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

Mithrasena Punchihewa
No. 17/1, Kawiraja Mawatha
Wekada, Panadura.

C.A. 41/2009 (Writ)

**PETITIONER**

Vs.

1. Urban Development Authority
   6th & 7th Floor
   Sethsiripaya, Battaramulla.

   **And 5 others**

6. Chandrasiri Rodrigo
   No. 17/2, Kawiraja Mawatha
   Wekada, Panadura.

   **And 6 others**

**RESPONDENTS**

**BEFORE:** Anil Gooneratne J. &
H. N. J. Perera J.

**COUNSEL:** Lisitha Sachindra for the Petitioner

H. Peiris for the 6th Respondent

Chaya Sri Nammuni S.C. for the 1st to 10th and 11th Respondents

**ARGUED ON:** 04.04.2013, 28.07.2014 & 04.09.2014

**DECIDED ON:** 04.12.2014

**GOONERATNE J.**

The Petitioner to this application has sought a Writ of Mandamus against the 1st to 4th Respondents, to remove or caused to be removed the unauthorized constructions made by the 5th Respondent on lot Nos. 15 & 17 in plan P1, which plan had been approved by the 4th Respondent (Urban Council of Panadura). It is pleaded that the Petitioner is the owner of 15/16th shares of (lot No. 7). (paras 4, 5 & 6 of petition). It is pleaded in para 7 of the petition that lot Nos. 16, 17 & 18 were reserved for a 10 feet wide road, and lot 15 reserved for drain 2.5 feet wide. P1 approved by 3rd Respondent the Secretary,

Urban Council Panadura. Petitioner further pleads that lots 14 & 15 shall be reserved for a drain, and lots 12 to 18 in plan P1 are not owned by any party and no construction or development permitted. Petitioner relies on document P3. It is averred that the 5th Respondent who is the owner of lot (2) in the above plan had produced a plan bearing No. BA/61/97 to the 4th Respondent to get approval to construct a wall besides lot No. 17 and erect a gate at the entrance of Lot 17, which the Petitioner states the 5th Respondent provided false information to the authorities concerned to get such approval. The plan submitted by the 5th Respondent was approved by the 4th Respondent. Thereafter the 5th Respondent constructed a wall on the boundary of lot 15 and blocked the drain envisaged in plan P1 in violation of the constitution stated therein.

The Petitioner complained to the 4th Respondent about the above plan BA/61/97 submitted by the 5th Respondent. As a result of the complaint the Petitioner's wife (original owner of lot 7, now demised) received an order addressed to the 5th Respondent by letter of 16.3.1999 marked P4, directing the Petitioner to demolish the unauthorized construction. There is also some reference made in the petition to state that the address in P4 was wrong and

Petitioner made another complaint and on that petitioner's wife received P5 of 4.5.1999.

This is a very prolix petition filed of record. It refers to a series of acts and omissions, as contained in paras 12 – 40. The gist of it seems to be the failure to remove the alleged unauthorized construction or obstructions referred to in the body of the petition. In this regard the official Respondents are also blamed, and in that process a Writ of Mandamus has been sought. The question is whether the Petitioner could invoke the writ jurisdiction of this court in the facts and circumstances of this case? On the other hand the alleged wrongful acts in the way pleaded by the Petitioner commences from the year 1999, without moving a Civil Court of Competitive Jurisdiction?

In para 40 of the petition it is pleaded that since the official Respondents did not take the required steps to remove the unauthorized construction, he lodged a complaint (P34) with the Human Rights Commission. On 26.1.2004, the said complaint was acknowledged by P35 of 27.1.2004. The Petitioner thereafter gives every detail before the Human Rights Commission at paras 41 to 48. By letter dated 21.11.2007 (P47) the Human Rights Commission informed the Petitioner that his fundamental rights are violated

and the Commission ordered the relevant parties to pay Rs. 2000/- to the Petitioner. (para 47).

Petitioner having narrated the matters pertaining to the Human Rights Commission and the order made by the Commissioner in favour of him (P47) refer to the subsequent events, to establish his case. I would incorporate the following paras of the petition which seems to be emphasized by the Petitioner.

1. The Petitioner states that after the letters the Petitioner sent to the 3rd Respondent, the Petitioner received a letter dated 12th February 2008 by the 3rd Respondent in which the Petitioner was informed that since the matter relates to his right of way that he should pursue a civil action to preserve the same.
2. The Petitioner states that thereafter he sent a letter to the 3rd Respondent through his Attorney Mr. Sisira Kodikara informing the 3rd Respondent that the Petitioner is filing a civil action against the 3rd Respondent and others in order to preserve his right of way. The Petitioner states that after that letter his Attorney received a letter dated 20th June 2008 by the 3rd Respondent stating that, after the instructions received by the 10th Respondent regarding the matter immediate action would be taken to resolve the same.
3. The Petitioner states that by letter dated 30th September 2008, the Petitioner made an appeal to the 10th Respondent regarding the whole incident.

4. The Petitioner states that he received a copy of a letter dated 22nd October 2008 sent by the 10th Respondent to the 3rd Respondent requesting that the building permit in question should be cancelled and legal action be taken in respect of the Petitioner's complaint.
5. The Petitioner states that in terms of the Urban Development Authority Law and the Urban Council Ordinance there is a statutory duty cast on the 1st to 4th Respondents to take steps according to law to remove and/or cause to be removed unauthorized constructions.

I have also considered the position of the 1st, 10th & 11th Respondents to this application. It is the position of the Urban Development Authority that as in terms of Section 23 of the Urban Development Authority Law the Authority has power to delegate to any officer or local Authority in consultation with the Local Authority any of its powers, duties or functions relating to planning in any area described as a development area (Section 3). A Local Authority as defined by Section 4 of the said Act, includes an Urban Council as that of the 4th Respondent. These Respondents by document 2R3 delegated its powers to the Panadura Urban Council (4th Respondent). It is pleaded in the objection of the above Respondent that.

1. Therefore the Respondents state that powers relating to removing and or causing to removal of unauthorized constructions are under the category of planning which has been delegated to the 4th Respondent.

2. The Respondents further state that any intervention the Respondents would be in the case of supervision and control and not in making substantive decisions regarding the removing and or causing to removal of unauthorized constructions.

3. The Respondents further states that no relief in the nature of a writ of Mandamus could be claimed by the Petitioner against the Respondents to compel the removal and/or cause to be removed of any unauthorized constructions made on Lot No. 15 and 17 in the plan No. 1999 at P1 of the petition.

The 6th Respondent is an interested party. It is also equally important to refer to the position of the said Respondent briefly, as follows.

(i) P1 was a plan made blocking out a private land for sale by public auction by the executor of a last will in pursuance of an order of Court. Approval for this plan was given by the 4th Respondent against whom the present writ is sought.

(ii) The present owner of lot 2 in the said plan, is the 6th Respondent Justin Susil Thomas Rodrigo whilst 15/16 share of Lot 7 belongs to the Petitioner, Mithrasena Punchihewa.

(iii) The 5th Respondent, Asoka Vanderbona bought the said Lot 2 at the public auction on 1977.1.9 on the deed marked 6R4.

(iv) After such purchase Vanderbona wanted to build a wall 4 inches in width (see clause 3 ඇ of 6R5) surrounding lots 2 and 17 with a gate at

the entrance and made an application on 1977.3.3 (page 1 6R5) for the purpose, to the 4th Respondent, the U.C. Panadura.

The 4th Respondent approved building application BA 61/97, 6R5, together with the plan annexed thereto, on 1977.3.18 (2 months after the said purchase)

(v) One of the conditions in building permit BA 61/97 was that this parapet wall was to be built within one year of issuing the said permit (clause 5 of 6R5)

(vi) It was completed on 1997.3.31 (affidavit 6R6 para 6)

(vii) This parapet wall inter alia flanked the Eastern side of Lot 7 preventing access form Lot 7 to the road Lot 17.

(viii) Lot No. 7 was bought by the wife of the petitioner, Nandani Silva, who is the predecessor in title, of the Petitioner, on 1997.8.19, upon P1A 8 months after Vanderbona purchased Lot 2 and 5 months after the plan was approved and the wall was built.

(ix) Well knowing that a parapet wall and gate had been erected preventing access to road, Lot 17, the petitioner's wife and presumably the petitioner got a right of road access to Lot 17 inserted in their deed P1A (deed No. 1086 field before P53).

(x) This is unique because the owner of Lot 6 (in plan P1) whose lot also flanks Lot 17 and is similarly deprived of access to the said Lot because of the same parapet wall to the West of Lot 6, makes no such claim to access to Lot 17. It is a fact that both Lots 7 and 6 are serviced by wide stretches of the 20 ft. wide road to the South , Lot 12, in terms of the approval plan.

(xi) It is also a fact that when Venderbona, 5th Respondent, completed the impugned constructions on 1977.3.31 there was no objection to such construction because P1A (deed No. 1086 filed before P53) came into existence only in August 1977. For the same reason when the 4th Respondent, Urban Council, approved the plan on 1977.3.18 there was no objection.

The insertion of the right of access over Lot 17 in P1A became known to the 5th and 6th Respondents only after the present application.

(xii) On 1999.8.3 by 6R4 the 5th Respondent transferred the said Lot 2 and his rights in the roadway to the 6th Respondent. This was known to the Petitioner (para 12 of the petition).

It is apparent to this court that the entire episode commenced according to the Petitioner from the year 1999. Thereafter there had been a series of correspondence between parties, authorities etc. By P33, P53 & 2R1 instructions had been given to take steps to remove unauthorized structures and also cancel the permit referred to in their letters. It is evident that unless and until the permit referred to therein is cancelled, no other steps could be taken in this regard. These are not matters for the Urban Development Authority to get involved. There is clear evidence that powers of the UDA as regards planning had been delegated to the relevant local Authorities.

Therefore no prerogative writ could be issued against the Urban Development Authority (2R3). In fact some direction had been given by the 1st Respondent by 2R1 dated 26.2.2002 and 2R2 of 11.8.2008 but nothing seems to have happened, and beyond that the Urban Development Authority would not have the required statutory authority to deal with a problem of this nature, having delegated its powers. As such there is no merit in the application of the Petitioner.

Section 23 of the Urban Development Authority Law as Amended read as:

> The authority may delegate to any officer of a local authority, in consultation with that local authority, any of its powers, duties and functions relating to planning within any area declared to be a development area under Section 3, and such officer shall exercise, perform and discharge any such power duty and functions so delegated under the supervision and control of the Authority"

As such by virtue of the available statutory provisions the 1st Respondent has duly delegated its powers and functions of planning to the 4th Respondent with respect of the development of the area. Planning would necessarily imply the power to prohibit development of land not in conformity with plans. Therefore the authorization of plans and cancelling such authority

is after delegation, and a matter for the local authority and not the UDA. As such the Local Authority need to make proper inquiries prior to cancellation and if necessary if the law requires grant a hearing to all interested parties prior to taking steps and take action accordingly. If any kind of authority granted or permit had been issued, a proper inquiry need to be held prior to taking steps to cancel, or to act otherwise. Nothing seems to have happened. This court need not unnecessarily get involved in a process after delegation of powers by the UDA to the Local Authority.

There is also another matter that would disentitled the Petitioner for a prerogative writ of this nature. As observed above all disputed matters and questions arose in the year 1999. The counter objections of Petitioner indicates that construction of the parapet wall commenced on or about 1999. On the other hand the 6th Respondent denies and disputes very many factual matters and the dates of 1st complainant by petitioner. The building plan of 6th Respondent had been approved on 18.3.1997 (6R5). According to Clause 5 of 6R5 building permit BA 61/97, the construction had to be completed within 1 year from the said date. As at the date of filing the petition in this court several years have lapsed. On one hand the Petitioner is

guilty of laches and on the other hand the Petitioner has not taken meaningful steps to litigate his cause in a court of competent jurisdiction for over a decade. Review procedure is never suited to resolve disputed facts.

Mandamus is a discretionary remedy – a legal tool for the dispensation of justice, when no other remedy is available. Given the power of such a remedy, the common law surrounding this remedy requires multiple conditions that must be met prior to the issuance of a writ by court. Only if(a) major facts are not in dispute and legal resulting of facts are not subject to controversy – vide Thajudeen Vs. Sri Lanka Tea Board and Another (1981) 2 SLR 471 . (b) Remedy is sought to perform a public and or a statutory, duty.

The question of a right of way or an obstruction placed on a party are matters of all relevant facts that need to be proved not only by proof of affidavits but by sound oral testimony. In such instances the review procedure cannot be so well suited. What is connected to land and its surroundings are better understood and dealt more efficiently by leading oral and documentary evidence. One would require plans, deeds, details of stay/surroundings, right of way, necessities are all aspects that need to be proved on oath. One

question that should have been given serious thought is whether as to why the Petitioner did not take the required steps and invoked the jurisdiction of a court of competitive civil jurisdiction at the correct time and stage. A court cannot give legal advice, and court should only attempt to resolve factual and legal matters according to law.

In all the above facts and circumstances we are not inclined to grant any relief to the Petitioner. As such we proceed to dismiss this application without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

H. N. J. Perera

I agree.

JUDGE OF THE COURT OF APPEAL