DE SILVA
v.
ATUKORALE, MINISTER OF LANDS, IRRIGATION AND MAHAWELI DEVELOPMENT AND ANOTHER

SUPREME COURT.
FERNANDO, J., DHEERARATNE, J. AND
WADUGODAPITIYA J.
S.C. APPEAL NO. 76/92.
C.A. APPLICATION NO. 482/91.

3 MARCH, 1993.

Mandamus – Acquisition – Land Acquisition Act as amended by Act No. 8 of 1979, S. 39A, 38 proviso (a) – Section 16 of the Urban Development Authority Law, No. 41 of 1989 – Exercise of discretion – Public purpose.

After a notice had been exhibited under section 2 of the Land Acquisition Act, orders had been made on 12.03.82 under proviso (a) to section 38, for the taking of immediate possession, on the ground of urgency, of seven allotments of land in Bibile 19A IR 23, 8P in extent. An application made in April 1982 for *certiorari* to quash the orders on the ground that the acquisition was politically motivated and not in compliance with the UDA Law was dismissed on 16.10.86. Thereafter possession was taken. No action was taken to utilise the land. The inaction was attributed to the fact that court proceedings were pending and lack of finance. The public purpose for which the land was acquired was the Bibile (Town) Development Project. Tenders were called for a project to construct a shopping complex of 32 shops on the land – When can the Minister divest an acquired land? – Exercise of discretion – Section 39 (A) & (2) of the Land Acquisition Act as amended by Act No. 8 of 1979.

Held :

(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 that 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 for 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 satified 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 some 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 abolute. 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 fulfilment 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.

(5) The Minister in the instant case, has exercised his discretion very curiously. First he agreed to divest one lot, but did not do so. He then divested the first lot. Thereafter his reply to a direct request to divest the remaining land, was in effect, that it was not his business, but a matter for his colleague, who was not the statutory authority. This was a clear refusal to exercise his discretion for a wrong reason, and also an abdication of discretion. In the Court of Appeal he sought to justify his inaction on the different, but patently erroneous basis that the land was required for a shopping complex – ignorant or forgetful of the fact that the land was over 19 acres in extent while the shopping complex required only about 3% of that extent ; a manifestly erroneous basis for his refusal to exercise his discretion.

(6) The affidavits and documents produced, show, beyond doubt, that had the matter been considered properly, the Minister (1st respondent) had no option but to make a divesting order, retaining only the land actually required for the shopping complex, subject to compliance with section 39A (2) (d).

Cases referred to :

1. *Ratwatte v. Minister of Lands,* (1969) 72 NLR 60,61,63.
2. *Gamage v. Minister of Lands,* (1973) 76 NLR 25,32,44.
3. *Fernandopulle v. Minister of Lands,* (1978) 79 (2) NLR 115, 118.
4. *United States v. Wunderlich,* (1951) 342 US 98, 101.
5. *Rooke's Case,* (1598) 5 Co. Rep. 99b.
6. *Estwick v. City of London* (1647) Style 42.
7. *Roberts v. Hopwood,* (1925) AC 578, 613.
8. *Padfield v. Minister of Agriculture, Fisheries and Food,* (1968) AC 997.
9. *Breen v. Amalgamated Engineering Union,* (1971) 2 QB 175, 190.
10. *Roncarelli v. Duplessis,* (1959) 16 DLR (2d) 689, 705.

APPEAL from judgment of the Court of Appeal.

R. K. W. Goonesekera with *K. Balapatabendi* for the petitioner-appellant.

D. Premaratne, P.C., A. S. G. with *Chanaka de Silva* for the respondent-respondents.

Cur. adv. vult.

APRIL 01st, 1993.

FERNANDO, J.

This appeal involves a question of public and general importance as to the manner of the exercise of the powers of the Minister under section 39A of the Land Acquisition Act, as amended by Act No. 8 of 1979. After a notice had been exhibited under section 2 of the Act, Orders had been made on 12.3.82, under proviso (*a*) to section 38, for the taking of immediate possession, on the ground of urgency, of seven allotments of land in Bibile, 19A–1R–23, 8P in extent. One Lot was 1R–17P (" the first Lot "), another (" the second Lot ") 25,8P, and the remaining five 18A–3R–21P in extent. The petitioner-appellant (" the appellant ") claims that he and other members of his family were co-owners of those allotments ; he made an application in April 1982 for Certiorari to quash those Orders, alleging that the acquisition had been politically motivated, that there was no urgency, and that there had been no compliance with section 16 of the Urban Development Authority Law. No. 41 of 1989 ; that application was dismissed on 16.10.86 ; and thereafter possession was taken. Subsequently the land seems to have been handed over to the 2nd respondent, the Urban Development Authority. It is common ground that the public purpose for which the land was acquired was the Bibile (Town) Development Project.

No action was taken to utilise the land, or any part thereof, pending the determination of that application by the Court of Appeal; thereafter, says the Chairman of the Bibile Pradeshiya Sabha, implementation was " suspended " due to the nonavailability of finance. The appellant, probably noticing this large extent of land remaining unutilized for so long, began to seek its return administratively ; since Orders under section 38 had been made, the acquisition proceedings could not be abandoned under section 50 ; since possession had been taken under section 40 (*a*), pursuant to the section 38 Orders, the Minister was not empowered to revoke those Orders under section 39. The only possible remedy was thus under section 39A ; according to its long title, Act No. 8 of 1979 was " An Act..... to provide relief to persons whose lands have been acquired without adequate justification "; it provided :

" 39A (1) Notwithstanding that by virtue of an Order under section 38 (hereinafter in this section referred to as a " vesting Order ") any land has vested absolutely in the State and actual possession of such land has been taken for or on behalf of the State under the provisions of paragraph (*a*) of section 40, the Minister may, subject to subsection (2), by subsequent Order published in the Gazette (hereinafter in this section referred to as a " divesting Order ") divest the State of the land so vested by the aforesaid vesting Order.

(2) The Minister shall prior to making a divesting Order under subsection (1) satisfy himself that –

(a) no compensation has been paid under this Act to any person or persons interested in the land in relation to which the said divesting Order is to be made ;

(b) the said land has not been used for a public purpose after possession of such land has been taken by the State under the provisions of paragraph (*a*) of section 40 ;

(c) no improvements to the said land have been effected after the Order for possession under paragraph (*a*) of section 40 has been made ; and

(d) the person or persons interested in the said land have consented in writing to take possession of such land immediately after the divesting Order is published in the Gazette ".

It would appear that the appellant was espousing the cause of all the co-owners, and at no stage did the respondents contend that the appellant lacked *locus standi* or that the application was defective for failure to join all the co-owners. At first he had some success. By letter dated 10.1.89, a director of the 2nd respondent informed the appellant's sister that there had been a change in the 2nd respondent's development plan, and that it had been decided to divest the ownership of one lot to her ; the appellant says he met the said director and tendered a handwritten letter from his sister consenting to the divesting, but that up to date the land had not been divested ; the respondent's position is that no letter of consent was received. However, it is admitted that by a divesting order dated

25.1.89 under section 39A, published in Gazette 543/12 of 2.2.89, another lot (the first lot) was divested. The appellant then appealed to H.E. the President by letter dated 19.5.89, to which he received a reply dated 16.7.89 from the Presidential Secretariat stating that the letter had been forwarded to the Secretary, Ministry of Lands, for appropriate action. On 11.8.89 the then Minister of Lands, in answer to a question in Parliament, stated that the decision as to the suitability of the land for acquisition had been taken by the 2nd respondent, which would be responsible for the payment of compensation ; if the 2nd respondent decided that this acquisition was unnecessary, because the land was not required for urban development, or for any other reason, the acquisition proceedings might even be totally abandoned ; apart from this, there appears to have been no response to the appeal to H.E. the President. The appellant's brother then appealed on 1.3.90 to the Chairman of the 2nd respondent, who by letter dated 26.3.90 stated that " this Authority is studying the present land requirements of the Bibile Town Development and..... you will be informed when this matter is finalized "; and again on 14.9.90 that " this Authority is pursuing action with the Ministry of Policy Planning..... to reach a finality in acquisition of lands at Bibile ". Thereafter representations were made to H.E. the President in January 1991 by a Member of Parliament from Bibile, on behalf of the appellant, pleading for the return of his lands which had not been put to any use for nine years. On 22.2.91 the appellant wrote to the then Minister requesting him to divest the land. The reply to that request, sent on behalf of the Minister, was very significant :

> " Acquisition proceedings were initiated by this Ministry on a request made by the then Ministry of Local Government. Housing and Construction. Your request for the release of this land is a matter for consideration by the Ministry of Policy Planning and Implementation. Please, therefore, make your representations to the Secretary of that Ministry. "

According to the Chairman of the Bibile Pradeshiya Sabha, since Bibile town had an acute shortage of proper facilities for commercial activities it was decided to construct a shopping complex consisting of 32 shops ; tenders were called on 9.11.90 from prospective occupants (lessees) ; and numerous applications were received. According to the 1st respondent (who is the Minister for the purposes of section 39A), it would appear that the decision to construct a

shopping complex was taken in the latter part of 1990 – probably the result of the " study " and the " action " referred to in the letters written by officers of the 2nd respondent in March and September 1990. Within the ambit of the original town development project, as conceived in or about 1982, there was nothing in contemplation in 1991 other than this shopping complex ; there was no other public purpose.

It is therefore necessary to consider this shopping complex in some detail. According to the Chairman of the Pradeshiya Sabha, the cost of the project was six million rupees ; upon completion it would bring immense benefit to the people of Bibile – public roads, wells, conveniences, and cemeteries in the area were in poor condition, and the income from the shops would enable the Pradeshiya Sabha to improve their condition, and also to provide pre-school facilities for needy children ; the complex was to be completed in time for the Buttala Gam Udawa of June 1992. The extent of the proposed complex appears from two documents annexed to the 1st respondent's affidavit. One was the relevant declaration under section 5 which referred to the second lot, 25.8P in extent. The other document was a set of sketches of the complex, according to which the total area required was 900 square metres (or less than 35 perches). Learned Counsel for the appellant submitted that the 1st respondent's affidavit proceeded on the basis that the shopping complex was to be constructed on the second lot alone. Clearly, the shopping complex did not require 19 acres of land ; in the foreseeable future no shopping complex, anywhere in Sri Lanka, would require 19 acres of land ; beyond any reasonable doubt, therefore, over 18 acres of the remaining vested land was not required for the only public purpose in contemplation during the period 1990–1992.

On 10.6.92 the appellant filed an application in the Court of Appeal for Certiorari to quash the acquisition and for Mandamus to compel the 1st and 2nd respondents to divest the aforesaid six allotments of land. The Court of Appeal dismissed that application, holding that –

(a) The appellant was not entitled to question the acquisition, as his previous application had been dismissed :

(b) the appellant could not complain that the land vested for a specific public purpose ("Bibile (Town) Development Project") was to be used for a different public purpose (the

establishment of a shopping complex) which is for the benefit of the public ; " the Minister has the discretion to utilize the land acquired for any other public purpose with the ultimate view of the development of the area ";

(c) since the land was being used for a public purpose, the question of making a divesting order did not arise ; and

(d) in any event " the whole question of whether there should be a shopping complex is a question to be resolved in the political arena and the appellant is trying to turn a political matter into a justiciable issue "; " the Minister has the power (to make a divesting order) but it is discretionary. Central to this sense of discretion is the idea that within a defined area of power the official must reflect upon its purpose, and then settle upon the policies and sto (sic) [steps ?] for achieving them. There may be discretion in identifying and interpreting purposes, there may also be discretion as to the policies, standards and procedure to be followed in achieving these purposes "; " where a decision involves a broad question of State Policy for the development of the area for the public benefit, the courts will also be unwilling to exercise their supervisory jurisdiction ".

The respondents do not dispute that, as at the date when the application was made to the Court of Appeal (and even now), the conditions specified in section 39A (2) have been satisfied : no compensation had been paid in respect of the land (except perhaps in the case of one lot), the land had not been used for a public purpose, and no improvements to the land had been effected. Although no formal written consent by the co-owners was submitted, it is apparent that this was not the ground on which the Minister refused to divest ; it appears from the affidavits and documents that such consent would have been forthcoming if called for ; and the Court of Appeal did not refuse the application for want of such consent, nor did the respondents take up that position. Learned Counsel for the Appellant did not pursue the prayer for Certiorari in respect of the original acquisition. He did not seek to question the refusal to divest the second lot, or such other portion of land, as was reasonably required for the shopping complex. He conceded for the purposes of this appeal, that the shopping complex was a

public purpose and that some land in addition to the second lot could reasonably be regarded as necessary for that purpose ; he only claimed a right to the divesting of the rest of the land.

The first and second grounds relied on by the Court of Appeal are not questioned by the appellant. Indeed, the shopping complex was not a different public purpose, but merely one component of a town development project. The order of the Court of Appeal is challenged in respect of the other two grounds :

(1) the Minister's discretion under section 39A is not an unfettered or absolute discretion ; the statute did not even seek to make it " final and conclusive "; and it is subject to the supervisory jurisdiction conferred by Article 140 of the Constitution ;

(2) that discretion has to be exercised reasonably and properly ; if not, it is subject to review by Mandamus ; and

(3) that discretion either was not exercised, or was unreasonably and erroneously exercised, insofar as the Minister failed to divest the remaining land (apart from whatever was actually required for the shopping complex) ; the fact that a small part of the land was required for that purpose did not enable the retention of the entirety.

The learned Deputy Solicitor General contended that even if the conditions set out in section 39A (2) had been satisfied, section 39A (1) confers an unfettered or absolute discretion on the Minister ; that the Minister had chosen not to exercise his discretion under section 39A (1), and that in any event the refusal to exercise his discretion could not be questioned ; and, alternatively, that the Minister could be compelled to make a divesting order only where the original acquisition was improper or illegal, or constituted an abuse of power.

There is a fundamental fallacy in this contention. 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 ; hence section 39 and section 50. But there was a *lacuna*. 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. The mischief of that state of the law is apparent from several decisions, reported and unreported. Thus in *Ratwatte v Minister of Lands,* [1] Samarawickrame, J., pointed out that " in recent times, it has been the rule rather than the exception to make order for immediate possession of land in acquisitions..... it is remarkable how often over the years it has turned out that the public interest appeared to require the acquisition of land belonging to persons politically opposed to the party in power at the time ". Pathirana, J., in *Gamage v Minister of Lands,* [2] held that the validity of a section 38, proviso (*a*), order cannot be questioned in a Court, and an aggrieved person can only seek administrative relief from the Minister under section 39 ; but that provision had no application where possession had actually been taken. Thereafter when the power of the Courts to issue interim injunctions in respect of *mala fide* acquisitions was upheld in 1974 by a bench of nine Judges (S. C. APN/GEN/6/74 and other cases), the Interpretation (Amendment) Law No. 29 of 1974 was immediately enacted. Although Samarakoon, C.J., in *Fernandopulle v Minister of Lands,* [3] disagreed with *Gamage v Minister of Lands,* there continued to be dissatisfaction about the extensive use of section 38, proviso (*a*), and the difficulty of challenging such Orders ; thus an improper acquisition in those circumstances could not be put right by executive action. So it was that the amending Act was enacted in 1979 to enable relief to be granted even where possession had been taken. 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.

If compensation has been paid or improvements have been made, then despite the inadequacy of justification, divesting is not permitted. The purpose and the policy 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. Of course, even in such a case it would be legitimate for the Minister to decline to divest if there is some good reason – for instance, that there is now a new public purpose for which the land is required. In such a case it would be unreasonable to divest the land, and then to proceed to acquire it again for such new supervening public purpose. Such a public purpose must be a real and present purpose, not a fancied purpose or one which may become a reality only in the distant future. The 1st respondent, however, has not given any such reasons, and I cannot make any assumption in his favour.

The argument that an executive discretion of this nature is unfettered or absolute, that the repository of such a discretion can do what he pleases, is not a new one. But it is one which has been unequivocally rejected. The discretion conferred in 1979 must also be considered in the background of the constitutional guarantees which sought to make the Rule of Law a reality, and in particular Article 12. An example was suggested to the learned Deputy Solicitor General : where after an acquisition of one hundred contiguous allotments of land, for an irrigation project, or for a road, the project had to be abandoned, for technical, financial or political reasons, the Minister then exercised his discretion under section 39A, to divest some allotments, while retaining others (in circumstances in which no rational distinction could be made between the two categories), perhaps influenced by personal or political considerations. It was readily conceded that such a decision could be challenged in an application under Article 126. That alone is enough to establish that the discretion under section 39A is not unfettered ; and here, out of seven lands acquired in one acquisition proceeding, the first lot has been divested, but not other lots which are equally unaffected by the proposed shopping complex, and no grounds have been urged to justify that discrimination. The respondents did not contend that the time limit prescribed by Article 126 (2) applied in respect of this allegation of the violation of fundamental rights by executive action, and in any event that time limit has not been made applicable where such a question arises in the course of hearing a writ application (cf Article 126 (3)). However, leaving aside constitutional

considerations, according to the general principles of administrative law governing statutory discretions, the Minister's discretion is neither unfettered nor absolute. As Justice Douglas of the United States Supreme Court observed, dissenting, in *United States v Wunderlich,* [4].

> " Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded ; at times, his privacy ; at times, his liberty of movement ; at times, his freedom of thought ; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions. [The decision of the majority] makes a tyrant out of every contracting officer. He is granted the power of a tyrant even though he is stubborn, perverse or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected. "

These principles have been explained and elaborated in a series of English decisions over a long period of time :

> ".....and notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections ; for as one saith, *talis discretio discretionem confundit* " (Lord Hailsbury, citing Coke, in *Rooke's case,* [5])

> " Wheresoever a commissioner or other person hath power given to do a thing at his discretion, it is to be understood of sound discretion, and according to law, and that this court hath power to redress things otherwise done by them " *(Estwick v City of London,* [6])

" A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so – he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably " (Lord Wrenbury in *Roberts v Hopwood,* [7])

" Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court " (Lord Reid in *Padfield v Minister of Agriculture, Fisheries and Food,* [8])

" First, the adjective [unfettered] nowhere appears in section 19 and is an unauthorised gloss by the Minister. Secondly, even if the section did contain that adjective I doubt if it would make any difference in law to his powers, save to emphasise what he has already, namely that acting lawfully he has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and objects in conferring a discretion upon the Minister rather than by the use of adjectives " (Lord Upjohn in *Padfield v Minister of Agriculture, Fisheries and Food,* [8])

" The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this : the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into

account, then the decision cannot stand. No matter that the statutory body may have acted in good faith ; nevertheless the decision will be set aside. That is established by *Padfield v Minister of Agriculture, Fisheries and Food* which is a landmark in modern administrative law " (Lord Denning, M.R., in *Breen v Amalgamated Engineering Union,* [9])

" 'Discretion' necessarily implies good faith in discharging public duty ; there is always a perspective within which a statute is intended to operate ; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another Province or because of the colour of his hair ? The ordinary language of the Legislature cannot be so distorted " (Rand, J., in *Roncarelli v Duplessis,* [10])

Wade observes (Administrative Law, 5th ed., pp. 353–354) :

" The common theme of all the passages quoted is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Athough the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.

The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do neither unless it acts reasonably and in good faith and

upon the lawful and relevant grounds of public interest. Unfettered discretion is wholly inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.

> There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Nor is this principle an oddity of British or American law ; it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities ; it applies no less to Ministers of the Crown. Nor is it confined to the sphere of administration : it operates wherever discretion is given for some public purpose, for example where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law *.

I hold that 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 fulfilment of the stipulated conditions. It was a power conferred solely to be used for the public good, and not for his personal benefit; it was held in trust for the public ; to be exercised reasonably and in good faith, and upon lawful and relevant grounds of public interest.

Further, the Minister has approached his discretion very curiously. First, he agreed to divest one Lot, but did not do so. He then divested the first Lot. Thereafter, his reply to a direct request to divest the remaining land, was, in effect, that it was not his business, but a matter for his colleague, who was not the statutory authority ; this was a clear refusal to exercise his discretion for a wrong reason, and also an abdication of discretion. However, in his affidavit in the Court of Appeal, he sought to justify his inaction on the different, but patently erroneous, basis that the land was required for a shopping complex – ignorant or forgetful of the fact that the land was over 19 acres in extent while the complex required only about 3% of that extent ; a manifestly erroneous basis for his refusal to exercise his discretion. The affidavits and documents produced, show, beyond doubt, that had the matter been considered properly, the 1st

respondent had no option but to make a divesting order, retaining only the land actually required for the shopping complex, subject to compliance with section 39A (2) (*d*).

It was agreed by Counsel for all parties that the 1st respondent would tender to the Court a copy of the Preliminary Plan showing the portion of land actually required for the shopping complex ; that Plan No. MO/A/80/10 dated April 1981 has been tendered on 26.3.93, and shows two allotments, 2R–19.8P in extent, as being required for the shopping complex. This the State will be entitled to retain. According to the respondents, one allotment, Hatnarawawatta (2A–3R–32P in extent) did not belong to the appellant, and compensation has been paid. I therefore set aside the order of the Court of Appeal, insofar as it dismissed the Appellant's prayer for Mandamus. A mandate in the nature of a writ of Mandamus will issue to the 1st respondent (or if he has ceased to hold office, to his successor in office)–

(1) directing him to make a divesting order under section 39A (1) of the Land Acquisition Act, in respect of three allotments of land of which possession was taken by virtue of Orders, under proviso (*a*) to section 38, dated 12.3.82, (namely Dalukwatta, 5A–1R–24P ; Galsiyambalawatte, 1A–1R–24P ; and Hatnarawawatta, 8A–2R–13P, in respect of which the conditions specified in section 39A (2)(*a*) to (*c*) admittedly have been satisfied), provided that the Appellant tenders to the 1st respondent on or before 31.5.93 a written consent in terms of section 39A (2) (*d*) from the persons interested (insofar as he is aware) in the said allotments, and

(2) directing him to consider whether a divesting order under section 39A (1) ought to be made in respect of Hatnarawawatta, 2A–3R–32P in extent, after hearing the appellant.

The respondents will pay the appellant a sum of Rs. 10,000 as costs in this Court.

DHEERARATNE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Appeal allowed.
Mandamus issued.