

1987 March 14

[PIKIS J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

DEMETRAKIS NICODEMOU FAKONTIS,

Applicant,

v

THE REPUBLIC OF CYPRUS THROUGH
THE COUNCIL OF MINISTERS

Respondents

(Case No 613/85)

Compulsory acquisition — Revocation of an order for acquisition before perfection — The power vests in the acquiring authority — The nature of such power is discretionary — The Compulsory Acquisition Law 15/62 section 7(1)

5 *Constitutional Law — Right of property — Constitution Art 23 5 — Compulsory acquisition — Period of three years begins to run as from time of perfection of the acquisition*

10 *Executory act — Informatory or advisory act — Not justiciable — Offer for compensation in respect of immovable property compulsorily acquired — Demand by applicant for the return of his property — Reply by District Lands Officer expressing opinion that order of acquisition is still valid as it had not been revoked — Said reply does not embody a decision of an executory, but merely of an informatory character*

15 *Applicant's property was compulsorily acquired in 1974. By the year 1979 it became clear that the purpose for which the property was acquired was abandoned. Nevertheless it was decided to pursue the acquisition and, as a result, the procedure for the perfection of the acquisition was reactivated and on 14 3 85 an offer was made by the Paphos Lands Officer for the compensation of the applicant. The applicant rejected the offer and demanded the return of the property. In reply, the Lands Department expressed the opinion (Letter dated 23 4 85) that the order of acquisition was*
20 *valid as it had not been revoked by any subsequent act*

Hence the present recourse, which is essentially directed against the decision, if any, embodied in the letter of 23 4 85. However, counsel for the

applicant broadened his challenge by attributing an omission to the Acquiring Authority to return the property as allegedly bound to do by Art 23 5 of the Constitution

Held, *dismissing the recourse* (1) Communications of an informatory or advisory character are not justiciable as they leave unchanged the legal regime applicable to the determination of the rights of the petitioner. The letter of 23 4 85 is of an informatory character. In any event the Paphos Lands Officer had no power to revoke the order of acquisition. The power to revoke an order of acquisition before perfection, i.e. before change of ownership, vests in the Acquiring Authority (Section 7(1) of the Compulsory Acquisition Law) and is of a discretionary nature. The exercise of the discretion is, of course, reviewable by this Court. In this case, however, no decision was taken under section 7(1) 5 10

(2) Art 23 5 of the Constitution imposes a duty on an Acquiring Authority to return property compulsorily acquired, if the purpose for which the acquisition was effected is not attained within a period of three years. The period of three years does not run until after perfection of the acquisition (*Cyprus Tannery v The Republic* (1985) 3 C L R 522 followed) 15

Observations by the Court No doubt the applicant is free to petition the Council of Ministers to revoke the acquisition in exercise of their powers under section 7(1) of the Compulsory Acquisition Law. Considering the abandonment of the purpose of the acquisition and in the light of the provision in Art 23 5 of the Constitution that «acquired property shall only be used for the purpose for which it has been acquired» revocation may well be inevitable 20 25

Finally this Court cannot overlook the scanty regard paid in this case by administrative organs to the effective protection of the rights safeguarded by Art. 23 of the Constitution. One is apt to gain the impression that they put administrative convenience above the need to protect the aforesaid rights

Recourse dismissed. No order as to costs 30

Cases referred to

Cyprus Tannery v The Republic (1980) 3 C L R 405 and on appeal (1985) 3 C L R 522,

Vassiladou v The Republic (1986) 3 C L R 955 and on appeal Rev Junsd Appeal 602, to be reported in (1987) 3 C L R 35

Recourse.

Recourse against the omission of the respondents to revoke the acquisition of applicant's property due to the abandonment of the purpose for which the property was acquired.

Chr. Georghiades, for the applicant.

M. Clerides - Tsiappa (Mrs.), for the respondents.

Cur. adv. vult.

5 *PIKIS J.* read the following judgment. Far back in 1974, the property of the applicant was compulsorily acquired for purposes signified a year earlier in the notice of acquisition, namely, the improvement of air communications by the construction of an airport in the Paphos district. The plans for the implementation of the project were, as can be gathered from the history of the acquisition, left in abeyance for a number of years. And no steps were taken to perfect the acquisition by the payment of compensation, a prerequisite for the vesting of ownership in the Acquiring Authority.

15 By the year 1979 it became clear that the purpose for which the property was acquired was abandoned. Another location was chosen and acquired in the Paphos district for the construction of an airport. For a time government departments toyed with the idea of returning the property to the owners and correspondence was exchanged on the subject between various departments of government. But no firm decision was taken either way. Eventually, it was decided to pursue the acquisition notwithstanding the abandonment of the purpose for which it was acquired. It was planned to retain the immovable property and use it for defence needs.

25 Following the decision to keep the property, the procedure for the perfection of the acquisition was reactivated and on 14th March, 1985, an offer was made by the Paphos Lands Officer for the compensation of the owner. Promptly, he rejected the offer (18/4/85) and demanded the return of the property on the ground that the purpose for which it was acquired had been abandoned. In reply, the Lands Department expressed the opinion that the order of acquisition was valid, reminding it had not been revoked by any subsequent act (letter of 21/4/85). The recourse, both as originally framed and as subsequently amended, is essentially directed against the decision, if any, embodied in the letter or the omission to revoke the order of acquisition.

35 The justiciability of the subject matter of the recourse is the first ground upon which it is opposed. In the contention of the respondents the letter of 23/4/85 disclosed no executory

administrative decision amenable to the revisional jurisdiction of the Court. It merely signified the opinion of that department of government on the legal implications of the order of acquisition and its validity in the absence of any revocatory decision discharging it. Furthermore, it was not in the power of the Director of Lands Department to revoke the order of acquisition. Discretion to recall a notification or an order of acquisition under s.7 of the Compulsory Acquisition Law*, vests, whenever the Republic is the Acquiring Authority, in the Council of Ministers in accordance with the provisions of s.6(3) of the Law. So, under any circumstances it was beyond the power of the Paphos Lands Officer to exercise any of the powers vested in the Acquiring Authority by s. 7 of the Law.

Counsel for the applicants in a thorough and illuminating address examined the right of ownership from a variety of angles and drew attention to its protection in Cyprus by Article 23 as a fundamental right not to be denied or interfered with, save as provided in the Constitution. In Greece there is provision in the Constitution** for the automatic revocation or lapse of an order of acquisition whenever the Acquiring Authority is guilty of inordinate delay (18 months) in the payment of compensation adjudged whether on provisional or a permanent basis***. No comparable provision is included in our Constitution. Power to revoke an order of acquisition before perfection, that is, before change of ownership, vests in the Acquiring Authority, conferred by s.7 of the Compulsory Acquisition Law. The discretionary nature of the power was acknowledged by the Full Bench in the *Cyprus Tannery v. Republic*****. Being power of a discretionary character no statutory duty is cast on the Acquiring Authority to exercise it under given or any circumstances. Of course, a decision resulting from the exercise of the discretion vested by s.7 is reviewable under article 146.1.

* (Law 15/62)

** (see, article 17 of the Constitution of 1975)

*** (The subject of compulsory acquisition in Greece is discussed in great detail in the work of K Horomides - *Compulsory Acquisition*, at pp 132-133, 136, 137-161, 389-398)

**** (1980) 3 C L R. 405, 415, and *Cyprus Tannery v Republic* (1985) 3 C.L.R 522)

In this case no decision was taken under s.7(1) of the Law nor the letter of 23/4/85 makes reference to any such decision. It merely informs of the understanding of the Paphos Lands Authorities that the order of acquisition is still in force in the
5 absence of a decision revoking it, information factually correct. Communications of an informatory or advisory character are not justiciable as they leave unchanged the legal regime applicable to the determination of the rights of the petitioner. Nor was it for that matter in the power of the Paphos Lands Officer to revoke an
10 order of acquisition. Consequently, the recourse to whatever extent it is directed against a decision or omission embodied in the letter of 23/4/85, must necessarily fail.

On the other hand, counsel did not confine the challenge to the content of the letter of 23/4/85 but broadened it, attributing an
15 omission to the Acquiring Authority to return the property as allegedly bound to do by the provisions of article 23.5 of the Constitution. Paragraph 5 of article 23 imposes a duty on an acquiring authority to return property compulsorily acquired if the purpose for which the acquisition was effected is not attained
20 within a period of three years. In pressing this aspect of his case counsel did not ignore obstacles in his way or underestimate their effect. In the submission of counsel the three-year period should be computed from the date of the order of acquisition and not its perfection by the transfer of ownership. In *Cyprus Tannery*, supra,
25 it was decided otherwise with the Court holding that the period of three years does not run until after the perfection of the acquisition. The interpretation of article 23.5, favoured in the case of *Cyprus Tannery*, is unavoidable in view of the concept of compulsory acquisition, elicited in para.4 of article 23. The
30 payment of just compensation is a condition precedent to the compulsory acquisition of property. Etymologically too, the word «acquisition» connotes vesting of ownership. It is, therefore, fair to presume that the constitutional legislator used the expression «compulsorily acquired» in article 23.5 in the above sense and not
35 as synonymous to the sanctioning of the acquisition that leaves ownership wholly unaffected. Before the perfection of the acquisition the property remains for all purposes in the ownership and possession of the owner who may do with his property as he pleases unless it is requisitioned in the meantime. But in that case

also, requisition cannot last for longer than three years as laid down in article 23.8(c)*.

It must be added that compensation of the owner affected by an order of acquisition is not left to the discretion and speedy action of the Acquiring Authority. Section 9 of the Law** empowers the owner to have recourse to a civil court for the determination of compensation where no agreement is reached within a month after publication. That the applicant was not compensated in this case in time is, at the least, partly his fault. 5

For the reasons explained above the recourse cannot succeed; it is, in the first place, directed against a non executory act whereas to the extent that it is founded on alleged omission to give effect to the provisions of article 23.5, it is ill founded as the acquisition was not perfected. No doubt the applicant is free to petition the Council of Ministers to revoke the acquisition in exercise of the powers vested them by s.7(1) of the Compulsory Acquisition Law. Considering the abandonment of the purpose for which the acquisition was effected, its revocation may well be inevitable. Paragraph 5 of article 23 explicitly provides that «... acquired property shall only be used for the purpose for which it has been acquired.» However, no more need be said on the matter as it does not immediately arise for consideration. What I cannot overlook reflecting upon administrative records before me relevant to the sub judice acquisition, is the scanty regard paid by administrative organs to the effective protection of the rights safeguarded by article 23. One is apt to gain the impression that they put administrative convenience above need to protect effectively the rights safeguarded by article 23. I remind that in accordance with article 35 of the Constitution, it is the duty of every executive organ to secure within the limits of their competence the efficient application of Part II of the Constitution. 10
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In the result, the recourse fails and it is dismissed. There will be no order as to costs.

Recourse dismissed.
No order as to costs. 35

* See, *Loulla Vassiadou v The Republic* (1986) 3 C L R. 955 (Revisional Jurisdiction Appeal No 602 - decided on 27 2 87, to be reported in (1987) 3 C L R)

** (Law 15/62)