AMARASINGHE AND OTHERS
v.
THE ATTORNEY-GENERAL AND OTHERS
(COLOMBO – KATUNAYAKE EXPRESSWAY CASE)

SUPREME COURT.
FERNANDO, J.
GOONEWARDENE J. AND
PERERA J.
S.C. (SPL) NO. 6/92,
JANUARY 21st AND 22nd, 1993.

Certiorari and Prohibition – Declaration made by President under section 2 of the Urban Development Projects (Special Provisions) Act, No. 2 of 1990 – Recommendation of Minister – Opinion of President – Construction of Colombo – Katunayake Expressway – Environmental Impact Assessment (EIA) – Acquisition – Writ Jurisdiction – Pre-requisite of a hearing – Natural justice – National Environmental Act, No. 47 of 1980 as amended by Act. No. 56 of 1988, sections 23 AA and 23 BB – Opportunity for raising objections – Resettlement of persons affected.

The petitioners are residents and owners along with others of the lands and buildings which were declared by the President under section 2 of the Urban Development Projects (Special Provisions) Act No. 2 of 1990, on the recommendation of the Minister, as being urgently required for carrying out an Urban Development project namely the construction of the Colombo – Katunayake expressway connecting the port of Colombo with the Katunayake International Airport. This was after a feasibility study by a Japanese Agency. On 03.5.1991 the Urban Development Authority (2nd respondent) signed a consultancy agreement with the Japan Bridge and Structure Institute Inc. (JBSI) for certain

services including review and update of the previous feasibility study, the preparation of the detailed design, the carrying out of a comprehensive environmental impact assessment (EIA) of the project and the preparation of the implementation project and tender documents. The Cabinet approved the project and the 2nd respondent (UDA) had been requested to go ahead with the work schedule. The land required for the expressway had to be acquired under the Land Acquisition Act. A Supplementary EIA had also to be prepared and submitted to the 3rd respondent (Central Environmental Authority (CEA) and if found satisfactory, would be made available to the public and no action would be taken to obtain possession of the lands required (e.g. by means of an order under section 38, proviso (a) of the Land Acquisition Act) until the lapse of 30 days after the EIA is made available for public scrutiny. Resettlement of persons affected (nearly 2500 families) was to be given adequate consideration.

Held :

1. A valid order under section 2 of the Urban Development Projects (Special Provisions) Act No. 2 of 1990 requires the following elements:

(a) A recommendation by the Minister (here the Minister was the President himself).

(b) An opinion formed by the President :

(i) in relation to an urban development project,

(ii) that lands are required for the purposes of such project,

(iii) that this requirement is urgent, and

(iv) that such project would meet " the just requirements of the general welfare of the People ".

2. The Expressway project is undoubtedly an urban development project.

3. Section 3 of Act No. 2 of 1990 does not affect the jurisdiction by Article 140 of the Constitution which in terms of section 4 (1) has been transferred to the Supreme Court.

4. Although section 7 (1) of the Act No. 2 of 1991 empowers the Government or any other person to obtain possession of any lands, such possesion can be taken only when the lands are vested by virtue of proceedings under the Land Acquisition Act or other statutes.

5. A hearing was not a pre-requisite for making a recommendation. The President cannot make a recommendation to himself and it is sufficient for him to form an opinion on the available material.

6. The President's opinion as urgency was not vitiated by any excess of jurisdiction or error of law. There was adequate material on which he could form his opinion.

7.(a) A hearing before forming an opinion that the order would meet the just requirements of the general welfare of the people would be impracticable and would need some sort of local referendum to ascertain the views of all those having a legitimate interest.

(b) Persons affected will have an opportunity of submitting objections when steps are taken under section 4 of the Land Acquisition Act.

(c) The Minister in making a recommendation and the President when making an Order under section 2 of Act No. 2 of 1990 are determining policy, based on evidence of a general character ; there is no *lis*. The obligation to give a hearing arises only later, when objections are submitted, and when there is a *lis*; at that stage evidence as to the local situation, and the effect on individuals, has to be adduced and weighed.

8. The jurisdiction of the Court is not to determine whether or not the expressway is necessary, and if so, which alternative is most suitable. It is for the Executive under the laws enacted by Parliament, to make those decisions. The writ jurisdiction authorises the Supreme Court to examine whether jurisdiction has been exceeded, whether there is error of law and whether there has been procedural due process. The merits of a decision cannot be questioned merely because the Court considers that some other decision would have been better. The Court can interfere only if it is unreasonable. The available material does not in any way indicate that the decision to build the expressway was unreasonable; but on the contrary, that it was necessary and urgent ; and there is nothing whatever to suggest that the selection of the particular route or the rejection of alternative options, was unreasonable.

9. Sections 23AA and 23BB of the National Environmental Act No. 47 of 1980 amended by Act No. 56 of 1988 adequately protect the public interest in regard to environmental considerations by preventing the implementation of a project until an EIA is submitted and approval obtained. There will thus be a further opportunity for all interested persons to raise their objections when the amended EIA is made available for public scrutiny. The section 2 Order cannot therefore be impugned on this ground.

10. Although nearly 2500 families would be affected, in the context of population of the district, and the areas concerned, that cannot *per se* be regarded as unduly high, particularly if satisfactory steps are taken for resettlement.

11. It was not unreasonable for the President to have concluded when he made the section 2 order, that the expressway is in the national interest.

Cases referred to :

1. *Hirdaramani v. Ratnavale* [1971] 75 NLR 67.
2. *Visuvalingam v. Liyanage* [1984] 2 Sri L.R. 123.
3. *Wickremabandu v. Herath* [1990] 2 Sri L.R. 348.
4. *Weeraratne v. Colin-Thome* [1988] 2 Sri L.R. 151, 167–169.
5. *Fernandopulle v. Minister of Lands and Agriculture* (1978) 79(2) N.L.R. 115.

APPLICATION for writs of Certiorari and Prohibition.

R. K. W. Goonesekera with *Lalanath de Silva* and *Manohara de Silva* for petitioners.

K. C. Kamalasabaysan Deputy Solicitor-General with *Miss. A. Navaratne* for respondents.

Cur. adv. vult.

March 15, 1993.

FERNANDO, J.

On 21.01.92 the President made an Order ("P1") under section 2 of the Urban Development Projects (Special Provisions) Act, No. 2 of 1980 :

> " By virtue of the powers vested in me under Section 2 of the Urban Development Projects (Special Provisions) Act, No. 2 of 1980, I, Ranasinghe Premadasa, President, upon the recommendation of the Minister in charge of the subject of Urban Development, being of opinion that the lands specified in the Schedule hereto are urgently required for the purpose of carrying out an urban development project, do by this Order declare that the said lands are required for such purpose".

The Schedule to that Order referred to all lands situated within several specified Grama Seva Niladhari Divisions, which fell within six different A.G.A.'s Divisions. The Petitioners are residents of, and owners of lands and buildings within the areas described in P1; they say that they are some among about 2,500 families affected by P1. They seek Certiorari to quash the Minister's recommendation referred to in P1, and the President's declaration contained in P1, as well as Prohibition to restrain the Road Development Authority (the 2nd Respondent) from taking steps to construct the Colombo–Katunayake expressway (" the expressway ") connecting the Port

of Colombo with the Katunayake International Airport along the route depicted in the Plan marked P2A. That expressway is the Urban development project referred to in P1. The Order P1 having been made by the President, the Attorney General (in terms of Article 35(3) of the Constitution), has been made the 1st Respondent. The Central Environmental Authority established under the National Environment Act, No. 47 of 1980, and the Urban Development Authority established under the Urban Development Authority Act, No. 41 of 1978, have been made the 3rd and 4th Respondents, but no relief has been sought against them.

HISTORY OF THE EXPRESSWAY PROJECT

In 1982, at the request of the Government of Sri Lanka, the Government of Japan agreed to conduct a feasibility study in regard to the expressway, and entrusted that study to a Japanese Agency; that Agency, in its report made in January 1984, recommended the construction of an expressway to the east of the existing Colombo-Negombo road. The Petitoners have annexed ("P2") the contents pages of that report, and no more ; although they say that " the said report was never made public nor was the public given free access to the same ", they add that they " have gained access to parts of this report only very recently ". They state that the report dealt with traffic surveys and projections, and included a project financial and economic evaluation, and contained " final route drawings " for the proposed expressway ; but did not contain "a socio-economic analysis wherein data collected, through field surveys, of the people affected by the proposed expressway was analysed "; " nor did the economic and financial evaluation consider or take into account the social and environmental costs involved in the construction of the expressway nor were fundamental alternatives to the proposed expressway considered..... what was shown as alternatives were route alternatives which did not depart significantly from the pre-determined final alignment ".

The Director, Special Projects, of the 2nd Respondent, and the Chairman of the 4th Respondent, have sworn affidavits to the effect that the report was a feasibility study not intended for publication ; that it contained a socio-economic analysis to arrive at traffic projections for the future ; that " four alternative routes were

considered..... after careful field reconnaissance, collection of data and information, detailed study of the relevant conditions, including photography, sociology, land use and distribution of facilities "; that " the final alignment was not pre-determined but was chosen after considering the four alternatives "; that " social and environmental effects of the construction were considered in the evaluation of the project "; and that the report was prepared under the guidelines set by an Advisory Committee which consisted of a large number of Sri Lankan Government officials and other experts, (whose names were set out in the report). Some extracts from the report were produced in support.

It is unfortunate that the entire report (running into about 200 pages), or at least more substantial extracts, were not produced. It was open to the Petitioners to have asked for an order for production, if they had not had sufficient access to the report. From the contents pages (P2) it appears that the feasibility study covered *inter alia* " present transport conditions ", " projection of traffic demand ", " relationship of expressway and railway ", " survey of alternative routes ", " environmental consideration ", " economic cost ", " benefit calculation ", " economic analysis ", conclusions and recommendations. According to the extracts produced by the Respondents, the Chapter on " Environmental Consideration " considered *inter alia* " physical indicators of assessment ":

a) Topography and geology
b) Hydrology (drainage, floods)
c) Metereology (climate and weather)
d) Traffice nuisances (noise, air pollution, vibration and other nuisances)
e) Traffic accidents
f) Construction nuisances

as well as social and economic indicators of assessment :

g) Transport mobility and accessibility
h) Land use potentiality
i) Population distribution
J) Tourism

k) Regional spectacle
l) Community cohesion
m) Resident displacement
n) Industrial and agricultural production
o) Land price
p) Prices of commodities

It was for the Petitioners to substantiate their allegations that the report was defective ; the available material neither indicates that the above factors were not adequately considered, nor suggests that there was any significant error.

On 3.5.91 the 2nd Respondent signed a consultancy agreement with the Japan Bridge and Structure Institute Inc. ("JBSI") which was required to provide certain services, including the review and update of the previous feasibility study, the preparation of the detailed design, the carrying out of a comprehensive environmental impact assessment ('EIA") of the project, and the preparation of the implementation program and tender documents. The 3rd Respondent issued the terms of reference ("P4") for the EIA. A note at the end of P4 refers to " a number of meetings " held to discuss the terms of reference, the outcome of which was reported at the Eighth Coordination Meeting for the project. The minutes of the Thirteenth Coordination Meeting held on 21.8.92 have been produced as ("4R4"), and from this it appears that a large number of Government agencies, including the 3rd Respondent, were represented on that Committee ; an EIA prepared by JBSI was considered at that meeting, at which it was confirmed that the Cabinet had approved the project and that the 2nd Respondent had been requested to go ahead with the work schedule. Further –

" The General Manager stated that priority will have to be given to carry out the surveys and finding alternative accommodation for people who will be affected....."

" The General Manager also requested the RDA to immediately commence work to peg the center line and based on the center line to define a corridor (the normal section required will be 100m. but expected borrow area will require extra land) for the Survey Department to commence the survey....."

" The General Manager requested the UDA to look at the development plan in the area and in relation to this how settlement of families is going to take place and NHDA to do the infrastructure work....."

" Acting Director (NRM) of the CEA stated that the Environmental Assessment Report prepared by the Consultants, which is due to be open for a 30 day period of public comments lacks certain information. She was of the opinion that the report should be updated prior to making it available for public comments. She stated that :

– The resettlement aspect has not been covered adequately.

– How to deal with the various categories of people coming under this project and the assurance given will have to be incorporated in this report.

The General Manager requested CEA to initiate a letter indicating their comments and inadequacies observed by them, and RDA will identify ways of dealing with the suggestions. The EAR will not be open for public comments pending these alterations.

However, the General Manager, stated that the Consultants may proceed with their work, pending the results of the EAR."

By letter dated 4.9.92 ("4R5") the 3rd Respondent sent to the 2nd Respondent the terms of reference ("4R5A") for resettlement aspects which had not been adequately addressed in the EIA, and called for a supplementary report. Those terms required a detailed study of the area affected by the development and the sites involved in resettlement of the people affected, the population characteristics, the existing facilities, the major economic activities in the area, rehabilitation policy, land availability for relocation, and alternative sites for relocation.

The affidavit of the Director, Special Projects, of the 2nd Respondent states :

" From October to December, 1992, National Housing Development Authority carried out an enumeration of all the householders that would be affected by the expressway. It was reported that the first petitioner has not co-operated with the enumerators and has refused to provide any information to them. It was the intention of the 2nd Respondent to hold meetings with affected parties and two meeting were held in December, 1992. More meetings are expected to be held. 3rd Respondent has examined the Environmental Assessment Report prepared in March, 1992, as part of Detail Engineering; and had recommended that human settlement aspects should be studied in further detail. This supplementary environmental impact assessment study has been entrusted to a firm of consultants and it is still under preparation. Once completed, the Report of this study will be submitted to 3rd Respondent for comments and if satisfactory, the report will be available for scrutiny by members of the public ".

He, as well as the Chairman of the 4th Respondent, state that proceedings will be taken under the Land Acquisition Act to acquire the required lands. The learned Deputy Solicitor General categorically assured us, in the course of his submissions, that the supplementary EIA would be submitted to the 3rd Respondent, and if found satisfactory, would be made available to the public ; and that no action would be taken to obtain possession of the lands required (e.g. by means of an order under section 38, proviso (a), of the Land Acquisition Act) until the lapse of 30 days after the EIA is made available for public scrutiny.

The section 2 Order was published in the Gazette Extraordinary No. 738/4 of 26.10.92, and the Petitioner filed this application on 25.11.92. It was supported on 4.12.92, but fixed for hearing only for 21.1.93 ; although it was taken up for hearing on that day and concluded on 22.1.93, it was not possible, because many complex questions arose, to make our order within the period of two months stipulated by section 4(2) of the Urban Development Projects (Special Provisions) Act.

JUSTICIABILITY

Learned Counsel for the Petitioners submitted that although section 2 referred to the President's " opinion " in subjective terms, it was nevertheless subject to review on the basis set out in *Hirdaramani v. Ratnavale* [1], *Visuvalingam v. Liyanage* [2], and *Wickramabandu v. Herath* [3]. He did not contend that that opinion had not in fact been entertained by the President, or had been formed in bad faith, or was a mere pretence. His submission was that –

(a) there was a failure of Natural Justice, in that there had been no hearing prior to the recommendation and the opinion referred to in section 2, and

(b) there had been an excess of jurisdiction and/or a failure to consider relevant material and/or that the President did not have adequate material on which he could properly have formed an opinion.

As the learned Deputy Solicitor General did not contend that the Order was not justiciable, we do not have to consider that question.

Learned Counsel for the Petitioners contended that in order to determine the character of an Order under section 2 it was necessary to consider its consequences : firstly, the *ouster of jurisdiction* effected by sections 3 and 4, and secondly, the liability of an owner to *summary deprivation of possession* under section 7.

A valid order under section 2 requires the following elements :

(1) a *recommendation* by the Minister (and it is common ground that the President was himself the Minister concerned) ;

(2) an *opinion* formed by the President –

(i) in relation to an *urban development project,*
(ii) that lands are *required* for the purposes of such project,
(iii) that this requirement is *urgent,* and
(iv) that such project would meet " *the just requirements of the general welfare of the People* ".

Whether the expressway project is desirable, prudent, or otherwise, undoubtedly it is an " urban development project "; and it is clear that for the particular expressway that has been proposed, some parts of the lands, described in the Schedule to the Order, are required. I need therefore to consider only the remaining elements.

It is convenient to reproduce here the relevant sections :

"2. Where the President, upon a recommendation made by the Minister in charge of the subject of Urban Development, is of opinion that any particular land is, or lands in any area are, urgently required for the purpose of carrying out an urban development project which would meet the just requirements of the general welfare of the People, the President may, by Order published in the Gazette, declare that such land is or lands in such area as may be specified are, required for such purpose.

3. No person aggrieved by an Order made or purported to have been made under section 2 of this Act, or affected by or who apprehends that he would be affected by any act or any step taken or proposed to be taken under or purporting to be under this Act or under or purporting to be under any other written law, in or in relation to any particular land or any land in any area, shall be entitled –

(a) To any remedy, redress or relief in any court other than by way of compensation or damages ;

(b) to a permanent or interim injunction, an enjoining order, a stay order or any other order having the effect of staying, restraining, or impeding any person, body or authority in respect of –

(i) any acquisition of any such land or any land in such area;

(ii) the carrying out of any work on any such land or in any land in any such area ;

(iii) the implementation of such project in any manner whatsoever.

4(1) The jurisdiction conferred on the Court of Appeal by Article 140 of the Constitution shall, in relation to any particular land or any land in any area in respect of which an Order under or purporting to be under section 2 of this Act has been made, be exercised by the Supreme Court and not by the Court of Appeal.

(2) Every (such) application ..... shall be made within one month..... and the Supreme Court shall hear and finally dispose of such application within two months.....

7(1) Where it becomes necessary for the Government or any person, body or authority, for the purpose of carrying out or assisting in the carrying out of any Urban Development Project, to take possession of any particular land or any land in any area in respect of which an Order under or purporting to be under section 2 of this Act has been published, it shall be lawful for the Government or any such person, body or authority, to take steps under the provisions of the State Lands (Recovery of Possession) Act, and accordingly –

(a) the expression " State land " as defined in such Act shall include any land vested in or belonging to any such person, body or authority or which such person, body or authority is entitled to dispose of ; and

(b) the expression " competent authority " shall include such person or the principal executive officer of such body or authority.

(2) Every application under the State Lands (Recovery of Possession) Act, in respect of any particular land or any land in any area in respect of which an Order under or purporting to be under section 2 of this Act has been published, shall be finally disposed of within thirty days..... and the court shall make all such orders as are necessary to ensure that all persons are ejected from that land within sixty days of the making of such application ".

OUSTER OF JURISDICTION: SECTIONS 3 AND 4

It was contended on behalf of the Petitioners that section 3 not only took away the jurisdiction of the District Court to grant declarations and injunctions in respect of an order under section 2, but even the jurisdiction of the superior courts ; that " any court " included the Supreme Court. My observations in *Weeraratne v. Colin-Thome* [4], were referred to : that the scope of the ouster provided for by section 9 (2) of the Special Presidential Commissions Law, No. 7 of 1978, was enlarged by section 18 (A) 2 of the amending Act No. 4 of 1978 so as to preclude " any court " – and this would include the Supreme Court – from staying, suspending or prohibiting the holding of any proceeding ". Those observations were only *obiter,* as the power of this Court to make an interim order was not in issue. However, Law No. 7 of 1978 (and section 9(2) in particular) was pre-Constitution legislation, which was kept in force by Article 168(1), and the Bill in respect of Act No. 4 of 1978 was referred to this Court with a certificate that it was intended to be passed by the special majority required by Article 84, (and thus would have effect notwithstanding inconsistency with Article 140). Further a section 18A (2) of that Statute disclosed an intention to affect the jurisdiction conferred by Article 140, quite unlike section 3 which is phrased in very different terms. Section 3 must therefore be interpreted, as far as possible, in a manner consistent with Article 140. If " any Court " in section 3 (a) is interpreted as including the Supreme Court, the only relief which that provision permits would be compensation or damages ; that view would render section 4 nugatory because Article 140 does not refer to those remedies. Clearly therefore section 3 (a) read with section 4 – quite apart from the constitutional question – was not intended to apply to the superior courts. Section 6 puts this beyond doubt, because " nothing contained in section 3..... shall affect the powers which the Supreme Court may otherwise lawfully exercise [under] section 4 (1)", i.e. the jurisdiction (conferred by Article 140) and transferred by section 4(1) to the Supreme Court. The learned Deputy Solicitor General conceded that section 3 did not affect the jurisdiction conferred by Article 140.

I hold that section 3 does not affect the jurisdiction entrenched by Article 140, which has (in terms of the First Amendment), been transferred to this Court by section 4(1).

SUMMARY DEPRIVATION OF POSSESSION: SECTION 7

Learned Counsel for the Petitioners submitted that section 7(1) empowers the Government, or any other person, to obtain possession of any lands, in respect of which a section 2 Order has been made, under the State Lands (Recovery of Possession) Act ; a landowner could thus be summarily dispossessed at any time after a section 2 Order. However, section 7 merely authorises the Government or any other person " to take steps " under that Act. In view of the definition of " State land " at that time notices could have been issued under that Act only in respect of land to which the State was lawfully entitled or which may be disposed of by the State and lands under the control of certain specified authorities ; and it was only a " competent authority " who could issue such notices and take other steps. The effect of section 7 (1) was to enable a " person, body or authority " to take steps, even though not a " competent authority ", and paragraph (a) was enacted in order to widen the description of " State land " to include " any land vested in or belonging to any such person, body or authority "; hence notices can be issued and possession obtained only after the lands referred to in the section 2 Order became duly vested in the State or such other person, body or authority. The learned Deputy Solicitor General agreed with this construction of section 7, and submitted that possession could not be taken under that Act before the lands were vested by virtue of proceedings under the Land Acquisition Act or other statutes.

A section 2 Order thus does not have the drastic consequences suggested by learned Counsel for the Petitioners, and it is on that basis that the validity of the section 2 Order has to be examined.

MINISTER'S RECOMMENDATION

Learned Counsel for the Petitioners submitted that although the President was also the Minister concerned, there should nevertheless have been a recommendation, and that this should have been made after hearing the views of those affected by and/or opposed to the project ; and also that the recommendation should have made reference to those views in order to enable the President to form an opinion after considering every aspect of the matter.

I hold that a hearing was not a pre–requisite for making a recommendation, for the same reasons which I have set out later in this judgment for holding that the President was entitled to form an opinion without a prior hearing. It is constitutionally permissible for the President to refrain from assigning a particular subject or function to a Minister, whereupon it would remain in his charge (under Article 44 (2)). I cannot interpret section 2 as requiring the President to make a recommendation to himself, and thereafter to form an opinion upon the same matter ; if his opinion was the same as his recommendation, the latter would be superfluous ; and it is absurd to think that his opinion could have differed from his recommendation. I hold that the President was not legally required to make a recommendation to himself, and it was sufficient for him to form an opinion on the available material. The Order has been drafted with less than ordinary care and precision, and mistakenly refers to a non-existent " recommendation of the Minister.....; however, in the circumstances this is a superfluity which does not vitiate the Order.

URGENCY

Urgency is always relative ; sometimes action may be required within hours ; for an enormous project, such as this expressway, urgency may be a matter of months or years. Considering that the project had been in contemplation at least from 1983, and had already been delayed for almost ten years, it is not unreasonable to consider, in the light of increases in population, traffic, economic activity, etc., that speedy implementation was imperative. I hold that the President's opinion as to urgency was not vitiated by any excess of jurisdiction or error of law ; and that there was adequate material on which that opinion could have been formed.

JUST REQUIREMENTS OF THE GENERAL WELFARE OF THE PEOPLE

Learned Counsel for the Petitioners submitted that in forming an opinion that the expressway would meet the just requirements of the general welfare of the People, the President was obliged –

(a) to give a hearing to the people likely to be affected by the project;

(b) to consider alternatives to the project ;

(c) to consider environmental and socio-economic factors ; and

(d) to have regard to the large number of people affected and the need for their relocation.

The " People " referred to in section 2 includes not only such " People " as may be affected by the project, but the " People " of Sri Lanka. The phrase under consideration is virtually identical to that occurring in Article 15 (7) of the Constitution. It must include the national interest in general. In any event, any supposed requirement of a hearing must apply also to those likely to benefit from the project. Thus a hearing is obviously impractical, as some sort of a local referendum would be needed to ascertain the views of all those having a legitimate interest in the project. The Order has, of itself, no adverse impact on the citizen's property, liberty or livelihood ; it does not deprive him of, or affect, the title to, or possession of, his property ; his legal remedies under Article 140 are unimpaired ; he is not subjected to any disadvantage whatsoever; and he will have an opportunity of submitting objections when steps are taken under section 4 of the Land Acquisition Act. I am of the view that the Minister in making a recommendation, and the President when making an Order, under section 2, are determining policy, based on evidence of a general character; there is no *lis*. The obligation to give a hearing arises only later, when objections are submitted, and when there is a *lis* ; at that stage evidence as to the local situation, and the effect on individuals, has to be adduced and weighed.

It is of course possible that land–owners may be deprived of their right to submit objections if, instead of making an order under section 4, the relevant Minister makes an order under section 2 of the Land Acquisition Act, and soon thereafter an order under section 38, proviso (a). However, in the present case the land that is actually required for the expressway (and therefore land the possession of which is urgently required) cannot be determined from the schedule to the section 2 Order, since that schedule admittedly includes more land than needed. To determine what portions of land are required, it will be necessary to enter those lands, survey and take and mark

levels, set out and mark the boundaries of the proposed expressway, and do other necessary acts. An Order under section 2 of the Land Acquisition Act would be needed to do all this. It is only thereafter that the Minister would know which particular lands are required, and that possession must be taken urgently. The learned Deputy Solicitor General concedes that an order under section 38, proviso (a) can be challenged by certiorari, as held in *Fernandopulle v. Minister of Lands and Agriculture* [5].

The extracts produced from the 1984 report show that alternatives were considered – not only the alternative routes but the railway as well. In the absence of other relevant portions of the report, it is impossible for us to say either that the material was inadequate or that the rejection of the alternatives was unreasonable. Learned Counsel for the Petitioner further submitted that one of the alternatives that should have been considered was the " no action " alternatives – to leave the *status quo* unchanged. Our jurisdiction is not to determine whether or not the expressway is necessary, and if so, which alternative is the most suitable. It is for the Executive, under the laws enacted by Parliament, to make those decisions. The writ jurisdiction authorises this Court to examine whether jurisdiction has been exceeded, whether there is error of law, and whether there has been procedural due process. The merits of a decision cannot be questioned merely because we consider that some other decision would have been better ; we can interfere only if it is unreasonable.

The available material does not in any way indicate that the decision to build the expressway was unreasonable ; but on the contrary, that it was necessary and urgent ; and there is nothing whatever to suggest that the selection of the particular route, or the rejection of the alternative options, was unreasonable.

Any expressway would inevitably cause a certain amount of inconvenience, (or loss or prejudice) to one group of citizens or another, depending on its location. Neither the fact that a particular route causes inconvenience to some people, nor the selection of one route (which causes inconvenience, or inconvenience to a greater number of people), in preference to another route, constitutes proof of unreasonableness. In any event, the Petitioners have not even attempted to show that some other route would be better for any reason whatsoever.

The next contention on behalf of the Petitioner was based on Part IV C of the National Environmental Act, No. 47 of 1980, introduced by amending Act No. 56 of 1988. Section 23AA requires that approval be obtained for the implementation of all " prescribed projects ", from the appropriate " project approving agencies ". Under section 23BB, for the purposes of granting such approval, project approving agencies are required to call for an Environmental Impact Assessment report ("EIA"), which is defined in section 33. It was submitted that a section 2 Order could not have been made in respect of the expressway before an EIA had been prepared, and that an essential component of an EIA was an " environmental cost–benefit analysis " – something much more than mere financial cost–benefit analysis. This contention cannot succeed. Those provisions apply only to " project approving agencies " and " prescribed projects ", as determined by the Minister by Orders under sections 23Y and 23Z ; no such Orders had been made. Further, section 33 makes it clear that the submission of an environmental cost–benefit analysis is required only if such an analysis has in fact been prepared.

It was then urged that draft regulations under section 32, covering these matters, have been prepared and that the section 2 Order had been made hastily before the regulations could be gazetted, not because of any real urgency, but simply to prevent the expressway project becoming subject to those regulations. This is highly speculative, and is not supported by any evidence. The implementation of the project could reasonably have been considered urgent ; even if regulations had been made the expressway might not have been declared to be a prescribed project ; and finally the scheme of the Act does not contemplate that an EIA should have been prepared and finalised before a section 2 Order in respect of the project. Sections 23AA and 23BB adequately protect the public interest in regard to environmental considerations by preventing the implementation of a project until an EIA is submitted and approval obtained.

However section 10 (h) does provide certain safeguards, even though the expressway is not a prescribed project. One of the powers, functions and duties of the Central Environmental Authority ("CEA") is to require the submission of proposals for new projects " for the purpose of evaluation of the beneficial and adverse impacts of such proposals on the environment ". Section 24B authorises the CEA

to issue directives in respect of a project " which is causing, or is likely to cause, damage or detriment to the environment, regarding the measures to be taken to prevent or abate such damage or detriment " ; upon failure to comply with such directives the CEA may apply to a Magistrate to order the temporary suspension of such project until such measures are taken. The Respondents have stated that no action will be taken to obtain possession of the lands required for the project until an EIA, satisfactory to the CEA, had been prepared and made available for public scrutiny for 30 days. While that would be the appropriate stage at which to consider public representations as to environmental factors, I must emphasise that the documents produced indicate that some consideration has already been given to these matters. Noise, fumes and other forms of air pollution are inevitable with any road or railway ; the " no action " alternative, which would leave the existing road as it is, will, as traffic increases with time, increase pollution, as well as expense, delay and inconvenience to all users of that road and residents ; widening that road will entail much greater expense for land acquisition, and will affect a much larger number of residents, with no appreciable reduction in pollution. The construction of an alternative road will necessarily reduce traffic, and consequently also pollution, congestion and delay in respect of the existing road. While the expressway will inevitably cause some amount of noise pollution, an inconvenience to residents in the vicinity, yet these will be comparatively very much smaller in number ; the documents produced also show an awareness of the need to reduce noise and pollution by preventing the construction of buildings immediately adjacent to the road and by erecting suitable fences and barriers. It appears to me therefore that environmental factors have already been considered, and that there will be a further opportunity for all interested persons to raise such matters when the amended EIA is made available for public scrutiny. The section 2 Order cannot therefore be impugned on this ground.

Learned Counsel for the Petitioners focussed attention on one factor in particular – the need for resettlement of a large number of persons who would be displaced from their homes by the expressway. This has already been considered, and in 4R4, inadequacies have been specifically pinpointed, and a supplementary EIA has been called for in accordance with the terms of reference, 4R5A. The Petitioners contend that 2,500 families will be affected : in the context of population of the district, and the areas concerned, that cannot

per se be regarded as unduly high, particularly if satisfactory steps are taken for resettlement.

It is not for this Court to determine whether, upon a consideration of all these factors, the disadvantages outweigh the advantages of the expressway, or whether in its view the expressway meets the just requirements of the general welfare of the People. There is adequate material to show that these factors have been considered, and will be considered further in accordance with the relevant statutory provisions ; that the public will have an opportunity to express their views ; and that it was not unreasonable for the President to have concluded, when he made the section 2 Order, that the expressway is in the national interest.

For these reasons the Petitioners application for Certiorari and Prohibition is refused. The questions raised by the Petitioners in regard to environmental considerations demonstrate that they have been motivated primarily by concern for the public interest, and for that reason I make no order for costs.

The 1st Petitioner has another grievance personal to himself. It appears from his correspondence with some of the Respondents that at the time of the 1984 study, surveyors had demarcated the centre line of the proposed highway by means of cement pegs ; his property was not affected. However, a priest who had thereafter been expelled from a nearby temple then put up a building upon a land which was affected by the centre line ; in 1988 the priest planted a Bo–sapling next to the centre line pegs upon that land. In February 1992 the surveyors entertained the protests of the priest, and moved the centre line on to the 1st Petitioner's land. These matters are not relevant to the questions which arose for determination, and quite properly were not agitated by learned Counsel for the Petitioners ; the 1st Petitioner will be free to raise these matters in the appropriate proceedings.

GOONAWARDENA, J. – I agree.

PERERA, J. – I agree.

Application refused.