SENEVIRATNE AND OTHERS

v.

URBAN COUNCIL KEGALLA AND OTHERS

COURT OF APPEAL
J. A. N. DE SILVA (P/CA)
AMARATUNGA, J.
C. A. 298/2001
JUNE 29TH, 2001

Land Acquisition Act.- S. 2, S 4(3), S. 38A, S. 38(a) - Public purpose not disclosed - Is the Applicant prejudiced? Acquisition effected through wrong section - Is it valid? - Mala fides

The Petitioner contended -

1. that Notice issued under S. 2 is defective in that the Public Purpose is not specified;
2. the Gazette notification should have been under S. 38(A) and not in terms of S. 38(a);
3. that there is no public purpose in the acquisition.
4. Acquisition is tainted with malice

Held :

"If the Appellant has not been prejudiced by the matters on which he relies on the Court may refuse relief even though he has succeeded in establishing some defect. The literal or technical breach of an apparently mandatory provision in a statute may be so insignificant as not in effect to matter. In those circumstances the Court may in its discretion refuse relief."

(i) In this instance, it appears that no prejudice had been caused to the Petitioner.

(ii) The invocation of the wrong section does not render an order invalid provided that the Authority concerned was actually vested with the power.

(iii) The Petitioners have not been singled out and subjected to harassment as suggested. It appears that authorities have done a thorough examination in selecting the lands earmarked for acquisition - which is for the development of the Kegalle Town. The need for public purpose is evident.

(iv) The question of malice and the absence of a public purpose are linked. In the instant case the presence of a public purpose negatives the allegations of malice.

It is also significant to note that allegations of malice was raised in the counter affidavit. No opportunity was given to the Respondents to answer these allegations. If actually there was malice, it should have been mentioned in the Petition itself. There must be specific evidence to establish and sustain the allegations of mala fide.

APPLICATION for a Writ of Certiorari.

Cases referred to :

1. *Manel Fernando v. Jayaratne* - 2000 1 SLR 112.
2. *Pieris v. Commissioner of Inland Revenue* - 65 NLR 457 at 458.
3. *Edirisuriya v. Navaratnam* - 1985 1 SLR 100 at 114.
4. *Fernando v. A. G.* - 1983 1 SLR 347 at 383.
5. *Samalanka v. Weerakoon* - 1994 - 1 SLR 405 at 409.

Mahinda Nanayakkara for Petitioner.

Manohara R de Silva for the Respondents.

M. R. Ameen S. C. for Attorney General.

Cur. adv. vult.

June 29, 2001.

J. A. N. DE SILVA, J. (P/CA)

The petitioners seek a writ of certiorari quashing the decision contained in the Extraordinary Gazette notification marked "L" in terms of proviso (a) section 38 of the Land Acquisition Act.

When this application was taken up for hearing learned Counsel for the petitioners submitted that the petitioners are entitled to the reliefs prayed for on the following grounds.

(a) The notice issued in terms of Section 2 of the Land Acquisition Act marked "H" is defective in that the public purpose for which the land is to be acquired is not specified.

(b) The Gazette notification should have been made under Section 38(A) of the Land Acquisition Act and not in terms of the proviso (a) to Section 38 of the Act.

(c) That there is no public purpose in the acquisition.

(d) That the acquisition is tainted with malice.

On the first point the learned Counsel for the petitioners submitted that Section 2 notice is not in conformity with the provisions of the Act and therefore it is bad in law and due to that reason the subsequent notice under Section 38 Proviso (a) too is defective. He drew the attention of Court to the Judgement of the Supreme Court in *Manel Fernando v. Jayaratna*[1]. Justice Fernando has stated "public purpose cannot be an undisclosed one. The purpose must be disclosed. From a practical point of view, if an officer acting under Section 2 (3)(f) does not know the public purpose he cannot fulfil his duty of ascertaining whether any particular land is suitable for that purpose. Likewise the object of Section 4(3) is to enable the owner to submit his objections which would legitimately include an objection that his land is not suitable for the public purpose which the State has in mind or that there are other and suitable lands. That object would be defeated and would be no meaningful inquiry into objections, unless the purpose is disclosed. If the public purpose had to be disclosed at that stage there is no valid reason why it should not be revealed at the Section 2 stage."

State Counsel who appeared for the respondents submitted that the petitioners were aware of the public purpose for which the land was to be acquired long prior to the publication of Section 2 notice. Attention of Court was drawn to paragraph 12 -15 of the petition and the document marked "G" dated 05. 12. 1999. The letter marked "G" has reference to Kegalle Urban Development Plan and to the acquisition of paddy fields on Kalugalla Mawatha to construct the proposed weekly fair. By this letter the 3rd petitioner has been requested to participate

at a meeting that was to be held in that regard. This letter has been written five months well in advance to the publication of Section 2 notice dated 04. 05. 2000.

In these circumstances the learned State Counsel submitted that no prejudice had been caused to the petitioners. Even in the petition and in the counter affidavit petitioners do not aver that due to the defect in Section 2 notice prejudice is caused to them. The learned State Counsel submitted that as no prejudice is caused to the petitioners, Court ought in its discretion refuse to issue the writ of certiorari. He relied on the following passage on "Judicial Review of Administrative Action" (by De Smith 5th Edition 1995),

"If the applicant has not been prejudiced by the matters on which he relies then the Court may refuse relief even though he has succeeded in establishing some defect. The literal or technical breach of an apparently mandatory provision in a Statute may be so insignificant as not in effect to matter. In these circumstances the Court may in its discretion refuse relief."

The learned Counsel also submitted that the facts of this case are distinguishable from *Manel Fernando's case* cited above. In the instant case there is a genuine public purpose for which the land is required and this public purpose was in existence prior to the publication of Section 2 notice. In *Manel Fernando's case* the acquisition of the land was malicious and there was no genuine public purpose at the time Section 2 notice was published. I am in agreement with the submission of learned State Counsel that no prejudice is caused to the petitioners.

The second ground relied on by the learned Counsel for the petitioners was that the acquisition has been effected through the wrong Section of the Act. It was his submission that the notification should have been Gazetted in terms of Section 38(A) of the Land Acquisition Act and not in terms of Proviso (a) to Section 38 of the Land Acquisition Act.

It is to be noted Section 38(A) applies only when a land is being acquired on behalf of a Local Authority. However in this instant the lands are being acquired on behalf of the Urban Development Authority which is not a Local Authority. Thus Section 38(A) has no application. There are several decided cases where the view has been expressed that invocation of the wrong Section does not render an order invalid provided that the authority concerned was actually vested with the power. The following decisions are relevant on this point. *Peiris v. Commissioner of Inland Revenue*[2] at 458, *Edirisuriya v. Navaratnam*[3] at 114, *Fernando v. A. G.*[4] at 383, *Samalanka v. Weerakoon*[5] at 409.

The third and fourth grounds raised by the petitioners were that there is no real "public purpose" and the acquisition is tainted with malice. In this respect the documents marked 5R1(a), 5R1(b), 5R2, 5R3, 5R4 and 5R5 (a) - (c) are relevant. All these documents pre-date the Section 2 notice and contain a detailed discussion of the public purpose for which the lands in question were required. Document 5R1 (a) and 5R1(b) clearly show that during the years 1997-1999 a comprehensive plan was designed under the Director of Research and Development of Urban Development to develop the town centre of Kegalle. The Urban Development Authority has approved this Plan which is named as the Kegalle Urban Design Plan. Paragraph 1.3 of the said Plan discusses the need for development of the city of Kegalle with reference to following matters amongst other things.

(1) That there is a considerable traffic congestion in Kegalle City principally along the Colombo - Kandy Road and other By-Pass Roads.

(2) Inadequate parking facilities in the Town Centre.

(3) The wholesale and retail markets are located at the City Centre facing Colombo - Kandy Road which has contributed to the traffic congestion.

(4) That there are large areas of marshy and paddy lands within the Town Centre that could be used to develop the City and thereby the City could be expanded.

(5) To remove the public bus terminal which is on the Main Road.

It is also to be noted that the Kegalle Town Development project would be partly funded by the General Treasury and already a sum of Rs. 20 million has been allocated for this purpose for the year 2001. The lands aggregating to a total extent of 6 acres 2 roods 27.9 perches are needed for the city development project and these lands belong to several owners. The petitioners have not been singled out and subjected to harassment as suggested by the petitioners. It appears that authorities have done a thorough examination in selecting the lands earmarked for acquisition. The suitability of other paddy lands located in the vicinity had also been examined. Consequently steps have been taken to publish notices in term of Section 2 of the Land Acquisition Act. Therefore the need for public purpose is evident. Time and again this Court has warned the acquiring authorities to follow the law as explained by Justice Fernando in *Manel Fernando's case*. However since no prejudice is caused to the petitioners in the instant case I refrain from making an adverse order.

The petitioners have also submitted that there is malice in respect of this acquisition. It is to be noted that question of malice and the absence of a public purpose are linked. In the instant case the presence of a public purpose negatives the allegations of malice. It is also significant to note that allegation of malice was raised in the counter affidavit. No opportunity was given to the respondents to answer these allegations. If actually there was malice it should have been mentioned in the petition itself. There must be specific evidence to establish and sustain the allegation of mala fides.

On the question of "malice" it would be relevant to refer to the following observations with regard to the standard of proof required for the allegation of mala fides to succeed.

"The plea of mala fides is raised often but it is only rarely it can be substantiated to the satisfaction of Court. Merely raising a doubt is not enough. There should be something, specific, direct and precise to sustain the plea of mala fides. The burden of proving mala fides is on the individual making the allegation as the order is regular on its face and there is a presumption in favour of the administration that it exercises its power in good faith and for the public benefit." Principles of Administrative Law (Jain & Jain, 4th Edition 1988 Page 564)

For the above mentioned reasons I refuse this application and dismiss the same with costs fixed at Rs. 3500/=.

AMARATUNGA, J. - I agree.

Application dismissed.