RASHID
v
RAJITHA SENARATNE, MINISTER OF LANDS AND OTHERS

SUPREME COURT
FERNANDO, J.
YAPA, J. AND
WEERASURIYA, J.
S.C. APPEAL NO. 25/2003
C.A.NO. 1032/2001
OCTOBER 7, 2003

Writs of mandamus and certiorari – Order under section 38 Proviso (a) of the Land Acquisition Act to acquire a land urgently for a public purpose – Identity of the land – 17 years delay in using the land – Application for mandamus to direct a divesting of the land – Section 39A of the Act.

The petitioner was the owner of 1/16 share of a land and building, No. 2 New Bazaar Street, Nuwara Eliya. Proceedings for acquiring the said land commenced in 1983. A section 2 notice was published in respect of the land. This was followed by an order for the acquisition of the land under section 38 proviso (a) of the Land Acquisition Act. The notice of the order did not specify the purpose of the acquisition; and the acquiring proceedings continued for 17

years. The land was not used for any purpose although possession of the land was given to the Urban Development Authority.

A notice under section 7 of the Act was published calling for claims to the land. The appellant claimed title and compensation to the land. As different decisions were being made by the acquiring officer, the appellant applied for a *writ of mandamus* to compel finality to the proceedings. That case was settled when the Surveyor-General made a plan NU/1839 dated 15.12.97 showing the premises acquired as 25:25 purchase *viz.*, premises No. 2 aforesaid.

In view of the continuing delay of proceedings the appellant applied *inter alia*, for a *writ of mandamus* to direct the Minister to make an order divesting the property under section 39A of the Act.

The application satisfied the pre-conditions in section 39A for divesting, but the Court of Appeal dismissed it stating that it could not be shown that the acquisition was *ultra vires*.

Held:

1. The Minister never claimed that the land was required for a particular public purpose.
2. For the issue of mandamus to compel a divesting of the land under section 39A of the Act, it is unnecessary to establish that the acquisition was *ultra vires*.
3. The appellant was entitled to a *writ of mandamus* for a divesting of No. 2 New Bazaar Street depicted in the Surveyor-General's plan UN/1839 dated 15.12.97 and a *writ of certiorari* quashing the initial order of acquisition.

Cases referred to:

1. *De Silva* v *Dissanayake* – (2003) 1 SRI LR 52
2. *De Silva* v *Atukorale* – (1993) 1 SRI LR 203 at 293

APPEAL from the judgment of the Court of Appeal

M.A. Sumanthiran for appellant

M. Gopallawa , State Counsel for 1st and 3rd respondents.

Cur.adv.vult

JANUARY 20, 2004

FERNANDO, J.

This is an appeal against the order of the Court of Appeal dismissing the application of the petitioner-appellant ("the Appellant") 01

for *Mandamus* directing the 1st respondent, the Minister in charge of the subject of land, to divest land acquired by the State under the Land Acquisition Act ("the Act").

In November 1974 the appellant became the owner of an undivided 1/6th share of a land and building (2 acres 3 roods 28 perches in extent), which included the land and building bearing assessment No. 2 New Bazaar Street, Nuwara Eliya. Thereafter, according to him, with the full consent of the other co-owners he went into exclusive possession of No.2 New Bazaar Street, which was approximately 29.25 perches in extent. In July 1975 the building was requisitioned by the Minister of Internal and External Trade, but in 1977, after litigation, the appellant was restored to possession. In July 1983 the building was extensively damage in the ethnic riots.

Thereafter a notice dated 28.9.83 under section 2 of the Act was published in respect of a land (2 acres 2 roods 21 perches in extent), which admittedly included No. 2 New Bazaar Street. That was followed by an order under the proviso (a) to section 38 which was published in the Gazette of 6.3.84. Neither the notice nor the order specified the public purpose for which the land was required. Possession was taken of several premises including No. 2 New Bazaar Street, and on 31.5.88 possession was handed over to the Urban Development Authority, the 2nd respondent. I will consider later in this judgment the question whether No. 2 New Bazaar Street thereafter vested in the 2nd respondent.

The acquisition proceedings dragged on. In response to a notice under section 7, the appellant claimed title and compensation in a sum of Rs. 4.6 million. On 3.4.90 the Acquiring Officer made his determination under section 10(1)(a), declaring the appellant entitled to 29.25 perches out of the land acquired. The appellant accepted that determination in regard to title to 29.25 perches but requested clarification as to whether the building on No. 2 New Bazaar Street was included. By letter dated 17.4.90 the Acquiring Officer confirmed that the determination referred to No. 2 New Bazaar Street. While pressing his claim to compensation, the appellant requested that the land acquired from him be demarcated so that it could be valued correctly.

There was no objection to that determination, nor any application for a reference, and as stated in the determination it therefore became final. However, by letter dated 12.9.91, another officer purported to cancel that determination and to order a fresh inquiry. After a fruitless exchange of correspondence, the appellant applied to the Court of Appeal (CA Application No. 399/96) for *Mandamus* directing the acquiring officer to expedite the finalisation of the matter and the payment of compensation. It was specifically averred that the purported cancellation of the determination made on 3.4.90 was illegal and had no force in law. That application was settled on 10.12.96. Senior State Counsel who then appeared did not take up the position that the determination had been cancelled or was not in force, but on the contrary acknowledged that the appellant was entitled to a 1/6th share. However, she maintained that he was entitled to less than 29.25 perches, and consented to the relevant land being identified. The land was thereafter surveyed by the Surveyor-General, and was identified and depicted in Plan No. NU/1839 dated 15.12.97, its extent being stated to be O.0634 hectares in extent: i.e. 25.25 perches. Although the appellant now disputes that extent, he took no action either in the same or in another application to challenge that finding. For the purpose of this appeal, therefore, the land and its extent must be taken to be as shown in Plan No. NU/1839, and the appellant's title to that land, its identity and its extent cannot now be disputed. The determination dated 3.4.90 is also final, subject only to the variation in extent.

Not having received compensation for 17 long years, by letter dated 1.3.2001 the appellant requested the then Minister of Lands to divest the land under section 39A of the Act, pointing out that although it was purportedly acquired for an urgent public purpose it remained idle and neglected, and that the requisite conditions had been satisfied, namely:

(a) No compensation had been paid;

(b) The land had not been used for a public purpose;

(c) No improvements had been effected; and

(d) The person interested in the land consented in writing to take possession upon divesting.

The Minister did not deny or dispute the appellant's contentions, either in a reply or by an affidavit in the subsequent writ application. In particular, he did not claim that the land had been vested in the 2nd respondent, or had been used for a public purpose, or was needed for a public purpose. Instead, after four months, by a letter dated 4.7.2000 the Director/Lands of the Minister acknowledged the appellant's letter dated 1.3.2000 - both references should have been to the year 2001 – stating that "action ***will be taken*** to acquire the land and to pay compensation to you under the of the Land Acquisition Act". One can only lament such a grievous lack of care and consideration in acquiring a citizen's land and disposing of his claims to compensation or divesting.

The appellant then applied to the Court of Appeal for *Mandamus* to divest the land, *certiorari* to quash the Acquiring Officer's decision of 12.9.91 to cancel the determination dated 3.4.90, and *Mandamus* to direct the Acquiring Officer to declare the appellant entitled to a 1/6th share equivalent to 29.25 perches.

The matter was argued on 24.9.2002, and on 14.11.2002 the Court of Appeal held that:

> "The [Appellants] application is based on the ground that he had obtained prescriptive right against the other co-owners and therefore this Court should make a declaration that he is entitled to 1/6th share of the land..... Clearly this application is misconceived in law, as this relief can only be granted by a Civil Court of competent jurisdiction.
>
> ....the relief sought which was to divest the corpus under section 39A [of the Act] was on the basis that the land was not used for any purpose for the last 18 years nor any compensation was paid in relation to the same. However [the notice under section 2 had been sent and the order under the proviso (a) to section 38]..... could be challenged only.....on the ground that there was no urgent public requirement, or on the basis of failure to comply with the rules of natural justice...
>
> ....it seems that the [appellant has] indirectly acceded to this vesting and the inquiry that was held in terms of

section 9 and 10(1)(a)...

> ...this Court cannot on the basis of the prayers of the [appellant] come to a finding that the aforesaid order... was *ultra vires* even though no steps have been taken with regard to the public purpose for which the land was acquired, even after the lapse of 18 years. Therefore it must remain as a valid order.
>
> Further the prayer of the [appellant] to quash the order of the Acquiring Officer cancelling the decision made under section 10(1)(a)... is belated and *laches* would operate against the invocation of the writ jurisdiction."

I will deal first with the Acquiring Officer's determination dated 3.4.90. The effect of that determination read with the subsequent settlement in the Court of Appeal (CA Application No. 399/96) was that the determination was valid and operative (subject only to the variation in extent), that the cancellation of that determination was void and inoperative, and that the appellant had title (howsoever acquired) to the land 25.25 perches in extent depicted in Plan No. NU/1839. In those circumstances, the appellant's prayer for *Certiorari* to quash the cancellation of that determination was superfluous, and the Court of Appeal should have proceeded on the basis that the determination was valid and operative. No question of *laches* arose.

Likewise, whatever the basis on which the appellant claimed title, that determination was final and conclusive as to the appellant's 1/16th share, and *Mandamus* directing the Acquiring Officer to declare the Appellant's right was superfluous. The Court of Appeal should have proceeded on the basis that the appellant's share had been conclusively established.

There remained only the prayer for *Mandamus* to divest the land. The Court of Appeal erred in holding that the appellant was not entitled to a divesting order because the notice under section 2 and the order under proviso (a) to section 38 were valid and/or had not been challenged, and because he had acquiesced in the vesting. There is nothing in section 39A of the Act which excludes the right to a divesting order where the original vesting is valid: the entitlement to a divesting order springs primarily from the fact that –

after vesting – the land had not been used for the public purpose for which it had been acquired. Thus a claim under section 39A does not depend on the validity or invalidity of the original vesting, although a divesting order may perhaps be more readily granted where the original vesting was wrongful (see *de Silva* v *Dissanayake*[1]).

I turn no to the question whether No. 2 New Bazaar Street did vest in the State and thereafter in the 2nd respondent.

Although the documents produced did not unambiguously show that No. 2 New Bazaar Street was covered by the section 38 order, the appellant (as well as the other parties) proceeded throughout on the basis that the premises had vested in the State, and in the circumstances I will proceed on the same basis.

In the course of the hearing in this Court, we raised the question whether this Court would be precluded from directing the divesting of the premises if in the meantime title to the premises had passed to the 2nd respondent. However, up to that point of time there was no evidence that title had passed, and the 2nd respondent had made no such claim. When judgment was reserved the parties were given time to file written submissions. The respondents were also asked to ascertain whether there was documentary proof that title had passed. Although the 2nd respondent had not been represented at the hearing, its attorney-at-Law tendered an affidavit from its Director-General, together with a copy of a vesting certificate (dated 20.12.2000) under section 44 of the Act in favour of the 2nd respondent, which was subject to the condition ***that the land should be used only for the purpose for which it had been acquired***. At no stage previously had it been pleaded that No. 2 Bazaar Street had vested in the 2nd respondent. It appears from the vesting certificate (read with relevant plan) that the certificate did cover No. 2 New Bazaar Street, but restricted the purposes for which the 2nd respondent could use the land.

In order to determine the appellant's claim to a divesting order, I have now to consider whether the land had been used for a public purpose and/or whether any improvements had been effected.

The only relevant material produced in the Court of Appeal was a brochure issued by the 2nd respondent advertising "an uniquely

designed complex to accommodate both commercial and residential units", consisting of a three-storey building, with 35 shops (120 to 525 square feet in area, at prices running from Rs. 0.7 to Rs. 2.3 million) and 16 residential units (200 to 575 square feet in area, at prices ranging from Rs.1.0 to 2.7 million). A senior assistant secretary of the Ministry of Urban Development submitted an affidavit, dated 2.11.2001, in which he claimed that the 2nd respondent "has implemented a commercial complex within Lawson Street on the land acquired for constituting the subject-matter of this application [s/c] has also been utilized as a public car park, as part of the commercial development of the site". The Court of Appeal itself observed that "no steps have been taken with regard to the public purpose for which the land was acquired, even after the lapse of 18 years".

In the written submissions filed in this Court (before the oral hearing) by the 1st and 3rd respondents, it was contended that the land had been used for a public car park, as part of the commercial development of the site and that "the mere fact that the shopping and residential complex has not been constructed does not in any manner indicate that the land has not been used for a public purpose". It is thus clear that nothing had been done in respect of the commercial complex.

As for the "public car park", it was only their written submissions filed in this Court that those respondents tendered the 2nd respondent's "construction plan" and the builder's final bill dated 18.12.2001 (for nearly 5 million rupees). That bill disclosed that the contract for the "construction of ***car park and public square*** at Lawson triangle" was awarded on 16.3.2001 – ***after*** the appellant had sought divesting on 1.3.2001. No explanation was forthcoming for the failure to produce these documents in the Court of Appeal. The construction plans do not show any shopping or residential units, or any buildings, but only an open area consisting of a raised stage, paved areas for pedestrians, and some parking areas. According to those plans, the appellant's land was intended to be used for the stage, and not for a car park. A "car park and public square" is a purpose very far removed from a multi-storey shopping-cum-residential complex. Even if the vesting certificate did vest the land in the 2nd respondent, that was not a permissible use

of the land taken from the appellant. Construction activities connected with a wrongful use of the land cannot be regarded as an "improvement" within the meaning of section 39A.

In support of the contention that the land was required for a public purpose, albeit different to the original, the respondents referred to my observations in *de Silva* v *Atukorale* (2) [1993] 1 Sri LR 283 at 293:

> "....even [if the requisite conditions are satisfied] 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."

Not only did the vesting certificate excluded the "new" purpose, but the Minister never claimed – either in the course of the court proceedings or before – that he (or any of his predecessors) had ever formed the opinion that No. 2 New Bazaar Street was required for a car park and/or public square.

I therefore hold that the acquisition was only for the purpose of the particular shopping-cum-residential complex proposed by the 2nd respondent; that no steps whatsoever had been taken to implement that project; that the mere use of the land as a car park in the meantime cannot in the circumstances be regarded as "use" for that public purpose; that the use of the land by the 2nd respondent for a "car park and public square" was not a purpose contemplated or authorised by the State; that even if the vesting certificate did pass title to the 2nd respondent, a "car park and public square" was nevertheless an unauthorised and unlawful purpose, and not for a public purpose within the meaning of section 39A of th Act; that construction activities for the purpose were not "improvement" within the meaning of section 39A; and that in any event construction activities commenced after divesting had been demanded should not, save in very exceptional circumstances, be treated as improvements.

I therefore grant and issue an order in the nature of a *writ of Mandamus* directing the 1st respondent to divest No. 2 Bazaar Street (depicted in Plan No. NU/1839 dated 15.12.97, 0.0634 hectares in extent) to the appellant under and in terms of section 39A of the Act, and in order to make such order effective and to remove any doubt as to title, I also grant and issue an order in the nature of a *writ of Certiorari* quashing the vesting certificate dated 20.12.2000 in favour of the 2nd respondent, in so far as it relates to the aforesaid land and premises. This order will not preclude any 270
future *bona fide* acquisition of the aforesaid land and premises. The appellant will be entitled to costs in a sum of Rs. 50,000 payable by the 2nd respondent.

YAPA, J. – I agree

WEERASURIYA, J. – I agree

Appeal allowed.