MENDIS
v.
JAYARATNE, MINISTER OF AGRICULTURE, LANDS AND FORESTRY

COURT OF APPEAL.
DR. RANARAJA, J.
C. A. NO. 425/96.
MAY 09, 1997.

Land Acquisition Act No. 9 of 1950 – Sections 2, 5(2), 38, 38A, 39(A) – Public Purpose – Urgency – Laches – Piece meal divesting.

Under the provisions of section 38 of the Land Acquisition Act the then Minister of Lands directed the Acquiring Officer to take possession of the petitioner's land. Physical possession was taken on 27.1.88. Thereafter in terms of the Act, petitioner made claims for compensation in respect of the 3 lots. The petitioner received compensation in respect of 2 lots. Not being satisfied with the quantum of compensation paid in respect of the 3rd lot, the petitioner appealed to the Land Acquisition Board of Review. While the appeal was pending, the petitioner, alleging victimisation by the previous regime, requested the Minister of Lands to make a divesting Order under section 39A, stating that the land has not been made use of for the "Public Purpose" for which it was acquired.

The petitioner thereafter sought to quash the Order made under section 38A, and further sought a Writ of Mandamus directing the 1st respondent to make order divesting the said land in terms of section 39A.

The petitioner contends that the public purpose for which the acquisition has been made is *mala fide* and for an extraneous purpose, and that the land acquired has not been used for the stated public purpose or for any purpose.

HELD:

(i) The petitioner is not entitled to question the decision of the Minister that the land is required for a public purpose under section 38, made 16 years ago.

(ii) The decision whether the land should or should not be acquired is one of policy to be determined by the Minister concerned and therefore cannot be questioned by a Court of Law.

(iii) It is to be noted that in the instant case, the petitioner had by 1988 already claimed and received compensation for two other lots acquired for the same

purpose. He has taken no objection that the acquisition of those two lots was bad in law for lack of 'Urgency.' Even in respect of the lot in respect of which this application is made, he claimed and was awarded compensation on 27.6.1991.

(iv) The petitioner has not challenged the statement of the 1st respondent that the later land was taken over for the implementation of a Development Project – neither has he satisfied court that the land acquired is not being utilised for the purpose it was acquired.

(v) It is only if the Minister has failed to reasonably exercise his discretion that relief could be granted. The petitioner has failed to satisfy court on this aspect.

(vi) A piece-meal divesting order of a particular portion of the vested land is not possible.

APPLICATION for a Writ of Certiorari and Mandamus.

Cases referred to:

1. *Hopman v. Minister of Lands* – [1994] 2 Sri L.R. 240.
2. *Ratnayake v. Jayasinghe* – 78 NLR 35.
3. *Hulangamuwa v. Principal, Visaka Vidyalaya,* [1988] 1 Sri L.R. 275.
4. *Gamage v. Minister of Agriculture,* 76 NLR 25.
5. *Gunasekera v. Minister of Lands* – 65 NLR 119.
6. *Fernandopulle v. Minister of Lands* 79(2) NLR 116.
7. *De Silva v. Atukorale* – [1993] 1 Sri L.R. 283.
8. *Fernando v. Dayaratne* – [1991] 2 Sri L.R.129.

Faiz Mustapha, P.C. with *S. N. Senanayake* for petitioner.

P. G. Dep., D.S.G. for respondents.

Cur. adv. vult.

May 09, 1997.
DR. RANARAJA, J.

The petitioner is the owner of the allotment of land called Tambilikotuwa depicted as lot 3 in Plan No. 1717 (P1) and Plan 2062 dated 12.12.84 (P1A), 0A, 2R, 23P in extent. By notice dated 28.3.1980 (P2) published under the provisions of section 2 of the Land Acquisition Act (Act) the Government Agent of the Kalutara District informed the public that the land called Modarwila,

approximately 90 acres in extent, inclusive of the said land called Tambilikotuwa, would *inter alia,* be surveyed to ascertain whether that land is suitable for a public purpose, namely a Housing Project. By notice (P3) dated 27.10.80 issued under the provisions of Proviso (a) to section 38 of the Act, the then Minister of Lands directed the Acquiring Officer, Panadura District to take possession of the land, and physical possession thereof was taken on 27.1.88. By notice under the provisions of section 7 of the Act published in Gazette 411/11 dated 22.7.1986 (1R1) the Acquiring Officer called for claims for compensation. The petitioner made claims in respect of 3 lots, namely lots 3 and 4 in Plan P1A and lot 5 in Plan P1. The petitioner has received compensation in respect of lot 4 in Plan P1A and lot 5 in Plan P1. Not being satisfied with the quantum of compensation paid (P5) in respect of lot 3 in Plan P1A, the petitioner has made an appeal to the Land Acquisition Board of Review. It appears that whilst that appeal was pending, the petitioner by letter P6 dated 10.10.94, alleging victimisation by the previous regime, requested the 1st respondent Minister of Lands, to make a divesting order under section 39A of the Act, stating that the land has not been made use of for the public purpose for which it was acquired. The matter was referred to the 2nd respondent Urban Development Authority, for necessary action (P8). By letter P9E dated 4th December, 1995, the petitioner informed the 2nd respondent *inter alia,* that "**If however the release of the land will disturb your development program**, I am not averse to accepting an extent of land to make up the deficit from the western side of Noel Mendis Mawatha. I am of course, glad to see the development of my town of which I was a one-time Chairman and a councillor for thirty years. But then there is a limit to which I could sacrifice, I have already surrendered 3A.0R.33P. in the heart of Panadura Town for a mere pittance. **In this context, "natural justice demands that I be appropriately compensated.**" Although the 2nd respondent offered the petitioner alternative land in lieu of compensation during the course of proceedings before this Court, that offer was rejected by the petitioner.

This application is *inter alia,* for:

(a) a writ of certiorari quashing the order made under proviso (a) to section 38 of the Act, (P3) and

(b) a writ of mandamus directing the 1st respondent to make order divesting the said land in terms of section 39A of the Act.

It is submitted that the public purpose for which the acquisition has been made is *mala fide* and for an extraneous purpose, since the land has been **sold** by the 2nd respondent to the 3rd respondent Colombo Gas Company Ltd. for a large profit. He has stated so in paragraph 9 of his counter affidavit. The petitioner has in his affidavit stated that he has credible information that negotiations are being carried on for the **lease** of the said land by the 2nd respondent to the 3rd respondent. The petitioner has not produced any document in proof of either a **lease or sale** of the said land by the 2nd respondent to the 3rd respondent. Equitable relief is not available on mere statements.

The petitioner has sworn that the land acquired has not been used for the stated public purpose or for any purpose after possession was taken thereof by the State. The 1st respondent has in his affidavit stated that approximately 69 acres of land had been acquired and possession taken over by the National Housing Development Authority in three stages for the Moderawila Development Project. The Design and Project Management Division of the 2nd respondent had already prepared lay-out plans and the project will commence immediately after providing the necessary infrastructure. The petitioner in his letter P9E has conceded that there was a proposed development plan and would be glad to see the development of the Town.

In any event, the petitioner is not, as the law stands, entitled to question the decision of the Minister made on 27.10.80 that the land is required for a public purpose, under the provisions of section 38 proviso (a) of the Act, that is almost 16 years ago.

In *Hopman v. Minister of Lands*[1] **Kulatunga, J.** with **G. P. S. de Silva, C.J.** and **Ramanathan, J.** agreeing upheld the decision of the Court of Appeal that the delay by the petitioner of less than three years to seek relief by way of a writ of certiorari to quash an order made under section 38 proviso (a) of the Act constituted laches, and dismissed the petitioner's appeal to the Supreme Court. Also see: *Ratnayake v. Jayasinghe*[2], *Hulangamuwa v. Principal Visaka Vidyalaya*[3].

In *Gamage v. The Minister of Agriculture*[4], **Pathirana, J.** with **Rajaratnam, J.** agreeing stated, "I am of the opinion that on the construction I place on section 2(1) and proviso (a) to section 38, the Court cannot question the decision or the order of the Minister and substitute its judgment in place of that of the Minister and hold that the decision of the Minister was wrong, namely, that the land was needed for a public purpose. The decision whether the land should or should not be acquired is one of policy to be determined by the Minister concerned and therefore cannot be questioned by the court of law." Pathirana, J. found support for his decision in the judgment of **H. N. G. Fernando J.** in *Gunasekera v. Minister of Lands*[5] which view was followed also in *Fernandopulle v. Minister of Lands*[6] by **Samarakoon C.J.** with **Ismail J.** and **Walpita J.** agreeing, when he held, "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 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 of the courts. The latter has not been so treated and it is legitimate to hold that the legislature did not intend to remove the Courts power of scrutiny."

However on the facts of that case, **Samarakoon C.J.** proceeded to hold that extraneous forces had delayed the take over of the land and that the delay and the need decided the urgency.

The petitioner has submitted that no "urgency" existed in the instant case and therefore the order P3 should be quashed on that ground.

The reason why section 38 proviso (a) should not be made use of is explained by Samarakoon C.J. in *Fernandopulle* (*supra*) thus: "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... 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 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."

It is to be noted that in the instant case the petitioner had by 1988 already claimed and received compensation for two other lots acquired for the same purpose. He has taken no objection that the acquisition of those two lots was bad in law for lack of "urgency". Even in respect of the lot in respect of which this application is made, he claimed and was awarded an amount of compensation way back, on 27.6.91 (P5) with which he was not satisfied. The principle of laches in *Hopman* (*supra*) will equally apply here, apart from his acquiescence of the allegedly illegal order for lack of "urgency" before an order under section 17 of the Act was made. The petitioner has failed to satisfy court that he was unduly prejudiced by order P3 for the reason that there allegedly was no "urgency" by adducing an argument based on the curate's egg.

The entire extent of the land acquired was over 65 acres. The difficulty in taking physical possession of many lots comprising that extent could very well have been the reason for the delay between 27.10.80 the day P3 was made and 27.1.88, when actual physical possession was finally taken over.

It is submitted that the 1st respondent is under a legal duty to make an order divesting the said land under section 39A of the Act in as much as the petitioner had satisfied all the criteria contained in section 39A (2) (a) to (d) of the Act.

It has been submitted by the 1st respondent that a major portion of the 65 Acres acquired for the Moderawila Development Project, of which lot 3 in plan P1A forms part, has been utilised for building houses and factories. The petitioner has implicitly accepted this fact in letter P9E referred to above.

The rationale for introducing section 39A by Act, No. 8 of 1979, was explained by **Fernando, J.** in *De Silva v. Atukorale*[7] as follows. "The long title of the Act refers to land acquired without adequate justification. The Act contemplates a continuing state of things; it is sufficient if the lack of justification appears at any subsequent point of time; this is clear from paragraph (b) of section 39A (2); if the land has not been used for a public purpose after possession has been taken, there is then an insufficiency of justification; and greater the

lapse of time, the less the justification for the acquisition...The purpose and powers of the amendment is to enable the justification for the original acquisition as well as for the continued retention of acquired lands, to be reviewed; if the four conditions are satisfied, the Minister is empowered to divest."

Nowhere in his counter affidvit has the petitioner challenged the statement of the 1st respondent that the larger land of 65 acres was taken over by the 2nd respondent for the implementation of the Moderawila Development Project involving Housing, Commercial and Industrial Development. The petitioner has merely denied the averment of the 1st respondent that the Design and Project Management Division of the 3rd respondent had already prepared lay out plans for the project and the work on the project will commence immediately. Apart from his bare denial no documentary proof has been forthcoming of his allegation that the relevant land has either been sold or leased to the 3rd respondent or for that matter to any other person. On the other hand it is evident from P9E that the petitioner was satisfied that the 2nd respondent was in the process of implementing the proposed development program and for that reason expressed his willingness to accept alternative land. The petitioner has not satisfied this Court that the land acquired is not being utilised for the purpose it was acquired and the acquisition cannot be adequately justified. The petitioner has therefore not made out a case for mandamus, considering the fact that section 39(A) of the Act does not grant him such a right. It is only if the Minister has failed to reasonably exercise his discretion under that section, that relief by way of mandamus could be granted. The petitioner has failed to satisfy this Court that the 1st respondent had acted unreasonably. The question also arises whether in any event the petitioner is entitled to a "piece-meal" divesting order of a particular portion of the land vested by order P3. – See *Fernando v. Dayaratne*[8] where Silva J. held it was not possible.

The application is dismissed with costs fixed at Rs. 2500/- payable to the 1st respondent.

Application dismissed.