

**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, *mandamus*, and *prohibition*
under Article 140 of the Constitution
of the Democratic Socialist Republic
of Sri Lanka.

CASE NO: CA/WRIT/278/18

1. Arachchige Dona Christene Shani
De Silva
No. 75, Old Road,
Nawala, Rajagiriya.
2. Clarice Niranjela Gurusinghe
No. 75/2, Old Road,
Nawala, Rajagiriya.
3. Suraweera Arachchige Mary Dona
Bridget
No. 75/3, Old Road,
Nawala, Rajagiriya.
4. Gurusinghe Devapriya Sumithra
Gurusinghe
No. 75/2, Old Road,
Nawala, Rajagiriya.

PETITIONERS

VS.

1. Urban Development Authority
6th & 7th Floors,
Sethsiripaya,
Battaramulla.
2. Sri Jayawardenapura Kotte
Municipal Council

No. 06, Sri Jayawardenapura,
Rajagiriya.

3. Condominium Management
Authority
1st Floor, National Housing
Development Building,
Sri Chittampalam A. Gardiner
Mawatha,
Colombo 02.
4. Central Environmental Authority
“Parisara Piyasa”
No. 104, Denzil Kobbekaduwa
Mawatha,
Battaramulla.
5. JAT Property Group (Pvt) Ltd
(formerly known as JAT Engineering
Pvt Ltd)
No. 351, Pannipitiya Road,
Thalawathugoda.
6. Hon. Attorney General,
Attorney General’s Department,
Colombo 12.

RESPONDENTS

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

Counsel: Mangala Niyarepola with Kushani Gunaratne,
instructed by Tharaka Sachindra Jayathilaka for the
Petitioner.

Jagatha Wickramanayake, P.C., with Kethmini
Dharmasena, instructed by Padma Perera
Ranamukaarachchi for the 2nd Respondent.

Manoj Bandara with Thivanka Hettiarachchi,
instructed by N.G.J.M.W. Senanayake for the 5th
Respondent.

K. De Silva, S.S.C., for the 1st, 3rd, 4th, and 6th
Respondents.

Written Submissions on:

23.05.2019, 21.09.2020, 19.03.2021 & 23.04.2021
(by the Petitioners).

23.02.2021 (by the 1st, 3rd, 4th, and 6th Respondents).

16.09.2020 (by the 2nd Respondent).

18.03.2021 (by the 5th Respondent).

Argued on: 30.03.2021.

Decided on: 26.10.2021.

MOHAMMED LAFFAR, J.

The Petitioners as residents or immediate neighbours of the Apartment Complex in issue, which is located at No. 77, 4th Lane, Old Road, Nawala, Rajagiriya have filed this application seeking several prerogative orders including writs of *certiorari*, *mandamus*, and *prohibition* upon several grounds that are set out in their petition dated 31.08.2018 [*vide paragraphs (b) to (m) of the prayer to the petition*].

The learned Senior State Counsel appearing for the 1st, 3rd, 4th and 6th Respondents took up several preliminary objections seeking dismissal of the application *in limine* without going into the merits. To understand the said preliminary objections in the proper perspective, it is necessary to know the facts of the case. Hence, I proceed to consider the merit of the application first.

The Petitioners in their petition state that the 5th Respondent Company as the Constructor, commenced the construction work of the Apartment Complex on the adjoining land, which is immediately adjoining to the Petitioners' land and premises (on the Western side of the Petitioners' land) in which they have been residing since 1935.

The Petitioners state that the construction work of the said Apartment Complex on the 5th Respondent's land caused severe inconveniences, nuisance, pollution and damages to them, the members of their families and other neighbouring residents [*vide paragraph 14 (a) and (b) of the petition*]. They also state that although the 4th Respondent had laid down specific conditions as prescribed in P8, the 5th Respondent repeatedly failed to take appropriate steps to minimize the damages caused to them.

The Petitioners state that in relation to the said property which they and other family members collectively own, they have developed a 10 feet wide private roadway from the Western boundary of the said property in order to access from the Old Road, Nawala, Rajagiriya. However, the said building of the 5th Respondent now has numerous openings on each floor of the left side of the building which has been strangely constructed on the existed Western boundary wall shared by both the Petitioners as well as the 5th Respondent, whilst claiming almost all light and ventilation and seriously affecting the privacy of the Petitioners. Thus, the Petitioners further submit that, the 5th Respondent had arbitrarily, dubiously, and unlawfully treated the said 10 feet wide private roadway of the Petitioners and other family members, which extends along the Western boundary of the Petitioners' land, as the side space and or fire gap of that Apartment Project building of the 5th Respondent.

The Petitioners also state that even though they approached the 1st to 4th Respondents to interfere with these unlawful acts of the 5th Respondent, the 1st to 4th Respondents have failed or neglected to

execute their statutory duties to take appropriate preventive and or remedial action against the 5th Respondent.

When this matter was supported on 26.09.2018, the Petitioners informed Court that they will not be pursuing the relief sought in respect of the 4th Respondent. Accordingly, on 15.02.2019, learned Senior State Counsel for the 4th Respondent filed a motion stating that, in the circumstance, a statement of objections will not be filed on behalf of the 4th Respondent. All other Respondents filed their respective objections and written submissions.

The 1st Respondent in their statement of objections state that upon receiving a complaint from the 1st and 2nd Petitioners on the alleged opening i.e., window in the blind wall of the 5th Respondent, they carried an inspection and accordingly on 12.02.2018 directed the 5th Respondent to take necessary action to close all openings in the blind wall and take precautions to mitigate the fire hazard (*vide 1R9*). Therefore the 1st Respondent submit that upon the above issues being brought to their attention, the 1st Respondent has taken prompt action to inquire and take steps in accordance with law.

The 5th Respondent, in their statement of objections, while denying the Petitioners' averment that they are the immediate neighbours of the said Apartment Complex of the 5th Respondent, submits that upon the directions made by the 1st Respondent to take immediate action to close the openings i.e., windows from the interior of the said apartment building itself, towards the Eastern direction of the said building, they took adequate steps to seal and close such windows [*vide 5R20(a) and 5R20(b)*]. The 5th Respondent further submit that although the 5th Respondent complied with these necessary directions made by the relevant authorities including the 1st Respondent, the Petitioners have from the very commencement of the said apartment complex of the 5th Respondent itself

continuously made several baseless complaints against the said apartment complex in *mala fide*.

Having heard the parties at considerable length and perused the record in-depth, let me consider the primary objections now.

In their statement of objections, the learned Senior State Counsel for the 1st and 3rd Respondents take up the following preliminary objection:

1. The Petitioners are guilty of laches
2. The Petitioners have failed to name as Respondents, all parties affected by the relief prayed for in this application.

Laches or inordinate delay:

The Respondents submitted that the said conditional Preliminary Planning Clearance was granted to the 5th Respondent on 31.08.2015 by the 1st Respondent. The Development Permit in respect of the impugned project was issued by the 2nd Respondent on 14.12.2015. As per the paragraph 11 of the petition, the 5th Respondent commenced construction of a building in mid-2016. According to 1R4, the initial complaint by the Petitioners, expressing concerns regarding the impugned project is dated 16.12.2017. The petition filed in this Court only on 31.08.2018. Therefore, the Respondents argued that the Petitioners have failed to explain the undue delay in invoking the jurisdiction of this Court, they are guilty of laches.

If the writ jurisdiction of this Court is invoked after an inordinate delay, the Petitioner shall explain the delay in his petition. That is a threshold requirement. Vide ***Lindsey Petroleum Com. v. Hurd*** [1873-74] LR 5 PC 221; ***Fisher v. Brooker*** [2009] UKHL 41; ***Biso Menika v. Cyril de Alwis and Others*** [1982] 1 Sri LR 368 and

Bogawanthalawa Plantation Ltd. v. Minister of Public Administration, Home Affairs and Plantation Industries [2004] 2 Sri LR 329.

The Petitioner in the instant matter has done so.

A careful perusal to the paragraph 46 of the petition dated 31.08.2018 shows that the Petitioners well explained the reasons for making this delayed application. They have pleaded that they were compelled to file this delayed application due to the delay in seeking to obtain several documents from the various authorities including the 1st to 3rd Respondents that are crucial to substantiate their case. Therefore, the Petitioners submitted that they have never *intentionally delayed* seeking relief before this Court and if any delay was caused as purportedly alleged by the Respondent, such delay was caused due to unavoidable circumstances, which were beyond the control of the Petitioners. Therefore, I am of the view that the delay in filing this application has been properly explained by the Petitioners.

Accordingly, the objection raised as regards laches would be overruled.

Necessary Parties not before court:

As I already mentioned hereinbefore, the Petitioners state that the construction work carrying by the 5th Respondent, caused severe inconveniences, nuisance, pollution and damages to them, the members of their families and *other neighbouring residents* in the area.

Also, at paragraph 44 of the petition, the Petitioners aver that “...*the 5th Respondent has unlawfully sought to sell several condominium parcels to several individuals and as at present, the Petitioners believe that there are several Apartment Owners in the said*

Apartment Project located at No. 77, 4th Lane, Old Road, Nawala, Rajagiriya...". Hence, it is quite clear that at the time the petition was being filed, there had been several parties as purchasers who had brought condominium units from the Apartment Building and had acquired rights or interests of their respective purchase.

Accordingly, it is further clear that, the case embraced by the Petitioners challenging the legality of construction in the Apartment Building clearly has an adverse effect on the aforesaid purchasers whose property rights and interest are very much affected by the grounds and matters alleged in the petition. However, the Petitioners still had chosen not to add the said purchases or interested persons as parties to this instant application.

As precisely observed by J.A.N. De Silva J. (as he then was) in ***Rawaya Publishers and Other v. Wijedasa Rajapaksha, Chairman Sri Lanka Press Council & Others*** [2001] 3 Sri LR 213 at 216, in the context of writ applications, a necessary party is one without whom no order can be effectively made. A proper party is in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the proceedings. Therefore, the failure to make the necessary party a respondent to the proceedings must be regarded fatal to the application. If the omission is discovered during the pendency of the application for the writ the Petitioner is well advised to apply to court to add such party as a respondent. Such an application for addition will be allowed only if the application is not yet ready for final disposal by court: ***Vinnasithamby v. Joseph*** [1961] 65 NLR 359. Once the final hearing of the application by court commences, such an application made thereafter will be refused. Vide ***Goonetilleke v. Government Agent, Galle*** [1946] 47 NLR 549 and ***Dharmaratne v. Commissioner of Elections*** [1950] 52 NLR 429, at 432 (also see, Dr. S.F.A. Coorey's *Principles of Administrative Law in Sri Lanka* (2nd Edition) at p. 537).

Therefore, I hold that the Petitioners are guilty of the non-joinder of necessary parties in this case.

Now, I would pause at this moment to examine the relief sought by the Petitioners. In my view, the relief sought by the Petitioners are broad and vague. The order sought in paragraph (b) of the petition reads as follows: “Issue a writ of mandamus compelling the 1st Respondent and/or its servant and/or agents to act forthwith in terms of Sections 8, 8J, 8K, 28, 28A, 28B, 28C, 28D and other relevant provisions of the Urban Development Authority Law of 41 of 1978 as amended and other prevailing laws...”. The order sought in this paragraph demonstrates that the Petitioners themselves do not know which statutes grant powers to the Respondents to deal with the alleged unlawful construction and approval.

Similarly, the Petitioners in prayer (d) seeks a writ of mandamus compelling the 3rd Respondent “to hold a formal inquiry under and in terms of the provisions of the Condominium Management Authority Law No. 10 of 1973 as amended....and/or take appropriate remedial and punitive actions forthwith against the 5th Respondent...”. The Petitioners have failed to specify a relevant provision which requires and/or empowers the 3rd Respondent to conduct an inquiry.

Writ is a discretionary remedy. In a writ petition, it is eternally important to correctly plead the relief sought. As it was observed by Anil Gooneratne J. in **S.P. Siriwardena v. Provincial Council Public Service Commission – North Western** [2012] BLR 373 (CA), ‘One should never have a vague prayer. As far as possible there should be reference to the order or decision to be quashed. Court should not be called upon to supply the omission. Specific relief should be pleaded with certainty’.

In **Sipkaduwa Anthony Danawathie Wimalasuriya v. Commissioner General of Lands and Others** [CA/WRIT/47/2014, CA Minutes of 27.09.2018], held was held that, “This Court cannot

issue writs in such vague terms against an array of Government Officials. This application, filed seeking vague reliefs, shall, in my view, be dismissed in limine on that basis”.

This view further emphasized in ***K. Selvarajah and Others v. Minister Rural Economic Affairs and Others*** [CA (Writ) Appl. No. 431/2016, CA Minutes of 15.09.2020].

I am therefore of the view that the above relief sought by the Petitioners are misconceived in law.

As such, on the 2nd preliminary objection raised by the State regarding necessary parties which I uphold, the misconception of the Petitioners in seeking the above vague relief, this application should be dismissed.

Accordingly, I dismiss the application without costs.

Application dismissed.

JUDGE OF THE COURT PF APPEAL

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

I agree.

JUDGE OF THE COURT OF APPEAL