1978 *Present*: **Samarakoon, C.J., Ismail, J. and Walpita, J.**

MARIE INDIRA FERNANDOPULLE and ANOTHER, Petitioners

and

E. L. SENANAYAKE, MINISTER OF LANDS AND AGRICULTURE, Respondents

S. C. Application No. 119 of 1978

Writ of Certiorari—Application to quash order made by Minister under proviso to section 38 of Land Acquisition Act (Cap. 460)—Immediate possession only in case of urgency—Can Courts review such order—Burden on petitioner.

An order 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.

Cases referred to:

Gunasekera v. Minister of Lands and Agriculture, 65 N. L. R. 119.

Gamage v. Minister of Lands, 76 N. L. R. 25.

Reg. v. Barnsley Council, Ex parte Hook, (1976) 1 W.L.R. 1052; (1976) 3 All E.R. 752.

Reg. v. Agricultural Land Tribunal, Ex parte Davies, (1953) 1 W.L.R. 722; (1953) 1 All E.R. 1182.

Reg. v. Criminal Injuries Compensation Board, (1967) 2 Q. B. 864; (1967) 2 All E. R. 770; (1967) 3 W. L. R. 348.

Reg. v. Board of Visitors of Hull Prison, Ex parte St. Germain, (1978) Q. B. 678; (1978) 2 W. L. R. 598; (1978) 2 All E. R. 198.

APPLICATION for a Writ of Certiorari.

V. S. A. Pullenayagam, with *G. F. Sethukavaler*, *Dr. N. Tiruchelvam* and *Mrs. Shanthini Gnanakaran*, for the petitioner.

Sarath Silva, Senior State Counsel, for the respondents.

Cur. adv. vult.

August 25, 1978. SAMARAKOON, C.J.

This is an application for a Writ of Certiorari to quash the order made by the Minister of Lands and Agriculture (1st respondent) in terms of the proviso to section 36 (*a*) of the Land Acquisition Act (Cap. 460) directing the Assistant Government Agent, Negombo, to take immediate possession of a land called Melawatte situated at Muruthana in Negombo. It is admitted that the said land was required for the purpose of providing a playground and agricultural farm for the Muruthana Mixed Farm School. The land is claimed by the petitioner. On the 20th December, 1974, a notice was duly published in terms of section 2 of the Land Acquisition Act stating that the land was required for a public purpose. Objections to the proposed acquisition were then lodged by the Chief Political Organiser of the Sri Lanka Freedom Party for the Katana Electorate and the petitioner's father. On the 15th November, 1976, a notice was duly published by the Assistant Government Agent, Colombo District, in terms of section 4 of the Act stating that the land was required for a public purpose and that the government intends to acquire the said land (vide Document P). An objection was then lodged by Muruthana Rural Development Society (vide Document C) to the said acquisition. An inquiry was then held on 22nd February, 1977, into all the objections by the Chief Education Officer of Minuwangoda. On the 13th May, 1977, a declaration was duly published under section 5 of the Act (Document J). Thereafter the 1st respondent on 7th December, 1977, made order under the proviso to section 38 (*a*) of the Act vesting the said land in the State and directing the 2nd respondent to take immediate possession of the land. This notice was published in *Government Gazette* No. 296 of 16.12.77 (vide Document 2R1). The 2nd respondent then gave notice to the petitioner that he would come to the land on 28.02.78 at 10 a.m. to take possession. The 2nd respondent has stated in his objections dated 16th June, 1978, that he has been unable to take possession. It must be noted that a period of about 4 years has elapsed between the date of the notice under section 2 and the notice to the petitioner on 13.02.76. The petitioner pleads—

(*a*) that the land is not required for a public purpose, and

(*b*) that the order 2R1 was in excess of powers conferred by section 38 (*a*) of the Act "in that the 1st respondent has failed to disclose the ground of urgency, and in fact no such ground of urgency exists."

The first contention was not argued before us. Indeed such position was not tenable in view of the declaration published by the Minister (1st respondent) in *Gazette* No. 282 of the 9th of September, 1977. It is conclusive evidence that the land is required

for a public purpose (vide section 5 (2) of the Act) and therefore cannot be canvassed in a Court of Law. *Gunasekera v. The Minister of Lands and Agriculture,* 65 N.L.R. 119. Such a provision expressly removes the right of a Court of Law to review the decision of the Minister. However there is no such provision with regard to the proviso to section 38. The provisions of section 38 states that the Minister may by order published in the Gazette "*at any time after the award is made under section* 17" direct the acquiring officer to take possession of the land or servitude acquired, as the case may be. Such an order is a vesting order and vests title in the State absolutely and free from all encumbrances from the date of the order. It must be noted that the Minister ordinarily has no power to vest the land in the State until an award is made in terms of section 17 of the Act. Even though the market value is calculated as at the date of the notice under section 7 the award can only be made after 21 days of the date of the notice. If there is a reference to Court under the provisions of section 10 of the Act such award will be made at a such later date (section 17). Whatever the length of time the Act makes it clear that in the first place possession only be taken after the award is made and after the quantum of compensation offered is made known to the claimants. Any vesting order made before such award would be an act in excess of powers. The intention of the legislature is clear, i.e., that the officers of the State cannot take possession until and unless an offer of payment of compensation is made and the acquisition proceedings are concluded. It is only then that the Act recognises the State's right to possession of the land. The proviso to section 38 is a departure from this general rule. It empowers the Minister, on behalf of the State, to take immediate possession "where it becomes necessary to take immediate possession of any land on the ground of any urgency." As observed earlier, there is no express conclusive effect given to this decision as is given to the decision regarding "public purpose" in section 5 of the Act. This is a distinction which is significant. It was contended by State Counsel that the notice under section 38 (Proviso) had already been published and the title now vests absolutely in the State free from all encumbrances. Therefore, the argument goes, it is futile for the Court to judge the correctness or otherwise of the Minister's act. In fact it cannot now look into it as title has vested in the State absolutely. I cannot agree. If in fact the Court has the power its jurisdiction cannot be extinguished by a mere vesting order.

State Counsel next contended that the order of the Minister under the provisions of section 38 (Cap. 460) cannot be reviewed by this Court. He cited the authority of this Court's decision in

Hewavasam Gamage v. The Minister of Lands (76 N.L.R. 25). In that case the plaintiff (who was the appellant), sought an injunction from the District Court to restrain the Minister from acquiring his land. The Minister stated that it was urgently required for a public purpose, viz., the construction of a public market in the town of Homagama. The plaintiff alleged that the acquisition was motivated by the political and personal animosity of the chairman of the Town Council against the plaintiff. His Counsel's first argument was recited by Pathirana, J. as follows:—

> "I shall deal with the first contention of Mr. Jayewardene that the 1st defendant in issuing notice under section 2 and the order under proviso (*a*) to section 38 was not acting in terms of the Statute but was exercising his powers *mala fide* for the furtherance directly or indirectly, of political motives and not for a public purpose as stated in the Act and that therefore the decision of the Minister was *mala fide* and/or in excess of his powers, and was, therefore, subject to review by this Court."

The Court was dealing with the question as to whether the purpose was in fact a public purpose or whether the acquisition was a cloak for purely personal vengeance against a political opponent. Pathirana, J. was of the view that on a construction of section 2 and proviso to section 38 the Court cannot question the decision or order of the Minister and thereby cannot hold that "the decision of the Minister was wrong namely that the land *was needed for a public purpose*". He was dealing only with the question of the "public purpose". A reading of section 38 reveals that it comes into operation only after an order under section 2 and/or section 4. Both these sections operate on the Minister's decision under these two sections that the land is required for a public purpose. Section 38 nowhere refers to "public purpose". It only refers to the sections where the need for such purpose has been decided. The only decision it is concerned with is the "urgency" which necessitates "immediate possession" of the land being taken. The Minister's sole power under that section is to decide the question of urgency to meet the need for which an order was made under section 2 and/or section 4. I therefore find myself unable to follow that decision so far it concerns the provisions of section 38 and must respectfully disagree. Furthermore, we are in this case dealing with the situation where a decision has been made under the provisions of section 5(1) that the land is required for a public purpose and that decision is conclusive as stipulated by section 5(2).

The next question is whether the Minister's decision regarding the urgency, and therefore the need to take immediate possession, can be reviewed by Court. Counsel for the petitioner stated that the Court must apply an objective test and not a subjective test. State Counsel contended for the latter. If one looks at the entire Act two main powers are given to the Minister. They are :—

1. The power to decide whether the land is required for a public purpose and to direct that it be acquired, and

2. Whether there is an urgency compelling the immediate possession being taken of the land of and to direct that possession be taken.

As pointed out earlier, the former decision is by enactment (section 5(2)) made conclusive and therefore removed from scrutiny by the Courts. The latter has not been so treated and it is legitimate to hold that the legislature did not intend to remove the Court's power of scrutiny. Another important fact is that section 38 circumscribed the Minister's power to interfere with private rights or property by stating that possession can only be interfered with after an award is made. It is only in cases of urgency that an exemption is made. To my mind this is a clear indication, that the Minister was only permitted to act with due regard to Common Law rights. When Common Law rights are involved the Court always has a right of review. *Reg. v. Barnsley Council, Ex parte Hook,* (1976) 1 W.L.R. 1052. The Common Law right to possession of one's own property is one of these. *Reg. v. Agricultural Land Tribunal, Ex parte Davis,* (1953) 1 W.L.R. 722. This writ of certiorari is not confined to judicial or quasi-judicial acts. It extends even to administrative acts that affect the rights of the subject. It has been stated that " the exact limits of the ancient remedy by way of certiorari have never been and ought not be specially defined. They have varied from time to time being extended to meet varying conditions "—per Lord Parker, C.J. in *Reg. v. Criminal Injuries Compensation Board,* (1967) 2 Q.B. at page 882. " One must start this question of whether certiorari will or will not go with a recognition of the fact that there is not, and one may hope never will be, a precise and detailed definition of the exact sort of order which can be subject to certiorari. If we ever get to the day when one turns up a book to see what the limit of the rights of certiorari is, it will mean that the right has become rigid, and that would be a great pity "—per Lord Widgery in *Reg. v. Board of Visitors Ex parte St. Germain,* (1978) 2 W.L.R. at page 60. I approach it in the same way bearing in mind that purely private and domestic bodies and a few others are outside

the pale of certiorari. What is the exact limit of a subjective test. Are the Courts obliged to turn a deaf ear merely because some statutory officer is able to proclaim "I alone decide". "When I ope my mouth let no dog bark"? If that be the position when the rights of the subject are involved then the Court would have abdicated its powers necessary to safeguard the rights of the individual. I do not think that is the test. No doubt primarily the Minister decided urgency. He it is who is in possession of the facts and his must be the reasoning. But the Courts have a duty to review the matter. 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 take over 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 being the facts the petitioner has failed to satisfy me that there was no urgency. I would therefore dismiss the application with costs.

ISMAIL, J.—I agree.

WALPITA, J.—I agree.

Application dismissed.