

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA

In the matter of an application for mandates in the nature of Writs of Certiorari and Mandamus under Article 140 of the Constitution .

Madapulliarachchige Oliver Gregory Earnest Fernando

No. 40/11, Watson Peiris Mawatha,
Moratuwa.

Petitioner.

CA Writ Application No.322/08

Vs.

1: Municipal Council
Moratuwa
Galle Road,
Moratuwa.

1st Respondent

2.

2. Urban Development Authority
Sethsiripaya
Battaramulla.

2nd Respondent.

BEFORE: Hon. Sathya Hettige P.C. J, President of the Court of Appeal
Hon. Anil Goonaratne J, Judge of the Court of Appeal

COUNSEL; Chula Bandara for the petitioner
D.S.P Batagahage for the 1st respondent
Ms. Maithrie Amarasinghe Jayatilake SC for 2nd respondent.

ARGUED ON: 13/03/2009, 09/09/2009, and 05/03/2010

Written submissions tendered on 14/01/2011

DECIDED ON: 03/03/2011

SATHYA HETTIGE P.C. J P/CA

The petitioner is a permanent resident at no. 40/11, Watson Peiris Mawatha, Moratuwa who was the owner of 4 adjacent blocks of land namely,

Lot 14 A and Lot 14 B Lot 11 A and Lot 10 depicted in plan Nos. 1273 dated 26.08.1962 and no. 1273 dated 12/06/1957 and prepared by C.W. de Mel

3.

licensed Surveyor and plan no. 3445 dated 12/12/1987 prepared by W.O.J. Fernando licensed surveyor annexed and marked respectively as P1 A, P1 B and P1 (C). The petitioner further states that the said blocks of land are subdivisions of a larger land called 'Pokunewatte' bearing assessment no. 5/10, Holy Cross Avenue situated in Moratuwa within the Moratuwa Municipal Council limits, the 1st respondent. All 4 blocks of land are bounded by two roads namely, Rev. Fr. Alex Ranasinghe Mawatha on the North and Watson Peiris Mawatha on the south.

The petitioner in the year 1996 submitted a building application to the 1st respondent's predecessor the then Urban Council of Moratuwa under application No 58/96 to construct a two storied building to house workshop and an office on the said land , lot 14B at no. 74 , Watson Peiris Mawatha which was approved . The petitioner completed the foundation of the building accordingly and a copy of the approved building plan is annexed to the petition marked P 2

On 16.01,1998 the petitioner submitted a new plan No. 24/98 marked P3 to expand the building up to three stories with a larger workshop , office and a residence . It is not denied that the said plan has been received by the 1st respondent. The petitioner complains that the said plan no. 24/98 was never rejected nor approved by the 1st respondent. As there was no response from the 1st respondent the petitioner visited the Municipality several times and during such visits , it was intimated to the petitioner by the officers of the 1st respondent that there was no impediment not to approve the plan and as such the petitioner presumed that the building plan No. 24/1998 would be approved in due course.

4.

The petitioner did not receive any communication from the 1st respondent stating that the petitioner has violated any UDA requirements or has breached any Municipal Council regulations or requirements or to the effect that there was any technical defect (fault) in the building as reflected in the plan. It is also stated in the petition that the petitioner with the intention of selling part of the property prepared a block out plan No. 1539 in 2001 and submitted same for approval of the 1st respondent. The said block out plan no. 1539 was approved subject to certain conditions.

The petitioner has prepared another block out plan no. 1560 and submitted same for approval in 2004. The petitioner received a letter marked P 9 informing him that block out plan no. 1560 cannot be approved as the building under construction has been built within the building limits Municipal Council road way.

The issue in the present application is that whether the road way namely, Fr. Alex Ranasinghe Mawatha on which a part of the building stands is a private road or a road that has been vested in the 1st respondent's Municipality.

The petitioner states that the Fr. Alex Ranasinghe Mawatha which is the subject matter of this application is a private road and it has never vested with the 1st respondent or there is no street lines or building limits for the said road. However the petitioner received another letter marked P 14 informing that the Planning Committee 1st respondent decided to approve the block out plan no. 1560 subject to the following conditions which the petitioner has to satisfy.

5.

(1) to submit a building application for the three storied building under construction on lot B indicating that the section within the building limits will be demolished

(2) Until the said sections are demolished to deposit Rs. 780,000/- with the 1st respondent to assure the demolishing of 780 Sq. ft. at the rate of Rs. 1000/- per sq. foot

(3) to pay a service surcharge of Rs. 14 820/

(4) To indicate that building shown in lot A will be demolished and removed

The petitioner states that the said letter marked **P 14** is bad in law and seeks inter alia,

i. a Writ of Certiorari to quash the decision of the 1st respondent requiring the petitioner to deposit Rs. 780,000/ indicated therein.

ii. a Writ of Mandamus to compel the 1st and 2nd respondents to approve the building application no. 24/98 and block lout plan no. 1560 of 2004.

Learned counsel for the 1st respondent objected to this application on the basis that the 1st respondent has informed the petitioner of the danger of new construction by stating that the 1st respondent is not responsible for the approval for the existing building under construction and the extent of the land.

6

The counsel for 1st Respondent further raised the following objections.

- a) The Rev. Fr. Alex Ranasinghe Mawatha is a public road and it falls in to two electoral divisions namely 8 and 9 divisions.
- b) The said road is a tarred road which belongs to the public and being maintained by the Municipality
- c) That there is a case No. 1329/M pending in the District Court of Moratuwa filed by the petitioner claiming compensation.

However, when this matter was taken up for argument the learned counsel for the 1st respondent failed to adduce any documentary evidence or produce any Gazette notification to show that the said road way is a public road showing the **street lines** or it has vested in the Moratuwa Municipality. The court granted several dates to the 1st respondent to produce any Gazette Notification or any other documents to establish the fact that road way in question is a private road or a public road vested in the Moratuwa Municipality. However, the 1st respondent failed to produce any document and the counsel indicated to court accordingly and submitted that the road way is a tarred public road with street lamps maintained by the Moratuwa Municipality.

All parties filed comprehensive written submissions on the issue before court. On a proposal made by court on 05/03/2010 the 1st respondent was directed to consider to bring about a settlement with regard to the granting approval of the building plan already submitted by the petitioner since the 90 % of the construction of the building has been completed. It appears that the petitioner had proceeded to construct the building in

question from 2004 and no action was taken by the Municipality to stop the construction if the construction was **unlawful and unauthorized**.

However, on the proposal made by court it appears from a document dated 29/07/2010 annexed to the written submissions of the 1st respondent addressed to the petitioner, the 1st respondent has waived off the requirement of payment of Rs. 780,000/- being the cost of demolition of the building referred to in P 14 and the petitioner was required to pay only a sum of Rs. 59,280/- being the service charges requiring the petitioner to submit a new building plan including the 2nd and 3rd floors already constructed in lieu of the earlier building plan as a settlement.

As such the court is of the view that the relief sought by the petitioner in sub paragraph (b) of the prayer seeking a Writ of Certiorari need not be considered by court.

It has also been proposed by that letter dated 29/07/2010 that the petitioner was required to show the old building in plan no. 1560 (P7) as a building to be demolished. It appears that the settlement terms have been arrived at and agreed upon by the parties consequent to a meeting held with the participation of the learned State Counsel for the 2nd respondent, UDA representative, Petitioner's legal representative and Mr Gemunu Perera, the engineer of the 1st respondent's Municipality.

On considering the circumstances of the case it appears that the petitioner has proceeded with the construction of the building in question at his own risk without obtaining building plan approval. However, it seems that 1st respondent has failed to take legal steps to restrain the petitioner from continuing with the construction at the proper stage and failed to inform the petitioner accordingly not to construct the said building in question.

8

In the circumstances I allow the application of the petitioner as per sub paragraph © of the prayer to the petition only and issue a Writ of Mandamus on the 1st respondent accordingly subject to the condition that the part of the building that stands within the building limits of the road way in question be demolished by the petitioner or at the expense of the petitioner when the street lines are demarcated and published in the Government Gazette by the 1st respondent Municipality.

Subject to the above, the petitioner's application is allowed.

In the circumstances of this application I order no costs.

PRESIDENT OF THE COURT OF APPEAL

Anil Goonaratne J,

I agree.

JUDGE OF THE COURT OF APPEAL.