IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an application for Certiorari and Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Court of Appeal Case No:
CA/WRIT/74/2016

Ramasinge Kurunaagala
Pathiranage Damayanthi
No. 80/1,
Sri Rathnapala Mawatha,
Isadin Town,
Matara.

PETITIONER

Vs.

1. Urban Development Authority
   6th and 7th Floors
   Sethsiripaya, Battaramulla.

2. Ranjit Fernando
   Chairman,
   Urban Development Authority
   6th and 7th Floors
   Sethsiripaya, Battaramulla.

3. Nayana Mawilmda,
   Director General,
   Urban Development Authority
   6th and 7th Floors
   Sethsiripaya, Battaramulla.

4. Municipal Council of Matara
   Matara

5. Senaka Palliyaguru,
   Commissioner,
   Municipal Council of Matara

6. Ranjith Yasaratne, Mayor,
   Municipal Council of Matara

7. K. Dayan Aravinda
   (Dayan Furniture)
   No. 51,
   Kumaradasa Mawatha
   Weliweriya
   Matara

7A. Kamburugamuwa Loku Arachchige
   Upul Manohara,
   288,
   Hiththatiya Meda,
   Matara

RESPONDENTS

Before:	C.P Kirtisinghe, J Mayadunne Corea, J
Counsel:	Darshani Gampalage with Lasitha Kanuwanarachchi instructed by Mayomi Ranawaka for the Petitioner Shiloma David, SC for the 1st – 3rd Respondents Asthika Devendra with Lakdini De Silva for the 4th – 6th Respondents.
Argued on:	08.11.2022
Written Submissions:	Tendered by 1st – 3rd Respondents on 11.11.2022 Tendered by 4th – 6th Respondents on 02.09.2019 Tendered by the Petitioner on 03.07.2019
Decided on:	30.11.2022

Mayadunne Corea J

The Facts of the case briefly are as follows. The Petitioner's father had obtained title to the land in dispute by a partition decree in case no P7663. The said land consisting of 21 P had a single-storied old house and two shops, premises bearing assessment no 78 & 80. Subsequent to a partition action the petitioner had got lot I in the plan marked as P2 which consisted of the old house in the extent of 17.24P and her sister had got title to Lot 2. Part of the said lot 2 had been acquired for the construction of a road. After the acquisition, the front portion of the two shops had been demolished. The petitioner submitted that slightly less than three perches of the said Lot had been acquired for the construction of the road. The said acquisition had taken place prior to the preparation of plan P2 in January 2014. The petitioner alleges that subsequently, her sister had sold the remaining 1.13P of lot 1 to the 7th Respondent. The 7th Respondent had thereafter sold it to the present owner 7A Respondent. It is alleged that the new owners had demolished the existing partly demolished two shops and had put up a three-storied construction which is used as a commercial premise containing shops in the said land.

The Petitioner further alleges that the said approval granted for the construction is violative of the law and thereby the said decision is arbitrary, illegal, *ultravires*, biased, and made for collateral purposes. Further, she alleges that the said construction too is violative of the UDA law and regulations and is causing a hindrance to her property. It is also submitted that the new construction has kept open areas facing her property and the rainwater outlet is allowed to fall into her property. It is further submitted that there are loosely hanging name boards hung projecting to her premises which are all violations of the UDA regulations on construction. She further alleges that despite her objections and request for relief the 4th, 5th & 6th Respondents have failed to grant her any relief pertaining to the illegal construction hence this application for a writ.

Petitioner's complaint to the Court

Despite several complaints being lodged with the 4th, 5th & 6th Respondents permission had been granted by the said Respondents to the construction in violation of the UDA Development and Building Regulations.

The Petitioner states that the aforesaid construction by the 7th Respondent is illegal as it is contrary to several regulations made in terms of Section 8(e) of the Urban Development Amendment Act No 4 of 1982 in respect of Matara Municipality for the following among other reasons.

(i) The building line according to schedule 3 of Volume II of the said Regulation of (at page 55) and Regulation 10.2.3 (iv) of Volume I is 15 meters from the mid of the road but the construction of the 7th Respondent has encroached into the aforesaid building line.

(ii) The new construction has encroached into the Street Line.

(iii) The rare space has not been kept according to Regulation 26 in Volume II.

(iv) The minimum plan area for the construction of a building does not exist in the premises owned by the 7 Respondent. (Regulation 15 read with Schedule 3, format (g) of Volume II)

(v) Since the 7 Respondent demolished the old single-storied building and started constructing a new two-storied building it has to be considered as a new building and new construction and the procedure for approval for new construction has not been followed.

(vi) The 4 Respondent Municipal Council of Matara has purportedly approved a building plan for a building constructed contrary to the Urban Development Authority Regulation.

The Petitioner has sought the following relief among others from this Court

(b) Grant a mandate against the 4th 5th and 6th Respondents in the nature of a writ of Certiorari quashing the purported approval granted under BA 11/2015 which was conveyed to the Petitioner and/or reflected by letter marked P26, to the construction of the building within the premises bearing No 78 Akuressa Rd Matara which is also described as Lot 2 in the Plan No.3499 dated 23.1.2014 prepared by HJ Samarapala Licensed Surveyor marked as P 2,

(c) Grant a mandate in the nature of a writ of Certiorari against the 4th 5 and 6th Respondents quashing the decision of the 4th and/or 5th and/or 6th Respondents which was conveyed to the Petitioners and/or reflected by the letter marked P 26 granting the approval to the construction of a building/part of a building within premises bearing No 78, Akuressa Rd, Matara which is also described as Lot 2 depicted in Plan No 3499 dated 23.1.2014 prepared by H.J Samarapala Licensed Surveyor marked P2

(d) Grant a mandate in the nature of a writ of Mandamus compelling the 1 to 6th Respondents to remove and/or caused to be removed according to law, The unauthorized construction made on premises No 78, Akuressa Road, Matara which is also described as Lot 2 in the plan No 3499 dated 23.1.2014 prepared by H. J Samarapala Licenses Surveyor marked P2;

In essence, the petitioner's main grievance is that the approvals given by the 4th, 5th & 6th Respondents are contrary to several Regulations made pursuant to section 8e of the Urban Development Act no 4 of 1982 as amended. The crux of the petitioner's argument was based on the following;

- that the development is in violation of the building line set out in Schedule 3 of volume ii of the UDA regulations mainly regulation no 10.2.3(iv)

- The approval for the development is in violation of the street lines requirement and the requirement for rear space.

- The minimum floor plan area required for the development under regulation 15 read with Schedule 3 of volume ii does not exist.

The 7th Respondent despite several notices being sent by this Court has failed to take part in the proceedings of the Court. Subsequently, the petitioner submitted that the 7th Respondent had transferred the property to another party who had been added as 7A Respondent. It was further submitted that despite notices being issued on several occasions the 7A Respondent too had failed to appear before this Court thus making him absent and unrepresented.

The learned counsel appearing for the 1st to 3rd Respondent on 23.07.18 informed this Court that they will not be filing any objections to the application as there is no substantial relief preyed against the said Respondents. However, reserved the right to assist the Court at the argument stage and after arguments with the permission of the Court, they filed a written submission.

4th, 5th & 6th Respondents objected to the petitioner's application on the basis that the petitioner's claim does not fall within the grounds for judicial review thus the argument that this application has to fail. This objection was based on the premise that the decision taken has not been challenged on the basis that it falls within the ambit of illegality, irrationality, and procedural impropriety. This Court will consider the said objections with the petitioner's claim.

It is not disputed that the municipal Council limits of Matara have been declared as an urban development area. It is also common ground that the 1st Respondent had delegated its powers pertaining to the development and other related matters acting in pursuance of section 23(5) of the UDA Act as amended, to the 4th, and 6th Respondents (P1 and P1a). Accordingly, the authority to approve construction under UDA development and building Regulations is delegated to the 4th, & 6th Respondents.

It is the contention of the petitioner that her sister who had title to lot 2 of the disputed land had transferred her rights to the 7th Respondent by deed no 2917 dated 27.4.15(P8). It was also the contention of the petitioner that the 7th Respondent had thereafter demolished the existing remains of the two shops and had started a new construction without proper approval and that too was for a two-storied building. The petitioner has demonstrated the state of the existing two shops, and the new construction by photographic evidence(P10(1)-P(11(xiv)and also p 32(1)-P40(v). These photographs were not challenged by the Respondents and they clearly demonstrate that the new construction is two-storied but has provision to go higher up as reflected in the photos. It is further argued that the new construction has iron and columns drawn up from the 2nd-floor slab for the construction of a 3rd-floor.

The petitioner submitted that when the alleged construction commenced, she had submitted several complaints to the 5th and 6th Respondents (P12, P12A, P13, P13A, P14, and P15, P18.She has also complained to the grama niladhari and the police (P16, P17) She has also complained to the 1st and 2nd Respondents P21, P22, and P27A about the alleged illegal and unauthorized construction. After several complaints to the authorities without any redress, the petitioner got a reply from the 5th Respondent. The said reply states as follows;

1. අදාළ නිලධාරී වාර්තාව අනුව අදාළ ස්ථානයේ කරන ලබන ඉදිකිරීම් අංක BA 11/2015 මගින් අනුමැතිය ලබා ඉදිකරනු ලබන ගොඩනැගිල්ලක් බවත් පිඹුරු අංක 3617 හි අංක 02 කැබැල්ල බවත් තහවුරු විය.

2. අකුරැස්ස පාර ශ්‍රී රතනපාල මාවත පුළුල් කිරීම හේතුවෙන් අංක 02 කැබැල්ල තුළ පිහිටි ගොඩනැගිල්ල කොටසක් අත්පත් කරගන ඇති අතර පැරණි ගොඩනැගිල්ල තිබු බව 3617 පිඹුර මගින් ද ග්‍රාම නිලධාරී වාර්තා මගින් ද තහවුරු වේ.

3. තවද රතනපාල මාවත පුළුල් කිරීම හේතුවෙන් පැවැති ගොඩනැගිල්ල මුහුණත අළුත්වැඩියා කිරීම අනිවාර්යය වේ.

4. භූමිය කුඩා වීම හේතුවෙන් යෝජිත සංවර්ධනයේ දී විවෘත අවකාශය 1.0m නයගනහිර දිශාවෙන් තැබීමට කමිටු නිර්දේශය ද ලැබී ඇත.

5. පෙත්සමේ පිටපත් නීතිඥ මහතකු මගින් එන්තරවාසියක් ලෙස එවා ඇති අතර එහි සඳහන් වන්නේ පෙත්සම්කාරියගේ නිවසට මෙම ඉදිකිරීම හේතුවෙන් නිසි වාතාශ්‍රයක් නොලැබෙන බවයි. එය සාධාරණීය කළ නොහැකි කරුණක් බවත් පෙත්සම්කාරිය පදිංචි නිවස ඔහුගේ වැට මායිම් සිට නිවැරැදි දුරින් ස්ථාපිත වීම ඔහු විසින්ම කටයුතු යොදා ගැනීමටත් වෙනත් බාහිර පාර්ශව ඒ සඳහා බැඳී නොමැති බවයි. කෙසේ වුවද මෙම ස්ථානයේ එවැනි බාධාවක් සිදුව ඇති බවත් නොපෙනේ

ඉහත කරුණු සැලකිල්ලට ගෙන මෙය අනවසර ඉදිකිරීමක් නොවන බව වැඩිදුරටත් දන්වයි.

Thus, the petitioner's contention that the decision reflected in the said letter P26 giving permission to construct is *ultravires,* illegal bias, unreasonable, and in violation of the UDA Development and Building Regulations.

The 5th Respondent contended that the said construction had been approved and therefore the construction is not illegal. It was their contention that since the front portion of the land in dispute had been acquired for road widening the front portions of the buildings had been demolished and that there was a mandatory requirement to renovate the face of the building. However, due to the limited space availability in the remaining portion of the land, the 5th Respondent contended that they had considered the ground floor of the remaining part of the existing building as a renovation, and as the plan submitted for approval 5R7 had a second floor which was considered new construction. It was their contention that since the ground floor was a renovation the applicability of the street lines and the building line limitation had been done away but for the new construction of the first floor, the same was to apply. Thus, they submitted that the first floor should be built after observing the street lines and the other requirements under the building regulations. Further, the 5th Respondent had varied the requirement to have mandatory clearance of the rear space and had allowed it to be kept from the eastern side.

Application by the Petitioner's sister

At this stage, it is pertinent to consider the application that had been made by the applicant who is seeking permission to develop the land**.** The said application consisting of several attachments was tendered to the Court by the 5th Respondent marked as 5R6 to 5R11. However, the said application does not disclose that it is an application for a renovation of existing premises. What is disclosed is an application for an amendment to the existing premises.

This Court observes that though the town planning and zonal regulations mandate the approval of renovations, and amendments the plan that is submitted for approval should clearly define the old or the existing building and the proposed renovations/amendments in different colors

the plan submitted to this Court does not display such a contrast. The inspection report prior to issuing a development permit which was marked as 5R9 under clause 15 specifically requests to answer the question as to whether the proposed amendments are depicted in red and the answer is in the negative. It is pertinent to note that as per the 5th Respondent's contention if the proposed construction was for an amendment to the ground floor, then the old building should have been depicted in one colour. However, the failure of the developer to follow the guidelines of the colour coding in the plan demonstrates that from the inception their intention had been to construct a new building rather than effecting an amendment to the existing ground floor.

The petitioner argued that the said two shops had long been abundant and not used thus when the portion of land was acquired for the road construction the said building was already in a delipidated condition. Therefore, they argued that the necessity for renovation subsequent to the acquisition does not arise.

The 5the Respondent submitted that as per the application the applicant had declared it as a renovation of an existing building. However, the documents presented to this Court demonstrate it is for an amendment "වෙනස්කිරීමක්". As submitted by the petitioner this court is also of the view that an amendment has to be in incompliance with the regulations.

Failure to tender necessary documents with the application for renovations/amendments purported to hide the true motive thus the application should have been rejected

The petitioner contended that before an application for renovation or for amendment is made there should be an approved subdivision of the disputed lot where the development is to take place. However, it is the petitioner's contention that no such sub-division plan had been approved and the Respondents have failed to tender any approved sub-division to this Court. The application for a subdivision had been made vide 6R1,6R2A. However, no approved subdivision plan had been tendered to this Court. It was the contention of the petitioner that the failure to submit the subdivision was to hide the unavailability of the minimum required space for construction under the UDA regulations. It was further contended that in the absence of such subdivision the 4th,5th & 6th Respondents could not have proceeded or entertain the

application for an amendment. thus, making the whole process illegal and the act of entertaining an incomplete application and considering the same an act of *ultravires*.

The 5th Respondent had replied to this application by letter dated 19.12.2014 6R3 and had informed as follows;

එච්. ජේ. සමරපාල බලයලත් මිනින්දෝරු මහතාගේ පිඹුරු අංක 3617 යටතේ 2012.11.25 දින පිළියෙල කරන ලද පිඹුරේ අංක 02 වශයෙන් දක්වා ඇති බිම් කැබැල්ල පවත්නා ඉඩමක් සේ සලකා ඉදිකිරීම් සදහා සංවර්ධන අධිකාරියේ සැලසුම් බලපත්‍රයක් ඉල්ලුම්කරන්නේ නම් නාගරික සංවර්ධන අධිකාරිටයේ සංවර්ධන සැලසුම් හා ඉදිකිරීම් රෙගුලාසි වලට අනුකූලව අනුමැතිය ලබාදීම සලකා බැලිය හැකි බව දන්වා සිටිමි.

This reply demonstrates that it was the 4th,5th & 6th Respondents who had suggested sending the application for the development of an existing building and also demonstrates that the granting of the approval would be subject to the UDA Development and Building regulations.

It appears that thereafter the petitioner's sister had made an application for the development of the two shops bearing no 78 and 80(6R4 and 6R5a) subsequently an application has been tendered marked Y, as well as 6R6which, which is also marked 5R6. It is pertinent to note that the column that states when the application was received by the 6th Respondent, is not filled nor is the signature of the commissioner visible. In the said application under section B, what the owners proposed to do is not clearly demonstrated. it does not specify whether it is a renovation or new construction but what is written there is the word amendment. Annexure(i) it stets that the entire square area of the building is only 28.25 square meters.

Under the column "the present position" it says floors as 2. However, as submitted by the Petitioner and this Court observes that the photographic evidence as well as the Grama Sewaka report (5R5B) demonstrates that what is in existence is a single-storied building. Further, it

says the proposed development would consist of 91 % of the available square area. The plan is annexed to the application. Report 6R8 the "Technical Officer/Public Health Inspector" s Report after an inspection answers the 2nd question, stating that it is a new construction but had recommended the proposed development.

Thereafter by 6R10, the planning committee had approved the said development as per the application submitted and also had varied the requirements for keeping the rear space and allowed it to be kept from the east. It further states that they had approved the development considering the ground floor to be part of the existing building but had imposed a condition that the first floor is constructed only towards the rear portion of the first-floor slab so that it is in compliance with the building line.

The Petitioner argues that plan 6R7 submitted for the approval of the development, depicts the construction of two floors on a new foundation, new walls, and columns making it a new construction. Hence it was her contention that the said application cannot be considered as an application for renovation or amendment but should have been considered as a new construction to which the building regulations should strictly be applied.

The Petitioner also submits without conceding that even if the ground floor is considered an existing building as per the approved plan still the 1st floor should have commenced from half of the first-floor slab, but as demonstrated by the photographic evidence the said floor which the 4th, 5th, 6th[th] Respondents too concede as new construction has violated the building line and occupies the same floor area as of the ground floor. It was also contended that as per the photographic evidence that there is no rear space kept at all(P39).P39(1). The Petitioners as well as the 1st and 2nd Respondents also submitted that what is now constructed is a three-storied building that has never been approved.

The second argument of the petitioner is that even if the 4th,5th & 6th Respondents have granted the approval the said approval is contrary to the regulations.

The approval granted for an amendment to an existing building is contrary to the building regulations.

The Petitioner's main argument is based on the premise that the approval granted violates the building regulations. The said building regulation has been tendered to this Court marked P30. As per the building regulation clause 19, it is imperative to observe the street lines and the building lines. The exception or the amount that deviation is allowed is specified under subclause (3) This would be an appropriate time to consider clause 19(3) of the building regulations which allows taking into consideration some constructions, in view of granting the permit for development. The said regulation 19(3) states as follows;

ගොඩනැගිලි රේඛාවෙන් ඔබ්බට කිසිදු ගොඩනැගිල්ලක් ව්‍යාප්ත නොවිය යුතුය. එසේ වුවද පළලින් මීටර් එකකට (1.0) වැඩි නොවූ සඳළුතල, හිරාවරණ හෝ අගු ගොඩනැගිලි රේඛාව සහ විට රේඛාව අතරද මිටර් දෙකට වඩා නොඋස් වැටක් හෝ මායිම් තාප්පයක් වත්දි නොගෙවා කඩා දැම්මේ පදනම මත විට රේඛාව මතද ඉදිකිරීමට ඉඩ දෙනු ලැබිය හැකිය.

It is observed that as per the sub-regulation (3) the 4th,5th & 6th Respondent has some discretion to vary the application of the street line and the building line. However, it has to be done in accordance, with, and within the meaning of the sub-regulation. As submitted by the Petitioner the planning committee cannot disregard the said regulation and permit an entire floor or construction to be done in violation of the requirements stipulated nor can they allow new construction to take place in the guise of an amendment disregarding and deviating from the clauses in the UDA zonal development and building regulations.

Does the intended construction area qualify for development under the building regulations?

The Petitioner contended that for the 4th, 5th, and 6th Respondents to approve a subdivision plan for development purposes no such plan has been forwarded and no such plan has been forwarded to this Court. Even if there was a subdivision plan for it to be approved for development purposes there should be compliance with planning and construction regulations within the Matara Municipal Limits which are depicted in P30.

As per 3rd Schedule form E(ඉ) it clearly depicts the application of regulation 17 which describes the minimum land parcel that qualifies for development. All parties were not at variance on the fact that as per the regulation, there should be a minimum of 150 Square Meters with a minimum of 6m in width. As contented It is observed by this Court that in the application for the proposed development, submitted pertaining to lots 78 & 80 the minimum square area to be utilized is given as 28.25sqm (5R6) the approximate square area of the land is given as 25.91sqm. This is a violation of the Regulations as it does not qualify under the minimum required land area for any development activity. Thus, the petitioner's contention that the said development application should have been rejected by the 4th 5th, and 6th Respondents have merit in view of his contention that the application is not for an amendment but for new construction. Accordingly, the Petitioner contends the said approval in the 1st instance itself is a violation of the UDA regulations.

In response, the Respondents submitted that considering the fact that the front portion of the buildings which were in existence in lot 2 and which had been damaged due to road widening had to be renovated, but due to insufficient land area they were unable to grant permission for development work they had considered the Petitioner's application as for an amendment to the premises which would not attract the minimum land area requirement. It was also submitted that in any way the said Respondents had the right to relax some of the requirements for the purpose of granting approval under regulation 17(3) which this Court has briefly dealt with above. This Court will consider this response further in a while.

The Learned counsel for the Petitioner vehemently rejected this submission of the Respondents on the basis that even her own sister who was the predecessor in title to the 7th and 7A Respondent had got her title to the land to be developed only after the acquisition of part of the

said land for road construction. Therefore, it was submitted that by the time she got the title the two buildings situated therein bearing no 78 and 80 had long been partly demolished and what she inherited was a dilapidated, overgrown with weeds, partially demolished building. Therefore, it is the position of the Petitioner that since the buildings were partially demolished long before her sister had even got the title the assumption that it's an amendment to an existing building or an urgent amendment in view of the acquisition of part of the land cannot be sustained.

It was further argued that if the minimum square area was not available the 4th, 5th & 6th Respondents should not have granted approval at all but should have rejected the application for non-compliance with the building requirements under the regulations. Thus, making the entire process of accepting and granting approval tainted with irregularity and illegality.

In any event, the Petitioner submitted that the 4th, 5th & 6th Respondents could not consider the development applications as an amendment, in view of the document 5R8 and the material submitted for approval. In the said document under question no 2 which poses the question as to whether the construction is a new construction the answer given is in the affirmative.

Bringing the attention of the Court to building approved plan 5R7 it was argued that in fact what has been approved in the said plan is only the construction of a small portion which is to the rear part of the first floor.

In response, the respondents submitted that there is no approval needed for the ground floor as it is considered as an existing building. It is also pertinent to note that even if the ground floor was considered as an existing building if it is an amendment then the proposed amendment should be considered as it has to be in accordance with the regulations. The only exception being a renovation which is not relevant to the present context of this case.

However, it is observed by this Court and as per the photographic evidence that has been submitted and as per the drawings in 5R7 the building on the ground floor is too a new

construction. Though this proposition was presented at the argument stage the 5,6 7th Respondents failed to explain this observation which was made by Court.

As per clause 19 of the regulation it is not permitted to encroach and construct within the street lines and the building lines except under clause 19(3) which does not have any relevance in this instance. Thus the petitioner's contention that the application fail to qualify evan to be processed.

The requirement to have a rear space

It was common ground that Pursuant to regulation 26, for the construction to be approved the requirement for rear space should be adhered to. Regulation 26(1) identifies the requirement to maintain the rear space of 3m to be kept open. The Petitioner contends that the rear space of the construction is bordering her property and the 7th Respondent has failed to observe the said requirement. It is her contention that the approval could not have been granted as after observing the requirements for street lines and building lines there is no space to maintain the rear space.

In response, it was submitted that the Respondents had considered the said fact before approval was granted, and acting under regulation 26 subclause 4 the Respondents had waived the requirement to observe the rear space as stipulated in 26(1) but had permitted the same to be kept from the eastern side of the development block. It was argued that this decision had been taken in view of the insufficient space available in the rear part of the development site. This Court will now consider the said regulation 26(4). The said subclause states as follows;

ගොඩනැගිල්ලේ සම්පූර්ණ පළලින් යුත් විවෘත ඉඩකඩක් ගොඩනැගිල්ලේ පිටුපස පැත්තෙන් වෙන් කිරීම නොකළ හැකි පරිදි <u>අක්‍රමවත් හැඩවලින් යුත් භූමි</u> භාග සම්බන්ධයෙන් වන විට එක් එක් අවස්ථාවට අදාල පරිවේශන සැලකිල්ලට ගැනීමෙන් පසු සුදුසු යැයි අධිකාරිය විසින් සලකනු ලබන ආකාරයට පිටුපස විවෘත ඉඩකඩ තබන ලෙස අධිකාරිය විසින් නියම කරනු ලැබිය හැකිය

It is correct that the building regulations permit the relaxing of the strict compliance of regulation 26 (1). However, it is permitted only in specific instances where the land sought to be developed is of an odd shape. It does not allow the Respondents to disregard the applicability of regulation 26 (1) or to vary the application of the said regulation as and when the Respondents like.

After considering the said regulation this Court is not inclined to subscribe to the 4th,5th & 6th Respondents' arguments on the power vested with them to vary the requirement of the rear space. Plaine reading of the said subclause clearly demonstrates that it can be utilized only in instances where the land parcel for the proposed development is in an odd shape and the said odd shape does not permit the reservation of rear space as contemplated under regulation 26(1). In our view, the approving authority can vary the requirement of the rear space only if it fulfills the requirements under Regulation 26(4). However, as per all the documents submitted to this Court and the documents that have been submitted for approval for the 4th,5th & 6th Respondents which are annexed to the objections of the Respondents this Court cannot find an odd shape in the plan submitted for approval. Accordingly, in the view of this Court, this is not an instance that attracts subclause 26(4). Thus, in our view, the said approval granted to vary the subclause under 26(4) cannot be justified.

Are the development within the stipulated building line and street line?

The Regulation marked as P30, 4th part defines what the building line and the street lines are. All the parties were not at variance on the fact that there should be 15 m reservations for the building line. It is common ground that the building application submitted for approval depicts only a 12m distance out of the required 15m building line. To overcome this the 4th,5th & 6th Respondents had considered the ground floor as an existing building. In these circumstances, it was the contention of the Respondents that there was no encroachment on the building line. However, the 4th,5th & 6th Respondents submitted that in order to come to this decision they considered the application as an application to renovate/amend an existing building. Thus, they had allowed the requirement to be waived off for the ground floor. But insisted on maintaining the said line for the 1st floor. However, as per the photographic evidence that has been submitted to this Court all parties were not in dispute on the fact that the construction depicted in the said photographs is in violation of this requirement and the approval granted.

It is the contention of the Respondent that the planning committee of the 4th Respondent council can waive off and recommend variations for new constructions which may not be in accordance with the regulations. They also said that the said power is given to the planning committee by the regulations themselves. The Respondent heavily relied on UDA regulations marked as P30 especially regulation 17(3), to justify their varying and deviating from the other mandatory requirements that are stipulated in the said regulations.

Let us consider Regulation 17(3) which state as follows;

"යම් භූමියක ගොඩනැගිල්ලක් ඉදිකිරීම සම්බන්ධව <u>අනිකුත් නියමතාවන් සපුරාලන්නේ</u> නම් ඉඩමක ප්‍රමාණය හා බිම් කට්ටියක පළල පිළිබඳව අවශ්‍යතා අධිකාරිය මගින් ලිහිල් කළ හැක."

Thus it was argued that the 4th,5th & 6th Respondents had the authority to change and or to vary the building regulations and permit the construction though at face value it violates the building Regulations. It was further contended that the approval granted was within the power vested

to the said Respondents under the building regulations and the said decision is not *ultravires* illegal or the said process does not attract the allegation of following an irregular procedure.

While disagreeing with the said submissions this Court observes that there is leverage given to the planning committee to relax some of the regulations subject to what is stated in 17(3). It is pertinent to observe that the planning committee can only utilize this provision to vary requirements, if only the development fulfills the other requirements that are stipulated in the said regulations. And that too the discretion is given to the planning committee only to vary regulations pertaining to the square area and the width of the land parcel. It does not give unlimited freedom for the planning committee to vary and disregard the provisions contained in the building Regulations

The Respondent's objections

4th,5th & 6th Respondents relying on civil Service Union Vs Minister for the Civil Service (GCHQ case 3AER 935) contended that the Petitioners have failed to demonstrate the existence of any ground for the grant of a writ, namely grounds for illegality, irrationality, and procedural impropriety in the decision the planning committee had taken.

In considering all the facts and the materials submitted we are not inclined to agree with the said objections. As demonstrated above in the judgment we find the 4th 5th and 6th Respondents have clearly violated and misinterpreted and misapplied the regulations for the benefit of the developer who made the application to develop lots 78 and 80. The said application has been submitted on the basis of an amendment. As submitted by the Petitioner this Court agrees that the said development application should have been rejected when it was tendered, as the said application is not a proper application in the sense that the particulars furnished contradict each

other and also it lacks the basic information called for, even to consider as an application for development purposes under the UDA regulations. Nowhere does it say definitely whether it's an application for a renovation addition, for an amendment, or for a new construction. In one form it states as a "වෙනස්කිරීම" amendment however, the approving documents show that it is a new construction (Public health Inspector's Report) 5R8. The way the application has been filled it is safe to come to the conclusion that the said application is not a complete application that can be approved.

As submitted by the Respondents we find that in annexure 1 of 5R6 describing the present building, the applicant to the said application states that it has 2 stories. This is contradicted by the Grama Sevaka Report (5R5B). As to the present usage of the building the application is silent. It was common ground that these applications are processed after the technical officer and other field officers inspect these premises and submit their reports before the approvals are granted. Therefore, when insufficient particulars are submitted or false particulars are submitted Respondents cannot subsequently plead that they have approved plans only based on the contents of the application. It is their duty to ascertain and verify the information before approval is granted. In this instance, the 4th,5th & 6th Respondents had gone the extra mile and varied all the requirements stipulated under the building regulations to accommodate the construction. Considering the material submitted before this Court in our view, the objection of the 4th,5th & 6th Respondents raised based on the GCHQ case has to fail.

Writ of Mandamus

As discussed above in this judgment the 4th,5th & 6th Respondents have acted in violation of the regulations in granting the approval for the purported development of lot 78 and 80. We have also considered the photographic evidence submitted. The 1st to 3rd Respondents filed their Written submissions dated 11.11.2022 which we have considered. In the said Written Submission the Respondents had invited this Court to consider the fact that the UDA regulations confer and appreciate a degree of discretion to the planning committee to grant approvals depending on facts and circumstances on a particular case. However, the said discretion cannot be an unfretted discretion it has to be used in a justifiable manner, and also

the said discretion cannot completely disregard the intention of the drafters of the regulation. In this instance, we find 4th,5th & 6th Respondents have failed to demonstrate their actions to justify the deviations allowed from the prescribed regulation. they have failed to submit good reasons to justify the deviations. In our view, the said Respondents have failed to justify any of the deviations they have permitted pertaining to the application of the Building Regulations, further they have failed to demonstrate that the variations that have been allowed are in compliance with the limited variances afforded under the regulations.

1 – 3 Respondents also submitted that while this case was pending, they had conducted a site inspection and had found that the construction that is completed had even violated the approvals that were granted deviating from the applicable regulations for the benefit of the developer. However, it is up to the said Respondents to take appropriate action if there is a violation of the approvals granted according to the law. keep it as it may this Court observes that since this Court has considered the original granting of the approval by the 4th,5th & 6th Respondents to be illegal and *ultravires* of the powers vested with them the said approval is devoid of any legality.

In the case of **Surveyors of Sri Lanka Vs. Acting Surveyor General 1998 1 SLR 266** it was held as follows;

An administrative act or order which is ultra vires or outside the jurisdiction is void in law, ie., deprived of legal effect. This is because an order to be valid it (sic) needs statutory authorization, and if it is not within the powers given by the Act, it has no leg to stand on…."

Considering all the materials that have been submitted to this Court we are of the view that the petitioner has satisfied this Court to obtain the reliefs pleaded.

Accordingly, for the aforesaid reasons, we issue a writ of certiorari as prayed for in prayer (b) and we also issue a writ of mandamus as per payer (d). Parties to bear their own expenses.

Judge of the Court of Appeal

C.P Kirtisinghe, J

I agree

Judge of the Court of Appeal