HOPMAN AND OTHERS

v.

MINISTER OF LANDS AND LAND DEVELOPMENT AND OTHERS

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. APPEAL NO. 21/93.
C.A. APPLICATION NO. 1777/79.
OCTOBER 06, 1993.

Land Acquisition - Certiorari - Land Acquisition Act, ss. 2, 4, 5 and 38 proviso (a) - Undue Delay and Waiver - National Housing Act, ss. 49, 50 - Act, No. 18 of 1972 and Act, No. 29 of 1974 - Interpretation Ordinance Section 24 - Courts Ordinance s. 42 - Administration of Justice Law No. 44 of 1973, s. 12 - Constitution of 1978 , Article 140.

The land in dispute was acquired on a certificate by the 2nd respondent (Minister of Housing & Construction) under s. 49 of the National Housing Act, that it should be acquired by the Government for carrying out a "housing object" by the 5th, 6th and 7th respondents. Under s. 2 of the Act "a housing object" includes construction of buildings for residential purposes. The Acquiring Officer took possession of the land and vested it in the National Housing Department. Thereafter the 4th respondent (Commissioner for National Housing) gave possession thereof to the 5th, 6th and 7th respondents presumably pending a formal disposition under s. 50 of the Act after receiving a payment of Rs. 168,000/-.

The appellants impeached the validity of the acquisition on the following grounds:

1. The boundaries and extent of the land described in the notices under sections 2 and 4 and the declaration under s. 5 of the Land Acquisition Act differ from those set out in the Acquisition Order – particularly the extent differs by 18.12. p.

2. The acquisition was not for a public purpose or for a housing society.

3. The acquisition is *mala fide* as it was done at the behest of the 5th respondent who was a Cabinet Minister who was using his political power for himself and for the 6th and 7th respondents who were his brother and brother-in-law respectively.

While denying these grounds the 5th, 6th and 7th respondents alleged that the appellants had sought an increase of compensation from the Board of Review and they were guilty of delay.

Held:

1. The appellant's appeal to the Board of Review for enhanced compensation cannot be regarded as conduct which precludes the relief sought by the appellants and their conduct did not amount to a waiver.

2. Under s. 49 of the National Housing Act the 5th, 6th and 7th respondents would be eligible to receive land for a housing object in their individual capacity. The construction of buildings for residential purposes would be under s. 49 "deemed to be for a public purpose".

3. There is no evidence of *mala fides.*

4. The allegation of delay in filing the writ application is not irrelevant.

5. Act, No. 18 of 1972 and Act, No. 29 of 1974 do not preclude the appellants from challenging the impugned acquisition. Under s. 24 of the Interpretation Ordinance enacted by Act No. 18 of 1972 and amended by Act No. 29 of 1974 the jurisdiction of the Court to grant an injunction or a stay order against the State or a Minister or a State Officer acting as such was removed, but by subsection 5 of s. 24 the power of Court to make an order declaratory of the rights of parties was not affected. The said Acts did not touch the power of the Supreme Court to grant writs under s. 42 of the Courts Ordinance (or later), under s. 12 of the Administration of Justice Law No. 44 of 1973, except that by force of s. 24 of the Interpretation Ordinance the court may not have had the power to grant a stay order restraining an acquisition. This power was regained after the writ jurisdiction became a remedy provided for under Article 140 of the 1978 Constitution.

6. The appellants were not by law precluded from challenging the acquisition. The excuse for delay based on the amendment to the Interpretation Ordinance is

not tenable. The appellants have failed to give a satisfactory explanation for their conduct and the delay in making their application to the Court of Appeal.

Cases referred to:

1. *Biso Menike v. Cyril de Alwis* [1982] 1 Sri LR 368, 379-380.
2. *Billimoria v. Minister of Lands* [1978-79-80] 1 Sri LR 10.

Appeal from judgment of Court of Appeal.

D. R. P. Gunatilaka with *Raja Peiris* for appellants.
H. L. de Silva, P.C. with *N. M. Musafer* for 5th, 6th and 7th respondents.
1st, 2nd, 3rd and 4th respondents absent and unrepresented.

Cur. adv. vult.

November 02, 1993.

KULATUNGA, J.

On 25.09.79 the appellants made an application to the Court of Appeal for a writ of certiorari to quash an order made by the 1st respondent (The Minister of Lands & Land Development), under s. 38 proviso (a) of the Land Acquisition Act and published in Gazette dated 10.12.76, for the acquisition of a land in extent 1R.31.53P, in Castle Street, Colombo 8. The Court of Appeal gave its judgment dismissing the application on the ground of an objection taken by Counsel for the 5th, 6th and 7th respondents that the appellants were guilty of undue delay and other conduct amounting to a waiver of their right to challenge the acquisition. This appeal is against that judgment.

The land in dispute appears to have been acquired on a certificate by the 2nd respondent (The Minister of Housing & Construction), under s. 49 of the National Housing Act (Cap. 401) that it should be acquired by the government for the purpose of being made available for the carrying out of a "housing object" by the 5th, 6th and 7th respondents. Under s. 2 of the Act "a housing object" includes the construction of buildings for residential purposes. Accordingly, on 07.02.77 the 3rd respondent (The Acquiring Officer) took possession of the said land and vested it in the National Housing Department. Thereafter, the 4th respondent (The Commissioner for National Housing) gave the possession thereof to the 5th, 6th and 7th respondents, presumably pending a formal disposition under s. 50 of the Act. Before possession of the land was given to the said respondents, the 4th respondent recovered a sum of Rs. 168,000/- from them.

The original owner of the said land was one Ebert who died in 1970 whereupon it is said to have devolved on his sons, the appellants each of whom claims an undivided 1/3 share. In or about 1963, proceedings had been commenced to acquire this land on the request of the 5th respondents, but those proceedings had been abandoned in 1965. It would appear that acquisition proceedings were recommenced on 04.03.70 after which the land was acquired and made available to the 5th, 6th and 7th respondents, as aforesaid.

The appellants impeached the validity of the acquisition on the following grounds:

1. That the boundaries and extent of the land described in the notices under sections 2 and 4 and the declaration under s. 5 of the Land Acquisition Act differ from those set out in the Acquisition Order; that in particular, the extent mentioned in the Acquisition Order exceeds the extent shown in the aforesaid notices and the declaration, by 18.12P.

2. That the land has been acquired not for "a housing society" under the National Housing Act, but for the use of the 5th, 6th and 7th respondents, which is not a public purpose. There was also no urgency for the said acquisition and hence there is no power to make an Order under S. 38 proviso (a) of the Land Acquisition Act.

3. That the acquisition is *mala fide* in that it was effected at the behest of the 5th respondent who was a Cabinet Minister of the then government who used his political power to acquire the land in dispute for himself, and for the 6th and 7th respondents who are his brother and brother-in-law, respectively.

It is relevant to note that the acquisition proceedings were recommenced on 04.03.70 prior to the change of government and these proceedings were continued during the period of the next government and the application before the Court of Appeal was filed on 25.07.79 after the assumption of power by a new government. If the acquisition was *mala fide* then, the Ministers who were responsible for such acquisition have not been made respondents personally for the 1st and 2nd respondents (being the relevant ministers) have been joined "nominee officii". It is perhaps in these circumstances that objections to the application were filed only by the 4th, 5th, 6th and 7th respondents, denying *mala fides*.

In particular, the 5th, 6th and 7th respondents raised a legal objection to the application on the ground that the petitioners who had previously challenged the acquisition in application No. CA 270/72 had withdrawn that application; that after the acquisition they had appealed to the Board of Review constituted under the Land Acquisition Act for enhancement of compensation; that the petitioners had by such conduct waived the right to challenge the acquisition; and that their application is bad for undue delay.

At the hearing before us, the learned Counsel for the appellants strenuously contended that the impugned acquisition was not for "a housing society" or for a public purpose but for the benefit of three individuals, namely the 5th, 6th and 7th respondents; that the acquisition is a sham and obviously *mala fide* in that it was influenced by the 5th respondent; that as such, the said acquisition is a nullity; and hence the delay is irrelevant. He also submitted that the fact that the appellants took the precaution of appealing to the Board of Review for enhanced compensation does not constitute conduct which disentitles them to the remedy of certiorari. Counsel cited in support *Biso Menike v. Cyril de Alwis* [1]. As regards the withdrawal of the C.A. Application No. 270/72, Counsel reiterated the explanation offered by the appellants in their pleadings in the Court below and in this Court that it was only an application for an injunction, pending the filing of an action. However, the contemplated action was not filed in view of the law existing at that time namely, the Interpretation (Amendment) Act No. 18 of 1972, and Act No. 29 of 1974 which precluded the appellants from challenging the acquisition.

Learned Counsel for the 5th, 6th and 7th respondents submitted that the allegation of *mala fides* is based solely on the fact that the 5th respondent was a Minister. It is a mere inference based upon the status of the 5th respondent; that there is no evidence that the two Ministers who were responsible for the acquisition were in fact influenced; and that the 1st and 2nd respondents have been sued in their official name. Hence, individual Ministers who are alleged to have acted *mala fide* have not been identified. He also submitted that the statutes referred to by the appellants did not preclude a challenge to the acquisition and the remedies available to the appellants included the right to relief by way of certiorari. Counsel argued that in the circumstances the impugned acquisition is not a nullity; and that the Court of Appeal has correctly dismissed the application on the ground of laches.

I am of the view that the appellant's appeal to the Board of Review for enhanced compensation cannot be regarded as conduct which precludes the relief sought by the appellants. The exercise of that right cannot amount to a waiver of the right to challenge the Order of Acquisition. We must, therefore, consider the issue of laches on the basis of the other submissions made by Counsel. It would be convenient to examine those submissions in the following order:

1. It seems to me that the submission that the acquisition was not for "a housing society" is irrelevant. The reason for this view is that whilst Part III of the National Housing Act (Sections 10-30) provides for the establishment of "building societies", "housing bodies" and "building companies" for carrying out housing objects, individuals are also competent, with the assistance of the Commissioner for National Housing, to carry out such objects. Thus S. 49 provides:

> *"Where the Minister certifies any land (other than State land) should be acquired by the government for the purpose of being made available for the carrying out of any housing object and such certificate is published in the Gazette, that purpose shall be deemed to be a public purpose, and that land may be acquired under the Land Acquisition Act, and be made available for that purpose to the Commissioner, or to any other person by being disposed of under the succeeding provisions of this Act."*

Under this section, the 5th, 6th and 7th respondents would be eligible to receive land for a housing object in their individual capacity; and in the absence of any material placed before us that the authorities processed their application as one made by an organization such as a "building society", I have to assume that their request for land was made as individuals. Presumably, the object of such request was the construction of buildings for residential purposes which under the above section is "deemed to be a public purpose".

In the circumstances, the objection to the acquisition of land for the benefit of the 5th, 6th and 7th respondents, as well as the submission that the impugned acquisition was not for a public purpose fail.

2. I am in agreement with the submission of the learned President's Counsel for the respondents that there is no evidence of *mala fides* on the part of the relevant Ministers and that such

allegation is based solely on the fact that the 5th respondent was a Minister. I am, therefore, unable to hold that the Acquisition Order is a nullity. As such, *Biso Menike's* case (*supra*) has no application. It is to be noted that in that case what was challenged was an order made for the vesting of a house pursuant to an application by the tenant to purchase it under s.13 of the Ceiling on Housing Property Law No. 1 of 1973. This Court held that the said tenant had no right under the law to purchase the house in question and hence the vesting order by the Minister under s.17 was *ultra vires* and a nullity. In these circumstances, Sharvananda, C.J. (as he then was) held:

> *". . . ., the Court has ample power to condone delays, where denial of writ to the petitioner is likely to cause great injustice. The Court* ***may*** *therefore* ***in its discretion*** *entertain the application in spite of the fact that the petitioner comes to Court late, especially where the order challenged is a* ***nullity for absolute want of jurisdiction*** *in the authority making the order"* (emphasis is mine).

It follows that the submission of the learned Counsel for the appellants that the delay in filing the writ application "is relevant" must fail.

3. I am also of the view that the submission that Act No. 18 of 1972 and Act No. 29 of 1974 precluded the appellants from challenging the impugned acquisition is untenable. Under S. 24 of the Interpretation Ordinance enacted by Act No. 18 of 1972 and amended by Act No. 29 of 1974, the jurisdiction of the Court to grant an injunction or a stay order against the State or a Minister or a State Officer acting as such was removed. However, subsection 5 of S. 24 states:

> *"The preceding provisions of this section shall not be deemed to affect the power of any Court to make an order declaratory of the rights of parties".*

The said Acts did not touch the power of the Supreme Court to grant writs under s. 42 of the Courts Ordinance (Cap. 6) (or later) under s.12 of the Administration of Justice Law No. 44 of 1973, except that by the force s. 24 of the Interpretation Ordinance the Supreme Court

(exercising its writ jurisdiction under ordinary Law) may not have had the power to grant a stay order restraining an acquisition. This power was regained after the writ jurisdiction (now exercised by the Court of Appeal) became a remedy provided for under Article 140 of the 1978 Constitution. From the time of the decision in *Billimoria v. Minister of Lands* [2], such power has not been questioned and hence writ jurisdiction of the Court regained its effectiveness to the fullest extent.

However, as indicated earlier, the appellants were not by law precluded from challenging the acquisition. They had the right to challenge the acquisition by action in the Original Court or by seeking a writ in the Superior Court even though the relief available had become somewhat less effective, until 1978. As such, the excuse for the delay based on the amendment to the Interpretation Ordinance is not tenable.

In the result, the appellants have failed to give a satisfactory explanation for their conduct and the delay in making their application to the Court of Appeal and hence that Court cannot be faulted for exercising its discretion against the issue of the writ. I, therefore, dismiss this appeal and affirm the judgment of the Court of Appeal, but without costs.

G. P. S. DE SILVA, C.J. – I agree.

RAMANATHAN, J. – I agree.

Appeal dismissed.