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

In the matter of an Application for a mandate in the nature of *Writ of Certiorari and Mandamus* under article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Habaragamuralalage Sunil Premasiri Peiris,
"Mihira",
No. 241, Temple Road,
Maharagama.

PETITIONER

CA/WRIT/419/2014

Vs,

1. Urban Development Authority,
   6th and 7th Floors,
   Sethsiripaya, Battaramulla.
2. Chairman,
   Urban Development Authority,
   6th and 7th Floors,
   Sethsiripaya, Battaramulla.
3. Director General,
   Urban Development Authority,
   6th and 7th Floors,
   Sethsiripaya, Battaramulla.
4. Homagama Pradeshiya Sabha,
   Pradeshiya Sabha Office,
   Homagama.
5. Chairman,
   Homagama Pradeshiya Sabha,
   Pradeshiya Sabha Office,
   Homagama.

6. Secretary,
   Homagama Pradeshiya Sabha,
   Pradeshiya Sabha Office,
   Homagama.

RESPONDENTS

Before: **Vijith K. Malalgoda PC J (P/CA) &**
S. Thurairaja PC J

Counsel: Chandana Prematilake for the Petitioner
Chaya Sri Nammuni SC for the Respondents

Argued on: 25.07.2016, 11.10.2016

Written Submissions on: 09.12.2016

Judgment on: 24.03.2017

Order

Vijith K. Malalgoda PC

Petitioner to the present application Habaragamuralalage Sunil Premasiri Peiris had come before this court seeking inter alia,

b) A mandate in the nature of writ of *Certiorari* to quash the circular dated 07.12.2009 marked P-11

c) A mandate in the nature of writ of *Certiorari* to quash the decision set out in P-10 by Homagama Pradeshiya Sabha and P-13 by the Urban Development Authority, respectively, that any residential premises on lot D1 in sub- division plan No 2358 dated 19.08.2011 (P-1)

should be limited to a single story building or a building of 4 meters in high and that P1 would be approved subject to such condition

d) A mandate in the nature of writ of *Certiorari* to quash the decision set out in P-14C by the Urban Development Authority that it had decided to approve the sub-division plan No 2359 dated 19.08.2011 marked P1 for residential development subject to the construction of a building consisting of the ground floor and another on lot D1

e) A mandate in the nature of writ of *Mandamus* directing any one, several or all of the 01st to 06th Respondents to approve the sub-divided lot D1 in sub-division plan No 2358 –P1 for residential purpose only subject to the restrictions set out in Regulation 18(2) of Urban Development Authority Planning and Building Regulations published in the Gazette Extraordinary No 392/9 dated 10th March

One Galagedarage Eugine Nona was the owner of a land called Kongahawatte to the extent of 1 rood and 12.4 perches. The said land was sub-divided in to two lots called 3C1 and 3C2 by plan 261 dated 1987 and the said lot 3C1 was again sub-divided in to 4 lots namely C, D, E and F by plan 24/95 dated 26th February 1995 (P-3). The Petitioner had become the owner of the lot D referred to above to the extent of 9 perches with the right of way over lot F in the year 1995. The said block out plan bearing No 24/95 was approved by the Homagama Pradeshiya Sabha (4th Respondent) on or about 23rd December 1996.

The Government acquired a strip of land from the said divided and defined lots marked C, D and E in its East boundary for the construction of the Southern Express Way and a resurvey of the remaining portions of lots C, D and E was carried out by Senaka Fernando LS and prepared a fresh plan 1956 dated 3rd May 2009 (P-8) re-naming the said lots as C1, D1 and E1 to the extent of 8.50 perches, 8.25 perches and 8.28 perches respectively.

The said plan too was approved by the Homagama Pradeshiya Sabha subject to certain conditions. The Petitioner who caused a fresh plan, only with regard to lot D1, (P-1) was subsequently tendered to the 4th Respondent on 1st September 2011 to obtain a building approval.

When the present application was made by the Petitioner to the 4th Respondent, he was informed by the 4th Respondent that according to the law prevailed at that time with regard to the lands bordering Southern Express Way, the application for building approval could only be granted subject to the condition that it should be limited to the construction of residential premises only and any residential premises should be limited to one story building or a building of 4 meters in height.

Being dissatisfied with the said decision of the 4th Respondent, the Petitioner had protested to the 4th Respondent and the said 4th Respondent had sought advice from the 1st Respondent by letter dated 29.09.2011 (P-10). The 1st Respondent by its letter dated 30th December 2011 communicated its decision to the 4th Respondent with a copy to the Petitioner, that they cannot consider any deviation with regard to the lands coming under the development zones identified under Southern Express Way and therefore the decision already communicated to the Petitioner cannot be changed.

In this regard our attention was drawn to the Regulations published under section 21 of the Urban Development Authority Law 41 of 1978 in Government Gazette Extraordinary 392/09 dated 10th March 1986 (P-4A and B) and a circular issued by the Director General Urban Development Authority to Heads of all Local Authorities comes within the Southern Express Way Area, dated 7th December 2009 (P-11).

As observed by us the contention of the Petitioner before this court was to challenge the validity of P-11 and in fact in prayer (b) the Petitioner had sought a writ of *Certiorari* to quash the said circular and to implement the provisions in P-4A or 4B as far as it is applicable to the Petitioners Land.

As referred to above, P-4A and B are Regulations made under section 21 of the Urban Development Authority Law No 41 of 1978 and the Petitioner's relied on Regulation 18 made under the said

regulation which deals with the height of a building. The relevant provisions of the Regulation 18 of the said regulations read thus;

18 (1) The maximum height of a building on an "existing lot" which is six meters of less in width and or has less than one hundred and fifty square meters in extent shall not exceed seven and a half (7.5) meters or two floors unless the authority direct otherwise.

(2) The maximum height of a building in other cases not being a high-rise building shall not exceed 15 meters or twice the distance between any storey of a building and the further edge of the abutting street whichever is less (emphasis added)

When considering the above provisions, it is important to consider the applicability of the said provision to the land in question and as observed by us the above provisions are applicable to existing lots as referred to in Regulation 18 (1) above.

Regulation 70 of the said Regulations refers to definitions and "existing lot" had been defined as;

"a lot which is in existence before the coming into operation of the law"

and the "Law" has been defined as,

"the Urban Development Authority Law No.41 of 1978"

and when considering the above interpretation, the existing lot referred to in Regulation 18 will have to be defined as a lot in existence as at the date on which the Urban Development Law came into operation in the year 1978.

In this regard the Petitioner's argument before this court is that the subdivision, the Petitioner relied upon was made in 1995 and not in 2011 and therefore what is applicable to him is the regulations referred to above (P-4A and 4B) and not the circular dated 7th December 2009 which will not have

any retrospective effect. The Petitioner had further argued that the plan prepared in 2011 (P-1) was made as a result of the acquisitions of a portion of his land for the construction of the Southern Express Way and therefore the said plan cannot be considered as a fresh subdivision but the subdivision relevant to the present application was done in the year 1995 by P-3.

However when considering the interpretation given to the applicability of Regulation 18, it has already being identified by us that the said regulation will only applicable to an existing lot as at the date the Urban Development Law came into operation i.e. in the year 1978 and not thereafter, unless the Authority direct otherwise.

As further observed by us the circular produced marked P-11 was issued by the Director General of the said Urban Development Authority and P-11 refers to specific guidelines which will applicable subject to the provisions of the Regulation made under the Urban Development authority Law No 41 of 1978.

The said circular has specific reference to the areas covered under the Southern Express Way, and in the schedule to the said circular three specific areas had been identified for development as against the Express Way. The said three areas had been identified as,

a) Within 10 meters

b) 10 meters to 250 meters

c) 250 meters to 1200 meters

When giving any interpretation to the said circular with regard to its applicability, the purpose under which it was introduced and the extent to which it can be made use, this court will have to be mindful of the fact that the said circular is not applicable to any other parts of this country, but limited only to the areas bordering the Southern Express Way and the said circular was promulgated having considered the purpose to which it is being issued. This fact is further clarified when the Respondents produced before us the guidelines issued by the Urban Development Authority to all the Local

Authorities bordering Colombo-Katunayake Express Way on 30th May 2013. According to the said guidelines in the 10 meters zone no construction was permitted and the remaining houses were permitted until a resettlement plan was implemented. The next zone identified in the said circular is 10 meters-60 meters zone where construction was permitted only up to 6 meters or two floors and for the existing blocks the permission was granted for two floors only.

During the argument before us the Learned State Counsel who represented the 1st to 3rd Respondent whilst referring to amendments introduced to the Urban Development Authority Law by Act No 4 of 1982 and No 44 of 1984 submitted that the new section 26A introduced by the amending Act had permitted the delegation of powers with regard to the development plans and the height of a building is a part of the development plan and therefore the directions referred to in P-11 are intravires and not *ultra vires.*

Our courts have repeatedly declared that such guidelines, directions issued by the Authorities should be given a purposive interpretation when it is issued for a valid purpose where such guidelines are compulsory. This court is mindful of several decisions by the Supreme Court where the Secretary, Ministry of Education had issued guidelines with regard to the school admissions and in this regard this court is guided by the decision of their Lordship of the Supreme Court in the case of ***T.G. Sumali Sudarshani Ferdinando and another Vs. S.S.K Aviruppola Principal Visaka Vidyalaya and three others SC FR 117/2011*** SC minute dated 25.06.2012 when the Supreme Court upheld the binding effect of the guideline circular issued by the Secretary to the Ministry of Education with regard to school admissions.

However when considering the guidelines produced as P-11 we observe that there is minimum extent of 20 perches is required to construct a dwelling house in the 10 meters zone but with regard to an existing lot development is permitted subject to the regulations published under the Urban Development Authority Law referred to as P4A. As observed above, the land referred to the present

application was in existence at the time P-11 was issued and therefore the Petitioner is entitled to come under the exception given by the said guideline for existing lots within the 10 meters zone.

As reveled before us the Petitioner who was dissatisfied with the decision in P-13 had gone before the Human Rights Commission and lodged a complaint. When the said inquiry was in progress before the Human Rights Commission, on a request made by the Human Rights Commission the 1st Respondent Authority agreed to grant permission to construct a two storied houses (G+1) subject to maintaining green belt of 3 meters at the edge of the land bordering the Southern Express Way, (P-14C) but the Petitioner was not agreeable for the said proposal by the 1st Respondent and proceeded with the inquiry before the Human Rights Commission.

The said inquiry before the Human Rights Commission was ended up with a recommendation by the Human Rights Commission to grant permission under regulation 18 (2) but the 1st Respondent who was not agreeable for the said recommendation, did not implement the recommendation by the Human Rights Commission.

As observed above the purpose of issuing the guidelines at P-11 was to regularize the use of the land area bordering the Southern Express Way and the subsequent guidelines issued with regard to Katunayake Express Way confirms the necessasity of regulating the land area bordering Express Ways. Lot D1 referred to the present application is a block of land to the extent of 8.25 perches within the 10 meters zone and at the time P-11 was issued it was an existing block but was not utilized to construct a dwelling house. Even though the said guidelines does not permit the construction of dwelling houses in blocks less than 20 perch in extent, with regard to the existing blocks, the said guidelines permitted the construction of dwelling houses subject to the provisions of the regulations but, the extent to which the said regulation should apply, will have to be determine by giving a purposive interpretation to the said guidelines.

In other words, any new house coming up in a block of land within the 10 meters zone whether it is coming up in a 20 perch new block or in an existing block less than 20 perches, it should follow the same guideline, since the said guidelines are issued to regularize the use of land area adjourning the Express Way.

In the said circumstance the only interpretation this court can offer with regard to P-11 is a purposive interpretation.

In the said circumstances this court is not in agreement with the recommendation of Human Rights Commission and of the view that the construction of dwelling house within a block of land in the 10 meters zone, whether it is new or existing should limit to the ground floor and not beyond.

As further observed by this court, on a request made by the Human Rights Commission the 1st Respondent had agreed to permit the Petitioner to construct a two storied houses (G+1) but the Petitioner was not agreeable for the said the proposal. Since the said proposal was not endorsed by the parties, this court is not inclined to consider P-14 as a document which carries any binding effect.

For the forgoing reasons this court is not inclined to grant any relief to the Petitioner. This application is therefore stand dismissed, but we make no order with regard to costs.

Application dismissed.

President of the Court of Appeal

S. Thurairaja PC J

Judge of the Court of Appeal