MAHINDA KATUGAHA
v
MINISTER OF LANDS AND LAND DEVELOPMENT AND OTHERS

SUPREME COURT
S.N. SILVA, C.J.
AMARATUNGA, J. AND
SOMAWANSA, J.
S.C. APPEAL NO. 68/2007
S.C. (SPL.) L.A. No. 11/2007
C.A. (WRIT) APPLICATION 522/2002
NOVEMBER 11, 2007.

Land Acquisition Act – Sections as amended – 2, 4, 5, 38, 39A, 44, 49, 50 – Acquisition proceedings – Non utilization of the land for public purpose for more than 10 years – Is it liable to be quashed by a Writ of Certiorari?

The Appellant filed an application in the Court of Appeal seeking inter-alia – orders in the nature of *Writ of Certiorari* to quash the entire acquisition proceedings commencing from the notice in terms of Section 2 of the Land Acquisition Act and in the alternative for an order in the nature of *mandamus* to compel the 1st respondent in terms of Section 39A of the Land Acquisition Act to divest the land which originally belonged to the appellant and was later vested in the State and restore the said land to the possession of the appellant.

The Court of Appeal by its judgment dismissed the application on the following grounds:

(1) Undue delay on the part of the petitioner.
(2) On the principle that the Minister's decision that a land is required for a public purpose cannot be questioned in a Court.
(3) As the land had been handed over to the UDA under Section 44 of the Land Acquisition Act which had drawn plans and the land was developed, the petitioner cannot claim that the land acquired was not for a public purpose.

Held:

(1) The Minister's decision to acquire a land can be challenged in a Court of Law.

(2) A Minister does not have the unfettered right to acquire land without specifying a public purpose. Nor does a Minister have a right to acquire land and utilize it for purposes other than a public purpose.

(3) The notice given under section 2 of the Land Acquisition Act in respect of the appellant's land *ex-facie* reveals that no public purpose has been specified and the failure to specify a public purpose is fatal to the acquisition proceedings and the subsequent vesting of the land in the Urban Development Authority does not cure the defect in the notice given under Section 2 of the Land Acquisition Act.

(4) The subsequent vesting of the land in the Urban Development Authority by the State under Section 44 of the Land Acquisition act is wrongful and bad in law and as such the Urban Development Authority does not become entitled to any rights in respect of the land so vested.

(5) The appellant realized that the land acquired from him was not used for a public purpose only in 2002 when the 4th respondent put up its name board on the said land. Accordingly, the appellant adequately explained his delay in instituting the application in the Court of Appeal.

per Andrew Somawansa, J. –

> "It is patently clear that the land was not acquired under the Land Acquisition Act for the 5th respondent but was vested in the 5th respondent in order to enable the 5th respondent to lease it to the 4th respondent, a private entity."

per Andrew Somawansa, J. –

> "No improvements have taken place on the land and the filling up of the land by the 4th respondent for a purpose other than a public purpose cannot be described as improvements for the purpose of section 39A(2)(C)".

Cases referred to:

(1) *Hewawasam Gamage* v *Minister of Agriculture and Lands* 78 NLR 25.
(2) *Gunasinghe* v *Dissanayake and Others* 1994 2 Sri LR 132.
(3) *Gunasekera* v *Minister of Lands and Agriculture* 65 NLR 119.
(4) *Fernandopulle* v *Minister of Lands and Agriculture* 79(2) NLR 116.
(5) *Manel Fernando and Another* v *D.M. Jayaratne, Minister of Agriculture and Lands and others* 2000 1 Sri LR 112.
(6) *De Silva* v *Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another* 1993 1 Sri LR 282.

APPEAL from the judgment of the Court of Appeal.

Romesh de Silva, P.C. with *Lilanthi de Silva* for the appellant.
Mrs. M.N.B. Fernando, D.S.G. for the 1st respondent.
Nihal Jayamanne, P.C. with *Uditha Collure* for the 4th respondent.
Shibly Aziz, P.C. with *A.P. Niles* for the 5th respondents

Cur.adv.vult.

July 23, 2008

ANDREW SOMAWANSA, J.

The petitioner-petitioner-appellant hereinafter called the appellant was granted special leave to appeal from the judgment of the Court of Appeal dated 27.11.2006 on the questions of law as stated in paragraph 8 of the petition which reads as follows:

(8)(a)(i) Are acquisition proceedings under the Land Acquisition Act incapable in law to be initiated or proceeded with, without the public purpose being specified in the notice under section 2 of the Land Acquisition Act?

(ii) If so, did the Court of Appeal make a serious error of law in failing to issue the writ of *certiorari* prayed for by the petitioner?

(b)(i) Is an order under proviso (a) to section 38 of the Land Acquisition Act made in 1990 in respect of land which is thereafter not utilized for any public purpose for more than 10 years liable to be quashed by a writ of *certiorari*?

(ii) Was the petitioner's land not utilized for any public purpose"

(iii) If so, did the Court of Appeal make a serious error in law in failing to issue the writ of *certiorari* prayed for by the petitioner?

(c)(i) Is the allocation of the land acquired from the petitioner to the 4th respondent not a public purpose?

(ii) Did the petitioner realize that the land acquired from the petitioner was not used for a public purpose only in 2002 when the 4th respondent put up its name board on the said land?

(iii) In the circumstances did the petitioner adequately explain his delay in instituting the application in the Court of Appeal?

(iv) If so, did the Court of Appeal err in law in concluding that the delay of the petitioner is ground for refusing the petitioner's application?

(d) Did the Court of Appeal err in law in concluding that the Minister's decision to acquire a land can never be challenged in a Court of Law?

(e)(i) Was the land acquired from the petitioner not used for a public purpose and/or the public purpose for which it was acquired?

(ii) If so, did the Court of Appeal err in law in failing to issue a writ of *mandamus* prayed for by the petitioner?

(f) Did the Court of Appeal err in law in failing to conclude that the land of the petitioner could not have been acquired without a decision by the 1st respondent under Section 4 of the Land Acquisition Act?

(g) Did the Court of Appeal err in law in failing to conclude that there was no urgent public purpose in relation to the acquisition of the petitioner's lands?

(h) Did the Court of Appeal err in law in failing to conclude that the acquisition of the petitioners lands was *ultra vires* the powers of the 1st respondent?

(i) Did the Court of Appeal err in law in failing to conclude that the purported vesting of the petitioners land in the 5th respondent was *ultra vires*?

(j) Did the Court of Appeal err in law in failing to grant the relief prayed for by the petitioner?

The relevant facts are that by Deeds Nos. 4411 and 263 the appellant became the owner of certain lands in extent about 0.597 hectares in Kandy. A notice dated 21.09.1989 under the Land Acquisition Act was published for the acquisition of the land claimed by the appellant and of several other lands in the vicinity stating that the said lands are needed for a public purpose but did not set out the nature of the public purpose, subsequently identified and described in the vesting order made under proviso (a) to section 38 of the Land Acquisition Act. A letter addressed to the appellant by the 3rd respondent stated that the acquisition was for development of necessary public utilities in the vicinity of the new Getambe Kandy Road and the appellant was directed to vacate, hand over vacant possession of the land was duly handed over by the

appellant acting through his agent as the appellant was out of the country.

The appellant contends that the provisions of Section 5 of the Land Acquisition Act has not been complied with and no Section 5 notice has been published. However, it is to be seen that the Section 5 notice has been published on 01.03.91. The appellant further contends that he being out of the country since 1981 for employment was represented at the inquiry before the 3rd respondent the District Secretary by his Attorney and the appellant's Attorney being unaware of the illegality of the acquisition and the true market value of the land at the date of acquisition had claimed compensation for the land acquired at Rs. 25,000/- per perch and the 3rd respondent has not accepted the said claim and that the appellant has so far not been paid any compensation under the Land Acquisition Act in respect of the aforesaid land.

The appellant's main contention is that the land belonging to him and which was acquired has not been used for any public purpose although possession of the same was taken by the 3rd respondent in December 1990 on the ground of urgency. That in or about January 2002 he discovered that the 4th respondent has been placed in possession of about 3 acres in extent including the said portion of the land which belongs to the appellant and that the 4th respondent was placed in possession by the Urban Development Authority the 5th respondent and that the 4th respondent was taking steps to construct a private hospital and resort thereon. The appellant contends that having taken possession of the property as far back as 1990 on the grounds of an alleged urgent public purpose and having not developed the property and having failed to specify the public purpose for which the said lands were purported to be acquired a third party was filling portions thereof which had been handed over to the 4th respondent for its private purpose.

The appellant by his letter dated 22.01.2002 brought the aforesaid matters to the notice of the 1st respondent and requested him to divest the land in terms of section 39A of the Land Acquisition Act which was copied to 2nd and 3rd respondents to which there was no response. He further contended that although the land has been purportedly vested in the 5th respondent in terms of Section 44 of the Land Acquisition Act no document specifying that the said land was

required for the purpose of the 5th respondent at the time the Section 02 notice was published or section 38 proviso (2) order was made has been produced.

In the circumstances, the appellant filed an application in the Court of Appeal in March 2002 seeking *inter-alia* – orders in the nature of writ of *certiorari* quashing the entire acquisition proceedings commencing from the notice in terms of Section 2 of the Land Acquisition Act and in the alternative for an order in the nature of *mandamus* to compel the 1st respondent in terms of Section 39A of the Land Acquisition Act to divest the land which belonged to the appellant and was vested in the State and restore the said land to the possession of the appellant.

The Court of Appeal by its judgment dated 27.11.2006 dismissed the application of the appellant on the following grounds:

1) Undue delay on the part of the petitioner.
2) On the principle that the Minister's decision that a land is required for a public purpose cannot be questioned in a Court.
3) As the land had been handed over to the UDA under Section 44 of the Land Acquisition Act which had drawn plans and the land was developed the petitioner cannot claim that the land acquired was not for a public purpose.

At the hearing of this application parties agreed that this application be restricted to lots 3 to 8 in the order under Section 7 of the Land Acquisition Act published in Gazette Extraordinary No. 784/6 dated 14.09.1993 marked 'H' and lots 01 to 11 in the order under Section 7 of the Land Acquisition Act published in Gazette Extraordinary No. 699/16 dated 20.01.1992 marked 'I'.

It is contended by Counsel for the 4th respondent that the question whether any land should or should not be acquired is one of policy to be determined by the Minister and therefore it cannot be challenged in a Court of Law. In fact this was the view taken by the Court of Appeal following the decision in *Hewawasam Gamage* v *Minister of Agriculture and Lands*[1]. Counsel for the 4th respondent also cited *Gunasinghe* v *Dissanayake and others*[2], *Gunasekera* v *Minister of Lands and Agriculture*[3], *Fernandopulle v Minister of Lands and Agriculture*[4] for the proposition that the Court cannot

interfere in the policy decision of the Minister unless it is illegal. Counsel for the respondent also contends that Section 5 notice has been published which in turn is a written declaration by the Minister that the land to be acquired is for a public purpose. In the circumstances, the fact that the subject matter of this appeal, the lands claimed by the appellant are required for a public purpose is conclusively evidenced as being required or needed for a public purpose. However, it is common ground that the section 2 notice did not specify or set out the nature of the public purpose for which the land was being acquired. Though counsel for the respondent contends that the provisions of the Land Acquisition Act does not require to specify the public purpose in the relevant notices and that Section 5 notice makes it conclusive evidence that the land is needed for a public purpose, I am unable to agree with the aforesaid contention in view of the decision in *Manel Fernando and Another* v *D.M. Jayaratne, Minister of Agriculture and Lands and others*[5] wherein the Supreme Court came to the conclusion that a Section 2 notice must state the public purpose – although exceptions may perhaps be implied in regard to purpose involving national security and the like. At 125 *per* Fernando J.

> "The first question is whether the public purpose should be disclosed in the Section 2 and Section 4 notices.
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> The Minister cannot order the issue of a section 2 notice unless he has a public purpose in mind. Is there any valid reason why he should withhold this from the owners who may be affected?
>
> Section 2(2) required the notice to state that one or more acts may be done "in order to investigate the suitability of that land for that public purpose"; obviously "that" public purpose cannot be an undisclosed one. This implies that 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 fulfill 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 more

suitable lands. That object would be defeated, and there would be no meaningful inquiry into objections, unless the public purpose is disclosed. If the purpose has to be disclosed at that stage, there is no valid reason why it should not be revealed at the section 2 stage.

In my view, the scheme of the Act requires a disclosure of the public purpose, and its objects cannot be fully achieved without such disclosure. A section 2 notice must state the public purpose – although exceptions may perhaps be implied in regard to purposes involving national security and the like."

In the circumstances, it appears that the failure to specify the public purpose in Section 02 notice in respect of the appellant's lands is fatal to the acquisition proceedings. I am also unable to agree with the contention that the Minister's decision to acquire a land can never be challenged in a Court of Law. A Minister does not have the unfettered right to acquire land without specifying a public purpose. Nor does a Minister have a right to acquire land and utilize it for purposes other than a public purpose. The appellant's land was taken possession of allegedly on the ground of urgent public purpose as far back as 1990. The whole of it was unutilized until the year 2000 and in 2000 the land was vested in the 5th respondent the Urban Development Authority. The 5th respondent in the year 2001 wrongly granted part of the land to the 4th respondent a private entity for a private purpose and a part of the appellant's land remains unutilized to date. This *per se* indicates that there was no public purpose urgent or otherwise at the time the Section 2 notice was made and indeed at the time the purported order under the proviso (a) to section 38 was gazetted.

It is contended by counsel for the 4th respondent that after the acquisition, the land was vested by State in terms of Section 44 of the Land Acquisition Act in the Urban Development Authority. In the circumstances the public purpose for which this land was acquired was fulfilled by the State by vesting of the land in the Urban Development Authority under Section 44 of the Land Acquisition Act and therefore the appellant cannot and could not have made an application to the Court of Appeal to divest the land as against the 1st respondent Minister as the State had already vested the land in the Urban Development Authority and the 1st respondent cannot divest

the land or portion of it as it is no longer vested in the State but in the Urban Development Authority. In the circumstances, the reliefs prayed for seeking a writ of *certiorari* to quash the acquisition or an order in the nature of a writ of *mandamus* as against the 1st respondent to divest the land to the appellant cannot be granted. Respondent's counsel further contends that in any event though the Urban Development Authority was added as the 5th respondent still no specific relief or orders are sought against the Urban Development Authority in whom the land is now vested and was vested at the time the application was filed in the Court of Appeal and the State or that 1st respondent cannot be called upon to divest the property as the State has no right to the land anymore. Thus the action of the appellant is baseless and misconceived.

Counsel for the respondent also brings to the attention of Court the 1st paragraph of the letter written by the appellant to the 1st respondent marked 'k' wherein the appellant admits that the land including the lots claimed by him were acquired for the state public purpose of constructing the Getambe-Kandy road and development of amenities adjacent to the Getambe-Kandy road. Counsel for the respondent contends that thus the appellant has admitted that the land was acquired for a public purpose and that the State vested it in the Urban Development Authority under Section 44 of the Land Acquisition Act to carry out the public purpose. Here again, I am unable to agree with the aforesaid submission of the respondent.

It is to be seen that according to the respondents the appellant's land has been acquired and vested in the Urban Development Authority under Section 44(1) of the Land Acquisition Act which is a special procedure that is available to acquire land required for the purpose of any local authority or any other person or body of persons. The relevant section provides as follows:

> *"Where any land which is required for the purpose of any local authority or of any other person or body of persons is, in pursuance of this Act or any other written law, acquired under this Act for such purposes, the acquiring officer of the district in which that land is situated shall, after possession of that land has been taken for and on behalf of the State, by a certificate issued under his hand, vest that land in such local authority or*

such person or body of persons, as the case may be, subject to such conditions or restrictions as may be specified in the certificate".

Thus section 44(1) specifically requires that lands vested in terms of this Section is to be acquired for a purpose of the body in whom it is vested. The appellant's land has been vested in the Urban Development Authority, the 5th respondent. However, there is absolutely no evidence whatsoever not even an averment that it was acquired for the purpose of the 5th respondent. On the contrary, the land taken possession of for an urgent public purpose in the year 1990 has been purportedly vested in the Urban Development Authority only on 28.08.2000. It is patently clear that the land was not acquired under the Land Acquisition Act for the 5th respondent but was vested in the 5th respondent in order to enable the 5th respondent to lease it to the 4th respondent a private entity.

In any event, the land has been purportedly vested in the 5th respondent subject to the following conditions:

a) the land to be used exclusively for development of public utilities adjacent to the Getambe-Kandy road.

b) the land or any part thereof not required for the 5th respondent should be handed back to the State.

Here again it is common ground that a part of the appellant's land has been handed over to the 4th respondent and that the 4th respondent is a private company and no hospital has been constructed on this land even by the year 2007. Thus it cannot be contended that a private profit making venture which has not utilized that land for over 07 years for the alleged purpose for which it was given to them can be construed as development of public utilities. In any event, as stated above the scheme of the Act requires a disclosure of the public purpose and its objects cannot be fully achieved without such disclosure. A Section 2 notice must state the public purpose although exceptions may be implied if the purpose involves national security and the like. The section 2 notice in respect of the appellant's land *ex-facie* reveals that no public purpose has been specified and the failure to specify a public purpose is fatal to the acquisition proceedings and the subsequent vesting of the land in the Urban Development Authority does not cure the defect in the

Section 2 notice. Thus the subsequent vesting of the land in the Urban Development Authority by the State under Section 44 of the Land Acquisition Act is wrongful and bad in law and as such the Urban Development Authority does not become entitled to any rights in respect of the land so vested.

It is also contended by counsel for the respondents that the appellant cannot have and maintain this application and or is entitled to any relief prayed for in the petition inasmuch as the appellant has been guilty of delay and or laches as the appellant has failed to take appropriate action against an acquisition effected in 1990. For even though he was said to be out of the country in 1990, it is admitted that his affairs in the country specially with regard to the subject matter of this action had been looked after by his attorney. Thus the appellant has failed to explain the delays and in any event the appellant's explanation of delay is not acceptable. The appellant contends that his land was taken possession of in 1990 allegedly on the ground of urgency. The whole of it was unutilized until the year 2000. In the year 2000 the land was wrongfully vested in the Urban Development Authority the 5th respondent and in the year 2001 the 5th respondent wrongfully granted a part of the land to a private entity the 4th respondent for a private purpose. Thus he became aware of it only when the 4th respondent put up a notice on the land in the year 2002 and the appellant filed the instant application in the Court of Appeal on 14th March 2002. Thus he contends that there was no delay on his part as he could not have been aware of the *ultra vires* transaction until 2002. I am inclined to accept the explanation given by the appellant as being reasonable, sufficient and acceptable, for the appellant could not have been aware of the purported lease to the 4th respondent by the 5th respondent until the 4th respondent put up the notice marked X. In this respect, the Court of Appeal observed on page 4 of its judgment,

> *"The procedure laid down in the Land Acquisition Act was properly followed and there is no illegality in the acquisition process. The petitioner could only challenge the order of acquisition on the ground that there is no urgency. The petitioner cannot challenge the said order of acquisition on the ground that there is no urgency after lapse of 12 years and after participating in the compensation inquiry".*

Though Counsel cited several decisions wherein it was held that delay vitiates a remedy by way of writ if there is no illegality, I am unable to agree with the aforesaid reasoning for acquisition proceedings commenced with a Section 2 notice which did not set out the nature of the public purpose for which the said notice was published. Thereafter by a notice purportedly in terms of proviso (a) to section 38 the 1st respondent directed the immediate possession of the said lands be taken for and on behalf of the State on the ground of a purported urgency. It is to be seen that none of the notices published in pursuance of acquisition of the land of the appellant specify the nature of the public purpose for which the land is being acquired. Without such disclosure can an owner submit his objection 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 more suitable lands available in the vicinity. The only intimation the appellant has as to the nature of the public purpose for which the land was acquired was by the caption to the letter addressed to him by the 3rd respondent requesting to hand over vacant possession of his land which reads as follows: "Acquisition of land for development of necessary public utilities in the vicinity of the new Getambe-Kandy road." Accordingly the petitioner handed over his land through his agent. Thus the petitioner's land was taken possession of allegedly on the ground of an urgent public purpose as far back as 1990. A portion of the land so acquired for an alleged urgent public purpose has been handed over to a private company in the year 2001 more than 10 years after the order under proviso (a) to Section 38 of the Land Acquisition Act.

Thus the appellant could not have been aware that the 5th respondent had leased out a portion of the appellant's land to the 4th respondent until the 4th respondent put up the notice on the land in 2002 and the appellant has come to Court on 14.03.2002. In the circumstances, the Court of Appeal has erred in law in refusing to grant relief to the appellant on the basis of delay.

Respondent contends that part of the appellant's land and the lands of several others had been used for the Getambe-Kandy road. However, it is apparent as contended by counsel for the appellant that no part of the appellant's land has been used for the construction of the Getambe-Kandy road nor has any part of the appellant's land

been used for development of any public utility. Counsel for the 5th respondent contends that the appellant's land and surrounding lands were vested with the 5th respondent in terms of Section 44 of the Land Acquisition Act and that it has endeavoured to allocate the said lands for large scale development with the intention of inducing investors from the private sector to participate in the planned development of the city of Kandy. However, it is to be seen as is contended by counsel for the appellant that while some lands acquired for a public purpose were in fact made use of for a pubic purpose of constructing Getambe-Kandy road, such lands are situated on the western bank of the Meda Ela and the lands claimed by the appellant are lands situated in the eastern bank of Meda Ela which were not used for a public purpose and remained unutilized until the said lands were allocated to the 4th respondent to construct a private hospital, the first large scale private hospital in the whole of the Central Province as claimed by the 5th respondent. The respondent also claims that the said Aloka Hospital project is a large scale project that will infuse capital of Rs. 60 million and create employment opportunities for a number of persons, whilst providing modern medical facilities for people in the whole of the Central Province.

The 4th respondent further claimed that the private hospital they were going to construct was unique in that it was a two-tier hospital in that it reserves part of the wards to give free treatment to the public. The non-paying facility for the public includes free OPD service and a ward with 15 beds free of charge for non-paying patients. Undoubtedly, the balance facility would be for private profit making venture which would be the hidden agenda. This certainly is not a purpose for which the provisions of the Land Acquisition Act could be made use of.

Counsel for the appellant points out that the conveyance of the lands to the 5th respondent was made subject to the condition that the land be used only for the purpose of developing the requisite public utilities adjacent to the Getambe-Kandy new road and that if any portion of the land was not required for the 5th respondent it should be handed back to the State. He also submits that the 5th respondent handed over some lands to the Diabetic Association of Sri Lanka which had returned the said lands. In any event, the new

Getambe-Kandy road does not run through any portion of the appellant's land and no portion of the appellant's land has been used to provide public utilities or any other development activity.

The lease of the said land was granted to the 4th respondent in the year 2001 for an initial period of 50 years. The 4th respondent has filled up a portion of the appellant's land and there is no other development. In any event, it is common ground that no hospital of whatsoever nature has been constructed on the appellant's land even by 2007 and one cannot claim that a private profit making venture which has not utilised the land for 7 years for the alleged purpose for which it was given to them can be construed as a development of public utilities. It is interesting to note that the lease of the land was granted to the 4th respondent in the year 2001 for an initial period of 50 years. The extent of the land to be utilized for the said project is approximately 2.5 acres. The 4th respondent has filled up a portion of the appellant's land only and there is no other development. The 4th respondent is getting very valuable land valued at Rs. 30 million when the 4th respondent has according to the indenture of lease only to pay rental at Rs. 600,000.00 a year from 2001 to 2005 and thereafter Rs. 1,200,000 for the next 20 years and Rs. 600,000.00 in 2028. Thus it could be seen the 5th respondent Urban Development Authority as well as the 4th respondent has been unjustly enriched at the expense of the appellant. It is my considered view that before the 5th respondent leased the appellant's lands to the 4th respondent for a purported private hospital and resort project which is a profit making venture of a commercial nature the 5th respondent should have offered the appellant's land to the appellant himself to develop the land for the public purpose, for development of public utilities. In fact the appellant had submitted an affidavit with his counter objections in the Court of Appeal wherein he and several persons who claimed to be owners of the land acquired and leased to the 4th respondent had stated that they can develop the land for a public purpose and that they have the money to do so. Though counsel for the 4th respondent contends that this proposal is unacceptable on the face of it as no mention is made of what the project is or how the financing is to be had, it appears to me that it would have been just and fair if the appellant was given the opportunity to place before the 5th respondent the proposal for development of public utility

before leasing out the appellant's land to a profit making private venture of a commercial nature.

Counsel for the 4th respondent contends that conditions precedent contained in Section 39A(2) before a divesting order can be made are as follows:

a) no compensation had been paid.
b) the land has not been used for a public purpose.
c) no improvements have been made.
d) the person interested in the land has consented to take possession of the land.

Counsel for the respondent submits that it is clear from the facts submitted to Court that elements (b)and (c) are not fulfilled.

i) as the land has been subsequently vested in the Urban Development Authority for the purpose of providing necessary facilities and amenities along side the main road.
ii) a part of the land has been used as a reservation for a stream or waterway.
iii) the remaining portion of the land is being used for a private hospital which is a public need in Kandy and based on a policy of the UDA the said hospital will have a free OPD service and a ward of 15 beds free which will benefit the public.
iv) appellant himself has admitted that improvements have been made.
v) the appellant's land is only a part of the land acquired and therefore cannot claim that his land was not used for a public purpose since the question is whether the entire lands acquired was used for a public purpose.

I am unable to agree with the aforesaid contention of counsel for the respondent.

As stated above, the appellant's land was taken possession of in the year 1990 on the ground of an alleged urgent public purpose the whole of it was unutilized until the year 2000 and then in the year 2000 the land was vested on the 5th respondent though there is no evidence produced that it was acquired for the purpose of the 5th respondent. The 5th respondent in 2001 wrongly granted a part of the land to a private entity the 4th respondent for a profit making venture of a commercial nature. A part of the appellant's land

remains unutilised even as at today. In the circumstances, no part of the appellant's land has been used for a public purpose. No improvements have taken place on the land and the filling up of the land by the 4th respondent for a purpose other than a public purpose cannot be described as improvements for the purpose of Section 39(A)(2)(c). However, the Court of Appeal too has come to the conclusion that conditions set out in Section 49(A)(2)(b) and (c) have not been fulfilled.

In the case of *De Silva* v *Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another*(6) the question of when can the Minister divest an acquired land was discussed at length with reference to Section 39(1)(A) and (2) of the Land Acquisition Act as amended by Act No. 8 of 1979. In that case Court came to the conclusion that:

(1) 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.

(2)(a) Where the public purpose was so urgent as to require immediate possession, necessitating a section 38 proviso (a) order, the land could not be restored if the public purpose was found to have evaporated after possession was taken. An improper acquisition could not be put right by executive action. So it was the amending Act No. 8 of 1979 was enacted to enable relief to be granted even where possession was taken. The Act contemplates a continuing state of things and does not refer only to the time of initial acquisition. It is sufficient if the lack of justification appears at any subsequent point of time.

(b) The Minister shall make a divesting order after satisfying himself of four conditions:

(i) no compensation has been paid:

(ii) the land has not been used for a public purpose after

possession was taken under Section 40(a) of the Land Acquisition Act.

(iii) no improvements have been effected after the Order of possession under section 40(a);

(iv) the person or persons interested in the land have consented in writing to take possession of the land after the divesting order is published in the Gazette.

(c) The purpose and the policy of the amendment (Act No. 8 of 1979) 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. Even in such a case it would be legitimate for the Minister to decline to divest if there is good reason – for instance that there is now a new public purpose for which the land is required.

(3) The executive discretion vested in the Minister is not unfettered or absolute. He must in the exercise of his discretion do not what he likes but what he ought.

(4) The true intent and meaning of the amending Act was to empower the Minister to restore to the original owner land for the acquisition (or retention) of which there was originally (or subsequently) no adequate justification, upon the fulfillment of the stipulated conditions. It is a power conferred solely to be used for the public good, and not for his personal benefit; it is held in trust for the public; to be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest.

At 292 *per* Fernando, J.

"So it was the amending Act was enacted in 1979 to enable relief to be granted even where possession had taken place. The long title of the Act refers to land acquired "without adequate justification". The learned Deputy Solicitor-General contended that this referred only to the point of time at which the land was initially acquired. I cannot agree. 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 the greater the lapse of time, the less the justification for the acquisition".

Considering the material placed before this Court, I would hold that the Court of Appeal erred in law in refusing to issue a writ of mandamus on the basis that conditions set out in Section 39A(2)(b) and (c) have not been fulfilled.

In passing I might also refer to a false and material misrepresentation of facts by the 4th respondent contained in paragraph 3 of page 10 of the written submissions tendered by the 4th respondent dated 28.12.2007 which reads as follows:

"It is respectfully submitted that the 4th respondent company is now owned by the Asiri Hospitals which has done yeomen service to the people of this country".

The appellant by motion dated 12.01.2008 has tendered a letter issued by the Asiri Hospitals PLC under the hand of Dr. Manjula Karunaratne the Director/Chief Operating Officer of Asiri Hospitals PLC stating that neither Asiri Hospitals PLC nor any of the Asiri Group of Companies have purchased nor have any interest in Aloka Hospitals Resorts Kandy (Pvt) Ltd.

It is apparent the aforesaid false and material misrepresentation of facts made by the 4th respondent is to overcome the allegations leveled against the 4th respondent by the appellant *inter alia* that it is a fraudulent company, that it has no assets to invest such a large sum of money, that it has no money to pay its contractors, that contractors have initiated two cases against the 4th respondent to recover a sum of 16 million etc. Though the 4th respondent vehemently denied these allegations it appears that in view of the aforesaid false statement of fact the credibility and integrity of the 4th respondent company is questionable and so is the motive and purpose of the 4th respondent company in obtaining the lease of the land.

For the foregoing reasons, I would answer the question of law Nos. c(i) to (iv), d,e (i) and (ii) and g dealing with the issue of a mandate in the nature of a writ of *mandamus* in the affirmative in

favour of the appellant. Accordingly I would set aside the judgment of the Court of Appeal insofar as it dismissed the appellant's prayer for *mandamus* and issue a mandate in the nature of a writ of *mandamus* to the 1st respondent directing him to make a divesting order under Section 39A(1) of the Land Acquisition Act in respect of the land which belongs to the appellant and was vested in the State and restore the said land to the possession of the appellant. The appellant would be entitled to costs of these proceedings.

S.N. SILVA, C.J. – I agree.
AMARATUNGA, J. – I agree.

Appeal allowed with costs.