

SILVA AND OTHERS
v
MINISTER OF LANDS AND LAND DEVELOPMENT AND
MINOR EXPORTS AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
ABEYRATNE, J.
CA 703/2001
MAY 21, 2008

Writ of Mandamus – Land Acquisition Act – Section 38 (a), Section 39, Section 50 – Urban Development Projects (Special Provisions) Act 2 of 1980 – Section 4 – No steps taken for a long period of time – Jurisdiction of the Court of Appeal to entertain an application for a Writ of Mandamus – Public purpose not in existence – Could the land be divested?

The application seeking to quash the Section 38 (a) notice in the Court of Appeal was dismissed on the ground that, His Excellency the President had made order in terms of Section 2 UDA (Special Provisions) Law. The Supreme Court in appeal held that, *when no steps* have been taken for a long time to implement a proposed project upon a land in respect of which a Section 2 order has been made, an application for *mandamus* in respect of an omission to divest the acquired land does not fall under Section 4 of the UDA (Special Provisions) Act. The Court of Appeal has jurisdiction to inquire into same.

It was contended by the petitioner that the acquisition was politically motivated, and there is no public purpose in existence. The possession has always been with the petitioners.

Held:

- (1) The Section 38 (a) notice has been published in 1992 and up to now no action has been taken to utilize the land in question. There are no development plans to utilize the said land for the just requirement of the general welfare of the people. It appears that the purpose for which the said land was acquired is now evaporated.
- (2) The possession of the land has not been taken over by the relevant authorities therefore the restriction of the title could not be made by divesting the said land under Section 39A but it has to be made only by a revocation order under Section 39 (1).
- (3) When the element of public benefit has 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 – Section 50.

APPLICATION for Writ of mandamus.**Case referred to:**

D Silva v Atukorale, Minister of Lands, Irrigation and Mahaweli Development and another 1993 1 Sri LR 283.

Faiz Musthapha PC with Thushani Machado for petitioner.

A. Gnanathasan ASG for 1st, 2nd and 3rd respondents.

Gamini Perera with *Wijitha Salpitikorale* and *A.N. Amarasiri* for 4th respondent.

June 25, 2008

SRISKANDARAJAH, J.

The Petitioner submitted that the Petitioners became owner of the land called "Palliya Bandarawatta" alias "Kammalawatta" situated at Ambalangoda in the District of Galle containing R1-P1.94 after the demise of their father in the year 1959. The 1st petitioner is also in occupation of the said land. There were several shops on the said land which had been tenanted to various persons and the main source of livelihood of the petitioners was the income that they received from the said land by way of rent from the tenants.

The petitioners submitted that the 4th respondent Council proposed to acquire the petitioners' land under a purported Development Plan for the Ambalangoda town. In response to

several appeals by the 1st petitioner the Additional Secretary to the Ministry of Local Government, Housing and Construction by his letter of 05.03.1986 informed the 1st petitioner that the Urban Development Authority had not finalized the Development Plan and that no steps had been taken to acquire the land. The petitioners in order to develop the said land submitted a plan for the construction of a shopping complex. On a request by the Deputy Director Planning to submit an amended plan an amended building plan was submitted to the then Chairman of the 4th respondent Council. The Chairman of the Ambalangoda Urban Council by his letter of 10.06.1988 approved the said building plan and requested to commence work within 30 days of the receipt of the said letter. Due to various reasons the construction work was not commenced and the application of the petitioners for the extension of the approval of the building plan beyond 08.06.1990 was not granted.

It is common ground that a section 2 notice under the Land Acquisition Act was published on 08.10.1991 and the Minister by an order made under proviso (a) to section 38 of the said Act published in the gazette bearing No. 7132 dated 04.05.1992 directed the Assistant Government Agent to take immediate possession of the said land.

The petitioners thereafter filed an application No. 504/92 in the Court of Appeal seeking a *writ of certiorari* quashing the said order. This application was dismissed on the ground that his Excellency the President made order in terms of section 2 of the Urban Development Project (Special Provisions) Act No. 2 of 1980 which was published in Gazette No. 721/2 dated 29.06.92 and therefore the Court has no jurisdiction to hear and determine the said Application.

The present application was filed by the petitioner on 17.05.2001 invoking the jurisdiction of this Court to issue a writ of *Mandamus* directing the 1st respondent to divest the land depicted in plan bearing No. 22 dated 13.07.1986 referred to in the order of vesting. When the present application was taken up for hearing the 1st and 2nd respondents raised preliminary objection with regard to the maintainability of this application. Shiranee Tilakawardana, J. in the Order on the preliminary objection upheld the preliminary objection and held that in terms of section 4 and 5 of the Urban

Development Projects (Special Provisions) Act No. 2 of 1980, this Court has no jurisdiction to hear and determine this matter and dismissed the application.

The above order was challenged in the Supreme Court in SC Appeal No. 34/2002 and the Supreme Court held that, where no steps have been taken for a long period of time, to implement a proposed project upon land in respect of which a section 2 Order has been made an application for *mandamus* in respect of an omission to divest the acquired land does not fall within the scope of section 4 of the Urban Development Projects (Special Provisions) Act, and must be filed in the Court of Appeal. The Supreme Court allowed the appeal and directed this Court to entertain, hear and determine the application on merits.

Now I will proceed to consider this application on its merits.

The said land was acquired by the Minister of Lands upon the request of the Urban Development Authority and the Urban Council Ambalangoda for the purpose of Urban Development. The Minister by an order under section 38 proviso (a) of the Land Acquisition Act dated 04.05.1992 acquired the said land for an urgent public purpose. His Excellency the President made order in terms of section 2 of the Urban Development Projects (Special Provisions) Act, No. 2 of 1980 in relation to the said land and it was published in Gazette No. 721/2 dated 29.06.92. The Divisional Secretary Ambalangoda the 2nd respondent submitted that there was a change in the Government in 1994 and hence there was some time taken in receiving instruction in proceeding with the said acquisition. The section 5 notice was published on 03.10.1996. In 1999 when the petitioner was requested to hand over possession they refused to do so and the possession of the land was not taken. The petitioners are in possession of the said land even now.

The petitioners contended that the acquisition was politically motivated. The 3rd respondent submitted that the land in question was identified for urban development in 1991 and the request was made to acquire the land through the Urban Development Authority. A notice has been published by the President in terms of section 2 of the Urban Developments (Special Provisions) Act, No. 2 of 1980 that the said land was urgently required for the purpose of carrying

out an urban development project. But it is an admitted fact that no action had been taken to utilize the said land until now. The 2nd respondent's position is that the land was acquired on the request of the 3rd respondent but the 3rd respondent Council has not submitted any development plan in relation to the said land that was acquired. Even at present the 3rd respondent does not have any development plan to utilize the said land for the just requirement of the general welfare of the people.

The question that arises is; in these circumstances is it justifiable for the respondents to have this land without any plan to utilize the same for any public purpose. It appears that the purpose for which the said land was acquired by the 3rd respondent is now evaporated. The 3rd respondent has not shown to Court that they have any public purpose for which this land could be utilized. As the possession of the said land has not been taken over and the public purpose for which the said land was acquired is not in existence, the Minister of land has authority under section 39(1) of the Land Acquisition Act by order published in the gazette to revoke the vesting order of the said land made under section 38 of the said Act.

When a land has been acquired without adequate justification and if immediate possession is taken over by the State the above provisions will not apply and therefore to fill this *lacuna* in the law the Land Acquisition Act was amended and section 39A was introduced to divest a land acquired if certain conditions stipulated in the said section are fulfilled. Even though the petitioners have sought a divesting of their land in this application, in effect the petitioners are seeking the restoration of their title. It is common ground that the possession of the land has not been taken over by the relevant authorities therefore the restoration of title could not be made by divesting the said land under section 39A but it has to be made only by a revocation order under section 39(1).

In *De Silva v Atukorale, Minister of Lands, Irrigation and Mahaweli Development and another*⁽¹⁾, Fernando, J. held:

"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."

The amending Act has introduced section 39A and has given discretion to the Minister to make an order to divest a land if possession of the land had been taken over by the State. It has been held that when the conditions in that section are fulfilled even though the Minister has discretion to divest he should exercise his discretion fairly and according to law divest the land and a *mandamus* will lie to compel the Minister to make such an order; *De Silva v Atukorale, Minister of Lands, Irrigation and Mahaweli Development and another (supra)*.

Similarly when the public purpose is not in existence and the authority which had sought the acquisition has no other identified public purpose for which it could be used it is the duty of the Minister to revoke the vesting order if the possession of the land has not been taken over by the State. Hence this Court issues a *writ of mandamus* directing the 1st respondent and his successors in office to revoke the vesting order made and published in the gazette bearing No. 713/2 dated 04.05.1992. The application for a *writ of mandamus* is allowed without costs.

UPALY ABEYRATHNE, J. - I agree.

Application allowed.