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* and *mandamus* under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CASE NO: CA/WRIT/337/15

G.K. Udeni Janaka Perera,
No. 871/2,
Rukmale Road, Kottawa,
Pannipitiya.

PETITIONER

VS.

1. Central Environmental Authority,
"Parisara Piyasa",
104, Denzil Kobbekaduwa Mawatha,
Battaramulla.

2. Prof. Lal Mervin Dharmasiri,
Chairman,
Central Environmental Authority,
"Parisara Piyasa",
104, Denzil Kobbekaduwa Mawatha,
Battaramulla.

2A. Chandrarathne Pallegama,
Chairman,
Central Environmental Authority,
"Parisara Piyasa",
104, Denzil Kobbekaduwa Mawatha,
Battaramulla.

3. K.H. Muthukudaarachchi,
Director General,
Central Environmental Authority,

"Parisara Piyasa",
104, Denzil Kobbekaduwa Mawatha,
Battaramulla.

3A. P.B. Hemantha Jayasinghe,
Director General,
Central Environmental Authority,
"Parisara Piyasa",
104, Denzil Kobbekaduwa Mawatha,
Battaramulla

4. Janaka Kumara Elvitigala,
No. 871, Rukmale Road, Kottawa,
Pannipitiya.

5. Kanthi Kodikara,
Chairperson,
Urban Council,
Maharagama.

5A. Tiraj Lakruwan Piyaratne,
Chairman,
Urban Council,
Maharagama.

6. The Secretary,
Urban Council,
Maharagama.

7. The Urban Council,
Maharagama.

8. The Urban Development Authority,
6th and 7th Floors, "Sethsiripaya",
Battaramulla.

9. Swarna Kusumaseeli,
Director (Enforcement),
The Urban Development Authority,
6th and 7th Floors, "Sethsiripaya",
Battaramulla.

9A. M.P. Ranathunga,
Director (Enforcement),
The Urban Development Authority,
6th and 7th Floors, "Sethsiripaya",
Battaramulla.

10. The Commissioner,
Department of Local Government
(Western Province),
No. 02, Cambridge Terrace,
Colombo 02.

11. The Assistant Commissioner,
Department of Local Government
(Western Province),
No. 02, Cambridge Terrace,
Colombo 02.

12. Assistant Commissioner,
Department of Local Government,
Colombo.

RESPONDENTS

Before: **M. T. MOHAMMED LAFFAR, J. and**
K. K. A. V. SWARNADHIPATHI, J.

Counsel: Faisza Marker, instructed by Hasna Mohamed for the Petitioner.

Udith Egalahewa, PC with Damitha Karunaratne for the 4th Respondents.

Farzana Jameel, PC, SASG for the 1st to 3rd and 8th to 12th Respondents.

Written Submissions tendered on:

11.02.2019 and 05.09.2019 (by the Petitioner).

22.01.2019 and 02.09.2019 (by the 1st to 3rd Respondents).

06.03.2019 and 05.09.2019 (by the 4th Respondent).

14.01.2019 (by the 5th to 7th Respondents).

21.01.2019 and 28.08.2019 (by the 8th and 9th Respondents).

30.08.2019 (by the 10th and 11th Respondents).

Decided on: 14.10.2021.

MOHAMMED LAFFAR, J.

The Petitioner in this application has invoked the supervisory jurisdiction of this Court under Article 140 of the Constitution seeking, *inter alia*, for the following relief:

(b) a mandate in the nature of writ *certiorari*, quashing the Environmental Protection License (hereinafter referred to as the "EPL") issued to the 4th Respondent by the 5th Respondent dated 28.01.2015 (marked P-15).

(c) a mandate in the nature of writ of *mandamus*, directing the 5th Respondent or any one or more of the Respondents abovenamed, to take steps according to law against the operation of the garage at the above captioned premises by the 4th Respondent.

When this matter was taken up for argument, both parties had consented to dispose the matter by way of written submissions that have already been tendered.

The brief narration of facts for proper appreciation of the controversy relevant for the purpose are as under.

The Petitioner who is a resident at No. 871/2, Rukmale Road, Kottawa, Pannippitiya had complained to the 1st Respondent Authority for the first time on 14.08.2014 against the 4th Respondent, of the serious health hazards caused to him and other family members in the vicinity of his premises by the activities carried out by the 4th Respondent in operating a bus repair garage at No, 871, Rukmale Road, Kottawa, Pannippitiya.

On this complaint, the 1st Respondent Authority has caused a site inspection on 05.09.2014. Through the observation of the site inspection it was revealed, that at the time of the inspection, spray painting in an open-air area and repairing of buses were carried out in the premises in question, oil spills/seepage was observed in vicinity of the garage.

Consequent to the said site inspection, the 4th Respondent was informed by the 1st Respondent Authority in writing that, he was required to stop spray painting with immediate effect and that it was necessary for the 4th Respondent to obtain an EPL from the Local Authority to continue with the garage (vide P-3).

As revealed before this Court, the Petitioner during the same period had lodged several complaints with number of authorities including Police Station Kottawa, Police Office Mirihana and Department of Local Government of the Western Provincial Council.

After the 1st inspection by the officers of the 1st Respondent on 05.09.2014, another site inspection was carried out by the 1st Respondent on 09.12.2014 and the report prepared by the officers of the 1st Respondent Authority was produced before this Court marked 1R2, where the said officials have observed an improvement of the cleanliness and organization of the said premises and at the time the inspection carried out, spray painting work has been stopped. The above findings were communicated to the parties by the 1st Respondent by letter dated 29.12.2014 (P-14). Subsequent to this

letter by the 1st Respondent, the 4th Respondent had applied for an EPL from the relevant Local Authority i.e., Maharagama Municipal Council and the said Council had issued the impugned EPL dated 28.01.2015 valid for a period of 3 years commencing from 05.12.2014 under part "C" of the Government Gazette No. 1533/16 dated 25.01.2008 (marked P-13).

It was further observed by this Court that another meeting was held after issuing the said EPL on 25.05.2015 at the Central Environmental Authority with the participation of several public servants including officials from the Environmental Authority, Maharagama Municipal Council and Police. At the said meeting it was proposed to the Petitioner to monitor the conduct of the 4th Respondent by the 1st Respondent - Central Environmental Authority and Maharagama Municipal Council to make sure that the 4th Respondent does not violate the conditions of the EPL. When the said proposal was made to the Petitioner, the Petitioner did not agree for the said proposal, since the Petitioner was of the view that the said issuance of the EPL was made *ultra vires* by the 5th Respondent.

The Petitioner who was dissatisfied with the said decision by the 5th Respondent to issue the 4th Respondent with an EPL dated 28.01.2015 had challenged the said decision prayed the relief as submitted above.

Having elucidated the factual background of this petition, I shall now turn to the issues before this Court and the submissions of respective parties.

One crucial argument raised by the Petitioner in the written submission was the effect of the zoning identified in the Development Plan for the Urban Development Area of Maharagama published on 12.09.2008 for the period 2008-2020 as contained in Gazette notification No. 1566/29 dated 12.09.2008 (marked P-21). In this regard the Petitioner had taken up the position that, the said license

has been issued to the 4th Respondent contrary to the National Environment Act, No. 47 of 1980 for the reason that the said garage is situated in a Residential Area contrary to the Zoning Plan 2008-2020 and as such *ultra vires* the powers conferred on the 5th Respondent.

Whilst submitting that the garage is situated in a Residential Area identified under the Development Plan P-21, the Petitioner argued that operating a garage is not identified a permissible user under the said Development Plan. However, this position was disputed before this Court by the 4th Respondent and submitted that the said area comes under Mixed Development Area (vide para 22 of the Statement of Objections filed by the 4th Respondent dated 16.11.2017), but the Petitioner in support of his argument produced several letters marked P-3, P-7 and P-20 confirming that the area in question comes within a Residential area.

The 5th to 7th Respondents, concurring the position taken by the Petitioner, submitted that the said garage belongs to the 4th Respondent is situated in a Residential Area (vide para 18 and 19 of the written submission dated 14.01.2019).

The 4th Respondent submitted that he has been carrying the garage under the name and style of 'Kumara Motors' which is a registered industry (on or around 15.01.1993) of his mother under the Business Names Ordinance (Chapter 149) incorporated by Business Names Statute No. 4 of 1990. Accordingly, the 4th Respondent contended that the said garage industry existed for longer period before the said Development Plan P-21 came in to force that is the imposition of zone regulation which came into force in 2008.

The learned Senior Additional Solicitor General who represented the 1st to 3rd and 8th to 12th Respondents also took up a comparable position that the said Development Plan P-21 prepared under section 8 of the Urban Development Act, No. 41 of 1978 (hereinafter referred to as the "UDA Law") by its very nature cannot be retrospective in

operation and zoning has to be done to be effective in the future. A garage which was in operation at the time the Development Plan come in effect cannot be removed from the area but, they have to be regulated under the provisions of the prevailing legislature. In this regard the learned Senior Additional Solicitor General submitted that the National Environment Act, No. 47 of 1980 and the Regulations made thereunder had provided the issuance of an EPL to cover particular prescribed activities and section 23A of the amending Act No. 53 of 2000 empowered the Minister to determine what activities would require a license, being activities, which involve or results in discharging, depositing or emitting waste into the environment causing pollution.

In this regard, our attention was drawn to the Gazette Extra Ordinary No. 1533/16 dated 25.01.2008 P-13 where the Minister had made regulation under section 23A referred to above, and under part "C" vehicle repairing or maintaining garages excluding spray painting as an activity which requires a license under the said section.

The main grievance of the Petitioner is that the EPL issued to the 4th Respondent is null and void because it has been issued in violation of procedure set out in the Development Plan P-13. Per contra, the learned Senior Additional Solicitor General for the 1st to 3rd and 8th to 12th Respondents and the Counsel for the 4th Respondent submitted that the said Development Plan prepared under section 8 of the UDA Law by its very nature *cannot be retrospective* in operation and zoning has to be done to be effective in the future.

It is no doubt true that, in terms of section 8A (1) of the UDA Law (as amended by Act, No. 4 of 1982), the Urban Development Authority (UDA) shall having regard to the amenities and services to be provided to the community, prepare a development plan for any development area with a view to promoting and regulating the integrated planning and physical development of lands and buildings in that area or part

thereof. In the instant case, the 8th Respondent has prepared a Development Plan for Maharagama Urban Council Area for the period 2008-2020 P-13. This has been approved by the relevant Minister in terms of section 8F of the UDA Law. Therefore, in my view, the Development Plan for Maharagama Urban Council Area for the period 2008-2020 has the force of law and are regulations within the meaning of the law. Vide ***A.K.S. Sumanapala v. The Urban Development Authority and Ten Others*** **[C.A. (Writ) Application 754/2007, CA Minutes of 27.02.2020]** at page 3 His Lordship Justice Janak De Silva (as he then was) has taken a similar view. Hence, I hold that the Development Plan 2008-2020 as contained in Gazette notification No. 1533/16 dated 25.01.2008 prepared by the Maharagama Urban Council (a subordinate legislative body), is within the meaning of the law.

In fact, in the Gazette publication P-21, it is specifically stated that the Plan will become effective only from the date of approval by the Minister which was 07.08.2008. Therefore, as contended by the learned Senior Additional Solicitor General, the said Zoning Regulations cannot, reasonably, apply to any activities that had commenced in the said Zones before 12.08.2008.

It is true that, a delegated legislation may have retrospective effect only if the primary legislation containing the delegation either has that effect or authorize the delegated legislation to have that effect, *'…no statute or order is to be construed as having a retrospective operation unless such a construction appears very clearly or by necessary and distinct implication in the Act'* (vide *Thornton's Legislative Drafting* at page 424). This principle was adapted by Sharvananda J. in the case of the ***Attorney General of Ceylon v. Fernando, Honorary Secretary, Galle Gymkhana Club*** **[1977] 79 (1) NLR 39.** This view has recently been emphasized by His Lordship Priyantha Jayawardena, PC. J, in ***Dr. K.M.L. Rathnakumar v. The Postgraduate Institute of Medicine*** **[SC Appeal No. 16/2014, SC**

Minutes of 30.03.2016]. A similar approach has followed by the Indian Supreme Court - vide ***Indramani Pyarelal Gupta v. Nathu and Others*** **1963 AIR 274 and** ***Mohan Reddy Etc v. Charles and Others*** **AIR 2001 SC 1210.**

Joseph A.L. Cooray in his work ***Constitutional and Administrative Law of Sri Lanka (June 1995)*** at page 329 says *"The doctrine that subordinate legislation is invalid if it is ultra vires, is based on the principle that a subordinate agency has no power to legislate other than such as may have expressly been conferred by the supreme Legislature. Subordinate legislation is fundamentally of a derivative nature and must be exercised within the periphery of the power conferred by the enabling Act. For example, subordinate legislation having retrospective effect is ultra vires unless the enabling Act expressly or by necessary implication authorizes the making of retrospective subordinate legislation."* At page 323 the author further states *"Unless Parliament has in the enabling or parent Act expressly or impliedly authorized the sub-delegation, the maxim delegatus non potest delegare applies to make the sub-delegation unlawful."*

However, this Court observed that there is no proof has been furnished by the 4th Respondent that the said garage had been in operation prior to the year 2008. In his Statement of Objections, the 4th Respondent stated that he operates a garage under the name and style of "Kumara Motors" at the abovementioned premise where he utilizes to park motor coach-vehicles belonging to his family members. To substantiate these facts the 4th Respondent annexed copies of the certificate of registration of the motor vehicles and Passenger Service Permits for Regular Passenger Carriage Services belonging to his family members as X1 to X12. It is to be noted that all these documents had been obtained from the relevant authorities around 2014-2015. Further, the 4th Respondent also contended that the Building Plan bearing No. BA5/2005/25 marked P-16A was an extension to the existing building in which he was operating the said

garage. However, the said building approval granted to the 4th Respondent was valid for only one year in terms the document marked P-4. Accordingly, to my mind, the 4th Respondent has not furnished any valid proof before Court to establish the fact that the said garage had been in operation prior to the year 2008.

As stated earlier, what is also to be taken note of, is that, while the 5th to 7th Respondents concurring with the Petitioner's contention that the said garage operates in a Residential Zone, in their written submission dated 14.01.2019, they state the reasons for granting an EPL to the 4th Respondent in the year of 2015 as follows:

> 18. It is respectfully submit that along with the document marked P-22, the report of inquiry held by the 1st Respondent on 25.05.2015 was produced, where an officer representing the 8th Respondent, Mr. Kulatunga misrepresenting the facts has stated that it was a mixed residential zone and that 7th Respondent has approved Plan for a garage in year 2005 whereas it's not so the approval had obtained for residence as evident on the face of the document marked P-16A.
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> 19. It is respectfully submitted to Your Lordships that Garage Premise is situated in a residential area as stated in P-20 and colored marking on the Zonal Map. EPL P-15 was issued by the 7th Respondent Local Authority taking into consideration of the fact that it was situated in a mix residential area basing the Report prepared by the Inspection team which was submitted to Technical Evaluation Committee (TEC) which compromises of an officer of CEA who function as the Secretary to TEC and based on TEC recommendation and the directions in P-14.

Considering the above, it is clear that the said EPL, P-15 has been issued to the 4th Respondent based on alleged misrepresentative founding of the Technical Evaluation Committee of the 1st Respondent. Accordingly, this Court is of the considered view that the said EPL, P-15 has been issued contrary to the National Environmental Act, No. 47 of 1980 for the reason that the said garage is situated in a Residential Area contrary to the Zoning Plan P-21.

In the circumstances, I take the view that this petition should be allowed.

Accordingly, I issue both the writs of *certiorari* and *mandamus* sought by the Petitioner as prayed for in paragraphs (b) and (c) of the prayer to the petition. No costs.

Application allowed.

JUDGE OF THE COURT OF APPEAL

K. K. A. V. SWARNADHIPATHI, J.

I Agree.

JUDGE OF THE COURT OF APPEAL