

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

In the matter of an appeal to Court of
Appeal under Article 154 P (6) read with
Article 138 of the Constitution against a
judgment of Provincial High Court
exercising its writ jurisdiction.

C A (PHC) 27 / 2011

Provincial High Court of

Western Province (Gamapaha)

HC Writ Application No. 05 / 2008

1. Brahakmanage Elmo St Ivor Perera,
No 11,
Second Cross Street,
Alwis Town,
Hendala.

2. Geeganage Karunapala,
No 144/14,
9th Cross Street,
Alwis Town,
Hendala.

3. Lionel Dharmadasa Ratnasinghe,
No 144/15,
9th Cross Street,
Alwis Town,
Hendala.

4. Sunil Mawalage,
No 29,
Alwis Town,
Hendala.

5. Felix Srilal Wickremasinghe,

No 46/4,
Second Cross Street,
Alwis Town,
Hendala.

6. Jayakody Arachchige Don Lal

Christopher,
No 31/3,
Second Cross Street,
Alwis Town,
Hendala.

7. Habaragamuwage Don Nimal

Siriwardena,
No 35,
Second Cross Street,
Alwis Town,
Hendala.

8. Perithiya Arachchige Rajakaruna,
No 44/1,
Second Cross Street,
Alwis Town,
Hendala.

PETITIONER - APPELLANTS

-Vs-

1. Wattala Pradeshiya Sabha,
Head Office,
Mahabage,
Ragama.

2. Diluksha de Alwis,
Chairman,
Wattala Pradeshiya Sabha,
Head Office,
Mahabage,

Ragama.

3. Sivagnanaratnam

Sivagnanakumaran,

No 125/D,

Balagala Road,

Hendala.

4. Candida Sivagnanakumaran,

No 125/D,

Balagala Road,

Hendala.

RESPONDENT - RESPONDENTS

Before: P. Padman Surasena J (P/CA)

K K Wickremasinghe J

Counsel; Dr. S F A Coorey for the Petitioner - Appellants.

K Asanka Withanage for the 1st Respondent - Respondent.

Kishani Jayasinghe for the 3rd and 4th Respondent - Respondents.

Argued on : 2017-9-18 and 2017-10-04

Decided on : 2018 - 02 - 23

JUDGMENT

P Padman Surasena J (P/CA)

The Petitioner- Appellants (hereinafter sometimes referred to as the Appellants) had filed an application in the Provincial High Court of

Western Province holden at Gamapaha praying for the following mandates;

1. a mandate in the nature of a writ of certiorari to quash

- i. the approval if any, granted by the 1st and / or 2nd Respondents for the construction of any building and / or boundary wall in the said lot 1 A,
 - ii. the certificate of conformity, if any, issued by the 1st and / or 2nd Respondents in respect of any construction done in the said lot 1 A,

in violation of the law
2. a mandate in the nature of a writ of mandamus to compel the 1st and / or 2nd Respondents to take all necessary steps under section 52 of the Pradeshiya Sabha Act No. 15 of 1987 to have the buildings and / or boundary walls constructed in the said lot 1 A in violation of the Housing and Town Improvement Ordinance and / or the Pradeshiya Sabha Act, demolished or removed.
3. a mandate in the nature of a writ of prohibition to restrain the 1st and / or 2nd Respondents from issuing any certificate of conformity in respect of any building and / or boundary wall constructed in the said lot 1 A in violation of the Housing and Town Improvement Ordinance and / or Pradeshiya Sabha Act, and which are therefore unauthorized constructions.

The Petitioner - Appellants (hereinafter referred to as the Appellants) are all residents of 2nd Cross Street, Alwis Town Hendala. They are members of the 'Association of Residents of Alwis Town Hedala'.

The property relevant to the writ application filed by the Petitioners in the Provincial High Court is described in paragraph 4 of the petition dated 2008-11-13 filed in the Provincial High Court. The Complaint of the appellants is that the 3rd and 4th Respondent - Respondents (hereinafter referred to as the 3rd & 4th Respondents) who are said to be the owners of the said property (Lot 1 A on plan No. 4617, Deed of transfer No.1375 dated 2008-01-30 attested by B. Yogeswari Notary public) have unlawfully engaged in an unauthorized construction in the said premises violating the prevailing laws. Underlying reason as to why the Petitioners are particularly aggrieved is the fact that the said constructions have posed a danger to them as they are exposed to accidents when turning from Alwis Town road to 2nd Cross road. The risk of exposing the Appellants for danger has assumed a serious level as the said unauthorized construction is situated right at the said turning point. The fact that the said situation exists is clear from the plan dated 2002-08-11, the sketch produced marked **B 1** by the

Petitioners and the document produced marked **B 2** etc. These factual positions have not been controverted by the Respondents at any time.

Learned Provincial High Court Judge in her judgement dated 2011-02-23 has refused to issue the writs the Appellants have prayed for, on the basis that the 3rd and 4th Respondents had constructed the impugned structures with necessary approval by the 1st Respondent - Respondent (hereinafter referred to as the 1st Respondent) Wattala Pradeshiya Sabha.

Learned Provincial High Court Judge had relied on the documents produced marked **1 R1** to **1 R3** in the Provincial High Court to come to this conclusion.

It is the position of the 1st and 2nd Respondents that the survey plan No. 4617 dated 2005-12-14 (**1 R1**) and the building plan No. 1076 (**1 R2**) have been duly approved according to the existing regulations.

The survey plan No. 4617 dated 2005-12-14 produced marked **1 R1** by the Respondents is the same as the survey plan relied upon by the Petitioners.

Although the 1st Respondent Pradeshiya Sabha takes up the position that this plan is duly approved, it is the position of the Petitioners that the Pradeshiya Sabha could not have legally approved it within their powers.

Therefore, this Court now has to turn to the prevailing provisions of law in this regard.

Section 111 (1) of the Housing and Town Improvement Ordinance...

Section 111

(1) No person shall erect any masonry boundary wall or gateway -

(a) within the street lines of any street for which street lines have been defined; or

(b) in the case of any street for which no street lines have been defined, within twenty feet of the center of the street,

unless in such case he shall have received the written permission of the Chairman.

(2) In the case last-mentioned the Chairman may require as a condition of such permission that the owner of the premises shall execute an undertaking that no compensation shall be payable in respect of such boundary wall or gateway in the event of the land on which such wall or gateway is situated being acquired for public purposes, or being included in the street under this Ordinance.

(3) *No person shall erect any masonry boundary wall of a height exceeding seven and a half feet.*

Provided, however, that this subsection shall not apply to any boundary wall which abuts upon any street.

(4) *Where any land is situated at the junction of any two streets, no shall erect any masonry boundary wall or gateway on such land in contravention of the following conditions, that is to say, that no part of such boundary wall or gateway which is within a distance of thirty feet from the point of such boundary wall or gateway which is nearest to the center of the junction, shall be of a height exceeding five feet.*

(5) *Any person who shall erect any masonry boundary wall or gateway in contravention of this section shall be guilty of an offence, and shall be liable on conviction to a fine not exceeding one hundred rupees, and the court upon conviction of any person under subsection (1)(b), in the event of the person convicted declining to execute the undertaking referred to in this section, may make an order in the terms of such undertaking, and every such order may*

be registered, and shall be binding upon the land in the same manner as an undertaking under this section.

Section 30 of the Housing and Town Improvement Ordinance

Section 30. ***Buildings at the corners of streets.***

The local authority may require the corner of any building intended to be erected or re-erected at the corner of two streets to be rounded off or splayed off to the height of the first storey or to the full height of the building, and to such extent otherwise as it may determine, and for any loss which may be sustained through the exercise of the powers by this section conferred upon the local authority it shall pay compensation in manner provided for by this Ordinance.

Section 49 of the Pradeshiya Sabha act No.15 of 1987 ...

Section 49 - **Building limits along roads**

"Notwithstanding anything contained in the Housing and Town

Improvement Ordinance, or other law it shall not be lawful for any person -

(a) to erect any building, boundary wall or gateway within a limit (hereinafter referred to as the "building limit") of twenty-five feet from the center of any road which is used or intended for vehicular traffic within limits of any Pradeshiya Sabha and in respect of which street lines providing for a roadway exceeding fifty feet in width have not been defined under this Act or the Housing and Town Improvement Ordinance:

Provided, however, that the Pradeshiya Sabha, shall have power to authorize the erection of a boundary wall or gateway on condition that the owners of the premises shall execute an undertaking that no compensation shall be payable in respect of such boundary wall or gateway in the event of the land on which such wall or gateway is situated being required for a public purposes; or

(b) except under the authority of a license granted by the Pradeshiya Sabha to re-erect or to any addition to any such building, boundary wall or gateway within such limit:

Provided always that nothing contained in this subsection shall apply to any repairs effected in any building, boundary wall or gateway existing at the date of the constitution of the Pradeshiya Sabha or in the case of –

- i. any street which is intended for foot traffick only and is not less than twenty feet in width; or*
- ii. any back lane or other service passage which is intended only for the purposes of scavenging or conservancy or other special sanitary purpose and is not less than ten feet in width where such street, lane or passage has been defined or approved by the Pradeshiya Sabha.*

For the purpose of the foregoing provisions of this subsection, "repairs" shall not be deemed to include any work of re-erection or re - construction or the addition of any new part.

Section 52 of the Pradeshiya Sabhas Act

Section 52 - *Power of Pradeshiya Sabha to deal with building boundary wall or gateway erected in contravention of law.*

If any person erects or re-erects any building, boundary wall or gateway, or makes any addition to any building, boundary wall or gateway, within the limits of any Pradeshiya Sabha in contravention of any of the provisions of section 49, the Pradeshiya Sabha shall be entitled to cause such building, boundary wall or gateway, or such addition, to be demolished or

removed by any officer or servant, and for that purpose the Pradeshiya Sabha shall have the same rights of entry and survey, and shall have the same power of removal, abatement and recovery of costs as are vested by this part in a Pradeshiya Sabha for the purposes of the abatement or removal of any obstruction or encroachment or supposed obstruction or encroachment upon a thoroughfare, and all the provisions of this Part relating to such obstructions or encroachments, as far as they are applicable, shall apply accordingly with such modifications as may be necessary.

This Court observes that although the Respondents state that the relevant construction has been duly approved, they have failed to satisfy this Court that the relevant Pradeshiya Sabha has acted within their legal power in granting the impugned approval.

Learned counsel for the Petitioners has drawn the attention of this Court to the following two journal entries in the docket.

Journal entry dated 2014-09-16

"

Before K. T. Chithrasiri J

Malini Gunerathne J

Dr. Sunil Cooray for the Appellant,

J. C. Boange for the 1st and 2nd Respondents,

Kishani Jayasinghe for the 3rd and 4th Respondents.

Heard all three counsel in support of their respective cases

Having argued the appeal, both counsel for the Respondents move that they be given time to act according to the provisions of the Pradeshiya Sabha Act and to submit an approved plan in respect of the boundary wall and the building situated within the 25 feet from the center of Alwis Town road if no such approved plan is available.

This is a matter in view of the decision of the learned High Court Judge where she has referred to approved plan. However the court does not see any plan approved for the construction of boundary in the brief.

Argument is refixed for 20 / 01/ 2015....”

Journal entry dated 2015-01-20

“

Before K. T. Chithrasiri J

Malini Gunerathne J

Sunil Cooray with B. Gamage for the Petitioners,

J. C. Boange for the 1st and 2nd Respondents,

Kishani Jayasinghe for the 3rd and 4th Respondents.

Both counsel move that this matter be refixed enabling them to have the constructions subject to in this case altered in accordance with the law.

Therefore counsel move that this matter be mentioned on 30-03-2015.

Mention on 30-03-2015...."

The inference that this Court can draw from what has transpired in Court is that the respondents have not been able to produce any document with which a Court of law could have been satisfied that the alleged unlawful construction by the 3rd and 4th Respondents is a construction made in conformity with the prevailing laws. Learned counsel for the Respondents before this Court have failed to fulfill their undertaking given to his Court either to submit to Court a lawful permit or to have the relevant constructions altered in conformity with the law.

For the above reasons it is not difficult for this Court to conclude that the learned Provincial High Court Judge has fallen into grave error when she had concluded that the 1st and 2nd Respondents had granted due approval for the said construction.

The above material shows convincingly to this Court the fact

- i. that Hendala Pradeshiya Sabha could not have approved the impugned construction according to law,
- ii. that the Respondents have failed to produce in Court any document which could be accepted as a granting of due approval for the said construction according to law,
- iii. that the 3rd and 4th Respondents have constructed the impugned structures in violation of the prevailing law,
- iv. that the 1st and 2nd Respondents had acted ultra-vires their powers if they had granted approval for the 3rd and 4th Respondents to construct the relevant structures

It is the view of this Court that it is because of the illegality of the relevant construction that the 1st and 2nd Respondents have stated¹ that they had

¹ Paragraph 6 (a) of their statement of objections dated 2009-05-06.

not applied for a certificate of conformity and that no such certificate has been issued by the relevant Pradeshiya Sabha to the 3rd and 4th Respondents. It is clear that the 3rd and 4th Respondents continue to occupy these premises without a certificate of conformity issued by the relevant Pradeshiya Sabha.

The Respondents despite the undertaking had failed to file any written submissions before this Court within the time that was granted for them for that purpose by this Court. Learned counsel for the 3rd and 4th Respondents had filed a motion² requesting further 3 weeks' time to file their written submissions. This Court waited for the said extended period also affording a further opportunity for the Respondents to file their written submissions. However, this Court regrets to note that the 3rd and 4th Respondents or the other Respondents have not up until now filed any written submissions. Thus, this Court has to proceed on the basis that the Respondents have no serious argument to be placed before this Court for its consideration.

² Motion dated 2017-11-24.

In the case of Mageswaran Vs University Grants Commission and others ³ cited by the learned counsel for the Appellants, this Court has held as follows;

" ... A writ of mandamus only commands the person or body to whom it is directed to perform a public duty imposed by law. In other words, a writ of mandamus would lie where a statute requires certain action in defined circumstances and despite the existence of such circumstances, the required action has not been performed. ... Thus, existence of legal right and statutory duty are essential conditions for the issue of mandamus."

Consideration of factual and legal positions of the instant case set out above satisfies this Court that both the conditions referred to in Mageswaran's case have been fulfilled.

Further, this Court notes that Nagalingam J in the case of The Chairman Urban Council Matara Vs Abeysuriya ⁴ has stated as follows;

³ 2003 (2) SLR 282.

⁴ 52 NLR 349.

“ ... However distasteful the task may be to have to make an order of demolition, I do not think that the law should be permitted to be flouted so fragrantly

In these circumstances this Court proceeds to set aside, the judgement dated 2011-02-23 pronounced by the learned Provincial High Court Judge. This Court decides to issue the writs prayed for by the Petitioners in their application made to the Provincial High Court.

This Court observes that the motion dated 2015-05-28, Appellants had forwarded a letter setting out certain terms of settlement proposed to the 3rd and 4th Respondents. Paragraph 6 of the said letter containing the said terms of settlement has proposed that the 3rd and 4th Respondent shall pay to the Appellants a sum of Rs. 450,000/= which the Appellant shall accept as reimbursement of expenses incurred by the Appellants in this litigation. However, learned counsel for the 3rd and 4th Respondents despite the undertaking given to Court had failed to respond to the proposed settlements.

This Court has observed the conduct of the 3rd and 4th Respondents during the proceedings both in the Provincial High Court as well as in this Court. It

is the view of this Court that they had taken all endeavors to drag this case indefinitely without attempting to take any meaningful step towards bringing their manifestly unauthorized construction to be in conformity with prevailing laws.

In these circumstances this Court orders the 3rd and 4th Respondent to pay as costs Rs. 300,000 to the Appellants.

Learned Provincial High Court Judge is directed to enforce without delay the order made by this Court.

Appeal is allowed.

PRESIDENT OF THE COURT OF APPEAL

K K Wickremasinghe J

I agree,

JUDGE OF THE COURT OF APPEAL