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

In the matter of an application under Article 140 of the Constitution for a mandate in the nature of a Writ of Certiorari.

Case No. CA (Writ) 76/2013

1. Shahul Hameed Mohamed Jawahir
   No. 307/2, Kottawatta, Mawanella.

1A. Mohamed Zawahir Mohamed Arshad
   No. 307/2, Kottawatta, Mawanella.

2. Abdul Wahid Siththy Sifaya
   No. 4, Walauwatta, Mawanella.

3. M. R. Yasmin Dhanuka Bandara
   No. 198/4, Heerassagala Road, Kandy.

4. Mohamed Ismail Yoosuf Ali
   No. 214, Main Street, Mawanella.

5. Mohamed Rashid Siththy Shereena
   No. A 56/1, Uyanwatta, Dewanagala.

6. Mohamed Rashid
   No. 160, Kiringadeniya, Mawanella.

7. Mohamed Rashid Sithy Raliya
   Beligammana, Mawanella.

8. Mohamed Rashid Siththy Ayesha
   Kiringadeniya, Mawanella.

9. Mohamed Naleer Mohamed Rishan
   No. 52, Thakkiya Road, Mawanella.

10. Abdul Azeez Fareeda Umma
    No. 105, Thakkiya Road, Mawanella.

11. P. M. M. Sheriff Liyauddeen
Thakkiya Road, Mawanella.

12. Mohamed Sheriff Abdul Saleem
No. 21/4, Thakkiya Road, Mawanella.

13. Abdul Sameed Mohamed Nawaz
Trustee,
Masjid Jennah Jumma Mosque,
Rabukkana Road, Mahawatte, Mawanella.

14. Hisbul-Islam Trust
No. 204/1, Dematagoda Road, Sri Vajiragnana Mawatha, Colombo 9.

15. Mohamed Sali Ahamed Jalaldeen
No. 21, Waluwatta, Mawanella.

15A. Mohamed Jalaldeen Mohamed Irfan
No. 21, Waluwatta, Mawanella.

Petitioners

Vs.

1. Hon. Minister of Lands and Development
Ministry of Lands and Development,
"Mihikatha Medura", No. 1200/6,
Rajamalwatte Road, Battaramulla.

2. Divisional Secretary, Mawanella.

3. Mawanella Pradeshiya Sabha, Mawanella.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Faisz Musthapha P.C. with Hussain Ahamed and Keerthi Tillekeratne for the Petitioners

Susantha Balapatabendi ASG P.C. for 1st and 2nd Respondents

Roshan Hettiarachchi with Sharon Reeves for the 3rd Respondent

Argued On: 23.07.2019

Written Submissions Filed On:

Petitioners on 13.12.2018 and 16.09.2019

1st and 2nd Respondents on 22.07.2019 and 25.09.2019

3rd Respondent on 14.12.2018

Decided On: 26.05.2020

Janak De Silva J.

The Petitioners are seeking a writ of certiorari quashing the order made by the 1st Respondent, Minister of Lands and Land Development dated 04.12.2012 under section 38(a) of the Land Acquisition Act as amended (Land Acquisition Act) directing the 2nd Respondent to take possession of the Petitioner's land, which had been published in Government Gazette No. 1787/38 dated 07.12.2012 (X10).

In the initial written submissions filed on 13.12.2018, the Petitioners seek to assail the said order on the following grounds:

(a) There exists no urgency to acquire the said lands and the said order is ultra vires the powers of the 1st Respondent vested in him by section 38(a) of the Land Acquisition Act.

(b) The said order had been mala fide and for a collateral purpose namely to politically victimize the 1st Petitioner who owns 1 Acre and 30 perches of the land situated within the land to be acquired and is therefore ultra vires the powers of the 1st Respondent.

(c) The said order is grossly unreasonable in view of the facts and circumstances relating to the matter as referred to above and is therefore ultra vires the powers of the 1st Respondent.

The Petitioners appear to have changed the stance in the written submissions filed on 16.09.2019 and have sought to assail the order X10 on the following grounds:

(a) There is no public purpose in law and in fact.

(b) No ground of urgency has been disclosed either by the then Minister who had made the order nor has there been any material produced by the succeeding Minister or the officers to establish that the then Minister addressed his mind to the issue of urgency or that there was any material on which he would have satisfied of the need for the said land.

Suppression and/or Misrepresentation of Material Facts

It is established law that discretionary relief will be refused by Court without going into the merits if there has been suppression and/or misrepresentation of material facts. It is necessary in this context to refer to the following passage from the judgment of Pathirana J in *W. S. Alphonso Appuhamy v. Hettiarachchi* [77 N.L.R. 131 at 135,6]:

> "The necessity of a full and fair disclosure of all the material facts to be placed before the Court when, an application for a writ or injunction, is made and the process of the Court is invoked is laid down in the case of the *King v. The* General Commissioner for the Purpose of the Income Tax Acts for the *District of Kensington-Ex-parte Princess Edmorbd de Poigns.* Although this case deals with a writ of prohibition the principles enunciated are applicable to all cases of writs or injunctions. In this case a Divisional Court without dealing with the merits of the case discharged the rule on the ground that the applicant

had suppressed or misrepresented the facts material to her application. The Court of Appeal affirmed the decision of the Divisional Court that there had been a suppression of material facts by the applicant in her affidavit and therefore it was justified in refusing a writ of prohibition without going into the merits of the case. In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go into the merits of the application, but will dismiss it without further examination".

This principle has been consistently applied by courts in writ applications as well. [*Hulangamuwa v. Siriwardena* [(1986) 1 Sri.L.R.275], *Collettes Ltd. v.* Commissioner of Labour [(1989) 2 Sri.L.R. 6], *Laub v. Attorney General* [(1995) 2 Sri.L.R. 88], *Blanca Diamonds (Pvt) Ltd. v. Wilfred Van Els* [(1997) 1 Sri.L.R. 360], *Jaysinghe v. The National Institute of Fisheries* [(2002) 1 Sri.L.R. 277] and *Lt. Commander Ruwan Pathirana v. Commodore Dharmasiriwardene& Others* [(2007) 1 Sri.L.R. 24].

In fact, in *Dahanayake and Others v. Sri Lanka Insurance Corporation Ltd. and Others* [(2005) 1 Sri.L.R. 67] this Court held that if there is no full and truthful disclosure of all material facts, the Court would not go into the merits of the application but will dismiss it without further examination.

In *Fonseka v. Lt. General Jagath Jayasuriya and Five Others* [(2011) 2 Sri.L.R. 372] a divisional bench of this Court held:

> "(1)A petitioner who seeks relief by writ which is an extra-ordinary remedy must in fairness to Court, bare every material fact so that the discretion of Court is not wrongly invoked or exercised.
>
> (2) It is perfectly settled that a person who makes an ex parte application to Court is under an obligation to make that fullest possible disclosure of all material facts within his knowledge.
>
> (3) If there is anything like deception the Court ought not to go in to the merits, but simply say" we will not listen to your application because of what you have done."

The Petitioner is guilty of suppression and/or misrepresentation of the following material facts.

The Petitioners claim at paragraphs 10 and 11 of the petition that the 1st Petitioner is a well-known politician in the area and a leading member of the Muslim community and is an active member of the United National Party and that the acquisition is based on political grounds. This position is reiterated at page 4 of the written submissions filed on 13.12.2018.

However, the 3rd Respondent has averred, at paragraph 8 of the statement of objections, that in fact the United National Party to which the Petitioner belongs had the majority number of seats of the 3rd Respondent from 2000 to 2005 during which period the said acquisition commenced (3R3).

According to the petition the acquisition process was abandoned in 2007 (X5) after representations made at the national level when the United National Party was not in power. This counteract any political victimization as alleged by the Petitioners.

This may well be the reason that the Petitioners dropped the political victimization grounds from the written submissions filed on 16.09.2019. But it is a ground averred in the petition designed to influence the Court. Indeed, if it was in fact true, a strong case would have been made by the Petitioner for the issue of a writ of certiorari.

In *Hotel Galaxy (Pvt) Ltd. and Others v. Mercantile Hotels Management Ltd.* [(1987) 1 Sri.L.R. 5] it was held:

> *"To justify the dissolution of an injunction the suppression or misrepresentation should be of "such a character as to present to court a case* ***which was likely to procure the injunction but which was in fact different from the case which really existed****"*
>
> *Thus, a misstatement of the true facts by the plaintiff which put an entirely different complexion on the case as presented by him when the injunction was applied for ex parte would amount to a misrepresentation or suppression of material facts warranting its dissolution without going into the merits".* (Emphasis added)

The Petitioner further sought to establish that the acquisition was based on racial or religious discrimination.

According to paragraph 5 of the petition, in 2007 an extent of seven acres of land which include the land forming the subject matter of this application were earmarked for acquisition for the 3rd Respondent for the purpose of constructing a vehicle park, children's park and an auditorium. The land owners including some of the Petitioners protested and made representations to the authorities including the then Chief Minister Hon. Mahipala Herath.

The Chief Minister by letter dated 06.02.2007 (X3) requested the Hon. Minister of Urban Development to refrain from acquiring the land of the Petitioners and others. The contents of X3 indicate that Western Province Governor Hon. Alavi Moulana and the Minister of Petroleum and Petroleum Resources Hon. A.H.M. Fowzie had made representations to His Excellency the President on this matter. The contents of X3 in my view indicate that representations had been made giving a racial or religious complexion to the proposed acquisition. In fact, X3 states that there may be communal riots as in 2001 if the proposed acquisition is proceeded with. This is reiterated by the Petitioner at paragraph 20 of the written submission filed on 16.09.2019.

However, the proposal to acquire these lands was moved by the Chairman of the 3rd Respondent on 15.11.1999 which was seconded by Member of the Pradeshiya Sabha M.S. Abdul Caffor (3R1). The proposal was unanimously approved with all 13 members voting in favour of which 6 members are from the same community as the Petitioners.

I therefore hold that the Petitioners are guilty of suppression and/or misrepresentation of material facts and as such this application must be dismissed in limine without going into the merits of the case.

Yet for the sake of completeness I will consider the merits of the matter as well.

Urgency

In *Fernandopulle s. Minister of Land and Agriculture* [79(II) N.L.R. 115] the Supreme Court held that an order made by the Minister under the proviso to section 38 of the Land Acquisition Act

can be made only in cases of urgency and an order made under this proviso can be reviewed by the Courts. It is however a matter for a petitioner who seeks the remedy by way of certiorari to satisfy the Court that there was in fact no urgency and his application cannot succeed should he fail to do so. The Supreme Court reiterated this position in *Urban Development Authority v. Abeyratne and Others* (S.C. Appeal No. 85/2008 and 101/2008; Decided on 01.06.2009). This Court has followed this reasoning in *Peiris v. Minister of Lands* [CA(Writ) 845/2007] and *Romesh Fernando v. Minister of Lands and Others* [CA (Writ) 81/2008].

The learned Presidents Counsel for the Petitioner drew the attention of Court to letter dated 19.06.2003 (Y1) written by the Director-General of the Urban Development Authority (UDA) to the then Chairman of the 3rd Respondent that the said land cannot be utilized for a car park or auditorium. This is not a matter that can be urged in these proceedings for two reasons.

Firstly, this letter and the position that the land was not suitable for the purpose for which the land was acquired were not set up in the petition. It has come by way of the counter objections and is a different basis to the case pleaded in the petition. A party cannot set up a new case in the counter objections which was not the subject matter in his original petition [*Vasana Trading Lanka (Pvt) Ltd. v. Minister of Finance and Planning and Others* (2005) 2 Sri.L.R. 290].

Secondly, a party seeking to assail an order under section 38(a) of the Land Acquisition Act is limited to establishing that there was in fact no urgency.

The Petitioners claim that, at paragraph 22 of the written submission filed on 16.09.2019, ten years before the acquisition impugned in this application, the 3rd Respondent had constructed the car park, children's park, auditorium and a playground for which purposes the lands of the Petitioners were to be acquired. Hence according to the Petitioners own showing these were constructed in or about 2002.

The 3rd Respondent contended that due to the dilatory tactics employed by the Petitioners when the resolution to acquire was passed in 1999, the 3rd Respondent was compelled to demolish the old pradeshiya sabha building and to build an auditorium in its place.

The 3rd Respondent while admitting that a small children's playground was constructed as a temporary measure, drew the attention of Court to the sketch (3R2) which shows that there are three waste water drains flowing through it and a high tension tower and a public toilet constructed on it along with the children's playground and as such it is unsuitable for such purpose and was built as the 3rd Respondent had absolutely no alternative. It was also submitted that the decision to base these facilities on this particular property was taken as there was a drastic need and since the Petitioners were preventing them being constructed on the land forming the subject matter of this application.

It was further submitted by the 3rd Respondent that the Mawenella town is the third largest town on the Colombo-Kandy road and that vehicles registered at the Mawanella Divisional Secretariat has increased from 6700 vehicles in 2001 to 10,899 vehicles in 2012 and that the present car park can accommodate approximately 20 cars which has caused much congestion within the main roads of the town and causes much inconvenience to the public [3R10 and 3R11].

The Petitioners have in the counter objections submitted that there are three car parks which can in total accommodate around 150 vehicles (Y4, Y5, Y6 and Y7). Yet, this is hardly sufficient to accommodate even one tenth of the total of 10,899 vehicles registered in the Mawanella Divisional Secretariat area in 2012.

As I have explained earlier, according to the Petitioners own showing these facilities were constructed in or about 2002. In this connection I have examined the Mawanella Development Plan 2004-2020 (X2) which even according to the Petitioners identified the need for car park*s* and play ground*s*. This clearly establishes the need for more of these facilities even after the constructions referred to by the Petitioners.

The Petitioners have in the counter objections sought to plead that the location of the car park, auditorium and children's park fall outside the paddy fields which are located in a basin [page 27 of Y3]. However, this is not part of the case pleaded in the petition although the Petitioners were in possession of the said development plan and in fact pleaded part of it with the petition. Therefore, the Petitioner cannot be allowed to set up this new ground by way of counter

objections [*Vasana Trading Lanka (Pvt) Ltd. v. Minister of Finance and Planning and Others* (supra)]. In any event, this is not a ground that can be urged in a challenge to an order made by the Minister of Lands in terms of section 38(a) of the Land Acquisition Act.

I hold therefore, that the Petitioners have failed to establish that there was in fact no urgency.

Contrary to the ratio in *Fernandopulle s. Minister of Land and Agriculture* (supra) and *Urban Development Authority v. Abeyratne and Others* (supra), it appears that in *Horana Plantations Limited v. Anura Kumara Dissanayake and Others* [SC Appeal 06/2009] the Supreme Court held that it was on the Minister of Lands to establish urgency where order was made in terms of the proviso to section 38 of the Land Acquisition Act. The learned Presidents Counsel for the Petitioners contended that the Minister has failed to do so in this case.

In the affidavit filed by the 1st Respondent, it is clearly stated that the land was acquired for the public purpose of developing the Mawanella area and that he was satisfied of the urgency of the public purpose [paragraph 9].

The facts also bear out that the initial steps to acquire the property were taken as far back as 1999 which was, for over 13 years, thwarted by the Petitioners by resorting to various pretext. In *Fernandopulle v. Minister of Land and Agriculture* (supra at page 120) it was held:

> "In this case the need for a playground and a farm had been mooted as far back as 1974. Political influences and extraneous forces delayed the takeover of the land. Four years dragged on and school's needs were still waiting to be met. The delay and the need decided the urgency."

These words are applicable to this case as well. The Mawanella Development Plan prepared by the UDA evidences the public purpose.

The 3rd Respondent submitted that in acquiring the property of the Petitioners it was also intended to construct a playground of about 4 acres. The reason given is that there are approximately 15,000 students enrolled at the Mayurapada National School, Zahira National School, Baduriya Muslim School and five other schools within the Mawanella town limits. But

these students do not have a playground that can accommodate a 400m track for athletics or a full ground for a cricket match and that the playground commonly used can only accommodate a 200m track.

In my view all the above facts clearly establish the existence of a public purpose for the impugned acquisition and the need for urgency.

Conduct of the Petitioners

In terms of Article 140 of the Constitution this Court must act "according to law" in deciding whether to issue writs of Certiorari and Mandamus. This means English common law principles [*Sirisena Cooray v. Tissa Dias Bandaranayake* (1999) 1 Sri. L. R. 1 at 14-15)].

English Courts have considered the conduct of the Petitioner in deciding whether to grant discretionary relief by way of judicial review. A ratepayer was denied a remedy to quash a refusal to make a refund of rates because of his previous deliberate and unjustifiable withholding of rates owed [*Dorot Properties Ltd. v. London Borough of Brent* (1990) C.O.D. 378]. A local authority which pursued pointless litigation was denied any remedy [*Windsor and Maidenhead Royal BC v. Brandrose Investments Ltd.* (1983) 1 W.L.R. 509]. A local council which sought to challenge ministerial confirmation of its own proposals for re-organising schools, relying on their own procedural error was denied relief [*R. v. Secretary of State for Education and Science ex. P. Birmingham City Council* (1985) 83 L.G.R. 79].

Our Courts have adopted this approach and withheld relief due to the unmeritorious conduct of the Petitioner even where there has been a clear violation of the rules of natural justice [*Wickremasinghe v. Ceylon Electricity Board and Another* (1982) 2 Sri.L.R. 607].

As I have adverted to earlier, the Petitioners were successful in thwarting the acquisition in 2007 by claiming that it was motivated by racial or religious grounds when in fact it was not so.

Article 12(2) of the Constitution prohibits all forms of discrimination, inter alia, on racial or religious grounds. Our Courts have consistently given practical value and effect to this fundamental right by protecting every citizen against racial or religious discrimination by

executive or administrative action. That is a sacred duty on Courts as it is the last bastion for the citizen to obtain relief against unlawful governmental action. The rule of law is violated where Courts fail to perform this hallowed duty.

At the same time, where it appears to Court that any citizen has falsely alleged discrimination on racial or religious basis and misled the authorities and obtained relief at the expense of the public interest, such conduct must be penalized as provided by law. More so as the area, in which the lands in dispute are situated, was the center of religious and racial disturbance in 2001. In this case, the Petitioners have falsely alleged that the acquisition in 2007 was motivated by racial or religious considerations and misled the authorities to granting them relief. Such conduct on the part of the Petitioners is a sufficient ground to deny them any relief by adopting the approach of the English Courts.

For all the foregoing reasons this application is dismissed.

The Petitioners shall pay the 3rd Respondent Rs. 1,00,000/= as costs of this case.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal