K.T.D.S.N. DE SILVA AND OTHERS
v.
SALINDA DISSANAYAKE, MINISTER OF LAND DEVELOPMENT AND MINOR AGRICULTURAL EXPORT PRODUCE AND OTHERS

SUPREME COURT
FERNANDO, J.
WIGNESWARAN, J., AND
WEERASURIYA, J.
SC APPEAL No. 34/2002
CA APPLICATION No. 703/2001
11TH SEPTEMBER, 2002

Writ of mandamus – Divesting of an order of acquisition of land under the Land Acquisition Act – Section 39A of the Act – Jurisdiction of the Court of Appeal – Ouster of jurisdiction – Sections 2 and 4 of the Urban Development Projects (Special Provisions) Act, No. 2 of 1980 – Circumstances in which jurisdiction is not ousted.

A notice under section 2 of the Land Acquisition Act ("the LA Act") was issued on 08.10.91 in respect of a land owned by the applicants and an order under section 38 proviso (a) dated 25.04.1992, was published in the Gazette on 04.05.1992, directing that immediate possession of that land be taken on the ground of urgency. The President then made an order under section 2 of the Urban Development Projects (Special Provisions) Act, No. 2 of 1980 ("the UDP Act") that the said land was urgently needed for the purposes of an Urban Development Project. That order did not specify or identify the project.

On 07.07.1992 an application was made to the Court of Appeal for a writ of certiorari to quash the section 38 Proviso (a) order. It was dismissed *in limine* on 15.08.1994 for want of jurisdiction in view of section 4 of the UDP Act and on the basis that writ jurisdiction can only be exercised by the Supreme Court. No appeal was made to the Supreme Court from that order, nor was any writ application made to the Supreme Court.

It was only in December 1999 that an attempt was made to take possession of the land. Whereupon on 11.05.2001 the appellants applied to the Court Appeal, *inter alia*, for a writ of mandamus directing the Minister to make a "divesting order" in terms of section 39A of the LA Act divesting the State of

the land vested under the aforesaid acquisition. On a preliminary objection raised, the Court of Appeal held that in view of section 4 of the UDP Act, it had no jurisdiction to hear and determine the matter.

Held:

Having regard to the purpose for which the UDP Act was enacted and the provisions of section 4(2), where no steps have been taken for a long period of time, to implement a proposed project upon land in respect of which a section 2 order has been made, an application for mandamus in respect of an omission to divest the acquired land does not fall within the scope of section 4 of the UDP Act, and must be filed in the Court of Appeal.

APPEAL from the judgment of the Court of Appeal

Cases referred to:

1. *De Silva v. Atukorale* (1993) 2 Sri LR 283
2. *Amerasinghe v. Attorney-General* (1993) 1 Sri LR 376

Sanjeeva Jayawardene with *Faizer Markar* for appellants

A. Gnanadasan, Deputy Solicitor General for 1st, 2nd, 3rd and 6th respondents.

Gamini Perera with *P.A. Amerasinghe* for 4th and 5th respondents.

Cur.adv.vult

November, 13, 2002

FERNANDO, J.

This is an appeal against the order of the Court of Appeal upholding a preliminary objection, in an application for writs of Prohibition and Mandamus, that the Court of Appeal had no jurisdiction by virtue of the provisions of section 4 of the Urban Development Projects (Special Provisions) Act, No. 2 of 1980 (the "UDP Act").

The relevant facts are not in dispute. A notice under section 2 of the Land Acquisition Act (the "LA Act") was issued on 8.10.91 in respect of an allotment of land owned by the Petitioners-Appellants ("the Petitioners"). That was followed by an order under proviso (a) to section 38, dated 25.4.92 and published in the Gazette of 4.5.92, directing that immediate possession of that land be taken on the ground of urgency. The President then made an order under section 3 of the UDP Act, published in the Gazette of 29.6.92, declaring that the said land was urgently needed for the purpose of carrying out an urban development project. That order did not specify or otherwise identify the project. On 2.7.92 an application was made to the Court of Appeal for a writ of Cetiorari to quash the section 38 proviso (a) order. A preliminary objection – that, in respect of that matter, the jurisdiction of the Court of Appeal, under Article 140 of the Constitution, could only be exercised by the Supreme Court – was upheld and the application was dismissed on 15.8.94.

The jurisdiction of the Supreme Court was not invoked either by way of an appeal against the Court of Appeal order or by a writ application to quash the section 38 proviso (a) order and/or the section 2 order. According to the Petitioners, it was only in December 1999 that an attempt was made to take possession of the land.

On 11.5.2001 the Petitioners applied to the Court of Appeal for, *inter alia*, a writ of Mandamus directing the 1st Respondent-Respondent, the Minister of Land Development, to divest the said land. The Petitioners' position was that the conditions specified in section 39A of the LA Act had been satisfied in relation to that land, and that accordingly the 1st Respondent became subject to a duty to make a divesting order in respect of that land.

Section 39A of the LA Act provides:

"(1) Notwithstanding that by virtue of an Order under section 38....any land has vested absolutely in the State and actual possession of such land has been taken... the Minister may, subject to subsection (2), by subsequent..."divesting Order" divest the State of the land so vested....

(2) The Minister shall prior to making a divesting order....satisfy himself that–

(a) no compensation has been paid under this Act...

(b) the said land has not been used for a public purpose after possession of such land has been taken...

(c) no improvements to the said land have been effected....

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

The UDP Act provides as follows:

"An Act to provide for the declaration of lands urgently required for carrying out urban development projects.

2. Where the President..... 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.... The President may, by Order published in the Gazette, declare that such land is, or lands in such areas 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...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....or other order having the effect of staying, restraining, or impeding any person 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 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 application invoking the jurisdiction referred to in subsection (1) shall be made within one month of the date of commission of the act in respect of which or in relation to which such application is made and the

Supreme Court shall hear and finally dispose of such application within two months of the filing of such application."

Section 5 made consequential provisions in regard to cases which were pending when a section 2 order was made.

The Court of Appeal, after setting out the facts and the relevant provisions of the UDP Act, upheld the preliminary objection as follows:

> "It is an important rule in the construction of statutes that what a Court or person is prohibited from doing directly, it may not do indirectly or in a circuitous manner.
>
> The Petitioner in the present application now seeks to have the same land, [in] regard to which the original vesting order was challenged divested. Having come to this Court originally on the basis that vesting was illegal he now seeks to invoke the jurisdiction of this Court on the basis that vesting was a valid vesting and the Court seems to have complied [sic] with the divesting of the said land.
>
> It appears that the Petitioner is seeking to *approbate and reprobate* in the same matter and therefore this application is not tenable in law. In any event in terms of sections 4 and 5 of the [UDP Act] this Court has *no jurisdiction* to hear and determine this matter."

The finding that the Petitioners were seeking to approbate and reprobate is plainly mistaken. While it is true that in the 1992 application the Petitioners' position was that the vesting was illegal, the present application does not relate to any such claim. In 2001 the Petitioners sought a divesting order, and their claim did not depend on, or acknowledge, the validity of the original vesting. The obligation imposed by section 39A does not depend on a valid vesting: indeed, the Minister's duty to divest would be all the greater if the original vesting was illegal. The long title of Act, No. 8 of 1979, which introduced section 39A, shows that section 39A was intended to provide relief to persons whose lands had been acquired *without adequate justification* (see *de Silva v. Atukorale* [1], where too an initial unsuccessful challenge to the vesting was followed by an application for Mandamus to divest.

In regard to the jurisdictional issue, the Court of Appeal gave no reasons for its conclusion. Mr. Jayawardene's contentions on behalf of the Petitioner may be summarized as follows: that section 4(1) must be interpreted together with, and in the context of, section 4(2); that *every* writ application under section 4(1) had to be made "within one month of the date of *commission of the act*" in respect of which that application was made; that, when read with section 4(2), it was clear that section 4(1) was restricted to applications in respect of the "positive commission of an act"; that although "act" might sometimes include an "omission", in this context the phrase "commission of the act" did not include an omission; that there was no method whereby the period of one month could be reckoned in the case of an omission, as no date could be ascribed to such omission; that the Petitioner's grievance was in respect of an omission to which no date could be ascribed, namely, the failure to perform the duty to make a divesting order when the requisite conditions were satisfied; that accordingly section 4 did not apply to an application for Mandamus to compel the performance of that duty; and that the intention of Parliament was to transfer to the Supreme Court for expeditious disposal within two months only those writ applications in respect of positive acts of commission in relation to the acquisition of land urgently required or an urban development project, and not the entire writ jurisdiction of the Court of Appeal in respect of land acquisition matters involving lands covered by an order made under section 2 of the UDP Act. He added that even if there was an inconsistency between the seemingly wide language of section 4(1) and the restrictive phraseology of section 4(2), the latter provision must prevail, as it was the later expression of the will of Parliament.

Although section 4 of the UDP Act appears to erode the jurisdiction vested in the Court of Appeal under Article 140 of the Constitution, that is no reason for interpreting section 4 restrictively. While the vesting of even a part of the constitutionally entrenched jurisdiction of one of the superior Courts in some *other* body or institution may be viewed with disfavour, as being an erosion of judicial power, the position is different in the case of a re-distribution of such jurisdiction between the superior

Courts themselves, as in this case. Besides, the First Amendment introduced a proviso to Article 140:

> "Provided that Parliament may by law provide that, in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal."

Section 4 of the UDP Act is a valid exercise by Parliament of the power conferred by that proviso, and cannot be restrictively interpreted upon an assumption that there was an erosion of the jurisdiction of the Court of Appeal.

However, giving section 4(1) a wide literal interpretation creates serious anomalies, and even absurdities, in several respects.

The phrase "any particular land or any land in any area" contemplates two distinct situations; first, where a particular land has already been identified as suitable for the relevant urban development project (e.g. the extention of a public market or public vehicle park will almost invariably require the acquisition of a particular identified adjacent land); and second, where a project (e.g. to provide housing for public officers) requires land located within a large area (e.g. within an electoral division, or a Grama Sevaka division, or an AGA's division, or a Municipal ward), but further investigations of various kinds are required in order to identify which land is most suitable for the project. Another example of the latter would be the acquisition of lands for an expressway (as in *Amerasinghe v Attorney-General*,(2)) where the most suitable route for the expressway cannot be identified without entering, examining and surveying many lands in several areas. Such areas may well include State land as well.

In the first situation, the ulimate result of the acquisiton process would be (a) the acquisiton of the particular land, or (b) the acquisition of part of that land, and the abandonment of the rest, or (c) the abandonment of the entire acquisition. In the second situation, the ultimate result would be (a) the acquisition of a defined land out of the larger area, or (b) the abandonment of the entire acquisition.

If section 4(1) is given a wide literal meaning, where any land is acquired and the project is thereafter fully implemented, that land would nevertheless continue to be "land in respect of which [a section 2 order] has been made". Thus in the case of land acquired for housing, disputes may arise, many years later, in regard to the allocation of houses, termination of occupation, ejectment, etc, giving rise to the need to invoke the writ jurisdiction. Even land which was ultimately *not* acquired would continue to be "land in respect of which [a section 2 order] has been made", and disputes may later arise (e.g. by reason of the exercise of powers under the LA Act or other statutes) requiring recourse to the writ jurisdiction. Was it the intention of Parliament when enacting the UDP Act, that in all such cases writ applications must be filed in the Supreme Court simply because at some time in the past a section 2 order had been made in relation to that land in an entirely different context? That would mean that a section 2 order had the effect of attaching to the land (creating,as it were, an encumbrance) an obligation to apply to the Supreme Court. Besides, there are practical difficulties, as for instance where such land has passed to a new owner, who many years later wishes to invoke the writ jurisdiction: how can he ascertain whether a section 2 order was ever made in respect of that land, in order to decide whether to apply to the Court of Appeal or the Supreme Court?

What is more, a literal interpretation would result in attaching such an "encumbrance" to land – not only a "particular land" but to all land in an entire "area" – even where the relevant section 2 order had been quashed in the exercise of the writ jurisdiction.

The purpose of the UDP Act was to ensure that lands urgently required for urban development projects were obtained without the delays caused by (1) the exercise of the writ jurisdiction, original and appellate, and (b) the exercise of the jurisdiction of other courts. Accordingly, section 4 abolished the appellate jurisdiction, and transferred the original writ jurisdiction to the Supreme Court, with time limits, thereby considerably reducing delays attributable to the exercise of the writ jurisdiction; and section 3 prevented other courts granting injunctions and making

orders which would stay, restrain or impede the acquisition of any land, the carrying out of work thereon, and the implementation of the project. In that context, I am of the view that section 4(1) must be interpreted in the light of that purpose and intention. One consequence is that section 4(1) does not require recourse to the Supreme Court where the dispute arises *after* the project has been implemented or where the dispute relates to land in respect of which the acquisition had been quashed or abandoned.

The phrase "jurisdiction....*in relation to* any....land...." gives rise to further questions. Land acquisition proceedings may result in a wide variety of disputes "*in relation to*" the land affected by the section 2 order but which would not in any way hinder either the speedy acquisition of the land actually needed for an urban development project or the expeditious implementation of the project. I will refer to a few examples.

Section 4(6) of the LA Act prohibits a decision to acquire only a part of a building if the owner desires that the whole building be acquired unless such part can be severed or demolished without serious detriment to the rest of the building. A landowner may accept the need for the project, and may therefore not object to the acquisition. However where the part to be acquired cannot be severed without serious detriment to the rest, he may properly insist that the entirety of his building be acquired. Although that would not be a dispute *as to* the part to be acquired it would nevertheless be a dispute *in relation to* or connected with the part to be acquired. If there is an *omission* on the part of the Minister to acquire the rest as well, and the owner seeks Mandamus to compel the acquisition of the rest of his building, should application be made to the Supreme Court? The grant or refusal of such an application will not affect the speedy implementation of the project. It would not be reasonable to attribute to Parliament an intention that such matters too should be transferred to the Supreme Court for expeditious disposal. Likewise, disputes regarding the assessment and payment of compensation for acquired land would constitute disputes *in relation to* the land acquired. Accordingly, Mandamus may be the remedy for disputes arising from such omissions, e.g. the omission to refer

a disputed claim to title to the District Court as required by section 10(2), the failure to make an award under section 17, the omission to honour a written agreement (under section 36) to transfer alternative land in lieu of compensation. Since such matters do not involve a date of *commission* section 4(1) read with section 4(2) would not require application to the Supreme Court. Again, a landowner may seek Prohibition, on the ground of bias, against an officer holding a compensation inquiry under section 9. Requiring that such applications be dealt with by the Supreme Court does not in any way facilitate the implementation of projects. Such applications do not appear to fall within the scope of section 4(1).

I must now turn to other situations in which writ applications may be *in relation to* omissions and acts which, though anticipated or imminent, have not yet been committed. If a notice under section 2 of the LA Act fails to state the public purpose for which land is required, a person whose land is affected by such notice may seek Certiorari to quash it, or Prohibition to restrain acts proposed to be done thereunder. If the Minister is about to decide under section 4(5) to acquire a land, unlawfully ignoring the owner's legitimate claim under section 4(6), the owner may seek Prohibition in respect of that imminent breach of his rights. In such cases recourse to the Court of Appeal would entail delay, and that would hinder the speedy implementation of the project concerned. I incline to the view (which I acknowledge is no more than *obiter*) that in such instances, notwithstanding section 4(2), section 4 requires recourse to the Supreme Court, even though there is no "positive commission of an act"; and, conversely, that where there is no such urgency, section 4 does not require recourse to the Supreme Court even in respect of the commission of an act. Legislative clarification is desirable, as otherwise litigants may be forced out of an abundance of caution to file writ applications simultaneously in both Courts.

Having regard to the purpose for which the UDP Act was enacted, and the provisions of section 4(2), I hold that, where no steps have been taken, for a long period of time, to implement a proposed project upon land in respect of which a section 2 order has been made, an application for Mandamus in respect of an

omission to divest the acquired land does not fall within the scope of section 4 of the UDP Act, and must be filed in the Court of Appeal, I must add that this judgment deals only with the jurisdictional issue, and I express no opinion on the question whether the conditions set out in section 39A have been satisfied.

I allow the appeal, and direct the Court of Appeal to entertain, hear and determine the application on the merits. The Petitioners will be entitled to a sum of Rs. 20,000 as costs in both Courts, payable by the State.

WIGNESWARAN, J. – I agree.

WEERASURIYA, J. – I agree.

Appeal allowed; Court of Appeal directed to hear application on merits.