JOSEPH FERNANDO
v
MINISTER OF LAND DEVELOPMENT AND MINOR EXPORT AGRICULTURE AND OTHERS

COURT OF APPEAL
SRIPAVAN, J.
CA NO. 18. 2001
MARCH 5, AND
MAY 29, 2003

Writ of certiorari – Land Acquisition Act, section 38(a) – Section 4 Notice published – Public purpose not disclosed – Possession not taken over – Delay – Proceedings a nullity? – Compensation awarded – Appeal lodged against order – Does writ lie?

The petitioner sought to quash a vesting order issued on 22.11.1990 under section 38(a). It was contended that the section 4 notice was published on 4.7.1983 without disclosing the public purpose. It was also contended that possession was not taken over even though the order was made, on the ground of urgency.

Held:

(i) No notice under section 2 had been published. The section 4 notice did not disclose the public purpose. The decision of the first respondent without disclosing the public purpose is clearly a decision made outside jurisidiction.

(ii) Length of delay does not disentitle the petitioner seeking a writ which lies at the discretion of court and will not be denied as the proceedings are a nullity.

(iii) Although 13 years have lapsed since the acquisition no material has been placed before court to show that the land has been developed or that it had been put to any public purpose. No material has been placed to justify urgency.

(iv) Mere fact that the petitioner has preferred an appeal to the Board of Review does not prevent him from challenging the Order made under section 38(a).

APPLICATION for *writ of certiorari.*

Cases referred to:

1. *Manel Fernando and another* v *Das Jayantha* (2000) 1 SRI LR 112 at 115
2. *Macfoy* v *United African Co.. Ltd.* (1961) 3 All ER 1172
3. *Biso Menike* v *Cyril de Alwis* (1982) 1 SRI LR 368
4. *De Silva* v *Athukorale, Minister of Lands* (1993) 1 SRI LR 283 at 292
5. *Bandula* v *Almeida and others* (1995) 1 SRI LR 309 at 330.
6. *Hopman and others* v *Minister of Lands and Land Development and others* (1994) 2 SRI LR 240.
7. *Fernandopulle* v *MInister of Lands and Agriculture* 79 NLR 115 at 120.

Nihal Jayamanne, P.C. with *Dilan de Silva* for petitioner

Y.J.W. Wijayatilake, Deputy Solicitor General for respondents.

July 7, 2003

SRIPAVAN, J.

The petitioner is the owner of the land called "Tilleaddy Thottam" morefully depicted in Plan No. 357 dated 04.12.1931 made by D.E.J.R.de Vas, Licenced Surveyor and Leveller. The petitioner alleges that the first respondent acting in terms of section 38 proviso (a) of the Land Acquisition Act published in the Gazette No. 637 / 20 dated 22.11.1990 a vesting order in relation to the said land. The petitioner seeks, *inter-alia,* an order in the nature of a *writ of certiorari* to quash the said vesting order published in the Gazette dated 22.11.1990 and / or a *writ of mandamus* directing the first and / or the second respondent to divest the said land acquired in terms of the said vesting order marked P4.

The affidavit of the first respondent dated 25.06.2002 reveals that the land in question was acquired upon a request made by the Secretary, Ministry of Fisheries on 17.08.1982 (1R1) for fisheries purposes. Notice under section 4 of the said Act was published on

04.07.1983 (1R2). However, the said notice did not disclose the public purpose for which the said land was acquired. The petitioner alleges that despite an order being made in terms of section 38 proviso (a) of the said Act on the ground of urgency, possession of the land has not been taken on behalf of the State. The first respondent however denies this and states that possession of the land has been taken over in the absence of the petitioner.

It is observed that the third respondent has not filed any objections to this application. The Acting Minister of Tourism and Fisheries (Western Province) by his letter dated 30.07.2000 (P20) wrote to the Chairman, Parliamentary sub Committee on Investment Promotions stating that the land in question was taken over to build up a trawler boat building yard and observed that the two bridges were not high enough to bring the trawlers to the said land. He recommended that the acquisition order be revoked and the said land be divested and given back to the owner. Another interesting feature is that the Director (Fisheries Community Development) of the MInistry of Fisheries and Aquatic Resources has by letter dated 30.06.1999 (P8) informed the Divisional Secretary, Negombo that the Ministry of Fisheries does not have any files in respect of this acquisition. No notice under Sec. 2 of the Act was published. Thus, the petitioner was not in a position to ascertain the public purpose for which his land was required. Accordingly, the decision of the first respondent without disclosing the public purpose is clearly a decision made outside jurisdiction. The lawful exercise of a statutory power presupposes not only compliance with the substantive, formal and procedural requirements laid down for its performance but also with the implied requirements governing the exercise of that discretion.

In the case of *Manel Fernando and another* v *D.M. Jayaratne*.[1] Fernando, J. stated "that the first question is whether the public purpose should be disclosed in the Sec. 2 and Sec. 4 notices .... In my view, the scheme of the Act requires a disclosure of the public purpose and its objects cannot be fully achieved without such disclosure". Thus, the failure to disclose the public purpose in Sec. 4 notice would make the said notice a nullity. "You cannot put something on nothing and expect it to stay there, it will collapse." - per Lord Denning in *Macfoy* v *United Africa Company*

Limited.[2] Hence, the length of delay as submitted by the learned D.S.G. does not disentitle the petitioner from seeking a writ which lies at the discretion of court, will not be denied if the proceedings were a nullity (*Vide Biso Menika* v *Cyril de Alwis*[3].

In *De Silva* v *Athukorale, Minister of Lands*[4], Fernando, J. observed that "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." The mere assertion by the first respondent that the land is required for fisheries activities without sufficiently describing the nature and extent of the requirement gives rise to a reasonable suspicion that there is no clear need for the land in question. Although thirteen years have lapsed since the said acquisition, no material has been placed before court to show that the land has been developed or that it has been put to any public purpose.

In *Bandula* v *Almeida and others*[5] Wadugodapitiya, J. observed "that the totality of the material placed before this court by the learned Counsel for the respondents does not measure up in any degree to satisfy the requirements of the factual existence of an Urban Development Project as envisaged in the Urban Development Projects (Special Provisions) Act, No. 2 of 1980 ... What strikes me at this point is that the learned Counsel for the respondents wanted this court to infer that an Urban Development Project existed, from the gazettes, sketches and photographs he produced. I regret I am unable to draw such an inference, and wish to state affirmatively, that this is too important a matter to be disposed of upon the basis of any such inference. There must be definite and positive material showing that a project already existed; for which project, the land in question had to be acquired, and not the other way around."

In the case in hand, the learned D.S.G. appearing for the respondents did not produce any positive material by way of project plan, development plan, sketches or photographs to demonstrate the existence of a public purpose. As submitted by the learned President's Counsel coast conservation should be carried

out consistent with a Coastal Zone Management Plan prepared in terms of the Coast Conservation Act, No. 57 of 1981. No such plan has been produced before this court. Neither did the respondents produce any feasibility report or minutes in the departmental file showing any discussions held regarding the conservation of coast. In the circumstances, I agree with the submissions made by the learned President's Counsel that no public purpose exists in relation to the land which is the subject matter of this application.

The learned D.S.G. submitted that the compensation inquiry has been completed and an award in terms of Sec. 17 of the said Act has been made. It was the submission of the learned D.S.G. that since the petitioner has preferred an appeal to the Board of Review against the award of compensation he is not entitled to get the reliefs sought in these proceedings. In *Hopman and others* v *Minister of Lands and Land Development and others* (6). Kulatunga, J. observed 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 and their conduct did not amount to a waiver." Accordingly, the mere fact that the petitioner has preferred an appeal to the Board of Review does not prevent him from challenging the order made under Sec. 38 proviso (a) of the said Act.

In *Fernandopulle v Minister of Lands and Agriculture* (7) Samarakoon, C. J. observed as follows "Are the Courts obliged to turn a deaf ear merely because some statutory officer is able to proclaim "I alone decide". "When I open my mouth let no dog bark?" If that be the position when the rights of the subject are involved then the Court would have abdicated its powers necessary to safeguard the rights of the individual. I do not think that is the test. No doubt primarily the Minister decided urgency. He it is who is in possession of the facts and his must be the reasoning. But the courts have a duty to review the matter." In the case in hand, although the vesting order was made in 1990 no material has been placed to justify urgency; no valid public purpose has been established with cogent evidence for retaining the said land in the State. In the circumstances, a *writ of certiorari* is issued to quash the vesting order published in the Gazette No. 637 / 20 dated 22.11.1990 marked P4 in so far as it relates to the petitioner's land. I make no order as to costs.

Application allowed.