RATHNAYAKA
v
SARATH, DIVISIONAL SECRETARY, THIHAGODA AND OTHERS

COURT OF APPEAL
WIJAYARATNE, J.
CA 259/2001.
FEBRUARY 26, 2004.

Writ of certiorari – Land Acquisition Act, sections 2, 4 and 38 – Laches – Principles of unreasonableness – Procedure of acquisition flawed? – Mala fide?

The petitioner sought to quash the decision of the 1st respondent Divisional Secretary to take over possession of his land. The petitioner contended that a portion of his land along with a portion of the land on the opposite side of the road were acquired in 1968 for the purpose of widening the road and these lands were still unutilized. It was his position that the 2nd respondent Minister has acted unreasonably, arbitrarily and capriciously.

The respondent contended that the acquisition was lawfully done after due process, and further contended that there is delay on the part of the petitioner.

Held:

(1) Delay unexplained and undue in the circumstances could be considered in rejecting an application.The petitioner however had explained the delay and it is for the court to consider whether the delay is unreasonable.

(2) The section 2 notice had been issued after the survey of the land by a private surveyor and it is evident that the section 2 notice was not for the purpose of determining the suitability of the land as it was already determined that the land should be acquired.

(3) Inquiry under section 4 (4) was a mere formality and there is nothing the respondents have shown to prove that it was a genuine effort to consider the grievance of that petitioner.

(4) Even at this late stage the decisions and the recommendation are not forthcoming and it is thus not possible to consider what this inquiring officer has considered.

(5) The matter of procedure of acquisition being followed, does not satisfy that the procedure was duly followed and genuinely taken in respect of the acquisitions challenged.

APPLICATION for a writ of *certiorari / mandamus.*

Cases referred to:

(1) *Dissanayake* v *Fernando* 66 NLR 145.

(2) *Virakesari* v *Fernando* 66 NLR 145

(3) *Biso Menike* v *Cyril de Alwis* –1982 1 Sri LR 368

(4) *Topa Sporting Goods (Pvt) Ltd.* v *The Commissioner of Labour and others* 1997 2 NLR 95

(5) *Manel Fernando* v *D. M. Jayaratne, Minister of Lands and others* – 2000 1 Sri L.R 112

Chandana Prematilka for petitioner.

Y. J. W. Wijayatilake, Deputy Solicitor General for respondent.

Cur. adv. vult

April 27, 2004

WIJEYARATNE, J.

The petitioner filed this application seeking the issue of a *writ of certiorari* quashing the decision of the 1st respondent in P33 to take over possession of the land in suit depicted as lot I in plan P16 and the order No. 79 of 1998 published in Gazette Extra Ordinary No. 1030/2 dated 06.01.1998 directing the 1st respondent to take possession of the land mentioned in such order. The petitioner sought the issue of *writ of mandamus* directing the 1st and 2nd respondents to take all steps to revoke the order No. 79 of 1988 and further sought interim relief pending determination of this application.

The application was made on the premise that a portion of the petitioner's land along with a portion of the land on the opposite side of the road were acquired in the year 1968 for the purpose of widening the road and the same are shown in plan ම්ඩ 169 dated 7.10.1069. Relevant documents were marked as P2 to P11. The petitioner states that though lands on either side of the road were acquired for the purpose of widening the road, the portion acquired on the opposite side of the road was never taken possession of. After several decades in 1992 the Pradeshiya Sabha of the area initiated action to acquire land from the petitioner (P12 & P13) and the Divisional Secretary after inspection recommended the demolition of parapet walls on either side of the road without damaging either of the houses (P14 & P15). Pradeshiya Sabha has passed a resolution to acquire 0.52 perches only from the petitioner's land and got a private surveyor to prepare plan No. 429 dated 12.7.1995 marked P16. The petitioner states that the acquisition and taking possession of the area depicted in plan 429 marked P16 will cause a portion of his residing houses to be demolished and the road widened would run at the doorstep of the remaining portion of the house. After the consideration of representations made the 2nd respondents predecessor in office abandoned the acquisition and a decision in terms of section 50 of the Land Acquisition Act was communicated in letter dated 11.11.1996 marked P17. However section 2 notice under Land Acquisition Act dated 22.01.1997 and section 4 notice (P18 and 19) were later published at the instance of the Pradeshiya Sabha, which the petitioner alleged acted *mala fides*, to acquire land only from the premises of the petitioner ignoring the recommendation in P14 & P15 and the previous abandonment of the acquisition (P17). Consequent to the representation made in P20 and P21 an inquiry was held at which the petitioner alleged his representation was not duly considered and documents rejected. Copies of the same are marked P22 and P23. No decision of the inquiry was communicated, the petitioner urged the respondents to use lot 2 in P4 for the widening of the road (P24). The petitioner appealed to the 2nd respondents predecessor in office and to Minister of Local Government and Provincial Councils (P25 to P28). Upon information he gathered, the petitioner made complaint to Police (P29 & P30) and made application to Provincial High Court of

Southern Province holden at Matara in case No. Writ 79/98 which was rejected on ground of jurisdiction (P31 and P32). Thereafter the 1st respondent informed the petitioner that possession of the land referred to in P31 be taken by him (P33) consequent to notice under section 38(a) of the Land Acquisition Act.

The petitioner states that the relevant Pradeshiya Sabha and its Chairman moving the acquisition of his land acted *mala fides* and with improper consideration and the predecessor in office of the 2nd respondent who made orders and decisions to acquire land only from the premises of the petitioner ignoring the recommendations in P14 and the fact that lot 2 in P4 already acquired for road widening was still unutilized for the purpose it was acquired and the utilization of the same would avoid the use of petitioners land after demolition of part of his residing house. There is no urgency in taking possession of his land as there is no recommendation by the applicant Minister requesting the 2nd respondent to take possession of land acquired under section 38(a). Accordingly the petitioner states that the 2nd respondent has acted unreasonably, arbitarity and capriciously and therefore the acquisition is illegal and / or bad in law and prayed for the relief as in this application.

The 2nd respondent's response to this application shown in his affidavit categorically states that he is unaware of previous acquisition as the relevant files and documents are not available but states that all requirements of the Land Acquisition Act and the procedures were followed in the acquisition of land from the petitioner's premises. The acquisition is lawfully done after due process and hence there are no grounds to issue writs as sought by the petitioner. He seeks the dismissal of the application.

At the stage of the hearing the learned counsel for the respondent reiterated his position that acquisition was lawfully done, and in the absence of proof of *mala fides*, reasonableness of the decision of the Minister to acquire and take possession of the land cannot be challenged in these proceedings. In addition the learned counsel for the respondent raised the objections that the application of the petitioner made in 2001 seeks to challenge the order made two years prior to the application and therefore should be dismissed in *limine.*

It is pertinent to note that delay unexplained and undue in the circumstances of the case only can be considered in rejecting an application. The petitioner however has explained the delay occasioned by the unsuccessful application before the Provincial High Court Matara. In those circumstances the period during the pendency of the proceedings before the Provincial High Court is neither undue delay not is it unexplained. However it is for the court to consider whether the delay is unreasonable *Vide Dissanayake* v *Fernando* (1):

> *"whether there has been unreasonable delay or not is largely a matter of opinion and depends on the circumstances of each case"*

In the cases of –

(i) Virakesari v *Fernando* (2)

(ii) *Bisomenika* v *Cyril de Alwis* (3) and

(iii) *Topa Sporting Goods (Pvt) Ltd* v *the Commissioner of Labour & others* (4),

It was decided that before dismissing an application on the ground of delay, the court should consider whether an aggrieved party could establish an error on the face of the record, the mischief complained and whether substantial prejudice would be caused to the respondents.

Upon a consideration of facts urged and the response to the same, it is apparent that previous acquisitions in 1969 is neither denied nor commented upon by the 2nd respondent due as alleged, to non availability of relevant records which are produced by the petitioner who produced copies of the notice under section 38 (a) dated 24.8.1969. However the non availability of relevant documents is no reason for the respondent to act unreasonably or without due consideration of relevant facts, and the respondent cannot in law claim any benefit of non-availability of documents to justify the subsequent acts.

With regard to acquisition procedures, it appears the section 2 notice was issued much after the survey of the land by a private surveyor. It is evident that section 2 notice was not for the purpose

of determining the suitability of the land, as it was already determined that the portion of land in P16 should be acquired. Even section 4 notice and the inquiry under section 4(4) were followed as mere formalities and there is nothing the respondent has shown to prove that it was a genuine effort to consider the grievance of the petitioner. Even at this late stage the decisions and the recommendation are not forthcoming and it is thus not possible to consider what the inquiring officer has considered. The petitioner has produced documents marked P35 to P39 establishing that the Ministry and relevant authorities in fact have acknowledged the receipt of complaints of the petitioner disproving the position taken up by the second respondent in his affidavit that petitioner's letter of complaints were not received by the relevant authorities.

However the fact of the land previously acquired on the other side of the road, remaining unutilized remains unanswered by the respondents. It appears that the respondents for whatever the reason are not acting in a just and reasonable manner when they have failed to utilize the already acquired land for the purpose of widening the road, but proceeded to acquire more land from the petitioner's premises only with the likely result of part of his house being demolished only to avoid the demolition of the parapet wall on the other side of the road. It is apparent that the respondents have failed to consider the recommendation of the 1st respondent's predecessor in office. Nor is there any proof that the inquiry officer has considered this aspect of the matter. Order under provision (a) to section 38 is not made on any recommendation of the applicant Ministry and the respondents do not even suggest that there was such recommendation.

This renders the impugned orders unreasonable, arbitrary and capricious, in so far as they were not made after due and reasonable consideration of all the attendant circumstances. Contrary to the submission made by the respondents, unreasonable arbitrary and capricious decisions are always considered to be amenable to judical review, and this is commonly and more popularly referred to as "Wednesbury Review"

Vide Chapter under the heading.

THE PRINCIPLE OF UNREASONABLENESS

page 353, Administrative Law, (Eighth Edition) by Professor Wade.

The matter of procedure of acquisition being followed as referred to by the respondent, does not satisfy that the procedure was duly followed and genuinely taken in respect of acquisitions challenged in these proceedings for the reasons stated earlier in this order and they appear a sham and a pretense, specially in the absence of any documents of such inquiry and consideration being referred to or placed before this court for consideration. The petitioner has made reference to the decision of the case of *Manel Fernando* v *D.M. Jayaratne, Minister of Lands and others.* The counsel for the respondents urged that the said decision is subsequent to the acquisition proceedings impugned in this case and hence it cannot reopen these proceedings. There is no dispute that the same cannot be applied as a rule. However the principles enunciated there are relevant to the facts at all times and the facts of the present case too are similar.

In the circumstances I hold that the decisions of 1st respondent in P33 and order No. 79 of 1998 published in Gazette Extraordinary No. 1030/2 dated 06.01.1998 are unreasonable, arbitrary and capricious for the reasons stated above and quash the same. Consequent to such quashing, *writ of mandamus* is issued to revoke the said order No. 79 referred to above and direct the respondents to take all steps according to law to revoke the same.

Accordingly the application of the petitioner is allowed and *writs of certiorari* and *mandamus* are issued in terms of prayer (IV) (V) and (VI) of the petition.

Application allowed .