seen from P13 and P14(a)-(i), some acquired Lots had been later divested. This fact has been expressly accepted by the 3rd-8th Respondents in paragraph 13(l) of the statement of objections and by the 11th Respondent in paragraph 10(g) of the statement of objections, which reads as follows:

> *The total extent of land acquired for the said Project had been 13.5 hectares approximately. Having identified an area of 7.7 hectares as being required for the implementation of the said project, the balance area of approximately 5.86 hectares,*

> *which consisted mostly of lands situated off the main roads, and including properties belonging to the Petitioners, had been divested to the original owners of the said lands.*

This means the Minister had not taken a considered decision when he decided to acquire lands for the Dambulla Development Plan.

The Petitioners have filed this application on 10.09.2014 upon seeing a newspaper advertisement dated 20.07.2014 marked P15 whereby the Urban Development Authority has disclosed a proposed project to construct a shopping complex on the land and sell the shops therein to private parties.

In short, by this application the Petitioners seek to compel the 1st Respondent Minister to make a divesting order under section 39A(1) of the Land Acquisition Act, as the public purpose, if at all there was one, has faded away over a period of more than 36 years from the time of acquisition.

Section 39A of the Land Acquisition Act reads as follows:

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

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

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

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

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

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

The threshold argument of learned Senior State Counsel for the Respondents is that, according to the pleadings of the Petitioners, as possession of the land had not been taken by the State, a section 39A application shall necessarily fail, because it is a prerequisite to have possession taken by the State in order to invoke the provisions of the said section.

This argument cannot succeed in view of the position taken by the Respondents themselves in their pleadings, i.e. that possession was in fact taken. Vide paragraph 12 of the statement of objections of the 3rd-8th Respondents and paragraph 9 of the statement of objections of the 11th Respondent. In my view, if there

is a doubt, the benefit of it shall be given to the citizenry whose lands have been acquired by the State.

In terms of section 39A(2) quoted above, the Minister shall satisfy himself on four matters, i.e. (a)-(d), before making a divesting order.

Learned Senior State Counsel for the Respondents has no issue on (a) and (d). But he states that conditions (b) and (c) have not been satisfied. These conditions relate to the land not being used for a public purpose and no improvements being effected to the land.

Learned Senior State Counsel does not state that Lot 12 has been used for a public purpose and improvements have been effected to that Lot. His argument is that Lot 12 is part of the larger land acquired for the development project, and a large part of the project has been completed but the remaining part is still in progress, and piecemeal divesting is not possible.

The contention of learned Senior State Counsel that piecemeal divesting is not possible is belied by paragraph 13(l) of the statement of objections of the 3rd-8th Respondents and paragraph 10(g) of the statement of objections of the 11th Respondent, which reads as follows:

> *The total extent of land acquired for the said Project had been 13.5 hectares approximately. Having identified an area of 7.7 hectares as being required for the implementation of the said project, the balance area of approximately 5.86 hectares, which consisted mostly of lands situated off the main roads,*

and including properties belonging to the Petitioners, had been divested to the original owners of the said lands.

Admittedly, several Lots have been divested after acquisition.

The position of the Respondents is that the land claimed by the Petitioners has been identified for the construction of a shopping complex. In this regard, the 3rd-8th Respondents in paragraphs 13(m)-(p) of the statement of objections state as follows:

(m) The land claimed by the Petitioners in this application, which is situated at a strategic location on the Matale-Trincomalee main road, has been identified for the construction of the commercial and shopping complex.

(n) The said complex would have two floors with an area of 65000 sq feet and have provision, inter alia, for 94 shops and parking spaces for vehicles.

A true copy of the project report of the proposed Commercial and Shopping Complex is annexed hereto marked 3R4 and is pleaded as part and parcel hereof.

(o) The total estimate for the construction of the said Commercial and Shopping Complex, which is considered as a mega development, is Rs. 250 million and a sum of Rs. 50 million has already been allocated from the 2014 budget of the 3rd Respondent for the said Commercial and Shopping Complex. Balance funds will be generated by the sale of the shopping space.

> *(p) In the above circumstances, the establishment of the Commercial and Shopping Complex is essential for the development of the Dambulla Town and the Greater Dambulla areas and thus, the Respondents are not in a position to divest the said lands to the Petitioners.*

If the position of the Respondents is that the Petitioners' land has been identified for the construction of a shopping complex, when have they identified so? Acquisition had taken place in 1984 and this application was filed in 2014 and we are now in 2020. Thirty long years had gone by between the acquisition and filing of this application. The public purpose, if there was one, has evaporated.

The Project Report of the proposed shopping complex marked 3R4 is revealing. The Report containing several pages has no date. The Plan of the proposed shopping complex is dated 12.05.2015. This means the Report has been prepared in 2015, which is after the filing of this application.

In this Report, under the heading "Existing Situation of the land", it is stated:

> *In order to Implement the Project, It has Selected a portion of the total land which is freely available for the Implementation of the project. Accordingly there is 195.5 P land is available for the construction of the proposed Shopping Complex. At present there are 25 shops and 4 Housing Units operating in this land. All these Shops are paying very marginal rentals to UDA as a fee for usage.*

This goes to show that even by 2015 nothing had been done to implement the alleged project. There was no urgency.

In *Horana Plantations Ltd., v. Hon. Minister of Agriculture [2012] 1 Sri LR 327* the Supreme Court held:

> *The proviso to Section 38 of the Land Acquisition Act is based on the urgency regarding a proposed acquisition and therefore the burden of establishing urgency is on the acquiring authority. In the circumstances of the case, the requirement of urgency has not been established by the acquiring authority and placing the burden of showing that there was no urgency on the appellant would amount to a misdirection in law. The facts and circumstances of this case do not warrant an order under proviso (a) to Section 38 of the Land Acquisition Act on the ground of urgency.*
>
> *Since the final authority regarding the decision to acquire land under the provisions of the Land Acquisition Act, especially in terms of Clause (a) of the proviso to Section 38 is on the Minister, the Minister has a duty to act with care in arriving at such decisions as the discretion conferred on him is not one which is unfettered. Exercise of unfettered discretion could be the subject of challenge. The Minister must endeavour to make proper inquiries and only pursue such acquisitions if no alternative is available as otherwise such actions would jeopardize the interests of the Public.*

Although in paragraph 13(o) of the objections of the 3rd-8th Respondents it is stated that the total estimate for the construction

of the complex is Rs.250 million, according to the said Report the total estimate is Rs.385.51 million.

Further, notwithstanding that the same paragraph says Rs.50 million was allocated from the 2014 budget to the Urban Development Authority for this project, there is no mention of this allocation in the said Report presumably prepared in 2015. There is no documentary proof of the said allocation.

In relation to implementation, the Report says "Presale system will be adapted for the total project." This is confirmed by paragraph 13(o) of the statement of objections of the 3rd-8th Respondents, which says that "Balance funds will be generated by the sale of the shopping space."

Items 4 and 5 of the "Project Objectives" in the Report, state the following: "To increase the income level of UDA and respective local Authority" and "To utilize the lands of UDA for profit generated project."

Under the banner of "public purpose", private lands cannot be acquired and possession taken urgently to increase the income of state agencies and private individuals.

The land acquired has not been used for a public purpose nor have any improvements been effected after possession was taken 36 years ago. Hence requirements (b) and (c) of 39A(2) of the Land Acquisition Act have been satisfied.

The total estimated cost of the proposed shopping complex had exceeded Rs.385 million by the year 2015. The authorities have no funds to undertake such a massive project. Therefore the

proposed shopping complex appears to be only wishful thinking. The public purpose shall be real, not fanciful.

After acquisition, if the Minister realises that the desired objective cannot be practically achieved due to some reason including lack of funds, and that the public purpose might become a reality only in the distant future, he ought to revert ownership of the acquired land to the former owner. He can, if he wants, seriously consider reacquiring the land when the necessity for a public purpose actually arises.

When the Minister acquires private lands under proviso (a) of section 38 of the Land Acquisition Act on the basis of urgent public purpose, he shall have a clear plan to implement at the time of taking that decision. He cannot acquire lands in a great hurry and then take his own time to think of plans after acquisition. That is a betrayal of the public trust doctrine.

In the Supreme Court case of *Sugathapala Mendis v. Chandrika Kumaratunga [2008] 2 Sri LR 339*, commonly known as *The Waters' Edge* case, the land acquired for a public purpose was sold to a private entrepreneur to set up a golf resort. Quashing the latter transaction and declaring that the Petitioners' fundamental right to equality before the law guaranteed under Article 12(1) of the Constitution had been violated, Thilakawardane J. with the agreement of S.N. Silva C.J. and Ratnayake J. at page 352 observed:

> *The principle that those charged with upholding the Constitution - be it a police officer of the lowest rank or the President - are to do so in a way that does not violate the*

> *Doctrine of Public Trust by state action/inaction is a basic tenet of the Constitution which upholds the legitimacy of Government and the Sovereignty of the People. The Public Trust Doctrine is based on the concept that the powers held by organs of government are, in fact, powers that originate with the People, and are entrusted to the Legislature, the Executive and the Judiciary only as a means of exercising governance and with the sole objective that such powers will be exercised in good faith for the benefit of the People of Sri Lanka. Public power is not for personal gain or favour, but always to be used to optimize the benefit of the People. To do otherwise would be to betray the trust reposed by the People within whom, in terms of the Constitution, the Sovereignty reposes. Power exercised contrary to the Public Trust Doctrine would be an abuse of such power and in contravention of the Rule of Law. This Court has long recognized and applied the Public Trust Doctrine, establishing that the exercise of such powers is subject to judicial review. (Vide De Silva v. Atukorale [1993] 1 Sri LR 283 at 296-297; Jayawardene v. Wijayatilake [2001] 1 Sri LR 132 at 149, 159)*

The case of *De Silva v. Atukorale [1993] 1 Sri LR 283* referred to in the above quotation is another Supreme Court Judgment which considered the question of divesting under section 39A of the Land Acquisition Act. In the said case, a larger land belonging to the Appellant and other members of his family had been acquired for the Bibile Town Development Project. Several years later, a decision was taken to construct a shopping complex on the land. The application of the Appellant to issue a writ of mandamus compelling the Minister to divest the land on the basis that the

whole process was politically motivated was dismissed by the Court of Appeal. On appeal, the Supreme Court did issue mandamus to divest the portion of land not required to construct the shopping complex.

The Supreme Court held:

> *(1) 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; Section 39 and section 50.*
>
> *(2) (a) Where the public purpose was so urgent as to require immediate possession, necessitating a section 38 proviso (a) order, the land could not be restored if the public purpose was found to have evaporated after possession was taken. An improper acquisition could not be put right by executive action. So it was that the amending Act No. 8 of 1979 was enacted to enable relief to be granted even where possession was taken. The Act contemplates a continuing state of things and does not refer only to the time of initial acquisition. It is sufficient if the lack of justification appears at any subsequent point of time.*
>
> *(b) The Minister shall make a divesting order after satisfying himself of four conditions:*

(i) no compensation has been paid;

(ii) the land has not been used for a public purpose after possession was taken under Section 40(a) of the Land Acquisition Act;

(iii) no improvements have been effected after the Order for possession under section 40(a);

(iv) the person or persons interested in the land have consented in writing to take possession of the land after the divesting order is published in the Gazette.

(c) The purpose and the policy of the amendment (Act No. 8 of 1979) is to enable the justification for the original acquisition, as well as for the continued retention of acquired lands, to be reviewed. If the four conditions are satisfied the Minister is empowered to divest. 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.

(3) The executive discretion vested in the Minister is not unfettered or absolute. He must in the exercise of his discretion do not what he likes but what he ought.

(4) The true intent and meaning of the amending Act was to empower the Minister to restore to the original owner land for the acquisition (or retention) of which there was originally (or subsequently) no adequate justification, upon the fulfilment of the stipulated conditions. It is a power conferred solely to be

used for the public good, and not for his personal benefit; it is held in trust for the public; to be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest.

(5) The Minister in the instant case, has exercised his discretion very curiously. First he agreed to divest one lot, but did not do so. He then divested the first lot. Thereafter his reply to a direct request to divest the remaining land, was in effect, that it was not his business, but a matter for his colleague, who was not the statutory authority. This was a clear refusal to exercise his discretion for a wrong reason, and also an abdication of discretion. In the Court of Appeal he sought to justify his inaction on the different, but patently erroneous basis that the land was required for a shopping complex - ignorant or forgetful of the fact that the land was over 19 acres in extent while the shopping complex required only about 3% of that extent; a manifestly erroneous basis for his refusal to exercise his discretion.

(6) The affidavits and documents produced show beyond doubt that had the matter been considered properly, the Minister (1st Respondent) had no option but to make a divesting order, retaining only the land actually required for the shopping complex, subject to compliance with section 39A(2)(d).

In the course of the Judgement, Mark Fernando J. with Dheeraratne J. and Wadugodapitiya J. concurring stated at 292 thus:

> *The Act [after the amendment by Act No. 8 of 1979] contemplates a continuing state of things; it is sufficient if the lack of justification appears at any subsequent point of time; this is clear from paragraph (b) of section 39A(2): if the land has not been used for a public purpose after possession has been taken, there is then an insufficiency of justification; and the greater the lapse of time, the less the justification for the acquisition.*

In the instant case, as I stated earlier, the allotment of land which is the subject matter of this application has not been used for a public purpose for the past 36 years.

With regard to "public purpose", Mark Fernando J. at page 293 of the abovementioned Judgement opined that acquisition for public purpose shall be on justifiable grounds and this justification shall be present not only at the time of acquisition but throughout the proceedings, although it may be possible to later change the original public purpose to another. Nevertheless, he emphasised:

> *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.*

Once possession is taken, the land shall be used for the public purpose within a reasonable time. What is reasonable time shall depend on the facts and circumstances of each individual case. The greater the lapse of time, the less the justification for the acquisition, particularly when possession has been obtained as a matter of urgency in terms of proviso (a) to section 38 of the Act.

In the instant case, as I stated earlier, the allotment of land which is the subject matter of this application has not been used for a public purpose for the past 36 years.

The Judgment of Mark Fernando J. in *De Silva*'s case was quoted with approval by Somawansa J. with S.N. Silva C.J. and Amaratunga J. agreeing in the Supreme Court case of *Mahinda Katugaha v. Minister of Lands and Land Development [2008] 1 Sri LR 285*. In this case the Appellant sought to compel the Minister of Lands by way of a writ of mandamus to make a divesting order under Section 39A(1) of the Land Acquisition Act in respect of land belonging to the Appellant, which had been vested in the State by an order of acquisition. In the Section 2 Notice issued under the said Act, the public purpose for which land was to be acquired had not been specified.

The Appellant's main contention was that the land had not been used for any public purpose although possession of the same was taken by the Divisional Secretary in 1990 on the ground of urgency, and, in or about January 2002, the Appellant discovered that the Urban Development Authority had placed possession of about three acres in extent of the land, including the portion belonging to the Appellant, with a private party in order to construct a private hospital and resort thereon.

The Court of Appeal by its judgment dismissed the application for mandamus on the following grounds:

(1) Undue delay on the part of the Petitioner.

(2) The Minister's decision that land required for a public purpose cannot be questioned in a Court.

(3) As the land had been handed over to the Urban Development Authority under Section 44 of the Land Acquisition Act, and the said Authority had drawn plans and developed the land, the Petitioner cannot claim that the land acquired was not for a public purpose.

On appeal, the Supreme Court *inter alia* following the Judgment of Mark Fernando J. in *De Silva*'s case set aside the Judgment of the Court of Appeal and held:

(a) The Appellant realised that the land acquired from him was not used for a public purpose only in 2002, when the 4th Respondent put up its name board on the said land, and therefore the Appellant adequately explained his delay in instituting the application in the Court of Appeal.
(b) The Minister's decision to acquire land can be challenged in a Court of Law. A Minister does not have the unfettered right to acquire land without specifying a public purpose. Nor does a Minister have a right to acquire land and utilise it for purposes other than a public purpose.
(c) No improvements had taken place on the land and the filling up of the land by the 4th Respondent for a purpose other than a public purpose cannot be described as improvements for the purpose of section 39A(2)(C).

In the instant case, learned Senior State Counsel for the Respondents did not vigorously submit at the argument that under

section 39A the Minister has only the discretion to make a divesting order and therefore such exercise of discretion is not amenable to judicial review.

Nevertheless, for completeness, I must state that in modern administrative law there is no unfettered and unreviewable discretion. Discretion shall be exercised rationally and reasonably, not arbitrarily and capriciously. In the exercise of discretion, the person in authority shall do not what he likes but what he ought.

I need only quote Mark Fernando J. at pages 293-297 in *De Silva*'s case in this regard.

> *The argument that an executive discretion of this nature is unfettered or absolute, that the repository of such a discretion can do what he pleases, is not a new one. But it is one which has been unequivocally rejected. The discretion conferred in 1979 must also be considered in the background of the constitutional guarantees which sought to make the Rule of Law a reality, and in particular Article 12. An example was suggested to the learned Deputy Solicitor General: where after an acquisition of one hundred contiguous allotments of land, for an irrigation project, or for a road, the project had to be abandoned, for technical, financial or political reasons, the Minister then exercised his discretion under section 39A, to divest some allotments, while retaining others (in circumstances in which no rational distinction could be made between the two categories), perhaps influenced by personal or political considerations. It was readily conceded that such a decision could be challenged in an application under Article*

126. That alone is enough to establish that the discretion under section 39A is not unfettered; and here, out of seven lands acquired in one acquisition proceeding, the first lot has been divested, but not other lots which are equally unaffected by the proposed shopping complex, and no grounds have been urged to justify that discrimination. The Respondents did not contend that the time limit prescribed by Article 126(2) applied in respect of this allegation of the violation of fundamental rights by executive action, and in any event that time limit has not been made applicable where such a question arises in the course of hearing a writ application (cf. Article 126 (3)). However, leaving aside constitutional considerations, according to the general principles of administrative law governing statutory discretions, the Minister's discretion is neither unfettered nor absolute.

As Justice Douglas of the United States Supreme Court observed, dissenting, in United States v. Wunderlich (1951) 342 US 98, 101:

"Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions. [The decision of the majority] makes a tyrant out of every contracting officer. He is granted the power of a

tyrant even though he is stubborn, perverse or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected."

These principles have been explained and elaborated in a series of English decisions over a long period of time:

".....and notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, talis discretio discretionem confundit." (Lord Hailsbury, citing Coke, in Rooke's case (1598) 5 Co. Rep. 99b)

"Wheresoever a commissioner or other person hath power given to do a thing at his discretion, it is to be understood of sound discretion, and according to law, and that this court hath power to redress things otherwise done by them." (Estwick v. City of London (1647) Style 42)

"A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do

not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably." (Lord Wrenbury in Roberts v. Hopwood (1925) AC 578, 613)

"Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court." (Lord Reid in Padfield v. Minister of Agriculture, Fisheries and Food (1968) AC 997)

"First, the adjective [unfettered] nowhere appears in section 19 and is an unauthorised gloss by the Minister. Secondly, even if the section did contain that adjective I doubt if it would make any difference in law to his powers, save to emphasise what he has already, namely that acting lawfully he has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and objects in conferring a discretion upon the Minister rather than

by the use of adjectives." (Lord Upjohn in Padfield v Minister of Agriculture, Fisheries and Food (1968) AC 997)

"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by Padfield v. Minister of Agriculture, Fisheries and Food which is a landmark in modem administrative law." (Lord Denning, M.R., in Breen v Amalgamated Engineering Union (1971) 2 QB 175, 190)

"Discretion necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another Province or because of the colour of his hair? The ordinary language of the Legislature cannot be so distorted." (Rand, J., in Roncarelli v. Duplessis (1959) 16 DLR 2nd 689, 705)

Wade observes (Administrative Law, 5th ed., pp. 353-354)

"The common theme of all the passages quoted is that the notion of absolute or unfettered discretion is rejected.

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.

The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependents, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do neither unless it acts reasonably and in good faith and upon the lawful and relevant grounds of public interest. Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.

There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not

imposed. Nor is this principle an oddity of British or American law; it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities; it applies no less to Ministers of the Crown. Nor is it confined to the sphere of administration: it operates wherever discretion is given for some public purpose, for example where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law".

I hold that the true intent and meaning of the amending Act was to empower the Minister to restore to the original owner land for the acquisition (or retention) of which there was originally (or subsequently) no adequate justification, upon the fulfilment of the stipulated conditions. It was a power conferred solely to be used for the public good, and not for his personal benefit; it was held in trust for the public; to be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest.

This dictum of Mark Fernando J. in *De Silva*'s case, i.e. that the Minister has no unfettered discretion under section 39A of the Land Acquisition Act, has been quoted with approval in several cases including the abovementioned two Supreme Court Judgments, viz. *The Waters' Edge* case and *Mahinda Katugaha* case.

For the aforesaid reasons, I issue a writ of mandamus directing the 1st Respondent Minister of Lands to divest Lot 12 in Plan No. 842

marked P3/3R7 in terms of section 39A(1) of the Land Acquisition Act.

This order however will not preclude any future *bona fide* acquisition of the aforesaid Lot.

I make no order as to costs.

Judge of the Court of Appeal