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

In the matter of an Appeal in terms of Article 138 read with Article 154P (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

K. Perera Maldeniya,
No. 28/10/4, Diwulpitiya,
Boralesgamuwa.

Petitioner

Vs.

C.A. Case No: **CA (PHC) 55/2014**

H.C. Colombo Case No: **Writ 05/2009**

1. Municipal Council,
   Boralesgamuwa.

2. Aruna Priyashantha,
   Chairman,
   Municipal Council,
   Boralesgamuwa.

3. Ramani Kulawardhana,
   Secretary,
   Municipal Council,
   Boralesgamuwa.

4. R.N. Kolambage,
   Technical Officer,
   Municipal Council,
   Boralesgamuwa.

5. Manoj Perera,

No. 04, Iddamal Mawatha,
Sirimal Uyana,
Rathmalana.

6. Hon. Attorney General
Attorney-General's Department,
Colombo 12.

Respondents

AND NOW BETWEEN

K. Perera Maldeniya,
No. 28/10/4, Diwulapitiya,
Boralesgamuwa.

Petitioner-Appellant

Vs.

1. Municipal Council,
Boralesgamuwa.

2. Aruna Priyashantha,
Chairman,
Municipal Council,
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Technical Officer,
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No. 04, Iddamal Mawatha,
Sirimal Uyana,
Rathmalana.

6. Hon. Attorney General
Attorney-General's Department,
Colombo 12.

Respondents-Respondents

BEFORE	:	K. K. Wickremasinghe, J. Janak De Silva, J.
COUNSEL	:	AAL Jiffry Zainudeen for the Petitioner-Appellant AAL A.R.P. Bandara for the 1st to 4th Respondents AAL Athula Perera with AAL Nayomi N. Kularathna for the 5th Respondent Nuwan Peiris, SC for the 6th Respondent
ARGUED ON	:	26.06.2018
WRITTEN SUBMISSIONS	:	The Petitioner-Appellant – On 14.09.2018 The 5th Respondent – On 04.09.2018 The 6th Respondent – On 03.09.2018
DECIDED ON	:	31.10.2018

K.K.WICKREMASINGHE, J.

The petitioner-appellant has filed this appeal against the order of the Learned High Court Judge of Colombo dated 23.04.2014, in Case No. Writ/05/2009.

Facts of the case:

The petitioner-appellant (hereinafter referred to as the "appellant") had filed a petition in the Provincial High Court of Colombo seeking a Writ in the nature of *Mandamus* directing the 1st respondent-respondent (hereinafter referred to as the "1st respondent") to take appropriate legal actions against the 5th respondent-respondent (hereinafter referred to as the "5th respondent") to remove an obstruction in a ditch situated between the lands of the appellant and the 5th respondent. The Learned High Court Judge of Colombo on 23.04.2014 dismissed the application of the appellant subject to a cost of Rs.10, 000. Being aggrieved by the said dismissal, the appellant preferred an appeal to this Court.

The Learned Counsel for the appellant has submitted following grounds of appeal;

1) The Learned High Court Judge had not considered the documents filed with the case,

2) The Learned High Court Judge had not considered the documents marked as "P5" and "P6" which indicated there was an unauthorized construction,

3) The Learned High Court Judge had failed to consider that the 5th respondent was the legal owner of the said corpus,

4) The Learned High Court Judge had failed to consider that the proper substitution had been made and Court had accepted it.

We will consider the 4th ground of appeal first. We observe that the 5th respondent mentioned in the original petition had died and the appellant had filed an amended petition dated 08.12.2009 with the name of 5th substituted respondent. The Learned High Court Judge of Colombo in the order dated 23.04.2014, has held that the substitution made with regard to the 5th respondent was contrary to law. However, we observe that this particular question of law was addressed by the preceding

Judge in the order dated 22.08.2012, and had held that the substitution was in accordance with law. The Learned High Court Judge had held as follows;

> "එම ඉල්ලීම පරිදි එකී ඉල්ලීමට ඉඩ දෙනු ලබන බවට එවකට සිටි උගත් මහාධිකරණ විනිසුරුවරයා නියෝගයක් කොට නොමැති නමුදු ඉල්ලීම පරිදි නම සංශෝධනය කොට පස්වන වග උත්තරකරු ලෙසට ඇතුළත් කර ඇති බවට නඩු වාර්තාවේ කාර්ය සටහන්වලින් තහවුරු වේ. අධිකරණය විසින් සිදුකරන ලබන අතපසුවීම් පාර්ශවකරුවන් විඳ දරා ගත යුතු නොවේ..." (Page 67 of the brief)

Accordingly the case was fixed for argument. However, the succeeding judge who delivered the final order has blatantly disregarded the said order. Since the Learned High Court Judge has not referred to the said order in the final order dated 23.04.2014, it is questionable whether the Learned Judge intended to overrule the said order and/or to act in *per incuriam*.

In the case of **Cargills Agrifoods Ltd. V. Commissioner-General of Inland Revenue & 6 others [C.A. (Writ) Application No. 198/2012],** it was stated that,

> *"Furthermore, in the Indian case of Government of* ***A.P. and Another V. B. Sathyanarayan Rao (dead) by L.R.S.amd others reported in [2000 (4) 5.C.C.262****, it was held as follows: "The rule of* ***per incuriam*** *can be applied where the court omits to consider a binding precedent of the same court or a Superior Court rendered on the same issue or* ***where the court omits to consider any statute*** *while deciding the same issue."*
>
> *Basnayake J (as he then was) in the case of* ***Alasupillai v. Yavetpillai [1949 (39) C L W 107 and 108]*** *gave the following definition: "A decision per incuriam is one given when a case or statute has not been brought to the attention of the Court and* ***it has given the decision in ignorance or forgetfulness of the existence of that case or that statute****".*

However, the circumstances of this case do not show that there had been such an ignorance of the law by the Court in this instance. Nevertheless, the authorities cited by both the Counsel show that our Courts have extended the aforesaid rule per incuriam even to remedy an injury caused to a party when there had been a mistake on the part of the Court..."

Therefore it is our view that the Learned High Court Judge was not empowered to overrule an order made by the same Court without pointing out any ignorance or error on the part of Court and such overruling should be done by an Appellate Court. Further it would cause prejudice to the appellant who had proceeded with his case relying on the order dated 22.08.2012 in which it was held that the substitution was lawful. The appellant could have instituted a fresh action within that period of 2 years. Accordingly we answer the 4th ground of appeal in affirmative.

We will consider grounds of appeal No. 1 to 3 together. The Learned High Court Judge of Colombo in the order dated 23.04.2014 has stated that the appellant had not submitted a plan or sketch to Court and the appellant had failed to explain the area from where the 5th respondent had disturbed the free flowing of the water. We perused the documents marked as "ඔඔ1" "ඔඔ2 (අ) and "ඔඔ2 (ඇ)" in the brief. The appellant has submitted the Deed of gift No.1087 dated 02.08.1988 attested by the notary public Proeson Fernando marked as "ඔඔ1", from which she acquired the rights of the land. The appellant has further submitted two plans i.e. plan No. 429 marked as "ඔඔ2 (අ)" and plan No. 1530 marked as "ඔඔ2 (ඇ)". As per the plan No.429 there is a ditch to the north of lot B2.

The Learned Counsel for the 5th respondent has submitted that there is no ditch to the western boundary of lot 9 in the plan No. 1530 and the appellant has claimed rights from the plan No. 1530 and not from plan No. 429. The Learned Counsel for

the 5th respondent further submitted that there was no evidence before Court whether the lot B2 in plan 429 corresponds to lot 9 in plan 1530. The Learned Counsel further contended that although the appellant claimed a ditch as per plan 429, no rights had been passed on to the Appellant on plan 429. Accordingly the Learned Counsel submitted that if the appellant is not the owner of lot B2, then he has no *locus standi* to maintain this application.

In the case of **Thajudeen V. Sri Lanka Tea Board and another (1981) 2 SLR 471**, it was held that,

> *"Where the major facts are-in dispute and the legal result of the facts is subject to controversy and it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining the witnesses so that the Court would be better able to judge which version is correct, a writ will not issue.*
>
> *Mandamus is pre-eminently a discretionary remedy. It is an extraordinary, residuary and suppletory remedy to be granted only when there is no other means of obtaining justice. Even though all other requirements for securing the remedy have been satisfied by the applicant, the court will decline to exercise its discretion in his favour if a specific alternative remedy like a regular action equally convenient, beneficial and effective is available..."*

However, we observe that the rights have been passed to the appellant on plan 429 as per the Deed No. 1087 (page 155 of the brief).

It is pertinent to note that two letters dated 08.10.2007 and 15.10.2007 had been sent to the father of the 5th respondent by the 2nd respondent namely the chairman of the urban council of Boralesgamuwa (Page 161 & 162 of the brief). In the said two letters it had been informed that legal action would be taken against the father

of the 5th respondent upon the failure to remove the obstruction caused to the disputed ditch as observed by the technical officer of the urban council. Accordingly it is undisputed that a technical officer had inspected the scene and made a report to the chairman of the urban council about the existence of an obstruction. Therefore we are of the view that the Learned High Court Judge had misdirected herself in stating that the appellant had failed to establish the existence of a ditch between the two lands and the existence of an obstruction to the said ditch.

The Learned Counsel for the 5th respondent has submitted that the relief sought by the appellant was of personal nature and cannot be granted in terms of Article 154(p) (3) of the Constitution.

The Learned High Court Judge of Colombo in the order dated 23.04.2014 has held as follows;

> "තවදුරටත් මෙම 1-4 දක්වා වග උත්තරකරුවන් පළාත් පාලන හෝ නාගරික සංවර්ධන රෙගුලාසි කඩකර ඇති බවක් හෝ පොදු යුතුකමක් ඉටුකිරීම පැහැර හැර ඇති බවක් තහවුරු කිරීමට අසමත් වී ඇති නිසා පෙත්සම්කාරියට මැන්ඩමුස් ආඥාව ලබා ගැනීමට නෛතික හිමිකමක් නැත..."

The section 108 of the Urban Council Ordinance reads as follows;

> (1) Every private drain in any town shall be under the survey and control of the Urban Council of that town, and shall be constructed, altered, repaired or kept in proper order as the Council may require, at the cost and charges of the owners of the land or building to which such drain belongs or for the use of which it is constructed
>
> (2) If the owner of any land or building to which any such drain belongs neglects during eight days after the service of a written notice in that behalf

by the Council, to alter, repair or put the drain in good order in such manner as may be specified in the notice, the Council may cause such drain to be altered, repaired, or put in good order in the manner required, and the expenses incurred therein by the Council shall be paid by the owner, and shall be recoverable as hereinafter provided.

It is evident that the 1st respondent had failed to comply with the section 108(2) of the Urban Council Ordinance.

The Learned High Court Judge of Colombo in the order dated 23.04.2014 has held that the appellant had failed to state in the petition precisely what action needed to be prevented.

In the case of **Rev. Battaramulle Seelarathana V. Ceylon Electricity Board and 33 others [CA 213/2007],** it was held that,

"A writ of mandamus cannot be issued to prevent a person from doing things; it is to compel a person in authority to perform his duty that he is legally bound to do..."

In the book of **Administrative Law by Wade and Forsyth** [Ninth Edition at page 615] it states that;

"The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities of all kinds. Like the other prerogative remedies, it is normally granted on the application of a private litigant, though it may equally be used by one public authority against another. The commonest employment of mandamus is as a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty by him. Certiorari and prohibition deal with wrongful action, mandamus deals with wrongful inaction..."

Therefore the Learned High Court Judge had manifestly misdirected herself with regard to the nature of a writ of *Mandamus*. We observe that the appellant had repeatedly requested the 1st to 4th respondents to take appropriate legal action against the 5th respondent but they had failed to do so. Therefore such inaction on the part of the government authority will certainly warrant an issuing a writ of *Mandamus*.

In the case of **K.K.P. Fernando V. Register General and another [CA Writ application No. 43/2012]**, it was held that,

> *"The writ of mandamus is a weapon. It can be used against a public officer or authority if he fails to do his public duty by him. The way of enforcing the order of Court, that is to say the way of using the weapon, is punishing the person for contempt of Court if he fails or neglects to act according to the direction given by court..."*

In the case of **Dayananda V. Thalwatte (2001) 2 Sri.L.R. 73**, it was held that,

> *"An aggrieved person who is seeking to set aside an unfavourable decision made against him by a public authority could apply for a prerogative writ of certiorari and if the application is to compel an authority to perform a duty he would ask for a writ of mandamus and similarly if an authority is to be prevented from exceeding its jurisdiction the remedy of prohibition was available. Therefore it is necessary for the Petitioner to specify the writ he is seeking supported by specific averments why such relief is sought."*

We are of the view that if a prayer can be certain enough to satisfactorily identify itself with decision of the public authority which it seeks to enforce, from the body of the petition, then such decision can be enforced by way of a *mandamus*.

We observe that the appellant, in the prayer of the petition, has not referred to the obstruction caused to the ditch and the letter of the urban council dated 15.10.2007 which he seeks to enforce. However the appellant has constantly referred to the said letter marked as "P6" in the petition and it is evident that the petition unequivocally relied on the same. The appellant had sent several letters through her Attorney at Law demanding the 2nd respondent to take appropriate legal action as per "P6". Therefore it is reasonable to infer that the prayer referred to the "P6" in the body of petition.

The Learned State Counsel for the Attorney General has submitted that he has no objection for the grant of relief to the appellant. Accordingly we set aside the judgment of the Learned High Court Judge of Colombo dated 23.04.2014.

We issue a writ of *Mandamus* in terms of the prayer (ඵ) of the amended petition dated 08.12.2009.

The 5th respondent is ordered to pay a sum of Rs. 50,000/= to the appellant as cost of this application.

Accordingly the appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. Cargills Agrifoods Ltd. V. Commissioner-General of Inland Revenue & 6 others [C.A. (Writ) Application No. 198/2012]
2. Thajudeen V. Sri Lanka Tea Board and another (1981) 2 SLR 471
3. Rev. Battaramulle Seelarathana V. Ceylon Electricity Board and 33 others [CA 213/2007]
4. K.K.P. Fernando V. Register General and another [CA Writ application No. 43/2012]
5. Dayananda V. Thalwatte (2001) 2 Sri.L.R. 73