

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

*In the matter of an application under and
in terms of Article 140 of the Constitution
of the Democratic Socialist Republic of Sri
Lanka in the nature of Writ of Certiorari
and Mandamus.*

Geekiyanage Viyantha Vijithweera,
158, Kandy Road,
Nuwara Eliya.

Petitioner

Vs.

Writ Application No:
CA/ WRIT/365/2018

1. **Urban Development Authority,**
6th and 7th Floors
'SETHSIRIPAYA'
Baththaramulla.
2. **Dr. Jagath Munasinghe,**
Chairman,
Urban Development Authority,
6th and 7th Floors
'SETHSIRIPAYA'
Baththaramulla.
- 2A. **Mr. Udaya Nanayakkara,**
Chairman,
Urban Development Authority,
6th and 7th Floors
'SETHSIRIPAYA'
Baththaramulla.
3. **S.S.P. Ratnayake,**
The Director General,
Urban Development Authority,
6th and 7th Floors

‘SETHSIRIPAYA’
Baththaramulla.

- 3A. **N.P.K. Ranaweera,**
Director General,
Urban Development Authority,
6th and 7th Floors
‘SETHSIRIPAYA’
Baththaramulla.
4. **M.T. Ranatunga,**
The Director (Enforcement)
Removal of Unauthorized
Construction Division,
6th and 7th Floors
‘SETHSIRIPAYA’
Baththaramulla.
5. **H.M.W. Herath,**
Deputy Director (Planning),
Regional Office,
Urban Development Authority,
Queen Elizabeth Plaza,
2nd Floor,
Queen Elizabeth Street,
Nuwara Eliya.
- 5A. **Mr. Ranjith Bandara,**
Deputy Director (Planning),
Regional Office,
Urban Development Authority,
Queen Elizabeth Plaza,
2nd Floor,
Queen Elizabeth Street,
Nuwara Eliya.
6. **Dinesh Gunawardena,**
Minister of Megapolis and Western
Development,
17th and 18th Floors,
‘Suhurupaya’

Sri Subhoothi Road,
Baththaramulla.

6A. Minister of Megapolis and Western Development,

17th and 18th Floors,
'Suhurupaya'
Sri Subhoothi Road,
Baththaramulla.

7. Nuwara Eliya Municipal Council,

Old Uda Pussellawa Road,
Nuwara Eliya.

8. P.D. Chandana Lal Karunarathna,

The Mayor,
Nuwara Eliya Municipal Council,
Old Uda Pussellawa Road,
Nuwara Eliya.

9. Sujeewa Bodimanna,

The Municipal Commissioner,
Nuwara Eliya Municipal Council,
Old Uda Pussellawa Road,
Nuwara Eliya.

10. K.B. Anura Senaratna,

The Municipal Engineer,
Nuwara Eliya Municipal Council,
Old Uda Pussellawa Road,
Nuwara Eliya.

11. R.M.K.R.B Ratnayake.

65, Dambulla Road,
Palapathwala.

Formerly
The Municipal Commissioner,
Nuwara Eliya Municipal Council,
Nuwara Eliya.

12. **K.M.H.W. Bandara,**
Secretary of the Urban Council of
Nawalapitiya,
Urban Council of Nawalapitiya,
Nawalapitiya.

Formerly
The Municipal Council Commissioner,
Nuwara Eliya Municipal Council,
Nuwara Eliya.

13. **K.A. Vidura Sampath,**
Assistant Commissioner of Local
Government - Nuwara Eliya,
Office of the Assistant Commissioner
of Local Government – Nuwara Eliya,
Nuwara Eliya,
Bambarakale,
Nuwara Eliya.

14. **H.M.M.U.B Herath,**
Commissioner of Local Government
(Central Province),
Department of Local Government
(Central Province),
Provincial Council Complex,
Pallekale.

15. **The Hon. Attorney General,**
Attorney General's Department,
Superior Court Complex,
Hulfsdorp,
Colombo -12.

16. **S. Selvarathnam,**
Daily Pola,
Nuwara Eliya.

Respondents

BEFORE : D. N. Samarakoon J
Neil Iddawala J

COUNSEL : Sadun Senadhipathi for the Petitioner.
Suranga Wimalasena, D.S.G for the 1st -
5th, 13th -14th Respondents.
M.S.A Wadood with Harshane
Mallawarachchi and Nadesha Dulmini
Liyanage, Palitha Subasinghe for the 7th
– 12th Respondents.
K.V.S.Ganesharajan with
M.Mangaleswary Shanker for the 16th
Respondent.

Argued on : 05.09.2023

Decided on : 01.11.2023

Iddawala – J

The petitioner through this application seeks relief by way of Writ of Certiorari and Writ of Mandamus. The petitioner challenges the failure and/or inaction of the 1st –14th respondents regarding the illegal and unauthorized construction of a *Kovil* on a state land situated next to the land of the petitioner. The petitioner claims that none of the aforementioned respondents have taken any legal steps against the 16th respondent for the gross violation of laws and regulations.

The salient facts of the case are as follows. Petitioner states around 2004, the 16th respondent without any valid legal permission commenced a praying/worship place at the small plot of land next to the land of the petitioner. The 16th respondent had kept a pole in the land yet had not reserved the place formally. The petitioner claims that few Hindu worshippers visited the said place. The petitioner further states that later in 2004 the 16th respondent illegally commenced to build a metal fence and reserved a plot of land for the said place of worship. The petitioner states that while the 16th respondent was building the metal fence it damaged and destroyed adjoining lands (*P4 -P14*) including the petitioners. Thereafter, the activities of the said place increased and the petitioner claims the activities caused a nuisance to the neighborhood. Due to the said nuisance people in the area had made complaints (*P15*) to a number of authorities including the 1st, 7th and 8th respondents, yet claims no actions had been taken against the act of the 16th respondents. By the beginning of 2017, the 16th respondent had placed a statue of God in the place where the pole was already erected, thereafter activities such as pujas, music, processions and chanting's by loudspeakers rapidly increased and the unauthorized construction accelerated further.

Several parties submitted their objections to relevant authorities including the 1st – 14th respondents with regards to the said unlawful construction. Moreover, the Governor's office of the Central Province and the Headquarters Inspector of the Nuwara Eliya Police too made complaints (*P21*) to the 11th respondents with this regard. Later on, 07.03.2017 an unauthorized announcement (*P22*) was issued by the 11th respondent who was the Municipal Commissioner at the given time. However, due to the undue political influence the 11th respondent himself overturned his decision and issued a letter (*P23*) dated 28.06.2017 to the Divisional Secretary stating that the Nuwara Eliya Municipal Council is not objecting to the existence of the alleged Kovil named '*Katpagavinayagar Kovil*' and future development activities must be limited to 10½ X 15 sq.ft of the land. By the end of 2017 the 16th respondent built a small altar, erected a metal roof joining concrete

slabs and beams and the flooring was made of cement bricks (P16 – P20). When the activities were in progress the residents and others including the petitioner continuously complained to the respondents. On 19.12.2017 the 5th respondent (*Deputy Director [Planning] of the Regional Office in Nuwara Eliya of Urban Development Authority*) issued a letter (P27) to the 16th respondent strictly informing to immediately stop all the activities of the unauthorized construction. Through the letter (P28) dated 22.12.2017 the 13th respondent informed the Coordinating Secretary of the Chief Minister of the Central Province the illegality of the said unauthorized construction. Moreover, on 25.01.2018 the 12th respondent sent a letter (P29) to the Headquarters Police of Nuwara Eliya emphasizing the 16th respondent was maintaining an illegal construction on a land owned by the 7th respondent. On 11.01.2018 the 16th respondent had sent a letter of request to the 12th respondent requesting to issue a license for the land where he was maintaining the unauthorized construction yet through the letter (P30) dated 16.02.2018 the 12th respondent had rejected the request. During the time period February – May 2018 the 16th respondent did not engage in any constructions yet the nuisance activities had continued. And a people's gathering called 'Voice of Nuwara Eliya' sent a letter (P31) of complaint to the District Secretary, Divisional Secretary and SSP Nuwara Eliya. By the 1st week of May 2018, the paused unauthorized works of the 16th respondent commenced again disregarding all warnings issued against him. The petitioner and other people had submitted their complaints (P32 and P33) to 1st – 14th respondents, yet the petitioner claims none of them had taken any appropriate actions. Again on 24.05.2018 the 12th respondent issued an unauthorized announcement (P34) against the 16th respondent but he disregarded it and continued the activities as he desired. Therefore, the petitioner and others complained to the president and police. Furthermore, the petitioner sent letters of demand to the 1st, 3rd, 4th, 8th, 9th and 10th respondents yet thus far no action has been taken.

Thereby the petitioner through this instant application seeks relief by way of Writ of Certiorari quashing the reserve of an extent of land to be developed for the development activities of the Kovil without a formal approval of a plan, a Writ of Mandamus directing the 1st – 5th respondents to take measures under S28(A) of the Urban Development Law No. 41 of 1978 amended by Act No. 04 of 1982 with respect to the construction of the 16th respondent and a Writ of Mandamus directing 7th – 10th respondents under the provisions of S28(A) Of the Urban Development Law No. 41 of 1978 as amended by Act No. 04 of 1982 and/or S42(A) of the Municipal Council Ordinance No. 29 of 1947 in respect of the construction of the 16th Respondent.

When considering the petition of the petitioner it is noticeable that the prayer of the petitioner is weak in its status. At the outset of the matter itself it could be said that the relief requested by the petitioner in this instant application cannot be granted, and even if the relief is granted the concern over the existence and validity of R4 marked by 1-5th respondents, the development permit dated 30.10.2018 should be examined. Nevertheless, this court cannot annul the said development permit (*R4 sometimes referred to as R6 by the 16th respondent*) as the petitioner in this instant application has not mentioned nor challenged proceedings with regards to R4.

According to the letter issued by the 11th respondent dated 28.06.2017 to the Divisional Secretary it was stated that the Nuwara Eliya Municipal Council is not objecting to the existence of the alleged Kovil *named 'Katpagavinayagar Kovil'* and future development activities must be limited to 10½ X 15 sq.ft of the land. Furthermore, through the R4 development permit it was legally permitted for the said area to be used for the purpose of religious development subject to few conditions and restrictions.

It must also be noted that the commissioner of the Municipal Council prior to the issuing of development permits for religious matters and developments considers people's welfare, concerns and the relates of the residents of the area. This is to ensure that the sensitivity of the community and the welfare

of all residents are provided for, while maintaining the harmony between people and ethnic groups.

Consideration should also be given to whether the government made any alterations to the policies set out by them within the course of the said development. It is essential to ensure that changes in government policies do not impact the sensitivity and harmony of people in the community.

According to S28(A) of the Urban Development Law No. 41 of 1978 as amended by Act No. 04 of 1982 the respondents have the power and authority to take necessary steps/actions in respect of unauthorized constructions.

S28(A) reads as follows:

*“(1) Where in a development area, **any development activity is commenced continued, resumed or completed without permit** or contrary to any term or condition set out in a permit issued in respect of such development activity, the Authority may, in addition to any other remedy available to the Authority under this Law, by written notice require the person who is executing or has executed such development activity, or has caused it to be executed, on or before such day as shall be specified in such notice, not being less than seven days from the date thereof*

(a) to cease such development activity forthwith; or

(b) to restore the land on which such development activity is being executed or has been executed, to its original condition; or

(c) to secure compliance with the permit under the authority of which that development activity is carried out or engaged in, or with any term or condition of such permit, and for the purposes of compliance with the requirements aforesaid

(2) It shall be the duty of the person on whom a notice is issued under subsection (1) (2) It shall be the duty of the person on whom a notice is issued under subsection (1) to comply with any requirement specified in such notice

within the time specified in such notice or within, such extended time as may be granted by the Authority on application made in that behalf.

(3)

(a) Where in pursuance of a notice issued under subsection (1), any building or work is not demolished or altered within the time specified in the notices or within such extended time as may have been granted by the Authority, the Authority may apply to the Magistrate to make a mandatory order authorizing the Authority to demolish or alter the building or work, and the Magistrate on serving notice on the person who had failed to comply with the requirement of the Authority under Subsection (1) to demolish or alter the building or work, may, if he is satisfied to the same effect, make order accordingly.

(b) If such person undertakes to demolish or alter the building or work, the Magistrate may if he thinks fit postpone the operation of the order for such time not exceeding two months as he thinks sufficient for the purpose of giving the person an opportunity of demolishing or altering the building or work.

(4) Where a mandatory order has been made under subsection (3), it shall be the duty of the police authorities to render all necessary assistance to the Authority in carrying out the order.

Accordingly, the respondents are vested with the power to take necessary actions against the 16th respondent only if the development activity has been done without a valid permit, which will then become an unauthorized construction activity. Nevertheless, in the instant application the document marked R4 demonstrates that the building plan for the said construction has been approved by the 7th respondent. Thus, once a construction activity is carried out with an approved building plan, the said construction would not be considered to be in violation of the provisions of the Urban Development

Law and therefore the respondents cannot be empowered to take actions against the construction activities and the relevant parties.

It is quite clear through both the oral and written submissions made by the petitioner that this application is mainly filed based on the fact that the said construction has been made without proper approval and falls within the category of unauthorized construction and thus the respondents are duty bound by the provisions of S28(A) of the Urban Development Law. However, with the filing of objections of the respondents and the filed document marked R4 it could be deemed that petitioner has misconceived in law and the construction no longer attracts the provisions of S28(A) of the Urban Development Act, since it is an approved construction.

On the other hand, it must be mentioned that if the 1st – 5th and 7th – 10th respondents are to take action against the 16th respondent in terms of S28(A) of the Urban Development Law, in respect of the said construction which has a valid permit, such actions of the respondents would amount to an act of *ultra vires*. Furthermore, in such an instance where the said construction of the 16th respondents is built upon a valid permit issued by an appropriate authority, this court too is barred from intervening.

The Deputy Solicitor General (DSG) during his submissions mentioned that the petitioner does not challenge any procedural status of any action or order by the respondents and thereby claimed that seeking a relief through Writ jurisdiction was improper. Further the DSG stated that only if the petitioner challenged such order or proceeding this court has the discretion to intervene. This court deems this submission of the DSG correct.

In the case of ***R V Fly (Bishop) 1750 1 Wro B 152***: Chief Justice Lee stated that “the court never grants a mandamus, except it indisputably sees that there is power lodged in the person to whom the mandamus is prayed.”

Furthermore, the case of ***Borella Private Hospital v Bandaranayake and Two Others CA/1006/2000 (Writ)*** CA Minutes 21-11-2004, it has been held

that: *“In an application for Mandamus, where the petitioner alleges a statutory functionary as having acted without jurisdiction and/or authority, **the petitioner is obliged to disclose the statutory provision that has been violated that establishes a legal right in the petitioner and a corresponding legal duty on the statutory functionary**”* (Emphasis added).

The principle enunciated by **Halsbury** (pg722, para 1308) also emphasizes another reason why mandamus should not be granted in the present case. As per Halsbury it states: *“A Mandamus will not go when it appears that it would be futile in its result, accordingly, the court will not, by mandamus order something which is impossible of performance because the party against whom mandamus is prayed does not, for some reason possess the power to obey.”*

Thus, in the instant application the 1st – 14th respondents do not have the power to initiate legal proceedings to demolish the construction which has an approved building plan. Thereby the submission of the DSG where he stated no Writ of Mandamus will lie against the respondents can be deemed correct.

Furthermore, the petitioner through his petition also prays for a Writ of Certiorari quashing the reserve of an extent of land to be deployed for the development activities of the *Kovil* without a formal approval of plan. However, the petitioner nowhere in his petition challenges the development permit granted. Even after the 7th respondent issued the approval of the building plan for the construction, the petitioner has not amended his petition nor has he challenged the said approval. Without challenging the development permit or its proceedings granted by the relevant authority, the petitioner prayer for a Writ of Certiorari quashing the reserve of extent of land deployed for the development activities of the *kovil* becomes misconceived in law.

Nevertheless, the petitioner through the petition claimed that *“the unauthorized construction such as pujas, processions, chanting by loudspeakers, shouting, sounds, music are performed throughout day and night. It’s a large nuisance to the neighbors including the petitioner.”* And

further during the oral submissions the counsel for petitioner reiterated on the disturbance caused to the neighbors due to the constructed kovil and its proceedings. However, the counsel for the respondent firmly noted and emphasized on the fact that the counsel for the petitioner in his oral submissions used the term 'Public Nuisance' repeatedly to explain the disturbance caused by the acts of the 16th respondent. And thereby stated that in an event of 'Public Nuisance' Section 261 of the Penal Code identifies and carries separate remedies and legal consequences. And as per Section 98 of the Code of Criminal Procedure Act, an application seeking relief under the offence of public nuisance could be made to the Magistrate's Court. Hence, claimed that the petitioner must go before an appropriate forum in order to obtain proper relief for the matter of concern.

This Court also notes that documents submitted by the petitioner of the instant application is vague in its nature, nevertheless it could be acknowledged that the document marked R4 marked (by 1-5th respondents) issued by the Nuwara Eliya Municipal Council was issued prima facie according to the procedure laid down in the statute. However, if the petitioner believes otherwise, he may possibly have challenged the document at an appropriate forum.

Thereby this Court is of the view that the prayer of the petitioner seeking relief through Writ cannot be granted.

Application dismissed without costs.

JUDGE OF THE COURT OF APPEAL

D.N. Samarakoon- J

I agree.

JUDGE OF THE COURT OF APPEAL