

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

In the matter of an application for a
mandate or a writ in the nature of a writ of
Certiorari in terms of Article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

1. A. A. Gunawardane
B 1/1, Jathika Mahal Niwasa,
Pamankada Road, Kirulapone,
Colombo 06.
2. M.P. Perera
B 2/2, Jathika Mahal Niwasa
Pamankada Road, Kirulapone
Colombo 06.
3. R.E.D. Amarasena
B 1/2, Jathika Mahal Niwasa
Pamankada Road, Kirulapone
Colombo 06.
4. P.H. Wimalasiri
B 3/1, Jathika Mahal Niwasa

Pamankada Road, Kirulapone
Colombo 06.

5. N.A. Illukpitiya
B 2/1, Jathika Mahal Niwasa
Pamankada Road, Kirulapone
Colombo 06.

COMPLAINANTS

CASE NO. C.A. (Writ) 603/2008

Vs

S.J. Sirisena
BG1, Jathika Mahal Niwasa
Pamankada Road, Kirulapone
Colombo 06.

RESPONDENT

AND NOW

S.J.Sirisena
BG1, Jathika Mahal Niwasa
Pamankada Road, Kirulapone
Colombo 06.

RESPONDENT-PETITIONER

- 1 A. A. Gunawardane
B 1/1, Jathika Mahal Niwasa,
Pamankada Road, Kirulapone,
Colombo 06.

1ST COMPLAINANT RESPONDENT

- 2 M.P. Perera
B 2/2, Jathika Mahal Niwasa
Pamankada Road, Kirulapone
Colombo 06.

2ND RESPONDENT

- 3 R.E.D. Amarasena
B ½, Jathika Mahal Niwasa
Pamankada Road, Kirulapone
Colombo 06.

3RD COMPLAINANT RESPONDENT

- 4 P.H. Wimalasiri
B 3/1, Jathika Mahal Niwasa
Pamankada Road, Kirulapone
Colombo 06.

4TH COMPLAINANT RESPONDENT

- 5 N.A. Illukpitiya
B 2/1, Jathika Mahal Niwasa
Pamankada Road, Kirulapone
Colombo 06.

5TH COMPLAINANT RESPONDENT

Condominium Management
Authority
First Floor, National Housing
Department Building
Sir Chittampalam A. Gardiner
Mawatha
Colombo 02.

6TH RESPONDENT

BEFORE

: Deepali Wijesundera J.

COUNSEL

: Ikram Mohamed P.C. with

Roshan Hettiarachchi for the
Petitioner.

Rajeev Amarasuriya with
Chathurani Jayasena for the 1st
and 3rd Respondent.

Viveka Siriwardhana D.S.G. for
the 6th Respondent.

ARGUED ON

: 12th February, 2015

DECIDED ON

: 19th June, 2015

Deepali Wijesundera J.

The petitioner has filed this application seeking the issuance of a writ of Certiorari to quash the order made by the document marked “J” dated 03/07/2008 sent by the sixth respondent Authority’s Acting General Manager, by which the petitioner has been directed to demolish an unauthorized permanent structure.

The petitioner's learned counsel argued that the said letter "J" refers to an inquiry conducted under Sec. 9A (1) of the *Common Amenities Board Law* and found an unauthorized construction in the rear compound of the house but the said order has been issued without complying with the mandatory provisions of Sec. 9A (1). The petitioner was informed by the sixth respondent to be present for an inquiry to be held under Sec. 6(M) of the said Act regarding a complaint made by the first to the fifth respondents. The petitioner submitted that an inquiry held under Sec. 6(M) is different from an inquiry held under Sec. 9A (1) and that under Sec. 9A (1) it is a mandatory requirement to issue notice to the party concerned specifying in the notice itself to show cause why the unauthorized construction should not be demolished and restored to its original condition. He further submitted breach of the provisions stated in Sec. 9A (1) and (2) would render the order made by the sixth respondent void in law for non-compliance of the mandatory provisions of the law.

Citing the Judgment in *Bradybury Vs Enfield LBC (1967) 1 WLR 1311*, *Fernando Vs Mohideen Ismail 1982 (1) SLR 222*, *Kandiah Vs Abeykoon 4 Sri Kantha's Law Reports p96*, *Mohideen Vs Inspector of Police Pettah 59 NLR 217* and *Wethanayagam Vs Inspector of Police in Kankasanthurai 50 NLR 185* stated that non observance of a procedural statute is an illegality and that the petitioner did not appear

before the sixth respondent's authority in pursuance to a notice that was sent under *Sec. 9A (1)* of the said act.

The learned counsel for the petitioner argued that it is incorrect to state in the letter marked **J** that at an inquiry held under *Sec. 9A (1)* of the said Act it was observed that the unauthorized structure referred to has been constructed, since no notice had been issued in term of *Sec. 9A (1)* of the said Act.

The petitioner's counsel further submitted that the unauthorized structure of the petitioner had been constructed in 1998/1999 before the *Amending Act No. 23 of 2003* by which, power was given to the sixth respondent in respect of unauthorized structures and that the impugned order has been made without jurisdiction.

The learned counsels for the respondents raised a preliminary objection stating that the petitioner has failed to make the necessary persons as parties to the application namely the Acting General Manager of the sixth respondent who has signed the letter marked **J** as well as the inquiry officer who conducted the inquiry in terms of the said act which they stated are a serious lapse.

The respondents also stated the petitioner has suppressed material facts the letter sent by the NHDA dated 17/07/1990 (marked **6R3** and **R6**) which was marked and produced at the inquiry, was not produced in the instant application. The said letter specifies the construction for which the NHDA has given permission to the petitioner but the petitioner has not confined his construction to the authorized limits. The respondents stated that at the inquiry the petitioner argued that the construction was done after getting permission by **6R3** which showed that he had not confined his construction to the authorized structural improvement but had gone beyond that and constructed an unauthorized structure.

The respondents stated that the petitioner has failed to establish that any prejudice was caused to him by reference to a mediation inquiry in the notices served. The respondents stated the petitioner was represented by an Attorney-at-Law at the inquiry and he was well aware of the nature of the inquiry. The petitioner had been given the opportunity to place evidence and documents at the inquiry and he and his Attorney have been present at the inquiry days.

The respondents stated on the notice issued mentioning a mediation inquiry no prejudice had been caused to the petitioner since

he had been given an opportunity to show cause and give evidence and mark documents at the inquiry. Citing the judgment in ***Edirisuriya Vs Navaratnam 1985 1 SLR 100*** respondents stated that as long as an authority has the power to do a thing it does not matter if it is done by reference to a wrong provision of law and the order can always be justified to the correct provisions of law empowering the authority making the order to make such order.

The respondents stated by virtue of provisions in *Sec. 9A and 16 (1)* of the said Act the sixth respondent is vested with the power to direct the petitioner to demolish the unauthorized structure erected by him.

The petitioner has deliberately suppressed facts from court when filing the instant application. Document **6R3** or **R6** is a vital document which shows that the petitioner had been granted approval to make certain adjustment to the house which had been marked at the inquiry. The petitioner had relied on this document to show his construction was authorized but it had proved otherwise at the inquiry hence he did not mention it in the petition.

The petitioner's main argument was that he was not served a notice under Sec. 9A of the said Act but a notice under **6M** was served on him. But the petitioner has participated represented by an Attorney at the inquiry. He was well aware for what the inquiry was held for; therefore one cannot say his rights were prejudiced. He was given an opportunity to show case, call evidence and submit documents after the inquiry only the letter **J** was sent to him.

The petitioner had tried to take cover under the letter **3R6** at the inquiry stating he had permission by the NHDA to make alternations to the house when making the present application he has failed to file this document which shows the petitioner has not come to this court with clean hands.

The document the petitioner is seeking to quash letter **J** very clearly states what has transpired at the inquiry this is not an illegal document as the petitioner stated.

By virtue of *Sec. 9A (1) and Sec. 16 (1) of the Common Amenities Board Act* it is clear that the sixth respondent is vested with the power to

direct the petitioner to demolish the unauthorized structure erected by him.

Even though the notices served on the petitioner makes reference to a mediation inquiry the decision of the Condominium Management Authority contained in document J can be justified since the Authority was vested with the power to make the said order under Sec. 9A of the said Act.

For the afore stated reasons I refuse the application of the petitioner with costs fixed at Rs. 25,000/=.

JUDGE OF THE COURT OF APPEAL