

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, Prohibition and Mandamus in
terms of Article 140 of the Constitution of
the Democratic Socialist Republic of Sri
Lanka*

C A (Writ) Application No. 81/ 2016

Mrs. Shahul Hameed Aynul Ariffa,
No. 45,
Dematagoda Passage,
Colombo 09.

PETITIONER

Vs.

1. A J M Muzammil,
Mayor of Colombo,
Colombo Municipal Council,
Colombo 07.

2. V K A Anura,
Municipal Commissioner,
Colombo Municipal Council,
Colombo 07.

3. L R L Wickremaratne,
Deputy Municipal Commissioner,
Colombo Municipal Council,
Colombo 07.

4. Mrs. S D N P N De Pieris,
Director,
City Planning Division,
Municipal Engineer's Department,

Colombo Municipal Council,
Colombo 07.

5. Director,
Urban Development Authority,
7th Floor,
Sethsiripaya,
Battaramulla.

6. Mrs. K A Premalatha Perera,
No. 52,
Dematagoda Passage,
Colombo 09.

7. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: P. Padman Surasena J (P/C A)

A.L Shiran Gooneratne J

Counsel: Rushdie Habeeb with S K Rizla for the Petitioner.

Senany Dayaratne with E Mendis and N Wickremasinghe for the
2nd, 3rd and 4th Respondents.

Saman Galappaththi with M Gunasena for the 6th Respondent.

Zuhri Zain SSC for the 5th and 7th Respondents.

Argued on : 2018 - 02 - 09

Decided on : 2018 - 07 - 12

JUDGMENT

P Padman Surasena J (P / C A)

The Petitioner in this application prays inter alia for a mandate in the nature of a Writ of Mandamus to compel the 1st to 6th Respondents to

Implement the decision in the document produced marked **P 5** and to remove the unlawful construction referred to therein.

The Petitioner has initially complained to the Colombo Municipal Council that the 6th Respondent has unlawfully constructed a bathroom and a toilet close to the Petitioner's kitchen. She had expected the 1st to 4th respondents to take action to demolish the said construction. The failure on the part of the said respondents to take action to demolish the said unauthorized structure constructed by the 6th Respondent has prompted the Petitioner to file the instant application praying from this Court, a writ of Mandamus to compel the said respondents to take such steps.

The 2nd, 3rd and 4th Respondents have brought to the notice of this Court that it is not only the 6th Respondent's structure that is unauthorized but that the Petitioner's dwelling place also has been built without any permit from any relevant authority. It is on that footing that the learned counsel for the 2nd, 3rd and 4th Respondents has argued that the Petitioner should be precluded from maintaining this application on the 'clean hands doctrine'.

Moreover, the learned counsel for the 2nd, 3rd and 4th Respondents has submitted that any issuance of a writ of Mandamus for such purpose from this Court might even lead to a civil unrest as majority of constructions along Dematagoda passage, Colombo 09, fall under the same category. It is the position of the Colombo Municipal Council that it had not taken any action with regard to the complaint of the Petitioner due to the above reason. The said respondents have stated that the Colombo Municipal Council would abide by any decision this Court would make.

Although the Petitioner has complained that her right to good health and sanitary facilities have been violated¹ this Court is of the view that no such right could be accrued to the Petitioner as long as she dwells in an unlawfully constructed dwelling place. This is because such rights to good health and sanitary facilities could not have been violated if the occupant of a house has ensured the strict adherence of the regulations and guidelines designed by the authorities with a view of protecting such rights for the occupants. In other words, when one constructs in an unauthorized way and occupies such a house without adhering to such guidelines it would be inevitable that the aforementioned rights would not be preserved. Thus, a

¹ Paragraph 12 of the petition.

person who occupies such haphazardly constructed house would not be able to enjoy any such right to good health and sanitary facilities.

Deprivation of such rights are inherent in most of such unauthorized constructions. Responsibility for such breaches lie with the unauthorized builder rather than the other persons around.

This Court is of the view that it should not permit the Petitioner to use the discretionary writ jurisdiction of this Court to assert rights, which the law does not guarantee to her.

In the case of Vasana Vs. Incorporated Council of Legal Education and others,² His Lordship Justice Gamini Amaratunga stated as follows; "... A writ of mandamus is available against a public or a statutory body performing statutory duties of a public character. In order to succeed in an application for a writ of mandamus the petitioner has to show that he or she has legal right and the respondent corporate, statutory or public body has a legal duty to recognize and give effect to the petitioner's legal right. .."

Perusal of the material adduced before Court clearly shows that the Petitioner has failed to satisfy this Court that she has any legal right to her

² 2004 (1) SLR 163

claim for a right to good health and sanitary facilities as she herself has constructed her house in violation of the existing legal requirements.

The jurisdiction to issue writs, which is vested in this Court by virtue of Article 140 of the constitution, is a jurisdiction, which this Court could decide in its discretion to exercise in a fit case. For the foregoing reasons, this Court is of the view that the instant case is not a fit case in which this Court should exercise its discretionary writ jurisdiction.

In these circumstances, this Court decides to refuse this application.

This Application should therefore stand dismissed without costs.

PRESIDENT OF THE COURT OF APPEAL

A.L Shiran Gooneratne J

I agree,

JUDGE OF THE COURT OF APPEAL