

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

In the matter of an Application for mandate in the nature of Writs of Certiorari and Mandamus under Article 140 of the Constitution of Sri Lanka.

CA/Writ 674/2011

1. Mohamed Ansar Mohamed (also known as P.M. Ansar), 115, Maradana Road, Beruwala.
2. Abdul Hameed Mohamed Nisthar, 143/1, Maradana Road, Beruwala.
3. Mohamed Sanoosi Mohamed Feroze, 127/3, A.C. Alim Mawatha, Maradana Road, Beruwala.
4. Abdul Fatha Mohamed Farook, 53, Arab Road, Beruwala.
5. Mohamed Zarook Mohamed Firdouse, 80, Zaviya Road, Mahagoda, Beruwala.
6. Abdul Wadood Mohamed Imamdeen, 71, Hanafi Mawarth, Maradana, Beruwala.
7. Peer Mohamed Omer Dee, 74F/1, Maradana Road, Beruwala.
8. Mohamed Sadikeen Mohamed Mahir, 135, Abubaker Hadjiarr Mawatha, Maradana, Beruwala.
9. Mohmed Ameer Mohamed Nizar, 119/2, Maradana, Beruwala.

PETITIONERS.

1. Urban Development Authority,
6th and 7th Floors, "Sethsiripaya", Battaramulla.
- 2(a) Ranjith Fernanado, Chairman,
Urban Development, Authority,
6th and 7th Floors, "Sethsiripaya", Battaramulla.

- 3(a) Prabath Chandrakeerthi, Director,
Coast Conservation Department,
New Secretariat, Maligawatta, Colombo 10.
4. Beruwala Urban Council,
Galle Road, Beruwala.
- 5(a) B.D.A.K. Gayanthi
Special Commissioner, Beruwala Urban
Council,
Galle Road, Beruwala.
6. Dhammika Rajapakse,
Divisional Secretary Beruwala,
Divisional Secretariat, Galle Road, Beruwala.
- 6(a) Mr. S. Janaka Sri Chandra Gupta
Divisional Secretary Beruwala,
Divisional Secretariat, Galle Road, Beruwala.
- 7(a) D.H.P. Wimal Goonaratne
Provincial Director of Education Western
Province,
Department of Education of the Western
Province, Green Path, Colombo 07.
8. Padma Kannangara,
Zonal Director of Education, Kalutara,
Department of Education Galle Road,
Kalutara.
- 8(a) Mrs. O.M.V.P. Mudalige
Zonal Director of Education Kalutara,
Department of Education, Galle Road,
Kalutara.
- 9(a) Mrs. A.S.S. Faisa,
Acting Principal, KL/AI Fasiyathul Nasriya
Muslim Balika Vidyalaya, Maradana,
Beruwala.
10. Hon. Prasanna Ranatunge,
Chief Minister of the Western Province,
Sravasthi, 32, Sir Marcus Fernnado Mawatha,
Colombo 7.

11. A.J.M. Rajji,
53/5, Razik Marikkar Mawatha, Beruwala.
12. AL-Haj A.H.M. Zawahir,
175 A, Maradana Road, Beruwala.
13. Al Haj M.N.M. Najath,
37A, Bakar Makar Mawatha, Maradana,
Beruwala.
14. Al Haj M.S.M Usman,
34, Buhari Thakkiya Road, Maradana,
Beruwala.
15. Al Haj A.M. Abdula Rahman,
163, Maradana Road, Beruwala.
16. Mr. M.S.M. Azhar,
21A, Marikkar Place, Beruwala.
17. Al Haj S.A.M. Kaleel,
155 C/9, Maradana Road, Beruwala.
18. Al Haj M.S.M. Nisam,
56, Godwatthamala, Maradana, Beruwala.
19. Al Haj A.H.M. Ismath,
87, Old Road, Beruwala.
20. M.T.M. Siddeek,
133/8, Masjidul Abraar Road, Beruwala.
21. M.Z.Z. Hussain,
51/3, Old Road, Sri Sumaida Mawatha,
Beruwala.
22. M.N.M. Fahim,
72/1, Hanafi Mawatha, Maradana, Beruwala.
23. A.S.S. Faisa,
24, Arab Road, Beruwala.
24. M.N.Z. Naeema,
67, Arab Road, Beruwala.
25. M.F. Kamaldeen,
13/1, Massala, Beruwala.
26. M.A.F. Farsana,
85, "Farsanas" Maradana, Beruwala.
27. M.N.F. Nawaisa,

143/2, Maradana, Berwala.

28. M.F.S. Yehiya,

07, Maradana, Beruwala.

29. Hon. Attorney- General,

Attorney – General’s Department, Colombo

12.

RESPONDANT

Before : E.A.G.R. Amarasekara, J

Counsel : J.C. Weliamuna P.C. with Khayati Wickranayake for the
Petitioner.

K. Aziz for the 4th & 5th Respondents Instructed by G.
Arulapragasam

Rohan Sahabandu P.C with Deluka Perera for 21st – 23rd and 26th
-28th Respondent.

Mithree Amarasinghe S.C for 1st, 3rd, 7th -10th and 24th
Respondents.

Decided on : 07.12.2018.

E.A.G.R. Amarasekara, J

The Petitioners filed this application on 09.02.2011 with regard to a construction of an extension to a building within the Fasiyathul Nasriya Muslim Balika Vidyalaya (hereinafter sometimes referred to as the school) premises in Kalutara for the purpose of a Ladies’ prayer hall and subsequent naming of the said prayer hall by the School Development Society (hereinafter sometimes referred as SDS). The said building has been marked as X in the document marked P4 with the Petition. The Petitioners’ position is that the construction of the said extension was done without obtaining the necessary approvals from the relevant authorities.

The Petitioners have pleaded that in December 2004, the school was severely damaged by the Tsunami. Consequently, in or about the year 2007 the school was reconstructed with the help of foreign donor agencies. In January 2011, the School Development Society (SDS) sought permission from the Zonal Director of Education to build a Ladies' prayer hall annexed to the ground floor of the aforesaid building marked as 'X' in P4.

It appears that the proposed prayer hall included an extension to the ground floor. The Petitioners state that despite their objection, the said extension was constructed by the SDS without obtaining the necessary approvals from Urban Development Authority (hereinafter sometimes referred to as UDA), Coast Conservation and Coastal Resource Management Department ((hereinafter sometimes referred to as CCRMD), and the Beruwala Urban Council. Furthermore, the Petitioners aver that the new construction had been arbitrarily named as "Masjid Ul Abraar Ladies' Prayer Hall" and a colossal plaque had been erected covering one of the side walls while permanently closing the large open windows that were built on the said side wall for maximum view of the sea. The Petitioners' contention is that the plaque too constitutes a structural change to the building. The petitioners plead that;

1. The dedication of the building in the memory of persons named in the said plaque is contrary to the guidelines issued by the Ministry of Education marked as P8.

2. The new construction and the said structural changes to the building are unauthorized and violate the provisions of UDA Law, the Coast Conservation Act and the Municipal by Laws.

The Respondents have filed their statements of objections. Among other things they plead the following grounds in opposing to the Petitioners' application.

1. This application of the Petitioners arises due to personal reasons based on a rejection of a proposal by the 1st petitioner and his family members to name the school in memory of the 1st petitioner's father and has nothing to do with the said extension being an unauthorized construction. Hence the Petitioners have not come to courts with clean hands.
2. In the aftermath of Tsunami, due to the urgency of resuming the education of the students in the tsunami affected areas, with the approval of the Ministry of Education and the Zonal Director of Education, the Non-Governmental agencies with the collaboration of the Government constructed the buildings.
3. However, the aforesaid constructions or reconstruction of damaged buildings were done without the approval of the relevant authorities such as UDA, Coast Conservation and Coastal Resource Management Department (CCARMD) or relevant Urban Council. Therefore, they were originally illegal constructions. (it appears not only the alleged extension and the structural changes, even the main building too was illegal at the time of filing the application by the petitioners.)
4. Nevertheless, after filing this application the 9th Respondent has regularized the construction of the said extension by obtaining approval of the UDA, and the CCRMD. Therefore, the proceeding with this application is futile.

5. The Ladies' prayer hall was a long felt need of the school and request to erect a Ladies' prayer hall was made by the Trustees of the Masjid UI – Abraar Grand Mosque (vide R2). With the approval of School Development Society (SDS), the 9th Respondent with his recommendation forwarded the proposal for the said prayer hall to the Zonal Director of Education and the Zonal Director gave the approval to construct it under the supervision and guidance of the Divisional Engineer. (vide R3)
6. A part of the ground floor of building marked X in P4 was converted to a prayer hall. Since a space was required for worshipers to keep their footwear etc., an additional extension was constructed as a veranda to the aforesaid prayer hall.
7. Anyway, in view of an application made pending this application, the Beruwela Urban Council has approved the said building plan and issued the certificate of conformity on 03.09.2012 (Vide R6 & R7). Thus, the issues relating to the legality of the said construction and structural changes of the said building have now been cleared.
8. The Petitioners have not amended their petition and sought a quashing of the said approvals which regularize any illegality that existed.
9. Though the Petitioners have stated in their counter affidavit that they are entitled to get the Planning Committee Decision (4R18) quashed they have not amended the prayer accordingly. Therefore, proceeding with this application is futile.
10. Even though the approval of the UDA was not taken for reconstruction of the buildings damaged by the Tsunami, pending this application, on an

application made by the 9th Respondent in September 2012, approval was granted by the UDA according to law, rules and regulation.

11. The Petitioners have not complained about the manner in which the buildings had been reconstructed after the Tsunami without obtaining the necessary approvals of UDA or the 4th Respondent, which clearly demonstrate that the objection to the extension is due to collateral reasons as mentioned before.
12. The building which is the subject matter of this action is situated within the coastal zone and in terms of the Section 14(1) of the Coast Conservation Act, no person can engage in any development activities within the coastal zone without a permit issued by CCRMD.
13. The reconstruction of the building relevant to this application was without obtaining any permit from the CCRMD. However, the Principal of the said school made an application dated 20.04.2011 to CCRMD for the extension of the ground floor of the said building (vide 3R1).
14. Since the said development activity was within the restricted area which falls within the Set Back area where development activities are not generally permitted, the said application was rejected (vide 3R2)
15. However, the principal of the said school made an appeal (3R3), urging a set back area variance and which was considered by Cost Conservation and Coastal Resource Management Advisory Council and the said Council granted the approval for the extension of the said building subject to conditions. *{This court observes that as per the page 788 of the document marked P22 by the Petitioners, the said Advisory Council can determine exceptions to the set back area (Buffer zone) for development activities*

within the coastal zone, if it is a nationally important project. Projects that were done to recover from the damage caused by the Tsunami disaster naturally falls within the term 'Nationally Important Project'.} The said decision of the aforesaid Advisory Council has been communicated to them.

The facts revealed through the aforementioned pleadings filed by the Petitioners and the Respondents clearly indicate that the relevant building itself, not only the extension or structural changes complained of, was an illegal construction at the time of filing this application by the Petitioners, but pending the hearing of this application such illegalities were regularized by the relevant authorities by granting relevant approvals.

In this backdrop it is important to see what the Petitioners have prayed for in their Petition dated 09.12.2011. Among other things they have mainly prayed for the following reliefs;

1. To Grant and issue a Writ of Certiorari quashing the decisions of the 4th to the 10th Respondents and/or anyone or more of them to allow and/or facilitate the construction of the said new structure annexed to the said Building X (as shown in P5) and the structural alterations effected on the said Building X (as shown in P6)
2. To Grant and issue a writ of certiorari quashing the decisions if any, of the 1st to the 3rd Respondents and/or anyone or more of them to allow and/or facilitate the construction of the said new structure annexed to the said Building X (as shown in P5) and the structural alterations effected on the said Building X (as shown in P6)

3. To Grant and issue a Writ of Certiorari quashing the decisions of the School Development Society of the School comprising of the 9th Respondent and/or the 11th to the 28th Respondents to name or facilitate and/or allow the naming of the said Building X as "Masjid-UI-Abraar Ladies' Prayer Hall" and the inclusion of a private memorial therein (as shown in P6)
4. To Grant and issue a Writ of Mandamus against the 1st and the 2nd Respondents compelling them to take all necessary actions under the provisions of the UDA Law and the Regulations made thereunder to demolish or remove the said new structure annexed to the said Building X (as shown in P5) and restore the said Building X to the extent it is necessary thereof.
5. To Grant and issue a Writ of Mandamus against the 3rd Respondent compelling him to take all necessary action under the provisions of the CC Act and the Regulations made thereunder to demolish or remove the said new structure annexed to the said Building X (as shown in P5) and restore the said Building X to the extent it is necessary thereof.
6. To Grant and issue a Writ of Mandamus against the 4th to the 10th Respondents and/or anyone or more of them to take all necessary actions within their statutory powers to facilitate the demolition or removal of the said new structure annexed to the said Building X (as shown in P5) and restoration of the said Building X to the extent it is necessary thereof.
7. To Grant and issue a Writ of Mandamus against the 1st to the 3rd Respondents and/or the 4th to the 10th Respondents and/or anyone or more of them to take all necessary actions within their statutory powers to remove the said plaque erected along the elevation of one of the side-walls of the said

Building X (as shown in P6) and to restore the said Building X to the extent it is necessary thereof.

8. To Grant and issue a Writ of Mandamus against the 1st to the 3rd Respondent and/or the 4th to the 10th Respondents and/or anyone or more of them, compelling them to remove the denomination of the said Building X as "Masjid-UI-Abraar Ladies' Prayer Hall" and the private memorial thereon (as shown in P5 and P6).

A careful perusal of aforementioned reliefs prayed for by the Petitioners indicate that, they have prayed for writs of certiorari to quash the decisions taken by 4th to 10th Respondents, 1st to 3rd Respondents, 9th and 11th to 28th Respondents. Since the date of the Petition is 09.12.2011, the decisions contemplated in those prayers praying for writs of certiorari have to be understood as decisions that existed at the time of filing the petition. As contended by the Respondents, no steps have been taken to amend the prayers after the Respondents revealed that the relevant building and/or extension including structural changes are now regularized by the approval^s given by the relevant Authorities. What is not prayed for cannot be granted by this Court. As there are no amended prayers to quash the approvals granted pending the hearing of this application, the relevant buildings and/or extensions or structural changes complained of have to be treated as authorized constructions at this moment. Hence, the reliefs in the Petition that prayed for to quash the decisions of the 1st to 3rd or 4th to 10th Respondents and the writs of Mandamus prayed for to remove or demolish the relevant structures have become futile now. Furthermore, as pointed out by some of the Respondents, neither the 11th to 28th Respondents nor the SDS they belong to, do any statutory functions.

SDS does not appear to be a statutory body. Therefore, no administrative law remedy is available against their actions.

Furthermore, this Court observes that the reliefs praying to quash the decision to name the relevant building as 'Masjid Ul Abraar' or to compel the Respondents to remove the denomination of the said building are based on the guide lines and instructions marked as P8 which were prepared by the Ministry of Education.

Basically, guide lines are given to develop best practices in the relevant service or field. Since it is not a rule or regulation, this court doubts whether it creates any public duty to be done by the relevant officers or rights that can be enjoyed or enforced by the Petitioners. The Petitioners are silent with regard to the officer or the officers who drafted or passed the said guide lines and the nature of the authority he or they had to do that. However, it appears that the SDS has taken approval for the contents of the plaque from senior officers of the Provincial Education Department. (Vide X14 and X15).

On the other hand, the 11th to 28th Respondents have marked photographs of some plaques within the same school premises containing similar details as X21 to X28.

This Court observes that the petitioners were not interested in challenging the legality of constructions when the buildings were reconstructed after the Tsunami disaster without necessary approval. They have become interested only when an extension was done to an already unauthorized building. They were not interested when other plaques were installed but only when the one in issue was installed.

This indicates that there may be a truth in the allegation made by some of the Respondents that this application arose due to personal reasons.

For the foregoing reasons, I decline to issue writs of Certiorari and Mandamus as prayed for in the Petition.

Hence, I dismiss the application.

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E.A.G.R. Amarasekara, J
Judge of the Court of Appeal.