

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

Sujatha Nalini Gunathilake
No.138B1, Old Road
Nawala
Nugegoda

Petitioner-Appellant

C.A. (PHC) No.63/09
P.H.C.Kandy No.Writ/11/2005

Vs

- 1B.Mahindra Ratwatte
Mayor
Municipal Council
Kandy.
2. Municipal Council
Kandy.
3. Gamini Weeraratne
No.36/6, Sangaraja Mawatha
Kandy

Respondent-Respondents

BEFORE : **K.T.CHITRASIRI, J.**

MALINIE GUNARATNE.J

COUNSEL : Dr.Sunil Cooray with Arjuna Udawatte
for the Petitioner-Appellant

Baratha Abeynayake with Maljani Atthathage
for the 1B and the 2nd Respondent-Respondents

Isuru Balapatabendi
for the 3rd Respondent-Respondent

ARGUED ON : 16.07.2014

**WRITTEN
SUBMISSIONS
FILED ON** : Not filed

DECIDED ON : 29th AUGUST 2014

CHITRASIRI, J.

This is an appeal seeking to have the judgment dated 03.04.2009 of the learned High Court Judge in Kandy, reversed. By this appeal, the petitioner-appellant also sought to have the reliefs that had been prayed for in the prayer to her amended petition filed in the High Court. In that prayer, she *inter alia* has sought for a Writ in the nature of a Mandamus in which the appellant sought for an order directing the first two respondents to take all necessary steps to remove the obstructions and/or encroachments found over the Municipal passageway which is approximately 4 feet in width situated between the premises Nos.74 and 72, Yatinuwara Veediya, Kandy. The said pathway is being morefully described in paragraph 32 in the amended petition dated 10.05.2006 filed in the High Court.

Learned Counsel for the appellant submitted that in terms of Sections 73 and 77 in the Municipal Council Ordinance, the first two respondent-respondents are duty bound to take all necessary steps to remove obstructions found on the aforesaid passageway. Sections 73 and 77 in the Municipal Council ordinance read thus:

73. (1) Whenever it appears to a Municipal Council that any building, enclosure or obstruction has been raised or made in any street under the control of the Council, or on any waste or other land immediately adjoining such street and belonging to the State, it shall be lawful for the Council by written notice served on the person claiming to be the owner of the premises on which such building, enclosure, or obstruction has been raised or made, to demand the production of

every deed, document, and instrument upon which such person founds such claim.

77. (1) It shall be lawful for the Council, through any person authorized by the Council in that behalf, to give order verbally or by notice in writing, to any person obstructing or encroaching upon any street under control of the Council, forthwith to remove or abate the obstruction or encroachment; and if any person to whom such order is given refuses or neglects to comply therewith within a reasonable time, or, if there be any doubt as to who is the proper person to whom such order should be given, after such notice has been fixed for a reasonable time to such obstruction or encroachment, it shall be lawful for the Council to cause any such obstruction or encroachment to be forthwith removed or abated.

Accordingly, Sections 73 and 77 empower Municipal Councils to remove obstructions and/or encroachments that are found over **any streets under the control of the Council**. Therefore firstly, it is necessary to ascertain whether or not the appellant has established that the passage in question had been under the control of the Kandy Municipality.

The appellant has alleged that the obstructions that she seeks to remove are on a passageway controlled by the Municipality whilst the first two respondents have stated that the Municipality has no control over the said passage. Documents marked P1, P3 and P4 are some of the documents filed by the appellant to establish that the passageway is under the control of the Municipality. However, upon perusal of the contents of the said documents, it is clear that those documents do not support such a proposition since it contains

the matters relating to the title of the premises referred to as Lot 49 in plan marked P5.

Furthermore, in the letter (at page 160 in the appeal brief) written on behalf of the Municipal Commissioner with a copy to the appellant, reference had been made to the Kandy Town Sheet Plan No.589 dated 22.06.1969 which was marked as P8. (at page 159 in the appeal brief) Even in that plan nothing is found to show that there had been a footpath or access road commencing from the main road, to reach the land to which the appellant claims title.

Moreover, no material is found to show that the Municipal Council in Kandy has exercised or performed any power or duty in respect of this pathway in order to consider it, as a roadway controlled by the Municipality. No evidence whatsoever is forthcoming to show that the roadway had been acquired by the Municipality either.

Only document available to show that it had been a passage under the control of the Municipality is the Plan No.2142 dated 13.06.1980, marked as P2. (at page 146 in the appeal brief) It is a plan prepared on the instructions of the appellant to show that the premises bearing the assessment No.72 belongs to her. It is a plan prepared pursuant to a private survey carried out on the instructions of the appellant to identify the premises belonging to her. Merely because the passage in dispute is identified as a Municipal passage in that private plan, such a remark will not support to establish that it was under the control of the Municipal Council in Kandy.

In the circumstances, it is clear that the appellant has failed to establish that the passage in question had been under the control of the Municipal Council in Kandy. Therefore, the appellant is not in a position to move for a Writ of Mandamus in terms of Sections 72 and 77 of the Municipal Council Ordinance which provision of law empowers the Municipality to maintain; only the roads that are under its control.

As mentioned hereinbefore, the appellant has failed to establish that the passage in question had been under the control of the Kandy Municipality. To the contrary preponderance of evidence is forthcoming to show that it is only a passage leading to three houses in a row, one of which alleged to have been owned by the appellant. Therefore, it is clear that the passage in question is meant as a private access to those three houses. Accordingly, no public duty is cast upon the Municipality to maintain such a passage used as private access.

It is trite law that no mandamus would lie, to direct or compel a person who exercises executive powers, unless a "public duty" is cast upon, on that person who exercises such a power. Also, it is necessary that the said public duty, sought to be enforced by way of a writ of mandamus shall not be of a private nature. This position in law has been discussed by Sripavan, J in **Samaraweera v. Minister of Public Administration. [2003 (3) S.L.R.at 64]** In that decision, he has held thus:

"To be enforceable by mandamus the duty to be performed must be of a public nature and not merely of a private character."

As mentioned hereinbefore, the appellant has failed to establish that there had been a public duty to perform by the first two respondents. Material before Court shows that the passage in question had been used by the respective parties for their private purposes. Accordingly, it is clear that the appellant is not in a position to seek for a writ of mandamus in this instance since no **public duty** is cast upon the first two respondents to maintain the passageway subjected to in this case.

The respondents also have pleaded that the appellant has failed to come to Court without undue delay. The issue of delay in coming to Court when moving for a prerogative writ such as a mandamus had also been discussed in the aforesaid case of **Samaraweera v. Minister of Public Administration**. (supra) Also, in the cases of **Sarath Hulangama v. Siriwardena, Principal Visakha Vidyalaya, Colombo 5 and others [1986 (1) S.L.R at 275]** and **Abdul Rahuman v. The Mayor of Colombo [69 N.L.R. at 211]**, importance of seeking relief without delay had been highlighted.

I will now turn to examine whether or not there had been a delay in seeking relief by the appellant. The 3rd defendant who is alleged to have obstructed the passage has obtained permission from the Municipality on 02.09.2004 to develop his land and to have a construction put up thereon. Immediately thereafter, he has commenced developing his land in accordance with the approval obtained from the Municipality. 3rd respondent alleged that obstructions over the passage in question had been in existence since then. It had not been denied by the

appellant. Application for a Writ of Mandamus had been made by the appellant to the Provincial High Court only on 10.05.2006.

In the circumstances, it is seen that there had been a delay which counts nearly two years, in coming to court by the appellant to seek redress. Reasons for such a delay have not been explained. It is a considerable period of time when applied to the circumstances of the given situation. The appellant has allowed the 3rd respondent to continue with his construction activities without coming to court for relief, for a long period of time. Accordingly, I am of the view that the learned High Judge is correct when he decided to dismiss the application of the petitioner-appellant due to laches on her part.

For the reasons set out above, I am not inclined to interfere with the findings of the learned High Court Judge. Accordingly, this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

MALINIE GUNARATNE, J

I agree

JUDGE OF THE COURT OF APPEAL