

**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*, *Prohibition* and *Mandamus*, in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA Writ Application No: 505/2021

1. Ekanayake Mudiyanseelage Heen Manike,
No. 580/2/B and (580/2/E), Model Town
Lane (also known as Admiral Clancy
Fernando Mawatha), Thelawala,
Rathmalana

And Now at :-

Sri Sugatha Buddhist Centre,
Kosgahawewa, Kobeigane

2. Venerable Mahanuwara Sugathasiri,
Sri Sugatha Buddhist Centre,
Kosgahawewa, Kobeigane

PETITIONERS

-Vs-

1. Moratuwa Municipal Council,
Moratuwa.
 2. Mr. S. D Thewarapperuma,
Municipal Commissioner,
Moratuwa Municipal Council, Moratuwa.
- 2A. Ms. L.P Manoja S. Pathirana,
Municipal Commissioner,
Moratuwa Municipal Council,
Moratuwa.

3. Mr. M.H.C Koorwathura,
Superintendent of Works,
Moratuwa Municipal Council,
Moratuwa.

4. Hon. W. Samanmal Fernando,
Lord Mayor,
Moratuwa Municipal Council,
Moratuwa.

RESPONDENTS

Before: M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

Counsel: Rajeev Amarasuriya for the Petitioners.

Sudan Senadipathi for the 1st – 4th Respondents.

H. Hisbullah, instructed by Dinika Dias for the 5th Respondent.

Written submissions tendered on:

20.10.2023 by the Petitioners

22.11.2023 by the Respondents

Argued on: 04.07.2023

Decided on: 23.01.2024

S. U. B. Karalliyadde, J.

The 1st Petitioner in this Writ Application resided at No. 580/2/B and 580/2/E, Model Town Lane (now known as Admiral Clancy Fernando Mawatha), Thelawala, Rathmalana since 1976 and operated a business up until the said building was

demolished by the Municipal Council of Moartuwa (1st Respondent) on 27.07.2021.

The Petitioners averred that the 1st Petitioner is the owner of the land marked as Lot No. 43 in the Cadastral Map No. 520208 in terms of the Title Certificate registered at the Title Registry on 09.04.2019 marked as P-2 and since 1976 she had been in the adverse, uninterrupted and undisturbed possession of the land more fully described in the Deed of Declaration No. 9382 marked as P3A. Moreover, her name is included in the Electoral Register under the above address (marked as P-3D), and she had duly paid electricity bills and the annual license fee obtained from the 1st Respondent to operate her business (marked as P-4A to P-4Q). In or about the year 2003, the Predecessor of the 1st Respondent filed a case bearing No.36362 in the District Court of Moratuwa seeking to demolish the premises owned by the 1st Petitioner, where the learned District Judge of Moratuwa refused to grant the relief sought by the Respondents by the Order dated 29.08.2003 (marked as P-9) on technical grounds. The 1st Petitioner received a letter dated 10.02.2021 marked as P-10A from the Municipal Commissioner of the Municipal Council of Moratuwa (2nd Respondent) informing her that an inspection was carried out by the technical officer due to a complaint received regarding the shop, built on the premises bearing No. 580/2E, Admiral Clarence Fernando Mawatha, Katubedda, Moratuwa blocking the road and asking her to remove the said building. Consequent to that the 1st Petitioner drew the attention of the 2nd and 4th Respondents to the relevant documents to establish her ownership of the said premises.

Thereafter, the 1st Petitioner received a letter dated 30.04.2021 marked as P-10B informing her that if she does not remove the unauthorized building obstructing the road, action would be taken to remove the said building on 12.05.2021 and recover the cost therein. Since she did not remove the building on 27.07.2021, the 2nd Respondent came to the premises along with other Officers of the 1st Respondent and demolished the premises.

The Respondents contend that the 1st Petitioner had erected an unlawful and unauthorised structure obstructing and encroaching a part of the public road (Admiral Clancy Fernando Mawatha) causing severe inconvenience to the general public and the Petitioners had obtained a Title Certificate from the Registrar of Title by furnishing false information. The 1st Respondent (Moratuwa Municipal Council) sent several letters (marked R-4 to R-7) asking the 1st Petitioner to remove the said unauthorised structure but she failed and/or refused to do so. Thereafter, by following Section 77 of the Municipal Council Ordinance No. 29 of 1947 (as amended) (the Ordinance), demolished the said unauthorised structure erected by the 1st Petitioner. The argument of the learned Counsel appearing for the Respondents is that they have acted in terms of the law and within the powers vested upon them in removing the said unauthorised structure.

The issue that arises for the determination of the Court is whether the Respondents have acted within the powers vested in them. The learned Counsel appearing for the

Petitioners argued that in terms of the letter dated 02.08.2021 marked P-13A, the demolition has been carried out under section 77 of the Ordinance and in terms of Section 73(1) of the Ordinance it is mandatory for a Municipal Council to give written notice to the person who is in unauthorised structure demanding production of deeds, documents and instruments in respect of his/her claim. The Section 73(1) of the Ordinance reads as follows;

(1) Whenever it appears to a Municipal Council that inclosure 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, inclosure, or obstruction has been raised or made, to demand the production of every deed, document, and instrument upon which such person founds such claim.

(emphasis added)

In terms of Section 73(1) of the Ordinance, “it shall be lawful” for the Municipal Council to demand the production of deed, document and instruments from a person claiming to be the owner of premises which appears that inclosure or obstruction have been raised or made in any street under the control of the Council. Justice G.P. Singh in “Principles of Statutory Interpretation” (14th edn), while considering the enabling words ‘may’ explained the following principles of interpretation,

“Ordinarily, the words ‘May’ and ‘It shall be lawful’ are not words of compulsion. They are enabling words and they only confer capacity, power or authority and imply discretion. “They are both used in a statute to indicate that something may be done which prior to it could not be done”. (emphasis added)

N. R. Bindra’s “Interpretation of Statutes” (8th edn) at page 1031, “Shall be lawful” has been interpreted as *“When found in the by-law of a company are not to be construed as obligatory to do what the law ordains.”*

It was observed by Cairns, L.C. in *Julius Vs. Bishop of Oxford*¹ that, when the words “it shall be lawful” are used in a statute, *“They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power”*.

N. R. Bindra’s “Interpretation of Statutes” (10th edn) on page 279 states that;

“The golden rule of interpretation is that we must first try to ascertain the intention of the Legislature from the words used, by attaching the ordinary meaning of the word on the grammatical construction adding nothing and omitting nothing and give effect to the intention thus ascertained if the language is unambiguous, and no absurdity results....”

¹ (1880) 5 A.C. 214 at pg. 222-223.

Thus, if the words “it shall be lawful” used in Section 73(1) Ordinance given its ordinary meaning, the conclusion must be that by giving written notice, the Council has power and authority to demand a person to prove his/her claim to the premises which he/she claims to be the owner by producing relevant documents, in an instance where the Council believe to have been inclosing or obstructing a street under the control of the Council and it does not mean that the Council must do so in such a situation. Considering the above-stated facts, in the instant Application the Court is of the view that, Section 73(1) only confers power/authority on the Council and no duty is cast upon the Council to demand relevant documents to prove a claim on ownership from a person the Council believes to have been enclosing or obstructing a street under the control of the Council.

It is the argument of the learned Counsel appearing for the Petitioners that, according to the letter marked P-13A issued by the 1st Respondent the alleged demolition of the building/premises of the 1st Petitioner’s residence was carried out in terms of Section 77 of the Ordinance, under which the Council may only remove any obstruction or encroachment upon any street under the Council. However, the 1st Petitioner is the lawful owner of the said premises in terms of documents marked P-2, P-3A and P-3B and therefore there had been no encroachment or obstruction to the street from the 1st Petitioner’s building/premises. Section 77 of the Ordinance reads as follows;

(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.

When observing the provisions of Section 77 of the Ordinance, it is clear that the Council has the power/authority to verbally or by written notice order any person obstructing or encroaching upon any street under control of the Council to remove or abate the obstruction or encroachment and if such person refuses or neglects to comply therewith within a reasonable time, the Council has power to remove or abate the obstruction or encroachment. According to the learned Counsel appearing for the Respondents, the Respondents have sent letters dated 10.02.2021, 30.04.2021, 14.07.2021 and 22.07.2021 marked R-4, R-5, R-6 and R-7 respectively, informing the 1st Petitioner about the decision to demolish the premises, and the Petitioners in their Petition to this Application admits that they received the letters marked P-10A and P-10B (R-4 and R-7). The position of the learned Counsel appearing for the Respondents

is that even though the Cadastral Map No. 520208 marked as R-1, shows a structure which is unauthorised structure, however there is no such construction shown in the Plan bearing No. 1310 (marked as R-2) approved by the Urban Development Authority. There is no plan approved either by the 1st Respondent or the Urban Development Authority for the said structure. Hence, the Respondents issued multiple notices to the 1st Petitioner requesting to remove the unauthorised structure. However, steps were taken to remove the said unauthorised structure since the 1st Petitioner did not take any steps to remove it. Therefore, it is clear that the Council has complied with Section 77(1) of the Ordinance by giving prior notice to the 1st Petitioner about the demolition of the 1st Petitioner's premises.

The learned Counsel appearing for the Petitioners submitted to the Court that the Petitioner does not pursue the relief sought in prayers (v) to (u) regarding the interim orders. In prayer (k) to (q) the Petitioners seek the following reliefs,

(k) Grant and issue a mandate in the nature of a Writ of Mandamus compelling the 1st Respondent to take all necessary steps and measures to reconstitute the 1st Petitioner to her state and position before the demolition of her building and premises in Cadastral Map marked P-2;

(l) Grant and issue a mandate in the nature of a Writ of Mandamus compelling the 1st to 4th Respondents to make payment of compensation to the 1st Petitioner to

recompense her for the loss, damage and prejudice suffered by her due to the demolition and up until the date of due restitution;

(m) Grant and issue a mandate in the nature of a Writ of Mandamus directing and compelling the 1st to 4th Respondents to act under the provisions of section 48 of the Municipal Council's Ordinance and enter into an agreement with the 1st Petitioner to grant other land in exchange for the 1st Petitioner's land together with due and reasonable payment of money to defray and recompense the loss, damage and prejudice suffered by the 1st Respondent:

(n) Grant and issue a mandate in the nature of a Writ of Mandamus directing and compelling the 1st to 4th Respondents to act under the provisions of section 48 of the Municipal Council's Ordinance and enter into an agreement with the 1st Petitioner to grant due compensation to the 1st Petitioner to recompense the 1st Petitioner for her land, building and premises (as it stood before demolition) and the loss, damage and prejudice suffered by the 1st Respondent:

(o) Grant and issue a mandate in the nature of a Writ of Mandamus directing and compelling the 1st to 4th Respondents to act under the provisions of section 45 of the Municipal Council's Ordinance and acquire the 1st Petitioner's land, building and premises (as it stood prior to demolition) subject to such terms, conditions and/or qualifications as may be deemed fit by Your Lordships' Court,

(p) Grant and issue a mandate in the nature of a Writ of Mandamus directing and compelling the 1st to 4th Respondents to act under the provisions of Section 77(4) of the Municipal Council's Ordinance and grant due compensation to the 1st Petitioner to recompense the 1st Petitioner for her land, building and premises (as it stood prior to demolition) and the loss, damage and prejudice suffered by the 1st Respondent;

(q) Grant and issue a Writ of Mandamus against the 1st to 4th Respondents that would deem fit to Your Lordship' Court to redress the prejudice, loss and damage caused to the 1st Petitioner,

Given the above-stated facts and authorities, this Court is of the view that the prayers (k) to (q) will fail, for the reason that the Council has acted in terms of the law and within the power vested upon it by the Ordinance.

Now I will address my mind to the reliefs sought by the Petitioner in prayers (c) to (j).

(c) the Petitioners have prayed for a mandate in the nature of the Writ of Prohibition preventing and restraining the 1st to 4th Respondents and /or their servants and agents /subordinates from acting and /or proceeding and or taking any steps to prevent / disturb / infringe the full enjoyment by the 1st Petitioner of her land,

(d) a mandate in the nature of a Writ of Certiorari quashing any one or more decisions of the 1st to 4th Respondents and/or their servants and agents / subordinates to demolish the building within the 1st Petitioner's land.

In prayers (e) to (j) the Petitioners have prayed for mandates in the nature of Writs of Certiorari quashing the documents marked P-10A, P-10B, P-13D, P-13E, P-13F and P-13G.

In the case at hand, the Petitioners are seeking the said reliefs with regard to the 1st Petitioner's land and building which had already been demolished. Therefore, granting the relief prayed for in those prayers will be futile.

In *Samastha Lanka Nidahas Grama Niladhari Sangamaya Vs Dissanayake*² Saleem Marsoof J. held that,

“It is trite law that no court will issue a mandate in the nature of writ of certiorari or mandamus where to do so would be vexatious or futile.”

Marsoof, PC. J (P/CA) in the case of *Ratnasiri and others Vs Ellawala and others*³ held that;

“This court is mindful of the fact that the prerogative remedies it is empowered to grant in these proceedings are not available as of right. Court has discretion in

² [2013] BLR 68.

³ (2004) SLR 180.

regard to the grant of relief in the exercise of its supervisory jurisdiction. It has been held time and time again by our Courts that "A writ... will not issue where it would be vexatious or futile."

In the case of *Siddeek Vs Jacolyn Seneviratne*⁴ Soza J. observed that,

"The Court will have regard to the special circumstances of the case before it before issuing a writ of certiorari. The writ of certiorari clearly will not issue where the end result will be futility, frustration, injustice and illegality."

Vide; *Rev. Nehinwela Piyadassi Thero Vs National Water Supply and Drainage Board*⁵; *Credit Information Bureau of Sri Lanka Vs Messrs Jafferjee & Jafferjee (Pvt) Ltd.*⁶; *De Silva Vs University Grants Commission*⁷; *P.S. Bus Co. Ltd. Vs Members and Secretary of Ceylon Transport Board*⁸; *Pushpakumara Vs Lt. Commander Wijesuriya.*⁹

In prayer (c) the Petitioners have prayed for a Writ of Prohibition preventing and restraining the 1st to 4th taking any steps to prevent/disturb the full enjoyment by the 1st Petitioner of her land and in prayer (d) a Writ of Certiorari quashing any one or more decisions of the 1st to 4th Respondents to demolish the building within the 1st Petitioner's land. However, the demolition has already been carried out. Thus, there is neither a

⁴ [1984] 1 Sri LR 83.

⁵ [2011] 2 BLR 470.

⁶ [2005] 1 Sri LR 89.

⁷ [2011] 2 BLR 474.

⁸ (1960) 61 NLR 491.

⁹ [2010] 2 Sri LR 393.

building nor a land for the 1st Petitioner to claim and enjoy. Further in prayers (e) to (j) the Petitioners have prayed for Writs of Certiorari quashing decisions/ orders and directives in the documents marked P-10A, P-10B, P-13D and P-13E, Report of the 3rd Respondent about the alleged obstruction in the document marked P-13F and the sketch prepared by the 3rd Respondent marked P-13G. However, all these documents are in respect of the premises claimed by the 1st Petitioner which was already demolished. Therefore, I hold that the reliefs sought in prayer (c) to (j) are futile.

Be that as it may, when considering the reliefs prayed for by the Petitioners it is clear that those are based on the enjoyment of the land, restitution and compensation for the damages caused to the Petitioners, which are Civil law remedies and therefore this Court is of the view that, the Petitioners have an alternative remedy to litigate this matter in an appropriate Court. It is trite law that since the Writ jurisdiction of the Court of Appeal is discretionary, when there is an adequate alternative remedy, the Court will not exercise its Writ jurisdiction. Therefore, the Petitioners are not entitled to invoke the Writ jurisdiction of this Court in the instant Application.

In the case of *Linus Silva Vs. The University Council of Vidyodaya University*¹⁰ it was held that the remedy by way of certiorari is not available where an alternative remedy is open to the Petitioner subject to the limitation that the alternative remedy must be an adequate remedy.

¹⁰ 64 NLR 104.

It was held in the case of *Tennakoon Vs. Director General of Customs*¹¹ that,

“the petitioner has an alternative remedy, as the Customs Ordinance itself provides for such a course of action under section 154. In the circumstances, the petitioner is not entitled to invoke writ jurisdiction”

Under the above-stated circumstances, I hold that the Petitioners are not entitled to the Writs sought in the Petition. Therefore, I dismiss the Writ Application without costs.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

M. T. Mohammed Laffar, J.

I agree.

JUDGE OF THE COURT OF APPEAL

¹¹ (2004) 1 SLR 53.