IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

Preethie Kumdinie Abeyesekera,
No. 137/B7, 3rd Lane,
Salgas Mawatha, Mattegoda
Polgasowita.

Petitioner

V.

CA Writ Application No: 784/2008

1. Hon. Gamini Thilaksiri
   Minister of Sports, Youth Affaires, Women Affaires, Housing and Constructions – Western Provincial Council
   No. 204, Denzil Kobbekaduwa Mawatha,
   Battaramulla.

2. Homagama Pradeshiya Sabhawa
   Pradeshiya Sabhawa Office,
   Homagama.

3. A.J. Karunaratne
   Divisional Secretary
   Divisional Secretariat – Homagama
   Court Road,
   Homagama.

4. J.A.S. Jayasuriya
   Regional Engineer's Office
   Court Road,
   Homagama.

5. Urban Development Authority
   "Sethsiripaya"
   Battaramulla.

6. Victor Samaraweera
   Chief Secretary – Western Provincial Council
   No. 32, Sir Marcus Fernando Mawatha,
   Srawasthi Mandhiraya

Colombo 07.

7. Nishendra Gunarathne
137/B5, 3rd Lane, Salgas Mawatha,
Mattegoda.

8. Thananthara Withanage Wimalasiri
137/13, 3rd Lane, Salgas Mawatha,
Mattegoda.

9. Kaludeera Saman Rvindra Lal
137/15, 3rd Lane, Salgas Mawatha,
Mattegoda.

Respondents

BEFORE	:	**K. PRIYANTHA FERNANDO, J** **SAMPATH B. ABAYAKOON, J**
COUNSEL	:	Anoma Goonathilake for the Petitioner. Edward Ahangama for the 2nd Respondent. Wikum De Abrew, SDSG for the 1st, 3rd, 4th, 5th and 6th Respondents. C. Wanigapura for the 7th, 8th, and 9th Respondents
WRITTEN SUBMISSIONS FILED ON	:	01.02.2021 by the Petitioner. 03.02.2021 by the 1st, 3rd, 4th, 5th and 6th Respondents.
JUDGMENT ON	:	03.03.2021

K. PRIYANTHA FERNANDO, J.

01. The petitioner filed this application against the respondents seeking to quash by writs of certiorari the approval granted and the decision taken by the 1st and/or 2nd and/or 3rd and/or 4th respondents or any one or more of them, which decision is contained in the letter dated 18th September 2008 marked P10 for the construction on lot No. B10 depicted in survey plan No. 2391/A dated 11th April 1986 made by S. Wickramasinghe Licensed Surveyor marked as P1(b), and to compel the 5th respondent by way of a writ of mandamus to demolish the construction made on Lot B10. The parties agreed that the judgment could be delivered on Written Submissions filed by the parties.

02. House and Property Traders Ltd., a property developer had blocked out the land called *Mattegodawatte* on two survey plans bearing No. 2251 dated 13th December 1985 (P1(a)) and No. 2391/A dated 11th April 1986 (P1(b)), both made by S Wickramasinghe Licensed Surveyor. It is an undisputed fact that when the above sub-division was approved by the Colombo Development Council, lot No. B10 of plan No. 2391A was reserved for community and recreation uses in terms of regulation 22(1) marked as P3.

03. On approving the above plan, the Authorized Officer recorded the following;

> බිම් කට්ටි සැලසුම් අංක. බි. ඕ. ෆි/86/1
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> අංක. 2391/ඒ දරන පිඹුරේ සඳහන් ලොට් 11.04.86 අංක. බි. 1 සිට බි. 9 දක්වා බිම් කට්ටි සැ ලැස්ම අනුමත කරමි.
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> ලොට් බි. 10 පොදු කටයුතු සඳහා වෙන්කර ඇත.

04. The petitioner submits that on or about 31st August 2008, with the approval of the 2nd respondent, and with funds allocated by the 1st respondent, under the supervision of the 4th respondent, the 3rd respondent wrongfully and unlawfully commenced constructing a non-residential building in the lot B10 in the above plan 2391/A.

05. While admitting the construction of the building in lot No. B10, the respondents deny the allegation made by the petitioner that the above construction is wrongful and unlawful. It is the contention of the respondents that the property referred to in plans P1(a) and P1(b) were sold by House and Property Trades Ltd. at public auction and the block out plan was approved by the Colombo Development Council (CDC) subject to the reservation of block B10 for public purposes. It is submitted that due to the need of a community hall for the welfare of the community, on the request of the members of the public of the 3rd lane of *Salgas Mawatha*, they have taken steps to build the community hall which is the subject matter. It is further submitted by the 7th 8th and 9th respondents that the building in question was constructed by the respondents due to the public demand made through the 7th 8th 9th respondents' society and that any technical mistakes of non-compliance of regulations can be cured on public interest.

06. It is pertinent to note that the land '*Mattegodawatte*' had been a private property. It was not owned by the State or the Urban Development Authority (UDA). House and Property Trades Ltd. (The Developer) had got the necessary approval for the sub-division.

07. Regulations made by the Minister in terms of Section 8 of the UDA Law No. 41 of 1978, which was published in gazette No. 392/9 dated 10.03.1986, among other things provide for sub-division of land. Regulation 22 provides;

22(1) Where the parcel of land or site to be sub-divided exceeds 1.0 hectare, an area of not less than ten percentum of the land or site, excluding streets shall be reserved for community and recreation uses in appropriate locations.

22(2) Such reserved space shall be vested with the Authority free of all charges.

08. As provided in the above Regulation 22, when approving the sub-division of the land *Mattegodawatte,* as a condition precedent the CDC has reserved Lot B10 for community and recreation uses. Therefore, it is obvious that all persons including the petitioner who bought the blocks from the land *Mattegodawatte* from the Developer have proportionately paid for that space (B10). Hence, it is clear that Lot B10 is reserved for community and recreation of the allottees of the sub-division plan, not for the general public.

09. Once the sub-division is approved, the reserved place B10 is vested with the UDA free of all charges in terms of Regulation 21(2). It is for the UDA or the local authority to maintain the reserved space for community recreation for allottees of the sub-division who are taxpayers to such local authority. In the above premise, I am of the considered view that the respondents have no legal right to grant approval to build or to build a community hall in lot B10 for the use of the residents of 3rd Lane, *Salgas Mawatha*, other than that for the use by the allottees of the plans P1(a) and P1(b).

10. Learned Counsel for the 1st 3rd 4th 5th and 6th respondents submitted that the petitioner is guilty of lashes. It is submitted that the government funds have been utilized and the building has almost been completed except for cementing the floor and plastering the walls.

11. In the case of ***Seneviratne V. Tissa Dias Bandaranayake and another [1992] 2 SLR 341*** at page 351, the Court commented;

'If a person were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance to enforce his rights; the law both to punish his neglect, nam leges vigilantibus, non dormientibus, subveniuntn and for other reasons refuses to assist those who sleep over their rights and are not vigilant.'

12. In the case of ***Biso Menika V. Cyril de Alwis and Others [1982] 1 Sri LR 368***, the Supreme Court held:

"When the Court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the Court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically."

13. The petitioner in submitting the sequence of events, in paragraph 10 of his petition has stated that this alleged unlawful construction commenced on or about 31st August 2008. 1st 3rd 4th 5th and 6th respondents in paragraph 8 of their statement of objections dated 17th December 2008, have admitted the contents of paragraph 10 of the petition, other than the contention that the construction is wrongful and unlawful.

14. The petitioner has written the letter marked as P5 on 9th September 2008 to the 1st respondent objecting to the above construction. The petitioner also has written letters marked P6 to the 6th respondent with copies to the 2nd and 5th respondents and P7 to the 6th respondent with copies to the 2nd and 5th respondents objecting to the construction, and the acceptance of the above letters is not denied. On 18th September 2008, the 3rd respondent sent the letter marked P10 stating, among other things, that the approval was granted by the 2nd respondent for the construction. The respondents have continued with the construction work. The petitioner filed the instant application on 26th September 2008. Hence, the submission by the respondents that the petitioner is guilty of lashes is untenable.

15. I bear in mind that even if the claim is made promptly, a Court may still refuse a remedy if it considers that granting a remedy would be likely to cause substantial hardship to, or substantially prejudice the rights of any person. I see no such hardship or prejudice to the 7th 8th or 9th respondents who intervened or to other respondents, if the relief sought by the petitioner to issue writs of certiorari is granted.

16. On behalf of the 2nd respondent, it is submitted that the petitioner has acted with an ulterior motive. In that, it is submitted that the petitioner has constructed the eaves of the upstair building on the common land and her rain water has been diverted to the common land. Windows of her upstair building open to the common land and a gate opens to the common land. It is submitted that the petitioner has violated the UDA regulations.

17. If the petitioner has violated the UDA regulations, the 2nd respondent and or the relevant local authorities may be entitled to take necessary steps to prevent such action or take legal action against the petitioner. That does not permit, nor is it an excuse for the respondents to act illegally or in excess of authority. It is pertinent to note that the letter 2R3 sent to the 2nd respondent by the 3rd respondent to take necessary action against the petitioner has been sent about five and a half years after the instant application was filed by the petitioner. That shows the lackadaisical approach of the 2nd and 3rd respondents on their duties, and their intentions, not the ulterior motives of the petitioner. That further shows that although the block B10 is vested with the UDA in terms of Regulation 22(2), the UDA has failed to maintain it for the benefit of the allottees of the lots in plans P1(a) and P1(b) including the petitioner, for their community and recreation purposes as it is reserved for.

18. It is submitted on behalf of the 1st 3rd 4th 5th and the 6th respondents that the Town and Country Planning Amendment Act No. 49 of 2000 amended section 8 of the UDA Law No 41 of 1978. It is submitted that as per that amendment the legislature has excluded the government projects from the operation of the regulations marked P3.

19. As I have already concluded in paragraph 08 of this judgment, the lot B10 is reserved for the community and recreation of the allottees of plans P1 (a) and P1 (b) and not for the general public including the residents of the 3rd Lane, *Salgas Mawatha*. It is not necessary for me to consider the issue of approval from the local authority for the impugned construction. However, for the completeness of my judgment I will address that issue as well.

20. It is to be noted that the 2nd respondent failed to appear in Court even after notices were sent repeatedly. As per the journal entries dated 04.10.2019 onwards, on 18.12.2019 the learned Senior Deputy Solicitor General has informed Court that he had no instructions other than the documents filed and has moved time to obtain instructions as to whether a building application along with the plan has been submitted. That was in spite of the fact that P10 had been sent by the 3rd respondent that the construction has been approved by the 2nd respondent. Only after issuing notice again through the Fiscal, District Court Homagama, the 2nd respondent appeared and moved to file objections on 22.07.2020, after a lapse of about 12 years. However, in both the objections and in the written submissions filed on their behalf, the 2nd respondent omitted to mention the document P10. The 2nd respondent has not even mentioned paragraph 19 of the petition that referred to the document P10.

21. As submitted by the learned SDSG for the 1st 3rd to 6th respondents, by the Town and Country Planning Amendment Act No 49 of 2000 Section 8 of the UDA Act has been amended. Section 8(p) of the UDA Act before the amendment was to read as;

'p) to approve, co-ordinate, regulate, control or prohibit, or any development activity, of any government agency or any other person in such areas;

Substituted section 8p provides;

"to co-ordinate regulate or control any development scheme or project or any development activity of any person in such areas".

22. It is the contention of the learned SDSG, that as the words 'Government agency' have been deleted, in terms of section 3 of the Interpretation Ordinance, the intention of the legislature was to exclude government projects from the operation of the Regulations marked P3.

23. I am unable to accept the above contention of the learned SDSG. Although the words 'Government Agency' have been deleted, the words 'development activity of any person' remain. This has widened or expanded the scope by including the words 'any person'.

24. On the 'Rule of Exclusion', **Interpretation of Statutes by N. S. Bindra 7th edition** at page 485 states;

"This is merely an auxiliary rule of construction adopted for the purpose of ascertaining the intention of the law-giver. It may be applied only when in the natural association of ideas the contrast between what is provided and what is left out leads to an inference that the latter was intended to be left out. It may accordingly be held inapplicable if there exists a plausible reason for not including what is left out. ..."

25. Government agencies are not expressly excluded by the amendment and therefore the words 'any person' should include government agencies as well. If the intention of the legislature was to exclude government agencies from getting approval for their projects, the legislature could have expressly excluded such agencies. Sections 8J (1) and (2) remain unchanged which includes Government agencies. Hence the argument

of the learned SDSG that the Government projects are excluded from the operation of the Regulations marked P3 is untenable.

26. As submitted on behalf of the petitioner, in terms of Regulation 16(1), no site or lot abutting a street less than 9 meters in width shall be used for non-residential use or construction of any building for such use except as provided under Regulation 16 (2) (b). Regulation 16(2)(b) does not apply to this instance. Road access to lot B10 is 12 feet in width which is much less than the 9 meters situated between lots B6 and B7 of plan P1(b). That access road is only to access lot B10. Hence, the 2nd defendant could not have legally given approval to construct a non-residential building in lot B10. For the reasons stated above, I conclude that the petitioner is entitled to get the relief prayed in paragraphs (c) and (d) of the petition.

27. Now I will turn to consider the writ of mandamus prayed by the petitioner to direct the 5th respondent to demolish the unlawful construction made in lot B10, in contravention of the UDA regulations. It is submitted on behalf of the 1st 3rd to 6th respondents that the community hall is almost complete and in the event that the Court made an order to demolish the building, the residents in the area would suffer and also it would be waste of public money.

28. There cannot be any issue of suffering by the residents in the area, as I have mentioned before, that lot No. B10 is reserved for community and recreation for the allottees of Plans P1 (a) and P1 (b), and not to the public. On the submission of waste of public money, I wish to state that it is the respondents who were involved in the illegal construction in contravention of the regulations, and it is the respondents who are responsible for such waste of public funds, if any. The respondents have continued with the construction work even after the objections were made by the Petitioner.

29. However, as public money has been utilized for the construction, I do not proceed to issue the writ of mandamus as prayed by the petitioner to demolish the construction.

The construction may be utilized for the purpose of community and recreation of the allottees of plans P1 (a) and P1 (b).

30. The petitioner is granted the relief as prayed in paragraphs (c) and (d) of the prayer of the petition. Relief sought in paragraph (e) is refused.

Application of the petitioner is partly allowed.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J

I agree.

JUDGE OF THE COURT OF APPEAL