

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

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

C.A (Writ) Application No. 35/2013

Kapila Chandima Gunaratne,
No. 89/5A, Dehiwela Road,
Pepiliyana,
Boralesgamuwa.

Petitioner

Vs.

1. Chairman,
Boralesgamuwa Urban Council,
Boralesgamuwa.

1A. Special Commissioner,
Boralesgamuwa Urban Council,
Boralesgamuwa.

2. Boralesgamuwa Urban Council,
Boralesgamuwa.

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

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

Respondents

Before: Arjuna Obeyesekere, J

Counsel: Saliya Peiris, P.C with Dhanushka Rahubadda and Rukshan Nanayakkara for the Petitioner

Nihal Jayawardena, P.C with A.R.P.Bandara for the 1st and 2nd Respondents

Manohara Jayasinghe, Senior State Counsel for the 3rd and 4th Respondents

Written Submissions: Tendered on behalf of the Petitioner on 29th August 2018

Tendered on behalf of the 1st and 2nd Respondents on
10th October 2018

Decided on: 18th January 2019

Arjuna Obeyesekere, J.

The Petitioner has filed this application, seeking *inter alia* the following relief:

- a) A Writ of Certiorari to quash the decision taken by the 1st and 2nd Respondents to cancel the approved building plan issued to the Petitioner¹, as reflected in the documents annexed to the petition marked '**P11a**' and '**P11b**';
- b) A Writ of Certiorari to quash the decision of the 1st and 2nd Respondents to demolish the boundary wall constructed by the Petitioner, as reflected in the documents annexed to the petition marked '**P14a**' and '**P14b**';
- c) A Writ of Mandamus directing the Respondents to grant approval to the applications submitted by the Petitioner, seeking approval for the boundary wall erected by the Petitioner.

When this matter was taken up for argument on 19th July 2018, the learned Counsel appearing for all parties moved that this Court pronounce judgment on the written submissions that would be tendered by the parties. Accordingly, when this matter was mentioned on 23rd November 2018 for judgment, this Court informed the parties that it required clarifications on matters arising from the written submissions. On 7th December 2018, the learned President's Counsel appearing for the 1st and 2nd Respondents informed Court that the 1st and 2nd

¹ A copy of the approved building plan has been annexed to the petition, marked 'P5'.

Respondents are agreeable to withdraw the letter marked 'P11a' in so far as it relates to the withdrawal of the building permit annexed to the petition marked 'P7'.² The learned Junior Counsel for the Petitioner informed this Court that since the filing of this application, the boundary wall erected by the Petitioner has been partially demolished on an order of the learned Magistrate of Nugegoda. Thus, while the necessity for this Court to adjudicate on the Writs of Certiorari prayed for may not arise, the only issue that remains for the consideration of this Court is the Writ of Mandamus prayed for.

The facts of this matter very briefly are as follows.

The Petitioner is the owner of a land situated within the limits of the 2nd Respondent, Boralesgamuwa Urban Council, having purchased the said land in January 2005. He states that the survey plan relating to the said land, annexed to the petition marked 'P3' had been approved in 2004 by the Kesbewa Pradeshiya Sabha, which was the relevant local authority at that time. The Petitioner states further that he made an application to the Boralesgamuwa Sub Office of the Kesbewa Pradeshiya Sabha on 22nd November 2005 seeking approval for the building plan annexed to the petition marked 'P5' to construct a house on the said land. By a letter annexed to the petition marked 'P6', the Chairman of the Kesbewa Pradeshiya Sabha had informed the Petitioner that the building plan submitted by the Petitioner can be considered once the following conditions are complied with:

² The building permit 'P7' sets out the terms and conditions subject to which the building plan 'P5' has been approved.

1. 'Rear space' අඩි 10 ක් විය යුතුය.
2. නාගරික සංවර්ධන අධිකාරියේ රෙගුලාසි පරිදි නීතිමය ආලෝකය සහ වාතාශ්‍රය ලබා දිය යුතුය.
3. මායිම් තාප්පය සඳහා වෙනම අනුමැතිය ලබාගත යුතුය.

The Kesbewa Pradeshiya Sabha had granted approval for the said building plan 'P5' on 28th June 2006, subject to the conditions set out in the building permit 'P7'.

This Court thus observes that the building plan 'P5' submitted by the Petitioner and approved by the Kesbewa Pradeshiya Sabha did not include the construction of the boundary wall of the house.

The Petitioner states that he commenced construction in March 2008 and had initially built the foundation of the house. By letter dated 17th March 2008 annexed to the petition marked 'P8a', the 2nd Respondent informed the Petitioner as follows:

"පල බැස යන කාණුව අවහිර කිරීම

බලයලත් මිනින්දෝරු ඩී.එච්.ඒ.ද සිල්වා මයා විසින් 2004 පනවාරි මස 24 දින මැන සාදන ලද 2198 A දරණ මාණක සැලැස්මේ නැගෙනහිර සීමාවේ පෙන්නා ඇති ස්වාභාවික වැසි චතුර බස්නා පල කාණුව අවහිර වන ලෙස මායිම් තාප්පයක් ඉදිකර ඇති බව මෙම සභාවේ තාක්ෂණ නිලධාරීන් විසින් මා වෙත වාර්තා කර ඇත.

මෙම තත්වය ස්වාභාවික පල ගැලීමකට හේතුවන බැවින් වහාම මෙම ඉදිකිරීම නතර කරන ලෙස මෙයින් ඔබ වෙත දන්වමි. එසේ කිරීමට අපොහොසත් වන්නේනම් ඔබ විසින් නගර

සභාවෙන් අනුමත කරගෙන ඇති අංක BA/512/2005 දරණ ගොඩනැගිලි සැලැස්ම අවලංගු කර තීරණය පියවර ගන්නා බව වැඩිදුරටත් දන්වමි.”

By a further letter dated 3rd April 2008 annexed to the petition marked ‘P9’, the 1st Respondent had informed the Petitioner as follows:

“අනවසර සංවර්ධන කටයුතු

ඔබ විසින් පැපිලියාන දෙතිවල පාර 89/6 දරණ ස්ථානයේ අනවසරයෙන් මායිම් තාප්පයක් ඉදිකර ගෙන යන බව මා වෙත වාර්තා වී ඇත.

02. එසේ හෙයින්, මෙම ලිපිය ලද වහාම ඉහත කී අනවසර ඉදි කිරීම් අත්හිටුවන ලෙසත්, දින 14 ක් ඇතුළත සියළු අමතර ඉදි කිරීම් කඩා ඉවත් කර, ඒ බව ලිඛිතව මා වෙත දැනුම් දිය යුතු බවත්, මෙයින් දන්වා සිටිමි.”

Although the Petitioner had denied that he was engaged in an illegal construction, the 1st Respondent, by a letter dated 30th April 2008 annexed to the petition marked ‘P11a’³, had informed the Petitioner as follows:

“පල බැස යන කාණුව අවහිර කිරීම

උක්ත කරුණ මැයෙන් ඔබ වෙත එවා ඇති මාගේ අංක බොහස/ගොලි/අන/2008 හා 2008/03/25, 2008/04/03 දිනැති ලිපි වලින් දැනුම් දුන් පරිදි ඔබ විසින් පලය බැස යන කාණුව අවහිර කර ඉදිකර ඇති රුඳුණුම් බැමීම මේ දක්වා ඉවත් කර නොමැති බව මා වෙත වාර්තා කර ඇත.

³ It is observed that the letter dated 7th May 2008, annexed to the petition ‘P11b’ is identical to the letter marked ‘P11a’.

මේ තත්වය ස්වාභාවික පළ ගැලීමකට හේතු වන බැවින් හා අවට නිවාසීයන්ට පීඩාකාරී වන බැවින් නාගරික සංවර්ධන අධිකාරියෙන් මා වෙත පැවරී ඇති බලතල ප්‍රකාර BA/512/2005 දරණ ලිපිගොනු වෙන් අනුමත කර ඇති නිවාස සැලැස්මේ අනුමැතිය අවලංගු කරන බව මෙයින් දැනුම් දෙමි.”

Thus, it is clear to this Court that the dispute between the Petitioner and the 2nd Respondent revolved around the construction of the boundary wall blocking the drain carrying rain water. The Petitioner's position was that the disputed part of the boundary wall was built by connecting two columns which had formed part of the approved building plan 'P5'. The Petitioner thus submitted that he had permission to build the disputed part of the boundary wall between the said two columns.

The position of the 2nd Respondent was that there was a drain situated on the boundary of the land belonging to the Petitioner and that no construction can be done on this boundary in a manner that would obstruct the drain and the free flow of rain water. The 2nd Respondent contended that the construction of the boundary wall on the said drain was therefore illegal. The 2nd Respondent stated further that the 2nd Respondent has not granted approval to the Petitioner to construct a boundary wall around his premises. The Petitioner has however disputed this assertion of the 2nd Respondent that there was a drain on the land. The 2nd Respondent has also submitted that the previous owner of the said land had given an undertaking that she has no objection to the disposal of rain water of a neighbour through an underground drain running alongside the land now owned by the Petitioner. This Court observes that the existence of a drain either alongside or beneath the Petitioner's land is disputed between the parties and, as

this Court cannot go into disputed questions of fact, this Court cannot make any determination with regard to the existence of a drain or on the legality of the construction of the boundary wall.

The Petitioner states that in February 2009, he had submitted an application seeking approval for the said boundary wall, but that the 2nd Respondent, by letter dated 30th March 2009 annexed to the petition marked 'P13', had refused to approve the said plan, for the following reasons:

“වැඩි පලය බැසයාම අවහිර කරමින් මායිම් තාප්පය අනවසරයෙන් දැනටමත් ඉදිකර ඇති බැවින්, මායිම් තාප්පය සඳහා අනුමැතිය සලකා බැලිය නොහැකි බවට 2009/03/24 දින පැවති සැලසුම් කමිටුවේදී තීරණය වූ බව මෙයින් දන්වා සිටිමි.”

By a letter dated 31st March 2009, annexed to the petition marked 'P14a'⁴, the 1st Respondent had informed the Petitioner that legal action would be taken against the Petitioner unless the illegal construction of the boundary wall was stopped and the illegal construction was removed.

The 2nd Respondent had thereafter filed action in the Magistrate's Court of Nugegoda⁵ seeking to demolish the illegal construction and by an order delivered on 26th November 2010, the learned Magistrate had granted the application of the 2nd Respondent. It was submitted by the Petitioner that the order of the learned Magistrate was executed on 23rd October 2014 and that the boundary

⁴ It is observed that the letter dated 30th April 2009, annexed to the petition 'P14b' is identical to the letter marked 'P14a'.

⁵ Case No. 12162.

wall had been demolished. In these circumstances, this Court observes that the necessity for this Court to consider the granting of a Writ of Certiorari sought by the Petitioner to quash 'P14a' does not arise as the boundary wall has already been demolished.

The Petitioner has complained to this Court that the cancellation of the whole of the building plan 'P5' on the basis that a boundary wall had been built on the drain is illegal and arbitrary. It appears to this Court that the building permit 'P7' can only be cancelled if there is a violation of the terms and conditions thereof. Although it was contended on behalf of the Respondents that the obstruction of the drain by the construction of the boundary wall thereon is in violation of Clause 7⁶ of the building permit 'P7', it does not appear that condition No. 7 of 'P7' deals with the situation that has arisen. Clause 7 is limited to the disposal of rain water, waste etc that is collected on the premises and cannot be extended to the rain water coming down the road. However, in view of the undertaking given by the learned President's Counsel for the 1st and 2nd Respondents that 'P11a' will be withdrawn, the necessity for this Court to consider the legality of 'P11a' and 'P11b' does not arise.

After the order of the learned Magistrate was delivered, the Petitioner had made an application on 27th December 2011 annexed to the petition marked 'P29' seeking approval to construct a boundary wall. It appears to this Court that the 2nd Respondent had not processed this application, inspite of reminders by the 3rd Respondent to act in terms of the law.

⁶ Condition No. 7 of 'P7' reads as follows: "වැසි පලය, අපවිත්‍ර පලය, කුණු කසළ හෝ ඕනෑම දූව්‍යයක් අවහිර නොවන සේ කාර්යක්ෂම ලෙස ඉවත් කිරීමේ කතුටුදායක වැඩ පිළිවෙලක් ඇති කළ යුතුය."

The Petitioner has therefore sought a Writ of Mandamus directing the Respondents to grant approval to the said application submitted by the Petitioner⁷, seeking approval of the 2nd Respondent to construct the boundary wall. As observed earlier, the boundary wall has been demolished by an Order of the learned Magistrate after the filing of this application and hence, the question of this Court directing the 2nd Respondent to approve an illegal construction as well as a wall that does not exist anymore, does not arise. For this reason, this Court does not see any legal basis to issue the Writ of Mandamus prayed for by the Petitioner. However, the Petitioner is entitled to make a fresh application to the 2nd Respondent seeking approval to construct a boundary wall in accordance with the law.

For the reasons set out in this judgment, this Court formally issues a Writ of Certiorari quashing the decision reflected in 'P11a' and 'P11b' cancelling the approval granted to the building permit 'P5'. For the avoidance of doubt, this Court wishes to emphasise that it is not interfering with the observations in the said letters with regard to the obstruction to the drain. This Court makes no order with regard to costs.

Judge of the Court of Appeal

⁷ The said application has been annexed to the petition marked 'P29'.