

KINGSLEY FERNANDO
V.
DAYARATNE AND OTHERS

COURT OF APPEAL.

S. N. SILVA, J.

C.A. APPLICATION NO. 1298/87.

JUNE 21, JULY 01 AND 08, 1991.

Land Acquisition - Public purpose - Urgency - Mandamus - Land Acquisition Act s. 38 - Housing Development Authority Act, No. 17 of 1979 - Right of Urban Development Authority to alienate land - Right to claim divesting (s. 39 A (1) and (2) of Land Acquisition Act).

Section 39 A (1) of the Land Acquisition Act vests a discretionary power in the Minister to divest any land that has vested upon an order under section 38 when possession has been taken for or on behalf of the State, to be exercised only if the pre-conditions set out in paragraphs (a) to (d) in subsection (2) are satisfied to wit:

- (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,
- (c) no improvements to the said land have been effected,
- (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.

Section 39 A applies only when the State has absolute title to and possession of the land that has been acquired. The former owner has by then lost the ownership and possession of the land and his legal claim is for compensation. Section 39 A does not give a right to the former owner to seek a divesting order even where the pre-conditions are satisfied but only vests a discretionary power in the Minister to make a divesting Order provided the pre-conditions mentioned are satisfied.

Section 50(1) of the Land Acquisition Act provides for the abandoning of the acquisition proceedings at any stage before the vesting Order is made

under s. 38. Section 39(1) provides for the revocation of a vesting order made under s. 38 which may be made only if possession of the land has not actually been taken for or on behalf of the State. Section 39 A applies in a situation where possession also has been taken. Section 50(1), 39(1) and 39(A) do not afford a statutory right to a person interested in the land to demand the exercise of such power by the Minister.

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.

According to the scheme the major portion of the land acquired (12A) was to be developed and alienated to members of the public for the specific purpose of constructing houses. Since the land was marshy it had to be reclaimed and allowed to consolidate before construction work is commenced. The development work to be carried out by the N.H.D.A. includes the provision of roads, the widening of existing roads, the provision of water and electricity. An extent of two acres and two roods was handed to the U.D.A. for the purpose of development on a commercial basis. There is no illegality in handing to the U.D.A. a portion of the land acquired for a housing object, for the provision of commercial facilities necessary to serve the increasing population of the town. These facilities are provided by the U.D.A. merely as an agent of the N.H.D.A.

In a divesting what is contemplated is a complete reversal of the status quo ante and not a piece - meal divesting of particular portions of a land, that is vested. Hence the application for a divesting of a particular portion of the land that is vested, is in any event untenable and mandamus cannot issue. The divesting has to relate to the entire extent covered by the vesting Order.

The fact that land was acquired for a particular public purpose does not prevent the land being used for another public purpose.

Case referred to:

1. *Gunewardena v. D.R.O. Weligama Korale* 73 NLR 333,335

APPLICATION for Mandamus to compel divesting of a portion of a land acquired.

R. K. W. Gunasekera for petitioner.

K. Sripavan S.S.C. for 1st and 2nd respondents.

N. R. M. Daluwatta, P.C. with *Rohan Sahabandu* for 3rd and 4th Respondents.

September 06, 1991.

S. N. SILVA, J.

The Petitioner has filed this application for a Writ of Mandamus to compel the 1st Respondent, the Minister of Lands and Land Development to divest the lands described as Lots 1 and 4 of Plan No. 2019 A (P1), less the portion shaded in black. The claim of the Petitioner is that this divesting Order should be made in terms of section 39 A of the Land Acquisition Act, as amended by Act, No. 8 of 1979.

The said lands described as lots No. 1 and 4 form part of a larger land known as "Mambole" and "Kudamambole kumbura" situated within the Town Council limits of Ragama. The entire extent of this larger land. (12A-02R-04.24P) was acquired under the Land Acquisition Act for a housing object as provided for in section 6(1) of the National Housing Development Authority Act, No. 17 of 1979. The acquisition was effected on grounds of urgency in terms of an order made under proviso (a) to section 38 of the Land Acquisition Act, made on 28-10-1980. A declaration under section 5 of the Act was also made in respect of the said land on 13-12-1980. Thereupon, possession of the land was taken by the State. The Petitioner and seven other persons challenged the said acquisition order by application No. 403/81 filed in this Court. This application was dismissed in November 1983.

According to the petition, the Petitioner was led to file the present application upon reading a notice in the newspapers of 12-07-1987 (P4) by which the Urban Development Authority (U.D.A. the 4th Respondent) called for bids for the lease of one acre and one rood of the said land in small allotments of two perches each, to locate businesses and offices. Learned Counsel for the Petitioner submitted that the land was acquired for a housing object to be carried out by the National Housing Development Authority (N.H.D.A. the 3rd Respondent) and that the U.D.A. had no power to alienate a portion

of the land for commercial purposes. The claim for a Writ of Mandamus is made on the basis that the land has not been used for a public purpose and no improvements have been made thereto after acquisition. Admittedly the Petitioner has not yet been paid compensation although a sum of Rs. 700,000/- was deposited with the acquiring officer for this purpose, by the N.H.D.A. Hence, learned Counsel submitted that the requirements specified in section 39 A(2) have been fulfilled and that the Petitioner has a right enforceable by Mandamus to require the 1st Respondent to divest the land by an order under section 39 A(1).

The claim for Mandamus is resisted by all Respondents. The 1st Respondent being the Minister of Lands, has specifically stated that improvements to the land acquired had been effected by the Road Development Authority after possession of the land was taken. It was also urged by learned Senior State Counsel appearing for the Minister, that the Minister is not under a statutory duty to divest the land to the Petitioner.

The N.H.D.A. and U.D.A. have in their objections and affidavits disclosed the circumstances relevant to the acquisition and those under which the portion of land described in newspaper notice marked 'P4' was handed over to the U.D.A. for alienation. According to the affidavit of W. D. Aillapperuma, Chairman of the N.H.D.A., the entire extent in excess of 12 acres was acquired for a Town Centre Project for Ragama to be carried out in accordance with the master plan for Ragama as prepared by the U.D.A. According to this plan the major portion of the land is to be developed and alienated to members of the public for the specific purpose of constructing houses. Since the land is marshy it would be reclaimed and allowed to consolidate before construction work is commenced. The development to be carried out by the N.H.D.A. includes the provision of roads, the widening of existing roads, the provision of water and electricity. An extent of two acres and two roods was handed over to the U.D.A. for the purpose

of developing the said portion adjacent to the housing project on a commercial basis. A. Wedamulla, Director of Lands of the U.D.A. has stated in his affidavit that a portion of the land was handed over to the U.D.A. upon acquisition but that no work could commence in view of the pendency of the previous application C.A. 403/81. He has stated that now the land which was in a marshy state has been reclaimed and allowed to consolidate. That, a portion of the land has also been filled up. The price for alienation includes the cost of infra-structure and ancillary services. On the basis of the aforesaid material learned President's Counsel appearing for the N.H.D.A. and U.D.A. submitted that the land is being used for a public purpose and that several measures have been and will be taken for the improvement of the land in relation to the public purpose for which it was acquired. Therefore the provisions of paragraphs (b) and (c) of section 39 A (2) do not apply in relation to this land.

It was also submitted that the validity of the acquisition was challenged and decided in the previous application and that the Petitioner is indirectly seeking to challenge the acquisition, once again by means of this application. That, in any event there is no illegality in using a portion of the land acquired for a housing object, for the provision of commercial facilities necessary to serve the increasing population of the town. These facilities are provided by the U.D.A. merely as an agent of the N.H.D.A. That the validity of the action taken, and the applicability of section 39A(2) should be judged in relation to the entire land and not in relation to a specified portion of it.

I have carefully considered the submissions of counsel in relation to the claim for a Writ of Mandamus. Section 39 A (1) and (2) introduced by the amendment No. 8 of 1979 states as follows:—

“39A. (1) 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 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 sub-section (2), by subsequent Order published in the Gazette (hereinafter 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 sub-section (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."

Sub-section (1) specifies the stage at which section 39A will apply. That is, after an order has been made vesting the land absolutely in the State in terms of section 38 and possession of that land has been taken for or on behalf of the State as provided for in paragraph (a) of section 40. In other words, this section applies only when the State has absolute title to and possession of the land that has been acquired. The former owner has by then lost the ownership and possession of the land. His legal claim is for the payment of compensation.

Sub-section (2) specifies certain pre-conditions to the making of a divesting Order under sub-section (1). The pre-conditions in paragraphs (a), (b) and (c) are negative in nature. They relate, respectively, to the non-payment of compensation and, the absence of use for a public purpose and of any improvement effected, after possession of the land was taken over by the State. The fourth pre-condition contained in paragraph (d) is the written consent of the former owner to take over immediate possession of the land after divesting.

The consequences of a divesting Order are set out in section 39A (4). Paragraphs (a) and (b) of this sub-section have the effect of restoring the *status quo ante* in relation to title and interest to the land that was acquired. Paragraph (c) is for the restoration of possession of the land. Paragraphs (d) and (e) remove all claims against the State for compensation and damages in respect of the acquisition.

The basic issue for determination in this application is whether section 39A gives a right to a former owner to seek a divesting Order if the pre-conditions are satisfied as contended by Counsel for the Petitioner or; whether this section merely vests a discretionary power in the Minister to make a divesting Order, if it is considered necessary, in situations where the pre-conditions are satisfied, without a corresponding right in the former owner to demand the exercise of such power, as contended by Counsel for the Respondents. This issue has to be considered in the light of the scheme of the Land Acquisition Act. As stated in the long title to the Act its objective is to make provision for the acquisition of lands and servitudes for public purposes.

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 var-

ious 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 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.

In relation to section 39A since the possession of the land has already been taken, the legislature has introduced the pre-conditions in subsection (2) designed primarily to ensure that a person who had interest in the land would not get the benefit of any improvement effected to the land after possession had been taken. The consequences provided for in sub-section (4) are similarly designed to ensure that the *status quo ante* will be effectively restored without any claim for compensation or damages being made against the State.

In any event, the contention of learned Counsel for the Petitioner that a former owner has a statutory right to demand the exercise of the power vested in the Minister by section 39A is inconsistent with section 40(a) which provides that upon a vesting Order made under section 38 the land vests absolutely in the State free from all encumbrances. Hence there could be no statutory right to demand a reversal of such vesting.

Learned Counsel for the Respondents relied on the use of the word "may" in section 39A(1) in support of the contention that the provision vests a discretionary power in the Minister. Learned Counsel for the Petitioner submitted that the word "may" does not lead to such a construction. Both Counsel relied on two different sentences in one passage of Maxwell on The Interpretation of Statutes. This passage is as follows: (12th Edition p. 234).

"In ordinary usage "may" is permissive and "must" is imperative, and, in accordance with such usage, the word "may" in a statute will not generally be held to be mandatory. In some cases, however, it has been held that expressions such as "may", or "shall have power," or "shall be lawful," have to say the least-a compulsory force, and so their meaning has been modified by judicial exposition."

It is clear from this passage that the use of the word "may" should generally be considered as permissive and not as mandatory. There could however be a modification of this general rule in view of the particular context of the provision. In this instance, the context in which section 39A appears, as seen by the foregoing analysis, suggests that the general usage of the word "may" as being permissive only and not mandatory, should be applied.

This view is strengthened by a comparison of the provisions of subsection (1) and (2). In sub-section (2) the word "shall" is used in relation to the pre-conditions that are set out. Therefore the use of the word "may" in sub-section (1) should be considered as indicative of an intention to couch the provision in terms of a discretionary power and not as an imperative duty. Therefore, I hold that section 39A(1) vests a discretionary power in the Minister to divest any land that has vested upon an order under section 38 when possession has been taken for or on behalf of the State, to be exercised only if the pre-conditions set out in paragraphs (a) to (d) of subsection (2) are satisfied. The provision does not have the effect of giving a statutory right to any person who had an interest in the land prior to vesting, to demand the exercise of this power by the Minister. In the result a Writ of Mandamus will not lie to compel the exercise of the power vested in the Minister in terms of section 39A of the Act.

The other matter that comes up for consideration is whether, in any event, the pre-conditions stated in section 39A(2) (b) and (c) have been met in relation to the particular land. Learned Counsel for the Petitioner submitted that this matter should be considered in relation to only the particular portion of land claimed by the Petitioner and not the entire extent of land. Learned Counsel for the Respondents submitted that this has to be considered in relation to the entire land acquired upon the vesting Order.

Section 39A(1) empowers the Minister to “divest” the State of the land so vested by the vesting Order”. The vesting Order referred to is that made under section 38. It is clear from the papers filed in the previous application that there was one vesting Order in respect of the entire extent of 12 acres. Therefore I am inclined to agree with the submission of learned Counsel for the Respondents that the divesting has to relate to the entire extent covered by the vesting Order. This view is further supported by section 39A (4)(a) which provides that upon a divesting Order that land shall be deemed never to have vested in the State by virtue of the vesting Order. Hence what is contemplated is a complete reversal of the *status quo ante* and not a piece-meal divesting of particular portions of a land that is vested. The Petitioner has sought in this application only a divesting of a particular portion of the land that was vested. Therefore his application for a Writ of Mandamus cannot, in any event, succeed.

This finding has a bearing on the question as to whether the pre-conditions in section 39A (2)(b) and (c) are satisfied. It is clear from the affidavits that the N.H.D.A. and the U.D.A. are in the process of effecting improvements to the land by reclaiming it and providing infra-structure such as roads and so on. In my view the pre-conditions set out in these two paragraphs have to be considered in relation to the entire land and not to particular portions of it. Therefore the land claimed by the Petitioner could not in any event be divested in terms of the provisions of section 39A (1).

Finally I have to deal with the submission of learned Counsel for the Petitioner that the handing over of the extent of two acres two roods by the N.H.D.A. to the U.D.A. is illegal and that it vitiates the acquisition that has been made. It was submitted that the land was acquired for a housing object as provided for in section 6(1) of the N.H.D.A. Act. The phrase “housing object” is not defined in that Act and Counsel relied on the provisions of the National Housing Act, No. 37 of 1964. On that basis it was argued that a housing object

is restricted to the construction of residential buildings or other construction necessarily connected with residential buildings.

The said extent of two acres two roods have been handed over to the U.D.A. to be used to locate offices and other commercial premises. It was submitted by Counsel for the Respondents that the provision of facilities for offices and commercial establishments is connected with the housing object. I am inclined to accept the submission of Counsel for the Respondents in this regard. It appears from the affidavits of the N.H.D.A. and the U.D.A. that an extent of about 10 acres will be used for the construction of residential units. The provision of facilities for offices and other commercial purposes is necessary for a housing complex of such magnitude. Therefore I do not see any illegality in the said extent of land being handed over to the U.D.A. for the provision of these facilities. The N.H.D.A. and the U.D.A. are statutory corporations that perform vital functions in relation to housing and urban development. In this respect they have functions and powers that bring them within the description of a state agency. It appears from the affidavits that the U.D.A. is acting in the matter of alienating land for offices and commercial purposes on behalf of the N.H.D.A. Such a course of action would be necessary considering the functions of the two institutions. In any event the fact that land was acquired for a particular public purpose does not prevent the land being used for another public purpose. The following observations made by Alles J. in the case of *Gunawardena vs. D.R.O. Weligama Korale* (1) are relevant:

“Even assuming that after the order made under section 38 the Crown had decided to utilise the land for some other public purpose, I do not think that it is open to a person whose land has been acquired and the title to which has been vested in the Crown to maintain that the acquisition proceedings are bad..... I can however see no objection to the Crown utilising the

land for a different public purpose than that for which it was originally intended to be acquired. Circumstances may arise when it may become necessary for the Government to abandon the original public purpose contemplated and utilise the land for another public purpose.”

Therefore I see no illegality whatever in the matter pleaded by Counsel for the Petitioner with regard to the handing over of the said extent by the N.H.D.A. to the U.D.A.

For the reasons stated above I dismiss the application but I make no order for costs.

Application dismissed.
