

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

W. Ashoka Jennet Silva
No. 15/7, Chakindarama Road,
Ratmalana.

PETITIONER

C.A . 451/2008 (Writ)

Vs.

1. Urban Development Authority
6th & 7th Floors, Sethsiripaya,
Battaramulla.
2. The Chairman,
Urban Development Authority
6th & 7th Floors, Sethsiripaya,
Battaramulla.
3. The Municipal Council
Dehiwela Mount Lavinia
Anagarika Dharmapala Mawatha,
Dehiwela.
4. The Mayor
The Municipal Council
Dehiwela Mount Lavinia
Anagarika Dharmapala Mawatha,
Dehiwela.
5. The Municipal Commissioner
The Municipal Council
Dehiwela Mount Lavinia
Anagarika Dharmapala Mawatha,
Dehiwela.

RESPONDENTS

AND NOW

1. Mallika Wanigasekera
No. 15/7, Chakindarama Road,
Ratmalana.
2. Hemawathie Kannangara
No. 15/7, Chakindarama Road,
Ratmalana.
3. L. Lalitha Ranjani Fernando
No. 15/7, Chakindarama Road,
Ratmalana.
4. M. D. Malkanthi Peiris
No. 15/7, Chakindarama Road,
Ratmalana.
5. M. Rohana Warnapriya Peiris
No. 15/7, Chakindarama Road,
Ratmalana.

INTERVENIENT-RESPONDNETS

Vs.

W. Ashoka Jennet Silva
No. 15/7, Chakindarama Road,
Ratmalana.

PETITIONER-RESPONDNET

1. Urban Development Authority
6th & 7th Floors, Sethsiripaya,
Battaramulla.
2. The Chairman,
Urban Development Authority
6th & 7th Floors, Sethsiripaya,
Battaramulla.

3. The Municipal Council
Dehiwela Mont Lavinia
Anagarika Dharmapala Mawatha,
Dehiwela.
4. The Mayor
The Municipal Council
Dehiwela Mount Lavinia
Anagarika Dharmapala Mawatha,
Dehiwela.
5. The Municipal Commissioner
The Municipal Council
Dehiwela Mount Lavinia
Anagarika Dharmapala Mawatha,
Dehiwela.

RESPONDENTS-RESPONDENTS

BEFORE: Anil Gooneratne J. &
H. N. J. Perera J.

COUNSEL: Dr. Jayatissa de Costa P.C. with Lahiru Silva for Petitioner

W. Dayaratne P.C. with R. Jayawardena & D. Dayaratne
For 3rd – 5th Respondents

Victor Fernando for 6th – 10th Intervenient-Petitioners

ARGUED ON: 07.02.2013

DECIDED ON: 02.04.2013

GOONERATNE J.

This is an application for a Writ of Certiorari and Mandamus. The application more particularly relates to a demolition order, and the Petitioner has sought a Writ of Certiorari to quash the decision taken by 3rd to 5th Respondents to demolish Petitioner's house bearing assessment Nos. 15/7, 15/7 1/1 and 15/7 ½. A Writ of Mandamus is sought to compel the 3rd to 5th Respondents to minimize the demolition to the extent of the old house and regularize a new building plan for the dwelling house of the Petitioner bearing the above assessment numbers. However on the issuance of a Writ of Mandamus, this court observes that learned President's Counsel for the Petitioner in his oral submissions as well as in the pleadings/written submission was not able to demonstrate the required public purpose and or the statutory duty to qualify for the issuance of a Writ of Mandamus.

What was stressed by the learned President's Counsel for the Petitioner was the question of the 3rd to 5th Respondents not having jurisdiction to invoke the provision of the Urban Development Authority Act No. 41 of 1978 as amended by Amending Acts of 1982 and 1984. It was the position of learned President's Counsel that there is and was a total patent lack of jurisdiction for the local authority (3rd to 5th Respondents) in taking steps to invoke the provisions of the above statute. He argued that all matters pertaining to planning in terms of the above statute is a matter for the Urban Development Authority and it cannot be delegated to the local authority. Learned President's Counsel also cited the cases reported in 2003 (3) SLR 40 Jayasinghe's case and contended a patent lack

of jurisdiction on the part of the 3rd to 5th Respondents. This was the only basis on which the Petitioner sought to canvass the decisions of the 3rd to 5th Respondents in their exercise of taking steps to demolish the building in question.

The learned Counsel for the Interventient-Petitioners as well as learned President's Counsel for 3rd to 5th Respondents demonstrated to this court that the learned Magistrate as contained in document P2A has made order for demolition of the premises in question, and that the Petitioner had not at any stage canvassed the order of the learned Magistrate. The learned Counsel for the Interventient Petitioners referred to us the case of Municipal Council Vs. Selvam reported in 2012 Bar Association Law Reports Pgs. 58 – 61. He also argued his case on the footing of the Petitioner's application to court is futile in the context of the order made by the learned Magistrate.

However the question of delegation must be sorted out at the very outset by perusing the following sections of the Urban Development Authority Act as Amended.

Section 23(5) of the Urban Development Authority Act as Amended by Act No. 4 of 1982 reads thus:

“The Authority may delegate to any officer of a local authority, in consultation with that local authority, any of its powers, duties and functions relating to planning within any area declared to be a development area under section 3, and such officer shall exercise, perform or discharge any such power, duty or function so delegated, under the direction, supervision and control of the authority

Section 28 A of Act No. 4 of 1982 is also reproduced and reads thus:

- (1) Where in a development area, any development activity is commenced, continued resumed or completed without a permit or contrary to any term or condition set out in a permit issued in respect of such development activity, the Authority may, in addition to any other remedy available to the Authority under this Law, by written notice require the person who is executing or has executed such development activity, or has executed it to be executed, on or before such day as shall be specified in such notice not being less than seven days from the date thereof –
 - (a) To cease such development activity forthwith; or
 - (b) To restore the land on which such development activity is being executed or has been executed, to its original condition; or
 - (c) To secure compliance with the permit under the authority of which that development activity is carried out or engaged in, or with any term or condition of such permit and for the purposes of compliance with the requirements aforesaid –
 - (i) to discontinue the use of any land or building; or
 - (ii) to demolish or alter any building or work.
- (2) It shall be the duty of the person on whom a notice is issued under subsection (1) to comply with any requirement specified in such notice within the time specified in such notice or within such extended time as may be granted by the Authority on application made in that behalf.
- (3)
 - (a) Where in pursuance of a notice issued under subsection (1), any building or work is not demolished or altered within the time specified in the notice or within such extended time as may have been granted by the Authority, the Authority may apply to the Magistrate to make a mandatory order authorizing the Authority to demolish or alter the building or work, and the Magistrate on serving notice on the person who had failed to comply with the requirement of the Authority under Subsection (1) to demolish or alter the building or work, may, if he is satisfied to the same effect, make order accordingly.
 - (b) If such person undertakes to demolish or alter the building or work, the Magistrate may if he thinks fit postpone the operation of the order for such time

not exceeding two months as he thinks sufficient for the purpose of giving the person an opportunity of demolishing or altering the building or work.

- (4) Where a mandatory order has been made under subsection (3), it shall be the duty of the police authorities to render all necessary assistance of the Authority in carrying out the order.
- (5) The Authority shall be entitled to recover any reasonable expenses incurred by the Authority in demolishing or altering any building or work in pursuance of an order made by the Magistrate under Subsection (3).

Having perused the above sections of the said law we find that the question of delegation has been dealt in the case of Perera, Special Commissioner Vs. Selvam 2012 BLR 58 ...

Held:

- (i) The scope of Section 28A is free from obscurity that the legislature intended to secure compliance with the development plan so that proper implementation of the said plan is carried out.
- (j) While Section 8A to 8H deal with the manner in which a development plan has to be prepared, Section 8J makes it clear that the purpose of issuing a permit is to ensure that all development activities in development area should conform to the development plan.
- (k) Section 8K further provides that upon the completion of any development activity by any person under the authority of a permit, he should apply for a certificate from the Authority confirming that the development activity has been carried out in accordance with the permit.
- (l) The provisions contained in Section 28A(3) fall within the scope of the term "planning" and therefore the powers, duties and functions referred to therein can be delegated by the UDA to any officer of a local authority.

The above decided case has also dealt with Jayasinghe Vs. Seethawakapura UC by Justice Sripavan and observes that Jayasinghe's case dealt

with a situation where there was no delegation and state further that the dicta in Jayasinghe's case is distinguishable from the above 'Selvams' case.

We have had the advantage of perusing the written submissions of all parties. Although on the above basis this application need to be rejected, this court has no doubt that it could reject this application on the basis of futility also. As observed above the learned Magistrate's order for demolition has not been canvassed and the attempt to file this application before this court is futile in the facts and circumstance of this case. Writs would not be issued if the writ would be futile in its result. *Credit Information Bureau of Sri Lanka Vs. Messrs Jafferjee & Jafferjee* 2005 (1) SLR 89 at 93.

Nevertheless, there are instances however passage of time has been held to render Mandamus futile. For instance, Mandamus was once sought to compel the Respondent to take steps to issue a butcher's licence for the year 1965 to the Petitioner. The steps to be taken required the Respondent to publish the Petitioner's application in the Gazette Delivering the judgment in October 1965, the Writ was refused partly because of futility. *Jayasena Vs. Punciappuhamy* 1980 (2) SLR 43,48. An application for Writs of Certiorari and Mandamus seeking, to quash orders made by the Respondents, refusing the Petitioner's application to admit his child in the year 1984 to the Kindergarten class of a school and, to direct them to admit the child to that class, was refused by judgment of December 1985, partly because the child was, by them, overage to be admitted to the kindergarten class, and "the court will not lend itself to making a stultifying order which cannot be carried out. Per Siva Selliah J. *Hulangamuwa Vs. Siriwardena, Principal Visaka Vidyalaya* 1986 (1) SLR 275, 278. A writ will not issue where it would be futile or vexatious (1958) 61 NLR 491, 496.

The Writ of Certiorari clearly will not issue where the end result will be futility, frustration, injustice and illegality. Per Soza J. Sidlect Vs. Jacolyn Seneviratne (1984) (1) SLR 90. Followed by Marsoof J. Ratnasiri Vs. Ellawella (2004) 2 SLR 180, 208.

In all the above circumstances we are of the view that the writs sought cannot be issued in law where a person fails to adhere to the requirement of the notice, Section 28A(3)(a) authorizes the municipality (as in Selvam's case) to commence proceedings before a Magistrate and obtain an order for demolition of the development activity to restore the land to its previous condition. All the necessary procedural steps have been taken by the 3rd to 5th Respondent and there is no challenge to the order of the Magistrate. As such writs sought cannot be issued in law. Application dismissed without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

H. N. J. Perera J.

I agree.

JUDGE OF THE COURT OF APPEAL